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Snakes, Bananas and Buried Treasure: The Case For Practical Jokes

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Abstract

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Frame your mind to mirth and merriment
Which bars a thousand harms and lengthens life.

- William Shakespeare, *The Taming of the Shrew*

I. INTRODUCTION

We all appreciate a good joke. Humor is good for the soul. A well-executed practical joke provides the greatest thrill of all. To everyone, that is, save the victim. Most practical joke victims take their humiliation in stride. They laugh along with the others, knowing that sooner or later they will exact revenge.

Occasionally, however, a brilliantly planned scheme goes awry. The victim, failing to find the joke funny, refuses to laugh. Or worse, he brings suit. The courts must then become the arbiters of comedic value. When is a joke funny? When does it constitute actionable conduct? And when does it simply make a mockery of the legal system? Such problems arise when the courts encounter the blurry line between joke and tort.

For decades, the courts have debated a plethora of practical joke issues. Astonishingly, little has been written on the subject. No casebook exists on the law of humor, and no commentator has directly addressed practical joke jurisprudence. This gap in legal scholarship must be filled. So let us begin.

II. ANALYSIS OF CASE LAW

A. *In Search of Buried Treasure*

The year is 1920. The place is the old South. Imagine, if you will, a Justice on the Louisiana Supreme Court presented with the facts of

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Nickerson v. Hodges,¹ which follow. The petitioners are the heirs of the late Carrie E. Nickerson (Miss Nickerson). Miss Nickerson brought the original suit against the respondents/perpetrators seeking \$15,000 in damages for financial outlay, loss in business, mental and physical suffering, humiliation, and injury to reputation and social standing.² Plaintiff, gold-digging Miss Nickerson, had previously visited a fortune teller who informed her that her relatives had buried a pot of gold. Miss Nickerson received a map showing the supposed location of the treasure and began digging (with the help of a few relatives). Defendants Minnie Smith, William "Bud" Baker, and H.R. Hayes, annoyed by the treasure hunt, decided to intervene in the name of humor. As an April Fool's joke, they buried a sealed bucket containing rocks and dirt near the site of the dig. They attached a predated note directing the finder of the pot "not to open it for three days and to notify all the heirs."³ They then waited for the hunters to take the bait.

The joke did not go off as planned. Miss Nickerson did not discover the bucket until April 14th. Believing she had recovered the lost treasure, she followed the terms of the note diligently. Miss Nickerson deposited the pot at a bank for safe-keeping during the three day waiting period. She then summoned the relatives. When the bucket was uncovered and its contents revealed, Miss Nickerson flew into a rage.⁴ She suffered extreme humiliation and "carried to her grave some two years later [the conviction] that she had been robbed."⁵

Miss Nickerson obviously did not find the joke funny. Neither did the court, as it awarded her heirs \$500 in damages. The court noted that: "If Miss Nickerson were still living, we should be disposed to award her damages in a substantial sum, to compensate her for the wrong thus done."⁶

1. 84 So. 37 (La. 1920).

2. We must not underestimate the importance of social standing in the old South. See TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE. While courts today may not entertain such a theory of tort liability, this commentator finds it funny and thus relevant.

3. *Nickerson*, 84 So. at 38.

4. Miss Nickerson, a 45 year-old "maiden," had spent time in an insane asylum twenty years earlier. *Id.* The legal ramifications of this point are uncertain. Should we hold perpetrators to a different standard if the victim is mentally unstable? Is it overtly cruel to play jokes on the emotionally fragile? Perhaps this calls for an adaptation of the "thin skull rule." As my Crim professor liked to ask, "If I hit the Dean on the head with a hammer, and unbeknownst to me he has an eggshell skull, am I liable for murder? What is the mens rea?"

5. *Id.* at 39.

6. *Id.*

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Louisiana apparently took treasure hunting very seriously in 1920. But what about more contemporary courts? Do they possess a better sense of humor?

