

Bons Mots, Buffoonery, and the Bench: The Role of Humor in Judicial Opinions

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ABSTRACT

Despite the serious nature of court orders, judicial opinions can be humorous. While some decisions are funny simply because of their facts, judges have also employed puns, penned poems, cited songs, and formulated fables to convey legal conclusions creatively. Scholars and jurists debate the propriety of such humor. However, witticisms and quips continue to find their way into legal reporters. This Essay notes examples of judicial jesting, offers an explanation for why we laugh at lighthearted opinions, and provides guidelines for the appropriate use of humor in court decisions.

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Special thanks to the editors of the *UCLA Law Review*, especially Nicole Howell, for excellent feedback. I would also like to thank Matthew Smock, Laurie Taylor, and Jonathon Townsend for their edits and humorous suggestions, and, of course, my family members for their love and support.

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INTRODUCTION

In the year 1709, Anthony Cooper, Earl of Shaftesbury, wrote, “Twas the saying of an ancient sage that humour was the only test of gravity, and gravity of humour. For a subject which would not bear raillery was suspicious; and a jest which would not bear a serious examination was certainly false wit.”¹ The wisdom of this observation rings true for the many judges who infuse their judicial opinions with humor. Few documents carry more gravitas than opinions handed down from the bench; citizens’ finances, livelihoods, and liberties depend on court orders. Nonetheless, judges find occasion to sneak humor into these solemn works, and some even argue that jesting deserves sincere consideration. “[H]umor,” Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals writes, “is the pepper spray in the arsenal of persuasive literary ordnance: It is often surprising, disarming and, when delivered with precision, highly effective.”²

While some commentators laud the use of humor in judicial opinions,³ others find it misplaced, arguing that court comedy disrespects parties and distracts from the merits of a case.⁴ Still others are ambivalent.⁵ Judge William Prosser, in his well-known book *The Judicial Humorist*, states that “the bench is not an appropriate place for unseemly levity. . . . [The litigant’s] entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.”⁶ He concludes, however, that “on rare occasions there are litigants deserving only of ridicule, and situations that call only for mirth.”⁷

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1. ANTHONY A. COOPER, *SENSUS COMMUNIS: AN ESSAY ON THE FREEDOM OF WIT AND HUMOUR* 23 (1709). Ninth Circuit Judge Carlos Bea quotes the Earl in his dissent in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), to justify his allusion to a whimsical quote by Lewis Carroll. Indeed, Judge Bea noted that U.S. Supreme Court opinions have mentioned Humpty Dumpty at least six times. *Id.* at 372 n.5 (Bea, J., dissenting).
 2. *In re Judicial Misconduct*, 632 F.3d 1289 (9th Cir. 2011).
 3. See David A. Golden, *Humor, the Law, and Judge Kozinski’s Greatest Hits*, 1992 BYU L. REV. 507; *infra* text accompanying notes 94–98.
 4. See Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989); *infra* text accompanying notes 90–93.
 5. See Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869, 876 (1993) (reviewing JOHN B. MCCLAY & WENDY L. MATTHEWS, *CORPUS JURIS HUMOROUS* (1991)) (“On this subject I must profess a certain amount of ambivalence about judicial humor; I do not enjoy much of it, but there is some that I enjoy very much.”).
 6. *THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES*, at vii (William L. Prosser ed., 1952).
 7. *Id.*

This Essay explores judicial humor.⁸ Part I considers what makes a judicial opinion humorous. Part II then categorizes judicial humor and presents exemplary writings in each category. Finally, Part III and the Conclusion evaluate arguments for and against the use of humor in judicial writings and suggest instances when humor is proper. So long as it is brief and respectful of litigants, judicial humor can be a useful tool, allowing a judge to add personality to an opinion and pique readers' interest.

I. WHAT MAKES US LAUGH?

Humor is not easy to define, and as a result, it is difficult to gauge what makes a judicial opinion funny. The attempt to understand what makes us laugh is often futile, leading the author E. B. White to observe that

[h]umor can be dissected, as a frog can, but the thing dies in the process and the innards are discouraging to any but the pure scientific mind It has a certain fragility, an evasiveness, which one had best respect.⁹

Citing this warning, Judge George Smith nonetheless proceeded to analyze humor's place in a judicial opinion in *A Critique of Judicial Humor*.¹⁰ First, Judge Smith noted that a judge must carefully weave playfulness into a writing which, by its nature, is very serious. This is a difficult task, at which only the most adept writers are successful.¹¹ Further, judicial opinions force a judge to use the written word to create humor, precluding the use of gestures and expressions that accompany successful spoken comedy.¹² Third, Judge Smith observed that a judge drafting an opinion must draw from a case's record, making it difficult to achieve spontaneity in her comments.¹³ Knowledge of the underlying facts reduces the element of surprise that is often essential to humor.¹⁴ Finally, a judge lacks an audience "primed" for humor.¹⁵ "[A] judge's humorous passages . . . are usually read by a sober lawyer or judge sitting alone in his office. Shouts of prolonged laughter

8. This Essay uses the term "judicial humor" to refer to humor in written legal opinions as opposed to spoken humor employed by judges in hearings, conferences, or at dinner parties. Fleeting oral humor is of a different breed than written humor designed for permanent preservation in legal reporters.

9. E. B. WHITE, *Some Remarks About Humor*, in *THE SECOND TREE FROM THE CORNER* 165, 165 (Harper & Row Perennial Library 1st ed. 1965) (1954).

10. George Rose Smith, *A Critique of Judicial Humor*, 43 *ARK. L. REV.* 1 (1990).

11. *Id.* at 4.

12. *Id.*

13. *Id.* Judges may benefit, therefore, from a funny factual scenario. See Part II.A.

14. Smith, *supra* note 10, at 4.

15. *Id.* at 5.

are unlikely.”¹⁶ In light of these factors, Judge Smith concluded that a notably funny opinion is a rare breed.¹⁷

While Judge Smith argued that a judicial opinion is a poor forum for comedy, scientific study of humor suggests that judicial opinions may not be the worst place to draw laughs. Arthur Berger summarizes four theories of humor in *American Behavioral Scientist*: superiority theories, incongruity theories, psychoanalytic theories, and cognitive theories.¹⁸ In broad terms, psychoanalytic and cognitive theories address the importance of internal psychology to humor, while superiority and incongruity theories acknowledge that external circumstances contribute to our sense of what is funny.¹⁹ Since judicial writings rely on external factual circumstances for humor, this Essay applies the latter two theories to court opinions.

