

# Playing It Dangerous: Justice Jackson's Passionate Style

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No one really knows what makes a series of written words ring in the mind or set the heart on fire. But part of what evokes that reaction seems to be meeting an interesting personality that lives through the words. Suppressing personality makes writing safe and dull. The writers of judicial opinions that we remember — Marshall, Holmes, Cardozo, Jackson — are those who took chances, risked offending others or, worse yet, risked making themselves look ridiculous in their writing. Editing judicial opinions is often seen as a way of excising offensive words or habits to make the opinions as unobjectionable as possible. If that is the purpose of legal editors, they are involved in a killing business, trying, as Holmes said, to cut out the genitals of judicial opinions.<sup>1</sup> The writing style of Robert Houghwout Jackson, a Supreme Court Justice under Roosevelt and Truman, escaped repressive editing. His writing, like Holmes's, retained its power to engage and enrage his readers and colleagues.

In good writing, even the good writing of judges, we must get at least a whiff of personality. Some writers peep out from behind the words they choose. In contrast, Jackson demands our attention, forcing us to acknowledge his personality. His style reflects "the Self escaping into the open."<sup>2</sup> He may not have been a first-rate thinker about constitutional issues, but the quality of a writer's thought is not, after all, an editor's primary concern.

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<sup>1</sup> 1 HOLMES-POLLOCK LETTERS 258 (Mark D. Howe ed. 1941).

<sup>2</sup> WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 67 (3d ed. 1979).

Jackson's writing is, however, as supple and charming as any other Justice's because it is so abundantly and consciously human. An editor of such prose should be careful about interfering with that humanity.

Justice Frankfurter said that the writing of Jackson "mirrored the man in him" more completely than any other man "who ever sat on the Supreme Court."<sup>3</sup> How does a writing style reflect personality in so stylistically restricted a medium as a Supreme Court opinion? Part of the sense we get of meeting a real person in Jackson's opinions comes from his habit of writing as a lawyer rather than as a judge, from his insistence upon judicial decision-making as a tentative and intensely personal process, and from his focus upon people instead of rules.

Jackson was a small-town lawyer who went to Washington and made good. He practiced law for 20 years, then went to work for President Roosevelt in 1934 as a government lawyer. In 1941, at age 49, he was appointed by Roosevelt to the Supreme Court. Though lacking judicial experience, he had more experience "as an advocate and practicing lawyer than any other appointee of President Roosevelt."<sup>4</sup> Except for a year as the United States prosecuting attorney at the Nuremburg war trials, he served on the Supreme Court until his death in 1954.

Jackson's life was that of an unusually successful lawyer. To me his life seems interesting primarily as the life of a writer — an assessment Jackson would have agreed with. In a conversation with his future biographer, Jackson said, "I know that my work, if it lives at all, will live in what I write."<sup>5</sup> Most people agree that Jackson was one of the Court's best writers, although he did not possess the brilliance or originality of Holmes. His "bent was to plow old pastures in a new way, not to leap the fences and attack

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<sup>3</sup> Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955).

<sup>4</sup> EUGENE C. GERHART, *AMERICA'S ADVOCATE* 289 (1958).

<sup>5</sup> *Id.* at 288.

virgin soil. He was a professional man, and neither a planner nor a dreamer.”<sup>6</sup> Yet “[h]is ideas remain important because of the manner, often provoking and never dull, in which he articulated them, and because they are so very orthodox. . . . In reading Jackson we are reading the opinions of Everyman of the law, although better said than the average lawyer would phrase them.”<sup>7</sup>

As an elegantly articulate “Everyman of the law,” Jackson spoke primarily as a lawyer and not as a judge — to persuade, not to justify his decision. The difference is important because reading persuasion is more interesting than reading apology. In his opinions, Jackson’s standard for clarity was almost always “what it would mean to a reasonably well-informed lawyer reading it.”<sup>8</sup> Unlike Frankfurter, “Jackson rarely seemed to be searching for the proper ‘judicial’ stance or tone.”<sup>9</sup> In fact, he went out of his way to poke fun at the self-aggrandizement of judges in general and the nine men on the Supreme Court in particular. In tone and attitude his opinions continually reminded the Court that “[w]e are not final because we are infallible, but we are infallible only because we are final.”<sup>10</sup> The distance between judge and judged thus seemed “suddenly shortened,” because Jackson’s “self pierced through roles to communicate at a more personal level.”<sup>11</sup>

A judge, Jackson said, ought to be a man who “didn’t let the personalities on either side interfere with his deciding the case. . . .