B. *Snakes and Unpeeled Bananas*

The work-place is the perfect forum for practical jokes. In fact, most of the recent practical joke cases arise out of work-place "misconduct."⁷ Several theories have been advanced to explain this phenomenon. Traditional humor theorists believe that joking is intended to direct attention to the perpetrator. Others have offered more elaborate theories. Hobbes thought that jokes are purely an expression of power. "A man who is laughed at," he declared, "is triumphed over."⁸ Spencer⁹ believed that jokes and laughter serve to release tension and "nervous energy."¹⁰ Darwin saw jokes as an expression of happiness, much like that seen in "subhuman primates."¹¹ Freud argued in "Jokes and Their Relation to the Unconscious" that aggressive practical jokes are a release of sexual energy.¹² Jokesters are characterized not as funny people, but as mentally disturbed neurotics. Freud believed that perpetrators "might have a disunited personality, disposed to neurosis."¹³ If he is correct, law firms (or at least law schools) should be disproportionately affected by practical jokes. I await the empirical data.

Whatever the explanation, workers often take time from their tasks to engage in releases of humorous energy. The modern split over work-place joke jurisprudence centers on two cases. The first, *Conner v. Magic City Trucking*,¹⁴ involves a benign but scary snake. Magic employee, perpetrator David King, chose the wrong forum to release his nervous energy. On June 25, 1985, King (a truck driver) drove up to an A-Pac (a company which employed the plaintiff/victim Sarah Conner) construction site wearing

7. This, of course, raises the interesting point of whether FELA and worker's compensation schemes provide coverage to practical joke victims. If the incidence of these cases increases, governments may be forced to form entities like the "Commission on Practical Jokes" and the "Work-place Humor Administration." Since I believe the country should be spared bureaucrats with titles like "Deputy Assistant Undersecretary of Practical Jokes," I advocate no coverage.

8. ROBIN ANDREW HAIG, *THE ANATOMY OF HUMOR*, 15 (1988).

9. I profess no knowledge of Spencer's identity or work. But he has a good theory, so I am citing it.

10. HAIG, *supra* note 8, at 16.

11. *Id.* at 17.

12. Surprise, surprise!

13. HAIG, *supra* note 8, at 21.

14. 24 Ala. 1048 (Ala. 1992).

a Halloween mask.¹⁵ King stopped at Conner's post, and Conner stared at King but failed to acknowledge the joke.¹⁶ Frustrated by this lack of attention, King returned later and told Conner "to release the dumping latch on his truck quickly or else he would 'put his friend' on her."¹⁷ Conner refused to cooperate, at which point King brandished a large snake and began chasing Conner. King finally gave up the chase and threw the snake at the frightened victim. Conner ran until she collapsed, left work for the day, and was treated for dizziness and a headache.¹⁸ The snake suffered no serious injuries.

Conner sued Magic under a respondeat superior theory, claiming that King's boss had ratified the activity by failing to intervene. Conner introduced evidence that King's superior laughed during the incident. So did the Supreme Court of Alabama. Without dissent, the court dismissed the suit stating: "Proof of laughter, under such bizarre circumstances, is legally insufficient proof of ratification."¹⁹ Score one for humor.

The second case is *Temp Tech Industries, Inc. v. National Labor Relations Board*.²⁰ *Temp Tech* involves an attempt to recover attorney's fees under the Equal Access to Justice Act.²¹ The crux of this case, at least for our purposes, lies in an unpeeled banana. *Temp Tech* dismissed striking employee Bernard "Banana" Szkolny for assaulting another employee on the picket line. Szkolny "pushed a softened, unpeeled banana in the face of a nonstriking employee as that employee crossed the picket line."²² Szkolny maintained his innocence and claimed that he was engaging in a practical joke. After all, the "banana in your face" joke has a long and storied history, beginning with Darwin and his happy apes. But the Administrative Law Judge did not agree and upheld Szkolny's dismissal.²³

15. This fact appears in the opinion but is unexplained. Nor does the court describe the precise nature of the mask. I find this omission most irresponsible on the part of the Alabama Supreme Court. Entire joke theories could rest on what character King was impersonating. Certainly Freud would find this information essential.

16. *Conner*, 592 So. 2d at 1049.

17. *Id.*

18. *Id.*

19. *Id.* at 1051.

