

Terms of Art

Occasional Dispatches from the Intersection of Language & the Law

Of Style & Substance, Law & Lore

David Franklin

IN HIS BOOK *The Man Who Once Was Whizzer White*, Dennis Hutchinson recounts an exchange between Justice White and one of his law clerks that began auspiciously (for the clerk) but soon soured. White had just finished reading the clerk's first draft of a major opinion. "You write very well," White told him, and then added, "Justice Jackson had that problem too."

To many Supreme Court aficionados White's gibe might seem almost blasphemous. After all, only a philistine or a drudge could belittle the gifts of Robert Jackson, a self-taught writer (he had neither an undergraduate nor a law degree) who became one of the Court's most legendary stylists. But White, who had been exposed to his illustrious predecessor at close range during the 1946 Term when he served as a law clerk to Chief Justice Vinson, may have been on to something. As Hutchinson notes, the suggestion was that

Jackson sometimes let style get too far out ahead of substance.

Consider the following passage from Jackson's dissent in the 1953 immigration case of *Shaughnessy v. United States ex rel. Mezei*:

Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.

This is vintage Jackson, particularly the inverted-pair symmetry of the last sentence. ("We are not final because we are infallible," he memorably wrote of the high court in a 1953 concurrence, "but we are infallible only because we are final.")

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Yet on closer examination Jackson's rhetoric may have outflowed his reasoning. To begin with, no one in the case was contending that procedures "mattered not"; that was a straw-man argument used by Jackson to set up the flourishes that followed. Even putting this common tactic aside, would anyone really wish to endure severe laws evenhandedly applied? While no one would want to turn the Cheka loose with a copy of the United States Code, living under scrupulously applied Soviet law wouldn't be a picnic either. (Unless, perhaps, the law of the USSR were deemed to encompass its Edenic constitutional aspirations, such as guaranteed health care, recreation, and personal development for all.) In the end I suspect that only a lawyer would be tempted to exalt procedure over substance as Jackson does here.

Despite his occasional penchant for overstatement (forgivable in a dissent like the one just quoted), Jackson brought to his craft an elegance and urbanity that are rarely seen in the pages of U.S. REPORTS or F3D today. Indeed, the sad fact that most judges fall far short of literary greatness was recognized as long ago as 1925 by Benjamin Cardozo, in his essay entitled "Law and Literature." In that article Cardozo sketched a taxonomy of styles in judicial opinion writing:

As I search the archives of my memory, I seem to discern six types or methods which divide themselves from one another with measurable distinctness. There is the type magisterial or imperative; the type laconic or sententious; the type conversational or homely; the type refined or artificial, smelling of the lamp, verging at times on preciosity or euphuism; the type demonstrative or persuasive; and finally the type tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem.

(Cardozo, never the type to put an adjective before its noun, really outdoes himself here.) A few judges scored highly in Cardozo's estimation; examples include his paragons of the

magisterial style, Chief Justice Marshall and Lord Mansfield. He clearly idolized Holmes's writing as well, although he didn't quite know how to classify it, depositing Holmes's *œuvre* somewhere along the (wide) spectrum between the laconic and the conversational.

Much of Cardozo's disdain was reserved for judges of the shears-and-pastepot variety, but he optimistically forecasted that this type of judge was "slowly but steadily disappearing." If only. The increasing roles of law clerks and electronic research databases have combined to elevate cutting and pasting above literary ambition in most chambers, or so it would seem. William Domnarski, in his engaging book entitled *In the Opinion of the Court*, comes close to the mark when he observes that "[c]lerk-written opinions, to use Randall Jarrell's savage observation about bad poetry, are opinions written on a typewriter by a typewriter." Perhaps one should update the observation: many present-day opinions seem to have been written on a word processor by a word processor. If Cardozo were to scan the latest reports, he would see that the critical implements of today's opinion writers are not the shears and the pastepot but the "Cut" and "Paste" options on a pull-down computer menu.



