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Historian Barbara W. Tuchman on the “Art of Writing” (Part I)

By Douglas E. Abrams

In October of 1962, the world stood on the brink of war as the United States demanded dismantling of offensive medium-range nuclear missile sites that the Soviet Union was constructing in Cuba, potentially within striking range of American cities. From behind-the-scenes accounts, we know that a new book by historian Barbara W. Tuchman, a private citizen who held no government position, contributed directly to the negotiated outcome of the Cuban Missile Crisis as the world watched and waited. After chronicling Tuchman’s contribution, this two-part article discusses her later public commentary about what she called the “art of writing.”¹

THE MISSILES OF OCTOBER

In the last week of January 1962, Barbara W. Tuchman was a little known historian whose three books had not won much popular attention.² Then she published *The Guns of August*, a military history of the antecedents and first month of World War I. The book presented a penetrating, carefully researched, and eminently readable account of the chain reactions that led European powers to stumble into the four-year conflict in the summer of 1914, after an obscure 19-year-old Bosnian Serb assassinated the obscure Austrian Archduke Franz Ferdinand and his wife during a motorcade in Sarajevo.

Few European leaders wanted the

war, some thought it would last only a few weeks, but none could apply the brakes to the miscalculations, national resentments, and interlocking alliances that abruptly ended years of peace.³ When the guns finally fell silent more than four Augusts later, 30 nations had suffered a total of 20 million military and civilian deaths, plus 21 million more wounded.⁴

The *Guns of August* sold more than 260,000 copies in its first eight months, remained on the *New York Times* best seller list for nearly a year, and won Tuchman the first of her two Pulitzer Prizes. The war’s origins continue to intrigue historians,⁵ but the Modern Library ranks *The Guns of August* as number 16 on its list of the 100 best non-fiction books of all time.⁶

One of the book’s earliest and most avid readers was President John F. Kennedy, who requested his aides to read it, had copies distributed to U.S. military bases throughout the world,⁷ and reportedly gave copies as gifts to visiting dignitaries who visited the White House.⁸ In a world overheated by Cold War tensions, the President was particularly struck by Tuchman’s account of a late 1914 conversation between the former German chancellor and his successor about the blunders that sparked the outbreak of war.

“How did it all happen?” asked the first. “Ah, if only one knew,” answered the other, without even trying to make sense of things.⁹

During the tense faceoff with the Soviet Union, President Kennedy

explained the price of miscalculation to aides who had not yet read *The Guns of August*. “If this planet is ever ravaged by nuclear war – and if the survivors of that devastation can then endure the fire, poison, chaos and catastrophe – I do not want one of those survivors to ask another, ‘How did it all happen?’ and to receive the incredible reply: ‘Ah, if only one knew.’”¹⁰

Nearly all of Kennedy’s advisors urged him to bomb the Cuban missile sites photographed by American reconnaissance flights. The Joint Chiefs of Staff urged a full-scale invasion of the island, but the President resisted escalation that might have slid the United States and the Soviet Union into World War III.

The Guns of August directly influenced Kennedy’s thinking. “I am not going to follow a course which will allow anyone to write a comparable book about this time, *The Missiles of October*,” he told his brother, Attorney General Robert F. Kennedy. “If anyone is around to write after this, they are going to understand that we made every effort to find peace and every effort to give our adversary room to move.”¹¹ To help preserve this understanding for later generations, Kennedy installed a taping system in the White House, including the Oval Office.

A “WHAT IF” OF HISTORY

When *The Guns of August* appeared late in January of 1962, President Kennedy was a busy man beginning

the second year of the “New Frontier,” with little time outside the Oval Office for extracurricular reading. Tuchman’s book was more than 450 pages long, and any White House aide dispatched to the Library of Congress could easily have returned with other books to satisfy the President’s appetite for written history.¹²

What if President Kennedy found *The Guns of August* opaque, stodgy or inartful and put it aside after a few pages, without drawing lessons that helped stiffen his resolve to avoid the sort of impetuous missteps that led Europe to “sleepwalk” into total war nearly fifty years earlier?¹³

Instead Tuchman delivered prose that observers have called “erudite and highly readable,”¹⁴ “elegant,”¹⁵ “illuminating,”¹⁶ lucid and graceful,¹⁷ and “transparently clear, intelligent, controlled, and witty.”¹⁸ At a time when historiography held immediate real-world consequences, her best-seller sent a powerful message with powerful writing that kept legions of readers (including the President of the United States) turning the pages. It is hard for any writer, including a lawyer, to deliver the first without the second.