20. 756 F.2d 586 (7th Cir. 1985).

21. 5 U.S.C. § 504 (1982).

22. *Temp Tech*, 756 F.2d at 590.

23. I defiantly will continue to use footnotes to point out tangential humorous issues. Szkolny claimed that his activity was protected under § 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3) (1982). Sections 8(a)(1) and (3) of

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Temp Tech provided poor Banana Szkolny with a modicum of consolation; the court refused to award attorney fees to the company. The court found that "the conduct alleged was [not] so egregious that the General Counsel's decision to litigate . . . lacked substantial justification."²⁴ While the court did not find banana stuffing acceptable, it was funny enough not to be "egregious." Still, this isolated incident cost poor Banana his job. Without a doubt, this represents a grave defeat for humorists around the world.

C. Flag Girls and Herpes

Sexual harassment is still prevalent in the work-place; perversely, it provides us with some of the more humorous cases around. Take, for instance, the plight of Iowa construction workers Darla Hall, Patty Baxter, and Jeannette Ticknor. They took their jobs thinking that most male construction workers were enlightened, sensitive men, but they soon discovered otherwise.²⁵ "Immediately after the women started work, male members of the construction crew began to inflict verbal sexual abuse on the women."²⁶ In their defense, the male workers claimed that they were merely joking. A few of their exploits included: "The men nicknamed Ms. Ticknor 'Herpes' after she developed a skin reaction due to a sun allergy;"²⁷ the male workers were constantly referring to the women as "fucking flag girls;"²⁸ and "several men urinated in the gas tank of Ms. Ticknor's

the NLRA protect organizational activity and forbid discrimination against union employees. This raises some interesting hypotheticals. For example, if several union employees organized a "banana stuffing protest" in which they stuffed bananas in the faces of all incoming scabs, would the NLRA protect this as organizational activity? Or what if a union employee and non-union strikebreaker become involved in a banana stuffing contest in which they stuffed bananas in each others' faces? Could the company fire the union employee without firing the strikebreaker, or would that be considered discrimination? Would it matter who started the "fight?" Finally, what if the strike had taken place at a banana factory? Would banana stuffing be considered a legitimate means of protest?

24. *Temp Tech*, 756 F.2d at 590.

25. I do not, of course, wish to impugn the integrity of construction workers as a whole. As we know, construction workers perform a valuable function in our society: they fix roads. In fact, they are constantly fixing roads. Once a road is under construction, our industrious construction workers will work for years if necessary to effect the repairs. I have the utmost respect for their diligence and dedication, not to mention the efficiency of the various governmental agencies in charge of fixing roads. But let's get on with the story.

26. *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988).

27. *Id.* at 1012.

28. This phrase could well make Hall the practical joke equivalent of *Cohen v. California*, in which the Supreme Court ruled that the phrase "Fuck the Draft" did not

car."²⁹

The court found that these incidents (and other more serious infractions) constituted sexual harassment. Let us suppose, however, that the three actions listed above were the only contested conduct. Are any of them humorous enough to deserve protection?

Freud would say that the men are releasing their sexual frustrations on the women. Hobbes would call it an exercise in power. Feminists may argue that the power and sexual elements combine to make this rape. Objectivists may argue that the world is a jungle and the women should fight back with jokes of their own. Stoics would say turn the other cheek.

The male perpetrators here are certainly testing the tolerance of even the most comedic aficionados. To lovers of cutting-edge humor, the "Herpes" joke may actually be funny. Abusive nicknames form a venerable tradition in the humor business. Al Capone had to live with the name "Scarface," which in the 1920s may have been just as embarrassing. Manuel Noriega is often called "Pineapple Face." Ross Perot is compared to Dumbo. So why not "Herpes?"³⁰ Still, sexually explicit nicknames should be subject to strict scrutiny. If no harm is intended, we can all have a laugh. But if the nickname is malicious, perhaps the jokesters should be subject to liability.

The other instances hardly merit in-depth discussion. The "fucking flag girls" line has no comic value (this one doesn't even purport to be a joke) and thus deserves no protection. And urinating in the gas tank is just too strange. These men should find (1) a toilet and (2) a Freudian therapist.

