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## Imagery, Humor, and the Judicial Opinion

Adalberto Jordan

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# Special Issues and Topics

## Imagery, Humor, and the Judicial Opinion

*I like to think that the work of a judge is an art . . . . After all, why isn't it in the nature of an art? It is a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. He has some vague purposes and he has an indefinite number of what you might call frames of preference among which he must choose; for choose he has to, and he does.*

Learned Hand<sup>1</sup>

*Judicial humor is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a judge utter a good one. There seems to be something about the judicial ermine which puts its wearer in the same general class with the ordinary radio comedian. He just is not funny. In the second place, the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His 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.*

William Prosser<sup>2</sup>

### I. INTRODUCTION

From time immemorial, judges, more so than lawyers, have been acknowledged as the high priests of the religion we call law.<sup>3</sup> As

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1. Remarks at Proceedings of a Special Session of the United States Court of Appeals for the Second Circuit in Commemoration of Judge Learned Hand's Completion of Fifty Years of Federal Service, *quoted in* H. SHANKS, *THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND*, at flyleaf (1968). For a collection of Judge Hand's papers and addresses, see I. DILLIARD, *THE SPIRIT OF LIBERTY* (1960).

2. W. PROSSER, *THE JUDICIAL HUMORIST* vii (1952). Despite this comment, Prosser apparently thought enough of legal humor to write a book on the subject.

3. "[M]any have noted the similarity between the judiciary and the priesthood—the black robes, the stylized formulae of address, the sanctification of the witness's testimony by a hand on the holy book." Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 604 (1986). See also Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 696 (1986) ("We surround our courts with ritual and mystique and accord our judges, like a secular priesthood, with distinctive honor."); cf. D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 453 (1963) ("[T]he language of the law depends for survival upon those it unites in priesthood—the lawyers."); F. RODELL, *WOE UNTO YOU LAWYERS!* 3 (1939) ("In tribal times, there were medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers."). The religious metaphor, applicable to law

such, they have come to personify the aura that surrounds the legal system and its attendant rituals. The image of the stern, sober, larger-than-life judge looking down at the defendant from a lofty bench was prevalent in the earlier days of Anglo-American jurisprudence. In Gilbert and Sullivan's *Trial by Jury*, for example, the judge, upon entering the courtroom, is greeted by the following chorus:

All hail, great judge!  
To you bright rays  
We never grudge  
Ecstatic praise. All Hail!

May each decree  
As statute rank  
And never be  
Reversed in banc. All Hail!<sup>4</sup>

The view that judges are omnipotent and god-like still lingers, but public and professional perceptions of the judiciary have changed radically in the past fifty years. The work of legal realists<sup>5</sup> and critical

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because both law and religion involve the explication of society's moral values, continues to appear in current literature concerning judicial review. See, e.g., J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 138, 162 (1980). Anthony Amsterdam has compared the role of the Supreme Court to that of the priestess of the Oracle at Delphi. See Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 785-86, 793 (1970).

The perception of law as something mystical was probably reinforced, if not engendered, by the formal view of the judicial process—that judicial decisions were the “mechanical result of the application of antecedent rules to the facts of particular cases,” and that “[j]udges ha[d] virtually no freedom in the selection or interpretation of these rules.” W. RUMBLE, AMERICAN LEGAL REALISM 49 (1968). In the words of Sir William Blackstone, “[judges] are the depositories of the laws; the living oracles, who must decide in all cases of doubt . . . not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.” 1 W. BLACKSTONE, COMMENTARIES \*69. If the judicial process was truly mechanical, however, we would hardly need gods to implement it. Predictably, the formalist view is not shared by modern writers. For different descriptions of how judges decide “hard” cases, see R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1978); Hart, *Positivism and the Separation of Laws and Morals*, 71 HARV. L. REV. 593, 606-14 (1958).

4. W. GILBERT & A. SULLIVAN, TRIAL BY JURY (1875), reprinted in W. GILBERT, THE SAVOY OPERAS 6 (1926). The two playwrights seemed to have a knack for satirizing contemporary attitudes about the law. In *Iolanthe*, the Lord Chancellor sings:

The Law is the true embodiment  
Of everything that's excellent  
It has no kind of fault or flaw,  
And I, my Lords, embody the Law.

W. GILBERT & A. SULLIVAN, IOLANTHE, ACT I (1882), reprinted in W. GILBERT, THE SAVOY OPERAS 212 (1926). For a humorous treatment of *Iolanthe*, see Buchmeyer, *Judicial Ethics: The Iolanthe Report*, TEX. B.J., Oct. 1981, at 1169-70.

5. See, e.g., K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).

legal theorists<sup>6</sup> has demystified the images created by the formal view of law and the judiciary by pointing out what had been suspected all along: that judges have failings and that they necessarily make law<sup>7</sup> because of the need to interpret and the indeterminacy of legal argument. More and more, judges are portrayed and perceived as the human beings they have always been.<sup>8</sup>

This realist perception of judges has consequences for judicial writing and the use of imagery and humor. Although judges in the eighteenth, nineteenth, and early twentieth centuries used imagery to adorn their pronouncements, the use of figurative language is more likely to be accepted today because of the realist view. Judges' personalities, training, education, prejudices, and views of their role are bound to shape in some way the opinions they write and the way they write them. Moreover, judges—appellate judges in particular—should be considered professional writers, for they will often be judged by what appears on a written page. Consequently, “[w]ords—the right words—matter” to judges and underscore their status as writers.<sup>9</sup> Because “the judge has at his disposal the various stylistic and rhetorical devices that the essayist has available to him,”<sup>10</sup> it is not surprising to find that some judges use different literary devices to help explain their reasoning and get their points across.<sup>11</sup> As Irving

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6. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

7. See R. POSNER, *THE FEDERAL COURTS* 3-7 (1985).

8. Television programs today depict different aspects of the legal system more realistically. *L.A. Law*, NBC's critically acclaimed depiction of life in a small Los Angeles law firm, often focuses on the human frailties of judges and lawyers. In the NBC comedy series *Night Court*, Judge Harry Stone, a practical joker turned judge, conducts his courtroom in an informal manner—laughter is the only formality that is adhered to. Judging from the success of both programs, it appears that television executives and the American people alike feel comfortable in dealing with the law and the judiciary on a personal level.

Recent books on the Supreme Court, by describing the “inner workings” of the Court and the way cases are decided, have also helped to reshape the way the judiciary is viewed. See D. O'BRIEN, *STORM CENTER: THE SUPREME COURT AND AMERICAN POLITICS* (1986); B. WOODWARD & S. ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

9. Domnarski, *The Opinion as Essay, The Judge as Essayist: Some Observation on Legal Writing*, 10 J. LEGAL PROF. 139, 141 (1985).

10. *Id.* at 144 (citation omitted).

11. Judges may face a dilemma in trying to write opinions that are figurative, quotable, humorous, or unique. While they may want to forsake the wooden form of judicial opinion writing (issue, facts, law, application, conclusion), they must, in some way, maintain the dignity and integrity that, at least in part, gives the judiciary its legitimacy. Tennyson, writing in the Victorian Age, described a similar problem faced by poets of that era. The poets wanted to experience the life of the masses, but were afraid that such an experience would impair their ability to write. Tennyson captured the essence of the dilemma in a poem about a lady who wove a magic web in a tower near Camelot. She could only observe Camelot and its surroundings by looking at the reflections in a mirror. If she looked toward Camelot, a curse

Younger has noted, "[a] legal education needn't stifle literary talent."<sup>12</sup>

This article is about the use of imagery<sup>13</sup> and humor in judicial opinions.<sup>14</sup> Although in a sense it is really about judges who have had the imagination, courage and ability to deviate from conventional norms in writing their opinions, it is not an exhaustive compilation of all colorful judicial opinions,<sup>15</sup> and does not pretend to rank or com-

would fall upon her and kill her. Although she was "half sick of shadows," she was afraid to risk looking at Camelot. A glance at Sir Lancelot, however, forced her to take a chance:

A bowshot from her bower eaves  
He rode between the barley sheaves,  
The sun came dazzling through the leaves,  
And flamed upon the brazen greaves  
of bold Sir Lancelot.  
A red-cross knight forever kneeled  
To a lady in his shield,  
That sparkled on the yellow field.  
Beside remote Shalott.

....

His broad clear brow in sunlight glowed;  
On burnished hooves his war horse trode;  
From underneath his helmet flowed  
His coal-black curls as on he rode,  
As he rode down to Camelot.  
From the bank and from the river  
He flashed into the crystal mirror,  
"Tirra lirra," by the river  
Sang Sir Lancelot.

She left the wheel, she left the loom,  
She made three paces through the room,  
She saw the water lily bloom,  
She saw the helmet and the plume,  
She looked down to Camelot.  
Out flew the web and floated wide;  
The mirror cracked from side to side;  
"The curse is come upon me," cried  
The Lady of Shalott.

A. TENNYSON, *THE LADY OF SHALOTT*, Part III (1832). Tennyson's poem does not pretend to solve the dilemma, but may suggest to judges that they sometimes have to take chances. The consequences for judges, in any event, are bound to be less momentous than they were for Tennyson's heroine—tempered use of humor and imagery is not likely to impair the judiciary's ability to function. In addition, there are mechanisms to deal with judges who abuse their power and freedom of expression. See *infra* notes 38-42 and accompanying text.

12. Younger, *Legal Writing All-Stars*, A.B.A. J., Dec. 1986, at 94.

13. Imagery is defined as "figurative language." WEBSTER'S NEW WORLD DICTIONARY 300 (1979).

14. As the excerpts in section three demonstrate, imagery and humor are not mutually exclusive. Humorous opinions often contain imagery, and figurative language is sometimes funny.

15. At the time this article went to print, the West Publishing Company had not yet designated a key number for judicial opinions employing imagery or humor.

pare the quality of the opinions considered. Rather, it simply celebrates the prankster and poet in all of us.

The second section of this article begins by briefly summarizing the conflicting viewpoints on the place of humor and imagery in judicial opinions and presents a defense of creative judicial writing. The next section, section three, compiles colorful judicial opinions, focusing on two judges who are famous for their unique writing styles. The last section, a brief essay on colorful opinion writing, concludes that imagery and humor have a place in legal writing.

