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## ON DISSPLACEMENT, OR THE DISSING OF PLACES

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Bent Vestergaard, a Danish accountant, attended a tax seminar on the island of Crete. Naturally, he deducted his expenses. However, the Danish National Tax Tribunal denied the deductions, in effect, because nothing serious ever happens on the island of Crete.<sup>1</sup> On appeal, the decision was reversed, and the deductions allowed.<sup>2</sup> The European Court of Justice also held for the taxpayer, noting that to do otherwise would be to countenance discrimination against a member state.<sup>3</sup>

The Bent Vestergaard case is at least mildly embarrassing to the nation of Denmark.<sup>4</sup> However, if it could be shown that

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1. Perhaps it is best to clear something up at the outset. A resident of Crete is a Cretan. The word “cretin,” which has indeed appeared in judicial decisions as a derogatory term, such as in *Lynn v. Roberts*, No. 03-3464-JAR, 2005 WL 3087841, at \*5 (D. Kan. Nov. 1, 2005), *Brodetski v. Duffey*, 141 F. Supp. 2d 35, 40 (D.D.C. 2000), or *Cumbest v. State*, 456 So. 2d 209, 219 (Miss. 1984), has an entirely separate derivation.

2. Vestergaard v. Ministry of Taxation, VLD (Judgment by the Western Regional Court) of 5/3/1995, 8., 1. B-2013-93. I am grateful to Wake Forest University for paying to have this decision translated from the original Danish. I have been associated with Wake Forest for quite a long time. Accordingly, Wake Forest knew enough not to ask why I wanted the translation, and I knew enough not to tell them.

3. Case-55/98, *Skatteministeriet v. Vestergaard*, 1999 E.C.J. 7641, 7667. The United States handles these matters in a more pragmatic, although less principled, manner. Pursuant to Internal Revenue Code section 274(h), expenses of attending certain conventions outside the “North American area” are nondeductible unless the taxpayer manages to jump through a number of further, unpleasant hoops. See 26 U.S.C. § 274(h) (2000). For certain Caribbean countries, “North American area” is defined in section 274(h)(6) as any country that has signed a tax treaty with us. *Id.* § 274(h)(6). For a handy list of the countries, see Rev. Rul. 2003-109, 2003-2 C.B. 839. The message: you play ball with us on the treaty thing and you can get rich on our bogus conventioners.

4. Denmark itself has been on the receiving end of displacement since Shakespeare. Perhaps it is some consolation to them that the U.S. Tax Court did allow a doctor to deduct a \$150 seminar fee for twenty-eight hours of medical workshops, offered during a fourteen-day Scandinavian cruise, which included ports in Denmark. The \$1598 cost of the cruise, sadly, was

Denmark is not alone in committing these judicial displacements, then perhaps the sting could be lessened. Indeed, Denmark is not alone.<sup>5</sup>

There have been quite a few instances of displacement in American judicial opinions. However, most of them were from the parties, not the court. For example, criminal defendants seeking a change of venue in order to get a fair trial are often less than complimentary about the original location.<sup>6</sup> Similarly, immigrants seeking asylum have been known to make disparaging remarks about the home country.<sup>7</sup> Employment discrimination lawsuits often contain allegations that the supervisor insulted the plaintiff, perhaps calling him a “Goddamn Sicilian,”<sup>8</sup> a “stupid Polack,”<sup>9</sup> or even a “terrorist, a hijacker, an Arab, an afghan, a cave-dweller, a camel driver, an immigrant, and a wetback.”<sup>10</sup>

There is flat-out libel, such as when a Louisville, Kentucky newspaper claimed that the judicial system of Kentucky had outdistanced even Mississippi and Georgia in “legal lynchings.”<sup>11</sup> One can also impugn the credibility of a witness by disparaging his place of origin. A Missouri State Attorney argued, “How can one believe a person who is a bootlegger, a poker player, a thief, one who lives in the hell hole of Butler County?”<sup>12</sup>

Finally, there is the international law doctrine that, if a claim arises in a foreign jurisdiction, the law of that jurisdiction must be respected, unless it is a region “having no law that civilized

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nondeductible. *Holswade v. Comm’r*, 82 T.C. 686, 703 (1984).

5. Admittedly, once I get past the pastry, I have no feelings either way about Denmark. I just like a good challenge.

6. *See, e.g., Ex parte Ray*, 183 N.W. 774 (Mich. 1921) (holding that a Negro can indeed get a fair trial in Georgia).

7. *See, e.g., Dawoud v. Gonzales*, 424 F.3d 608 (7th Cir. 2005) (Egypt); *Ssali v. Gonzales*, 424 F.3d 556 (7th Cir. 2005) (Uganda).

8. *Garone v. United Parcel Serv., Inc.*, 436 F. Supp. 2d 448, 453 (E.D.N.Y. 2006).

