



WINDING (BACK) THE CRAZY CLOCK

THE ORIGINS OF A BENCHSLAP

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WRITING FOR THE First Circuit in 2015, Judge William J. Kayatta, Jr., delivered a deft benchslap:¹ “the government’s argument is like the thirteenth chime of a clock: you not only know it’s wrong, but it causes you to wonder about everything you heard before.”² Though the horological simile

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¹ “Benchslap” made its *Black’s Law Dictionary* debut in the 10th edition, defined as: “A judge’s sharp rebuke of counsel, a litigant, or perhaps another judge; esp., a scathing remark from a judge or magistrate to an attorney after an objection from opposing counsel has been sustained.” BLACK’S LAW DICTIONARY 185 (10th ed. 2014). David Lat, founder and managing editor of the *Above the Law* website, is credited with coining the term, *id.*, although the dictionary commits an etymological error. It twice indicates that the word dates from 2005. *Id.* Lat, however, used the term in hyphenated form (“Bench-Slapped!”) a year earlier. See *Bench-Slapped! Reinhardt v. O’Sannlain*, UNDERNEATH THEIR ROBES (June 24, 2004), underneaththeirrobes.blogs.com/main/2004/06/greetings_welco.html; see generally David Lat, *Tweet of the Day: Ask Your Co-Author, Justice Scalia; He’s an Expert on Benchslaps!*, ABOVE THE LAW (Nov. 29, 2012), abovethelaw.com/2012/11/tweet-of-the-day-ask-your-co-author-justice-scalia-hes-an-expert-on-benchslaps/?rf=1 (“I believe that I was the first person to use the term, back in a 2004 post on my first blog, Underneath Their Robes.”).

² *United States v. Marchena-Silvestre*, 802 F.3d 196, 203 (1st Cir. 2015).

was unsupported by a citation, it has a rich legal and literary history. Sometimes referring to a “thirteenth stroke” and sometimes a “thirteenth chime,” the phrase has been invoked by Justice Stephen Breyer (in both Supreme Court and First Circuit opinions³), then-Judge Michael B. Mukasey,⁴ Charles Fried (in both a judicial opinion and a law review article⁵), and many others. Only one reported American judicial opinion attributes the simile to any source other than a previous American judicial opinion; a 1998 California Court of Appeal decision observes: “as Lord Light, the fictional English judge created by A.P. Herbert put it in *Rex v. Haddock*, ‘it is like the thirteenth stroke of a crazy clock, which not only is itself dis-

³ *Janus Capital Grp. v. First Derivative Traders*, 564 U.S. 135, 157 (2011) (Breyer, J., dissenting) (“The possibility of guilty management and innocent board is the 13th stroke of the new rule’s clock.”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 857 (2007) (Breyer, J., dissenting) (“That necessary implication of the plurality’s position strikes the 13th chime of the clock.”); *Alabama v. Bozeman*, 533 U.S. 146, 155 (2001) (“But to call such a violation ‘technical,’ because it means fewer days spent away from the sending State, is to call virtually every conceivable antishuttling violation ‘technical’ — a circumstance which, like the 13th chime of the clock, shows that Alabama’s conception of the provision’s purpose is seriously flawed.”); *NLRB v. Sheraton Puerto Rico Corp.*, 651 F.2d 49, 54 (1st Cir. 1981) (“Indeed, the Board’s finding that, on this record, the supervisors must be reinstated to avoid injury to non-supervisory employees does not suggest to us that there is more of an anti-employee nature here than meets the eye, but, rather, like the thirteenth chime of the clock, casts doubt on that which went before.”).

⁴ *Sun Ref. & Mktg. Co. v. Statheros Shipping Corp.*, 761 F. Supp. 293, 304 (S.D.N.Y. 1991) (“I do not have to find that Proeller was actually biased against Sun, nor do I. However, the fee episode rings like the 13th chime on the mantel clock: Not only is it utterly unreasonable in its own right, but it also generates substantial doubts about the validity of what preceded it.”).

⁵ *Canter v. Comm’r of Pub. Welfare*, 668 N.E.2d 783, 786-87 (Mass. 1996) (“For, of course, there is no practical way in which the discounted value of the interest may be calculated. And this, like the thirteenth chime of the clock, casts doubt backward on the second step by which the department posited that the change in contingent beneficiary constituted a transfer of an interest, and finally on the entire argument.” (footnote omitted)); Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1747 (1998) (“Having read Finnis’s book as a whole, I agree with Posner’s judgment on the argument that he quotes, and I do not think that the context improves it. On the contrary, the sentence, like the thirteenth chime of the clock, casts the severest doubts on the system as a whole, doubts from which Finnis does not rescue the system.”).