## II. ALEKHINE'S DEFENSE:<sup>16</sup> THE PROPRIETY OF IMAGERY AND HUMOR

Much has been written about the problems associated with legal writing.<sup>17</sup> One attorney has described it as "mountains of dreary drivel, so formal, heavy and pedantic, unleavened by spritely humor or sparkling language, rhythm or rhyme."<sup>18</sup> For years, and without much success, commentators, educators, judges, and lawyers have urged the legal profession to write clearly and in a way that most people can understand. Many have criticized the hyper-technical nature of legal writing (e.g., wills and contracts), arguing that the difficult language prevents the public (and some lawyers and judges) from understanding what is really being said. Both lawyers and non-lawyers have revolted against the monopolization of the existing legal system by lawyers by trying to help people solve their legal problems in unorthodox ways.<sup>19</sup>

The dogmatic style of legal writing used by lawyers may be attributed to the fact that lawyers are concerned only with their cli-

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16. I have entitled this section "Alekhine's Defense" because of the parallels between that chess opening and the use of imagery and humor by judges. In Alekhine's Defense (1.P-K4, Kt-KB3), Black, rather than trying to control the center, allows White to advance his center pawns in the hope that those pawns will be weakened. Like imagery and humor, the defense involves some risk, see R. FINE, IDEAS BEHIND THE CHESS OPENINGS 95-99 (1949), but can pay off handsomely if used appropriately.

17. See, e.g., Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 YALE L.J. 161 (1982); Raymond, *Legal Writing: An Obstruction to Justice*, 30 ALA. L. REV. 1 (1978); Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984); Wydick, *Plain English for Lawyers*, 66 CALIF. L. REV. 727 (1978). Not all of the commentary, however, has been critical. See, e.g., Friedman, *Law and Its Language*, 33 GEO. WASH. L. REV. 563 (1964); Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599 (1986).

18. Goodheim, *Literary Style and Legal Writing or Why Not Throw Some Literary Effort into Preparing Mr. Blackstone's Chowder*, 37 N.Y. ST. B.J. 529, 529 (1965).

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

ents' claims and do not worry about their clients (or anyone else, for that matter) understanding legal jargon,<sup>20</sup> but such a concern should not operate to constrain judicial creativity. Judges do not have clients; their audience is the legal profession and, in a larger sense, the public. Therefore, "[i]n developing an idea in the opinion that effects on the whole of society, as opposed to asserting a principle to advance a client's cause, the appellate judge can, and indeed should, draw upon a wide range of cultural resources."<sup>21</sup>

It is heartening that judges on occasion have turned to literature, humor, and imagery in writing opinions and deciding cases. Judges in England, for example, have long used figurative language to adorn or explain their reasoning. In *The King v. Shipley*,<sup>22</sup> a 1784 case, Lord Mansfield quoted lines from a ballad in discussing the jury's function in cases of seditious libel:

For Sir Phillip well knows  
His innuendos  
Will serve him no longer  
In verse or prose;  
For twelve honest men have decided the cause,  
Who are judges of fact, though no judges of laws.<sup>23</sup>

The House of Lords, in *Thomson v. Weems*,<sup>24</sup> held that a life insurance policy was null and void because the deceased had falsely answered a question pertaining to his temperance. Lord Fitzgerald, concurring, agreed that the deceased had not been temperate: "The cause of death, too, is confirmation strongly of the [insured] having fallen into that fatal habit which produces

" \* \* \* \* all the kinds of maladies that lead to death's grim  
cave  
Wrought by intemperance.' "<sup>25</sup>

Concurring in *Southwark Borough Council v. Nightingale*,<sup>26</sup> Mr.

20. Domnarski, *supra* note 9, at 140. Nevertheless, lawyers seem to ignore the effect that imagery can have in legal writing:

To the mnemonic device with the greatest possibilities—writing (in prose or in rhyme) so unhackneyed that it pricks the dozing reader and disturbs the peace of the quiet memory—lawyers give their least efforts. They have accustomed themselves to the dullest prose in the world as though it were inevitable.

D. MELLINKOFF, *supra* note 3, at 439 (citations omitted).

21. Domnarski, *supra* note 9, at 143.

22. 99 Eng. Rep. 774 (K.B. 1784).

23. *Id.* at 823. Another judge quoted the ballad with approval in a civil slander case 140 years later. See *Broome v. Agar*, 138 L.T.R. 698, 699 (C.A. 1928) (Scrutton, L.J.).

24. 9 App. Cas. 671 (H.L. 1884).

25. *Id.* at 698 (Fitzgerald, L.J.). The insured had died of chronic hepatitis. *Id.* at 696-97.

26. 64 T.L.R. 563 (K.B. 1948).

Justice Singleton included a ditty to illustrate the obscurity of certain sections of an act passed by the London County Council:

"I thought when I learned my letters  
That all my troubles were done,  
But I find I am sadly mistaken  
They have only just begun."<sup>27</sup>

In *Sydall v. Castings Ltd.*,<sup>28</sup> the Court of Appeal held that the word "descendant," as used in an insurance policy, was a term of art, and that an illegitimate child therefore did not qualify as a descendant. Lord Denning dissented, arguing that the term should have been given its ordinary meaning.<sup>29</sup> Lord Russell, borrowing from Shakespeare, suggested that Lord Denning had been swayed by sympathy:

I may perhaps be forgiven for saying that it appears to me that Lord Denning M.R. has acceded to the appeal of Bassanio in the Merchant of Venice.

*Bassanio*: "And, I beseech you, wrest once the law to your authority: To do a great right, do a little wrong."

But Portia retorted:

*Portia*: "It must not be; there is no power in Venice

Can alter a decree established:

'Twill be recorded for a precedent,

And many an error, by the same example,

Will rush into the State: it cannot be."

I am a Portia man.<sup>30</sup>

Commentators, and judges themselves, disagree as to the propriety of humor and other literary devices in judicial opinions. Several commentators on judicial opinion-writing advise judges to avoid using humor, sarcasm, irony, and other figurative language. The author of a handbook on opinion writing states that "sarcasm should never be used, and humor should be avoided."<sup>31</sup> Others believe that the use of humor and imagery can be effective,<sup>32</sup> and that it adds life to the

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27. *Id.* at 565 (Singleton, J.).

28. [1967] 1 Q.B. 302.

29. *Id.* at 308-13 (Denning, L.J.).

30. *Id.* at 321-22 (Russell, L.J.) (quoting W. SHAKESPEARE, *THE MERCHANT OF VENICE*, Act IV, scene 1).

31. J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 7 (1981). See also Hopkins, *Notes on Style in Judicial Opinions*, 8 *TRIAL JUDGE J.* 49, 51 (1969) ("Humor has a dubious place in an opinion. It is not a universal commodity and the decision of the rights of the parties is a serious matter.").

32. "Humor may also be an aid to remembrance, and need not be an outcast of legal writing. All that a [judge] has to fear from humor is failure, and with the stakes so high (an end to unmitigated dullness) the risk is sometimes worth taking." D. MELLINKOFF, *supra* note 3, at 442 (citations omitted). See also F. COOPER, *EFFECTIVE LEGAL WRITING* 36 (1953)



otherwise rigid format<sup>33</sup> of judicial opinions. A syllabus on opinion writing prepared for a federal circuit judges' conference, for example, pointed out that "our big failure is lack of color: We are urged to liven up the opinion by an occasional touch of humor, satire or figure of speech."<sup>34</sup> Judge (later Justice) Cardozo, acknowledged by many as a great legal writer, appeared ambivalent on the issue:

Flashes of humor are not unknown, yet the form of opinion which aims at humor from beginning to end is a perilous adventure, which can be justified only by success, and even then is likely to find its critics as many as its eulogists. . . . I would not convey the thought that an opinion is the worse for being lightened by a smile. I am merely preaching caution. . . . In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed.<sup>35</sup>

Notwithstanding the disagreement over figurative language, there exist several functional and theoretical justifications for the use of humor and imagery in judicial opinions. First, such language helps demystify law. At its most basic level, law is simply a restatement of everyday disputes between people (or between the government and its citizens). Law aggrandizes the dispute with the use of such lifeless terms as "cause of action" and "litigation," and enshrines an otherwise human problem in a formal legal setting. In what can be called an act of self-legitimation, the law formalizes and thereby complicates everything (including the language) surrounding the ultimate resolution of conflicts arising from everyday life experience.<sup>36</sup> Imagery and humor can reshape the dispute into the story that it originally was, help bring the dispute back "down to earth," and dispel some of the notions held by those affected by the legal system.

Second, humor and figurative language can help crystallize a point, put it in context, and breathe life into the set of facts that the law has formalized. Images and informal language make an opinion

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("Judges can sometimes make good use of sarcasm. It can be highly persuasive, in the hands of a master.").

33. Most judicial opinions are divided into five parts: (1) the nature of the action and how it is before the court; (2) the issues; (3) a statement of the facts; (4) an analysis of the legal issues; and (5) the disposition of the case. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 582 (1983). For a comprehensive bibliography and survey of literature about writing judicial opinions, see C. BOLDEN, *APPELLATE OPINION PREPARATION* (1978).

34. Witkin, *Appellate Court Opinions—A Syllabus for Panel Discussion*, 63 F.R.D. 515, 568 (1973).

35. B. CARDOZO, *LAW AND LITERATURE* 26-27, 29 (1931).

36. Most legal documents use the word "said" to designate the objects of controversies or transactions ("said" contract, "said" car). Few, if any, of us would ask a fellow diner to "pass the 'said' salt."

much easier to read and understand. Consider, for example, Judge Irving Goldberg's clear statement of the reasons why parties filing a federal suit could not complain about a federal injunction prohibiting them from pursuing state court remedies.

Appellants themselves issued the invitation to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that "Good Night Ladies" should have been played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not The Last Tango for the Parish. Appellants still have an encore to perform and their day in court is not over.<sup>37</sup>

Third, 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. Because of the nature of their profession, judges lead cloistered lives, devoid of much human interaction.<sup>38</sup> Much of their time is spent inside chambers performing administrative chores and writing decisions and memoranda. By writing creatively judges can arguably derive more satisfaction from their work.

Fourth, because they show the lighter side of the law, imagery and humor further illustrate the inherently human nature of law and of those who are charged with administering it. When judges break from the mold, they demonstrate that law is fluid, ephemeral, and ever-changing.