The superiority theory posits that we take pleasure from feeling that we are superior to others. Thomas Hobbes perceptively summarized the theory:

[T]he passion of laughter is nothing else but a sudden glory arising from sudden conception of some eminency in ourselves, by comparison with the infirmities of others, or with our own formerly: for men laugh at the follies of themselves past, when they come suddenly to remembrance, except they bring with them any present dishonour.²⁰

Superiority theory, which explains why one might find mockery and ridicule amusing,²¹ is relevant to judicial humor. Judicial opinions resolve differences between parties who have expended significant resources to air their grievances in public. Authors and nonparty readers of opinions feel a sense of superiority over the entrenched parties; upon reading about a sticky dispute, a legal practitioner or student might justifiably conclude, “I’m glad that’s not me.” Judges draw on this reaction in drafting humorous opinions.

16. *Id.* Conversely, a large audience “primed by cocktails . . . may generate bursts of the kind of laughter that infectiously feeds upon itself and goes on and on before finally dying down.” *Id.* Perhaps, however, Judge Smith failed to take into account the law student who is both sitting alone at his desk and primed by cocktails.

17. *Id.* at 4 (“[A] judge’s probability of success in using humor in an opinion is decidedly low . . .”).

18. Arthur Asa Berger, *Humor: An Introduction*, 30 AM. BEHAV. SCI. 6, 7–8 (1987).

19. *See id.* at 7–10.

20. THOMAS HOBBS, *THE ELEMENTS OF LAW: NATURAL AND POLITIC* 42 (Ferdinand Tonnies ed., Simpkin, Marshall & Co. 1889) (1640); *see also* Arnold Kruger, *The Nature of Humor in Human Nature: Cross-cultural Commonalities*, 9 COUNSELLING PSYCHOL. Q. 235 (1996). Kruger observes that Aristotle, who was an early proponent of the superiority theory, thought that humor “consisted in the perception of some defect, deformity, or ugliness in another, which then led to pleasant feelings of superiority in the viewer.” *Id.* at 235.

21. Berger, *supra* note 18, at 7.

Main v. Main, an Iowa Supreme Court decision involving an action for divorce for cruel and inhuman treatment, illustrates the superiority theory.²² The allegations of domestic discord, though doubtless distressing to the parties, stirred Judge Silas M. Weaver's²³ cynical inclinations. He wrote:

The parties did not drift into love unconsciously, as sometimes happens with younger and less experienced couples. Both knew from the start exactly what they wanted. She wanted a husband with money—or money with a husband. He wanted a wife to adorn his house and insure that conjugal felicity of which fate and the divorce court had repeatedly deprived him.²⁴

According to superiority theorists, the humor in this passage, if the passage is humorous at all, springs from readers' feelings of eminency upon learning of the unfortunate courtship of the divorced couple. If this sense of superiority is indeed the reason one finds the passage funny, judicial opinions are ripe with opportunities for humor. It is the nature of the adversarial system that judges frequently find themselves resolving disputes between parties in difficult situations. By magnifying the absurdity of the dispute for nonparties, judges can evoke feelings of superiority and, in turn, a humorous response in readers.

The second theory of humor this Essay addresses—the incongruity theory—is likewise relevant to judicial opinions. This theory proposes that, at the root of humor are “the differences between the expected and the received, inconsistencies between circumstances and the person—basically a surprise, as seen in the normative structure of a joke.”²⁵ Humor is the pleasurable experience that results from a resolution of the expected and unexpected.²⁶ Because an opinion is a serious document, the reader expects its content to be dry and stern. From the perspective of the incongruity theorist, however, judicial opinions can be fertile ground for humor when the insertion of playful or unusual language creates an incongruity.²⁷ When the reader resolves the incongruity, he finds the opinion funny.

22. *Main v. Main*, 150 N.W. 590, 591–92 (Iowa 1915).

23. At least one commentator has described Judge Weaver's opinions as “characterized by the felicity of expression and fine judicial humor.” *Biography of Silas M. Weaver*, IOWA JUD. BRANCH, <http://www.iowacourtsonline.org/wfdata/frame1773-1463/pressrel33.asp> (last visited Oct. 17, 2012).

24. *Main*, 150 N.W. at 591.

25. Kruger, *supra* note 20, at 236.

26. *Id.*

27. “[I]ncongruity humor—humor derived by using an unexpected literary device, such as a fable, to convey the court's holding—is popular in contemporary judicial opinions.” Rudolph, *supra* note 4, at 182.

Judge Kozinski took advantage of this effect in *United States v. Syufy*, an opinion concerning an antitrust action against a movie theater owner.²⁸ Throughout the opinion, Judge Kozinski worked in 215 movie titles, all while maintaining a serious judicial tone.²⁹ For example, he noted that “movie distributors are not exactly a powerless lot, likely to *surrender the first time* they are presented with *hard choices* by a theatre operator; nor are they reluctant to precipitate a *showdown* when they believe their rights are being infringed.”³⁰ Consequently, a reader gradually recognizes the incongruity between the facially stern opinion and the underlying puns and double entendres. When the reader recognizes Judge Kozinski’s clever ploy and resolves the incongruity between the primary and secondary meanings of the words, laughter results.

Given humor’s enigmatic nature, scholars may long debate whether a judicial opinion is an effective vehicle for drawing laughs. This Essay suggests that circumscribed use of humor in court orders is appropriate. Whether judges heed the academic discourse on judicial humor, however, there is no doubt that many judges have tried their hand at drafting humorous opinions. Part II presents some famous—and infamous—examples of judicial humor.

II. PLAYFUL PRECEDENT

Since the advent of the written opinion, reporters have recorded funny cases for posterity. In 1622, for instance, the King’s Bench resolved a dispute between a brewer and a patron in *Dickes v. Fenne*.³¹ The patron had insulted the brewer’s product by communicating that “he would give a peck of malt to his mare, and she should pisse as good beare as [the brewer] doth Brew.”³² Though the court

28. 903 F.2d 659 (9th Cir. 1990).

