

Judicial Audiences: A Case Study of Justice David Watt's Literary Judgments

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Volume 64, Number 2, December 2018

URI: <https://id.erudit.org/iderudit/1070286ar>

DOI: <https://doi.org/10.7202/1070286ar>

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)

1920-6356 (digital)

[Explore this journal](#)

Cite this article

Craig, E. (2018). Judicial Audiences: A Case Study of Justice David Watt's Literary Judgments. *McGill Law Journal / Revue de droit de McGill*, 64(2), 309–348. <https://doi.org/10.7202/1070286ar>

Article abstract

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Justice David Watt's short, staccato style introductions to decisions, authored since his elevation to the Court of Appeal for Ontario, have received attention. His introductions, which differ from the conventional style of legal judgments, have been the subject of legal blogs, mainstream media articles, and professional praise and criticism. Decisions that include intentional stylistic departures from conventional judicial writing are sometimes referred to as literary judgments. These so called literary judgments, including the ones written by Justice Watt, raise particular issues regarding the notion of judicial audience. Justice Watt's departure from the conventional style of legal writing, particularly given the gruesome and tragic facts involved in many of the decisions he has written, raises numerous questions: Who is the audience for these literary judgments? Do judges write for a different readership when they issue decisions which depart significantly from the traditional style of legal writing? What are some of the attendant risks of delivering literary judgments to particular audiences? Do Justice Watt's literary judgments speak appropriately and productively to the three constituencies for court decisions identified by judges themselves: the parties (understood broadly), the public, and the legal profession? Using Justice Watt's decisions as a case study, this article considers the issue of judicial audience in the context of literary judgments. The article proceeds in three sections, each dedicated to an examination of Justice Watt's literary decisions in relation to one of these three audiences.

JUDICIAL AUDIENCES: A CASE STUDY OF JUSTICE DAVID WATT'S LITERARY JUDGMENTS

*Elaine Craig**

In 2016, the government of Canada announced reforms to the federal judicial appointment process aimed at increasing openness and transparency in the process. As part of those changes, all applicants for appointment to, or elevation within, the federal judiciary are required to submit responses to a new questionnaire. Applicants are asked to reflect upon the role of the judiciary in Canada's legal system. One of the questions they are asked is: "Who is the audience for decisions rendered by the court(s) to which you are applying?" While the audience for a court's decisions is not a new matter of academic and professional discussion, this recent change has brought judicial audience more squarely into the public eye. Nearly every successful applicant, of those whose responses are available, highlighted three key constituencies that should be addressed in every court decision: the parties, the public, and the legal profession.

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En 2016, le gouvernement du Canada a annoncé des réformes du processus de nomination judiciaire fédéral visant à accroître l'ouverture et la transparence du processus. Dans le cadre de ces changements, tous les candidats à une nomination ou à une promotion au sein de la magistrature fédérale sont tenus de répondre à un nouveau questionnaire. Les candidats sont invités à réfléchir sur le rôle du pouvoir judiciaire dans le système juridique canadien. L'une des questions qui leur est posée est la suivante : « Quelle est l'audience à laquelle s'adressent les décisions rendues par le ou les tribunaux auxquels vous postulez ? » Bien que l'audience des jugements ne soit pas un nouveau sujet de discussion académique et professionnelle, ce récent changement a permis de mieux faire connaître au public l'audience des tribunaux. Presque tous les candidats retenus, parmi ceux dont les réponses sont disponibles, ont mis en évidence trois groupes clés qui devraient être abordés dans chaque décision : les parties, le public et la profession juridique.

Les introductions courtes et staccatos dans les décisions du juge David Watt, rédigées depuis son élévation à la Cour d'appel de l'Ontario, ont attiré de l'attention. Ses introductions, qui diffèrent du style conventionnel des décisions judiciaires, ont fait l'objet de blogs juridiques, d'articles de journaux et de louanges et critiques professionnelles. Les décisions qui comportent des écarts stylistiques intentionnels par rapport à la rédaction judiciaire conventionnelle sont parfois appelées des « jugements littéraires ». Ces jugements dits littéraires, y compris ceux rédigés par le juge Watt, soulèvent des questions particulières concernant la notion d'audience judiciaire. Le fait que le juge Watt s'écarte du style conventionnel de la rédaction juridique, notamment en raison des faits macabres et tragiques qui sont impliqués dans nombre des décisions qu'il a rédigées, soulève de nombreuses questions : Quelle est l'audience de ces jugements littéraires ? Les juges écrivent-ils pour un lectorat différent lorsqu'ils rendent des décisions qui s'écartent considérablement du style traditionnel de la rédaction juridique ? Quels sont les risques liés au fait de rendre des jugements littéraires pour des audiences particulières ? Les jugements littéraires du juge Watt s'adressent-ils de manière appropriée et productive aux trois groupes de lecteurs identifiés par les juges eux-mêmes : les parties (au sens large), le public et la profession juridique ? En utilisant les décisions du juge Watt comme une étude de cas, cet article examine la question de l'audience judiciaire dans le contexte des jugements littéraires. L'article se divise en trois sections, chacune consacrée à l'examen des décisions littéraires du juge Watt par rapport à l'une de ces trois audiences.

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Introduction: For Whom do Judges Think They are Writing?

In 2016, the Government of Canada announced reforms to the federal judicial appointment process aimed at increasing openness and transparency in the process.¹ As part of those changes, all applicants for appointment to, or elevation within, the federal judiciary are required to submit responses to a new questionnaire. Applicants are asked to reflect upon the role of the judiciary in Canada's legal system. One of the questions they are asked is: "*Who is the audience for decisions rendered by the court(s) to which you are applying?*"² Excerpts from the responses to the questionnaire by successful applicants (which would include newly appointed judges as well as those who were already appointed but have been elevated to a higher court) are made publicly available.³ While the audience for a court's decisions is not a new matter of academic and professional discussion, this recent change has brought judicial audience more squarely into the public eye.

A review of the available applications to the federal judiciary reveals broad consensus among successful applicants regarding the audiences that should be addressed in judicial decisions.⁴ Applicants to the federal judiciary also seem to agree, as do academic commentators,⁵ that in judicial writing "[knowing and] understanding one's audience is crucial."⁶ The audience identified by these judges is wide. Justice Deborah Swartz, for example, notes in her application that "[t]he audience for decisions rendered in the Ontario Superior Court are our neighbors across the fence, next door, in the next city, farm, village and province."⁷ Nearly every successful applicant, of those whose responses were available at the time of

¹ See Department of Justice, News Release, "Government of Canada Announces Judicial Appointments and Reforms the Appointments Process to Increase Openness and Transparency" (20 October 2016), online: *Department of Justice Canada* <www.canada.ca> [perma.cc/E8RS-N67L].

² Office of the Commissioner for Federal Judicial Affairs Canada, "Guide for Candidates" (October 2016), online: *Office of the Commissioner for Federal Judicial Affairs Canada* <www.fja-cmf.gc.ca> [perma.cc/Z3DE-6NB5]. This question appears in Part 11(4) of the Questionnaire for Federal Judicial Appointments made available through the online Guide.

³ See Department of Justice, "Judicial Appointments" (2012–2017), online: *Department of Justice Canada* <www.justice.gc.ca> [perma.cc/9EDZ-UPNK] [Department of Justice, "Judicial Appointments"].

⁴ See *ibid.*

⁵ See e.g. Michael J Higdon, "The Legal Reader: An Exposé" (2013) 43:1 NML Rev 77.

⁶ *Ibid* at 81.

⁷ Department of Justice, *The Honourable Justice Deborah Swartz's Questionnaire* (Questionnaire for Judicial Appointment) (7 April 2017) at Part 11(4), online: Department of Justice Canada <www.canada.ca> [perma.cc/73EK-S7JR].

writing, highlighted three key constituencies that should be addressed in every decision: the parties, the public, and the legal profession. For example, in his application for elevation to the Court of Appeal for Ontario, Justice David Paciocco summarized these audiences as follows:

There are three constituencies that should be spoken to in judicial decisions. The primary audience for any judicial decision is the “parties” to the proceeding, understood in a broad sense. It is equally important, however, that judges speak in their decisions to the public at large, to whom the law belongs. And there is an additional primary audience for appellate court decisions, in particular, namely lawyers and judges. A worthy judicial decision is crafted with all of these three constituencies in mind, and is crafted in a way that enables all of them to understand.⁸

The style of writing embraced by most judges is formal, somewhat technical, and impersonal. In relation to the issue of judicial audience, the stylistic norms of conventional judicial writing raise important questions regarding accessibility and tone. However, consideration of the audience for a court’s decision may be of particular interest and import when assessing judicial writing that is unorthodox.

Justice David Watt’s short, staccato style introductions to decisions, authored since his elevation to the Court of Appeal for Ontario, have received attention.⁹ His introductions, which differ from the conventional style of legal judgments, have been the subject of legal blogs,¹⁰ mainstream media articles,¹¹ and professional praise and criticism.¹² This aspect of Justice Watt’s judicial writing has been likened to that of a crime fiction novel and the work of American novelist Elmore Leonard, in par-

⁸ Department of Justice, *The Honourable Justice David M Paciocco’s Questionnaire* (Questionnaire for Judicial Appointment) (7 April 2017) at Part 11(4), online: *Department of Justice Canada* <www.canada.ca> [perma.cc/8JX4-V3CV] [*Paciocco Questionnaire*].

⁹ See e.g. James Morton, “Speaker’s Corner: Watt Deserves Praise for Clarity”, *Law Times* (28 March 2011) online: <www.lawtimesnews.com> [perma.cc/UL2E-F4QU]; Simon Fodden, “Watt’s the Matter?” (11 March 2011), online (blog): *Slaw* <www.slaw.ca> [perma.cc/EHQ2-H6SA].

¹⁰ See e.g. Fodden, *supra* note 9; Nancy McCormack, “Developments in Canadian Law and Law Libraries” (2011) 19:2 *Austl L Librarian* 148.

¹¹ See Kirk Makin, “The Judge Who Writes like a Paperback Novelist”, *The Globe and Mail* (10 March 2011) online: <theglobeandmail.com> [perma.cc/KM28-KUK7]; Andrew Duffy “A Judge’s Flair for the Dramatic”, *Ottawa Citizen* (2 January 2013) D1; Katie Daubs, “Legal Decision with Literary Flourish and Dry Wit Making Rounds in Toronto Legal Circles”, *The Toronto Star* (29 March 2013) online: <www.thestar.com> [perma.cc/WZX6-AM2M] (quoting Watt’s decision in *Flores CA*, *infra* note 24).

¹² See Morton, *supra* note 9; Makin, *supra* note 11.

ticular.¹³ Justice Watt is an accomplished judge. His legal reasoning is concise, rigorous, and rooted in a deep knowledge of the law, particularly in matters of criminal and evidence law. The style, tone, and content of his introductions reflect a notable departure from his legal writing more generally.

Many of the cases Justice Watt has introduced using this style of writing involved criminal law matters. The first paragraph of his decision in *R. v. Cyr* is illustrative:

A jury decided that Paul Cyr (the appellant) was not only a chicken thief but also a killer. A chicken thief because he hijacked a tractor-trailer unit carrying about 14,000 kilograms of frozen chickens, then sold the chickens to some food wholesalers eager for a bargain. A killer because he shot the truck driver in the back of the head and left him dead in the cab of his truck.¹⁴

A significant number of the criminal cases in which Justice Watt has used this style of writing involved serious and very tragic factual circumstances. For instance, he begins his decision in *R. v. Luciano* with: “On a cold weekend in late January 2000, the lengthy but brittle relationship among Michael Luciano, Colleen Richardson-Luciano and James Cooper ended. Abruptly and violently. First, in Woodbridge. Then, in Egmondville. Two deaths.”¹⁵ In *R. v. Simon* he writes: “Handguns and drug deals are frequent companions, but not good friends. Rip-offs happen. Shootings do too. *Caveat emptor. Caveat venditor.* People get hurt. People get killed. Sometimes, the buyer. Other times, the seller. That happened here.”¹⁶

Justice Watt has used this style of writing to introduce a variety of criminal cases, including several that involved violence against women. In *R. v. Boukhalfa*, for example, Justice Watt opens his decision to uphold a murder conviction as follows: “Shortly before Christmas a few years ago, John Boukhalfa killed his mother. He hit her on the head with a baseball bat. And stabbed her with a knife. Repeatedly.”¹⁷

Decisions that include intentional stylistic departures from conventional judicial writing are sometimes referred to as *literary judgments*.¹⁸

¹³ See Makin, *supra* note 11.

