Is Judicial Humor Judicious?

Susan K. Rushing*

Modern law reports brim with judges' attempts at humor. These judicial larks range from clever headings and literary references to puns, extended metaphors, and doggerel. "Humorous" judicial opinions are not a purely modern phenomenon, however. As early as 1784, judges in England used colorful language to adorn their opinions. Lord Mansfield, in *R. v. Shipley*, quoted from a ballad to illustrate the function of the jury:

> For twelve honest men have decided the cause,
> Who are judges of fact, though no judges of laws.[1]

In 1884, Lord Fitzgerald concurred in a decision holding a life insurance policy null because the deceased had "fallen into that fatal habit which produces

> . . . all the kinds
> Of maladies that lead to death's grim cave
> Wrought by intemperance."[2]

American judges have often indulged in a more whimsical style of humor. For example, Justice John S. Wilkes, a member of the Tennessee Supreme Court from 1893 until 1908, wrote many jocular opinions; in one case, he heeded the sensibilities of a runaway mule, saying "we do not desire to say anything disrespectful of or derogatory to the mule. He

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*Candidate for J.D., 1990, The University of Texas.

1. (1784) 4 Doug. K.B. 73, 168, 99 Eng. Rep. 774, 823 (cited in Note, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 698 (1987) [hereinafter Miami Note]).
2. Thompson v. Weems, (1884) 9 App. Cas. 671, 698 (H.L.).

has no posterity to protect and keep alive his memory."[3] In 1916, Justice Scott of the Colorado Supreme Court quoted a fable to express his distaste for blind adherence to precedent; the fable likened lines of precedent to crooked calf trails:

> "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."[4]

Another celebrated judicial humorist, Justice Henry Lamm of the Missouri Supreme Court, played upon the colloquial nature of nicknames in holding a deed signed by "Mike Ohlmann" void because the court never gained jurisdiction over "Michael Ohlmann."

> Otherwise we would have Amelia Jones notified by an order of publication directed to "Sis" Jones; or William Brown under the title of "Bub" or "Bill" or "Buck" Brown . . . or Winfield Scott . . . under the name of "Fuss-and-Feathers," or "Hasty-Plate-of-Soup" Scott, or Thomas H. Benton as "Old Bullion" Benton.[5]

The early humor of these judges has largely given way to judicial humor that many characterize as more "foot-in-mouth" than "tongue-in-cheek."

Views on the merit of judicial humor range from unblinking approval and celebration of "the prankster and poet in all of us,"[6] to full-scale contempt for judges who take ad-

3. Mincey v. Bradburn, 103 Tenn. 407, 414, 56 S.W. 273, 274-75 (1899); *see* Hale, *John S. Wilkes: Judicial Humorist*, 23 TENN. L. REV. 255, 260 (1954).
4. Van Kleeck v. Ramer, 62 Colo. 4, 44-46, 156 P. 1108, 1121 (1916) (Scott, J., dissenting) (*quoting* Sam Walter Foss).
5. Ohlmann v. Clarkson Sawmill Co., 222 Mo. 62, 73, 120 S.W. 1155, 1159 (1909).
6. *See* Miami Note, *supra* note 1, at 697.

vantage of their positions to display their wit.[7] Most commentators, however, accept judicial humor in some limited circumstances. William Prosser remarked that "[j]udicial humor is a dreadful thing. . . . But on rare occasions there are litigants deserving only of ridicule, and situations that call only for mirth . . . ."[8] Similarly, Justice Cardozo preached caution, although he did not wish to convey the thought that judicial opinions are "the worse for being lightened by a smile."[9] Most commentators also recognize that the position of dissenters often lends their language "a certain looseness of texture and depth of color."[10] But under what circumstances

7. *See* Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 210 (1967). *But see* Smith, *A Critique of Judicial Humor*, 43 ARK. L. REV. 1, 25 n. 60 (1990) (declaring that "that part of the Primer disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!").

8. W. PROSSER, THE JUDICIAL HUMORIST vii (1952).

9. B. CARDOZO, *Law and Literature*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 29 (1931); *see also* Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES J. 49 (1969) (quoted in R. LEFLAR, APPELLATE JUDICIAL OPINIONS 164-67 (1974) [hereinafter R. LEFLAR]) ("Humor has a dubious place in an opinion. It is not an universal commodity and the decision of the rights of the parties is a serious matter. Irony may be an effective tool of expression, when sparingly used, but sarcasm directed toward the parties is seldom in good taste."); Lord McMillan, *The Writing of Judgments*, 26 CAN. BAR REV. 491 (1948) (quoted in R. LEFLAR, *supra*, at 183-85) ("[A] judgment is not the appropriate vehicle for wit and pleasantry at large. . . . [I]n all the best examples of judicial levity the lighter passages are not dragged in by the ears for the mere purpose of display but are strictly relevant to the issue and really advance the argument."); E. WARREN, SPARTAN EDUCATION 31 (1942) (quoted in R. LEFLAR, *supra*, at 189-90) ("[B]e picturesque; but *never* be cheap. And be keenly conscious of the fact that the line between the picturesque and the cheap is *not* a bright line); Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 194-95 (1989) (proposing an amendment to the Code of Judicial Conduct that would permit judicial humor only so long as it does not ridicule the litigants or impair the utility of the opinion).