This does not mean, however, that the unbridled use of humor and sarcasm is always appropriate. It can have harmful effects, especially when directed at a litigant. Thus, judges, because of their position, must accept certain constraints upon their freedom of expression,<sup>39</sup> and must be able to determine when the use of humor or imagery is proper.

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37. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1114 (5th Cir. 1973).

38. See generally F. COFFIN, *THE WAYS OF A JUDGE* (1980).

39. *In re Bonn*, 375 Mass. 680, 709, 378 N.E.2d 669, 684 (1978); *Matter of Seraphim*, 97 Wis. 2d 485, 500, 294 N.W.2d 485, 494 (1980). One commentator has suggested that in-court speech by judges be subject to greater restraint than out-of-court speech when proceedings are pending. See Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986). For other views on judges' out-of-court speech, see Lubet, *Judicial Ethics and Private Lives*, 79 NW. U.L. REV. 983 (1984-85); Reavley, *Free Speech for Judges*, 9 LITIGATION 5 (1982).

Obviously not feeling restrained, some judges have compiled and published selected humorous and figurative opinions. See, e.g., M. JONES, *SHOULD UNCLE SAM PAY—WHEN AND WHY?* (1958); M. MUSMANNO, *THAT'S MY OPINION* (1966). Others, like United States

Possible abuse, however, should not preclude the proper use of figurative language, for there exist mechanisms to deal with improper judicial conduct. An illustrative example is *In re Inquiry Relating to Rome*.<sup>40</sup> In that case, a Kansas state court trial judge placed a prostitute on probation for soliciting an undercover policeman. He then filed a memorandum written in verse:

This is the saga of —  
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.  
Unknown to —, this officer, surnamed Harris,  
was duty bent on —'s lot to embarrass.

. . . .

Trial was set in this higher Court,  
But the route of appeal — chose to abort  
And back to Judge Rome, came this lady of the night,  
To plead for her freedom and end this great fight.  
So under advisement —'s freedom was taken,  
and in the bastille this lady did waken.  
The judge showed mercy and was free,  
But back to the street she could not flee.  
The fine she'd pay while out on parole,  
But not from men she used to cajole.  
From her ancient profession she'd been busted,  
And to society's rule she must be adjusted.  
If from all of this a moral doth unfurl,  
It is that Pimps do not protect the working girl.<sup>41</sup>

The memorandum was widely quoted in local papers, and eventually the state commission on judicial qualifications brought a proceeding against the judge. The Supreme Court of Kansas concluded that the memorandum portrayed the defendant in a "ludicrous or comical situation—someone to be laughed at and her plight found amusing."<sup>42</sup> The court held that the code of judicial conduct circumscribed Judge Rome's free speech rights, and censured him for having held the defendant up to public ridicule or scorn.<sup>43</sup> The court pointed out,

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Circuit Judge Frank Coffin, have published light-hearted books about advocacy. See F. COFFIN, A LEXICON OF ORAL ADVOCACY (1984).

40. 218 Kan. 198, 542 P.2d 676 (1975).

41. *Id.* at 200-01, 542 P.2d at 680-81.

42. *Id.* at 208, 542 P.2d at 685.

43. *Id.* at 205-06, 208, 542 P.2d at 684, 686. In 1981, the Supreme Court of Kansas removed Judge Rome from office because he had allowed his feelings about a vote on how

however, that Judge Rome was "not being subjected to disciplinary proceedings because he wrote and filed a memorandum in poetic form but because of the particular manner in which it was written."<sup>44</sup> *Rome* demonstrates that there are ways to discipline judges who abuse their position and freedom of expression.

Judges must always remember that lawsuits and cases are serious matters for those involved, and should be careful not to demean litigants or lawyers in their opinions. It does not necessarily follow, however, that judicial opinions must be lifeless and dull. Judges are called upon to draw lines and make difficult decisions every day; if they wish to use figurative language, they can surely be entrusted to determine if and when the use of humor or imagery is proper. If they go over the line, they can be disciplined.

### III. THE COURT JESTERS

Humor and imagery have had a long, if uncomfortable, relationship with law. Much of the discomfort is attributable to the frequent use of humor by outsiders to lampoon the legal system. Political commentators and satirists traditionally have taken aim at legal institutions. For instance, Honore Daumier, the 19th century French illustrator, ridiculed his country's legal system in a well-known series of lithographs.<sup>45</sup> The use of humor by insiders, however, is by no means something new. English judges used figurative language to

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judges should be selected to affect his treatment of certain lawyers. *See Commission on Judicial Qualifications v. Rome*, 229 Kan. 195, 623 P.2d 1307 (1981).

44. *Rome*, 218 Kan. at 206, 542 P.2d at 684. The line between disparaging remarks and proper criticism is a fuzzy one. Consider millionaire Victor Posner's recent trial on tax evasion charges. After a jury found Posner guilty, newspaper reports and juror interviews revealed that the jury had considered extrinsic materials during its deliberations. Judge Eugene Spellman found that Posner had been denied a fair trial, and granted his motion for a new trial. In his opinion, Judge Spellman chastised one of the jurors for his misconduct in language that was both humorous and critical:

Up until a few months ago, only one other individual with the last name Bach earned a place in history for his contribution to the world. Added to this list now is Roger Bach, who through this case emerges as a new figure rivaling the accomplishments of even the great composer of the Brandenburg Concertos. . . . [Mr. Bach] put on a clinic of some of the most interesting and harmful abuses of the jury system that any one juror could hope to achieve in a single trial.

*United States v. Posner*, 644 F. Supp. 885, 888 n.7 (S.D. Fla. 1986).

45. Daumier's legal prints are collected in *Lawyers and Justice*, published by Leon Amiel Publishers. Today, editorial cartoonists criticize crooked lawyers, ridicule controversial legal decisions, and poke fun at both the judiciary and the legal system. This cartoon by Pat Oliphant, which appeared in 1984, compared the Supreme Court under Chief Justice Warren Burger to the Spanish Inquisition.

adorn their opinions as far back as the 18th century,<sup>46</sup> and books on law, literature and humor began appearing fairly frequently in the United States in the late 1800's.<sup>47</sup>

The largest American legal publisher highlighted the lighter side of law in the early 20th century by publishing *West Publishing Co.'s Docket*, a legal periodical devoted to "instructive and entertaining comments and discussions on matters of interest to the legal profession."<sup>48</sup> Since then, books on legal humor and literature have become more common. R.E. Megarry's *Miscellany-at-Law*<sup>49</sup> is a scholarly compilation of legal anecdotes, and *The Legal Spectator*,<sup>50</sup> by Jacob



"OK, Burger Court, second Reagan term — all hold for the camera, please . . ."

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Critical commentary on the legal system has also taken other forms. In a recent article, Jennifer Jaff examined the way pop musicians portray lawyers. See Jaff, *Law and Lawyer in Pop Music: A Reason for Self-Reflection*, 40 U. MIAMI L. REV. 659 (1986).

46. See *supra* notes 22-30 and accompanying text.

47. See, e.g., L. BIGELOW, *BENCH AND BAR: A COMPLETE DIGEST OF THE WIT, HUMOR, ASPERITIES, AND AMENITIES OF THE LAW* (1871) (collection of anecdotes, miscellaneous legal epigrams, puns and poems); I. BROWNE, *LAW AND LAWYERS IN LITERATURE* (1883) (depiction of law in literature and drama). In one of his best sections, Browne reproduces a burlesque of the trial scene in Shakespeare's *The Merchant of Venice* written in the form of a pretended judicial opinion. *Id.* at 30-39.

48. WEST PUBLISHING CO.'S *DOCKET*, March-April 1927, at introduction. The West periodical—not to be confused with *The Docket*, the newsletter of the National Institute for Trial Advocacy—had sections devoted to legal humor, law, and literature.

49. R.E. MEGARRY, *MISCELLANY-AT-LAW* (1955).

50. J. STEIN, *THE LEGAL SPECTATOR* (1976). In *An Odd Report*, Stein tells about an incredibly lucid volume of the federal reporter he had once found. The volume, which turned

Stein, is, in the author's words, a collection of "transient essays" about the law memorialized in book form. In a recent essay, Edward Bander, law librarian at Suffolk University Law School, surveys books on legal humor and places legal humor in perspective.<sup>51</sup>

Apparently sensing that creative writing is no longer taboo, some judges have turned to humor and imagery in their opinions.<sup>52</sup> What follows is a small sampling of some of the best judicial opinions employing colorful language.

### A. *Imagery in the High Court*

The United States Supreme Court is the most visible judicial body in the country. As a result, the decisions it hands down are scrutinized more closely than are the decisions of other courts. This, however, has not deterred Supreme Court Justices from writing creatively. Although some of the most memorable passages in Supreme Court cases have been penned in majority opinions, imagery and humor have surfaced more in concurrences and dissents, perhaps because such opinions tend to undercut the majority's position.

In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>53</sup> the Court held that the tenth amendment did not bar Congress from applying minimum-wage laws to state and local governments. Justice O'Connor dissented, likening the disagreement over the interpretation of the tenth amendment to a battle:

The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice POWELL, I would prefer to hold the field and, at the very least, render a little aid to the wounded. I join Justice POWELL's opinion. I also write separately to note my fundamental disagreement with the majority's views of federalism and the duty of this Court.<sup>54</sup>

The comparison of legal argument to war had appeared before *Garcia*. Justice (now Chief Justice) Rehnquist, concurring in *Northern Pipeline Co. v. Marathon Pipe Line Co.*,<sup>55</sup> used figurative language to

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out to be counterfeit, "was filled with spurious cases deciding issues that needed deciding but were as yet unreached by judicial illumination." *Id.* at 161-62.

51. See Bander, *A Survey of Legal Humor Books*, 19 SUFFOLK U.L. REV. 1065 (1985).

52. This has naturally generated some commentary about judges with unique or humorous literary styles. See, e.g., Domnarski, *The Tale of the Text: The Figurative Prose Style of Connecticut Supreme Court Justice Leo Parksey*, 18 CONN. L. REV. 459 (1986); Hale, *John S. Wilkes: Judicial Humorist*, 23 TENN. L. REV. 255 (1954).

53. 469 U.S. 528 (1985). The Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), a case it had decided only nine years earlier.

54. *Garcia*, 469 U.S. at 580 (O'Connor, J., dissenting).