¹⁴ 2012 ONCA 919 at para 1.

¹⁵ 2011 ONCA 89 at para 1.

¹⁶ 2010 ONCA 754 at para 1.

¹⁷ 2017 ONCA 660 at para 1.

¹⁸ For a general discussion of judicial writing style and “law and literature,” see Richard A Posner, “Judges’ Writing Styles (And Do They Matter?)” (1995) 62:4 U Chicago L Rev 1421–25.

These so-called literary judgments, including the ones written by Justice Watt, raise certain issues regarding the notion of judicial audience. In particular, given the gruesome and tragic facts involved in these cases, Justice Watt's departure from the conventional style of legal writing raises numerous questions: Who is the audience for these literary judgments? Do judges write for a different readership when they issue decisions which depart significantly from the traditional style of legal writing? What are some of the attendant risks of delivering literary judgments to particular audiences? Do Justice Watt's literary judgments speak appropriately and productively to the three constituencies for court decisions identified by judges themselves: the parties (understood broadly), the public, and the legal profession?

Using Justice Watt's decisions as a case study, the remainder of this article considers the issue of judicial audience in the context of literary judgments. The article proceeds in three Parts, each dedicated to an examination of Justice Watt's literary decisions in relation to one of these three audiences.

Part I considers the interested and affected parties to a legal proceeding as a primary audience for the decisions of a court. This Part examines four decisions authored by Justice Watt, involving the rape, torture, murder or attempted murder of women, in which he attempts humour or uses puns, parody, stark imagery and highly stylized and colloquial language to introduce the violence, or factual circumstances surrounding the violence, in these cases. Justice Watt's writing in these judgments does not reflect the empathy and sensitivity that some judges have identified as an important feature of writing that is intended for the parties.

Part II examines the public as a significant audience for judicial decisions. The four decisions analyzed in the previous Part—*R. v. Flores*, *R. v. Bradey*, *R. v. Shafia* and *R. v. Salah*—all involved violence (or attempted violence) against women. Part III highlights the two interrelated factors that judges should consider when writing decisions involving gender-based violence with a view to the public audience these decisions are likely to receive. These factors are the crisis of public faith in the legal system's ability to respond appropriately to incidents of gender-based harm, and the importance of writing judicial decisions that do not obscure the social context and dynamics that produce gender-based violence. Justice Watt's unorthodox writing in these four cases does not reflect consideration of these factors.

Part III also scrutinizes Justice Watt's literary judgments in relation to the third constituency identified by judges and judicial applicants: lawyers and judges. This Part concludes that Justice Watt's decisions in these cases likely are written for a legal audience and that they are written in this unorthodox style in an effort to capture the attention of the legal reader. Part III also concludes that because of the disjuncture between the style of writing in his introductions and the style of writing in the remaining bulk of these decisions, his unorthodox openings may catch, but not sustain, the attention of legal readers. In addition, his style of writing in these cases may instigate a socially undesirable reaction in the legal reader. The article concludes with the proposition that judicial humility might best facilitate the difficult task of writing court decisions that speak productively to these three different constituencies.

I. Involved and Affected Parties are a Primary Audience for (Literary) Judgments

Applicants to the federal judiciary are required to complete a questionnaire as part of the application process. The questionnaire asks them to reflect upon the audience for judicial decisions. While none of the applicants quoted here were commenting on Justice Watt's literary judgments, their responses highlight a contrast in judicial approach to opinion writing—the very contrast that this article will explore. Nearly every successful applicant to the federal judiciary, of the applications made available to the public, identified the affected parties as the most immediate audience for the decisions of a court. In criminal cases, the involved and affected parties include the accused (which will be discussed next) but also those harmed by an accused's alleged conduct. Commenting on judicial audience in his application for elevation to Ontario's Superior Court of Justice, Justice Nakatsuru states: “especially for offences of violence, victims and their families need to be heard and their voices need to be validated. The judicial system needs to be respectful of everyone. The needs and rights of victims should never be forgotten in criminal trials.”¹⁹ As Justice Paciocco writes, “human decency requires that a judgment speak to all of the parties in a broad sense – everyone who has a direct and material interest in the case, whether they have standing or not.”²⁰

¹⁹ Department of Justice, *The Honourable Justice Shaun S Nakatsuru's Questionnaire* (Questionnaire for Judicial Appointment) (11 May 2017) at Part 11(4), online: *Department of Justice Canada* <www.canada.ca> [perma.cc/5DRQ-33MJ].

²⁰ *Paciocco Questionnaire*, *supra* note 8 at Part 11(4).

Judicial writing that is intended for the involved and affected parties in a case should be compassionate and humane.²¹ As Justice Benoît Moore noted in his application for appointment to the Superior Court of Quebec,

it is ... important for a judge to remain mindful of the message that a judgment transmits to the parties involved personally and emotionally in the dispute. Decisions must therefore be written with empathy and humanity, taking into account the fact that beyond simply conveying the court's ruling, words also carry weight, and the reasoning and the grounds have meaning.²²

In his application, Justice Paciocco emphasized that

[t]he parties must be spoken to as real people and with appreciation of the stake they have. In writing a decision judges should think of “faces,” not “cases,” and they should consider and speak to those “faces” in their decisions so that those decisions do not become disconnected and insensitive and so that their decisions are understood.²³

Justice Watt's unorthodox style of writing, used to introduce the acts of violence perpetrated against women or their children in four recent murder cases, suggests that the intended audience for these decisions did not include the family and friends of these dead women (and children). Each of the four cases involved the murder or attempted murder of women by men known to them. As noted in the introduction, Justice Watt uses some combination of attempted humour, pun, stark imagery, parody, highly stylized sentence structure, and colloquial language to introduce the violence, or factual circumstances surrounding the violence, in these four cases.

A. *R. v. Flores, 2011*

Consider the opening paragraphs of his decision to grant the accused's appeal from conviction in *R. v. Flores*:

[1] They met in a bar in London. Melvin Flores and Cindy MacDonald. Soon, they became lovers. Then, Cindy got pregnant. Melvin was excited about the prospect of fatherhood. He wanted to get married. Cindy did not share her lover's excitement. She had an abortion.

²¹ See Department of Justice, *The Honourable Justice Benoît Moore's Questionnaire*, (Questionnaire for Judicial Appointment) (31 March 2017) at Part 11(4), online: *Department of Justice Canada* <www.canada.ca> [perma.cc/64AW-WYSS] [*Moore Questionnaire*]; *Paciocco Questionnaire*, *supra* note 8 at Part 11(4).

²² *Moore Questionnaire*, *supra* note 21 at Part 11(4).

²³ *Paciocco Questionnaire*, *supra* note 8 at Part 11(4).

[2] Cindy made it clear to Melvin that their relationship was over. But Melvin continued his pursuit. He enlisted the assistance of some of Cindy's relatives to convince her to marry him.

[3] Early one morning in June 2006, Melvin Flores closed the book on his relationship with Cindy MacDonald. With a butcher knife left embedded in Cindy's back. Fifty-three blunt force injuries.²⁴

Justice Watt's account of the violence in this case reads more like a description of characters in a novel than a judicial decision recounting the facts of a tragedy involving actual human beings. Cindy MacDonald was twenty-seven years old when her ex-boyfriend murdered her. He killed her after finding out that she had had an abortion during the course of their relationship.²⁵ He stated to the police shortly after the murder "...I fucking stabbed her...she did not want my baby."²⁶ Flores told the police "she had been fucking this guy and that he got her pregnant. Then I went crazy."²⁷ Several times after they broke up, Flores phoned MacDonald's aunt, with whom the victim was close, telling her that he loved MacDonald and wanted her family to convince her to marry him. After MacDonald's abortion, Flores told the aunt that "Cindy killed his blood" and that "if he couldn't have her, nobody would."²⁸

Cindy MacDonald was described as "vibrant and fun loving."²⁹ (Not by Justice Watt, whose description of her, other than details about her relationship with the accused, included only her age, the fact that she lived with her father—a long haul trucker—and the allegation that she was "a regular user of, if not addicted to, crack cocaine").³⁰ Justice Helen Rady, who presided over Flores's second trial and sentencing, reportedly charac-

²⁴ 2011 ONCA 155 [*Flores CA*].

²⁵ See *ibid* at para 18.

²⁶ *R v Flores*, 2012 ONSC 2643 at paras 36, 38 [*Flores 2012*]. This quote is taken from the evidence of a police officer who testified at Flores's second trial. The trial decision in the first trial was not reported. Justice Watt's decision refers to Flores's statements to this officer, indicating that he also testified at the first trial. Justice Watt's decision, unlike the second trial judge, does not refer to the specific statements attributed to Flores by the police but rather summarizes this evidence. However, it is reasonable to assume that the evidence of this officer, which was recorded in his duty book, was the same at both proceedings and thus that these statements were part of the appeal record before Justice Watt (*Flores CA*, *supra* note 24 at paras 38–39, 44–51).

²⁷ *Flores 2012*, *supra* note 26 at para 39.

²⁸ *Ibid* at paras 50–53. This evidence was introduced by the victim's aunt during Flores's first trial. She died between the first and second trials. Her evidence from the first trial was read into the record in the second trial.

²⁹ Jane Sims, "Melvin Flores? sentence from his second trial means he can apply for parole after 12 years instead of 15", *The London Free Press* (14 December 2012), online: <lfpress.com> [perma.cc/8SPE-8TY9].

³⁰ *Flores CA*, *supra* note 24 at para 11.

terized MacDonald's death as "starkly horrific".³¹ At the accused's sentencing hearing after the second trial, Cindy MacDonald's family described the deep loss the family has experienced as a consequence of her death.³² Her father spoke of feeling numb and her brother described the family's sense of unfairness regarding the lengthy legal process that they had endured.³³

Consider what her family's reaction to reading Justice Watt's description of her murder might have been. Given the way in which Justice Watt described her murder, is it reasonable to assume that his decision overturning the conviction of the man who murdered her was not written for Cindy MacDonald's family and friends? It seems unlikely that her father, in whose home the murder occurred,³⁴ would find Justice Watt's sensationalist suggestion that "Melvin... closed the book on their relationship" by stabbing his daughter fifty-three times with a "butcher knife"³⁵ witty or amusing, let alone "empath[etic] and human[e]", to borrow the standard identified by Justice Benoît Moore.³⁶

B. R. v. Bradey, 2015

Justice Watt's decision in *R. v. Bradey*, a case involving the rape, torture, and murder of a mentally disabled woman, begins:

Paul Bradey, Susanna Balogh and Matthew Sitte had a problem. In the basement of the house they shared near Midland. For them, Katlin Cousineau was the problem. She was dead on the basement floor. With burns all over her body. From a blowtorch.³⁷

The accused in *Bradey* engaged in a series of sickening acts of violence against Katlin Cousineau before they murdered her, creating what Justice Watt referred to in his introductory paragraph as their "problem" (the physical presence of her beaten and burned body in the basement of Bradey's home). Before her death Kaitlin Cousineau was held in Bradey's basement, where she was forced to sleep on the concrete floor and use a bucket to urinate and defecate.³⁸ She was handcuffed to the rafters and beaten with a two by four. Her vagina was burned with the nozzle of a

³¹ Sims, *supra* note 29.

³² See *ibid.*

³³ See *ibid.*

³⁴ See Flores 2012, *supra* note 26 at para 25.

³⁵ Flores CA, *supra* note 24 at para 3.

³⁶ Moore Questionnaire, *supra* note 21 at Part 11(4).

³⁷ 2015 ONCA 738 at para 1 [*Bradey*].

³⁸ See *ibid* at para 16.

blowtorch. She was anally raped with a broomstick. After being repeatedly burned with a blow torch on the arms, legs, shoulders, breasts, stomach and legs she was left in Bradey's basement, where she eventually died.³⁹

Justice Watt described the accused's plan to address their "problem" as follows:

[2] Bradey, Balogh and Sitte were each in their own way responsible for Katlin Cousineau's death. None of them wanted to take the blame for what they had done. So they devised a plan. And the purpose of the plan was to destroy any evidence about how Katlin Cousineau died and who was involved in her death.