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<sup>6</sup> Warner W. Gardner, *Robert H. Jackson, 1892-1954: Government Attorney*, 55 COLUM. L. REV. 438, 438 (1955).

<sup>7</sup> GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 6 (1969).

<sup>8</sup> *Adams v. Maryland*, 347 U.S. 179, 184 (1954).

<sup>9</sup> G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 232 (1988).

<sup>10</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>11</sup> WHITE, *supra* note 9, at 232.

The interpretation of the law ought to be as impersonal as possible."<sup>12</sup> But Jackson never achieved impersonal detachment. He remained an individualist, both emotionally and philosophically.<sup>13</sup> He seemed to revel in the particulars of each case, almost always beginning his opinions, even dissenting and concurring opinions, with a recitation of facts and referring to each party by name rather than as "appellant" or "petitioner." He almost always expressed issues in personal terms.

In his conflicts and friendships with his fellow judges on the Supreme Court as well, "[h]e personalized issues and poked fun at opposing Justices' views; he filled his opinions with devastating similes and pejorative metaphors. When pressed, he revealed the internal politics of the Court."<sup>14</sup> While Jackson may have intended, as a judge, to be a symbol "of the nobility and impartiality and transcendence of law, which was composed of more than the sum of human passions and prejudices[,] . . . he conveyed the humanness of himself and his colleagues so sharply that he seemed to be living proof of the unattainability of his own standards for judicial performance."<sup>15</sup> For example, in a case concerning a newspaper article that attacked a judge's conduct of a trial, Jackson dissented from the majority opinion by saying:

With due respect to those who think otherwise, to me this is an ill-founded opinion, and to inform the press that it may be irresponsible in attacking judges because they have so much fortitude is ill-advised, or worse. I do not know whether it is the view of the

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<sup>12</sup> Phillip B. Kurland, *Robert H. Jackson*, in 4 LEON FRIEDMAN & FRED L. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 2563 (1969).

<sup>13</sup> *Id.*

<sup>14</sup> WHITE, *supra* note 9, at 234-35.

<sup>15</sup> *Id.* at 238.

Court that a judge must be thickskinned or just thick-headed . . . .<sup>16</sup>

Jackson's office staff deleted personal references from his judicial opinions whenever possible,<sup>17</sup> but quite a few escaped this prudent censorship. While these personal references may have been bad politics and perhaps bad, too, for the image of the Supreme Court, they make his opinions lively reading.

Jackson revealed this all-too-human face of the law largely by rejecting the appearance of certitude in his opinions. He tended to use "I think" or "it seems to me" as a motif or rhythmic device so often that these phrases are an identifying characteristic of his writing style and a demonstration of the pragmatism of his constitutional philosophy. In *American Communications Ass'n v. Douds*, he wrote:

I think that under our system, it is time enough for the law to lay hold of the citizen when he acts illegally, or in some rare circumstances when his thoughts are given illegal utterance. I think we must let his mind alone.<sup>18</sup>

The repetition of the words "I think" in these two sentences was a deliberate assertion of his view that judges should not claim to be sure about essentially unknowable matters and that substantive constitutional issues are always of that kind. In *Thomas v. Collins*, these words appear four times within the five sentences of one paragraph:

Though the one may shade into the other, a rough distinction always exists, I think, which is more shortly illustrated

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<sup>16</sup> *Craig v. Harney*, 331 U.S. 367, 396 (1947).

<sup>17</sup> PAUL A. FREUND, *ON LAW AND JUSTICE* 173 n.26 (1968).