29. To find the many titles hidden in *Syufy*, see Editorial, *The Syufy Rosetta Stone*, 1992 BYUL REV. 457.

30. *Syufy*, 903 F.2d at 672 (emphases of movie titles added). Judge Kozinski is not the only judge to have exploited film for humor. Other opinions have cited movies for their memorable quotes. *E.g.*, *Lopez v. Quarterman*, No. V-07-95, 2009 WL 1325715, at *1 (S.D. Tex. May 12, 2009), (“Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.” (quoting *BILLY MADISON* (Universal Pictures 1995)) (internal quotation marks omitted)); *Giuliani v. Duke Univ.*, No. 1:08CV502, 2009 WL 1408869, at *5 (M.D.N.C. May 19, 2009) (“He’s on his final hole. He’s about 455 yards away, he’s gonna hit about a 2 iron, I think.” (quoting *CADDYSHACK* (Orion Pictures 1980)) (internal quotation marks omitted)).

31. [1622] 82 Eng. Rep. 411, 1 March 59 (K.B.), *reprinted in* THE JUDICIAL HUMORIST, *supra* note 6, at 104.

32. *Id.* Despite the passage of centuries, disputes between beverage manufacturers and dissatisfied customers endure. See *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 260–61 (Ct. App. 1985) (dismissing a wine producer’s defamation action against a comedian who publicly suggested its product “tasted like urine”).

determined these words were not actionable, incorporating this quotation into the record of the parties' dispute ensured that the legal community could delight in the situation centuries later.

Cases that are funny simply on their facts comprise my first category of examples. Any recitation of the facts in *Dickes* would naturally be amusing: Even if the judge had done nothing to add his own embellishments, the circumstances provided the humor. Unique factual circumstances such as those in *Dickes* continue to facilitate judicial humor today. So long as men and women make their exits and entrances onto the stage of life, ridiculous and unlikely fact patterns will provide fodder for humorous opinions.³³

Judges also enliven otherwise mundane opinions with creativity and wit, however, oftentimes through poetry or unique literary devices. Judicial writings have parodied famous literary works, quoted song lyrics, and cited fables. Thus, the second category of this Essay includes well-known humorous opinions that depart from traditional forms of legal prose. Finally, judges may invoke humor by playing with words or making puns. Courts draw laughs by working crafty references to popular culture and clever phrases into opinions. Examples of such wordplay make up my third category of judicial humor.

A. Fun on the Facts

Mere recitation of the facts in some cases may provoke laughter from the opinion author's audience.³⁴ Among the best examples of such an opinion is the New York negligence case *Peevey v. Burgess*,³⁵ involving a defendant who enjoyed chewing tobacco.³⁶ To facilitate his habit, the defendant "had attached a homemade

33. See, e.g., WILLIAM SHAKESPEARE, AS YOU LIKE IT, act 2, sc. 7 ("All the world's a stage,/ And all the men and women merely players:/ They have their exits and their entrances . . .").

34. See Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 719 n.135 (1987) ("Without intending to demean any litigants, it should be noted that some cases are 'funny' simply because of their subject matter.")

35. 596 N.Y.S.2d 250, 251 (App. Div. 1993) (reversing summary judgment on a negligence claim). Negligence cases, especially those involving causation disputes, often recite uniquely unfortunate events. Nearly all law students are familiar with the torts classic, *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 99, 105 (N.Y. 1928), involving an action against a rail company for injuries caused by a platform scale's collapse after a distant fireworks explosion.

36. Chewing tobacco plays a singular role in creating unusual fact patterns. See, e.g., *Bruce v. Ray*, No. 7:09CV00070, 2009 WL 728538, at *1 (W.D. Va. Mar. 19, 2009) (dismissing a section 1983 claim founded on officers' use of chewing tobacco when serving prisoners their meals); *Smith v. Gardner*, 998 F. Supp. 708, 711 n.3 (S.D. Miss. 1998) (rejecting the argument that "[p]rourement of this tobacco product is an accepted part of baseball" and would be incidental to an assistant coach's employment, thereby limiting tort liability (alteration in original)); *Diem v. Diem*, 193 So. 65, 66 (Fla.

spittoon to the emergency brake release handle under the dashboard” of his pickup truck.³⁷ On the day of the event at issue, the defendant took his truck in for service. Presiding Judge M. Dolores Denman stated the facts as follows:

[T]he spittoon contained about six ounces of spit. After . . . mechanic Robert Shaff completed his work on the truck’s alignment, he opened the driver’s door to get a better view as he backed the truck off the service ramp. Shaff shifted the truck into reverse and bent to find the emergency brake release. When he pulled the handle and released the brake, the brake pedal popped up and struck the spittoon, spraying its contents into Shaff’s face. As a result, Shaff’s eyes burned and he became disoriented, lost control of the truck and fell out. Defendant’s truck continued down the ramp and struck a vehicle being repaired by plaintiff . . .³⁸

No one involved in the case intended it to be humorous. The accident, which seriously injured the plaintiff, did not amuse the parties, who were in the midst of ongoing litigation. Further, the judge did not present the facts in an intentionally humorous manner. Regardless, by describing the occurrence of an implausible and disastrous series of events, the opinion naturally provokes amusement in a reader.

Frank v. NBC, another opinion funny solely on the facts, concerned a tax accountant’s allegations that a *Saturday Night Live* skit defamed him.³⁹ The plaintiff, Maurice Frank, complained that the skit’s protagonist, a tax consultant named “Fast Frank,” “bore a noticeable physical resemblance” to him.⁴⁰ In the skit, Fast Frank gave questionable tax advice; he recommended claiming houseplants as dependents, using midnight visits to the restroom to create write-offs for “business trips,” and deducting divorce expenses as “home improvement.”⁴¹ Although the plaintiff categorized this advice as “ludicrously inappropriate,” the New York trial court found he failed to state a cause of action for defamation.⁴²

Suits against the devil also make for amusing opinions. In *United States ex rel. Mayo v. Satan & His Staff*,⁴³ the plaintiff alleged that “Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff’s

1940) (“A wife that chews tobacco may strain the connubial relation and the husband that dips snuff may do likewise.”).

37. *Peevey*, 596 N.Y.S.2d at 251.

38. *Id.*

39. 506 N.Y.S.2d 869 (App. Div. 1986).

40. *Id.* at 870 (internal quotation marks omitted).

41. *Id.* at 870–71.

42. *Id.* at 870, 875.

