



# The Yale Law Journal

RECEIVED

DEC 01 1993

U.S.D. LAW LIBRARY

## Articles

In a Different Register:

The Pragmatics of Powerlessness in Police Interrogation

*Janet E. Ainsworth*

Autonomous Lawmaking:

The Case of the "Gypsies"

*Walter Otto Weyrauch & Maureen Anne Bell*

Comment by

*W. Michael Reisman*

## Essays

The Jurisprudence of Justice Byron White

*Allan Ides*

Lawsuit, Shmawsuit

*Alex Kozinski & Eugene Volokh*

## Notes

Campaign Finance Reform and the

Return of *Buckley v. Valeo*

Who's Being Greedy? A Theoretical and Empirical Examination of  
Holdouts and Coercion in Debt Tender and Exchange Offers

Challenging Criminal Disenfranchisement

Under the Voting Rights Act: A New Strategy

The Persistence of Prejudice: Process-Based Theory  
and the Retroactivity of the Civil Rights Act of 1991

Volume 103

November 1993

Number 2

# Lawsuit, Shmawsuit

Alex Kozinski<sup>†</sup> and Eugene Volokh<sup>††</sup>

Searching the MEGA file in LEXIS reveals that “chutzpah” (sometimes also spelled “chutzpa,” “hutzpah,” or “hutzpa”<sup>1</sup>) has appeared in 112 reported cases. Curiously, all but eleven of them have been filed since 1980. There are two possible explanations for this. One is that during the last thirteen years there has been a dramatic increase in the actual amount of chutzpah in the United States—or at least in the U.S. legal system. This explanation seems possible, but unlikely.

The more likely explanation is that Yiddish is quickly supplanting Latin as the spice in American legal argot. As recently as 1970, the Second Circuit not only felt the need to define “bagels”; it misdefined them, calling them “hard rolls shaped like doughnuts.”<sup>2</sup> All right-thinking people know good bagels are rather soft.<sup>3</sup> We’ve come a long way since then. The first reported use of “chutzpah” was in 1972, in an opinion of the Georgia Court of Appeals.<sup>4</sup> We’re happy to say it was quite apt: breaking into a sheriff’s office to steal guns qualifies as chutzpah in our book. The four times “chutzpah” was used in published opinions in 1973, the courts didn’t even bother to give a definition.<sup>5</sup> And, as we said, it’s been used over a hundred times since 1980.

---

<sup>†</sup> Judge, Ninth Circuit Court of Appeals, Pasadena, California.  
<sup>††</sup> J.D., UCLA, 1992.

1. Though basically a Germanic language, Yiddish is written in the Hebrew alphabet. This is why Yiddish words in English often have several alternate spellings.

2. *NLRB v. Bagel Bakers Council*, 434 F.2d 884, 886 (2d Cir. 1970).

3. Day-old bagels are rather hard, but right-thinking people do not eat day-olds, even when they are only 10 cents each.

4. *Williams v. State*, 190 S.E.2d 785, 785 (Ga. Ct. App. 1972); see also Ralph Slovenko, *Plain Yiddish for Lawyers and Judges*, TRIAL, June 1992, at 86; Gerald F. Uelmen, *Plain Yiddish for Lawyers*, A.B.A. J., June 1985, at 78. See generally ALAN M. DERSHOWITZ, CHUTZPAH (1991); Lillian M. Feinsilver, *A Lot of Hutzpah*, 9 ENGLISH TODAY 43 (1993).

The earliest reported case we’ve found that uses a Yiddish word (other than in a name or a literal quote) is *In re Kladneve’s Estate*, 234 N.Y.S. 246, 247 (Surrogate’s Ct. 1929), which describes Kladneve as “what is called in Yiddish a ‘schmorer.’” This is a puzzle. To the best of our knowledge, there’s no such Yiddish word, and “schmorer”—the closest word that might fit—means “moocher,” which doesn’t make a lot of sense in context, and also isn’t a very nice thing to say about the recently departed.

We know of no other cases before the 1970’s except *Robison v. Robison*, 394 P.2d 876, 878 (Utah 1964) (Henriod, C.J., dissenting); *Zannone v. Polino*, 155 N.Y.S.2d 836, 837 (City Ct. 1956); and *In re Bodus’ Will*, 36 N.W.2d 926, 927 (Wis. 1949), all involving kibitzers.

5. *Switkes v. United States*, 480 F.2d 844, 851 (Ct. Cl. 1973) (Nichols, J., dissenting); *Weir v. United States*, 474 F.2d 617, 620 (Ct. Cl. 1973) (described in *Switkes* as awarding a “chutzpah championship”); *In re Sarelas*, 360 F. Supp. 794, 798 (N.D. Ill. 1973); *Pistorio v. Zoning Bd.*, 302 A.2d 614, 618 (Md. 1973).