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credited but casts a shade of doubt over all previous assertions.”⁶ In fact, Herbert – a legally trained writer who later became a Member of Parliament – himself borrowed the phrase without attribution. This article explores the thirteenth stroke’s origins and its path to benchslap status.

I. THE ORIGIN OF A SIMILE

A. A foggy history: the mysterious case of Rex v. Hatfield

Can a clock strike thirteen? An incident in the late-seventeenth century suggests that it might have happened. Here is what we know from the 1770 obituary of a John (or James⁷) Hatfield:

Mr. John Hatfield, who died last Monday at his House in Glass-house Yard, Aldersgate, aged 102, was a Soldier in the Reign of William and Mary and the Person who was tried and condemned by a Court Martial for falling asleep on his Duty upon the Terrace at Windsor. He absolutely denied the Charge against him, and solemnly declared that he heard St. Paul’s clock strike Thirteen, the truth of which was much doubted by the Court because of the great Distance; but whilst he was under Sentence of Death, Affidavit was made by several Persons, that the clock actually did strike Thirteen instead of Twelve, whereupon he received His Majesty’s Pardon. The above his friends caused to be engraved on his [coffin] Plate, to satisfy the World of the Truth of a Story which has been much doubted, tho’ he had often confirmed it to many Gentlemen, and a few Days before his Death told it to several of his Neighbours. He enjoyed his Sight and Memory to the day of his Death.⁸

⁶ *Shea v. Dep’t of Motor Vehicles*, 72 Cal. Rptr. 2d 896, 898 (Cal. Ct. App. 1998) (citing “Herbert, Uncommon Law (Eyre Methuen Ltd.1974), p. 28.”).

⁷ 1 THE MIRROR OF LITERATURE, AMUSEMENT, AND INSTRUCTION 99 n.* (1823) (asserting that Hatfield died at 105).

⁸ THE PUBLIC ADVERTISER, June 22, 1770, at 2. A poem published in 1774 describes Hatfield as “accus’d with sleeping on his post, / Heard Paul’s bell sounding, or his life had lost.” TIMOTHY SCRIBBLE, A TRIP TO WINDSOR, in THE WEEDS OF PARNASSUS, A COLLECTION OF ORIGINAL POEMS 5 & n.* (1774). Another account a century later reports that Hatfield was acquitted rather than convicted and pardoned. LAURA VALENTINE, PICTURESQUE ENGLAND: ITS LANDMARKS AND HISTORIC HAUNTS 19 (1891).



The short street, just outside the City of London, named for the area where John Hatfield died in 1770. Many decades earlier, he had defended himself against the charge of falling asleep while on guard duty at Windsor, proving his wakefulness by saying that he had heard a distant clock tower strike thirteen.

Very few British Army court-martial records of trial survive from the late-seventeenth century. The single box of records from that era available at the National Archives at Kew contains a number of cases that were tried on the Continent, including several in which death sentences were personally commuted by William III, but there is no record among them of a court-martial of a private soldier named Hatfield. Given the obituary, however, the Hatfield Incident cannot be dismissed as fictional. While the distance from London to Windsor is considerable,⁹ a great bell might indeed be heard given the proper atmospheric conditions and the absence of the levels of ambient noise to which a modern reader is accustomed.

⁹ The 1774 poem quoted in note 8 *supra* estimates the distance as 23 miles.

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We have been unable to determine whether the Hatfield Incident is the source for what has followed in both literature and law, but it seems to have been widely known even a century later. As a result, it cannot be disregarded even if the case is not proved. As Herbert himself once observed, “The law is not always a ass, but it is often a enigma.”¹⁰

