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## ”Good Humor” on The Bench: Just Desserts in a Judicial Diet

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## **Abstract**

Lawyers, long the subject of jokes, are themselves often portrayed as humorless.

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# "Good Humor" on The Bench: Just Desserts in a Judicial Diet

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Lawyers, long the subject of jokes,<sup>1</sup> are themselves often portrayed as humorless.<sup>2</sup> Given the special and often puzzling legal terminology and structured form of most legal drafting,<sup>3</sup> and that much of legal writing requires the attorney to avoid qualities of ornamentation,<sup>4</sup> it is easy to see why attorneys are perceived as humorless. The historic view of judges as omnipotent, stern and sober, with powdered wig, staring down from a lofty bench has further contributed to this perception. Rare, however, is the attorney who has never encountered judicial humor.<sup>5</sup>

Judicial opinion writing, as any form of legal writing, requires precision, conciseness, simplicity, clarity and forcefulness.<sup>6</sup> With the possible

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1. Lawyer jokes would seem to be even more common than lawyers themselves. One dependable source of lawyer jokes is *Playboy Magazine's* monthly "Party Jokes" section. In addition, a collection of cartoon illustrations lampooning attorneys can be found in, BILL BERGER & RICARDO MARTINEZ, *WHAT TO DO WITH A DEAD LAWYER* (1988).

2. Raymond T. Elligett, Jr., *Legal Wit & Wisdom*, FLA. B.J., Mar. 1992, at 19.

3. Many organizations have campaigned against the over-legalization of American society, and some nonlawyers (such as paralegals) have begun to offer legal advice. The legal profession, not surprisingly, has responded by charging these non-lawyers with unauthorized practice of the law!

4. RUGGERO J. ALDISERT, *OPINION WRITING* 243 (1990). The author is a senior United States Circuit Judge.

5. For most lawyers exposure occurs within a few weeks of starting law school. The classic first year text WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* (8th ed. 1988) contains the case *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198 (1941) (where the court considers whether a taxi driver's actions while at gunpoint constitute negligence). The entire case, nearly four pages long, is presented in a single paragraph and is written in the style of a would-be pulp novelist or wannabe playwright:

The chauffeur in reluctant acquiescence proceeded about fifteen feet, when his hair, like unto the quills of the fretful porcupine, was made to stand on end by the hue and cry of the man despoiled accompanied by a clamorous concourse of the law-abiding which paced him as he ran; the concatenation of "stop thief," to which the patter of persistent feet did maddeningly beat time, rang in his ears as the pursuing posse all the while gained on the receding cab with its quarry therein contained.

6. See *And*, supra note 4, at 243.

exception of the Bible, no writing is subjected to greater scrutiny than is judicial writing.<sup>7</sup> Even so, judicial humor can be found interspersed throughout legal opinions in nearly every area of law. It can be found as metaphors, imagery, puns, poetry, humorous headings, popular songs, and many other forms. Moreover, considering the popularity of such television programs like *Night Court*, the American public seems comfortable with a practical joker turned judge. Yet, it is unlikely that society ever expects humor from a judge.<sup>8</sup> Between the weighty responsibility of dispensing "justice" and the public perception of judicial power and solemnity, there is an "unexpectedness" of judicial humor which makes it so funny and such a curiosity in the legal landscape.

Like humor in general, judicial humor varies greatly in form and potency. The most lighthearted attempts at humor have been prompted simply by the case names themselves. For example, the first sentence of the opinion in *Plough v. Fields*,<sup>9</sup> reads as follows: "In spite of its title, this case does not involve the age old struggle of mankind to wrest a living from the soil . . . ." In *Short v. Long*,<sup>10</sup> another opinion making use of the litigants names, the appellate court ends with: "The judgment of the trial court is affirmed, and that is the long and the short of it."