During the same period, the word "temerity" (a woefully inadequate substitute) was used only about two hundred times, and "unmitigated gall" a mere ten.

Other Yiddish words have had tougher sledding. Variations on "kibitz" have appeared in ten cases,<sup>6</sup> "maven" in four,<sup>7</sup> "klutz" in three.<sup>8</sup> "Schlemiel" (also spelled "shlemiel") comes up five times, but one is in a quote from testimony, which doesn't count, one is in the name of a book and two are descriptions of Woody Allen's screen persona.<sup>9</sup> The only bona fide use was, believe it or not, in another Georgia opinion (and not by the same judge, either).<sup>10</sup> "Schlimazel" is nowhere to be seen, even when spelled as "schlimazl," "shlimazel," "shlimazl," "schlemazl," "shlemazel," "schlemazel," or "shlemazl." "Schmooze" appears only once, in—you guessed it—a Georgia case.<sup>11</sup> Unfortunately, the judiciary of that great state stumbled this time, both misusing the word and misspelling it as "schmoose." We concede that *Webster's* permits this spelling,<sup>12</sup> but what do they know from Yiddish?<sup>13</sup>

There is, of course, one obvious question that must be on every reader's mind at this juncture: what about "schmuck"? Regrettably, we were stymied

6. *Gacy v. Welborn*, 1993 U.S. App. LEXIS 7650, \*32 (7th Cir. Apr. 12, 1993); *Bachowski v. Brennan*, 413 F. Supp. 147, 150 (W.D. Pa. 1976); *In re Finkel*, 1993 Bankr. LEXIS 264, \*13 n.2 (Bankr. W.D. Tex. Jan. 8, 1993); *People v. Oliver*, 241 Cal. Rptr. 804, 810, 811 (Ct. App. 1987); *People v. Holtzman*, 294 N.E.2d 708, 711 (Ill. App. Ct. 1973) (Smith, J., dissenting); *State v. Davis*, 515 S.W.2d 181, 182 (Mo. Ct. App. 1974); *Galbraith v. State*, 503 P.2d 1192, 1197 (Wyo. 1972); and cases listed *supra* note 4.

*Zannone v. Polino*, 155 N.Y.S.2d 836, 837 (City Ct. 1956), is a case with a moral, a case of kibitzing at a card game turning into a knife fight and a lawsuit. Boys and girls, take note!

7. *Eklaf Marine Corp. v. United States*, 762 F.2d 200, 203 (2d Cir. 1985); *Nova Ribbon Prods., Inc. v. Marchand*, 1992 U.S. Dist. LEXIS 13123, \*27 (E.D. Pa. Aug. 21, 1992); *Valenti v. Mitchell*, 790 F. Supp. 534, 543 (E.D. Pa. 1992); *In re Love*, 61 B.R. 558, 558 (Bankr. S.D. Fla. 1986) (an opinion written mostly in rhyme, as in a famous poem the name of which rhymes with "maven"); *Arlean Farmer v. Supermarkets Gen. Corp.*, 22 Phila. 260, \*4 n.5 (Pa. 1991).

8. *Thomas v. City of Evanston*, 610 F. Supp. 422, 429 (N.D. Ill. 1985); *State v. American Equitel Corp.*, 395 N.E.2d 1355, 1368 (Ohio C.P. 1979); *Miffleton v. State*, 777 S.W.2d 76, 82 (Tex. Crim. App. 1989) (quoting trial court); see also *Klopp v. Wackenhut Corp.*, 824 P.2d 293, 297 (N.M. 1992) (quoting one of the parties as contending "it had no duty to design the security station 'for klutzes and total idiots'").

9. Woody Allen's characters have always struck us more as nebbishes than schlemiels. "A [schlemiel] is always knocking things off a table; the [nebbish] always picks them up." LEO ROSTEN, *THE JOYS OF YIDDISH* 349 (1968).

10. *Redwing Carriers, Inc. v. Knight*, 239 S.E.2d 686, 691 (Ga. Ct. App. 1977).

11. *MCG Dev. Corp. v. Bick Realty Co.*, 230 S.E.2d 26, 27 (Ga. Ct. App. 1977). The opinion starts with, "The right to amend is as broad as the Atlantic Ocean and as saving as the power of salvation," a nifty line, even if mere English. Georgia also brings us "tsoriss," *Banks v. State*, 209 S.E.2d 252, 253 (Ga. Ct. App. 1974) (describing "appellant's tsoriss"), "shammes," *State v. Koon*, 211 S.E.2d 924, 925 (Ga. Ct. App. 1975), and "gut gezacht," *Whitner v. Georgia State Univ.*, 228 S.E.2d 200 (Ga. Ct. App. 1976). All four of these come from Judge Clark, the same one who first used "chutzpah."

