Terms of Art

Occasional Dispatches from the Intersection of Language & the Law

Void for Vividness

David Franklin

In my first column I promised to examine the highlights and lowlights of language "as used by lawyers, whether in briefs or oral arguments, judicial opinions or statutory and regulatory promulgations." But so far *Terms of Art* has focused exclusively on judicial opinions, ranging from the colorful offerings of Judge Bruce Selya to judicial appropriations of Shakespeare. This focus on the writings of judges produces a skewed picture of the modern-day lawyer's reality. The era of the common law is of course long past; most law nowadays is found in statute books and regulatory codes rather than appellate reports. Unfortunately, though, statutory and regulatory promulgations feature many more stylistic lowlights than highlights. Colorful prose is just hard to come by in the United States Code or the Federal Register.

Not that vividness ought to be a primary goal of legislators and administrators. Perhaps the most flavorful statute ever to reach the Supreme Court was the vagrancy ordinance invalidated by the Court in its famous 1972 opinion, *Papachristou v. Jacksonville*:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

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By the time this law reached the Supreme Court a fraction of its vividness had vanished – a footnote in the opinion tells us that the city had by that time removed the reference to juggling, perhaps in response to pressure from the circus lobby. In any event, the Court struck down the ordinance as unconstitutional because it invited arbitrary and discriminatory arrests and convictions. Yet the Court's term for such subjective and pliable statutes – "void for vagueness" – doesn't quite fit the Jacksonville statute. If anything the statute was *too* evocative, too fraught with socioeconomic trigger words. Certainly the image of a man habitually living upon the earnings of his wife or minor children is far from vague.

Incidentally, Justice Douglas's opinion in *Papachristou* – in addition to citing Walt Whitman and Vachel Lindsay – features an interesting etymological aside on the origins of the verb "to saunter." Thoreau is quoted as tracing the word to beggars who asked for alms on the pretext of traveling *à la Sainte Terre* (to the Holy Land). Other observers, Thoreau reports, link the word to the French *sans terre*, meaning without land of one's own.

Of course statutes and regulations do not typically contain the kind of colorful descriptions that doomed the *Papachristou* ordinance. More often they are deadly dull and, well, frankly unreadable. The problem is due in large part to the fact that legislative drafters tend to be lawyers, and lawyers tend to write in stiff and archaic ways. As legal historian Lawrence Friedman puts it, "legal writing, as it pours out of thousands of word-processors, is overblown yet timid, homogeneous, and swaddled in obscurity. The legal academy is positively inimical to spare, decent writing." Leases, contracts, and pleadings are still all too rife with phrases like "aforementioned," "the party of the first part," and "Further affiant sayeth not" – and statutes are usually no better. Take, for example, the following fairly representative mouthful from the state code of Georgia:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls product supply, controls the price of the product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

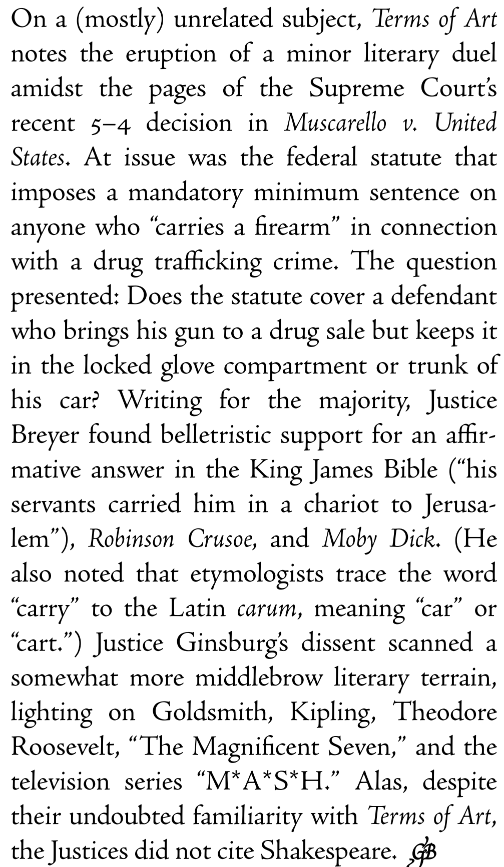
In 1981 the Fifth Circuit concluded that this one-sentence behemoth was "amenable to some sensible construction" – though it noticeably failed to suggest one. I fed the statute into my word processor's automatic grammar checker, which (among other things) assigns each passage of text a "Flesch-Kincaid grade level," gauging readability by measuring word and sentence length. Standard writing usually weighs in at a seventh- or eighth-grade level. The Georgia statute achieved an impressive grade level of 25.3, making it just right for a tenth-year graduate student.

Impenetrable statutes and regulations are hard to square with the rule of law, which presupposes that governing norms will be reasonably transparent to average citizens. This is more than just an academic concern. Earlier this year, for instance, the Ninth Circuit held that certain INS documents relating to deportation and document fraud were so unintelligible that they deprived aliens of due process. Judge Stephen Reinhardt con-

cluded that "the documents are so bureaucratic and cumbersome and in some respects so uninformative and in others so misleading that even those aliens with a reasonable command of the English language would not receive adequate notice from them."

Now the White House is getting into the act. On June 1, 1998, the Clinton administration issued an Executive Memorandum announcing that from now on all government regulations must be written in "plain language." According to the Memorandum, plain language is characterized by common, everyday words (except for necessary technical terms), "you" and other pronouns, the active voice, and short sentences. At a press conference announcing the initiative, Vice President Gore cited an existing OSHA regulation providing that "ways of exit access and the doors to exits to which they lead shall be so designed and arranged as to be clearly recognizable as such." This, he said, is to be replaced by a somewhat simpler version: "An exit door must be free of signs or decorations that obscure its visibility." Even so, Gore wondered aloud whether it might not be still better to say, "Don't put up anything that makes it harder to see the exit door."

Lawyer-linguist Lawrence Solan, in his book *The Language of Judges*, expresses some skepticism about the plain language movement. Solan applauds the effort to do away with legalese, but he observes that even straightforward language harbors a bedrock indeterminacy that breeds costly litigation. Learned Hand made a similar point in 1951, in a passage reproduced on the frontispiece of the Spring 1998 *Green Bag*. Law, Hand said, ought to be indeterminate (actually, he said it ought to be "unintelligible," a proposition that is hard to take seriously) "because it ought to be in words – and words are utterly inadequate to deal with the fantastically multiform occasions which come up in human life." To which I can only add my hope that the plain language movement does not thoroughly succeed – for if it does, I'll have nothing left to write about.



On a (mostly) unrelated subject, *Terms of Art* notes the eruption of a minor literary duel amidst the pages of the Supreme Court's recent 5–4 decision in *Muscarello v. United States*. At issue was the federal statute that imposes a mandatory minimum sentence on anyone who "carries a firearm" in connection with a drug trafficking crime. The question presented: Does the statute cover a defendant who brings his gun to a drug sale but keeps it in the locked glove compartment or trunk of his car? Writing for the majority, Justice Breyer found belletristic support for an affirmative answer in the King James Bible ("his servants carried him in a chariot to Jerusalem"), *Robinson Crusoe*, and *Moby Dick*. (He also noted that etymologists trace the word "carry" to the Latin *carum*, meaning "car" or "cart.") Justice Ginsburg's dissent scanned a somewhat more middlebrow literary terrain, lighting on Goldsmith, Kipling, Theodore Roosevelt, "The Magnificent Seven," and the television series "M*A*S*H." Alas, despite their undoubted familiarity with *Terms of Art*, the Justices did not cite Shakespeare. GB