“THE ART OF WRITING”

Barbara W. Tuchman said that “the art of writing interests me as much as the art of history.”¹⁹ In 1981, she wrote *Practicing History*, a slim volume of essays drawn from her earlier articles and speeches. The book opened with observations about what she called “that magnificent instrument that lies at the command of all of us – the English language.”²⁰

Historians’ writing can yield helpful, though not necessarily perfect, analogies for lawyers’ writing. Imperfect analogies remain readily adaptable by lawyers because there are only

two types of writing – good writing and bad writing. Good historical writing is good writing about history, and good legal writing is good writing about law.²¹

Poet (and Massachusetts Bar member) Archibald MacLeish made the point more than a half century ago. “[L]awyers would be better off,” he said, “if they . . . realized that the art of writing for legal purposes is in no way distinguishable from the art of writing for any other purpose.”²²

Tuchman’s observations about a writer’s personal and professional commitment to good writing appear in italics below. The next issue of *Precedent* will discuss her observations about research and expression. That discussion will conclude with lessons that writers, including lawyers, can draw from the ongoing controversy among professional historians about the relative merits of popular and academic writing.

PERSONAL AND PROFESSIONAL COMMITMENT

*“[B]eing in love with your subject . . . is indispensable for writing good history – or good anything, for that matter.”*²³

For lawyers in everyday practice, “love” may often be an inapt word. “Commitment” may better describe the impulse that should sustain legal writers, even ones not moved by “love” of subject in the general sense of the word. In private practice and the public sector alike, lawyers sometimes write for clients or superiors whom we find difficult or may not know very well, and sometimes argue forcefully for policies or positions that would draw our ambivalence, distaste, or even outright rejection if we were writing for ourselves and not as representatives.

As an advocate, the lawyer “zealously asserts the client’s position under the rules of the adversary system.”²⁴ Zealous representation advanced by the Model Rules of Professional Conduct does not always afford lawyers the personal autonomy to choose among topics that pique our interest, and then to pursue research wherever it leads.

At the core, however, commitment does matter to lawyers. When fueled by commitment to client or cause, the lawyer’s research and writing can show life and vitality. But when research and writing remain unstimulated by that commitment, the final product inevitably sags. Perceptive readers can distinguish between legal writing that (in the words of former U.S. District Judge Charles E. Wyzanski, Jr.) “shines with the sparkling facets of a diamond,”²⁵ and legal writing that appears dry and listless.

In 1980, Tuchman wrote a newspaper article decrying what she perceived as the “decline of quality” in American life.²⁶ She characterized “quality” as the fruit of “investment of the best skill and effort possible to produce the finest and most admirable result possible.”²⁷ Quality legal writing depends on lawyers who, in the exercise of professional responsibility, marshal personal and professional commitment to client or cause before putting words on paper.

“[C]oupled with compulsion to write must go desire to be read. No writing comes alive unless the writer sees across his desk a reader, and searches constantly for the word or phrase which will carry the image he wants the reader to see and arouse the emotion he wants him to feel. . . . [T]he reader is the essential other half of the writer. Between them is an indis-

soluble connection. . .”²⁸

Lawyers summon personal and professional commitment most effectively when we recognize that just because we write something does not necessarily guarantee that anyone will read it, wholly or even in large part. This frank recognition, drawn from humility and not entitlement, led Catherine Drinker Bowen to keep a simple sign posted above her desk as she wrote her well-crafted biographies: “Will the reader turn the page?”²⁹

That is a good question for lawyers, too. “The writer’s object is – or should be – to hold the reader’s attention. I want the reader to turn the page and keep on turning to the end,” Tuchman said.³⁰ Achievement of this desire does not normally follow from taking readers for granted.

Before a lawyer ever puts words on paper, the effort to spark a dialog with prospective readers begins with a threshold question: “Who is likely to read this?” The answer is usually well within the lawyer’s grasp because most legal writing targets a discrete audience readily identifiable in advance. Before ever hitting the keyboard, the lawyer may even know the prospective readers personally or by name or reputation.

Lawyers know, for example, that briefs, motion papers and contracts target the parties and the court, but hardly anyone else. An opinion letter is usually for the client’s eyes only. A judicial opinion speaks first to the parties, and then to future courts and litigants, academic researchers, and (this invites spirited debate) perhaps lay readers when the decision touches on matters of social concern.³¹ A magazine article, newspaper column or other “popular piece” anticipates a wider audience, but one whose membership the lawyer can usually anticipate.

Once the legal writer identifies the intended audience, the writer can tailor style, tone and content in ways that help engage readers. This rhetorical empathy is particularly important to quality writing in today’s frenetic legal practice. Federal and state judicial dockets have increased faster than population growth for most of the past generation or so, leaving judges with limited patience for submissions that remain bloated, sloppy, or off the point.³² Judges may sense when they have read enough of a brief, just as counsel researching precedents may grow bored with an overwritten judicial opinion. Counsel may have no choice but to plod through an opponent’s unwieldy brief or motion papers, or through unnecessarily verbose legislation or administrative regulations, but even here the writer risks obscuring important points amid the fog.

When lawyers write popular pieces for lay audiences outside the legal arena, holding a reader’s attention can also pose challenges today because reading is a buyer’s market. Readers have more competitors for their attention than ever before, thanks to technology that generates an unprecedented volume of easily accessible written material on almost every conceivable subject, and just a mouse click away.