B. The literary life of the thirteenth stroke: Hardy’s Far from the Madding Crowd

The thirteenth stroke’s first known appearance as a simile was in Thomas Hardy’s *Far from the Madding Crowd*. In Chapter XXIX, “Particulars of a Twilight Walk,” first published in *Cornhill Magazine*’s June 1874 issue,¹¹ Gabriel Oak attempts to dissuade Bathsheba Everdene from her romantic interest in the dashing Sergeant Frank Troy. When Bathsheba defends Troy by invoking his regular church attendance, Gabriel parries that he has never seen Troy in church. Bathsheba replies that “he goes in privately by the old tower door, just when the service commences, and sits at the back of the gallery. He told me so.”¹² The omniscient narrator explains, “This supreme instance of Troy’s goodness fell upon Gabriel’s ears like the thirteenth stroke of a crazy clock. It was not only received with utter incredulity as regarded itself, but threw a doubt on all the assurances that had preceded it.”¹³

The thirteenth stroke continued to resonate in literature, perhaps most famously in the first line of Orwell’s *Nineteen Eighty-Four*: “It was a bright cold day in April, and the clocks were striking thirteen.”¹⁴ Of greater interest for our purposes, however, is its persistence in legal writing (a genre few think of as literature). Here the fun begins.

C. A.P. Herbert’s use of the phrase in a legal parody

The thirteenth-stroke simile jumped from literature to the law via a parody first published in 1927. Sir Alan Patrick Herbert (he was knighted

¹⁰ A.P. HERBERT, WIGS AT WORK 10 (1966).

¹¹ *Far From the Madding Crowd*, CORNHILL MAGAZINE, June 1874, at 660, hdl.handle.net/2027/coo.31924066341664?urlappend=%3Bseq=694.

¹² THOMAS HARDY, *FAR FROM THE MADDING CROWD* 209 (First Vintage Classics ed. 2015).

¹³ *Id.* at 209-10.

¹⁴ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 1 (1949).

in 1945¹⁵) – better known as A.P. Herbert or by his “APH” byline – was a renowned wit who joined the *Punch* staff on February 6, 1924.¹⁶ He had an academic background in the law, earning first-class honors in jurisprudence at Oxford in 1914.¹⁷ Following service as a Royal Navy officer in World War I, Herbert was called to the bar at the Inner Temple in 1918, but chose a career in literature over the law.¹⁸ He would later serve in the House of Commons as a University Member for Oxford from 1935 until 1950.¹⁹

The year he joined the *Punch* staff, Herbert “published the first of his *Misleading Cases*,”²⁰ a series of satirical court decisions. Three years later, in the January 19, 1927 issue of *Punch*, he would invoke the thirteenth-stroke simile, although without referring to Hardy.

The fictitious case involved an appeal of a criminal conviction arising from a regatta spectator’s jump off a bridge into the Thames. The Court of Appeal’s decision by “Justice Frog” explained the facts leading to the conviction. The appellant – identified in the original version only as “Bill” – “jump[ed] off Hammersmith Bridge in the afternoon of August 18th, 1922, during the Hammersmith Regatta.”²¹ A friend of the appellant’s named “Snooker” testified that before the leap, he challenged the appellant by saying, “Bill, betcher a pound you won’t jump over,” to which the appellant, “who had had a beer or (as he frankly admitted) two,” replied: “‘Betcher I will, then,’ after which pronouncement he removed his coat, handed it to the man Snooker, climbed on to the rail and jumped into the water below, which, as was sworn by Professor Rugg of the Royal Geographical Society, forms part of the river Thames.”²²

¹⁵ Reginald Pound, *Sir Alan Patrick Herbert*, 26 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 651 (2004 ed.) [hereinafter *Herbert*, OXFORD DNB].

¹⁶ REGINALD POUND, A.P. HERBERT 80-81 (1976).

¹⁷ *Herbert*, OXFORD DNB, *supra* note 15, at 651.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ POUND, *supra* note 16, at 82.

²¹ A.P.H., *Misleading Cases. VIII. Is It a Free Country?*, PUNCH, OR THE LONDON CHARIVARI, Jan. 19, 1927, at 68 [hereinafter *Is it a Free Country?*, PUNCH]. Herbert lived at No. 12, Hammersmith Terrace in London, POUND, *supra* note 16, at 48 – less than a mile upstream from the Hammersmith Bridge.

²² *Is it a Free Country?*, PUNCH, *supra* note 21, at 68.