43. 54 F.R.D. 282 (W.D. Pa. 1971).

downfall.”⁴⁴ Noting that, among other problems, this claim raised the possibility of an unwieldy class action, the court declined to allow the plaintiff to proceed *in forma pauperis*.⁴⁵

In none of these cases did the court intentionally poke fun at the parties' circumstances. Other times, however, a judge adds his own commentary to make an otherwise serious factual pattern *appear* more amusing. In *Cordas v. Peerless Transportation Co.*, a thief fleeing the scene of a crime forced a chauffeur to facilitate his escape at gunpoint.⁴⁶ The driver, terrified, jumped out of his moving taxi, which then ran into a mother and her children.⁴⁷ The facts, though unusual, are more tragic than amusing. Justice Frank Carlin crafted an entertaining opinion, however, incorporating references to Scylla and Charybdis⁴⁸ and ultimately excusing the driver by asking the following rhetorical question:

If the philosophic Horatio and the martial companions of his watch were “distilled almost to jelly with the act of fear” when they beheld “in the dead vast and middle of the night” the disembodied spirit of Hamlet’s father stalk majestically by “with a countenance more in sorrow than in anger” was not the chauffeur, though unacquainted with the example of these eminent men-at-arms, more amply justified in his fearsome reactions when he was more palpably confronted by a thing of flesh and blood bearing in its hand an engine of destruction which depended for its lethal purpose upon the quiver of a hair?⁴⁹

Given the harrowing facts of *Cordas*, Justice Carlin could have drafted a humorless order. By writing humor into the opinion, however, the judge exposed his personality and lightened what was an otherwise dramatic situation.

44. *Id.* at 283.

45. *Id.* The case, not surprisingly, was filed by a pro se plaintiff. Judges must tread lightly when disposing of pro se complaints because it is not in the interest of justice to poke fun at litigants' legal inexperience. Some complaints, however, may be too ridiculous to take seriously. *See, e.g.*, *Gordon v. Sec'y of State*, 460 F. Supp. 1026, 1026, 1028 (D.N.J. 1978) (dismissing plaintiff's allegations that his incarceration prevented him from being elected president of the United States); *Norman v. Reagan*, 95 F.R.D. 476, 476 (D. Or. 1982) (dismissing plaintiff's complaint alleging that President Reagan caused the plaintiff to suffer “irreparable [sic] harm and neglect” and demanding a federal jury trial for parking fines).

46. 27 N.Y.S.2d 198 (1941).

47. *Id.* at 199–200. Fortunately, the mother and children sustained only minor injuries. *Id.* at 200.

48. *Id.* at 199. In Greek mythology, Scylla and Charybdis are treacherous sea monsters.

49. *Id.* at 201.

B. Meter and Myth

When judges do not have the advantage of a naturally humorous fact pattern, some provoke laughs through literary devices that are unorthodox in legal writing. The poem is one of the most common instruments of judicial humor.⁵⁰ In her article on the propriety of poetry in judicial opinions, Mary Kate Kearney gives several reasons judges might craft an opinion in verse.⁵¹ First, Kearney suggests that a poetic opinion might capture a reader's attention and be more accessible to the general public than normal, formulaic legal writing.⁵² Even an individual lacking legal training can comprehend the simple language of an opinion written in verse.⁵³ Additionally, and perhaps most importantly, a rhyming opinion allows a judge (or, more likely, her clerk) to "break the monotony of opinion writing."⁵⁴ Finally, writing in verse forces economy of expression by stripping a case down to its essential components.⁵⁵ Regardless of the justification, many judges have written poems into their opinions.⁵⁶

Though the quality of judicial verse varies, *Fisher v. Lowe*⁵⁷ exemplifies one of the more successful attempts at incorporating poetry into a legal opinion.⁵⁸ *Lowe* was a tort action in which the plaintiff alleged that the defendants' automobile had struck her "beautiful oak tree."⁵⁹ The trial court granted summary judgment to the defendants, and on appeal, Judge John H. Gillis drew upon Joyce Kilmer's poem "Trees" to dispose of the matter. He quoted the following verse:

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;

50. See generally Gerald Lebovits, *Poetic Justice: From Bad to Verse*, N.Y. ST. B.J., Sept. 2002, at 48; Robert E. Rains, *To Rhyme or Not to Rhyme: An Appraisal*, 16 LAW & LITERATURE 1 (2004).

51. Mary Kate Kearney, *The Propriety of Poetry in Judicial Decisions*, 12 WIDENER L.J. 597 (2003).

52. *Id.* at 604.

53. *Id.*

54. *Id.*

55. *Id.* at 605. An opponent of judicial humor, however, might argue that writing in verse oversimplifies an opinion at the litigant's expense. See *infra* text accompanying note 92.

56. See, e.g., *United States v. Batson*, 782 F.2d 1307, 1316 (5th Cir. 1986); *Jenkins v. Comm'r, 47 T.C.M. (CCH) 238, 247 n.14* (1983); *Mackensworth v. Am. Trading Transp. Co.*, 367 F. Supp. 373 (E.D. Pa. 1973); *City of Columbus v. Becher*, 180 N.E.2d 836, 838 (Ohio 1962).

57. 333 N.W.2d 67, 67 (Mich. Ct. App. 1983).

58. For a particularly egregious attempt at judicial verse, see *Joyner v. Guccione*, No. A-00-CA-799-SS, 2000 WL 33388728, at *1 (W.D. Tex. Dec. 14, 2000) (parodying Clement Clarke Moore's famous poem, "Twas the Night Before Christmas," in ruling on a prisoner pornography case).

59. *Lowe*, 333 N.W.2d at 67 n.1.

A tree whose battered trunk was prest
 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.⁶⁰

Although Judge Gillis's even meter and integrity to Kilmer's original poem made his opinion remarkable, *Lowe* is not unique in using a famous work as a template. The opinion in *In re Love*,⁶¹ a bankruptcy case, parodied Edgar Allan Poe's "The Raven" and concluded

Now my motion caused me terror
 A dismissal would be error.⁶²

Some judges have quoted the work of others to make their points. In *Van Kleeck v. Ramer*, Justice Tully Scott cited the entirety of Sam Walter Foss's poem "The Calf-Path" in a dissent warning against blindly following bad precedent.⁶³ Songs also find their way into judicial opinions: Judge Stephen Reinhardt cited Arlo Guthrie at length in *Henry v. County of Shasta*,⁶⁴ while Chief Judge Stephanie Seymour included the lyrics of John Denver and the Grateful Dead in *United States v. Youts*.⁶⁵

60. *Id.* at 67. In accord with the opinion's style, the editors of the *West* reporters gave *Lowe* rhyming headnotes. *In re Love*, 61 B.R. 558 (Bankr. S.D. Fla. 1986), received the same treatment, *see infra* notes 61–62 and accompanying text.