“I never feel my writing is born or has an independent existence,” said Tuchman, “until it is read.”³³ In the legal arena and elsewhere, the sinews of her “indissoluble connection” with readers depend on writers who recognize, as stage and screen actress Shirley Booth said soon after winning an Academy Award in 1952, that “the audience is 50 percent of the performance.”³⁴

Next issue: Barbara W. Tuchman on research and expression.

ENDNOTES

1 BARBARA W. TUCHMAN, *PRACTICING HISTORY: SELECTED ESSAYS* 38 (1981).

2 BARBARA W. TUCHMAN, *THE LOST BRITISH POLICY: BRITAIN AND SPAIN SINCE 1700* (1938); BARBARA W. TUCHMAN, *BIBLE AND SWORD: ENGLAND AND PALESTINE FROM THE BRONZE AGE TO BALFOUR* (1956); BARBARA W. TUCHMAN, *THE ZIMMERMANN TELEGRAM* (1958).

3 MARGARET MACMILLAN, *THE WAR THAT ENDED PEACE: THE ROAD TO 1914* (2013).

4 CHRISTOPHER CLARK, *THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914*, Introduction (2013).

5 *E.g.*, *id.*; PAUL HAM, *1914: THE YEAR THE WORLD ENDED* (2013); SEAN McMEEKIN, *1914: COUNTDOWN TO WAR* (2013); MacMillan, *supra* note 3.

6 Modern Library, *100 Best Nonfiction*, available at <http://www.modernlibrary.com/top-100/100-best-nonfiction/>.

7 Jordan Michael Smith, *What JFK Didn't Know*, BOSTON GLOBE, Oct. 21, 2012.

8 Richard Pearson, *Pulitzer-Winning Historian Barbara Tuchman Dies at 77*, WASH. POST, Feb. 7, 1989, at B6 (obituary).

9 ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917-1963*, at 505 (2003).

10 *Id.*; *see also, e.g.*, THEODORE C. SORENSEN, *KENNEDY* 513 (1965); Richard Aldous, *How Did It All Happen?*, N.Y. TIMES, Oct. 25, 2013 (reviewing MacMillan, *supra* note 3).

11 ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* 127 (1969); *see also, e.g.*, ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* 692-93 (1965); Meredith Hindley, *The Dramatist: Barbara Tuchman Saw History as a Grand Tragedy*, 33 HUMANITIES (Sept./Oct. 2012).

12 JFK Presidential Library & Museum, *John F. Kennedy Fast Facts: President's Favorite Books*, <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Fast-Facts/Favorite-Books.aspx>.

13 Clark, *supra* note 4.

14 Hank H. Cox, *Blood Royal: True Tale of Crime and Detection in Medieval Paris*, WASH. POST, May 18, 2014, at B7 (book review)

15 Charlotte Gray, *IFOA Author of the Day*, TORONTO STAR, Oct. 29, 2010, at E12 (quoting Gray).

16 *The Tuchman Touch*, L.A. TIMES, Feb. 8, 1989, at 6.

17 Malcolm Jones & Lucas Wittmann, *Read All About It*, NEWSWEEK, Apr. 2, 2012.

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18 Robert K. Massie, *Foreword*, in BARBARA W. TUCHMAN, *PRACTICING HISTORY: SELECTED ESSAYS* viii (1981).

19 Tuchman, *supra* note 1, at 38.

20 *Id.* at 17.

21 Jay Wishingrad & Douglas E. Abrams, *The Lawyer's Bookshelf*, N.Y.L.J., Dec. 12, 1980, at 2 (reviewing RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (1st ed. 1979)).

22 Archibald MacLeish, *Book Review*, 78 HARV. L. REV. 490, 490 (1964) (reviewing DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963)).

23 Tuchman, *supra* note 1, at 14.

24 ABA MODEL CODE OF PROFESSIONAL CONDUCT, Preamble [1] (2014).

25 Hon. Charles E. Wyzanski, Jr., *Judge Learned Hand's Contributions to Public Law*, 60 HARV. L. REV. 348, 348 (1947).

26 Barbara W. Tuchman, *The Decline of Quality*, N.Y. TIMES MAG., Nov. 2, 1980, at § 6, p. 38.

27 *Id.*

28 Tuchman, *supra* note 1, at 58, 81.

29 Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 39 n.87 (2009).

30 Hindley, *supra* note 11 (quoting Tuchman).

31 *Compare* Lee C. Bollinger, *IMAGES OF A FREE PRESS* 42 (1991) (the Supreme Court “can perform a deeply educative role in society, affecting behavior far beyond the strictly legal domain”); Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 58 (1948) (“The Supreme Court . . . is and must be one of our most effective teachers.”), *with* William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 227-28 (1980) (“[T]he Supreme Court does not ‘teach’ in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution

for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us.”).

32 *See, e.g.*, Judicial Conf. of the U.S., *Long Range Plan For the Federal Courts* 9-12 (1995); ABA Comm’n on the 21st Century Judiciary, *Justice in Jeopardy* 39 (2003) (state courts).

33 Tuchman, *supra* note 3, at 81.

34 Shirley Booth, *News Summaries*, Dec. 13, 1954 (winner for Best Actress in *Come Back, Little Sheba*).



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