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The appellant, “a strong swimmer,” rose to the surface and “swam in a leisurely fashion towards the Middlesex bank.”²³ But before he reached the shore, “he was overtaken by a river-police-boat, the officers in which had observed his entrance into the water and considered it their duty to rescue the swimmer. They therefore took him, unwilling, it appears, into their boat, and landed him.”²⁴ He was arrested, taken before a magistrate, and ordered to pay a fine for the offenses of:

- (a) Causing an obstruction.
- (b) Being drunk and disorderly.
- (c) Attempting to commit suicide.
- (d) Conducting the business of a street-bookmaker.
- (e) (Under the Navigation Acts) endangering the lives of mariners.²⁵

After reciting the appellant’s plausible responses to each of the individual charges, the opinion observed that “appellant made the general answer that this was a free country and a man can do what he likes if he does nobody any harm.”²⁶ That general defense led to the opinion’s invocation of the thirteenth-stroke simile: “If I may use an expression which I have used many times before in this Court, it is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions.”²⁷ The opinion countered, “It cannot be too clearly understood that this is *not* a free country, and it will be an evil day for the legal profession when it is.”²⁸ Justice Frog concluded that the appeal should be denied: “It is not for me to say what offence the appellant has committed, but I am satisfied that he has committed *some* offence, for which he has been most properly punished.”²⁹ Mudd, J., concurred on the ground that

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 69.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* Judge A. Wallace Tashima quoted that sentence in *United States v. Hayat*, 710 F.3d 875, 904 n.1 (9th Cir. 2013) (Tashima, J., dissenting).

“the appellant has done his trousers no good and the offence was damage to property” while Adder, J., concurred without additional explanation.³⁰

*D. The apocryphal origin story:
Herbert’s biographer’s account*

There can be little doubt that Herbert, a bibliophile, borrowed the thirteenth-stroke simile from Hardy’s *Far from the Madding Crowd*. Herbert had even visited the famous author at his home, Max Gate in Dorchester, four years before *Punch* published “Is it a Free Country?”³¹ Yet Herbert’s biographer, Reginald Pound, offers an origin story that does not involve Hardy. Pound wrote that a saying of Herbert’s father, “Irish in origin, survived to serve APH’s dialectical purposes when scepticism was aroused: ‘Like the thirteenth stroke of a crazy clock, a shadow of doubt is cast over all previous assertions.’”³² Unfortunately, the assertion is unannotated.

Herbert identified his father as “Patrick Coghlan Herbert Herbert (yes, two Herberts),” who was originally from County Kerry, attended Trinity College, Dublin, and then moved to England where he “spent his life as a Civil Servant in the old India Office.”³³