61. 61 B.R. 558.

62. *Id.* at 559.

63. 156 P. 1108, 1121 (Colo. 1916) (Scott, J., dissenting). Foss's "moral tale" features a young calf that walked a crooked route home. After countless others blindly follow the same zigzag path for three centuries, it becomes the main thoroughfare of a city. Justice Scott compares building on bad precedent to following the calf's faulty trail.

64. 132 F.3d 512, 516 n.7 (9th Cir. 1997) (quoting ARLO GUTHRIE, *Alice's Restaurant Massacre*, on THE BEST OF ARLO GUTHRIE (Warner Bros. Records 1977)).

65. 229 F.3d 1312, 1315 nn.2–3 (10th Cir. 2000) (quoting JOHN DENVER, *Daddy What's a Train?*, on ALL ABOARD (Sony/Wonder 1997); THE GRATEFUL DEAD, *Tons of Steel*, on IN THE DARK (Arista 1987)); *see also* *United States v. Murphy*, 406 F.3d 857, 859 n.1 (7th Cir. 2005) (quoting LUDACRIS, *Ho*, on BACK FOR THE FIRST TIME (Disturbing tha Peace 1999)) ("You doin' ho activities with ho tendencies . . ."). Alex B. Long discusses music's role in legal scholarship and judicial opinions in Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531 (2007). Long's empirical research suggests Bob Dylan's lyrics are used more than any other writer's in legal opinions and briefs. *Id.* at 540; *see Interview*

Other judges, inspired by famous works, have abandoned verse altogether, drawing instead on other literary devices. *Zim v. Western Publishing Co.*,⁶⁶ for example, employed a Biblical motif for humorous effect:

*In the beginning, Zim created the concept of the Golden Guides. For the earth was dark and ignorance filled the void. And Zim said, let there be enlightenment and there was enlightenment. In the Golden Guides, Zim created the heavens (STARS) (SKY OBSERVER'S GUIDE) and the earth. (MINERALS) (ROCKS AND MINERALS) (GEOLOGY).*⁶⁷

Finally, Justice William Douglas of the U.S. Supreme Court used a fable in one of his opinions, proving that even the nation's highest tribunal is not immune from humor.⁶⁸ In a case declaring unconstitutional an Arizona statute requiring one year of state residency as a condition to eligibility for health benefits, Justice Douglas filed a separate opinion expressing concerns about the financial realities of health care.⁶⁹ An appendix to his opinion contained a fable about "Gourmand," an imaginary nation.⁷⁰ The fable described Gourmand's collapse after its citizens, striving to consume only the most gourmet cuisine, ignored all civic duties. The tale cautioned against creating unworkable, overly regulated government systems.⁷¹ Seizing on Douglas's precedent, Chief Judge Donald Lay of the Eighth Circuit Court of Appeals likewise appended a fable of his own to his dissenting opinion in *Hatfield ex rel. Hatfield v. Bishop Clarkson Memorial Hospital*.⁷² Judge Lay's fable featured Wilhelm Virtuoso, a young musician who had fought the odds to become an excellent violin player, only to have his success stymied by indecisive judges at music competitions.⁷³ Judge Lay meant to illustrate the consequences of court-created procedural delays, but the fable also added humor to an otherwise dry subject.

with Alex Long: Bob Dylan's Words Find Place in Legal Writings, NPR (May 10, 2011), available at <http://www.npr.org/2011/05/10/136181949/bob-dylans-words-find-place-in-legal-writings>.

66. 573 F.2d 1318 (5th Cir. 1978).

67. *Id.* at 1320 (parodying *Genesis* 1:1–12). Included in the parentheses are titles of Zim's publications.

68. Judges have written orders as fairy tales as well as fables. *Selmon v. Hasbro Bradley, Inc.*, 669 F. Supp. 1267 (S.D.N.Y. 1987), begins, "Once upon a time, in lands far, far away . . ." *Id.* at 1268. While it does not appear that the Supreme Court has characterized any of its opinions as a fairy tale, this has not stopped law professors from using them as naptime stories.

69. *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 270 (1974).

70. *Id.* app. at 274–76. Justice Douglas borrowed this fable from a law journal article. Judith R. Lave & Lester B. Lave, *Medical Care and Its Delivery: An Economic Appraisal*, 35 LAW & CONTEMP. PROBS. 252, 252–53 (1970).

71. *Mem'l Hosp.*, 415 U.S. app. at 274–76.

72. 701 F.2d 1266, 1272–73 (8th Cir. 1983).

73. *Id.* at 1273.

C. Wordplay and Witticisms

A third way judges craft funny opinions is with puns and the clever use of words. This is likely the most common expression of judicial humor; many opinions contain a droll turn of phrase or a witty footnote. Some judges, however, wield language in an especially noteworthy way. Judge Stephen Reinhardt played with words in a recent Ninth Circuit opinion finding unconstitutional California's Proposition 8 amendment, which revoked the right of same-sex couples to marry in the state.⁷⁴ Judge Reinhardt, emphasizing the cultural importance of the term "marriage," pointed out that

Groucho Marx's one-liner, "Marriage is a wonderful institution . . . but who wants to live in an institution?" would lack its punch if the word "marriage" were replaced with the alternative phrase. So too with Shakespeare's "A young man married is a man that's marr'd," Lincoln's "Marriage is neither heaven nor hell, it is simply purgatory," and Sinatra's "A man doesn't know what happiness is until he's married. By then it's too late." We see tropes like "marrying for love" versus "marrying for money" played out again and again in our films and literature because of the recognized importance and permanence of the marriage relationship.⁷⁵

By emphasizing the many uses of the word "marriage" in popular culture, Judge Reinhardt made his argument in a clear, lighthearted way.