D. Over the Line

Occasionally, a jokester clearly crosses the line into the world of tort. *Caudle v. Betts*³¹ presents such a case. Defendant/perpetrator/tortfeasor Peter Betts, principal shareholder of Betts Lincoln-Mercury in Alexandria, Louisiana, thought he had a great idea for a practical joke. Betts took a

constitute fighting words. 403 U.S. 15 (1971). Since then, every legal scholar and law student wishing to throw the word "fuck" into an academic paper has cited the case. I now join their ranks.

29. *Id.*

30. Yes, another tangential issue. What do you expect, humor law is complex! *McKinney v. Dole* considered the question of whether calling the plaintiff "Buffalo Butt" was enough to charge the defendant with sexual harassment. 765 F.2d 1129 (D.C. Cir. 1985). While the nickname may be cruel, would the discerning observer at least give the jokester credit for creativity? And if we do not allow offensive jokes, what good is humor anyway?

31. 512 So. 2d 389 (La. 1987).

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charged automobile condenser, which delivers an electric shock when touched, and "shocked the back of plaintiff/victim/car salesman Ruben Caudle's neck with the charged condenser and chased Caudle with it until he escaped by locking himself in an office."³² Caudle suffered damage to the occipital nerve³³ and experienced frequent headaches and fainting spells, which required surgery to alleviate. He sued Betts for damages, and the perpetrator defended claiming he had played a practical joke on his employee and had "intended to shock Mr. Caudle but did not intend to injure him beyond a momentary, unpleasant jolt."³⁴ The court wisely rejected this theory and found for Caudle.³⁵

E. Conspiracy in the Courtroom

Even courts attempt humor from time to time. Judges are often stereotyped as serious, stoic figures. But experience shows otherwise. Take the case of *Drayton v. Hayes*.³⁶ During the trial, Judge Held asked Assistant District Attorney Kenneth Ramseur to help play a joke on defense counsel Frank Markus. After Held informed counsel that no further witnesses would be called, the Judge, Ramseur, and the court reporter instigated the joke. When Markus returned to the courtroom for closing arguments, Ramseur rose to call several rebuttal witnesses. The court reporter pretended to record the proceedings. Markus rose to object and argued for several minutes, until Held advised him to "sit down and relax"

32. *Id.* at 390.

33. For those of us not versed in anatomy, I took the liberty of looking up some key terms:

Occipital: "Of the occiput or the occipital bone."

Nerve: "(1) A sinew or tendon; (2) any of the cord-like fibers or bundles of fibers connecting the body organs with the central nervous system (the brain and the spinal cord) and parts of the nervous system with each other, and carrying impulses to and from the brain or a nerve center; (3) emotional control, coolness in danger, courage; (4) strength, energy, vigor."

Occiput: "The back part of the skull or head."

Skull: "(1) The entire bony or cartilaginous framework of the head of a vertebrate, enclosing and protecting the brain and sense organs and composed of the cranium and the bones of the face and jaws; (2) the human head regarded as the seat of thought or intelligence; usually with derogatory allusion [a thick skull, an empty skull]." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1982).

34. *Caudle*, 512 So. 2d at 390.

35. Social commentators note that the result may have been different had Betts defended on the theory that car salesmen deserve a jolt every now and then. No evidence is provided

36. 589 F.2d 117 (2d Cir. 1979).

because it was all a joke.³⁷ Markus later moved for a mistrial claiming that the hoax had "unnerved" him and caused him to deliver an ineffective closing argument.

The *Drayton* court rejected Markus' appeal citing a lack of bad faith on the part of Held. Despite finding the joke in "poor taste," the court noted that "Held was [not] motivated by a desire to prejudice or harass Mr. Markus and his client."³⁸ But has the Second Circuit gone to far in allowing courtroom jokes? Snakes and bananas in the work-place seem funny enough, but trials are supposed to be serious. Does *Drayton* make a mockery of the judicial system? Or is it a welcome breath of fresh air? What should be our standard for judging practical jokes?