[3] The plan involved a fire. A blaze that would completely destroy the house and any evidence about how Katlin Cousineau died. And maybe Bradey, who owned the house, would be able to collect the proceeds of the fire insurance policy he had placed on the house.

[4] The fire had to look accidental. And so it was that a yarn was to be spun about a cooking accident and a "threesome" involving Sitte and two girls. The story would serve two purposes. It would characterize the fire as accidental in origin. And it would provide an explanation for the absence of Bradey and Balogh from the house when the fire started.

[5] The house burned down. But the story about the origins of the fire was soon extinguished. Bradey, Balogh and Sitte got arrested. Each was charged with offences arising out of the fire and unlawful killing of Katlin Cousineau.⁴⁰

Justice Watt used stylized language and an attempt at gallows humour to describe Kaitlin Cousineau's murder. For example, he referred to the presence of her raped and tortured body in the accused's basement as "a problem". His introductory paragraph was blunt and dramatic, relying on sentence fragments, and stark imagery: "For them, Katlin Cousineau was the problem. She was dead on the basement floor." He used highly stylized, colloquial language to explain the accused's attempt to conceal their crimes (e.g., "and so it was that a yarn was to be spun..."). And he developed a pun to explain that their "plan" had failed: "The house burned down. But the story about the origins of the fire was soon extinguished." While the remaining 178 paragraphs of his decision are written in a more formal, impersonal, and traditional legal style, it is the unconventional and informal writing in the first ten paragraphs of this judgment that communicates a chilling detachment from the humanity of Katlin Cousineau.

³⁹ See *ibid* at paras 17–28.

⁴⁰ *Ibid*.

The tone, style of writing, and attempt at humour in Justice Watt’s introductory paragraphs in *Bradey* can be contrasted with statements made by Justice Harris at Balogh’s sentencing hearing. Justice Harris reportedly described the prolonged attack against Kaitlin Cousineau as “sadistic torture” and indicated that the “callousness and inhumanity” of leaving her to die in a cold basement had “left him shaken.”⁴¹ He characterized her death as “one of ‘stark horror’.”⁴² To be clear the decision does go on to recount the horrifying facts in this case, but it does so in a more conventional style. Sentencing hearings and the issuance of appeal decisions serve different functions in the criminal justice process. The point of comparing Justice Watt’s introductory statements about this case with Justice Harris’ characterization of the victim’s death is simply to demonstrate the degree of detachment in his opening paragraphs.

Bradey was tried and convicted of first degree murder by a jury. His conviction was upheld by Justice Watt.⁴³ Mathew Sitte pled guilty to second degree murder and Susanna Balogh to criminal negligence causing death.⁴⁴ At Balogh’s sentencing hearing, Katlin Cousineau’s mother reportedly advised Justice Roland Harris (who presided over the hearing) that “she relives the nightmare of her daughter’s death every day.”⁴⁵ She testified that “the pain and anger is so overwhelming that [she] fear[s] it’s going to eat [her] up.”⁴⁶ Could introducing the facts of her daughter’s rape, torture, and murder in this style and manner be characterized as an effort to (as Justice Paciocco advocates) speak “to the parties as real people and with appreciation of the stake they have” in the case?⁴⁷ How would Kaitlin Cousineau’s mother react to the fact that a publicly paid judicial officer had, in a public document, used the facts of her daughter’s rape, torture, and murder to develop a pun, attempt a joke, or display literary prowess?

C. *R. v. Shafia, 2016*

Justice Watt’s opening paragraphs in an appeal from conviction in *R. v. Shafia*—a case involving the murder of four women by three of their family members—deploys a similar style:

⁴¹ Roberta Avery, “Judge shaken by woman’s ‘sadistic’ death”, *The Toronto Star* (18 August 2007), online: <www.thestar.com> [perma.cc/V3UD-VCGZ].

⁴² *Ibid.*

⁴³ *Bradey*, *supra* note 37 at para 188.

⁴⁴ *Ibid* at paras 6–7.

⁴⁵ Avery, *supra* note 47.

⁴⁶ *Ibid.*

⁴⁷ *Paciocco Questionnaire*, *supra* note 8 at Part 11(4).

[1] Boaters who travel the Rideau Canal system between Colonel By Lake and Lake Ontario pass through a series of locks at Kingston Mills. Lock gates open. Boats enter. Lock gates close. Boats leave.

[2] But not always.

[3] One morning – June 30, 2009 – boaters could not enter Kingston Mills Locks. Oil on the water of the upper lock. A closer look revealed its source. Something in the water.

[4] In the water was a Nissan Sentra. Driver's window open. Ignition off, but not locked. Headlights off. Seatbelts unfastened. Front seats reclined. Rear name plate damaged.

[5] And inside the vehicle, a terrible loss of life. Four dead family members. Three young women. One adult.

[6] About three weeks later, three arrests. Three members of the same family. The father, mother and brother of the young women. Each charged with four counts of first degree murder.⁴⁸

The four women victims in *Shafia* were found in a vehicle submerged in the upper lock at Kingston Mills Lock near Kingston, Ontario. They drowned. Three of the women had similar bruises to the scalp, which the pathologist testified “were not of the kind that would be caused by striking the back of a padded seat, but rather required that a firm surface be struck with a sufficient degree of force.”⁴⁹ Three of the women were under the age of twenty. They were murdered by their father, mother, and brother. The fourth victim was the first wife of their father, in what was a polygamous marriage. After the murders, the police recorded the father of the three younger women referring to one of his daughters as “a whore...in the arms of this or that boy”; stating, when speaking about one of them, that she was a “shameless girl with a bra and underwear,” and muttering “honourless girl”.⁵⁰

The issues on appeal in *Shafia* involved the admissibility of expert opinion concerning honour killings and the trial judge's instructions to the jury regarding that evidence, the Crown's use of post-offence conduct by the accused, as well as whether one of the three defendants (the brother) was wrongly tried as an adult.⁵¹ While it is true that the victims were found in a car submerged in the canal, the issues raised by the grounds of appeal in this case did not relate in any way to boaters, the Rideau Canal in particular, oil on the surface of the water, or the Canal's system of locks. Styles, as Richard Posner notes in his consideration of judicial writ-

⁴⁸ 2016 ONCA 812 at paras 1–6 [*Shafia*].

⁴⁹ *Ibid* at para 84.

⁵⁰ *Ibid* at para 94.

⁵¹ See *ibid* at para 7.

ing, are optional.⁵² Justice Watt’s introductory paragraph, with its highly stylized description of boaters and the opening and closing of locks, appears to be gratuitously included for dramatic effect.

To describe the location at which these four women were found Justice Watt writes: “Boats leave. But not always...Something in the water.”⁵³ Ross Guberman, arguing in favour of less conventional judicial writing, suggests that an informal style of writing is sometimes used to bring a judicial writer closer to his or her intended audience.⁵⁴ If the loved ones of the victims form part of the intended audience for this decision, then introducing the horrific acts of violence perpetrated against these four women in an irreverent opening paragraph seems unlikely to achieve this result.

D. R. v. Salah, 2015

Justice Watt used a similar style of writing in his opening paragraphs in *R. v. Salah* to describe murderous violence targeted at a woman whose children ultimately became the victims:

[1] In the beginning, a message. In the end, a fire. And two dead children.

[2] Cindy Rodgers was the messenger. She told her friends and acquaintances Randy Parish was a paedophile. Randy Parish decided to silence Cindy Rodgers. Permanently. No messenger. No message. Cindy Rodgers would die in a fire in her home where she lived with her two young children.

[3] Randy Parish assembled a team to execute his plan. Two to set the fire. A third to act as a lookout. And an alibi for Randy Parish.

[4] The fire was set. The house burst into flames. But Cindy Rodgers escaped. She awakened neighbours to call 911. She ran back to her home. But the extent and intensity of the fire prevented her from re-entering the house. Her children were trapped. They died in the fire as she watched in helpless horror.⁵⁵

Justice Watt’s introductory description of the violence in this case includes the use of stark imagery and perhaps literary wit: “Cindy Rogers was the messenger...Randy Parish decided to silence Cindy Rodgers. Permanently. No messenger. No message.”⁵⁶ This introduction does not

⁵² See Posner, *supra* note 18 at 1426.

⁵³ *Shafia*, *supra* note 54 at paras 1–3.

⁵⁴ See Ross Guberman, “What a Breeze: The Case for the ‘Impure’ Opinion” (2015) 16 *Scribes J Leg Writing* 57 at 60.

⁵⁵ 2015 ONCA 23 at paras 1–4.

⁵⁶ *Ibid* at para 2.

use sensitivity and empathy as emphasized by recent applicants to the federal judiciary in their comments on writing for the victims of crime and their loved ones.⁵⁷ Do the tone and style of the introductory paragraphs to this judgment suggest an assumption that Cindy Rogers and the other family and friends who loved these two children would not read this decision?

To summarize, the style of writing used in the introductions in each of these four decisions does not seem consistent with the criteria that recent applicants to the federal bench have identified as necessary when writing for the emotionally invested lay persons connected with a criminal case.

E. Judicial Decisions Have Broad Public Accessibility in a Digital Era

The reported decisions of judges play a different, more public, role than they have in any other era. Today these decisions are digitized, searchable, and freely available to anyone with internet access.⁵⁸ Links to reported decisions are frequently included in media coverage of a case or in blogs discussing the case. In addition to CanLII and the Court of Appeal for Ontario's webpage, links to Justice Watt's decisions in *Flores* CA, *Shafia*, and *Bradey* can be found in either national media coverage or other online fora.⁵⁹

It may have always been likely that interested and effected parties would read a court's decision involving the murder of their loved one. Given the broad accessibility of judicial decisions and the media's reliance on reported case law, friends and family of a murder victim today may be exposed to judicial writing about their loved one even if they do not read the decision. In cases where the style and content of that writing deviates so significantly from the norm for legal decisions that the writing itself becomes newsworthy, the likelihood of exposure is even higher. For instance, Justice Watt's description of Cindy MacDonald's murder by Melvin Flores has been repeatedly recited online, including in mainstream national media.⁶⁰ Even if her family did not read his whole decision, the

⁵⁷ See *Moore Questionnaire*, *supra* note 21 at Part 11(4); *Paciocco Questionnaire*, *supra* note 8 at Part 11(4).

⁵⁸ All of Justice Watt's decisions discussed in this article are available online, for free, on CanLII.

⁵⁹ See e.g. Michael Friscolanti, "Shafia 'honour killers' lose bid for new trial", *Maclean's* (2 November 2016), online: <www.macleans.ca/news/> [perma.cc/U79K-87CT] (with a link to *Shafia*, *supra* note 54); Louise Tansey, "Likely Relevant, But Inherently Unreliable" (11 January 2016), online (blog): *Mack's Criminal Law* <dallas-mack-4x7v.squarespace.com/> [perma.cc/S399-MBK7] (with a link to *Bradey*, *supra* note 37); Fodden, *supra* note 9.

⁶⁰ See e.g. Makin, *supra* note 11; Duffy, *supra* note 11; Daubs, *supra* note 11.

possibility that they were confronted with Justice Watt's irreverent description of her murder, which has been quoted in the *Globe and Mail*,⁶¹ *Ottawa Citizen*,⁶² and *Toronto Star*,⁶³ seems high.

Judges should choose their words with a view to the personally-invested lay readers who are likely to read their judgments. This is true of judicial writing in any context; it is particularly important in cases involving tragedy and human suffering.

F. Criminal Law Decisions Should be Written for the Accused

As noted, recent judicial applicants identified the parties as the most immediate audience for the decisions of a court. In criminal law cases the accused individual is the most important party to the proceeding. Do Justice Watt's unorthodox introductions suggest that he was writing for the accused in these cases? Judicial decisions authored for the accused arguably have at least two essential features that are lacking in Justice Watt's literary decisions.