55. 458 U.S. 50 (1981) (holding jurisdictional aspects of the Bankruptcy Act of 1978 unconstitutional under article III of the Constitution).

describe Justice White's view of Congress' authority under article III of the Constitution: "I need not decide whether [the Court's article III cases] support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night, as Justice WHITE apparently believes them to be."<sup>56</sup>

In *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>57</sup> the Court held that low-income individuals and organizations representing them did not have standing to contest an Internal Revenue Service ruling which granted favorable tax treatment to hospitals despite their refusal to treat indigents to the extent of the hospitals' financial ability. Justice Powell's opinion for the Court distinguished *United States v. SCRAP*,<sup>58</sup> a case in which the Court had granted standing to a group of students who alleged that action by the Interstate Commerce Commission caused them aesthetic and environmental harm. Justice Brennan, dissenting, used a pun to criticize the majority opinion: "Certainly the Court's attempted distinction of *SCRAP* will not 'wash.'"<sup>59</sup> In *FCC v. Pacifica Foundation*,<sup>60</sup> the Court held that the Federal Communications Commission had the power to regulate indecent broadcasting. Justice Stevens, who authored the plurality opinion, ended with an observation that made the plurality's holding clear:

As Mr. Sutherland wrote, a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.<sup>61</sup>

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56. *Id.* at 91 (Rehnquist, J., concurring). The metaphor is Matthew Arnold's. See M. ARNOLD, *DOVER BEACH*, Stanza IV (1867) ("Ah, love, let us be true to one another! For the world, which seems . . . So various, so beautiful, so new, hath really neither joy, nor love, nor light . . . And we are here as on a darkling plain swept with confused alarms of struggle and flight, where ignorant armies clash by night.").

Apparently Chief Justice Rehnquist's penchant for wit extends to oral argument. In a recent case addressing the constitutionality of a Louisiana statute requiring the teaching of "creation-science" whenever the theory of evolution is taught in public schools, the plaintiffs' attorney suggested that the state's definition of creationism was an attempt to fool the Court, like Tweedledum tried to fool Alice in Lewis Carroll's *Through the Looking Glass*. The attorney predicted that the Court would not be so easily fooled. Chief Justice Rehnquist responded, "Don't overestimate us." Summary of Oral Argument in *Edwards v. Aguillard*, 55 U.S.L.W. 3420 (U.S., Dec. 16, 1986) (No. 85-1513).

57. 426 U.S. 26 (1976).

58. 412 U.S. 669 (1973).

59. *Simon*, 426 U.S. at 62 (Brennan, J., dissenting).

60. 438 U.S. 726 (1978). The case involved the radio broadcast of comedian George Carlin's satiric monologue, "Filthy Words."

61. *Id.* at 750-51 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

On occasion, Justices have used mellow humor to poke fun at themselves. Justice Robert Jackson, who is said to rival Holmes and Cardozo as a great legal writer,<sup>62</sup> once found himself in a slight predicament. In *McGrath v. Kristensen*,<sup>63</sup> the Court held that a temporary visitor to the United States, whose visit had been unavoidably prolonged by the outbreak of World War II, was not precluded from becoming naturalized under prevailing statutes and regulations simply because he had refused to perform military duty. Justice Jackson agreed with the majority. Before joining the Court, however, Jackson, as Attorney General, had given contrary advice to Secretary of War Stimson, and the Attorney General who argued for the government in *Kristensen* relied on Jackson's earlier opinion. The "circumstance apparently provoked Jackson to add the following [statement] to the opinion of the Court:"<sup>64</sup>

I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. 39 Ops Atty Gen 504. I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. It left the difficult borderline questions posed by the Secretary of War unanswered, covering its lack of precision with generalities. . . .

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, *License Cases*, 5 How 504, 12, recanting views he had pressed upon the Court as Attorney General of Maryland in *Brown v. Maryland*, 12 Wheat 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." *Andrews v. Styrap*, 26 L.T.R. (NS) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . ." *United States v. Gooding*, 12 Wheat 460, 478. Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that

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62. G. SCHUBERT, *DISPASSIONATE JUSTICE* 7 (1969). For examples of Justice Jackson's artistry, see his opinion for the Court in the flag salute case, *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and his dissent in the Japanese internment case, *Korematsu v. United States*, 323 U.S. 214, 242 (1944).

63. 340 U.S. 162 (1950).

64. G. SCHUBERT, *supra* note 62, at 312-13.



I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.<sup>65</sup>

Other literary devices have also found their way into Supreme Court opinions. In *Memorial Hospital v. Maricopa County*,<sup>66</sup> the Court held that an Arizona statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense violated the equal protection clause. Justice Douglas, concurring, appended a fable to his opinion. The fable, which had been written as a foreword to an article on medical care, told the story of Gourmand, a country whose people loved good food. The country required all its chefs to "complete at least twenty one years of training," and as a result the price of food skyrocketed. Eating clubs were organized, and people began to frequent specialty restaurants. Soon there were not enough chefs to keep the small restaurants open, and prices continued to rise. A government commission was created to study the culinary problems facing the country:

The commission agreed that weighty problems faced the nation. They recommended that a national prepayment group be established which everyone must join. They recommended that chefs continue to be paid on the basis of the number of dishes they prepared. They recommended that every Gourmandese be given the right to eat anywhere he chose and as elaborately as he chose and pay nothing.

These recommendations were adopted. Large numbers of people spent all of their time ordering incredibly elaborate meals. Kitchens became marvels of new, expensive equipment. All those who were not consuming restaurant food were in the kitchen preparing it. Since no one in Gourmand did anything except prepare or eat meals, the country collapsed.<sup>67</sup>

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65. *Kristensen*, 340 U.S. at 176-78 (Jackson, J., concurring).

66. 415 U.S. 250 (1974).

67. *Id.* at 274-76 (Douglas, J., concurring). Apparently, Justice Douglas' penchant for the out-of-the ordinary was contagious. Federal District Judge Jerry Buchmeyer, writing in the Texas Bar Journal, tells about a fictitious opinion authored by one of Justice Douglas' clerks in 1963. The "case," *Young v. Magnolia*, involved "racial discrimination, prayer in public schools, price fixing, police brutality, equal rights for women, rate-making, innkeepers, grist millers, and public utilities." The "opinion" began subtly: "We put to one side a number of the cases relied upon by the City. The opinions in these cases were written by Mr. Justice Frankfurter. With the way thus cleared the violation of the equal protection clause in this case is doubly apparent." The "opinion," which goes on to "hold" that a brothel is a public utility required to serve all who can pay, and Judge Buchmeyer's humorous commentary on it, cannot be adequately paraphrased in a footnote. For the complete story, see Buchmeyer, *A Matter of Opinion* . . . , TEX. B.J., Nov. 1981, at 1285-86.

### B. *The Prose of Irving Goldberg*

Judge Irving Goldberg was appointed to the United States Court of Appeals for the Fifth Circuit in 1966.<sup>68</sup> Since then, his colorful opinions have been a welcome change of pace for law students and lawyers alike. As evidenced by the excerpts that follow, Judge Goldberg's writing style defies classification. He seems to feel as comfortable with literary allusions as he does with sports analogies.<sup>69</sup>

The names of litigants, those involved in lawsuits, and the subject matter of cases themselves have often provided Judge Goldberg with the ammunition he has needed. In a case involving Kentucky Fried Chicken, Judge Goldberg penned the following lines: "This 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."<sup>70</sup> Dissenting in a diversity case, he used the facts involved in *Erie*<sup>71</sup> to argue that the court should have certified a question of "enterprise" liability to the Supreme Court of Louisiana:

As the majority opinion clickety-clacks down the *Erie* tracks, I fear I hear the sound of the cross-ties splintering. Were I the switchman I would sidetrack this case to the Louisiana switching yards where a locomotive of sufficient power to pull the freight of the majority opinion might be attached. As it is, I remain alone in

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68. Judge Goldberg was one of seven judges appointed to the Fifth Circuit that year. The circumstances that led to those appointments are detailed in J. BASS, UNLIKELY HEROES 304-05 (1981). Since his appointment, Judge Goldberg has been an activist sensitive to civil liberties issues.

69. It is apparent that Judge Goldberg loves to write. See *United States v. Taylor*, 448 F.2d 349, 354 (5th Cir. 1971) (Goldberg, J., dissenting from denial of rehearing en banc) ("my proclivity for verbosity, perhaps, impels me to add the following thoughts"). For his comparison of court-appointed attorneys to designated hitters, see *infra* notes 73 & 74 and accompanying text. Another Goldberg opinion alluding to sports is *Johnson v. Estelle*, 506 F.2d 347, 352 (5th Cir. 1975): "There are only four quarters to a football game. . . . The State's argument in the present case would nullify the doctrine of double jeopardy because any slight deviation in the indictment would give the State another Monday morning quarter."

70. *Kentucky Fried Chicken v. Diversified Packaging Corp.*, 549 F.2d 368, 372 (5th Cir. 1977). *Kentucky Fried Chicken* is not the only case in which Judge Goldberg has used a famous personality to color an opinion. See *Peerless Ins. Co. v. Texas Commerce Bank*, 791 F.2d 1177, 1178 (5th Cir. 1986) ("This diversity case involves the question whether § 3-419 of the Uniform Commercial Code displaced the common law action for money had and received under Texas law. It arises, one could say, from Vincent J. Menier's desire for more cream in his coffee. While Joe DiMaggio confidently extolled the virtues of 'Mr. Coffee' coffee makers, which are manufactured by appellant North American Systems, Inc., Menier, the Vice President of North American's Fairfield Filter Division, pilfered and filched checks through the financial filter of forged endorsements.").

71. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts in diversity cases must generally apply state substantive law).

the caboose, dissenting.<sup>72</sup>

Confronted by a defendant's allegation that he should have been allowed to represent himself, Judge Goldberg offered this introduction in *Chapman v. United States*:<sup>73</sup> "Don Garriga Chapman, for whom designated hitters have struck out in four at-bats before district courts and four previous trips to the plate before this court, protests that the trial court erred by refusing to let him pinch-hit for himself while his court appointed attorney was still in the on-deck circle."<sup>74</sup> In *United States v. Beechum*,<sup>75</sup> the Fifth Circuit overruled *United States v. Broadway*<sup>76</sup> and held that evidence of an extrinsic offense could be admitted to prove a defendant's intent because its probative value outweighed the danger of unfair prejudice. Judge Goldberg dissented: "As the lights are being extinguished on Broadway, I feel impelled to light a few candles in requiem. . . . I can only hope that the majority will soon see the error of its ways and return to the Great White Way of *Broadway* with the appreciation and respect that the grand old boulevard deserves."<sup>77</sup>

Poetry,<sup>78</sup> as well as literary, musical, and biblical allusions are common in Judge Goldberg's opinions. In *United States v. Batson*,<sup>79</sup> his opinion for the court began:

Some farmers from Gaines had a plan.  
It amounted to quite a big scam.  
But the payments for cotton  
began to smell rotten.  
Twas a mugging of poor Uncle Sam.  
The ASCS and its crew  
uncovered this fraudulent stew.  
After quite a few hearings,  
the end is now nearing—

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72. *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983) (Goldberg, J., dissenting). A legal newspaper selected Judge Goldberg's words as the quote of the week. See *Legal Times*, Sept. 26, 1983, at 6, col. 2-3.

73. 553 F.2d 886 (5th Cir. 1977).

74. *Id.* at 887-88.

75. 582 F.2d 898 (5th Cir. 1978) (en banc).

76. 477 F.2d 991 (5th Cir. 1973).

77. *Beechum*, 582 F.2d at 918, 927 (Goldberg, J., dissenting). Judge Goldberg's dissents are sometimes dramatic. See, e.g., *United States v. Colbert*, 474 F.2d 174, 179 (5th Cir. 1973) (Goldberg, J., dissenting) ("I dissent. I refuse to join my brothers as a pallbearer at the funeral of the Fourth Amendment in this Circuit. . . . I find, rather disconcertingly, that my funeral dirge is a solo.").

78. With apologies to any poets who might read this article, it should be clear that the poetry of judicial opinions includes (perhaps features) parodies, limericks and doggerel verse. I shall uncritically call it poetry nonetheless, whether it be high-, middle-, low-, or no-brow verse.

79. 782 F.2d 1307 (5th Cir. 1986).

It awaits our judicial review.<sup>80</sup>

The opinion in a publishing contract case began with a restatement of *Genesis*:

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. . . . And Zim saw that it was very good.

Then there rose up in Western a new Vice-President who knew not Zim. And there was strife and discord, anger and frustration. . . . Verily, they came with their counselors of law into the district court for judgment and sued there upon their covenants.

[A]nd the district judge heard Zim's cry, but gave judgment for Western. Yea, the district judge gave judgment to Western on a counterclaim as well.<sup>81</sup>

A famous passage from *Ecclesiastes* provided the opening lines in a tax deduction case:

"To everything there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted;" a time to purchase fertilizer, and a time to take a deduction for that which is purchased. In this appeal from a Tax Court decision, we are asked to determine when the time for taking a fertilizer deduction should be.<sup>82</sup>

In *Thornbrough v. Columbus & Greenville Railroad Co.*,<sup>83</sup> the plaintiff alleged that he had been the victim of age discrimination. Judge Goldberg quoted a poem by Robert Browning to put the case in perspective:

Grow old along with me!  
The best is yet to be,  
The last of life, for which  
the first was made.

—Robert Browning,  
*Rabbi Ben Ezra* st. 1  
(1864)

For many elder Americans, Browning's verse is a cruel jest rather

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80. *Id.* at 1309.

81. *Zim v. Western Publishing Co.*, 573 F.2d 1318, 1321 (5th Cir. 1978).

82. *Schenk v. C.I.R.*, 686 F.2d 315, 316 (5th Cir. 1982) (quoting *Ecclesiastes* 3:1-2). Judge Goldberg has made some interesting observations on the nature of the American tax system. See *U.S. Life Title Ins. Co. of Dallas v. Harbison*, 784 F.2d 1238, 1239 (5th Cir. 1986) (Goldberg, J.); see also *Pacific Coast Music Jobbers, Inc. v. C.I.R.*, 457 F.2d 1165, 1166 (5th Cir. 1972) (Goldberg, J.) ("A taxpayer cannot simply enter a telephone booth and change into his Subchapter S suit.").

83. 760 F.2d 633 (5th Cir. 1985).

than a reassuring vision. Not only must they face the inexorable advance of nature—they must face the biases of their fellow man.<sup>84</sup>

Determining congressional intent frequently has proven to be a difficult task for judges. Judge Goldberg used the theme to introduce two opinions. In *United States v. Baker*,<sup>85</sup> the Fifth Circuit had to determine whether the defendants must have known of federal involvement to be convicted of making false statements within the jurisdiction of a government department or agency:

We are faced today with a lacuna in the midst of a somewhat dense federal law. The statutory language provides little guidance, and we have no helpful legislative history to aid us in filling the gap. Our task, then, is to read the collective mind of the 1948 Congress. Without a (very large) psychiatrist's couch, this task is difficult indeed.<sup>86</sup>

In *Briggs v. American Air Filter Co.*,<sup>87</sup> the court had to interpret an ambiguous federal criminal statute:

We might wish we had planted a powerful electronic bug in a Congressional antechamber to garner every clue concerning Title III, for we are once again faced with the troublesome task of an interstitial interpretation of an amorphous Congressional enactment. Even a clear bright beam of statutory language can be obscured by the mirror of Congressional intent. Here, we must divine the will of Congress when all recorded signs point to less than full reflection. But, alas, we lack any sophisticated sensor of Congressional whispers, and are remitted to our more primitive tools. With them, we can only hope to measure Congress' general clime. So we engage our wind vane and barometer and seek to measure the direction of the Congressional vapors and the pressures fomenting them. Our search for lightning bolts of comprehension traverses a fog of inclusions and exclusions which obscures both the parties' burdens and the ultimate goal.<sup>88</sup>

Like literature and religion, humor is an important part of Judge Goldberg's repertoire. In a case involving title of property and a fire insurance policy, he used the subject-matter of the suit to have a little fun with metaphors:

We, the appellate firemen, must respond to all calls and have approached the question of title with caution, combing both the record of the proceedings below and the mortgage laws of Texas for a hidden spark. Finding appellant Allstate's pleas for help to

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84. *Id.* at 637.

85. 626 F.2d 512 (5th Cir. 1980).

86. *Id.* at 513.

87. 630 F.2d 414 (5th Cir. 1980).

88. *Id.* at 415.

be nothing more than a false alarm, we affirm the judgment below awarding recovery under the policy.<sup>89</sup>

In *Golden Panagia S.S., Inc. v. Panama Canal Commission*,<sup>90</sup> the attorney for a ship owner whose ship had been damaged in a collision in the Panama Canal absconded with settlement proceeds, and the shipowner brought two actions to reopen the settled case and replace the stolen settlement check. Judge Goldberg dropped a footnote, commenting on the fact that the shipowner had not sued its attorney:

Consistent with its theory that there was no valid settlement, and that the stolen funds still belonged to the Government, Golden Panagia has declined to bring suit against Newell. Counsel for Golden Panagia informed this court at oral argument that Newell is now, in any event, dead. A Higher Court thus has jurisdiction over Henry Newell, and we are confident that any sins he may have committed will be dealt with appropriately there. *See Matthew 25:41-46* (explaining Final Judgment procedures).<sup>91</sup>

The issue in *Oil & Gas Futures, Inc. of Texas v. Andrus*<sup>92</sup> was whether the Secretary of the Interior had erred in construing a bid of .82165 for an offshore gas lease as a bid of 82.165%. Judge Goldberg framed it this way: "In this appeal we are asked to determine whether '.82' is the equivalent of '82%.' Having successfully completed grammar school, we are able to answer in the affirmative."<sup>93</sup>

Judge Goldberg has also used humorous headings to add color to his opinions. In a case involving arbitration between a union and management, he used mythology to illustrate the "Olympian level" of the arbitration process. The headings read: "The Trojan War: Factual Background," "Scylla and Charybdis," "Setting Our Course: The Odyssey to Preserve Arbitration," and "The Cyclops: The Legend of Honeywell."<sup>94</sup> Popular songs were the focus of the headings in *City of Marshall, Texas v. Bryant Air Conditioning Co.*,<sup>95</sup> a case involving allegations of deceptive trade practices in the sale of air conditioning units: "Summer in the City," " 'We Can Work It Out': The

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89. *Reynolds v. Allstate Ins. Co.*, 629 F.2d 1111, 1112 (5th Cir. 1980). Judge Goldberg also "sermonized" the headings, which read "From Bark to Ash," "The Burnt Offering," "The Commandment," and "The Sacrifice Remanded."

90. 791 F.2d 1191 (5th Cir. 1986).

91. *Id.* at 1199 n.2. The opinion also contained a classic Goldberg opening: "It is sometimes said that 'two ships passing in the night' is a bad thing. This case proves that the opposite result—two ships colliding in broad daylight—may not always be desirable either." *Id.* at 1192.

92. 610 F.2d 287 (5th Cir. 1980).

93. *Id.*

94. *Oil, Chemical & Atomic, Etc. v. Ethyl Corp.*, 644 F.2d 1044, 1046, 1048-49, 1053 (5th Cir. Unit A May 1981).

95. 650 F.2d 724 (5th Cir. Unit A July 1981).

Deceptive Trade Practices Act Claim," " 'Promises, Promises': The Breach of Warranty Issues," and "Conclusion: 'The Second Time Around'. . . .'"<sup>96</sup> In *United States v. Grissom*,<sup>97</sup> the defendant was charged with disposing of soybean crops with intent to defraud the mortgagee, the Farmers Home Administration. Each heading in Judge Goldberg's opinion told a story: "All in the Family: Background Facts," "Joe and the Beanstalk: Grissom's Story," "Grissom Gets Beaned: The District Court's Jury Instructions," and "Making a Federal Mountain Out of a Bean Hill."<sup>98</sup>

It is probably appropriate to end this section on Judge Goldberg with one of his best efforts, *Miley v. Oppenheimer & Co.*<sup>99</sup> In *Miley*, an investor sued a broker and two of its registered representatives to recover for "churning," or excessive trading of securities of his account. After a descriptive opening,<sup>100</sup> Judge Goldberg milked the headings for all they were worth. They read: "The Ingredients of a Churning Case: Skimmed Versus Evaporated Milk," "Compensating Damages: Crying Over Spilt Milk," "Punitive Damages for Soured Milk: The High Cost of Churning," "The Court's Charge: A Tasty Dairy Recipe," "Refusal to Order Arbitration: Preserving the Homogenized Milk," and "Conclusion: Grade A Pasteurized and Homogenized."<sup>101</sup>

Judge Goldberg's opinions illustrate why humorous and figurative language is a desirable and healthy addition to American jurisprudence. Goldberg definitely captures the lighter side of law and the human experiences it addresses. Fortunately, he is not the only jurist who frequently uses figurative language.