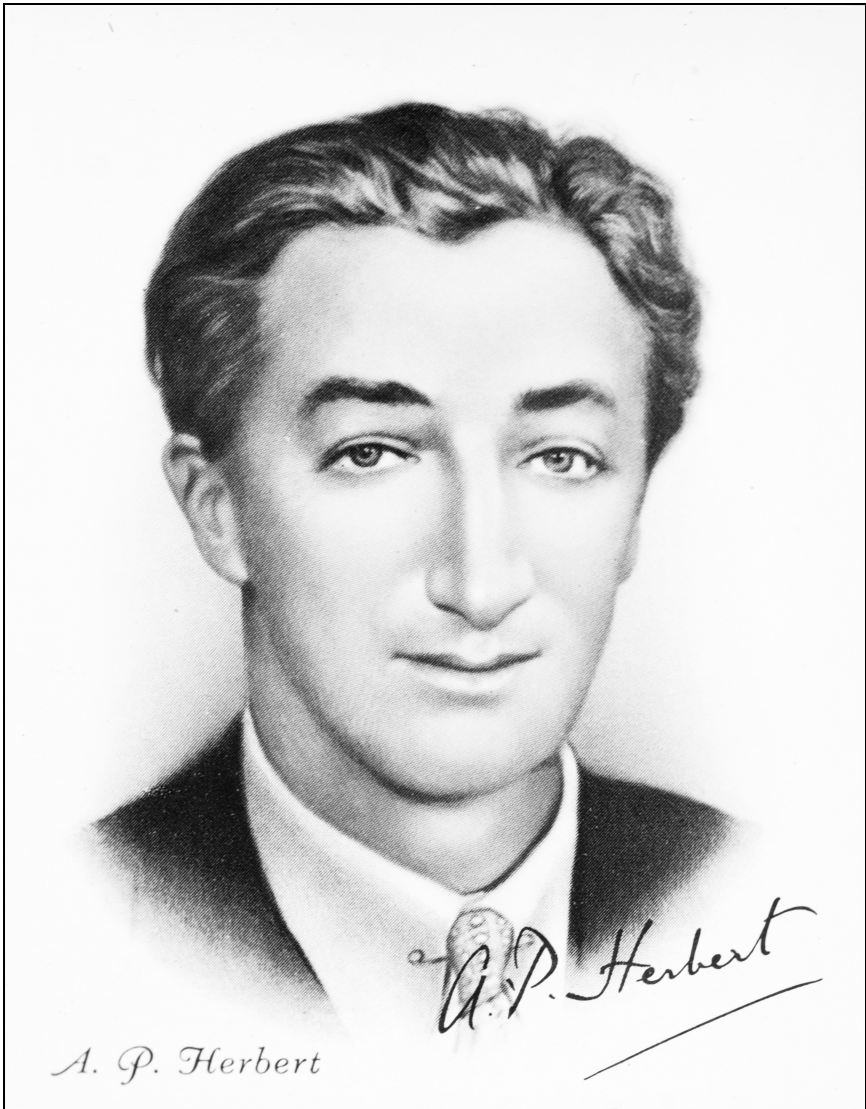
³⁰ *Is it a Free Country?*, PUNCH, *supra* note 21, at 69. Herbert returned to the subject of unreliable clocks a few years later in *Board of Inland Revenue v. Haddock*, which appeared in *Punch* on August 19, 1931. In it the Master of the Rolls, referring to the Court of Appeal and the House of Lords, comments: “The people may be taught to believe in one Court of Appeal; but where there are two they cannot be blamed if they believe in neither. When a man keeps two clocks which tell the time differently, his fellows will receive with suspicion his weightiest pronouncements upon the hour of the day, even if one of them happens to be right.” A.P. Herbert, *Misleading cases, Why Two Courts of Appeal? Board of Inland Revenue v. Haddock*, PUNCH, OR THE LONDON CHARIVARI, Aug. 19, 1931, at 185, 187, reprinted in A.P. Herbert, *Why is the House of Lords?* (Board of Inland Revenue v. Haddock), in WIGS AT WORK, *supra* note 10, at 91, 94 (indicating, at 95, incorrect date of Aug. 9, 1933). The corresponding index entry in WIGS AT WORK reads: “Clocks, imperishable dictum on, by Master of the Rolls, 94.” *Id.* at 217.

³¹ POUND, *supra* note 16, at 77-78; SIR ALAN HERBERT, C.H., A.P.H.: HIS LIFE AND TIMES 278 (1970) [hereinafter A.P.H.].

³² POUND, *supra* note 16, at 46.

³³ A.P.H., *supra* note 31, at 4.

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Sir Alan Patrick Herbert, the legal wit who wrote the first judicial opinion (in his case, a fake) comparing a litigant's argument to the credibility-destroying thirteenth stroke of a clock. This portrait was one of forty featured in the "Famous British Authors" series of Wills's Cigarette cards issued in 1937. The back of the card said: "Although called to the Bar in 1918, he has never practiced, but has made telling use of his legal knowledge in his series of Misleading Cases."

It seems unlikely that 16 years before A.P. Herbert's birth, Hardy – who lived in Dorset before moving to London at 21³⁴ – would have published a favorite Irish saying of Herbert's father's. While Herbert's phrasing of the simile is not precisely the same as Hardy's, the likeness is unmistakable, and certainly sufficient to mark it as Hardy's progeny.

II. THE THIRTEENTH STROKE'S LIFE IN THE LAW

The opinion featuring the thirteenth stroke simile evolved as it was republished. In a collection of Herbert's *Misleading Cases* published eight months after the opinion's original appearance in *Punch*, the appellant obtained a last name, as the case was restyled "Rex v. Haddock" – a recurring caption in the *Misleading Cases*.³⁵ The simile itself was unaltered.³⁶

The opinion changed still more in Herbert's 1935 *Uncommon Law*, which collected and revised 66 of the *Misleading Cases*.³⁷ The author judge changed from "Mr. Justice Frog" (as it had been in the original and "Lord Justice Fog" in the 1927 reprint) to "Lord Light, L.C.J."³⁸ The ground for Justice Mudd's concurrence changed from damage to the appellant's trousers in both the original version and the 1927 reprint to his having "polluted a water-course under the Public Health Act, 1875."³⁹ Justice Adder also added a basis for his concurrence that was not present in either of the previous two versions: "He thought that the appellant had attempted to pull down a bridge, under the Malicious Damage Act, 1861."⁴⁰ The thirteenth-stroke simile remained unchanged.