The first characteristic is empathy for the circumstances of the accused individuals. Judicial empathy, as Thomas Colby explains, facilitates a judge's ability to view an issue from all perspectives.⁶⁴ In turn, "an empathetic appreciation of the case from the perspective of all of the litigants" furthers a judge's ability to conduct the reasonableness and proportionality assessments so central to many areas of law.⁶⁵ Moreover, a judge's ability to "empathize with ordinary people...to be able to understand how the law hurts or helps people" is frequently identified by the public as a fundamentally important judicial trait.⁶⁶ According to Susan

⁶¹ See Makin, *supra* note 11.

⁶² See Duffy, *supra* note 11.

⁶³ See Daubs, *supra* note 11.

⁶⁴ For a thorough explication of the relationship between empathy and judging, see Thomas B Colby, "In Defense of Judicial Empathy" (2012) 96:6 Minn L Rev 1944 at 1960–66. Colby distinguishes between empathy and sympathy, and demonstrates why judicial empathy is consistent with judicial neutrality. Colby argues that empathy is in fact essential to good judging because of the degree to which judges must gain "an empathetic appreciation of the case from the perspective of all of the litigants" (*ibid* at 1946) as a function of the reasonableness and balancing assessments judges are frequently required to do). See also Mary Anne Franks, "Lies, Damned Lies, and Judicial Empathy" (2011) 51:1 Washburn LJ 61 at 62 (rejecting the notion that judicial empathy and judicial impartiality are incompatible).

⁶⁵ See Colby, *supra* note 70 at 1946.

⁶⁶ See *ibid* at 1948. See also Department of Justice, *A Survey of Survivors of Sexual Violence in Three Canadian Cities*, by Melissa Lindsay, Catalogue No J2-403/2014E (Ottawa: Department of Justice Canada, 2014) at 13 [Lindsay, *A Survey of Survivors*]; De-

Bandes, the question is not whether judges should exercise empathy—she assumes they should and unavoidably do exercise empathy, but that it is often exercised selectively in favour of particular groups and perspectives.⁶⁷ This selective empathy, she suggests, is sometimes mistaken for unbiased judging. For Bandes the more salient questions ask for whom do judges exercise empathy, are they aware of their own limitations and blind spots, and what measures do they take to remedy these limits?⁶⁸ One measure that helps to remedy these limits involves approaching one's judicial writing with humility. As will be discussed in the Conclusion, writing with humility facilitates empathetic judgment that is not selective.

Unfortunately, the lack of empathy for the victims and their survivors reflected in these introductions is echoed by a similar disregard for the life-destroying circumstances in which the accused individuals in these cases found themselves. Justice Watt's irreverent attempts at humour, colloquial language, and highly stylized tone to introduce the precipitating facts in these cases do not communicate empathy for the perpetrators of this violence—each of whom was facing the severe stigma, social condemnation, and extended periods of incarceration that come with murder convictions.

Whatever its intended function might be, the use of judicial humour in appellate decisions in which an accused's liberty is at stake is unlikely to be sympathetic towards the accused as a reader. Consider Justice Watt's introduction in *Manasseri*, which although it did not involve a murder charge, did involve the accused's liberty: [1] Déjà vu all over again? [2] Charlie Manasseri is in jail. He wants out of jail. [3] The last time Charlie Manasseri got out of jail, he got into trouble. He got arrested and sent back to jail.⁶⁹ The opening paragraphs of *Manasseri* seem to make light of the accused and his legal circumstances.⁷⁰ As noted, the introductions in *Flores CA* and *Bradely* also include explicit attempts at humour, in addi-

partment of Justice, *A Survey of Sexual Assault Survivors*, by Tina Hattem, 2000-4E (Ottawa: Department of Justice Canada, 2000) (two surveys in which the majority of respondents identified empathy as important).

⁶⁷ See Susan A Bandes, "Empathetic Judging and the Rule of Law" (2009) *Cardozo L Rev de•novo* 133 at 135, 139.

⁶⁸ See *ibid* at 135.

⁶⁹ 2017 ONCA 226 at paras 1–3 [*Manasseri*]

⁷⁰ See also *R v Mahmood*, 2015 ONCA 442 ("Mahmood was much better at earning money than at paying his bills. Tax bills, in particular. For the taxation years 2003 to 2006, Mahmood did not file any income tax returns. He paid no income tax. Nor did he remit the GST collected during those same years" at para 2).

tion to the highly stylized language and stark imagery used to craft the introductory paragraphs of these decisions.

Empathetic writing requires attentiveness to the fact that the litigants in any case will be personally impacted by the outcome—often in profound ways involving issues such as their financial security, the custody of their children, their perception of whether justice was achieved in response to experiences of victimization, or their liberty.⁷¹ As former law dean William Prosser stated in 1952: “The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance....”⁷² Michael Kirby, a former justice of the High Court of Australia, has commented: “I learned in my earliest days at the Bar that most litigants do not regard a court case as funny in the slightest.”⁷³

A court’s reasons should recognize that the accused persons in criminal proceedings will rarely find humour in his or her circumstances. Empathetic judicial writing engages directly with the subject of its judgment. It describes unflattering and painful details of the accused’s life or behavior with sensitivity and connects these conditions to the legal issues that must be addressed—making it clear to the reader why these details are relevant to the decision. Justice Watt’s introductions do not reflect this style of writing. Consider, for example, his decision in *R. v. Huard*:

[1] Three crack users in Windsor had a plan. It was a simple plan. Set up a drug deal. Show up at the designated place, at the appropriate time. Rip off the dealer. Grab the crack cocaine. Run.

[2] A problem developed in the execution of the plan. The dealer was not alone. A fight started. One of the crack users got stabbed. All three left empty-handed.

[3] Two days later, two men approached another drug dealer on a street corner. This time, a shot was fired. The dealer died. The two men fled.⁷⁴

Perhaps most important for the purposes of this discussion, empathetic judicial writing reflects explicit recognition of its context and role as *judicial* writing—in these cases writing that authorized fundamental and

⁷¹ Michael Gilbert, “Introduction” in Michael Gilbert, ed, *The Oxford Book of Legal Anecdotes* (Oxford: Oxford University Press, 1986) vi at xii.

⁷² “Preface” in William L Prosser, ed, *The Judicial Humorist: A Collection of Judicial Opinions and Other Frivolities* (Boston: Little, Brown & Co, 1952) vii at vii.

⁷³ Michael Kirby, “RP Meagher and I: Best of Times/Worst of Times” (2011) 35:1 Austl Bar Rev 26 at 30. See also Sharyn Roach Anleu, Kathy Mack & Jordon Tutton, “Judicial Humour in the Australian Courtroom” (2014) 38:2 Melbourne UL Rev 621 at 628; George Rose Smith, “A Critique of Judicial Humor” (1990) 43:1 Ark L Rev 1.

⁷⁴ 2013 ONCA 650 at paras 1–3 [*Huard*].

long-term deprivations of an individual's liberty.⁷⁵ Justice Watt's introductions in *Flores CA*, *Bradey*, *Shafia*, and *Salah* (and cases like *Manasseri* and *Huard*) are not consistent with the markers of empathetic judicial writing.

A second characteristic of judicial writing that is aimed at the accused (and interested and affected parties and other lay readers more broadly) is accessibility. In his application for appointment Justice *Benoît Moore* noted that "the primary role of court decisions is...to render justice in such a way that litigants who are concerned and affected by a ruling are able to understand the logic and reasons behind it, even if they do not agree with it."⁷⁶ In his view, access to justice requires judges to make the law accessible to the parties through plain language.⁷⁷

Some readers have defended Justice Watt's unorthodox introductions on the basis that they render the decisions more readable and accessible.⁷⁸ As already noted, Justice Watt's introductions have been likened to that of a crime fiction novel.⁷⁹ In "Imagery, Humor, and the Judicial Opinion," Adalberto Jordan suggests that better use of language, including reliance on imagery and humour, would make the law more understandable to the public.⁸⁰ Is the style of Justice Watt's introductory paragraphs in cases like *Flores CA*, *Bradey*, *Shafia*, and *Salah* likely to make the law—the legal issues in these decisions—more comprehensible to the accused (or other lay readers)?

English professor Greig Henderson, in his examination of some of Justice Watt's decisions, asserts that Justice Watt's writing is inspired more by Lord Denning's style of judicial authorship than by the crime novel genre.⁸¹ Lord Denning used plain language, short sentences, and a narrative style that is similar to that of Justice Watt's literary introductions.⁸²

⁷⁵ See Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601 ("[a] judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life" at 1601).

⁷⁶ *Moore Questionnaire*, *supra* note 21 at Part 11(4).

⁷⁷ See *ibid.*

⁷⁸ See e.g. David Cheifetz (13 March 2011 at 11:18), comment on Fodden, *supra* note 9.

⁷⁹ See Makin, *supra* note 11.

⁸⁰ See Adalberto Jordan, "Imagery, Humor, and the Judicial Opinion" (1987) 41:3 U Miami L Rev 693 at 727.

⁸¹ See Greig Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (Toronto: University of Toronto Press, 2015) at 39.

⁸² See e.g. Denning's dissent in *Miller v Jackson*, [1977] 3 All ER 338 at 340–45, [1977] QB 966 [*Miller*]; *Hinz v Berry*, [1970] 1 All ER 1074, [1970] 2 QB 40 [cited to ER] ("[i]t happened on 19th April 1964. It was bluebell time in Kent. Mr and Mrs Hinz, the plaintiff, had been married some ten years, and they had four children, all aged nine and

Henderson concludes, however, that Justice Watt’s literary decisions are only a partial imitation of Lord Denning’s celebrated text.⁸³ Henderson notes that while Justice Watt uses plain language in his openings, he writes for a legal audience throughout the remainder of the decisions, whereas Denning “writes for the public all the way [through].”⁸⁴

Analyzing Justice Watt’s decision in *Ontario v. Enbridge*⁸⁵, Henderson writes: “the problem with Watt’s opening is its incongruence with the rest of the judgment. The first three paragraphs are terse and fragmented. In the fourth paragraph, however, the paperback novelist disappears and the traditional judge takes over.”⁸⁶ The preponderance of the decision, Henderson writes, is “[a]imed at a professional audience” using a formalist style, which “sees the law as logical, objective, and constrained. Such a style is impersonal, elevated, technical, and conventional.”⁸⁷

While his study did not discuss the cases examined here, Henderson’s analysis captures the format, style, and structure of Justice Watt’s writing in *Flores CA*, *Bradey*, *Shafia*, and *Salah*. The style, language, and tone of his factual descriptions in these four cases (and in other criminal cases introduced in a similar manner)⁸⁸ are incongruent with the remainder of his decision in these cases. Indeed, the terminology, sentence structure, and diction used to explain the legal reasoning in these cases appears very similar to that of other most judicial decisions in Canada. Consider, for example, the length, language, and style of this sentence from his decision in *Flores CA*:

under. The youngest was one. The plaintiff was a remarkable woman. In addition to her own four, she was foster mother to four other children. To add to it, she was two months pregnant with her fifth child” at 1075).

⁸³ See Henderson, *supra* note 87 at 39. The fact that Lord Denning’s decisions continue to be “the delight of everyone” (*Miller*, *supra* note 88 at 340) to many first-year law students, and are in this sense inarguably celebrated, should not obscure the xenophobic, racist and sexist elements of some of his writing and public statements. Henderson discusses these latter attributes of Denning’s writing in *Creating Legal Worlds*, *supra* note 87 at 54.

⁸⁴ Henderson, *supra* note 87 at 49.

⁸⁵ *Ontario (Labour) v Enbridge Gas Distribution Inc.*, 2011 ONCA 13. Justice Watt introduced the case as follows: “Explosions damage and destroy things. Sometimes their victims are people. Like here. An explosion damaged and destroyed several buildings. Hurt some people too. And killed others. This explosion was preventable. If only...” (at para 1).

⁸⁶ Henderson, *supra* note 87 at 48.

⁸⁷ *Ibid* at 49.

⁸⁸ See e.g. *Manasseri*, *supra* note 75 at paras 1–6; *R v Yumnu*, 2010 ONCA 637 at paras 1–12.