### C. John Brown's Headings

Humor and imagery seem to thrive in the Fifth Circuit. One of

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96. *Id.* at 725, 727-28. For another Goldberg musical interlude, see *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978).

97. 645 F.2d 461 (5th Cir. Unit A May 1981).

98. *Id.* at 462-64.

99. 637 F.2d 318 (5th Cir. Unit A Feb. 1981).

100. Despite the fact that judges have been composing churning law for over a decade among the outdoor vendors and the pigeons that line Foley Square (the seat of the Second Circuit) and over the rumbling of nearby cable cars in San Francisco (the base of the Ninth Circuit), the Fifth Circuit's only churning composition has been a deafening silence, rivaling the notorious work of John Cage.

*Id.* at 323 (citing John Cage, *Four Minutes and Thirty-Three Seconds* (a piano composition dedicated to the proposition that silence is music to the ears)).

101. *Id.* at 324, 326, 329, 332, 334, 337. For other Goldberg opinions with headings employing imagery, see *Chaline v. Kco, Inc.*, 693 F.2d 477 (5th Cir. 1982) (acts of a play); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981) (ship in a storm).

Judge Goldberg's fellow judges, John Brown, shares his affinity for creative writing. Although Judge Brown's style is different, his opinions remind us that humor is as much a part of law as it is of everyday life. Judge Brown has had a long and distinguished career as a circuit judge on the United States Court of Appeals for the Fifth Circuit.<sup>102</sup> During the late 1950's and early 1960's, he, along with fellow circuit judges Richard Rives, Elbert Tuttle, and John Minor Wisdom, helped desegregate the South<sup>103</sup> by enforcing *Brown v. Board of Education*.<sup>104</sup>

The color with which Judge Brown sometimes dresses<sup>105</sup> often shows up in his opinions. As Jack Bass has noted, "[i]n later years, Brown spiced his opinions with quotable, colorful phrases—the 'Browning' of them, his [past] clerks called it."<sup>106</sup> Most of Judge Brown's humor and imagery show up in the headings and subheadings of his opinions, which have made him "something of a legend."<sup>107</sup> Although some of the headings do not contribute to an understanding of the cases, and may be written just for fun, they are nevertheless precisely that, fun to read.

In *Jackson v. Chevron Chemical Co.*,<sup>108</sup> a cotton farmer sued an insecticide manufacturer for crop losses allegedly caused by ineffective treatment with the manufacturer's products. Judge Brown's headings were filled with puns: "Getting the Bugs Out" and "See, Hear and Speak No Weevil."<sup>109</sup> *Products Carnie, S.A. v. Central American Beef and Seafood Trading Co.*<sup>110</sup> involved a lawsuit brought by a bankrupt to recover some 862,000 pounds of frozen boneless beef, or its value, from the corporation to which the beef had been shipped. Judge Brown's headings toyed with the subject matter of the suit: "No Bones About It," "Appellant's Beef," and "What's at

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102. Judge Brown was appointed to the United States Court of Appeals for the Fifth Circuit in 1955. He served as Chief Judge of the circuit from 1967 through 1969.

103. See J. BASS, *supra* note 68.

104. 347 U.S. 483 (1954) (holding that state laws authorizing segregation of white and black children in the public schools solely on the basis of race violated the fourteenth amendment's guarantee of equal protection of the laws).

105. During a 1979 interview at his office, Brown was clad in red trousers, a peach-colored shirt, black tie with a silk screen print of a New Orleans wrought iron design, and soft leather low-cut black boots—a sartorial style that contrasted with the conservative attire and attitude he displayed toward dress during his early years on the bench.

J. BASS, *supra* note 68, at 105.

106. *Id.*

107. *John Brown's Bawdy*, *Legal Times*, July 26, 1982, at 3, col. 3.

108. 679 F.2d 463 (5th Cir. 1982).

109. *Id.* at 464-65. *Jackson* is not the only case in which Judge Brown has dealt with crop-destroying weevils. See *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338 (5th Cir. 1980); *United States v. Lykes Bros. Steamship Co.*, 511 F.2d 218 (5th Cir. 1975).

110. 621 F.2d 683 (5th Cir. 1980).



Steak.”<sup>111</sup> In *Woolen v. Surtan Taxicabs, Inc.*,<sup>112</sup> a class action brought by a taxi company to challenge an airport’s restriction of taxicab passengers to limited holders of permits, a group of cab drivers sought to intervene. Using both the nature of the plaintiffs’ business and the legal issue before the court, Judge Brown came up with some dandy headings: “A Touch of Class,” “Trying to Get to the Head of the Class,” “United We Fall, Divided We Stand,” “Tax(i)ation Without Representation,” “Let’s All Join In,” and “Keep the Meter Running.”<sup>113</sup>

Names, products, music, and games have also surfaced in Judge Brown’s headings. In a counterfeiting case, Judge Brown entitled one section of his opinion “Pennies from Heaven—Dollars from Xerox.”<sup>114</sup> In *United States v. Anderton*,<sup>115</sup> the defendant challenged the admissibility of certain taped conversations between himself and a government agent. The section of the opinion addressing that issue was entitled “Is It Alive or Is It Memorex?”<sup>116</sup> A popular video game, Pac-Man, was the common thread of Judge Brown’s opinion in *TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta*,<sup>117</sup> where stevedores sought to recover unpaid stevedoring charges incurred during the loading of a vessel. The headings in that case included “TTT Stevedores’ Appeal: Pack-Men Piqued,” “Full Recovery of Additional Loading Charges: Pack-Men’s Profit Apportioned,” and “Wrongful Seizure: Are Pack-Men Space Invaders?”<sup>118</sup> Using the name of one of the parties in *ECEE, Inc. v. Federal Energy Regulatory Commission*,<sup>119</sup> Judge Brown came up with two innovative headings that read like a cliché: “Ecee Come . . .,” “Ecee Go.” In *Whittington v. Estelle*,<sup>120</sup> he structured the opinion with musical allusions, using headings like “The Overture: Con Brio,” “The Trial: Sour Notes and All that Jazz,” and “Appellate Prelude.”<sup>121</sup>

Like Judge Goldberg’s prose, Judge Brown’s opinions have their own unique and creative flavor. Although humorous headings domi-

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111. *Id.* at 685-86. For a “fish story” in a similar vein, see *Wells Fargo Bus. Credit v. Ben Kozloff, Inc.*, 695 F.2d 940 (5th Cir. 1983) (“Fish Story,” “The One that Got Away,” “Gone Fishin’”). See also *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964) (history of fish chowder).

112. 684 F.2d 324 (5th Cir. 1982).

113. *Id.* at 326-28, 330, 334.

114. *United States v. Lemaire*, 712 F.2d 944 (5th Cir. 1983).

115. 679 F.2d 1199 (5th Cir. 1982).

116. *Id.* at 1202.

117. 696 F.2d 1135 (5th Cir. 1983).

118. *Id.* at 1138, 1140-41.

119. 611 F.2d 554, 556, 559 (5th Cir. 1980).

120. 704 F.2d 1418 (5th Cir. 1983).

121. *Id.* at 1419-21.

nate his work, he sometimes plays with the text of opinions. One of his "famous"<sup>122</sup> cases is *Croft & Scully Co. v. M/V Skulptor Vuchetich*,<sup>123</sup> which involved liability for damaged cases of soft drinks. Several excerpts from the opinion speak for themselves:

Croft & Scully contracted to ship 1755 case of soft drinks from Houston, Texas to the middle eastern country of Kuwait. Apparently Kuwaits [sic] would like to be Peppers, too. . . .

As one of the Stevedore's employees was lifting the container, with the use of a forklift, he negligently dropped it. By our calculations, 42,120 cans of soft drinks crashed to the ground, never a thirst to quench. In the Crush, the cans were damaged. The stevedore, no doubt, was in no mood to have a Coke and a smile.<sup>124</sup>

Judge Brown had used the names of products for puns before *Croft & Scully*. In *Chemical Specialties Manufacturers Association v. Clark*,<sup>125</sup> the Fifth Circuit held that a Dade County, Florida ordinance requiring certain labels on detergents was preempted by federal law. Judge Brown's concurrence tracked the majority holding by using the names of detergents:

As soap, now displaced by latter day detergents, is the grist of Madison Avenue, I add these few comments in the style of that street to indicate my full agreement with the opinion of the Court and to keep the legal waters clear and phosphate-free. . . . 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. And, having done so, we are *Cheered* by the thought that striking down the regulation by the local jurisdiction does not create a void which is detrimental to consumers, but rather merely acknowledges that federal legislation has preempted this field with adequate labeling rules.<sup>126</sup>

In *United States v. Ven-Fuel, Inc.*,<sup>127</sup> Judge Brown composed a verse<sup>128</sup> to introduce the case:

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122. Some would say infamous.

123. 664 F.2d 1277 (5th Cir. 1982).

124. *Id.* at 1278-79. The opinion also contains a typical Brown heading—"Pepsi Cola Hits the Spot—On the Pavement." *Id.* at 1279.

125. 482 F.2d 325 (5th Cir. 1973).

126. *Id.* at 328. "Brown reportedly sent a clerk to a supermarket to copy [the] names of every detergent product on the shelves." J. BASS, *supra* note 68, at 105.

127. 602 F.2d 747 (5th Cir. 1979).

128. *See supra* note 76.