Some opinions are even more blatant in their use of humor and even announce their intention to call attention to themselves. For example, in *Aaron v. Life Insurance Co. of Georgia*,<sup>11</sup> a foreclosure case involving property owned by legendary baseball great Hank Aaron, Judge Clark added his own comments in a special concurrence. Although in full agreement with the majority opinion, he confessed that he was motivated to add his comments in order to "pay tribute to baseball's home-run champion" and to fulfill his intention "to make appellate opinions more interesting."<sup>12</sup> The concurring opinion then proceeds to analogize the facts of the case to the action in a baseball game, referring to the appellate judge as umpire, with the power to reverse, in this "television replay."<sup>13</sup> Judge Clark completes his opinion by reciting the last stanza of Ernest Lawrence Thayer's poem

7. AMERICAN BAR ASSOCIATION, JUDICIAL OPINION WRITING MANUAL 37 (1991).

8. JOYCE GEORGE, JUDICIAL OPINION WRITING HANDBOOK 145 (2d ed. 1986) (describing what litigants expect from judges and why humor is inappropriate).

9. 422 F.2d 824 (9th Cir. 1970).

10. 87 S.E.2d 776 (Va. 1955).

11. 226 S.E.2d 96 (Ga. Ct. App. 1976).

12. *Id.* at 97.

13. *Id.* at 98.

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"Casey at the Bat" and substituting for the last line the conclusion that "Mighty Aaron has struck out," the ultimate ruling.<sup>14</sup>

The saying "Nothing is certain except death and taxes" certainly communicates a somber resignation to the immutable character of nature and the Internal Revenue Service. However, the Tax Court offered an uplifting alternative to this otherwise universally accepted prophesy. In *Jenkins v. Commissioner*,<sup>15</sup> a case involving country music star Conway Twitty's bankrupt burger chain, Twitty Burger, the Tax Court concluded its opinion in verse of its own writing. Finding in favor of the plaintiff Twitty, the Tax Court paid tribute to him with an "Ode to Conway Twitty:"

Twitty Burger went belly up  
 But Conway remained true  
 He repaid his investors, one and all  
 It was the moral thing to do.  
 His fans would not have liked it  
 It could have hurt his fame  
 Had investors sued him  
 Like Merle Haggard or Sonny James.  
 When it was time to file taxes  
 Conway thought what he would do  
 Was deduct those payments as a business expense  
 Under section one-sixty-two.  
 In order to allow these deductions  
 Goes the argument of the Commissioner  
 The payments must be ordinary and necessary  
 To a business of the petitioner.  
 Had Conway not repaid the investors  
 His career would have been under cloud,  
 Under the unique facts of this case  
 Held: The deductions are allowed.<sup>16</sup>

The Internal Revenue Service, in an "Action on Decision" disagreed with the Tax Court, and added its own "Reprise:"

Harold Jenkins and Conway Twitty  
 They are both the same  
 But one was born  
 The other achieved fame.

14. *Id.*

15. T.C.M. (CCH) 238 (1983).

16. *Id.* at 243, 14.

The man is talented  
 And has many a friend  
 They opened a restaurant  
 His name he did lend.  
 They are two different things  
 Making burgers and song  
 The business went sour  
 It didn't take long.  
 He repaid his friends  
 Why did he act  
 Was it business or friendship  
 Which is fact?  
 Business the court held  
 It's deductible they feel  
 We disagree with the answer  
 But let's not appeal.  
 RECOMMENDATION  
 Nonacquiescence.<sup>17</sup>

Here it would seem the taxman was not only uncharacteristically merciful, but displayed a sense of humor too!

Literary themes and devices like the ones above take many forms in judicial opinion writing. In one Florida case, *Chemical Specialties Manufacturers Ass'n v. Clark*,<sup>18</sup> a detergent manufacturer successfully sued Dade County over a local labeling ordinance. Fully agreeing with the majority opinion which found that the ordinance was superseded by federal labeling requirements, Chief Judge John R. Brown sprinkles soap powder throughout his concurring opinion:

Clearly, the decision represents a *Gamble* [Proctor was used in preceding sentence] since we risk a *Cascade* of criticism from an increasing *Tide* of ecology-minded citizens. Yet, a contrary decision would most likely have precipitated a *Niagara* of complaints from an industry which justifiably seeks uniformity in the laws with which it must comply. Inspired by the legendary valor of *Ajax*, . . . we have *Boldly* chosen the course of uniformity . . .<sup>19</sup>

After including at least a dozen more references to detergents, the opinion ends with: "It is as plain as *Mr. Clean* the proper *Action* is that the

17. A.O.D. 1984-022 (Mar. 23, 1984).

18. 482 F.2d 325 (5th Cir. 1973).

19. *Id.* at 328.