Adopting, as I must, a functional approach to test the adequacy of these instructions, and considering them as a whole, I am satisfied that the “rolled-up” instructions in this case were not adequate to the task set for them: to bring home to the jury their obligation to consider the cumulative effect of the evidence, with a legitimate bearing on the prosecutor’s proof of the fault element in murder, despite their rejection of any discrete defence to which that same evidence was relevant.⁸⁹

This is not writing aimed at a lay reader (let alone an accused whose first language is not English, as was the case with Melvin Flores⁹⁰).

To be clear, relative to a great deal of case law, Justice Watt’s writing in these decisions is clear, organized, and straightforward. However, that his decisions are otherwise well-written relative to the decisions of some other judges, and thus more accessible to those with legal training, does not make them more comprehensible to an accused or a general, lay reader. Many of his decisions, including elements of those discussed here, are highly technical. Like in the cases Henderson examined, Justice Watt analyzes and resolves the issues on appeal in these cases using a clear and organized, but very much traditional style of legal writing. Adding an irreverent factual introduction to a legal opinion that is otherwise written in a conventional style does not make the law more accessible to a non-legal audience.

Justice Watt’s defenders have perhaps conflated his factual introductions in these cases with his clear, organized, and typically well-reasoned, but thoroughly conventional legal writing in the remainder of these judgments. In fact, his introductions in these cases arguably make his judgments less clear and accessible both for the lay reader *and* for legal audiences.

In his “Primer of Opinion Writing”, George Rose Smith, a former justice of the Supreme Court of Arkansas, highlighted for new appellate judges the significance of the first paragraph of a decision, asserting that its importance cannot be overemphasized.⁹¹ He argued that “the readability of an opinion is nearly always improved if the opening paragraph (occasionally it takes two) answers three questions”: what type of case is it; which party is appealing; and what was the decision at trial?⁹² Smith suggested that the issues on appeal should also be identified in the first paragraph or two, if capable of summary.

⁸⁹ *Flores CA*, *supra* note 24 at para 77.

⁹⁰ See *Flores 2012*, *supra* note 26 at paras 4–6.

⁹¹ See George Rose Smith, “A Primer of Opinion Writing, For Four New Judges” (1967) 21:2 *Ark L Rev* 197 at 204.

⁹² *Ibid.*

Justice Watt’s introductions generally do not serve this function.⁹³ Consider, for instance, the first paragraph of his decision in *R. v. Paryniuk*: “Looks can be deceiving. But not always. Sometimes, things are as they appear. At least to the practised eye.”⁹⁴ This paragraph does not reveal to the reader the type of case, which party is appealing, the nature of the trial decision, or the issues on appeal. Answers to these questions are similarly absent from his first paragraph in *R. v. Roks*: “Things don’t always work out according to plan. Failures occur at different times and for different reasons. Sometimes, the flaw is in the plan. At other times, the execution is faulty.”⁹⁵ Likewise in *United States v. Cavan*: “Those who persist in their pursuits have mixed results. Some succeed. Others fail.”⁹⁶ While they are written in plain language, these introductory paragraphs reveal virtually nothing about the cases they introduce.

Similarly, the dramatic openings in *Flores CA*, *Bradey*, *Salah*, and *Shafia* do not disclose the nature of the appeal, the decision at trial, or the specific issues on appeal. In *Shafia*, for instance, the reader is not provided with any of this information until the fifth paragraph of the decision.⁹⁷

⁹³ See e.g. *R v MGT*, 2017 ONCA 736 at paras 1–3 (appeal of sexual assault conviction):

[1] In May, 2013, a family home was in turmoil.

[2] M.G.T. thought his wife was unfaithful.

[3] His wife thought he was paranoid. She was making arrangements to leave him.

R v Gonzales, 2017 ONCA 543 at paras 1–2 (appeal of conviction for firearms offences and possession of marijuana for purposes of trafficking):

[1] They seemed out of place. Two young men in a new van. Rented, but overdue. Driving in and around a residential neighbourhood. In the middle of the day. Some new houses, others at different stages of completion.

[2] Another man was in the same area. Driving a truck. And trying to blend in. A police officer. Watching what was going on in the neighbourhood because there had been a lot of daytime break-ins there. Front doors kicked in. Things stolen.

R v Saleh, 2013 ONCA 742 at paras 1–2 (appeal of first degree murder conviction):

[1] In the drug business, loyalty and integrity are important. At every step along the way. Wholesalers. Brokers. Retailers. Street dealers. Everyone has their role. And everyone gets their due, their full due. No one gets short-changed. And no one gets cut out.

[2] Sometimes, however, loyalty and integrity get left behind. Forgotten. Ignored. Payments are short. Deliveries are light. Brokers are cut out. Retailers deal directly with wholesalers.

⁹⁴ 2017 ONCA 87 at para 1.

⁹⁵ 2011 ONCA 526 at para 1.

⁹⁶ 2015 ONCA 664 at para 1.

⁹⁷ See *Shafia*, *supra* note 48 at paras 1–5.

The incongruence between the style of writing in his factual introductions and the style of the remainder of these decisions to provide his reasoning, and the uninformative nature of his literary openings (despite their plain language), suggests that the accused was not the intended reader of these decisions.

Again, the core of Justice Watt's decisions in these cases are not written using a plain language style that is accessible to a non-legal audience. His departure from conventional legal writing in the introductions to these cases cannot be explained as an attempt at plain language, accessible and empathetic writing aimed at an accused. Given the style with which he describes the violence in these cases, it is also difficult to conclude that they were written for the friends and family of these murdered women and children.

II. The Public Audience for (Literary) Judgments

A third audience identified by successful applicants to the federal judiciary is the general public (and a subset of that public, the media). As already noted, given their online availability, it is reasonable to assume that members of the public are increasingly reading judicial decisions.

In her application for elevation to the Supreme Court of Canada, Justice Sheilah Martin suggests that the public is an important audience for every court because

the legitimacy of judicial decision-making rests in large measure on people believing that our legal system delivers justice. Judges seek to encourage public confidence in the legal system and foster respect for the rule of law at all times. Judicial decisions provide a powerful opportunity to build public confidence and respect because they are direct acts of communication.⁹⁸

Similarly, in his application for appointment to Alberta's superior court Justice William deWitt states that

[m]aking members of the public feel respected and understood is an important duty of a judge and is invaluable in promoting the public's respect for the court system and the administration of justice. Therefore, the general public is...an important audience for the decisions of judges of the Court of Queen's Bench.⁹⁹

⁹⁸ Sheilah Martin, "The Honourable Sheilah Martin's Questionnaire" (21 December 2017), online: *Office of the Commissioner of Federal Judicial Affairs Canada* <www.fjacmf.gc.ca> [perma.cc/YG4S-HP6G].

⁹⁹ William T deWitt, "The Honourable Justice William T deWitt's Questionnaire" (31 March 2017), online: *Department of Justice Canada* <www.canada.ca> [perma.cc/677P-D4FH].

In her application, Justice Robyn Ryan Bell asserts that “every trial, hearing or appeal is an act of communication with the public.”¹⁰⁰ How might we assess Justice Watt’s acts of public communication?

The four decisions examined in Part II involved violence (or, in the case of *Salah*, attempted violence) against women. *Flores CA*, *Bradey* and *Shafia*, in particular, involved gender-based violence. Gender-based violence refers to acts of violence that are targeted against women because they are women, or that disproportionately affect women.¹⁰¹ *Bradey*, for example, involved rape, which is disproportionately perpetrated against women by men.¹⁰² At the centre of *Shafia* was the issue of honour killings motivated by a supposed failure on the part of the victim to comport with puritanical sex and gender norms restricting the appearance and activities of women as a form of control. *Flores CA*, which will be discussed further in the paragraphs to follow, involved domestic violence by an ex-partner. Like rape, intimate partner violence is disproportionately perpetrated by men against women.¹⁰³

Writing judgments involving gender-based violence for a public audience should trigger consideration of two interrelated factors specific to this type of case. The first involves the current crisis of public faith in the legal system’s ability to respond appropriately to incidents of gender-based harm.¹⁰⁴ The second, related, factor involves the importance of rec-

¹⁰⁰ Robyn M Ryan Bell, “The Honourable Justice Robyn M Ryan Bell’s Questionnaire” (5 May 2017), online: *Department of Justice Canada* <www.canada.ca> [perma.cc/JN4M-DXQH].

¹⁰¹ See e.g. *Report of the Committee on the Elimination of Discrimination Against Women*, UNOHCHR, 47th Sess, Supp No 38, UN Doc A/47/38 (1993) at para 6.

¹⁰² See Statistics Canada, *Self-Reported Sexual Assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017) at 6, 13.

¹⁰³ See Statistics Canada, *Measuring Violence Against Women: Statistical Trends*, Maire Sinha, ed, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 February 2013) (“[o]verall, men were responsible for 83% of violence committed against women, with women accounting for the remaining 17%” at 14) [Sinha, *Measuring Violence*]. See also *ibid* (“[women] were almost four times more likely than men to be victims of both spousal violence and dating violence” at 20).

¹⁰⁴ See e.g. Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) at 87, 151. See also Blair Crew, Daphne Gilbert & Elizabeth Sheehy, “The Ghomeshi verdict: This is no time for complacency” (12 April 2016), online: *Policy Options* <policyoptions.irpp.org> [perma.cc/NPY5-XC3B]; Lindsay, *A Survey of Survivors*, *supra* note 72 (lack of confidence in the criminal justice system is identified as one of the main reasons not to report); Kathleen Daly & Brigitte Bouhours, “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries” (2010) 39 *Crime & Justice* 565; Teressa Nahanee, “Sexual Assault of Inuit Females: A Comment on ‘Cultural Bias’” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change*

ognizing the social context and dynamics that produce gender-based violence.¹⁰⁵

Despite initiatives like specialized courts, judicial education on gender-based harms, and independent legal advice for sexual assault complainants, survivors of gender-based violence continue to report significant deficiencies in the legal system's response to the violence perpetrated against them or their loved ones.¹⁰⁶ Lack of faith in the criminal justice process remains one of the main barriers to reporting experiences of sexual assault.¹⁰⁷ It is not hyperbolic to assert a crisis of public confidence in the ability of judges to recognize and respond appropriately to allegations of sex and gender-based harm, particularly in view of recent high profile sexual assault cases revealing dysfunction within the legal system.¹⁰⁸ It is reasonable to conclude that in Canada the law and judicial attitudes regarding gender-based violence have historically failed women.¹⁰⁹

(Toronto: University of Toronto Press, 1994) 192 at 192; Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 68–70; Elizabeth Comack & Tracey Peter, "How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage Between 'Responsibilization' and 'Blaming the Victim'" (2005) 17:2 CJWL 283; Rosemary Cairns Way, "Deliberate Disregard: Judicial Appointments under the Harper Government" (2014) 67:2 SCLR 43 at 50–53; Sonia Lawrence, "Reflections on Judicial Diversity and Judicial Independence" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193 at 198.

¹⁰⁵ See Arthur Selwyn Miller, "Public Confidence in the Judiciary: Some Notes and Reflections" (1970) 30:1 Law & Contemp Probs 69 at 82 (discussing the relationship between public confidence in the judiciary and the perception of its competence to handle complex social problems).

¹⁰⁶ See e.g. Deborah Epstein & Lisa A Goodman, "Domestic Violence Victims' Experiences in the Legal System" in Monica K Miller & Brian H Bornstein, eds, *Stress, Trauma, and Wellbeing in the Legal System* (New York: Oxford University Press, 2013) 45 at 46; Olivia Carville, "Judges under fire over failing domestic violence victims", *The Toronto Star* (11 May 2015), online: <www.thestar.com> [perma.cc/778Y-WTMJ].

¹⁰⁷ See Lindsay, *supra* note 72; Hattem, *supra* note 72 at 15.

¹⁰⁸ The arguably unprecedented public outcry following an acquittal of the accused in *R. v. Al-Rawi*, a case involving a highly intoxicated complainant and a taxi driver, is one example. I wrote about this case in Elaine Craig, "Judging Sexual Assault Trials: Systemic Failure in the Case of *Regina v Bassam Al-Rawi*" (2017) 95:1 Can Bar Rev 179. The public response to stereotypical and victim blaming comments made by former Justice Robin Camp in a sexual assault case in Alberta and Justice Robert Dewar's comments in a Manitoba sexual assault proceeding also exemplify current public perspectives, as does public commentary surrounding the prosecution of Jian Ghomeshi.

