Literary Allusion in Legal Writing:

The Haynsworth-Wright Letters

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On November 22, 1989, Clement F. Haynsworth, Jr., died. He was an outstanding jurist who had served with great ability since 1957 as judge, chief judge, and finally senior judge of the United States Court of Appeals for the Fourth Circuit. His death came 20 years and one day after the United States Senate, in one of its least shining hours, refused to confirm him for a seat on the Supreme Court of the United States. For many people this would have been a devastating defeat that would have crushed them for life. For Clement Haynsworth it was an opportunity to demonstrate what John Frank meant when he said that Haynsworth "bears without abuse the grand old name of gentleman."[1] He conducted himself with dignity and without recrimination, and for two decades continued to do his work with dedication and with distinction.

One of Judge Haynsworth's strengths as a judge was the lucidity of his writing. He cared about words and their proper use. He felt keenly that the most important attribute of a judicial opinion was that it be clear, that those who read it might understand what the court had held and why it held as it did. He never fell into the trap, however, of supposing that clear writing must be dull writing. His opinions told a story, one that captured the interest of readers and made them want to see what happened next. One of his important opinions begins:

> In a rural section of South Carolina one foggy evening not very long after sunset, Flossie Mae Garner Brown, with her seven year old daughter, was walking along the shoulder of a highway returning to her own home from

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1. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & CONTEMP. PROBS. 43 n.† (1970).

> her mother's. They were struck by a truck owned by a local lumber company and driven by a local man. The mother was killed; the daughter injured.[2]

My late colleague Bernard J. Ward has referred to this as "one of the most unforgettable mises-en-scène in all of the West Reporter System."[3] With the scene so expertly set, who could put the opinion down without finding out how the law resolved this rural tragedy?

There is inherent drama in a car-pedestrian collision on a foggy evening. It takes a master hand, however, to introduce interest into a Rule 10b-5 opinion. While sitting by designation with the Ninth Circuit, Judge Haynsworth was able to do this, and to write what those who practice securities law say is a leading decision on "churning," in a fashion that is both interesting and understandable. The facts are clearly stated in short, declarative sentences: "Follansbee was far from an untutored novice. He had a college degree in economics. He had taken a course in accounting." The critical point is made, however, with a nice turn of phrase: "Follansbee's judgment may have been flawed, but the principal ingredient of the flaw was the active pursuit of the quick profit."[4]

Because we shared an interest in how the English language is used, Judge Haynsworth and I had occasion from time to time to correspond on aspects of this. It is one of those exchanges of correspondence that is the subject of this memento. It began with a letter I wrote him on March 30, 1976, in which I said:

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2. Lester v. McFaddon, 415 F.2d 1101, 1102-1103 (4th Cir. 1969).
3. Quoted in Wright, *The Wit and Wisdom of Bernie Ward,* 61 TEXAS L. REV. 13, 30 (1982).
4. Follansbee v. Davis, Skaggs & Co., 681 F.2d 673, 677, 678 (9th Cir. 1982).

> Did you happen to catch the marvelous phrase that Henry Friendly came up with in *I.I.T.* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)? Speaking of 28 U.S.C. § 1350 he says: "This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 STAT. 73, 77 (1789), no one seems to know whence it came."

Judge Haynsworth was a prompt correspondent. He wrote me back on April 6th. In his reply, he said:

> I had not seen Henry Friendly's *bon mot*, but I like it. Indeed, I rather envy him, though I have been persuaded to avoid classical references which would not be understood by a large portion of the readers. Some among us will know that Lohengrin could dwell with his bride only so long as she and others knew not his name nor whence he came, but are there not many more of us who would simply be perplexed?
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> Should a judge write for the Charlie Wrights or for young law clerks preparing legal memoranda for the use of junior partners in advising clients?

His point is of course a telling one. It took me several weeks to muster the ammunition for a reply. I responded on April 22.