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Dade County Ordinance must be superseded, as *All* comes out in the wash.<sup>20</sup>

Often judges simply cannot resist the temptation to run with a humorous theme. In fact, probing legal analysis and artful writing style can combine to form what may be compared to a literary masterpiece.<sup>21</sup> One such opinion is presented in *United States v. Syufy Enterprises*.<sup>22</sup> In *Syufy*, a case involving an antitrust action against a movie theater chain operator, Judge Alex Kozinski of the Ninth Circuit meticulously analyzes the alleged monopolistic practices of the defendant while imaginatively hiding over two hundred movie titles in the opinion. One passage explains that a "dark horse" competitor took a step into the "major league" and "against all odds" began giving Syufy serious competition, in no time "trading places" with Syufy for the lead.<sup>23</sup> The one clue in the opinion indicating how many titles are buried in it is a cryptic footnote suggestion to "See also L. Maltin, Leonard Maltin's TV Movies & Video Guide 204 (1989)."<sup>24</sup> It was reported that the West editor was twice called to have the page number in that citation changed, first to 206 and then to 208, suggesting that even Judge Kozinski's clerks had trouble spotting all the movie names.<sup>25</sup>

A quite recent South Florida opinion, solid in its analytical approach, also took great liberty in its writing style. In *Noble v. Bradford Marine, Inc.*,<sup>26</sup> slang terms and popularized phrases from the hit movie *Wayne's World* were liberally used throughout an Order of Remand issued by United States District Court Judge James C. Paine. The first paragraph states: "After an extreme closeup review of the record and excellent authorities, the court enters the following order."<sup>27</sup> The next paragraph, which presents the factual account of a fire in a marina which cast burning debris upon neighboring vessels, is introduced with the heading "Hurling Chunks." Still another paragraph is introduced simply with "NOT!", a Waynism even pop star Madonna is known to have used in a cameo appearance in a Saturday

20. *Id.* at 329. "Brown reportedly sent a clerk to a supermarket to copy [the] names of every detergent product on the shelves." J. BASS, UNLIKELY HEROES 105 (1981).

21. Judge Learned Hand once commented that he liked to think that the work of a judge is an art, a bit of craftsmanship. See H. SHANKS, THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND, at flyleaf (1968).

22. 903 F.2d 659 (9th Cir. 1990).

23. No citation reference is given in order that readers may find these and the other two hundred or so movie titles on their own.

24. *Syufy*, 903 F.2d at 666 n.10.

25. *Movie Movie*, A.B.A. J., Aug. 1990, at 20.

26. 789 F. Supp. 395 (S.D. Fla. 1992).

Night Live episode. Finally, explaining that the defendant had waived its right of removal (in a paragraph with the heading "A Schwing and a Miss"), and deeming the belated attempt of removal "way" improvident, the court stated the defendant's "most bogus attempt at removal is not worthy and the Defendant must 'party on' in state court."<sup>28</sup> Some say that the use of such humor adds a refreshing touch to an already over-serious and hyper-sensitive profession.<sup>29</sup> Arguably, where litigants attempt to "pull a fast one" on the court, such humor may be well deserved and likened to court "sanctions" for frivolous or otherwise obvious improper actions by litigants. Thus, humor may have utility in its ability to bring not only the issues, but the litigants themselves, "down to earth." A good example of such use can be found in a court Order by United States District Court Judge Jose Gonzalez, Jr. in *Venezolana Internacional de Aviacion, S.A. v. International Ass'n of Machinists and Aerospace Workers*.<sup>30</sup> The defendant, in apparent disregard for Rule 8(e) and 7(b)(2) of the Federal Rules of Civil Procedure calling for pleadings and motions to be "simple, concise and direct" submitted a motion entitled:

IAM's Motion to Dismiss Complaint for Reasons of Mootness or, Alternatively, Motion to Strike Viasa's Prayer for Relief Requesting Court Approval of the Use of Self Help in the Form of the Implementation of Its Collective Bargaining Proposals Despite the Fact that the Mandatory Bargaining Provisions of the Railway Labor Act (Meeting and Conferring in Good Faith Regarding All Parties' Proposals) Have Neither Been Commenced nor Exhausted.<sup>31</sup>

In response, the District Court, alarmed that the defendant tried to argue its motion in the title, amended, *sua sponte*, the above named motion to read "*IAM's Motion to Dismiss Complaint, or Alternatively, Motion to Strike*."<sup>32</sup> Borrowing from A. Pope's "Essay on Criticism," the court added:

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28. *Id.* at 397.