¹⁰⁹ See e.g. Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2008) at 287–89; Sheila McIntyre et al, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20:3 Can Woman Studies 72; Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver:

Given this history and the current lack of public faith in the legal system, judicial writing for a public audience should not be irreverent or disrespectful in its descriptions of sexual assault, domestic violence, or intimate-partner murder. Rather, judgments in this area of law should reflect adequate recognition of the social dynamics that surround and perpetuate gender-based violence. Without adequate recognition of these dynamics, judicial writing risks contributing to a well-founded public perception that courts have failed to recognize the pervasive gender-based harms suffered by women, particularly racialized women, Indigenous women, poor women, and women living with addiction.¹¹⁰ Many judges will have little in common with these women's lived experiences of gender-based violence.¹¹¹ A continued shift in judicial culture towards greater recognition and deeper understanding of gender-based violence is necessary. Any judicial writing that risks impeding this cultural shift is both unfair to women and likely to aggravate the loss of public faith in the legal system's ability to respond judiciously to incidents of gender-based harm. This is true regardless of the substantive legal reasoning or outcome in such decisions.

A. Judicial Writing for a Public Audience Should Not Be Irreverent or Impertinent When Describing Violence against Women

Justice Watt's judgments in *Flores CA*, *Bradey*, and *Shafia* do not suggest careful attention to the impact that judicial writing in this area can have on the public's faith in the legal system. These decisions include irreverent descriptions of the gender-based violence that occurred in these cases—descriptions which could have an adverse impact on public confidence in the legal system. For example, public perceptions of the judiciary's response to gender-based violence are likely to be diminished by judicial writing that treats lightly the jealous rage that supposedly caused an accused to brutally stab his ex-girlfriend to death, that uses pun when describing the burning of a woman's raped, tortured, and murdered body, or that offers gratuitous details for stylistic effect when describing the supposed "honour killings" of four women by members of their family.

One of the literary devices in Justice Watt's introductions is humour. A central claim advanced in support of judicial humour is that judges are

UBC Press, 2014) at 296–97; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 CJWL 397.

¹¹⁰ See e.g. Sheehy, *supra* note 110 at 87, 151. See also Crew, Gilbert & Sheehy, *supra* note 110; Lindsay, *supra* note 72 at 13 (lack of confidence in the criminal justice system is identified as one of the main reasons not to report); Daly & Bouhours, *supra* note 110; Nahanee, *supra* note 110 at 192; Razack, *supra* note 110 at 68–70. See generally Comack & Peter, *supra* note 110.

¹¹¹ See e.g. Way, *supra* note 110 at 50–53; Lawrence, *supra* note 110 at 198.

human beings and the expectation that they perform their roles in a robotic fashion is neither reasonable nor desirable.¹¹² Proponents of this argument suggest that judicial humour reveals a judge's humanity, in contrast to the perception of judges as removed and distant.¹¹³ Jack Oakley and Brian Opeskin summarize the claim as follows:

Greater tolerance for natural displays of humour would have the beneficial effect of re-humanizing judges, and remolding their negative image as watchers from an ivory tower, disconnected from the 'real' people over whom they sit in judgment.¹¹⁴

Although the potential for "re-humanizing judges" in the eyes of the public may be true of some judicial humour, it is unlikely that Justice Watt's introductions in *Flores CA*, *Bradey*, *Salah* and *Shafia* could have that effect. His attempts at judicial humour in these cases may have the opposite effect. Consider, for instance, his opening paragraphs in *Bradey*. Humour concerning the rape, torture, and murder of a mentally disabled woman is not appropriate. Justice Watt's reference to the presence of Kaitlin Cousineau's beaten and burned dead body in Bradey's basement as "a problem" for the accused is not likely to re-humanize judges in the eyes of the public. The use of humour in *Bradey* is more likely to reinforce perceptions that law is made by detached judges in "ivory tower[s]" who have lost sight of the fact that they are writing about things that have happened to "real" people.

B. Judicial Writing for the Public Should Identify, Not Elide, the Social Dynamics Surrounding Gender-Based Violence

In addition to irreverent descriptions, judicial accounts of violence against women that fail to identify and articulate, or which obscure, the gendered specificity of these crimes may also undermine public faith in the legal system. Justice Watt's literary introduction in *Flores CA* does not identify, but rather obscures the social dynamics surrounding gender-based violence.

Recall that Melvin Flores murdered his ex-girlfriend, Cindy MacDonald, shortly after their break-up and upon learning that she had obtained an abortion and was engaged in sexual relations with another man. In the

¹¹² See e.g. The Hon Justice Michael Kirby, "On the Writing of Judgments" (1990) 64:11 *Austl LJ* 691 at 697–99; Anleu, Mack & Tutton, *supra* note 79 at 627; Jordan, *supra* note 86 at 701.

¹¹³ See Anleu, Mack & Tutton, *supra* note 79 ("[h]umour can be an 'expression of humanity and individuality in contrast to the conventional emphasis on distance'" at 627).

¹¹⁴ Jack Oakley & Brian Opeskin, "Banter from the Bench: The Use of Humour in the Exercise of Judicial Functions" (2016) 42 *Austl Bar Rev* 82 at 95.

weeks between the break-up and the murder, Flores repeatedly called MacDonald's aunt, and asked her, her husband, and MacDonald's grandmother to persuade MacDonald to marry him.¹¹⁵ Flores left MacDonald a series of loud, abusive voicemails in which he called her "a fucking bitch," threatened to murder her and said that if he could not have her, no one would.¹¹⁶ He told MacDonald's aunt that he would kill her if she did not resume the relationship.¹¹⁷ He breached a court order during this time period which prohibited him from contacting the victim.¹¹⁸ During his discussions with police and at his second trial, Flores described how he "went crazy" on the night of the murder after MacDonald told him that she had had an abortion and was currently pregnant from sex with another man.¹¹⁹

Justice Watt's introductory description of the events preceding the murder of Cindy MacDonald was as follows: "Cindy made it clear to Melvin that their relationship was over. But Melvin continued his pursuit. He enlisted the assistance of some of Cindy's relatives to convince her to marry him."¹²⁰ Based on the reported facts, Melvin Flores's behaviour towards his ex-girlfriend appears to be a clear example of stalking by a possessive and angry man. To label it as a "pursuit" misrepresents and romanticizes what occurred and also renders invisible the gender-based nature of the violence in this case.

Stalking, or criminal harassment, includes repeated, threatening communications which would cause a reasonable person to fear for their safety.¹²¹ Researchers have demonstrated a clear link between stalking and intimate partner violence.¹²² Women are far more likely to be the victims of intimate partner violence than are men.¹²³ Stalkers of ex-partners

¹¹⁵ See *Flores* 2012, *supra* note 26 at para 50.

¹¹⁶ *Ibid* at paras 52–53.

¹¹⁷ See *ibid* at para 53.

¹¹⁸ See *ibid* at paras 49–54, 58.

¹¹⁹ *Ibid* at para 58.

¹²⁰ *Flores CA*, *supra* note 24 at para 2.

¹²¹ See *Criminal Code*, RSC 1985, c C-46, s 264 [*Criminal Code*].

¹²² See e.g. Mindy B Mechanic, Terri L Weaver & Patricia A Resick, "Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women" (2000) 15:1 *Violence & Victims* 55; Kevin S Douglas & Donald G Dutton, "Assessing the Link Between Stalking and Domestic Violence" (2001) 6:1 *Aggression & Violent Behavior* 519.

¹²³ See Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2016*, by Marta Burczycka & Shana Conroy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 17 January 2018) at 16 (74% of victims of intimate partner stalking are women); Lisa S Price, *Feminist Frameworks: Building Theory on Violence Against Women* (Halifax:

are overwhelmingly male and tend to “react with rage to perceived or actual rejection.”¹²⁴ The murder of women by their intimate partners or former intimate partners is often motivated by jealousy and claims to possession.¹²⁵ Men are more likely to murder an intimate partner as she leaves, or attempts to end, the relationship.¹²⁶

It is critically important to the physical safety of women that the legal system and its actors be cognizant of the behavioural patterns that precede, and the social dynamics that produce, intimate femicide. Narratives that sentimentalize stalking behaviour impede greater understanding of the role that these factors play in the murder of women by their partners and former partners. When written by a judge and read by the public, they risk affirming the perception that courts are unable to understand or unwilling to protect women from gender-based violence.

Justice Watt's characterization of Flores's stalking behaviour as a “pursuit” is not the only example of him romanticizing the gender-based violence in *Flores CA*. His opening paragraph reads almost as if he is telling an ill-fated love story. Recall that he begins his description of the case by writing: “They met in a bar in London. Melvin Flores and Cindy MacDonald. Soon, they became lovers.”¹²⁷ Later he writes: “[Flores] wanted to get married. Cindy did not share her lover's excitement.”¹²⁸ Where the accused and the victim met was not relevant to the issues on appeal. This factual detail appears to have been included to facilitate the opening narrative. Justice Watt referred to the accused and his victim as “lovers” twice in this paragraph. The choice of language and the content of this paragraph depict a story of love and courtship, rather than sexual possessiveness, jealousy, and murderous rage.

Fernwood Publishing, 2005) at 11; Isabel Grant, “Intimate Partner Criminal Harassment Through a Lens of Responsibilization” (2015) 52 *Osgoode Hall LJ* 552 at 553.

¹²⁴ Douglas & Dutton, *supra* note 129 at 519.

¹²⁵ See Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2011*, by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 June 2013) at 43 (jealousy was the motivating factor in 25% of post-separation spousal homicides).

¹²⁶ See Sinha, *Measuring Violence*, *supra* note 109 at 43; see also Department of Justice Canada, *Violence Perpetrated by Ex-Spouses in Canada*, by Melissa Lindsay, Catalogue No J2-405/2014E-PDF (Ottawa: DJC, 2014) at 11, 23. See also Andrée Côté, Diana Majoory & Elizabeth Sheehy, *Stop Excusing Violence against Women: NAWL's Position Paper on the Defence of Provocation* (Ottawa: National Association of Women and the Law, 2000) at 5, citing Statistics Canada, *Spousal Homicide*, by Margo Wilson & Martin Daly, Juristat 14:8, Catalogue No 85-002 (Ottawa: Statistics Canada, 1994); Isabel Grant, “Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners” (2010) 47:3 *Atla L Rev* 779 at 780].

¹²⁷ *Flores CA*, *supra* note 24 at para 1.

¹²⁸ *Ibid.*

The partial defense of provocation—raised by the accused in *R. v. Flores* and one of the issues on appeal—reduces what would be a murder conviction to manslaughter.¹²⁹ It is premised on the notion that human frailties “sometimes lead people to act irrationally and impulsively.”¹³⁰ For an accused to avail himself of the defence, there must (1) be an air of reality to the assertion that the deceased’s indictable criminal conduct would cause an ordinary person to lose self-control; (2) that it did cause the accused to lose control and act suddenly; (3) before his “passion” could “cool”.¹³¹

The origins of this defence are deeply gendered.¹³² It was frequently used to show compassion for men who had murdered their wives upon discovering their infidelity.¹³³ Reliance on the partial defence of provocation in this context was premised on the belief that women were the sexual property of their husbands and that their adultery was a profound violation of the husband’s proprietary interests.¹³⁴ Legal scholars have shown how the gendered assumptions underpinning this defence continue to inform its application to reduce the murder convictions of men who kill intimate partners or former partners who have attempted to leave the relationship.¹³⁵

Whether the appeal in *R. v. Flores* required a gender analysis, given the accused’s reliance on provocation as a defence, is a separate question. To *obscure* the gender-based nature of the violence in this case by telling a romanticized, saccharine story of courtship gone wrong may reinforce public perceptions that the judiciary does not understand or respond appropriately to the social problem of violence against women.

¹²⁹ See *Criminal Code*, *supra* note 128, s 232(1).

¹³⁰ *R v Thibert*, [1996] 1 SCR 37 at 43, 131 DLR (4th) 675.

¹³¹ *Criminal Code*, *supra* note 128, s 232(2). Parliament has amended this provision since the *Flores* trial took place. At trial in *Flores*, the provocation defence in force required that the deceased had engaged in a wrongful act or insult to provoke the accused’s loss of control, rather than engaged in conduct that would constitute an indictable offence punishable by five or more years of imprisonment, as required by the current version of the provision.