<sup>18</sup> 339 U.S. 382, 444 (1950) (Jackson, J., concurring and dissenting).

than explained. A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right . . . . Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state . . . may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address . . . .<sup>19</sup>

In *Craig v. Harney*, Jackson again employed this device: "I think this publisher passed beyond the legitimate use of press freedom and infringed the citizen's right to a calm and impartial trial. I do not think we can say that it is beyond the power of the state to exert safeguards against such interference . . . ." <sup>20</sup> In the first two paragraphs of this dissent Jackson wrote, "it seems to me" and "I do not suppose." Jackson thus made the pragmatic and humanistic basis of his judgments inescapable. There is no pretense here to the godlike posture of the judge who *knows*.

Jackson's tentative language, used almost as a litany, reflected not only Jackson's philosophy but also his sense that the reader was his equal, a serious and educated person, neither dishonest in evaluating the opposing side's arguments nor "intransigently stupid in the face of a 'plain meaning.'" <sup>21</sup> While Jackson argued passionately for his side, his style "complement[ed] affirmation with

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<sup>19</sup> 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

<sup>20</sup> 331 U.S. 367, 395 (1947) (Jackson, J., dissenting).

<sup>21</sup> Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 923 (1961).

limitation and with humility.”<sup>22</sup> His language is the language of power bending to the possibility of another conclusion and, as such, it is charming.

Precedent, Jackson knew, like verses of scripture, can be found for almost every proposition. As he pointed out in *Youngstown Sheet & Tube Co. v. Sawyer*, “[a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.”<sup>23</sup> In a footnote, he continued the discussion of the inconclusiveness of precedent: “A Hamilton may be matched against a Madison. Professor Taft is counterbalanced by Theodore Roosevelt. It even seems that President Taft cancels out Professor Taft.”<sup>24</sup>

Jackson gracefully admitted that he, too, had changed his mind. *McGrath v. Kristensen*, for example, contains this good-natured final paragraph:

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, “The matter does not appear to me now as it appears to have appeared to me then.” And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: “My own error, however, can furnish no ground for its being adopted by this Court . . . .” Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary — “Ignorance, sir, ignorance.” But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister’s reliance upon an earlier opinion of his Lordship: “I can only say that I am amazed that a man

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<sup>22</sup> *Id.* at 924 (quoting ROBERT OPPENHEIMER, *THE OPEN MIND* 54 (1955)).

<sup>23</sup> 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

<sup>24</sup> *Id.* at 635 n.1 (citations omitted).

of my intelligence should have been guilty of giving such an opinion.” If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.<sup>25</sup>

Similarly, in *Massachusetts v. United States*, Jackson said:

[I]f I have agreed to any prior decision which forecloses what now seems to be a sensible construction of this Act, I must frankly admit that I was unaware of it. . . . [E]xcept for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.<sup>26</sup>

Not only did Jackson insist that his decision-making process was human, and therefore imperfect, he continually reminded the reader that his decisions resulted from his own personal experience and that to pretend otherwise would be dishonest. His opinions are filled with references to his own experience as a small-town lawyer and to common life in small towns. In *Schwegmann Bros. v. Calvert Distillers Corp.*, Jackson referred to the small-town lawyer “who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining” congressional histories.<sup>27</sup> In *Craig v. Harney*, he argued that the Court made unjustified assumptions about the sensitivity of small-town judges to newspaper criticism.

From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge ought to have shown more fortitude in the face of

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<sup>25</sup> 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring) (citations omitted).

<sup>26</sup> 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting).

<sup>27</sup> 341 U.S. 384, 396 (1951) (Jackson, J., concurring).



criticism. But he had no such protection. He was an elective judge, who held for a short term. . . . Of course, the blasts of these little papers in this small community do not jolt us, but I am not so confident that we would be indifferent if a news monopoly in our entire jurisdiction should perpetrate this kind of an attack on us.<sup>28</sup>

Having grown up and practiced law in rural America, Jackson knew what he was talking about and sounded quite certain that his brothers on the bench had forgotten, or never knew, about life in small towns.