See also *United States v. Cangiano*, 491 F.2d 906, 915 (2d Cir. 1974) (Oakes, J., dissenting) ("schlock"); *United States v. Scott*, 757 F. Supp. 972, 976 (E.D. Wis. 1991) ("no-goodnik"); *United States v. Mayersohn*, 335 F. Supp. 1339, 1354 (E.D.N.Y. 1971) ("tzimmes"); *Lerner v. Brin*, 608 So. 2d 519, 519 (Fla. Dist. Ct. App. 1992) ("rachmones"); *State v. Stephens*, 466 N.W.2d 781, 790 (Neb. 1991) (Shanahan, J., dissenting) ("Better the majority should worry about its umfarshdenish of Rule 404(2), not Stephens' chutzpah."); cf. David Margolick, *At the Bar*, N.Y. TIMES, June 26, 1992, at B8 (motion using the word "dreck" arouses judge's ire).

12. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2030 (Philip B. Gove et al. eds., 1981).

13. Note 1, *supra*, notwithstanding, there's the right way of doing these things and then there's the wrong way.

in our schmuck search by the fact that many people are actually named Schmuck.<sup>14</sup> This is an unfortunate circumstance for researchers (and even worse for the poor Schmucks themselves). We therefore can't report on the degree to which schmuck has worked its way into legal English, which is too bad, because schmucks are even more common in courtrooms than schlemiels, schmoozing, and chutzpah. We can, however, mention that there's a U.S. Supreme Court case named *Schmuck v. United States*.<sup>15</sup> For what it's worth, the petitioner was a used-car dealer.<sup>16</sup> And there's also *People v. Arno*,<sup>17</sup> where the first letters of each sentence in a footnote spell out "schmuck" (apparently referring to the dissent). Harsh.<sup>18</sup>

Just as we can't get much joy when a court uses "schmuck" to refer to a person named Schmuck, we also aren't very excited when it uses "kosher" to describe a deli or a piece of chicken. That "kosher" appears over 800 times in LEXIS is therefore not particularly impressive. But it's clear that "kosher" is used figuratively in quite a few cases, from *United States v. Erwin*'s insistence that the law "tell the felon point blank that weapons are not kosher"<sup>19</sup> to *Texas Pig Stands, Inc. v. Hard Rock Cafe International, Inc.*, which concludes that "though not entirely kosher, Hard Rock's actions were not . . . swinish."<sup>20</sup> *Pig Stands* is somewhat atypical, though, as its reference to "kosher" is just one in a series of pork jokes.

Yiddish has also begun to appear in defamation cases. A 1972 New York case concluded that calling the food at a restaurant "ground-up schmutz" wasn't actionable because it was only opinion.<sup>21</sup> An Arizona court recently held the same about calling a building development a "cockamamie idea,"<sup>22</sup> as did an Illinois court about calling a business a "schlock operation."<sup>23</sup> The Illinois trial court consulted as a reference Leo Rosten's *The Joys of Yiddish*; it also reviewed the case law of New York, California, Illinois, and

---

14. The same happens to be true of "putz" and of "mensch." We'd much rather be named "mensch" than "schmuck." Oddly, though, a search for NAME(SCHMUCK) found 59 cases and NAME(MENSCH) found only 43 cases. Perhaps this is because there are more schmucks than mensches in the world; but wouldn't the real schmucks change their names so as to better fool people, and real mensches change theirs out of modesty? Besides, the true schmuck-mensch ratio is much higher than 59 to 43.

15. 489 U.S. 705 (1989).

16. Another little surprise: searching for "goy" revealed dozens of people named "Goy." How come? Why would a Jew be named Goy? And why would a goy call himself a goy? Cf. *Gentile v. State Bar*, 111 S. Ct. 2720 (1991): Go figure.

17. 153 Cal. Rptr. 624, 628 n.2 (Ct. App. 1979) (Thompson, J.).

18. See *id.* at 644 n.14 (Hanson, J. dissenting and taking umbrage).

19. 902 F.2d 510, 513 (7th Cir. 1990).

20. 951 F.2d 684, 698 (5th Cir. 1992).

21. *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 334 N.Y.S.2d 325 (Sup. Ct. 1972). In a different vein, a 1911 New York case involved a Yiddish dying declaration. *People v. Falletto*, 96 N.E. 355 (N.Y. 1911).

22. *Amcor Inv. Corp. v. Cox Ariz. Publications Inc.*, 764 P.2d 327, 329 (Ariz. Ct. App. 1988).