¹³² See Isabel Grant & Debra Parkes, “Equality and the Defence of Provocation: Irreconcilable Differences” (2017) 40:2 Dal LJ 455 at 460.

¹³³ See *ibid*.

¹³⁴ See *ibid*.

¹³⁵ See *ibid* at 466. See also Jenny Morgan, “Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them” (1997) 21:1 Melbourne UL Rev 237.

Justice Watt is an accomplished jurist and an expert in criminal law, jury instructions, and the law of evidence.¹³⁶ His knowledge of these areas of law is matched by his organized, clear, and analytically rigorous legal reasoning. His decisions are frequently relied upon by his judicial colleagues.¹³⁷ These attributes and accomplishments increase the potentially adverse impact of these literary introductions on public confidence in the judiciary. Consider this quote reportedly taken from an anonymous Manitoba judge in response to Justice Watt's description of Cindy MacDonald's murder by Melvin Flores: "This is another excellent piece of work by one of Canada's finest criminal law jurists ... It is [a] must-read for all new judges in particular, and the rest of us, too. The first few pages are a tad whimsical but neither offensive nor demeaning."¹³⁸

It seems reasonable to suggest that Cindy MacDonald's brother, or her father, might consider Justice Watt's attempt at humour and the use of blunt imagery to describe her murder—that Melvin "closed the book" on their relationship with a "butcher's knife"—offensive and demeaning. Moreover, we should expect our judges, including this judge from Manitoba, to know that whimsy ought not to play a role in authoring a judicial decision about the "starkly horrific"¹³⁹ murder of a woman by her ex-boyfriend. Would we want other judges to emulate Justice Watt's writing style in these cases? What would be the impact on public perceptions of the judiciary and the legal profession more broadly if many, or most, judges opened criminal law decisions involving violence against women in this manner?

The Court of Appeal for Ontario typically hears cases in panels of three, and did so in *Flores CA*. That Justice Watt's concurring colleagues in *Flores CA*, Justices LaForme and MacFarland, failed to provide their colleague with a much-needed check by authoring a separate, concurring opinion that agreed with his legal reasoning but explicitly stated that they

¹³⁶ See e.g. David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015); David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2017).

¹³⁷ See e.g. *Flores CA*, *supra* note 24, which at the time of writing had been cited in 16 other cases: *R v Bouchard*, 2013 ONCA 791 at paras 60, 79, 93–95, 97; *R v Levy*, 2016 NSCA 45 at para 148; *R v Hill*, 2015 ONCA 616 at para 65; *R v Sidhu*, 2016 ABCA 321 at para 28; *R v Dahr*, 2012 ONCA 433 at paras 11, 15; *R v Bushie*, 2012 MBCA 67 at para 6; *R v Florence*, 2012 BCSC 799 at para 161; *R v Singh*, 2016 ONSC 3739 at para 83; *R v Howe*, 2015 NSCA 84 at para 67; *R v Brewer*, 2016 BCSC 1291 at para 227; *R c Torres Salazar*, 2014 QCCQ 8294 at para 32; *R v Marshall*, 2017 ONCA 1013 at para 28; *R v Phillips*, 2017 ONCA 752 at para 160; *R v Dounis*, 2011 ONSC 2301 at para 52; *R c Chaussé*, 2015 QCCS 5493 at para 11 n 13.

¹³⁸ Makin, *supra* note 11.

¹³⁹ See news reporter's description of sentencing judge's comments in *Sims*, *supra* note 29.

did not endorse his introduction, speaks to the need for a shift in judicial culture.¹⁴⁰ In terms of his substantive knowledge and legal reasoning, Justice Watt *is* “one of Canada’s finest criminal law jurists.”¹⁴¹ In terms of developing a judiciary which both has and is perceived to have a deeper understanding, and articulated recognition, of the social conditions and dynamics that perpetuate gender-based violence, Justice Watt’s status as a highly esteemed criminal law jurist makes introductions like the one he authored in *Flores CA* more problematic.

Whether Justice Watt’s unorthodox introductions in these cases were aimed at a public audience is unknown. That the opening descriptions of violence against women in these decisions could be perceived by members of the public as disrespectful and insufficiently cognizant of the social dynamics that perpetuate gender-based violence seems likely.

III. The Legal Profession as Audience for (Literary) Judgments

Unsurprisingly, applicants to the federal judiciary consistently identify lawyers, legal academics, and other judges as a primary audience for judicial decisions. As Justice Paciocco writes, “in our common law system, jurists learn the law from one another. The law builds and develops through shared efforts. If lawyers and jurists are not communicating about the law, it cannot progress.”¹⁴²

The legal community is the most likely audience for Justice Watt’s decisions in *Flores CA*, *Bradey*, *Shafia*, and *Salah*. The fact that the legal reasoning in these decisions is written in a conventional legal style, largely inaccessible to a lay audience, supports this conclusion. But this does not explain how a legal audience is served by these introductions—particularly given the disjuncture between them and the remainder of the decision in these cases.

¹⁴⁰ Taking this initiative is not unprecedented. In “*Bons Mots*, Buffoonery, and the Bench: The Role of Humor in Judicial Opinions” (2012) 60 UCLA L Rev Disc 16 at 31, Lucas K Hori discusses cases in which judges have taken this measure. One of his examples of a concurrence of this sort was written by American Judge George Carley, in *Russell v State*, 372 SE 2d 445 (Ga Ct App 1988) (“I agree that the judgment of conviction should be affirmed. However, I cannot join the majority opinion because I do not believe that humor has a place in an opinion which resolves legal issues affecting the rights, obligations, and, in this case, the liberty of citizens. The case certainly is not funny to the litigants” at 447).

¹⁴¹ Makin, *supra* note 11.

¹⁴² See Paciocco *Questionnaire*, *supra* note 8 at Part 11(4).

A. Stylistic Departures from Conventional Judicial Writing Must Have Purpose

Academics and judges who have commented on literary judgments seem to agree that the utility (and appropriateness) of departing from a traditional style of judicial writing hinges on whether the departure is genuinely relevant to the decision.¹⁴³ One of George Rose Smith's primary examples of injudicious literary judgments is decisions written as poetry.¹⁴⁴ Smith illustrates the defects with this type of judicial writing through analysis of several American cases in which judges have written parts of their decision in verse.¹⁴⁵ The shortcomings he identifies include cases in which the verse serves as a distraction, the poem states neither the facts nor the law (which are included instead in footnotes), or those in which there is no discernible purpose of writing in this manner.¹⁴⁶ In short, his critique is that in too many of these literary attempts, form trumps substance. Noting that neither the law nor the facts of a case can be stated as well in poetry as in prose, he asks: "What, then, is the reason for the muse's intrusion? Apparently the author either seeks to be amusing (humorous) or seeks to display cleverness or ingenuity. No other possible explanation comes to mind."¹⁴⁷ As explained in the paragraphs to follow, the literary stylings in *Flores CA*, *Bradey*, *Shafia*, and *Salah* cannot be said to be of genuine relevance to the case to be decided.

In *Creating Legal Worlds*, Henderson notes that Justice Watt's openings, unlike Lord Denning's, sometimes include background facts that are irrelevant to the issues being decided.¹⁴⁸ This is also true in the cases examined here. For example, many of the details he included in his opening ten paragraphs in *Shafia* were irrelevant to the issues on appeal in that case.¹⁴⁹ Henderson suggests that, unlike Lord Denning's, Justice Watt's "narrative opening[s] and overview[s]" do not clarify, or even reveal, the relevant legal issue(s).¹⁵⁰ Examples of this, and of the disjuncture between

¹⁴³ See Smith, *supra* note 79 at 8; Lord MacMillan, "The Writing of Judgments" (1948) 26:3 Can Bar Rev 491 at 493; Gerald Lebovits, "Judicial Jesting: Judicious?" (2003) 75:7 NY St BJ 64; Anleu, Mack & Tutton, *supra* note 79 at 642.

¹⁴⁴ See Smith, *supra* note 79 at 11.

¹⁴⁵ See *ibid* at 11–14.

¹⁴⁶ See *ibid*.

¹⁴⁷ *Ibid* at 11.

¹⁴⁸ See Henderson, *supra* note 87 at 49.

¹⁴⁹ See *Shafia*, *supra* note 54 at paras 1–10.

¹⁵⁰ Henderson, *supra* note 87 at 49. See e.g. *R v Peterkin*, 2015 ONCA 8 ("[a] dark backyard. A trespasser. A police search. A gun. Some ammunition. Drugs. Cellphones. Cash. Several charges. And convictions" at para 1).

the style of writing in the introductions and the legal reasoning in these cases were considered in Part III.

Most significant for this discussion is Henderson’s observation that “in Denning’s judgments, most of the time, style and substance “are fused in unity”; in Watt’s judgments, at least some of the time, style is “something added to substance as a mere protuberant adornment.”¹⁵¹ Henderson is quoting Benjamin Cardozo’s 1925 essay on “Law and Literature” in this passage. One need look no further than Justice Cardozo’s decision in *Palsgraf v. Long Island Railroad Co.*¹⁵² to find an example of judicial writing in which literary style and substance are “fused in unity.”¹⁵³

Palsgraf is a famous American case in which the dispute was whether one is liable in negligence for injuries that occurred following a series of unforeseeable events. In concluding that a defendant owes a duty of care only to those who, to a reasonable person, would foreseeably be within the range of danger created by the defendant, Cardozo wrote: “The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.”¹⁵⁴ Cardozo’s “eye of ordinary vigilance” and its “orbit” fully encapsulate the legal rule that he adopts. While his legal conclusion would have been more accessible if he had written it in plain language, Cardozo’s use of a literary device in *Palsgraf* to explicate the legal standard for proximity was genuinely relevant. It can be juxtaposed with the introductions in *Flores CA*, *Bradey*, *Shafia*, and *Salah*.

If these literary introductions do not advance the legal reasoning in these cases, what purpose do they serve? Justice Watt’s audience in the legal community would include his judicial colleagues, lawyers, legal commentators, justice reporters, bloggers, legal scholars as well as law students. As Higdon observes, legal writing is technical and not typically aimed at amusing or entertaining the reader.¹⁵⁵ Is the intended purpose of Justice Watt’s introductions to capture the attention of legal readers who may have become weary of reading case law? This seems plausible, given their evocative imagery and dramatic tone. In his examination of law as a unique form of narrative, Simon Stern argues that a key ingredient in the lure of literary narrative which is lacking in conventional legal judgments is “the drive, fueled by uncertainty and anticipation, that propels readers

¹⁵¹ Henderson, *supra* note 87 at 39.

¹⁵² 162 NE 99 (NY App Ct 1928), 248 NY 339 [*Palsgraf* cited to NE].

¹⁵³ Justice Benjamin N Cardozo, “Law and Literature” in *Law and Literature and Other Essays and Addresses* (New York: Harcourt, Brace & Co, 1931) 3 at 5.

¹⁵⁴ *Palsgraf*, *supra* note 160 at 100.

¹⁵⁵ See Higdon, *supra* note 5 at 81.

on toward the conclusion.”¹⁵⁶ Perhaps Justice Watt's introductions in these cases are meant to create a sense of uncertainty and anticipation in the legal reader, driving them to consume the remainder of the judgment.

Having identified the likely audience for *Flores CA*, *Bradey*, *Shafia* and *Salah* (the legal community) and a plausible explanation as to the purpose of beginning each of these judgments with this type of introduction (to capture the legal reader's interest), it seems reasonable to query whether the departure from conventional legal writing in these cases achieves this purpose.

Consider first the capacity of these introductions to captivate a legal audience. It is certainly true, as already noted, that Justice Watt's unorthodox writing has attracted attention within the legal community.¹⁵⁷ Moreover, his introductions are likely to capture the attention of the legal reader, given their combination of irreverence, stark imagery and attempts at humour. Less clear is whether this style of writing is likely to sustain the reader's interest. Recall that in each of these judgments the writing quickly reverts to a conventional legal style and that the literary devices employed in these introductions do not advance the legal reasoning in these decisions. Moreover, while this type of introduction is likely to evoke a particular reaction from the reader—a sense of uncertainty or anticipation that encourages them to read on—at least in the context of cases involving tragic circumstances like the ones present in *Flores CA*, *Bradey*, *Salah* and *Shafia*, legal readers may have an additional reaction to this type of judicial writing that is undesirable.