This case presents a vicious duel,  
Between the U.S. of A. and defendant Ven-Fuel.  
Seeking a license for oil importation,  
Ven-Fuel submitted its application.  
It failed to attach a relevant letter,  
And none can deny, it should have known better.  
Yet the only issue this case is about,  
Is whether a crime was committed  
beyond reasonable doubt.  
Ven-Fuel was convicted of fraudulent acts,  
By the Trial Court's finding of adequate facts.  
We think it likely that fraud took place,  
But *materiality* was not shown in this case. So while the  
Government will no doubt be annoyed,  
We declare the conviction null and void.<sup>129</sup>

The headings in the case also told a story: "The Procedural Background Is Easily Stated," "But The Facts Are Far More Complicated—," "Applying the Law Is Even Worse," "But For the Reasons Stated We Must Reverse."<sup>130</sup>

One of Judge Brown's classics, *City of Houston v. Federal Aviation Administration*,<sup>131</sup> involved a suit challenging federal regulations imposing a "perimeter rule" prohibiting air carriers from operating nonstop flights between Washington National Airport and any airport more than 1,000 statute miles away. The introduction was a hint of things to come:

This flight from Houston, Texas to our Nation's Capital takes us to both Dulles International and Washington National Airports. The Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, will serve as our flight plan, and the Supreme Court as air traffic control. In the course of our flight, our passengers—the City of Houston, American Airlines and the Federal Aviation Administration—will be informed of our conclusion that Department of Transportation regulations imposing a "perimeter rule" upon flights to and from Washington National Airport are valid and thus, as we disembark, we shall deny the petitions for review.<sup>132</sup>

The headings parodied air traffic regulations, airlines, and their advertisements. They included "One If By Land, Two If By Sea, and Three If By Air," "Pre-Flight Procedure," "We've Only Just Begun," "The Friendly Skies—Filled with Litigants," "Scope of Review—We're the

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129. *Ven-Fuel*, 602 F.2d at 749.

130. *Id.* at 749-50, 752-53.

131. 679 F.2d 1184 (5th Cir. 1982).

132. *Id.* at 1186.

Administrative Agency, Doing What We Do Best," and "You Deserve National Attention?"<sup>133</sup> Judge Brown's opinion, however, was not a hit with everyone. Plaintiff's losing lead counsel "deplored the opinion as 'beyond the bounds of proper judicial demeanor' and criticized the judge for apparently spending more time trying to be comedic than analyzing the facts of the case."<sup>134</sup>

#### D. *The Best of the Rest*

Judges Brown and Goldberg do not have a monopoly on the use of imagery and humor. The following excerpts show that on occasion judges throughout the country have used color to liven their opinions or to make a point.<sup>135</sup>

##### 1. THE ANIMAL MENAGERIE

Cases involving animals often provide judges with comic material. The three cases that follow involve deer, dogs, and birds.

In *United States v. Dowden*,<sup>136</sup> the defendant was charged with shooting a full grown deer in a national forest because the animal was a fawn within the meaning of a Louisiana statute. Judge Dawkins found that the deer was not a fawn despite its lack of horns, and acquitted the defendant. His opinion eulogized the deer and chastized the government for bringing the suit:

A tiny tempest in a tinier teapot has brought forth here all the ponderous powers of the Federal Government, mounted on a Clydesdale in hot pursuit of a private citizen who shot a full-grown deer in a National Forest.

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133. *Id.* at 1186-87, 1189-90.

134. *John Brown's Bawdy*, Legal Times, July 26, 1982, at 3, col. 3. Although the attorney's reaction was understandable given his lack of success, his attack is probably unfounded. It is likely that these headings (like unfunny ones) were formulated after the opinion was drafted and were tailored to the court's results. Nevertheless, Judge Brown has acknowledged that, although he does not use humor disparagingly, his words have sometimes caused embarrassment to others. In those cases, he has regretted his use of humor. Telephone Interview with Judge John Brown (Feb. 2, 1987).

135. Without intending to demean any litigants, it should be noted that some cases are "funny" simply because of their subject matter. See, e.g., *Norman v. Reagan*, 95 F.R.D. 476 (D. Or. 1982) (complaint alleging that President Reagan had caused "civil death" without legislation); *United States ex rel Mayo v. Satan and His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971) (denying plaintiff's motion to proceed in forma pauperis because of doubts about the court's personal jurisdiction over the defendant); *Frank v. NBC*, 119 A.D.2d 252, 506 N.Y.S.2d 869 (1986) (holding that *Saturday Night Live* skit did not defame a tax accountant).

Courts sometimes write humorously unintentionally. In one case, for example, a court stated that "[o]f course *murder without due process* by a person acting under color of state law denies a federal right." *Villaneuva v. McInnis*, 723 F.2d 414, 418 (5th Cir. 1984) (emphasis added).

136. 139 F. Supp. 781 (W.D. La. 1956).

Not content with embarrassing defendant by this prosecution, and putting him to the not inconsiderable expense of employing counsel, the Government has compounded calumny by calling the poor dead creature a "fawn." Otherwise fully equipped with all the accouterments of virile masculinity, the deceased, alas, was a "muley." Unlike other young bucks, who could proudly preen their points in the forest glades or the open meadows, this poor fellow was foredoomed to hide his head in shame: by some queer quirk of Nature's caprice, he had no horns, only "nubbins," less than an inch in length.

Instead of giving him a quiet, private internment and a "requiescat in pace," which decency should have dictated as his due, the Government has filed his blushing head in evidence for all to see. Pointing to the lack of points, to prove its point, it now insists that, whatever his status may have been in other climes, in Louisiana our departed friend is officially puerile.<sup>137</sup>

Proving that deer do not have a monopoly among animals as objects of judicial humor, super DEA agent Paul Markonni's<sup>138</sup> canine zeal in apprehending drug couriers provided the facts which led to an opinion riddled with puns. After receiving information that an airline passenger's companions had been caught with drugs, Markonni had the airline locate the passenger's bags. Because no drug dogs were available, he proceeded to smell the bags for the odor of marijuana. He "alerted" to two of the bags, and used his "detection" to apply for a search warrant. A magistrate issued a warrant, and the passenger-turned-defendant argued that he should have been able to cross-examine Markonni before the warrant was issued. In *United States v. Sentovich*<sup>139</sup> the United States Court of Appeals for the Eleventh Circuit upheld the defendant's conviction. Judge Johnson's opinion for the court played on Markonni's canine sense of smell:

The ubiquitous DEA Agent Paul Markonni once again sticks his nose into the drug trade. This time he is on the scent of appellant Mitchell Sentovich's drug courier activities. We now learn that among Markonni's many talents is an olfactory sense we in the past attributed only to canines. Sentovich argues that he should have been able to test, at a magistrate's hearing on issuance of a search warrant, whether Markonni really is the human bloodhound he claims to be. Sentovich's claims, however, have more

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137. *Id.* at 781-82.

138. In a WESTLAW search, Markonni's name appeared in 51 cases from the Fifth and Eleventh Circuits. Markonni has a very good batting average in those two circuits: The courts have upheld most of his searches and arrests of drug couriers as valid.

139. 677 F.2d 834 (11th Cir. 1982).

bark than bite. In fact, they have not a dog's chance of success. Zeke, Rocky, Bodger and Nebuchadnezzar, and the drug dogs of the southeast had best beware. Markonni's sensitive proboscis may soon put them in the dog pound. . . .

Markonni emerges with his nose unbloodied and his tail wagging. Sentovich's claims are without merit. Having also reviewed the evidence, we find it sufficient for his conviction.<sup>140</sup>

Judge William Mulligan, in his last opinion for the United States Court of Appeals for the Second Circuit before retiring, played the role of a stand-up comic. The case, *United States v. Byrnes*,<sup>141</sup> involved the smuggling of rare swans from Canada. Calling the opinion his "swan song," Judge Mulligan labeled the defendants' appeal a "*rara avis*:"

Canadian geese have been regularly crossing, exiting, reentering and departing our borders with impunity, and apparently without documentation, to enjoy more salubrious climes. Those unwilling or unable to make the flight either because of inadequate wing spans, lack of fuel or fear of buck shot, have become prey to unscrupulous traffickers who put them in crates and ship them to American ports of entry with fraudulent documentation in violation of a host of federal statutes.<sup>142</sup>

Not all interested readers, however, were amused by Judge Mulligan's humor. Despite the comic relief, the Second Circuit affirmed the defendants' convictions.

## 2. POETRY, FABLES, AND SUPPOSED DECISIONS

One of the literary devices most often used by judges is the

140. *Id.* at 835-36, 838 (footnotes omitted). For a light-hearted opinion involving a cat, see *Calleja v. Wiley*, 290 So. 2d 123 (Fla. 2d DCA 1974) (Mann, C.J.).

141. 644 F.2d 107 (2d Cir. 1981).

142. *Id.* at 109 (footnote omitted). The *New York Times* ran a small article on Judge Mulligan's opinion. See *Conceits From a Judge's Lofty Perch*, N.Y. Times, March 19, 1981, at 20, col. 3 (national edition).

Apparently, humor concerning animals knows no political boundaries. Conservative judges, like their liberal colleagues, also write humorously about the subject. *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986) involved an award of attorney's fees under 42 U.S.C. § 1988. The underlying § 1983 action featured pigeons, dogs, and marauding macaws: The plaintiff had been charged with feeding pigeons in a park, allowing her dogs to run unleashed, and with resisting arrest. Judge Frank Easterbrook, a Reagan appointee, commented on the charge of allowing dogs to run unleashed:

The charge concerning the dogs was more substantial. . . . The penalty for allowing dogs to run unleashed in the park is time in the pound (for the dogs only), see Section 30-7.10. The prosecutor asked for 30 days, but the judge apparently sentenced the dogs to time served.

*Id.* at 321. Some of Judge Easterbrook's footnotes also evoked laughter. See *id.* at 320 n.1, 321 n.2.

poem.<sup>143</sup> Whether it is an original or a variant of a famous one, the poem has been a staple of judicial imagery and humor.

In *Fisher v. Lowe*<sup>144</sup> the owner of a tree sued the driver and owner of a car that had crashed into the tree. The syllabus, the headnotes, and the opinion were all written in verse. Judge Gillis' opinion, composed of six stanzas, affirmed a judgment for the defendants:

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 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.<sup>145</sup>

During the sixth game of the 1986 World Series between the Boston Red Sox and the New York Mets, a parachutist landed in Shea Stadium with a Mets banner. The parachutist, Michael Sergio, pleaded guilty to criminal trespassing and was sentenced to 100 hours of community service and a \$500 fine. Queen's Criminal Court Justice Phyllis Flug's sentencing order in *State v. Sergio* tracked Clement Clarke Moore's *A Visit from St. Nicholas*:

'Twas game six of the series when out of the sky  
Flew Sergio's parachute, a Met banner held high.  
His goal was to spur our home team to success,  
Burst Beantown's balloon claiming Sox were the best.  
The fans and the players cheered all they did see  
But not everyone present reacted with glee  
"Reckless endangerment," the D.A. spoke stern.  
"I recommend jail. There a lesson he'd learn."  
Though the act proved harmless, on the field he didn't belong,  
His trespass was sheer folly, and undeniably wrong.  
But jail's not the answer in a case of this sort.  
To balance the equities is the job of this court.  
So a week before Christmas, here in the court,  
I sentence defendant for interrupting a sport.  
Community service, and a fine you will pay.