The simile obviously appeals to judges and lawyers, both for its logic and its somewhat precious liveliness, and it is hardly surprising that it has regularly figured in the jurisprudence of the UK⁴¹ and various far-flung

³⁴ Michael Millgate, *Thomas Hardy*, 25 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 227, 229 (2004 ed.).

³⁵ A.P. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 31 (4th ed. 1928) (1st ed. Sept. 29, 1927); *id.* at iv.

³⁶ *Id.* at 36.

³⁷ A.P. HERBERT, *UNCOMMON LAW* (Barnes & Noble ed. 1993).

³⁸ *Id.* at 24.

³⁹ *Id.* at 28.

⁴⁰ *Id.* at 29.

⁴¹ *E.g.*, *Novoship (UK) Ltd. v. Mikhaylyuk* [2014] EWCA Civ 908, 2014 WL 2957901, at

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common-law jurisdictions.⁴² Perhaps more surprising is the degree to which

*10 (¶ 29); *NR (Sri Lanka) v. Sec'y of State for the Home Dep't* [2008] EWCA Civ 1053 (¶ 4); *ST (Libya) v. Sec'y of State for the Home Dep't* [2007] EWCA Civ 24 (¶ 8); *Moeneddini v. Sec'y of State for the Home Dep't* [2005] EWCA Civ 1670, 2005 WL 3635216 (¶ 7); *Biggin Hill Airport Ltd. v. London Borough of Bromley* [2001] EWCA Civ 1089, 2001 WL 753350 (¶ 133) (finding *casus omissus* rather than 13th chime); *Ladjadj v. Bank of Scotland* [2000] EWCA Civ 21, 2000 WL 345173; *Clark v. Clark Const. Initiatives Ltd.* [2008] EWCA Civ 1446, 2008 WL 5130395 (¶ 3) (“tribunal’s reasoning . . . is vitiated by the citation of untraceable authorities which, like the thirteenth chime of the clock, cast doubt not only on themselves but on all that has gone before them”); *Citigate Dewe Rogerson Ltd. v. Artaban Public Affairs Sprl* [2009] EWHC 1689 (Ch.) (¶ 40) (Hodge, J.); *Murray Vernon Holdings Ltd. v. Hassall* [2009] EWHC 7 (Ch. 2010) (¶ 11) (Hodge, J.); *District Court of Slupsk v. Piotrowski* [2007] EWHC 933 (Admin) (Q.B.) (¶ 37); *R. v. Sec'y of State for Transport* [1993] EWHC Admin 1, [1994] Env. L.R. 134, 146 (Q.B. 1993); *Fattal v. Walbrook Trustees* [2010] EWHC 2767, 2010 WL 4365891 (Ch.) (¶ 157); *Preferred Mortgages Ltd. v. Countrywide Surveyors Ltd.* [2005] EWHC 2820, 2005 WL 1842664 (Ch.) (¶ 36) (substantial departure from basic valuation “rather like the thirteenth stroke of the clock, casts doubt on the substantive validity of [real estate appraiser’s] whole evaluation”); *Inland Rev. Comm’rs v. Mobil North Sea Ltd.* [1986] 1 W.L.R. 296, 301 (Ch. 1985) (describing Crown submission that taxpayer’s “argument, like the thirteenth stroke of a clock, threw doubt on the whole of the taxpayer company’s case, since it proved far too much and led to absurd results”); *In re Unit 2 Windows Ltd. (In Liquidation)* [1985] 1 W.L.R. 1383, 1391 (Ch. 1985); *Inland Revenue Comm’rs v. Morgan*, 2002 WL 31173595, at *14 (EAT 2002).