Sometimes the experience to which he appealed was general rather than specific. In one case, he admitted having “sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it. But experience shows there are thieves among automobile drivers . . . .”<sup>29</sup> Sometimes Jackson referred to his experience in government. But most often, he referred specifically to his life as a lawyer. He was clearly on the side of lawyers rather than judges. In *Craig v. Harney*, Jackson pointed out that a judge who had acted less than heroically was “not a lawyer, and I regard this as a matter of some consequence. A lawyer may gain courage to render a decision . . . because he has confidence that his profession over the years will approve it . . . . But this judge had no anchor in professional opinion.”<sup>30</sup>

Part of Jackson's charm lay in his willingness to admit his biases as frankly as the confines of judicial writing and his basic conservatism would allow. Like Holmes, but unlike most of his other predecessors, “Jackson entertained with his style.”<sup>31</sup>

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<sup>28</sup> 331 U.S. 367, 397 (1947) (Jackson, J., dissenting).

<sup>29</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382, 435 (1950).

<sup>30</sup> 331 U.S. 367, 397 (1947).

<sup>31</sup> WHITE, *supra* note 9, at 232.

Certainly both Holmes and Jackson were proud of their writing. Both enjoyed commenting ironically at the expense of fellow Justices and others, but Holmes "consciously distanced himself from those around him."<sup>32</sup> Jackson did not. His style demonstrates not distance, but an attempt at intimacy, though it is often the intimacy of conflict. While Holmes separated himself from life, wanting "to know as little as [he could] safely go on" about a case,<sup>33</sup> Jackson constantly referred to the facts of the case, not in formal language, but almost as if the case were about people he knew who were before a local tribunal. Jackson seemed to react to the facts of the case rather than to ideology, theory, or policy.

That emphasis on the personal surfaced in Jackson's dissent in *Korematsu v. United States*, which begins with the appellant's name.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that . . . he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.<sup>34</sup>

Other dissents to *Korematsu* begin with bald assertions that confinement of all persons of Japanese ancestry is racial discrimination and therefore a violation of the Constitution.<sup>35</sup> That, too,

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<sup>32</sup> William Domnarski, *Style and Justice Holmes*, 60 CONN. B.J. 251, 262 (1986).

<sup>33</sup> Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 3, 1925) (on file with the Harvard Law School Library).

<sup>34</sup> 323 U.S. 214, 242-43 (1944).

<sup>35</sup> *Id.* at 225, 233.

was Jackson's ultimate argument, but he started with the specific person.

He began also with a keen sense of the case's irony. Korematsu was a United States citizen — loyal, law-abiding, and well disposed — who had been convicted of being present where he lived. The military orders that Korematsu disobeyed, “forb[ade] such a one to remain, and they also forb[ade] him to leave.”<sup>36</sup> The majority held that these orders were justified because the United States was at war with Japan, but Jackson pointed out that the United States was also at war with other countries. Had Korematsu been of German or Italian descent, or of American-born parents convicted of treason, he would not have been subject to those orders.<sup>37</sup>

Jackson's argument began with the person, not the theory. Whatever the ultimate basis on which he decided a case, like any good trial lawyer, Jackson pointed to the person, not to the policy. And Jackson's typical weapon, here as elsewhere, was irony.

In *Korematsu*, Jackson defended individual rights against state power. But focusing on the individual in another case led him to make quite the opposite decision. In *Brinegar v. United States*, he argued that

if we are to make judicial exceptions to the Fourth Amendment . . . , it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. . . . However, I should candidly strive hard to sustain such an action . . . if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and

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<sup>36</sup> *Id.* at 243.

<sup>37</sup> *Id.*

universal search to salvage a few bottles of bourbon and catch a bootlegger.<sup>38</sup>

Jackson resisted deciding cases on abstract theory despite the fact that such resistance resulted in inconsistency and relativism in the courts. If he was inconsistent, Jackson did not particularly care. As he told his biographer, "I don't think I am always consistent! I hope I'm not! I don't want to strive to present a picture other than it is."<sup>39</sup> Jackson was a man of paradoxes: "politically astute but quixotic, at times morally uncompromising, at other times pragmatic."<sup>40</sup>

Jackson would have agreed with Holmes that judicial opinions do not require "solemn fluffy speech."<sup>41</sup> Neither Jackson nor Holmes wrote dull opinions; both wrote with "the rhythm and looseness of oral discourse."<sup>42</sup> Many of Jackson's articles in bar journals and legal periodicals were originally speeches, and they retain that flavor. Much of his word choice seems dictated by sound as much as by sense. He was inordinately fond of alliteration and assonance. Such phrases as "the President's paper powers and his real powers"<sup>43</sup> and references to an interpretation "narrowed by a niggardly construction"<sup>44</sup> appear everywhere in his writing.