9. *Rozskowiak v. Vill. of Arlington Heights*, No. 01 C 5414, 2004 WL 816432, at \*3 (N.D. Ill. Mar. 26, 2004). Curiously, there was some confusion as to whether the plaintiff’s supervisor had called the plaintiff a stupid Polack or whether the plaintiff, in explaining an error he had committed, had called himself a dumb Polack. *Id.* Perhaps that explains why he lost.

10. *Omari v. Waste Gas Fabricating Co., Inc.*, No. Civ.A. 04-796, 2005 WL 545294, at \*1 (E.D. Pa. Mar. 4, 2005). Actually, the plaintiff was Algerian. *Id.*

11. *Cole v. Commonwealth*, 300 S.W. 907, 909 (Ky. 1927). Speaking of Kentucky, perhaps it is best that Assistant U.S. Attorney Kenneth Taylor apologized for calling potential jurors in eastern Kentucky “illiterate cave dwellers.” *The Sorriest of Sorries*, N.Y. TIMES, Apr. 2, 2006, Week in Review, at 14.

12. *State v. Richmond*, 12 S.W.2d 34, 34 (Mo. 1928).

countries would recognize as adequate.”<sup>13</sup> The temptation to diss the foreign jurisdiction is obvious. In one case, counsel, whose client had been involved in an automobile accident in Saudi Arabia, argued that that country has “no law or legal system,’ and no courts open to plaintiff, but only a dictatorial monarch who decides according to his whim.”<sup>14</sup>

He lost.

Cases in which the court itself does the dissing are harder to find. Some judges have peculiar notions about the dignity of the office. Also, proper displacement requires a particular skill, one that not all judges have.<sup>15</sup>

When judges do diss, they often prefer to do it indirectly. Displacement by comparative inference can be effective. For example, it can punch up an otherwise drab opinion to compare allegedly horrible conditions to “Turkish prison[s],”<sup>16</sup> or, better yet, to the “Black Hole of Calcutta.”<sup>17</sup> Similarly, a North Carolina judge

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13. *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 478 (1912).

14. *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 545 (2d Cir. 1956).

15. Displacement needs to be done sparingly. Paul Theroux, in his travel memoirs, manages to diss every place he visits, so that, when he is finished, he simply comes across as a whiner. See PAUL THEROUX, *THE GREAT RAILWAY BAZAAR* (1975); PAUL THEROUX, *THE OLD PATAGONIAN EXPRESS* (1979).

It is better for the dissing to be efficient. Consider, for example, the statement of Ohio Representative Sidney Edgerton on the floor of the House of Representatives in 1861 that the “liberty of South Carolina’ was equivalent to the ‘despotism of Austria,” thus dissing both places in a single phrase. *Quoted in* MICHAEL KENT CURTIS, *FREE SPEECH, THE PEOPLE’S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 284 (2000).

Perhaps my all-time favorite example of displacement is in WILLIAM LEAST HEAT-MOON, *BLUE HIGHWAYS* (1982), a chronicle of the author’s travels around the United States, driving only on rural roads. Early on, Moon tests the claim that there is absolutely nothing to see in the western desert by stopping there for an hour and compiling a list of what he does, in fact, see. The list goes on for more than a page. *Id.* at 149-50. Having thus established his bona fides as an extremely sensitive observer, capable of ferreting out anything about a place that is the least bit interesting, his confession, more than 100 pages later, that he is bored to tears by the “appallingly featureless yonder of North Dakota,” is far more devastating. *Id.* at 274.

16. *United States v. Stockton*, 968 F.2d 715, 721 (8th Cir. 1992) (Bright, J., concurring). For a more direct dissing of Turkish prisons, see *R. v. Immigration Appeal Tribunal ex parte Yildiz*, (1999) Queen’s Bench Div. CO/0102/98, available at CO/0102/98 (Lexis). For dissing of Turkish prisons by counsel, see *United States v. Vasquez*, 1997 CCA LEXIS 81, at \*15 n.3 (A.F. Ct. Crim. App.).

17. *Pritchett v. Page*, No. 99 C 8174, 2000 WL 1129891, at \*7 (N.D. Ill. Aug. 9, 2000) (quoting *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992)); *Del Raine v. Williford*, 32 F.3d 1024, 1037-38 (7th Cir. 1994) (quoting *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992)). The parties can play this game, too. In *State v. Raglin*, 699 N.E.2d 482, 495 (Ohio 1998), the court-appointed

complained that the homicide rate in his state was “greater even than in Sicily.”<sup>18</sup> Presumably, none of these judges were hoping to make friends in Turkey, India, or Sicily.

Another form of indirect dissing can occur in cruel and unusual punishment cases. In *Trop v. Dulles*,<sup>19</sup> the Supreme Court held that expatriation for desertion from the army was cruel and unusual. Justice Warren commented:

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . . The United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.<sup>20</sup>

Surely, neither the Philippines nor Turkey would have been pleased by the attention.