⁴² *E.g.*, *John Fairfax Publications Pty Ltd. v. Rivkin* [2003] HCA 50; 201 ALR 77, 77 AJLR 1657 (2003) (¶ 5 & n.1) (Gleeson, C.J.) (citing *Madding Crowd* and *Uncommon Law*); Application for an Inquiry Relating to an Election in the Community & Public Sector Union, Western Austl. Branch — SPSF Group [1998] FCA 1210 (1998); *Bolt v. Williams* [1996] FLC 92-662, 127 FLR 305, 1996 WL 1745370, at *8 (Austl. Fam. Ct. 1996); *Erglis v. Buckley & Ors* [2005] QCA 404 (2005) (Queensland) (¶ 73 n.28); *Pasqualotto v. Pasqualotto* [2013] VSCA 21 (2013) (¶ 193 & n.35); *Little v. State of Victoria* [1998] VSC 349, VICSC 132 (1998) (“[t]hey also referred to [an English case], which, if I may say so without disrespect, is like the thirteenth chime of the clock for an Australian lawyer”); *R. v. Heyes* [2003] VSC 427 (2003) (¶ 13); *Schweitzer v. Schweitzer* [2010] VSC 543 (2010) (¶ 62); *Lincu v. Krnjulac* [2014] NSWSC 532, 2014 WL 2212121, at *21 (¶ 114); *(Habib v. Nationwide News Pty Ltd. [2007] NSWCA 91 (2007) (¶ 64) (rejecting thirteenth stroke; distinguishing Rivkin); Mahommed v. Channel Seven Sydney Pty Ltd. [2006] NSWCA 213 (2006) (¶ 20) (citing Rivkin); House of Commons v. Canada Labour Relations Bd., 1986 CarswellNat 2036, at *7, 38 A.C.W.S.2d 3 (Fed. Ct. App. 1986) (¶ 36) (Hugessen, J.); Ganja v. Minister of Nat’l Revenue, 1970 CarswellNat 60, [1970] Tax A.B.C. 272 (Can. Tax App. Bd. 1970) (¶ 70); Minister of Nat’l Revenue v. Lane, 1964 CarswellNat 292, at *7, [1964] Ex. C. R. 866, [1964] C.T.C. 81, 64 D.T.C. 5049 (Can. Ex. 1964) (¶ 36); R. v. Kohut,*

it has wormed its way into American case law, where it now ranks as a hardy perennial. Indeed, a case can be made that it is at risk of being overused.

The fateful stroke's first appearance in a published American judicial opinion appears to have been in 1964. In a First Circuit opinion reversing a National Labor Relations Board decision, Judge Bailey Aldrich wrote, without attribution, "The finding that the company discharged Fish as a 'leader' on September 6, as distinguished from September 12, was like the familiar example of the thirteenth stroke of a clock, not only unwarranted in itself, but infecting what went before."⁴³

As of August 2016, the simile has been used in a total of 25 American judicial opinions available in the LEXIS Federal and State Cases, Combined database: three from the Supreme Court (all by Justice Breyer), four from United States courts of appeals, ten from federal district courts, three from bankruptcy courts, and five from state appellate courts.⁴⁴ As previ-

2010 CarswellOnt 11076, at *6 (Ont. Ct. of Justice 2010) (¶ 55) ("cast out [*sic*] on everything than came before and after"), *aff'd*, 2012 ONSC 645, 2012 CarswellOnt 1003 (Ont. Sup. Ct. of Justice 2012); Keddy Motor Inn (Fredericton) Ltd. v. Dir. of Assessment, 1980 CarswellNS 251, 46 N.S.R.2d 254, 89 A.P.R. 254 (Cty. Ct. 1980) (¶ 8); X (Re), 2003 CanLII 55203 (Can. Immig. & Ref. Bd.) ("I begin with the observation that a lie is like the thirteenth chime of a clock, calling into question all that has gone before and everything that comes after"); Raj v. Hamid [1966] FJSC 1, [1966] 12 Fiji L. Rep. 126; Kensland Realty Ltd. v. Tai, Tang & Chong [2008] HKEC 395, (2008) HKCFAR 237, [2008] 3HKC 90, 2008 WL 279415, at *6 (H.K. Ct. of Final App. 2008) (¶ 23) ("[r]ather like the thirteenth stroke of the clock that falsifies all that went before").

⁴³ Raytheon v. NLRB, 326 F.2d 471, 476 (1st Cir. 1964). Readers "familiar" with the "example" from *Rex v. Haddock* would surely have appreciated the discharged employee's surname.