> I recognize the force of what you say in your letter of April 6th, that a judge should write for young law clerks rather than for Bernie Wards or Charlie Wrights. On the other hand I think that as long as the essential message of the opinion is clear that some literary grace and use of obscure allusions is not a bad thing. It adds to the pleasure of those of us whose daily work is the reading of Federal Reporter and it might contribute to the education of the young law clerk who will not understand the reference and who will then ask or look up to find out the story of Lohengrin. I have always thought that, in terms of lit-

> erary excellence and complete readability, Justice Jackson is the all time champion on the Supreme Court and he was particularly adept at making effective use of literary allusions. See for example "There are village tyrants as well as village Hampdens." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). Or how about "then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."? *Edwards v. California*, 314 U.S. 160, 186 (1941). One final example: "It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." *Zorach* v. *Clauson*, 343 U.S. 306, 324-325 (1952). I think that each of these is vivid and clear, their basic thrust will be understood even by readers who are not familiar with Gray's Elegy, or with Macbeth, or with the Gospels, but that they are more enjoyable for those who will recognize the allusion and delight in it.

His answer was immediate—and brief. In a letter of April 26th, he said: "Thanks very much for examples of Mr. Justice Jackson's literary allusions. I agree with you they are graceful without obscuring the meaning."

At the time those letters were exchanged, I was not familiar with Eric Partridge's fine book, *Usage and Abusage* (rev. ed. 1973). I like to think that what I said to Judge Haynsworth in the April 22 letter was consistent with the good advice Partridge gives. He asks if literary allusion is "a form of snobbery or is it not rather—in the scholarly and the unpretentiously cultured, the genuinely well-read—a legitimate source of pleasure and a kind of subtlety." Partridge clearly takes the latter view, though he quotes approvingly an earlier author, William Empson, who says that it is tactful, when making an obscure reference, to arrange that the text shall be intelligible when the reference is not understood. I

think that both Judge Friendly and Justice Jackson satisfied that test.

Bryan Garner agrees that allusions, "if not too arcane, can add substantially to the subtlety and effectiveness of writing." He adds, however, a further caveat:

> It is perhaps easier for judges than for practicing lawyers to use literary allusions, for judges have a guaranteed readership and do not suffer directly if anyone (or everyone) fails to appreciate their allusions. A lawyer submitting a brief to a judge, on the contrary, is likely to be less adventurous in literary flights of fancy.[5]

It has certainly been my experience that adventurousness is not the most conspicuous trait of briefwriters. Even so, I think it safe to use allusions in briefs, as in other legal writing, so long as the writer satisfies the Empson-Partridge test that the text must be intelligible even if the reference is not understood. The use of allusion pays the judge the unstated compliment of assuming that he is one of those "genuinely well-read" persons who will recognize and enjoy being reminded of what Garner calls the "common body of literature with which all cultured persons are familiar."

In one recent case in which I was involved, a draft of a brief by one of the lawyers with whom I was associated accused the other side of ignoring many of the documents in the record and of giving others "metaphysical constructions that corrupt the English language." I did not like "that corrupt the English language" and suggested that we substitute "worthy of Humpty Dumpty." I thought it would be nice to flatter the judges by indicating that we take it for granted that they know Lewis Carroll. The difficulty here is that the judge might think of the Humpty Dumpty who sat on a wall rather than

5. B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 342 (1987).

the Humpty Dumpty of *Through the Looking Glass*. The allusion would have failed the test, since it would not be intelligible if the reference were not understood. I had proposed safeguarding against that by dropping a footnote at that point. The footnote would simply have said, without citation: "'The question is,' said Alice, 'whether you can make words mean so many different things.'"

On reflection, I think my colleagues were right in not referring to Humpty Dumpty. Allusion to be effective must be subtle. If it requires a footnote to make the point clear, things have become too complicated. But if Clement Haynsworth had been the judge to whom the brief was going, I would simply have said "worthy of Humpty Dumpty" and would not have bothered with a footnote. Judge Haynsworth would have understood the reference. I like to think he would have enjoyed it and approved.