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<sup>38</sup> 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

<sup>39</sup> GERHART, *supra* note 4, at 304.

<sup>40</sup> WHITE, *supra* note 9, at 238.

<sup>41</sup> Letter from Oliver W. Holmes to Frederick Pollock (Apr. 6, 1924), in 2 HOLMES-POLLOCK LETTERS, *supra* note 1, at 132.

<sup>42</sup> Domnarski, *supra* note 32, at 255.

<sup>43</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

<sup>44</sup> *Id.* at 640.

Instead of the full stop of comma or semicolon, he often used a dash to capture the rapidity and timing of speech. For example, he remarked that a young lawyer could “help on an appeal — provided the client was still indignant, and solvent.”<sup>45</sup> He seldom missed the opportunity for parallel constructions such as the statement in *West Virginia Board of Education v. Barnette* that “the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.”<sup>46</sup> Jackson also liked the quick hard punch of a short sentence at the end of an argument. In *State Tax Commission v. Aldrich*, he ended a paragraph with this anapestic tetrameter: “Chaos serves no social end.”<sup>47</sup> Many of Jackson’s paragraphs end with short, simple sentences like the one that ends *American Communications Ass’n v. Douds*: “I think we must let his mind alone.”<sup>48</sup>

Alliteration, pauses rather than stops, short and incomplete sentences — these are all the characteristics of passionate oral speech. Jackson belonged to “the naturalistic school [of opinion writers]. He wrote as he talked, and he talked as he felt.”<sup>49</sup>

Yet Jackson did not write easily or quickly. The appearance of spontaneity in his writing and argument was the result of hard work. He merely intended to sound conversational. Jackson revised facts and arguments over and over in preparing for trial and in writing for the Court. The result was “presented in a simple and natural manner, one which had an engaging and quite

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<sup>45</sup> Robert H. Jackson, *Training the Trial Lawyer: A Neglected Area of Legal Education*, 3 STAN. L. REV. 48, 57 (1950).

<sup>46</sup> 319 U.S. 624, 641 (1943).

<sup>47</sup> 316 U.S. 174, 196 (1942) (Jackson, J., dissenting).

<sup>48</sup> 339 U.S. 382, 444 (1950).

<sup>49</sup> Frankfurter, *supra* note 3, at 938.

misleading appearance of spontaneity.”<sup>50</sup> And he did this work alone. Though he was not at his best as an administrator, when “he prepared for argument there came no requests for a digest of the record, no requests for supplementary research, no requests for consultation or advice on the presentation. It was his job and he did it — alone, thoroughly, . . . and with superlative skill.”<sup>51</sup>

Not everyone appreciated this carefully crafted casualness. In his dissent in *SEC v. Chenery Corp.*, he quoted contradictory passages from the majority opinion and ended by throwing up his hands: “I give up. Now I realize fully what Mark Twain meant when he said, ‘The more you explain it, the more I don’t understand it.’”<sup>52</sup> The *American Bar Association Journal* called this comment an “unimpressive informality.”<sup>53</sup> The informality continued, however.

Jackson constantly blended legal language and informal idiom. In fact, he was fond of the striking colloquialism that punctures the high ideal and brings it deliberately back to earth, as shown in his remark that Americans “want to talk, pray, think as we please — and eat regular.”<sup>54</sup> The startling contrast of noble words and realistic detail or common speech is funny. It is also effective as a device to shock the reader into an epiphany that what is true for the common man is true also for the judge, who is seemingly removed from common life. Such a sentence also illustrates another Jacksonian technique — putting the strong word at the end of the sentence, where it has the most punch. In *Duckworth v. Arkansas*, Jackson described the activities of a bootlegger who was

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<sup>50</sup> Gardner, *supra* note 6, at 442.

<sup>51</sup> *Id.* at 441.

<sup>52</sup> 332 U.S. 194, 214 (1947).

<sup>53</sup> *Judicial “Deference” to Administrative Agency “Experience,”* 33 A.B.A. J. 1121, 1122 (1947).