Judges also employ puns in their opinions. One example comes from a Fifth Circuit case concerning detergent labels,⁷⁶ in which Judge John Brown slipped the names of many soap brands into his concurrence:

Clearly, the decision represents a *Gamble* 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*, who withstood Hector's lance, we have *Boldly* chosen the course of uniformity in reversing the lower Court's decision upholding Dade County's local labeling laws.⁷⁷

74. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

75. *Id.* at 1078.

76. Chem. Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325 (5th Cir. 1973).

77. *Id.* at 328.

While Judge Brown's opinion concerned the mundane, the opinion in *Stambovsky v. Ackley*⁷⁸ employed puns to address the metaphysical. That case involved a homebuyer's complaint that poltergeists possessed his newly purchased residence.⁷⁹ The New York court concluded that "the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest."⁸⁰ Finally, in a case concerning Kentucky Fried Chicken, Judge Irving Goldberg brilliantly observed that

[t]his case presents us with something mundane, something novel, and something bizarre. . . . [T]he bizarre element is the facially implausible—some might say unappetizing—contention that the man whose chicken is "finger-lickin' good" has unclean hands.⁸¹

Unfortunately, though puns have created some notable judicial humor, their misuse has also marked comedic low points. Among these is Judge James Burn's opinion in *Oregon Natural Resources Council v. Marsh*,⁸² a case about a contract for the construction of a large dam. Judge Burn recognized the opportunity to incorporate a pun—but then proceeded to beat it to death:

This dam case is back. When the case was here before, there was only a dam plan. Now there is half a dam. The chore assigned on remand by the Court of Appeals requires me to determine what sort of half dam is a good (i.e., safe) half dam and which is a bad (i.e., unsafe) half dam. This assignment might seem strange, since my efforts earlier to determine whether the dam plan was good were not even half as good as those of the Court of Appeals.⁸³

Given the threat that judicial humor can fall as flat as it did in *Marsh*, some have questioned whether judicial jesting is appropriate, or whether all opinions should be written in the familiar, serious tone. Part III of this Essay attempts to answer this question.

78. 572 N.Y.S.2d 672 (App. Div. 1991).

79. *Id.* at 676.

80. *Id.* at 675.

81. *Ky. Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 372 (5th Cir. 1977). One can only hope the Hamburglar directed the Colonel to reputable counsel.

82. 677 F. Supp. 1072 (D. Or. 1987).

83. *Id.* at 1073 (footnotes omitted).

III. IS LEGAL LEVITY PROPER?

A. A Published Polemic

Although many judges have employed humor in their official writings, others believe that levity has no place in a court document. *Russell v. State*,⁸⁴ a case from Georgia's Court of Appeals, brought this difference of opinions into stark focus. In the text of the published opinion, Judges Braswell Deen and George Carley publicly debated the proper use of humor. The case was an appeal from a conviction for criminal damage to property. The appellant had vandalized the house of an ex-boyfriend and his new wife, destroying their waterbed and stealing wedding mementos. Judge Deen, author of the majority opinion, noted, "The events of the instant case dramatically illustrate the stark truth underlying the poetic adage, ' . . . Hell [has no] fury like a woman scorned.'"⁸⁵ Judge Deen then proceeded to pen a lighthearted opinion affirming the appellant's conviction.

Judge Carley took issue with his colleague's style. In a concurrence filed with the other member of the three-judge panel, Judge Carley stated succinctly:

I agree that the judgment of conviction should be affirmed. However, I cannot join the majority opinion because I do not believe that humor has a place in an opinion which resolves legal issues affecting the rights, obligations, and, in this case, the liberty of citizens. The case certainly is not funny to the litigants.⁸⁶

The parties then moved for a rehearing. Judge Deen, stung by Judge Carley's reproach, wrote a lengthy opinion denying the motion for rehearing and defending the use of "colorful quotes and language of levity."⁸⁷ Noting that "[a] sense of humor can complement fine judicial standards, . . . ward off the highly infectious disease 'black-robe-itis,' and . . . immunize Judges to the abhorrent judicial ailment known as the 'divinity virus,'" Judge Deen cited numerous Georgia opinions containing witty language and observed that his order carefully addressed the issues

84. 372 S.E.2d 445 (Ga. Ct. App. 1988).

85. *Id.* at 445 (alterations in original).

86. *Id.* at 447 (Carley, J., concurring specially). Judge Carley is not alone in publicly chastising a comedic colleague. Chief Justice Stephen Zappala took to task his colleague Justice John Eakin (who has a reputation as a "rhyming judge," see Rains, *supra* note 50, at 6) in *Porreco v. Porreco*, 811 A.2d 566 (Pa. 2002). In that case, Eakin filed a poetic dissent; Zappala filed a separate concurrence "to address [his] grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania." *Id.* at 572 (Zappala, J., concurring).

87. *Russell*, 372 S.E.2d at 447.

at bar.⁸⁸ He concluded by asserting the superiority of his opinion over the “scanty, shallow, swift, short-shrift” judgment-only opinions the court frequently issued.⁸⁹

B. Scholarly Suggestions

Although Judge Carley had no opportunity to respond to Judge Deen in public, scholars in the legal community continue to debate the propriety of judicial humor. Generally, those who oppose the use of judicial humor focus on the solemnity of a legal opinion. Litigants endow judges with the power to resolve their controversies. Judges, in turn, are responsible for treating the parties with respect and equity. Using humor to poke fun arguably flouts this responsibility.⁹⁰ Further, parties who feel demeaned have no way to defend themselves; a judge will always have the upper hand because she has the authority to resolve the dispute. Judge Smith noted that a judge “tak[ing] advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he’s down.”⁹¹

Even if judicial humor does not demean the parties, opponents argue that it also obfuscates the legal issues at the expense of creating solid precedent. Its use, they contend, is a red herring that distracts from the core holding of an opinion.⁹² Further, because judges are public employees, time spent crafting judicial jokes is reimbursed on the public dime. Since budget cuts have put courts under great strain in recent years, one could argue that using valuable time to pen funny opinions is unconscionable.⁹³

88. *Id.* (some internal quotation marks omitted).

89. *Id.* at 448.

90. Judge Gerald Lebovits and his coauthors make this argument in Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008). Although the article’s authors consider whether some humor might be appropriate, they conclude that “the potential for harm means that the safest course is to eliminate humor from judicial opinions. All litigants deserve to be treated with respect.” *Id.* at 274.