23. *Dauw v. Kennedy & Kennedy, Inc.*, 474 N.E.2d 380, 381 (Ill. App. Ct. 1984).

Florida (and why not Georgia?) to see if the word "schlock" had ever been the subject of a libel action.<sup>24</sup>

Like many other historical inquiries, etymological questions often have no clear, unambiguous answer.<sup>25</sup> Is "kosher," for instance, even a Yiddishism at all? Was it borrowed from Hebrew via Yiddish, or directly from Hebrew? "Put the kibosh on" can be found in two cases,<sup>26</sup> but while some authorities (including our ears) claim it's Yiddish, the better view seems to be that it's not.<sup>27</sup> "Brouhaha" has been used in more than 80 cases, but it's unclear whether it is in fact Yiddish.<sup>28</sup> "Glitch" appears in over 130 cases, but it might have been borrowed either from Yiddish or German (a difficult question, since the languages are so similar). Moreover, perhaps because it's been in general use in engineering lingo for decades, it may now be no more a Yiddishism than "robot" is a Czechism. Finally, "cockamamie"<sup>29</sup> is unknown in European Yiddish, and has developed entirely in America—is it a Yiddishism, or an Americanism that happened to originate with American Jews?

The spread of legal Yiddish is often inadvertent; for every case that self-consciously cites Leo Rosten, there are ten where a word seems to be used just because it's the right word. One of the authors of this very Essay has—entirely unwittingly—done this: the dissent from denial of rehearing en banc in *White v. Samsung Electronics America, Inc.*<sup>30</sup> contains the only use of the word "schtick" in a reported case. (As it happens, the law clerk who put it in was Irish Catholic.) And it was only by accident that the authors learned of the novelty of this feat; a friend wrote to say he was surprised to see the word in a published opinion. What's so surprising? How else would you say it?

Where all this will go from here is hard to say. "Chutzpah" is firmly ensconced, and, we're happy to say, usually spelled right. *Ch's* are always

24. *Id.* at 382.

25. *Cf., e.g.,* *Lee v. Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting); *id.* at 2667 (Souter, J., concurring).

26. *Sanjour v. EPA*, 984 F.2d 434, 461 (D.C. Cir. 1993); *Shannon v. Shannon*, 965 F.2d 542, 547 (7th Cir. 1992).

27. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1361 (2d ed. 1934), says it's "perhaps of Yiddish origin," and 8 OXFORD ENGLISH DICTIONARY 416 (2d ed. 1989), says "[o]rigin obscure," but "stated to be Yiddish or Anglo-Hebraic." Leo Rosten and William Safire are unsure, LEO ROSTEN, *supra* note 9, at 177-79; William Safire, *Gun That Rumor Down*, N.Y. TIMES, Apr. 9, 1989, § 6, at 18. So is WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1240 (3d ed. 1981). Another authority has suggested it comes from Irish. *See, e.g.,* NEW DICTIONARY OF AMERICAN SLANG 244 (Robert L. Chapman ed., 1986) (but conceding the "origin [is] unknown, and very extensively speculated upon"). Etymology is difficult business.

28. *Compare Comes a Schlepper*, MONTREAL GAZETTE, Apr. 24, 1992, at B2 with THE BARNHART DICTIONARY OF ETYMOLOGY 120 (Robert K. Barnhart ed., 1988).

29. *See In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1318 (2d Cir. 1988) (Lumbard, J., dissenting) (spelled "cockamamy"); *Phillips v. Virginia Bd. of Medicine*, 749 F. Supp. 715, 718 (E.D. Va. 1990); *People v. Foster*, 7 Cal. Rptr. 2d 748, 757 (Ct. App. 1992); *People v. Barrick*, 177 Cal. Rptr. 532, 538 (Ct. App. 1981) (Gardner, P.J., dissenting); *Allen v. Jones*, 163 Cal. Rptr. 445, 452 (Ct. App. 1980) (Gardner, P.J., concurring).

30. 989 F.2d 1512, 1517 (9th Cir. 1993).

better than mere *H*'s, and the *h* at the end gives it just the right touch. "Kosher," "kibitz," and maybe "maven" and "klutz" are looking good. The "sch" words are iffier, but we think they've got a future. Others, like "nudnik" and "meshugge," haven't made a dent, though they deserve better.

We return then to the beginning, to chutzpah. The most famous definition of "chutzpah" is, of course, itself law-themed: chutzpah is when a man kills both his parents and begs the court for mercy because he's an orphan.

But there's another legal chutzpah story. A man goes to a lawyer and asks: "How much do you charge for legal advice?"

"A thousand dollars for three questions."

"Wow! Isn't that kind of expensive?"

"Yes, it is. What's your third question?"

Chutzpah.