

# Terms of Art

Occasional Dispatches from the Intersection of Language & the Law

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## Mixologists

David Franklin

AS FAITHFUL READERS know by now, there is nothing *Terms of Art* appreciates more than colorful legal writing. Sometimes, however, colors can clash. The most obvious exemplar of semantic mismatch is the oxymoron. (It's no wonder that John Hart Ely chose the multi-hued phrase "green pastel redness" to anathematize the notion of substantive due process.) More than forty years later, the Supreme Court's best-known oxymoron is still the infelicitous phrase "all deliberate speed" from *Brown v. Board of Education II*. It seems we owe this particular contradiction in terms to Justice Frankfurter, who got it from Justice Holmes, who probably got it from Francis Thompson's second-rate poem, "The Hound of Heaven." In poetry, paradox and inconsistency can be evocative, but in *Brown II* the phrase proved to be more than a mere literary nuisance; it invited lower courts to drag their feet on desegregation.

My subject today, however, is not the oxymoron but the mixed metaphor. For the mixed metaphor is the true clash of narrative colors. It is the plaid-pants-and-herringbone-jacket of legal prose; it is the ugly duckling in the ointment. We lawyers seem unusually prone to this particular form of linguistic excess, perhaps because standard legal writing is so gray and weathered that many of us think nothing of slapping on two incompatible coats of paint at the same time.

A bar association committee once reported that it had "smelled a rat and nipped it in the bud." In 1986 the ABA Commission on Professionalism issued a report entitled "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism." (You can almost smell the acrid scent of burning blue ink in that one.) Legal academics are just as bad as practitioners – indeed, probably worse. "A finding that a market situation has

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no core upsets theorists,” wrote one scholar in a 1987 *University of Chicago Law Review* piece, “because they cannot state that the situation has a tendency to align individual conduct with social advantage; the Invisible Hand lurches off on a random walk.”

Even Supreme Court justices are not above serving up the occasional smorgasbord of similes. For instance, Justice Stewart, concurring in the landmark 1963 case of *Sherbert v. Verner*, called attention to the pushme-pullyu relationship between the two religion clauses of the First Amendment by saying, “This case presents a double-barreled dilemma, which in all candor I think the Court’s opinion has not succeeded in papering over.” And Justice Harlan, in his separate statement in the 1957 case of *Roth v. United States*, complained that the opinion for the Court “paints with such a broad brush that I fear it may result in a loosening of the tight reins” on obscenity statutes.

The last two examples come from the files of Brigham Young University law professor James D. Gordon III, for whom mixed metaphors appear to be a special *bête noire*. Nor is Gordon content merely to go after Supreme Court justices. He has also reproached Judge Richard Posner’s biographical study of Cardozo for its liberal use of the tangled trope. At one point Posner writes of a Cardozo opinion that “[w]hen the excess is peeled away, a prose gem is revealed.” “Perhaps the fabulous ‘Sun-kist Diamond,’” Gordon sniffs. Posner again: “The Massachusetts court encountered a rising tide of public law cases that fascinated Holmes and paved the way for the accomplishments of his Supreme Court years.” Gordon’s retort: “Perhaps a rising tide of asphalt?”

On the other hand, Professor Gordon commits the (common) mistake of chiding Hamlet for considering whether to “take arms against a sea of troubles.” Sorry, professor, but Shakespeare mixed that metaphor on purpose, wanting the Danish prince’s inner struggles to evoke his predecessor King Canute’s futile

efforts to command the tides. (Gordon at least has the prudence to admit that “by criticizing Shakespeare, I am skating on hot water.”) The lesson of the Shakespeare example is that mixed metaphors can turn out to be – or not to be – stylistic gaffes, depending on who deploys them. The point was not lost on Karl Llewellyn, who bristled at a younger colleague’s suggestion that he overblended his imagery. “A metaphor,” Llewellyn lectured his accuser, “is mixed when it is botched. My metaphors are cumulative creative synthesis of overtone, undertone, and connotation.”

When it comes to the stylistic equivalent of the multi-car pileup, of course, lawyers are no match for those ultimate purple prosodists: sportswriters. In keeping with our Supreme Court theme, here is an excerpt from the *Deseret News* of November 4, 1937: “Whizzer White of the Colorado football forces will be the cynosure of all eyes Saturday, including those of the Utah team. ... Will he be used to draw a red herring across the Ute trail, or will he continue to dish out poison himself? Either way, [Colorado] Coach Bunny Oakes has in his great triple threat an ace-in-the-hole of rare deceptive possibilities.”

As the above example suggests, most mixed metaphors are really mixed clichés. The reason is simple. To create a truly original metaphor, the writer must focus carefully on the mental picture she is painting, and is therefore unlikely to muck it up with a second, interloping image. Clichés, by contrast, are so timeworn that they never really create a picture in our heads to begin with; thus they can be mixed and matched promiscuously with minimal cognitive dissonance.

A close cousin of the mixed metaphor is the hopelessly extended one. Readers are invited to nominate their favorites from the annals of law. Mine is the following deathless analogy from Justice Scalia’s concurrence in the 1993 *Lamb’s Chapel* case, which, like its subject, simply refuses to come to an end:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* [*v. Kurtzman*] stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under ... . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart ... and a sixth has joined an opinion doing so. ... The secret of the *Lemon* test's survival, I think, is that it is so easy to

kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. ... Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Nice metaphor, but you've got to wonder: are little children really frightened of the *Lemon* test? "Mommy, there's something hiding under my bed – and it has three prongs!" Still, far be it from *Terms of Art* to pull the rug out from under Justice Scalia's parade. 