III. TOWARD A THEORY OF PRACTICAL JOKE JURISPRUDENCE

This controversy demands a resolution in the form of a coherent national standard. Beauty may be in the eye of the beholder, but funny should be a matter of law. I offer several standard policy arguments in support of this proposition:

* *Judicial Economy*: The courts are overloaded with cases, including joke cases. Until we pass tort reform measures, unimpressed victims of practical jokes will continue to flood the judicial system with suits. A national standard for practical joke cases will allow speedy resolutions to these claims.

* *Fear of Forum Shopping*: If, for instance, Alabama is known to be tough on practical jokesters while California allows great latitude, victims will attempt to flood the Alabama courts with joke cases. Also, it is simply unfair to hold jokesters to a higher standard dependent solely on where they perpetrate their scams. A joke is a joke is a joke, whether devised in Florida, Alaska, Hawaii, or on the moon.³⁹

* *Efficiency*: A national standard would eliminate haggling over the proper degree of protection afforded practical jokes. The courts could then waste

37. *Id.* at 119.

38. *Id.* at 122.

39. There are, to the best of my knowledge, no reported cases of practical jokes carried out on the moon. Readers should dismiss the phrase as it is mere rhetorical hyperbole.

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their time on more mundane cases, which the public expects them to do anyway.

* *Credibility*: People will not take the judiciary seriously if it cannot make up its mind on what is and is not funny. Judges must look confident and present a united front by laughing (and frowning) in concert.

What then should be the national standard? Three competing theories deserve attention: the "discerning viewer" test, the "reasonable jokester" test, and the "lighten up, please" test.

A. *Discerning Viewers*

This is a purely objective test. The analysis rests on one question: Would a discerning viewer find the joke funny? The advantage of this standard is its ability to separate truly classic practical jokes from ordinary trash. Trash, the theory goes, deserves no protection. Of our cases, only *Nickerson* would be spared. The elaborate scheme is certainly classic. *Drayton* may have a claim to protection if it can override the inherent presumption against court-induced laughter. All the other feeble attempts at humor are ordinary and unsophisticated. The discerning viewer would dismiss them as bourgeois humor.

Criticisms come, however, from "marketplace of jokes" theorists. They claim that classic jokes will only occur if some (if not most) jokesters are allowed to produce ordinary fair. After all, producing the classic practical joke is an acquired skill. One must first practice with lesser joke attempts. I reject the discerning viewer test on the grounds that Siskel and Ebert would appoint themselves sole arbiters of funniness.

B. *Reasonable Jokesters*

Joke rights advocates support this test. It would protect any joke reasonably calculated to induce laughter and avoid harm. This approach would protect every case I presented except *Hall*. Even *Caudle* involved a joke which was not intended to cause harm. Besides, who ever heard of the occipital nerve anyway? A reasonable jokester certainly could not foresee such consequences from an electric shock.

Certain eminent jurists have voiced opposition to this standard on the grounds that it ignores victims' rights. Jokesters, after all, should not be given complete control over the fate of hapless victims. Victims should have some means of retribution against malicious jokesters, and sometimes the courts as their only recourse as they are not inventive or courageous

enough to devise practical jokes of their own. Which leads us to the third test

C. *Lighten Up, Please!*

This test is simple and intuitive. A joke receives protection if the natural reaction by onlookers to a victim's outrage would be "lighten up, please!" The test, which would protect the perpetrators in *Nickerson*, *Temp Tech*, and *Conner* and punish those in *Hall* and *Caudle*, provides a nice compromise. (*Drayton* remains a judgment call based on one's opinion of courtroom etiquette. Personally, I find the episode funny and extremely creative. We need more judges like Judge Held.) The objectivity of the process is maintained as the standard of onlookers rather than perpetrators or victims. More important, this test allows peers of the parties to arbitrate rather than members of the cultural elite. This is essential to preserving the integrity of the process in a democracy. Besides, we need to take some of the pseudo-scientific seriousness out of judging. To all those self-important policy geeks who present intricate theories to answer every conceivable question, I have three words: Lighten up, PLEASE!

All you earnest young men out to save the world . . .
please, have a laugh.

- Reinhold Niebuhr