29. Brooks C. Miller, a senior associate at Kelley Drye & Warren in Miami and one of the lawyers involved in the case reacted with amusement: "I thought it was a refreshing change from most orders. I showed it around the office, and it got a few chuckles." Wendy Bourland, "*Wayne's World*" Collides with District Court, PALM BEACH REV., May 8, 1992, at A17. Not everybody got it, though. The litigator representing the plaintiff, unfamiliar with the movie, thought the judge was making light of the situation. *Id.*

30. 118 F.R.D. 151 (S.D. Fla. 1987).

31. *Id.*

32. *Id.*



Words are like leaves; and where they  
most abound,  
Much fruit of sense beneath is rarely found.<sup>33</sup>

There can be no mistaking the Court's message to the defendant and the aptness of its use of poetry to make its point.

It may be said that judicial opinions, humorous or not, are written for many reasons: for posterity, for the bar, for future judges, for the legislature, for law students, for newspaper readers, for voters, for the losing lawyer, for other judges, and for the writing judge himself.<sup>34</sup> Whoever the intended audience, judges have taken "poetic license" in many other ways. In apparent tribute to Joyce Kilmer, Judge J.H. Gillis, in an action for damages caused when the defendant's car struck the plaintiff's tree, penned his version of "Trees:"

We thought that we would never see  
A suit to compensate a tree.  
A suit whose claim in tort is prest  
Upon a mangled tree's behest;  
A tree whose battered trunk was pressed  
Against a Chevy's crumpled crest;  
A tree that faces each new day  
With bark and limb in disarray;  
A tree that may forever bear  
A lasting need for tender care.  
Flora lovers though we three,  
We must uphold the court's decree.  
Affirmed.<sup>35</sup>

The court explained in a footnote that summary judgment for the defendant was affirmed because of the operation of the state No-Fault Insurance Act. West Publishing, conforming to the opinion's poetic form, printed the headnotes and syllabus in the same style.<sup>36</sup>

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33. *Id.*

34. See ALDISERT, *supra* note 4, at 25-26.

35. Fisher v. Lowe, 333 N.W.2d 67 (Mich. Ct. App. 1983).

36. West Publishing has often printed both the headnotes and the syllabus in a style conforming to the rhyming opinion. See, e.g., Brown v. State, 216 S.E.2d 356 (Ga. Ct. App. 1965); *State v. Love*, 61 B.R. 559 (Bankr. S.D. Fla. 1986); Mackensworth v. American Trading Transp. Co., 367 F. Supp. 373 (E.D. Pa. 1973).

Another poetic parody, *In re Love*,<sup>37</sup> written by United States Bankruptcy Judge A. Jay Cristol, traces the language of Edgar Allan Poe's "The Raven:"

Once upon a midnight dreary, while I pondered  
 weak and weary  
 Over many quaint and curious files of  
 chapter seven lore  
 While I nodded nearly napping, suddenly  
 there came a tapping  
 As of some one gently rapping, rapping at  
 my chamber door,  
 'Tis some debtor" I muttered, "tapping at  
 my chamber door—  
 Only this and nothing more."

The court went on to deny a *sua sponte* motion to dismiss, stating:

Upon consideration of § 707(b), in anguish,  
 loud I cried  
 The court's *sua sponte* motion to dismiss  
 under § 707(b) is denied.<sup>38</sup>

Another case, *Mackensworth v. American Trading Transportation Co.*,<sup>39</sup> is entirely in rhyming couplet, including all but one of its eleven footnotes, which apologetically states: "The words of the statute are overly terse, still we will quote them, though not in verse . . . ." <sup>40</sup> Still another case, *United States v. Ven-Fuel, Inc.*,<sup>41</sup> introduces the case with original verse, then continues with a normal writing style divided by the following headings: "The Procedural Background Is Easily Stated," "But The Facts Are More Complicated—," "Applying The Law Is Even Worse," "But For Reasons Stated We Must Reverse."<sup>42</sup>

37. 61 B.R. 559 (Bankr. S.D. Fla. 1986).