Take, for example, students of law—who spend the better part of three years reading almost exclusively case law.¹⁵⁸ Researchers have found an adverse relationship between the emotional and psychological health of law students and the dominant pedagogical approach used in law schools—a method which requires them to approach every issue and every case from a rational, analytical perspective that excludes emotion, moral consideration, and their overarching ethical commitments.¹⁵⁹ Some

¹⁵⁶ Simon Stern, “Narrative in the Legal Text: Judicial Opinions and Their Narratives” in Michael Hanne & Robert Weisberg, eds, *Narrative and Metaphor in Law* (Cambridge: Cambridge University Press, 2018) 121 at 122.

¹⁵⁷ See e.g. sources cited *supra* note 11.

¹⁵⁸ See William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass/Wiley, 2007) at 5–6 (finding that, across law schools, legal pedagogy is remarkably uniform in its reliance on the case law method).

¹⁵⁹ See e.g. *ibid* at 7; Orrin K Ames III, “Concerns About the Lack of Professionalism: Root Causes Rather than Symptoms Must Be Addressed,” (2005) 28:3 Am J Trial Advoc 531; Gerald F Hess, “Heads and Hearts: The Teaching and Learning Environment in Law School,” (2002) 52:1-2 J Leg Educ 75 at 75–76; Jean Stefancic & Richard Delgado, *How*

researchers have suggested that repeatedly requiring students of law to disconnect from these aspects of themselves promotes cynicism, moral ambiguity, and feelings of alienation and unhappiness, as well as confusion and disillusionment with the law.¹⁶⁰ At least historically, law schools have been much better at teaching students to set aside their moral concerns and desire for justice in an effort to maintain analytical clarity, than at helping them to understand how and when their compassion for others should inform their work as lawyers.¹⁶¹

Judicial writing that describes horrific acts of violence in a manner that suggests complete detachment from the people impacted by this violence, and the effect that this writing will have on those people, seems likely to aggravate the unintended but problematic consequences of conventional legal pedagogy. Judicial descriptions of violence that use puns, parodies of Lord Denning, or jokes, and that as a result make light of stabbing a woman repeatedly or burning two children to death, may contribute to law students' sense of disillusionment with, and cynicism toward the law and legal system. This concern would outweigh any interest in easing the tedium that sometimes comes with the study of law.

Nor is it desirable to affirm or promote in the legal profession more broadly a sense of detachment from the human suffering that lawyers and judges are frequently required to address. Judicial writing that obscures the humanity underpinning many of the problems law is expected to resolve benefits neither the legal profession nor the public.

B. The Motivation for Authoring Literary Judgments Should Not Be Self-Interest

Some commentators have asserted that judges may author literary judgments to alleviate boredom.¹⁶² A similar argument is advanced by Adalberto Jordan, who suggests that creative judicial writing “is a way for judges, especially appellate judges, to achieve self-fulfillment and derive needed satisfaction from their jobs.”¹⁶³

Lawyers Lose Their Way: A Profession Fails Its Creative Minds (Durham: Duke University Press, 2005) at 33–46.

¹⁶⁰ Stefancic & Delgado, *supra* note 168 at 46.

¹⁶¹ See Sullivan, *supra* note 167 at 7.

¹⁶² Oakley & Opeskin, *supra* note 120 at 97; Richard Wallach, “Let’s Have a Little Humor”, *New York Law Journal* (30 March 1984): “over my fourteen years of judicial opinionating [humour] has relieved the tedium of the writer”.

¹⁶³ See Jordan, *supra* note 86 at 701.

Judges hold positions of power and social respect. They enjoy constitutionally protected independence and security of tenure.¹⁶⁴ They are among the most highly paid public servants.¹⁶⁵ Most retire with generous pensions.¹⁶⁶ Alleviation of boredom should not influence how a judge writes a decision. Allowing occupational tedium or lack of individual self-fulfillment to inform their style of judicial writing is to allow self-interest to affect their decisions. It is universally accepted that judges are not entitled to allow self-interest to inform the execution of their judicial duties. Certainly they are not entitled to allow self-interest to adversely impact performance of their judicial role.

Judges who have become bored with writing legal opinions or dissatisfied with the stylistic constraints that judicial authorship imposes upon them should find other outlets for their creative leanings: judges can write poetry or crime fiction in their spare time,¹⁶⁷ or pursue legal scholarship - which better lends itself to different styles of legal writing. Smith suggests writing a fictitious decision if *judicial* humour is a must.¹⁶⁸

The alleviation of boredom is not a compelling justification for departing from conventional legal writing. Simply put, in the context of criminal law jurisprudence the mitigation of one's work-related tedium will never serve as an appropriate justification for using the facts of someone else's tragedy for purposes of self-entertainment.

Conclusion: Writing with Humility

In articulating what he "has always loved about the law" Justice Paciocco writes:

when a court is convened it represents a coming together of a society. The trial is a morality play in which the judge speaks publicly for the community in a ceremony designed to redress an alleged transgression or wrong and to reinforce those values raised by the law. The enterprise could hardly be more important. The audience to be

¹⁶⁴ See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 99, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

¹⁶⁵ See Office of the Commissioner for Federal Judicial Affairs Canada, *supra* note 2. For example, as of April 1, 2018, the annual salary for justices of the Court of Appeal for Ontario was \$321,600.

¹⁶⁶ *Ibid.* For example, upon retirement justices of the Court of Appeal for Ontario who served for between 10 and 15 years depending on their age, will receive a pension equivalent to two thirds of their salary. For a member of that court retiring in 2018 that would mean an annual indexed pension starting at over \$210,000.

¹⁶⁷ See e.g. Beverley McLachlin, *Full Disclosure* (Toronto: Simon & Schuster, 2018) which is a crime novel by the former chief justice of Canada, published after she retired.

¹⁶⁸ See Smith, *supra* note 79 at 20.

addressed, if the law is to work to its potential, is multi-faceted, and each segment of that audience must be spoken to by the judge.¹⁶⁹

Writing that speaks to each of these three important constituencies for judicial decisions must be empathetic, accessible, and capable of protecting and promoting the public's perception of the judiciary and the legal system (particularly in problematic contexts like gender-based violence). It should advance legal knowledge and understanding within the legal profession. It should deploy literary devices and humour only where doing so is relevant, advances the legal reasoning in the decision, and serves a purpose that is consistent with these other criteria (empathy, sensitivity, consistency, promotion of public confidence in the judiciary, and accessibility). This is a demanding standard. What should guide judges in writing decisions that reflect a style, structure, diction, and tone that can speak simultaneously to these very different facets of their audience? One guiding factor may be humility.

As Justice Alice Woolley argues, “[j]udges need to strive for humility—to recognize it as a virtue. Judges may be independent, but their independence exists to deliver justice to the public, not to give judges a public forum to say what they want, when they want, to whom they want. It requires, in short, humility.”¹⁷⁰

In her exploration of humility as a judicial virtue Amalia Amaya argues that, “a critical component of humility, as many have argued, is the exhibition of an attitude of proper care and respect for the well-being of others and a sensibility to avoid boastful behavior that might cause pain and despair.”¹⁷¹ Amaya notes that intellectual humility disposes judges to listen carefully to the views of others, and helps judges to learn from others. Amaya focuses on the social-relational aspects of humility: “humility involves a profound appreciation of the equality of all human beings, in spite of any other kind of differences that there might be, and is distinctively valuable in that it fosters egalitarian social-relations.”¹⁷² Humility promotes empathy and an attitude of respect toward others regardless of differences in social position.

¹⁶⁹ See *Paciocco Questionnaire*, *supra* note 8 at Part 11(4).

¹⁷⁰ Alice Woolley, “The Problem of Judicial Arrogance” (20 October 2016), online: *Slaw* (20 October 2016) <slaw.ca> [perma.cc/E4SC-KZ6D].

¹⁷¹ Amalia Amaya, “The Virtue of Judicial Humility” (2018) 9:1 *Jurisprudence* 97 at 103. Amaya argues that judicial humility “disposes those who have humility to exhibit an attitude of respect towards others, acknowledging that—regardless of differences in knowledge, ability, and expertise—one might be able to learn even from those who are not one’s epistemic peers” (*ibid* at 100).

¹⁷² *Ibid* at 102.

Judges are among the most privileged members of our society.¹⁷³ They are privileged not only in terms of their education, salary, and social power but often as well in terms of their race, gender, and socioeconomic background.¹⁷⁴ They do not come from all walks of life. Typically, they are not representative of the people of whom they most frequently sit in judgment, particularly in the criminal law context.¹⁷⁵ Judges enjoy tenure and enormous independence relative to other public servants.¹⁷⁶ Transparency regarding their appointment, education as judges, their treatment of, and engagement with, staff and law clerks, and their intra-court administrative processes more generally, is almost non-existent.¹⁷⁷ Their circumstances and cloistered working conditions may produce incomplete perspectives on social dynamics, the diversity of living conditions in Canada, and systematic inequalities—all of which are critically important factors in the criminal justice context generally and in the adjudication of cases involving gender-based violence in particular.

In view of their insulated working conditions, the limited feedback they receive, and the narrow demographic from which they have historically been drawn judges are at risk of failing to fully account for the social conditions of those involved in or connected to the cases of horror and tragedy they are required to judge. Humility helps to bridge the gap be-

¹⁷³ See e.g. *supra* notes 173, 164, 165 and accompanying text.

¹⁷⁴ Andrew Griffith, “Diversity among federal and provincial judges” (4 May 2016), online: *Policy Options* <policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/> [perma.cc/T5G9-2678] (demonstrating that women, Indigenous peoples, and visible minorities are under-represented in both federally appointed and provincially appointed courts relative to their proportions of the population. Visible minorities and Indigenous people in particular are grossly under-represented).

¹⁷⁵ For example, Indigenous people are over represented in the criminal justice system as both victims and accused (Department of Justice Canada, *Indigenous Overrepresentation in the Criminal Justice System*, Catalogue No J23-A/2-2017E-PDF (Ottawa: DJC, January 2017)) yet less than 1% of federally appointed superior court judges are Indigenous and in provincial courts in every province Indigenous people are under represented on the bench relative to their proportion of the population. See Griffith, *supra* note 183.

¹⁷⁶ See *Constitution Act, 1867*, *supra* note 173, s 99.

¹⁷⁷ See Adam Dodek & Richard Devlin, “Fighting Words’: Regulating Judges in Canada” in Richard Devlin & Adam Dodek, eds, *Regulating Judges: Beyond Independence and Accountability* (Cheltenham: Edward Elgar Publishing, 2016) 76 at 88 (discussing lack of transparency (and accountability) in judicial education in Canada); Lorne Sossin, “Judicial Appointment, Democratic Aspirations and the Culture of Accountability” (2008) 58 UNBLJ 11 at 12 (describing the historical lack of transparency in judicial appointments in Canada); Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy-Making and the Supreme Court of Canada” (1996) 30:2 UBC L Rev 279 at 283 (discussing the lack of transparency regarding the role of law clerks at the Supreme Court of Canada).

tween judges and the lives over whom they preside (including the lives of both those accused of criminal offences and those who are the victims of violent offences). In other words, humility mitigates the disconnect that may occur between judges and the individuals whose lives and loved ones are affected by their judgments.

Judicial writing that is guided by humility is more likely to be empathetic and accessible to as broad an audience as possible. Writing guided by humility is less likely to diminish public confidence in the judiciary by, for example, using the factual circumstances surrounding a case of gender-based violence to make a joke or develop a pun. Judicial writing guided by humility is less likely to sacrifice relevance, respect, and clarity in pursuit of style.

Writing judgments that radically impact the lives of others is an arduous and unenviable task. It is a responsibility that few are given, but the performance of which affects many. Certainly it is much less onerous to produce legal scholarship than legal judgments. Nevertheless, given the impact that these decisions can have, judges should be expected to speak to a broad and disparate readership in a manner that reflects the public and private needs of the role they fulfill.