91. George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 210 (1967).

92. See Lebovits et al., *supra* note 90.

93. Jennifer London gives an account of the crowded Los Angeles County Superior Court in Jennifer London, *Courting Disaster: Budget Cuts Take Heavy Toll on L.A. Courts*, KCET (Mar. 16, 2012), http://www.kcet.org/shows/socal_connected/content/economy/courting-disaster.html. Marshall Rudolph contends that “[i]t is unreasonable to expect taxpayers to sponsor the extra time necessary to write an opinion in verse, or other similarly creative fashion, simply because some members of the judiciary feel the need to derive more satisfaction from writing their opinions.” Rudolph, *supra* note 4, at 185–86.

Proponents of judicial humor take a different view. First, proponents argue that judicial humor does not necessarily demean the parties to the action.⁹⁴ For example, Judge Reinhardt's opinion in *Perry v. Brown*,⁹⁵ discussed above, included popular references to the word "marriage." However, it would be difficult for either party to complain that this whimsical digression was demeaning. Further, proponents argue that judicial humor makes opinions more readable.⁹⁶ Indeed, "[i]mages and informal language make an opinion much easier to read and understand" and "can help crystallize a point, put it in context, and breathe life into the set of facts that the law has formalized."⁹⁷ Finally, crafting humor can give judges a sense of engagement and fulfillment by allowing them to exercise their creative talents while in chambers.⁹⁸

C. The Code of Judicial Conduct and *In re Rome*

Despite the debate over judicial humor among judges and scholars, the Model Code of Judicial Conduct (the Code)⁹⁹ has surprisingly little to say on the matter.¹⁰⁰ Canons 1 and 2 of the Code most directly apply to judicial humor and read, in relevant part, as follows:

Canon 1

A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

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94. See Ryan Benjamin Witte, *The Judge as Author / The Author as Judge*, 40 GOLDEN GATE U. L. REV. 37, 43 (2009) ("There is . . . a clear difference between humor used within a judicial opinion to make light of a particular legal issue or set of facts for readability's sake and a jab directed at the litigant or the attorney involved in the case in order to insult or belittle the participants."); Jordan, *supra* note 34.
95. 671 F.3d 1052 (9th Cir. 2012).
96. See Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 351 (2012) ("Humor and figurative language may demystify the law, crystallize issues or illustrate points, help place issues in context, animate facts, and make opinions more readable.").
97. Jordan, *supra* note 34, at 700–01.
98. *Id.* at 701. Jordan states that "the use of imagery and humor is a way for judges, especially appellate judges, to achieve self-fulfillment and derive needed satisfaction from their jobs. . . . By writing creatively judges can arguably derive more satisfaction from their work." *Id.*
99. MODEL CODE OF JUDICIAL CONDUCT (2011).
100. The American Bar Association, a body of attorneys, drafts the Code. Since the Bar's members do not compose judicial orders, the drafting body might not have given consideration to the role of humor in opinions. This may be, as Rudolph points out, a result of the fact that the "abuse of judicial humor is a minor flaw in our legal system." Rudolph, *supra* note 4, at 199. "Yet, because our system strives for perfection, even small problems deserve a remedy." *Id.*

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.¹⁰¹

As the Code does not prohibit judicial humor, there appears to be only one instance in which a disciplinary body took action as the result of a judge's written attempts at comedy.¹⁰² Kansas trial court Judge Richard Rome, writing in a criminal prostitution case, docketed the following poem under the title "Memorandum Decision"¹⁰³:

This is the saga of [defendant]
 Whose ancient profession brings her before us.
 On January 30th, 1974,
 This lass agreed to work as a whore.
 Her great mistake, as was to unfold,
 Was the enticing of a cop named Harold.

 On February 26, 1974,
 The State of Kansas tried this young whore.
 A prosecutor named Brown,
 Represented the Crown.
 [Defendant], her freedom in danger,
 Was being defended by a chap named Granger.
 Testimony was presented and arguments heard,
 Poor [defendant] waited for the Judge's last word.
 The finding was guilty, with no great alarm,
 And [defendant] was sentenced to the Women's State Farm.

 From her ancient profession she'd been busted
 And to society's rules she must be adjusted.
 If from all of this a moral doth unfurl,
 It is that Pimps do not protect the working girl!¹⁰⁴

101. MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2. Canons 2 and 3 of the Code of Conduct for United States Judges, which applies to federal judges, contain parallel language. CODE OF CONDUCT FOR UNITED STATES JUDGES (2011).

102. Of course, judges have been sanctioned or removed from the bench for unseemly attempts at humor that are unrelated to their *written* opinions. A commission removed Judge Leland Geiler of the Los Angeles Municipal Court, for example, after he engaged in an ongoing pattern of off-color courthouse behavior. For a recount, see *Geiler v. Comm'n on Judicial Qualifications*, 515 P.2d 1, 5 (Cal. 1973) (en banc).

103. I have edited the poem for length.

104. *In re Rome*, 542 P.2d 676, 680-01 (Kan. 1975).

Unfortunately for Judge Rome, a local newspaper published the piece, which led to negative public reaction.¹⁰⁵ Kansas' Commission of Judicial Proceedings recommended that the judge receive public censure.¹⁰⁶ Judge Rome rejected this finding, and the "imbroglio" reached the state's Supreme Court for determination.¹⁰⁷ The high court noted that "[j]udicial humor is neither judicial nor humorous," and found that "the defendant in the prostitution case was portrayed in a ludicrous or comical situation—someone to be laughed at and her plight found amusing."¹⁰⁸ Ultimately, the court censured Judge Rome for violating Canon 3 of the state's Judicial Code,¹⁰⁹ which provided that a "judge should perform the duties of his office impartially and diligently."¹¹⁰ The court noted that it expected a judge to afford "even-handed treatment to everyone coming into contact with the judicial system."¹¹¹ As a result of the mocking memorandum decision, the defendant had not received such treatment.¹¹² The *Rome* decision, as it stands, apparently provides the lone precedent for punishing a judge for a cheeky opinion. It does suggest, however, that at some point a judge's humor amounts to such an abuse of discretion that it is objectively impermissible.

CONCLUSION

In light of the debate over the use of judicial humor, this Essay concludes with a few thoughts on its proper use. While humor is sometimes appropriate in court orders, a judge must take care to ensure that the comedic aspect of an opinion does not detract from its legal substance or humiliate the parties to the lawsuit.