38. *In re Love*, 61 B.R. at 559.

39. 367 F. Supp. 373 (E.D. Pa. 1973).

40. *Id.* at 375 n.5.

41. 602 F.2d 747 (5th Cir. 1979).

42. *Id.* at 747, 749-50, 752-53.

Another case utilizing humorous headings is *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The headings, which parody air traffic regulations, airlines and their advertising slogans, include: "One If By Land, Two If By Sea, And Three If By Air," "Pre-Flight Procedure," "Weather Report," "The Friendly Skies—Filled with Litigants," "Scope

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Finally, no treatment of judicial humor would complete without reference to cases involving animals. In both the following examples, the judges who authored the opinions also made use of the lowly respected pun, probably the most widely used humorous device whether it be in legal or lay arenas. In *Bazzini v. Garran*,<sup>43</sup> which involved a civil suit by a pet store customer who bought a toucan which died three weeks later, Judge Colaneri remarked that it was "a sad tale (or is it tail) of the noble, but late [bird], which the plaintiff, Debra Bazzini, purchased from the defendants . . . Sexy Sadie's Exotic Bird House."<sup>44</sup> Exercising enormous restraint, given the facts of the case, the judge described that "there was no evidence of fowl play," and that the bird enjoyed "the reign of a lame duck politician," explaining that for "entrepreneurs in the tropical bird business, it is a jungle out there." Finding for the plaintiff, the judge acknowledged that his ruling might "ruffle some feathers" but that "It takes a tender judge to make a tough decision."<sup>45</sup>

In *Miles v. City Council of Augusta*,<sup>46</sup> the issue was whether the owner of Blackie the Talking Cat, prominent for appearances on such television shows as "That's Incredible," was required to pay for a business license for exhibiting Blackie's talents on a public street. The court of appeals unobtrusively worked six "cat" words into its opinion: Catechism, catapulted, catalyst, cataclysmic, category and catatonic. However, the most humorous aspect of this case, besides the recitation of facts, is the legal analysis. Ultimately, the court concluded that, in addition to Blackie's owner requiring a business license to solicit "donations" from pedestrians and motorists to hear Blackie talk, the Appellants' claim of illegal infringement of First Amendment rights of free speech were not demonstrated, stating in the final footnote:

This Court will not hear a claim that Blackie's right to speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a "person" and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a

of Review—We're the Administrative Agency, Doing What We Do Best," and "You Deserve National Attention?" *Id.* at 1186-87, 1189-90. The Plaintiff's losing lead counsel, however, deplored the opinion as "beyond the bounds of proper judicial demeanor." Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 719 (1987).

43. 455 N.Y.S.2d 77 (Civ. Ct. 1982).

44. *Id.* at 78.

45. *Id.* at 79.

46. 710 F.2d 1542 (11th Cir. 1983).

right, we see no need for the appellants to assert his right *jus tertii*. Blackie can clearly speak for himself.<sup>47</sup>

Clearly, the humorous analysis is impeccable in its logic.

While many critics say humor has no place in a legal adjudication,<sup>48</sup> Justice Richard Wallach of the Supreme Court of New York has noted, humor, carefully controlled, can properly find a place in judicial writing.<sup>49</sup> Furthermore, the Appellate Judges' Conference in 1966 reflected a mood that a judge should not flinch from the use of color or figures of speech if they add clarity and force to his writing.<sup>50</sup> As any artistic device, it can be overdone, if not misused. Fortunately, abuse of judicial humor would seem to be only a minor flaw in our legal system and in many instances it is used stylistically and artfully without becoming distracting or insulting. Measured, prudent doses of figurative language and humor in judicial opinion enlivens the law, enabling it to avoid becoming bland, commonplace recitation and prevents it from becoming too confusing or overbearing to the general public who is most affected by its application. Hopefully, it can also change the stereotype of the humorless lawyer. Of course, sometimes that requires that lawyers have the ability to laugh at themselves.

47. *Id.* at 1544 n.5.

48. See, e.g., Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989).

49. Richard Wallach, *Let's Have a Little Humor*, N.Y. L.J., Mar. 30, 1984 at 2.

50. B.E. Witkin, *Appellate Court Opinions—A Syllabus for Panel Discussion*, 63 F.R.D. 515, 567 (1973).