⁴⁴ Janus Capital Grp. v. First Derivative Traders, 564 U.S. 135, 157 (2011) (Breyer, J., dissenting); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 857 (2007) (Breyer, J., dissenting); Alabama v. Bozeman, 533 U.S. 146, 155 (2001); United States v. Marchena-Silvestre, 802 F.3d 196, 203 (1st Cir. 2015); Zheng v. Ashcroft, 383 F.3d 919, 921 n.4 (9th Cir. 2004); NLRB v. Sheraton Puerto Rico Corp., 651 F.2d 49, 54 (1st Cir. 1981); Raytheon, 326 F.2d at 476; *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 393 (S.D.N.Y. 2013); Hawaii Ironworkers Annuity Tr. Fund v. Cole, No. 3:10CV371, 2011 U.S. Dist. LEXIS 98760, at *9 (N.D. Ohio Sept. 1, 2011) (quoting *Janus Capital Grp.*, 564 U.S. at 157 (Breyer, J., dissenting)); United States v. Ageloff, 809 F. Supp. 2d 89, 102 (E.D.N.Y. 2011); S.A.F. v. United States Comm'r Soc. Sec. Admin., No. 08-cv-1984, 2010 U.S. Dist. LEXIS 75425, at *10 (W.D. La. July 26, 2010); Ritchie v. United States, No. C 00-03940 MHP, 2004 U.S. Dist. LEXIS 9270, at *20 (N.D. Cal. May 24, 2004); United States v. Berger, 188 F. Supp. 2d 307, 327 & 327 n.11 (S.D.N.Y. 2002); Neal v. Honeywell, Inc., 995 F. Supp. 889, 898

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ously noted, just one cited Herbert⁴⁵; none cited Hardy.



As Alan Dershowitz has noted: “there are no Nobel Prizes in law, because law is the only profession where you lose points for originality and gain points for demonstrating that somebody else thought of your idea first. Lawyers are prone to look to the ‘authorities’ – to past lawyers and judges – for their ideas.”⁴⁶ That professional commitment to precedent makes it all the more surprising that the thirteenth-stroke simile has become largely unmoored from its *Misleading Cases* ancestor and entirely untethered from its *Far From the Madding Crowd* literary roots. Private Hatfield, to whom the whole affair may conceivably be traced, remains unknown to all but the truest *cognoscenti*.

Hardy’s literary launch of the thirteenth-stroke simile calls to mind his poignant description of the “second death” feared by the departed in their tombs:

*When, with the living, memory of us numbs,
And blank oblivion comes!*⁴⁷



(N.D. Ill. 1998); Flynn v. Goldman, Sachs & Co., No. 91 Civ 0035 (KMW), 1991 U.S. Dist. LEXIS 15785, at *6 (S.D.N.Y. Nov. 1, 1991); Sun Ref. & Mktg. Co. v. Statheros Shipping Corp., 761 F. Supp. 293, 304 (S.D.N.Y. 1991); Daigle v. Cont’l Oil Co., 277 F. Supp. 875, 884 (W.D. La. 1967); Lassman v. McGuire, 209 B.R. 580, 583 (Bankr. D. Mass. 1997) (quoting *Canter v. Comm’r of Pub. Welfare*, 668 N.E.2d 783, 787 (Mass. 1996)); *In re Tacoma Boatbuilding Co.*, 81 B.R. 248, 262 (Bankr. S.D.N.Y. 1987) (quoting *In re United Merch. & Mfr.*, 3 B.R. 286, 299 (Bankr. S.D.N.Y. 1980)); *In re United Merch. & Mfr.*, 3 B.R. at 299; Scroggins v. Commonwealth, 446 S.W.3d 234, 239 (Ky. Ct. App. 2014) (Dixon, J., concurring) (quoting *Bozeman*, 533 U.S. at 155); *Shea v. Dep’t of Motor Vehicles*, 72 Cal. Rptr. 2d 896, 898 (Cal. Ct. App. 1998); *State v. George Anthony W.*, 488 S.E.2d 361, 373 (W. Va. 1996) (Workman, J., dissenting) (quoting *In re Stephon W.*, 442 S.E.2d 717, 723 (W. Va. 1994) (Neely, J., dissenting)); *Canter*, 668 N.E.2d at 787; *In re Stephon W.*, 442 S.E.2d at 723 (Neely, J., dissenting).

⁴⁵ See *supra* note 6 and accompanying text (discussing *Shea*, 72 Cal. Rptr. 2d at 898).

⁴⁶ ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 307 (1982). Dershowitz attributes the observation to his Harvard Law School colleague Alan Stone.

⁴⁷ THOMAS HARDY, *The To-Be-Forgotten*, POEMS OF THE PAST AND THE PRESENT 152, 153 (2d ed. 1902).