Jackson's closest companion on the Court, personally and ideologically, was Felix Frankfurter. Their styles were comparable as well, although Frankfurter wrote in a somewhat fussier, more pedantic register that has come in for its share of parody. (Domnarski cites a Frankfurterian version of the Gettysburg Address, found in the papers of Jerome Frank: "Engaged now we are in a colossal bellis civilis ... for the purpose of determining qualitatively and quantitatively in perpetuity the tensile strength and viscosity of a government, including its interstices and lacunæ, with this ontogeny ...")

Apparently, though, we have Frankfurter to thank for the introduction into judicial parlance of a literary allusion that has since become an all-time favorite:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

Since its use by Frankfurter in a 1948 dissent, this passage from *Through the Looking-Glass* has made well over 100 appearances in federal judicial decisions, typically standing for the proposition that one of the litigants – or the benighted majority or dissent – has tried to stretch some word or phrase beyond its natural semantic capacity. Often the usage is rather clumsy, as in this 1978 attempt by Justice Rehnquist: “All of this leads us to conclude that Congress intended, within broad limits, that ‘emission standards’ be regulations of a certain type, and that it did not empower the Administrator, after the manner of Humpty Dumpty in *Through the Looking-Glass*, to make a regulation an ‘emission standard’ by his mere designation.” Judge Easterbrook, ever the advocate of autonomous bargaining, put a rare positive spin on the Carrollian allusion in a 1988 decision: “Under the prevailing will theory of contract, parties, like Humpty Dumpty, may use words as they please. If they wish the symbols ‘one Caterpillar 19G tractor’ to mean ‘500 railroad cars full of watermelons,’ that’s fine – provided parties share this weird meaning.”

But the most tangled invocation of the *Through the Looking-Glass* trope has got to be this discussion from a 1993 Texas district court opinion:

With apologies to Derrida and de Man, the Court recognizes that an analysis of the pertinent policy language reveals that the definition

of ‘insured’ as applied to the insured v. insured exclusion does not deconstruct itself into ambiguity. To read the language otherwise would be to adopt the textual methodology of the protodeconstructionist Humpty Dumpty, for whom words means what he wanted them to. However, the body of anti-Humpty Dumpty jurisprudence is now well established in the courts, both state and federal ...

Of course, not only was Humpty Dumpty a protodeconstructionist, he was such a good one that all of the king’s horses and all the king’s men couldn’t un-deconstruct him.

The Humpty Dumpty parable has even inspired its own law book, a truly peculiar volume entitled *Alice’s Adventures in Jurisprudentia*, by Peter F. Sloss. In it, Alice comes face to face with some of the absurdities of American legal doctrine embodied in characters like “Tweedledum, Q.C.,” and “Tweedledee, J.D.” In one chapter Alice gets a lecture on a particularly senseless bit of the law of evidence from Humpty Dumpty, Lord Chief Justice of Jurisprudentia. Chief Justice Dumpty concedes that the law makes little sense but sighs in frustration that “to pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.” If this eloquent passage sounds familiar, that’s because Sloss lifted it wholesale from a 1948 Supreme Court opinion – by Justice Robert Jackson.



From time to time, *Terms of Art* intends to bring you amusing language-related moments from the annals of Supreme Court oral argument. Today’s selection comes from the 1995 argument in *Adarand Constructors, Inc. v. Peña*, and features a New England-inflected Justice who will remain nameless. Some spellings have been slightly modified for effect.

QUESTION: Mr. Pendley, I'm still trying to get clear on the significance of what we have for the standing issue. Let me go back behind the summary judgment motion to the complaint. Did your complaint specify the presumption as being the flore in the statutory scheme, or the clause as being the flore?

MR. PENDLEY: The – excuse me, Your Honor, the floor as to the –

QUESTION: No, I – flore –

MR. PENDLEY: Oh, flaw.

QUESTION: The constitutional infirmity. I'm sorry.

MR. PENDLEY: Excuse me, Your Honor.

QUESTION: It's my regional accent.

MR. PENDLEY: It's my hearing.

And from an argument later the same day:

MR. REICH: Well, there is one – there is one flaw, and perhaps a second flaw, but one immediate flaw, Justice _____, in that –

QUESTION: May I compliment you on the way you pronounce “flaw”? I didn't do quite so well earlier this morning.

MR. REICH: We have that way in New Jersey, sir.

QUESTION: It rhymes with lore – law. *GB*