Similarly, Justice White, in *Weems v. United States*,<sup>21</sup> made passing reference to historical instances of torture in England, and then commented that, pursuant to ancient Roman law:

[A] parricide was punished by being sewed up in a leather sack with a live dog, a cock, a viper, and an ape, and cast into the sea. These punishments may properly be termed cruel, but happily the more humane spirit of this nation does not permit such punishments to be inflicted upon criminals.<sup>22</sup>

Fortunately, any Englishman or Roman who might have been offended by these references was long dead.

In addition to indirection, judges are also more comfortable about the displacement if they are, in fact, dissing their own place. Perhaps they think it makes them appear to be humble and self-effacing. Consider the North Carolina judge who wrote, “There is nothing that is more subversive of good government than lynchings, yet more men have been executed in this mode in North Carolina in the last 14 years than by lawful process, and some years twice as

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psychologist testified that the defendant’s living conditions while he was growing up were similar to those in Rio de Janeiro or India. Similarly, in *The Oregon*, 133 F. 609, 626-27 (9th Cir. 1904), a first class passenger “testified that she suffered extremely from hunger and the filth on the vessel; [and] that the little children looked as bad as the starving children of India.”

18. *State v. Neville*, 95 S.E. 55, 58 (N.C. 1918).

19. 356 U.S. 86 (1958).

20. *Id.* at 102-03 (citation omitted).

21. 217 U.S. 349 (1910).

22. *Id.* at 406 (White, J., dissenting).

many.”<sup>23</sup>

That very same judge, in yet another opinion, quoted an unnamed article in a “legal journal of prominence” that characterized North Carolina and certain other states as being “commonwealths of retarded development.”<sup>24</sup>

When it comes to out and out judicial displacement, however, nothing quite compares to Judge Musmanno’s rant in *Estate of Belemecich*.<sup>25</sup> In upholding the Iron Curtain Act as not violative of the treaty between the United States and the Republic of Yugoslavia, he declared:

All the known facts of a Sovietized state lead to the irresistible conclusion that sending American money to a person within the borders of an Iron Curtain country is like sending a basket of food to Little Red Ridinghood in care of her “grandmother.” It could be that the greedy, gluttonous grasp of the government collector in Yugo Slavia does not clutch as rapaciously as his brother confiscators in Russia, but it is abundantly clear that there is no assurance upon which an American court can depend that a named Yugo Slavian individual beneficiary of American dollars will have anything left to shelter, clothe and feed himself once he has paid financial involuntary tribute to the tyranny of a totalitarian regime.<sup>26</sup>

It doesn’t get much better than that. Unless, of course, you consider it topped by Justice Scalia’s warnings about giving too much (or any?) respect to the “views of foreign[ers].”<sup>27</sup> Only Justice Scalia, in his stated distaste for the “so-called international community,”<sup>28</sup> can manage to diss the entire world with such panache.

Thus, the Danes can rest easy, for they are surely not alone. In at least this respect, we stand with them, shoulder to shoulder. Further, we Americans should know that, if we are searching for

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23. *State v. Cole*, 44 S.E. 391, 396 (N.C. 1903) (Clark, C.J., dissenting).

24. *State v. Cameron*, 81 S.E. 748, 751 (N.C. 1914). North Carolina, situated as it is between Virginia and South Carolina, is “a valley of humility between two mountains of conceit.” Actually, this displacement is all the more delicious because it is secondhand. The phrase was initially coined by Benjamin Franklin, but he was referring to New Jersey, situated as it is between New York and Philadelphia.

25. 192 A.2d 740 (Pa. 1963).

26. *Id.* at 742-43; *see also* *Granite Valley Hotel Ltd. P’ship v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 167 (Minn. 1997) (Randall, J., concurring) (“In former Yugoslavia, just shut up and just listen.”).

27. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

28. *Id.* at 622.

something rotten, we can find it a lot closer to home than Denmark.<sup>29</sup>

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29. I have focused upon judicial attacks. It is only fair to point out that judges can occasionally defend places (antidissplacement?) as well. Consider Judge Samuel Kent's reaction to a motion to transfer venue from Galveston to Houston because Galveston did not have a commercial airport. "Defendant should be assured that it is not embarking on a three-week long trip via covered wagons when it travels to Galveston. Rather, Defendant will be pleased to discover that the highway [from the Houston Airport] is paved and lighted all the way to Galveston, and thanks to the efforts of this Court's predecessor, Judge Roy Bean, the trip should be free of rustlers, hooligans, or vicious varmints of unsavory kind." *Smith v. Colonial Penn. Ins. Co.*, 943 F. Supp. 782, 784 (S.D. Tex. 1996). Then again, there is Judge Walker's cryptic comment: "'California' is a state, not a state of mind." *Estate of Condon*, 64 Cal. Rptr. 2d 789, 792 (Ct. App. 1997).