First, although several commentators noted above argue that judges should excise humor altogether from judicial writing,¹¹³ this is not practical. As discussed, some cases are naturally funny.¹¹⁴ No matter how serious the judge's tone, judicial humor is unavoidable in this context. Additionally, hundreds of creative, independent, and talented judges write the volumes of opinions that compose our legal system. A rule forbidding these judges from using clever phrases or witty obser-

105. *Id.* at 681.

106. *Id.* at 679.

107. *Id.*

108. *Id.* at 685 (quoting Smith, *supra* note 91, at 210) (internal quotation marks omitted).

109. *Id.* at 686.

110. *Id.* at 679. This language mirrors Canon 2 of the contemporary Code. *See supra* text accompanying note 101.

111. *Rome*, 542 P.2d at 685.

112. *Id.* at 686.

113. *See supra* Part III.B.

114. *See supra* Part II.A.

vations would be practically impossible to enforce, and policing judicial opinions to punish any ostensibly funny comment would be unreasonable.¹¹⁵ Further, the legal profession prides itself on incisive and well-crafted writing.¹¹⁶ Accordingly, judges should be free to employ a variety of writing styles. Preventing judges from using humor would ultimately quell the creation of unique opinions that employ creative means to convey difficult concepts. In the process, the legal profession would lose the tradition of fun opinions.¹¹⁷

Nonetheless, if they intend to use humor in their opinions, judges should keep in mind two guiding principles. First, judges would be well served to keep humor brief. Humor should not overwhelm the substance of the opinion but should provide a respite from the serious legal matter.¹¹⁸ Judge Kozinski, an excellent writer, is a master at short comedic bursts. In a 1988 dissent to a case requiring statutory interpretation, he aptly noted that “[a]s a linguistic matter, ‘and’ and ‘or’ are not synonyms; indeed, they are more nearly antonyms. One need only start the day with a breakfast of ham or eggs to be duly impressed by the difference.”¹¹⁹

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115. Additionally, it is difficult to conceive a workable method for defining humor in judicial opinions. As noted in Part I, *supra*, humor cannot be easily categorized. Therefore, a reader may have a difficult time discerning whether judicial writing is intended to invoke laughs. For example, Justice Potter Stewart, attempting to define obscenity in a judicial opinion, once famously concluded, “I know it when I see it . . .” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). While many practitioners may have chuckled at the scant legal guidance this line provides, it is likely that Justice Stewart intended the remark to be serious.
116. See, e.g., Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 887 (2002) (“High-quality writing is one of the crafts most necessary to a successful career in law.”); Kathleen Elliot Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507, 516–17 (2005) (“‘Law is a profession of words.’ . . . Thus, to enter the profession, obtain and maintain a legal job, and have a successful legal career, superior legal writing skills are required.” (quoting Debra R. Cohen, *Competent Legal Writing—A Lawyer’s Professional Responsibility*, 67 U. CIN. L. REV. 491, 492 (1999)) (internal quotation marks omitted)).
117. Humorous lines have produced some of the more memorable quotes from the nation’s highest court. A recent opinion by Justice Antonin Scalia attempted to analogize an electronic GPS tracking device to an eighteenth-century constable hiding in the trunk of a carriage. See *United States v. Jones*, 132 S. Ct. 945, 951 n.3 (2012). Justice Samuel Alito, concurring in the judgment, noted that this would “have required either a gigantic coach, a very tiny constable, or both.” *Id.* at 959 n.3 (Alito, J., concurring in the judgment).
118. Judge George Smith has commented on the importance of brevity in the judicial opinion. See Smith, *supra* note 10, at 5. In a recent interview, an active federal judge, though expressing reservations about judicial humor of any kind, made an exception for brief and witty comments. Interview With Active Judge in Los Angeles, California (Apr. 17, 2012).
119. *MacDonald v. Pan Am. World Airways, Inc.*, 859 F.2d 742, 746 (9th Cir. 1988) (Kozinski, J., dissenting) (emphasis omitted). By means of contrast, for a humorous, well-written, but overly long digression detailing beer’s role in history, see *City of Clinton v. Smith*, 493 So. 2d 331, 334–36 (Miss. 1986).

Using humor quickly to bolster an argument, and then moving on, is appropriate and useful.

Second, judges should critique their writing from the perspective of the parties to the case. Does the humor offend, or is it merely in good fun? A judge's writing should never demean litigants or poke fun at them. Although a party may annoy or amuse a judge, expressing ridicule in a published opinion degrades the image of the justice system as a detached and neutral arbiter.¹²⁰ Certain judges rely on biting or harsh comments to attract attention to their writing.¹²¹ As noted above, the superiority theory suggests that ridicule and belittlement are effective ways to invoke laughs.¹²² Although such scorn can be amusing for detached readers, it is not appropriate in judicial writing.¹²³

Ultimately, the use of judicial humor should be left to the sound discretion of the bench. Although guidelines are instructive, they cannot encompass every circumstance. As in many other contexts, we rely on judges to monitor their own behavior and act in the best interest of litigants and the legal system.¹²⁴ It is inevitable, from time to time, that a misled member of the judiciary will abuse her privileged position by writing a demeaning or biting opinion.¹²⁵ However, I trust that the great majority of judges will respect their position of authority. Permitting these members of the bench to write in creative, humorous ways will add interest and clarity to legal orders. Hopefully, in the process of adjudicating disputes impartially and respectfully, judges will also pen a few more witty opinions that future students of the law can cite for laughs.

120. See Rudolph, *supra* note 4, at 195.

121. For example, Judge Samuel Kent of the Southern District of Texas docketed an opinion scolding two attorneys for composing "some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston." *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001). Richmond, *supra* note 96, at 351–59, criticizes the *Bradshaw* decision as "a textbook example of judicial bullying in the guise of humor."

122. See *supra* Part I.

123. Richard Delgado and Jean Stefancic analyze the use of such scornful humor in Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994) (concluding that the Court, as a counter-majoritarian institution, should refrain from directing satire or sarcasm at litigants of low social standing).

124. For example, judges must exercise careful discretion when imposing criminal sentences and making child custody determinations. See Mary K. Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 594 (2009); Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2216–19 (1991).

125. *Rome* and *Bradshaw* provide two examples of such abuse. *In re Rome*, 542 P.2d 676 (Kan. 1975); *Bradshaw*, 147 F. Supp. 2d 668.