<sup>54</sup> 5 JACKSON’S SPEECHES No. 17 (1957).

running liquor across Arkansas to sell in Mississippi: "He asks us to hold that one provision of the Constitution guarantees him an opportunity to violate another. The law is not that tricky."<sup>55</sup>

Jackson's opinions are often funny, especially when the sarcasm is barely polite. In quoting the testimony of Senator Black to contradict the decision of Justice Black,<sup>56</sup> Jackson displayed what Schubert called his "sense of the jugular."<sup>57</sup> Jackson once compared the belief in "dispassionate judges" to belief in the Easter Bunny.<sup>58</sup> In *Everson v. Board of Education*, Jackson remarked that the majority's decision reminded him of Julia in Byron's *Don Juan*, who "whispering 'I will ne'er consent,' — consented."<sup>59</sup> Elsewhere, concurring reluctantly with the majority, Jackson said, "I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. . . . Never having been a Congressman, I am handicapped in that weird endeavor."<sup>60</sup> And in another dissent, Jackson warned the Court to be careful not to "walk into a well from looking at the stars" when it had held that preachers can claim protection of the government while attacking the beliefs of others.<sup>61</sup> In a case concerning Eugene Dennis, a member of the Communist party who objected to federal employees' being on his

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<sup>55</sup> 314 U.S. 390, 397 (1941) (Jackson, J., concurring).

<sup>56</sup> *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 177 (1945) (Jackson, J., dissenting).

<sup>57</sup> SCHUBERT, *supra* note 7, at 10 (noting that "[t]he phrase belongs to Holmes, who also possessed the instinct").

<sup>58</sup> *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

<sup>59</sup> 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

<sup>60</sup> *United States v. Public Utils. Comm'n*, 345 U.S. 295, 319 (1953).

<sup>61</sup> *Terminiello v. Chicago*, 337 U.S. 1, 14 (1949).

jury in a trial in the District of Columbia, Jackson explained that, “so long as accused persons who are Republicans, Dixiecrats, Socialists, or Democrats must put up with such a jury, it will have to do for Communists.”<sup>62</sup>

These are, for the most part, good-natured barbs. But often Jackson displayed anger as well as wit in his dissents, as shown in *Craig v. Harney*.<sup>63</sup> Despite the occasional temperamental outburst, Jackson wrote so “unlegally well”<sup>64</sup> that one of his opinions was published “intact, in the magazine section of the *New York Times*.”<sup>65</sup>

Jackson’s allusions to literature are too numerous to catalogue. Yet Jackson did not have much formal education — no college and only a year of law school. Even so, Gardner observes, “he became a remarkably well and broadly educated man.”<sup>66</sup> Others have commented on the unusual depth of his learning and its essentially untaught nature. According to Philip Halpern, Jackson “had a reservoir of learning, from which he drew gracefully and effortlessly.”<sup>67</sup> Jackson seemed to have no particular literary favorites from which he drew regularly, except perhaps the King James Bible and Shakespeare, but he quoted and alluded to both prose and poetry of American and English writers of most periods. He did not have a “trained” taste. As far as I have been able to discover, his writing contains no allusions to writers who were currently in vogue in the 1940s and 1950s, such as T.S. Eliot. But he obviously read

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<sup>62</sup> *Dennis v. United States*, 339 U.S. 162, 175 (1950) (Jackson, J., concurring).

<sup>63</sup> 331 U.S. 367, 396 (1947); *see supra* note 16 and accompanying text.

<sup>64</sup> FRED RODELL, *NINE MEN* 279 (1955).

<sup>65</sup> *Id.* at 282.

<sup>66</sup> Gardner, *supra* note 6, at 439.

<sup>67</sup> MEMORIAL PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT, 349 U.S. xxxv (1955).



widely and retained much of what he read. Sometimes he gave the sources of extensive quotations, but more often he paid his readers the compliment of assuming that their acquaintance with great literature and Western culture equaled his own. Jackson seldom used footnotes, though he did so more often than Holmes. But then, almost everybody did.