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143. See *supra* note 78.

144. 122 Mich. App. 418, 333 N.W. 2d 67 (1983).

145. *Id.* at 419, 333 N.W. 2d at 67. The syllabus in the West reporter also provided a lyrical summary of the dispute.

Happy holiday to all. And to all a good day.<sup>146</sup>

Like criminal law, the solemn world of bankruptcy is not immune from imagery and humor. Bankruptcy Judge A. Jay Cristol, in *In re Love*,<sup>147</sup> denied his own sua sponte motion to dismiss a chapter 7 bankruptcy proceeding. He did so in style, drafting his opinion as a poem in the format 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."  
Ah distinctly I recall, it was in the early fall  
And the file still was small  
The Code provided I could use it  
If someone tried to substantially abuse it  
No party asked that it be heard.  
"Sua sponte" whispered a small black bird.  
The bird himself, my only maven, strongly looked to be a raven.

....

Perhaps this case is wrongly placed.  
This is a thought that I must face, perhaps  
I should dismiss this case.  
I moved sua sponte to dismiss it  
for I knew I would not miss it  
The Code said I could, I knew it.  
But not exactly how to do it, or perhaps some day I'd rue it.  
I leaped up and struck my gavel,  
For the mystery to unravel.  
Could I? Should I? Sua sponte, grant my motion to dismiss?

....

Who would be the appellee?  
Surely, it would not be me.  
Who would file, but pray tell me,  
a learned brief for the appellee.  
The District Judge would not do so  
At least this much I do know.

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146. See *And to All a 'Play Ball!'*, New York Times, Dec. 20, 1986, at 1, col. 2 (national edition). Other judges also use poetry in their orders. United States District Judge Thomas Scott refused to release reputed organized crime figure Joseph Paterno from jail on pretrial bond even though Paterno was dying from cancer. Judge Scott quoted Shakespeare in a footnote: "The weariest and most loathed worldly life that age, ache and penury and imprisonment can lay on life is a paradise to what we fear of death." See *Legal Briefs*, Miami Herald, Dec. 8, 1986, at 2B, col. 6.

147. 61 Bankr. 558 (S.D. Fla. 1986).



Tell me raven, how to go.<sup>148</sup>

Not all rhymed opinions have been written by judges. In *State v. Lewis*,<sup>149</sup> a nineteenth century case, the defendant was convicted of escaping from custody while awaiting trial on burglary charges. The Supreme Court of Kansas upheld the conviction, holding that the defendant's acquittal on the burglary charges was not a defense to the charge of escape. A Kansas lawyer, believing that a great injustice had been done, penned a rhymed version of the case.

*Statement of Case, by Reporter*

This defendant, while at large,  
Was arrested on a charge  
Of burglarious intent,  
And direct to jail he went.  
But he somehow felt misused,  
And through prison walls he oozed,  
And in some unheard-of shape  
He effected his escape.

. . . .

LEWIS, tried for this last act,  
makes a special plea of fact:  
"Wrongly did they me arrest,  
"As my trial did attest,  
"And while rightfully at large,  
"Taken on a wrongful charge.  
"I took back from them what they  
"From me wrongly took away."

. . . .

*Opinion of the Court. PER CURIAM:*

We-don't-make-law. We are bound  
To interpret it as found.  
The defendant broke away;  
When arrested, he should stay.  
This appeal can't be maintained,  
For the record does not show  
Error in the court below,  
And we nothing can infer.

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148. *Id.* at 558-59. The syllabus and the headnote of the opinion were also in verse. The headnote read:

Sua sponte dismissal would be error,  
Though authority in Code is there,  
To eschew abuse of consumer debt,  
As presumption for debtor must be met.  
Bankr. Code, 11 U.S.C.A. § 707(b).

*Id.* at 558.

149. 19 Kan. 260, 27 A.R. 113 (1878).

Let the judgment be sustained-  
All the justices concur.<sup>150</sup>

The rhymed reporter's statement was included in the official reports, apparently by a clerk who was amused by it and worked it into the reports without consulting anyone. The Supreme Court of Kansas apparently did not share the clerk's sense of humor—it fired the prankster.<sup>151</sup>

Following in the footsteps of Aesop, some judges have used fables to make a point (especially a moral one).<sup>152</sup> A good example of this literary device can be found in *Hatfield v. Bishop Clarkson Memorial Hospital*.<sup>153</sup> In *Hatfield*, a medical malpractice action, the United States Court of Appeals for the Eighth Circuit certified a question to the Supreme Court of Nebraska. The question certified was whether a statute of limitations on professional negligence actions was tolled during the infancy of an injured minor. Chief Judge Lay dissented, arguing that neither party had asked for certification and that the procedure would work to deny justice by causing delay in a case that was already four years old. He appended a fable, "An Exercise In Time and Music," to his dissent to make his point. The fable concerned a virtuoso violinist who had made it to the finals of a national violin concerto in the year 2001. The judges who had selected him, however, could not make up their minds about the other finalists, and the contest was continued until the next year:

In December of 2002 the judges were still reviewing the compositions for the year 2001 and once again the 2001 contest was postponed. . . . However, in 2003, the judges were so engaged with the contest for that year they forgot about the 2001 contestants and the 2001 contest was once again postponed until 2004. . . . When Wilhelm's parents finally received the invitation for Wilhelm to play, they regretfully replied that they no longer could afford to send Wilhelm to the contest. The committee notified them, under the circumstances, they would finance Wilhelm's appearance. In response, however, Wilhelm . . . notified the committee that he . . . was no longer interested in playing. He wrote that he had given up the idea of becoming a concert violinist and had decided he would

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150. 19 Kan. 266 (1878).

151. See Buchmeyer, *Criminal Law: The Escape*, TEX. B.J., April, 1982, at 541. Other fake opinions have found their way into legal publications. For the story behind a fictitious Canadian case, *Regina v. Ojibway*, 8 Crim. L. Q. 37 (Ontario S. Ct. 1965), see Buchmeyer, *Judicial Logic: Birds & Ponies*, TEX. B.J., October, 1982, at 1345-46.

152. See *supra* text accompanying notes 66 & 67.

153. 701 F.2d 1266 (8th Cir. 1983) (en banc).

be better off to become a music judge.<sup>154</sup>

The judicial use of fables is not a recent phenomenon. Dissenting in a 1916 case, *Van Kleeck v. Ramer*,<sup>155</sup> Justice Scott of the Supreme Court of Colorado used a fable to warn about the dangers of blind adherence to precedent:

One day through the primeval wood  
A calf walked home, as good calves should;  
But left a trail all bent askew,  
A crooked trail, as all calves do.

Since then, three hundred years have fled,  
And, I infer, the calf is dead.  
But still he left behind his trail,  
and thereby hangs my moral tale.

. . . .

For men are prone to go it blind  
Along the calf-paths of the mind,  
And toil away from sun to sun  
To do what other men have done.

They follow in the beaten track,  
And out and in, and forth and back,  
And still their devious course pursue  
To keep the path that others do.<sup>156</sup>

Judges today still disagree over the proper use of precedent, but it is unlikely that they have expressed their views as uniquely as did Justice Scott.

#### IV. CONCLUSION

*Here's to the Judges who use a rhyme or two,  
Or employ figurative language to give readers a clue.  
By taking time their opinions to mull,  
They show us that law need not be confusing or dull.*

Judicial imagery and humor need not be dreadful. When used appropriately, figurative language can add levity, help make a point, or simply make an opinion fun to read. It can also help a judge avoid boredom. As Justice Richard Wallach of the Supreme Court of New York has noted,

It must immediately be conceded that the place of judicial opinions is rather low in the literary pantheon; as an art form they

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154. *Id.* at 1273 (Lay, C.J., dissenting). For a report on Chief Judge Lay's fable, see Wise & Berreby, *The Tale's The Thing*, Nat'l L. J., April 11, 1983, at 39, col. 1.

155. 62 Col. 4, 156 P. 1108 (1916).

156. *Id.* at 44-45, 156 P. at 1121 (Scott, J., dissenting).

probably rank slightly above a political speech and just below a sermon. . . .

Despite all this, I would urge that a touch of humor, carefully controlled, can properly find a place in judicial writing. At best, it can be useful in deflating the overblown argument; at worst (provided it is not nasty and therefore not humorous at all) it is probably harmless. And at least I can attest that over my fourteen years of judicial opinionating it has relieved the tedium of the writer. Whether it can ever relieve the tedium of the reader can [only] be tested by time.<sup>157</sup>

Law reflects society and culture. At its best, the legal system acts as a peaceful means of solving the disputes that are bound to occur in a world of ever-increasing complexity. At its worst, it discourages mediation and settlement and complexifies a problem that was not so difficult when it arose. As a result, fewer people are able to understand the legal system. There are no easy solutions to this latter problem. One small step, however, might be to recognize that better use of language by judges may make law more comprehensible to the public. Figurative language, by deemphasizing "legalese," helps bring law back to its most elemental form, the panoply of human experiences from which it arose.

The judges whose talents have appeared on the pages of this article have added life to legal problems through the use of creative writing. They have shown that figurative language, in the hands of good writers, can be a legitimate tool in shaping legal discourse. In the words of James White, "[i]t is . . . never enough to read a poem or opinion for its main idea, which is often, when simply stated, simply trite or meaningless. . . . In both cases the interesting question is not what the main idea is but how it is given meaning in particular by the oppositions that are its life."<sup>158</sup> By encouraging the use of figurative language in judicial opinions, we will go a long way towards recognizing that legal writing, and law itself, need not be static or commonplace.

ADALBERTO JORDAN\*

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157. Wallach, *Let's Have a Little Humor*, N.Y.L.J., March 30, 1984, at 2, col. 3. For one of Wallach's light-hearted opinions, see *Hawkeye Distilling Co. v. New York State Liquor Auth.*, 118 Misc. 2d 505, 460 N.Y.S.2d 696 (1986).

158. White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1679 (1984).

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