Jackson often alluded to the Bible. For example, he asserted that "what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."<sup>68</sup> He frequently referred to legal history. For instance, he told the story of Chief Justice Coke's admonition to King James that even the King is "under God and the Law."<sup>69</sup> In one case, he quoted from William James's *The Will to Believe*,<sup>70</sup> and in another, he summoned up Plato's cave.<sup>71</sup> In *Jordan v. De George*, he quoted a couplet from Butler's *Hudibras* to illustrate that when judges have too much freedom, they

Compound for Sins they are inclin'd to,  
By damning those they have no mind to.<sup>72</sup>

His most delicate and evocative allusion may be the reference to Gray's "Elegy Written in a Country Churchyard" in *West Virginia State Board of Education v. Barnette*.<sup>73</sup> He explained that there are

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<sup>68</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

<sup>69</sup> *Id.* at 655 n.27.

<sup>70</sup> *United States v. Ballard*, 322 U.S. 78, 93-94 (1944).

<sup>71</sup> *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (Jackson, J., concurring and dissenting).

<sup>72</sup> 341 U.S. 223, 242 n.15 (1951) (Jackson, J., dissenting).

<sup>73</sup> 319 U.S. 624 (1943).

“village tyrants as well as village Hampdens” among local and state boards of education.<sup>74</sup> Here again, he assumed that his readers did not need a footnote.

Jackson obviously wrote to be read — and not just by lawyers and judges. He intended to charm his reader. He intended to display his ability, his knowledge, his cleverness, his wit. Jackson’s writing demonstrates his ability to break the boundaries of the judicial opinion, creating a readable piece of prose within a form that does not often lend itself to readability. His unwillingness to disappear into bureaucratic impersonality, his eagerness always to reveal himself as a person rather than as a judge, charms readers, although it must infuriate those who want to preserve the myth of judicial detachment.

Max Lerner, himself a stylist of taste and elegance, said that Jackson was “the best stylist on the Court, and his opinions make the best literature, especially when he taunts his colleagues with some allusions to Byron or Demosthenes, and drives home his point by reducing their position to an absurdity.”<sup>75</sup> Jackson had what Freund called “an Elizabethan gusto for the swordplay of words. If his style was like pearls, they were occasionally . . . pearls dissolved in vinegar.”<sup>76</sup> He was a real person “escaping into the open,” and like most real things breaking loose, his writing produced both beauty and sting.

But after all, “a judge, like anybody else, is the better for being human — for having sympathy[,] . . . humor and a sense of beauty. And when these qualities exist in a man, some hint of them will be disclosed even by the style in which he draws up a judicial

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<sup>74</sup> *Id.* at 638; see Charles Alan Wright, *Literary Allusion in Legal Writing: The Haynsworth-Wright Letters*, 1 SCRIBES J. LEGAL WRITING 1, 3-4 (1990).

<sup>75</sup> Max Lerner, *The Supreme Court*, 8 HOLIDAY 73 (Feb. 1950).

<sup>76</sup> SCHUBERT, *supra* note 7, at 10 (quoting Paul Freund).

opinion.”<sup>77</sup> Jackson was not always a perfect gentleman; he would have been boring if he had been. According to White, when Jackson became involved in conflict with other judges, “[c]andor became a counterweight to dignity; pithiness an antidote to reverence, and Jackson the man became a difficulty for Jackson the judge.”<sup>78</sup> Maybe so. But what harmed Jackson politically did not necessarily harm his writing. To play it safe in his writing would have been to risk losing the fire. His judicial pronouncements do not sound safe. They do not sound lofty or assured or irrefutable. Jackson sounds, instead, as if he recognized the minutiae and chaos of life all too well and was attempting to create in his writing “a momentary stay against confusion”<sup>79</sup> while preserving the right to laugh at the mess he and others were making.

That seems to be a reasonable, if dangerous, stance to take, especially for a judge. An editor would have been well advised to let his words alone.

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<sup>77</sup> Henry C. Merwin, *Style in Judicial Opinions*, 9 GREEN BAG 521, 525 (1897).

<sup>78</sup> WHITE, *supra* note 9, at 239.

<sup>79</sup> Robert Frost, *The Figure a Poem Makes*, in *SELECTED PROSE OF ROBERT FROST* 17, 18 (H. Cox & E. Lathem eds. 1966).