10. B. CARDOZO, *supra* note 9, at 35-36.

and in what form can humor be an appropriate vehicle for judicial expression?

Opinions are the voice of the courts and represent much of the substance of judicial activity. Their quality reflects and largely defines the quality of our courts. Because the vehicle for judicial humor is the judicial opinion, the success or failure of judicial humor depends on whether it aids or hinders a judge in composing an effective opinion. And effectiveness depends on the purpose and audience of a judicial opinion. These vary from case to case. For example, while the major purpose of an opinion in a case dealing with a new issue may be to provide precedent for lawyers and judges, the opinion in a common case may aim only to explain the decision to the litigants.

At an appellate judges' seminar in 1960, judges on the state supreme courts and federal courts of appeal answered the question: "To whom (or for whom) do you write your opinions?" The judges named posterity, the bar, future judges, the legislature, law students, the readers of newspapers, oneself, the losing lawyer, and sometimes the other judges on the court.[11] The components of this broad audience correspond to different purposes of the judicial opinion. Commentators have identified several functions of judicial opinions, among them to set out precedent; to justify the outcome of the case to the parties; to help the writing judge to think; and to ensure the acceptance of law in society. The effect of humor in general and of every specific type of humor varies with the purpose and audience of the opinion.

In providing precedent, judges address the bar, students of law, and future judges. If an opinion introduces a new legal principle or clarifies an existing one, it ought to state the principle and provide future guidance by showing the reason-

11. Leflar, *Some Observations Concerning Judicial Opinions,* 61 COLUM. L. REV. 810, 813-14 (1961).

ing. Humor rarely if ever aids the judge in fulfilling this function. Indeed, some types of humor detract from the effective presentation of legal rules. In particular, humor in the form of doggerel verse and extended metaphor can undermine judicial opinions as sources of law.

Using verse usually obscures the logic of an opinion. For example, in *Harjo v. Albion Kaolin Co.*, in which an American Indian filed a pro se complaint seeking to enjoin the operation of a mine near Indian lands, United States Magistrate John Dunsmore, Jr., filed his opinion in doggerel. It reads, in part:

> So now the Court, with case law ingestion
> Will scour the pleadings for a federal question.
> Plaintiff omits cites to statu[t]es or cases,
> As non-lawyers often do not touch these bases.
> And yet, Plaintiff seeks, as best I can say,
> To proceed under guidelines of the NEPA.
> In that statute, Congress did seek to prevent
> Various harms to the environment.
> And yet, after research most careful and thorough,
> I find it speaks only to government bureaus. . . .
> The NEPA thus does not apply
> To make the defendants' plans go awry.
> Moreover, I find that at distance so far
> An environment waste here does plaintiff no harm. . . .
> Therefore, the Court cannot settle this friction,
> For over the subject it lacks jurisdiction.
> Though I hesitate to rule with iron fist,
> I must recommend that this case be DISMISSED.[12]

The "poetic" form of this opinion forced the magistrate to relegate the substance of the opinion to footnotes. The information obscured in the footnotes includes special rules for construing pro se complaints, the requirements for standing un-

12. Harjo v. Albion Kaolin Co., unpublished opinion (S.D. Ga. July 11, 1989) (footnotes omitted).

der the NEPA, and the specifics of subject-matter jurisdiction. Magistrate Dunsmore sacrificed the clarity of his opinion for the sake of his poem.

Poems that are separate from the substantive part of an opinion are less likely to interfere with the logic. In *Jenkins v. Commissioner*, Judge Loe H. Irwin held that payments made by Conway Twitty were tax deductible; in a footnote he closed the opinion with an "Ode to Conway Twitty":

> Twitty Burger went belly up
> But Conway remained true.
> He repaid his investors, one and all,
> It was the moral thing to do.[13]

Although the poem added nothing but whimsy to the opinion, it came only after thorough treatment of the relevant tax law as applied to the facts of the case.

Another opinion in which poetry does not interfere with the reasoning is *United States v. Sproed.* In dismissing prosecution against a man and his son, who were charged with catching butterflies in a national park, Judge Burns included in his opinion excerpts from poems about butterflies, including Lewis Carroll's verse:

> He said, "I look for butterflies
> That sleep among the wheat:
> I make them into mutton-pies,
> And sell them in the street."[14]

Although the poetry added nothing substantive to the opinion, it served as an introduction; the reasoning behind the decision followed. Additionally, the purpose of this opinion was not to lay down precedent, but to restore the boy's confidence

13. Jenkins v. Comm'r, 47 T.C.M. (CCH) 238 (1983) (quoted in Buchmeyer, *et cetera,* TEX. B.J. 113, 113 (Jan. 1987)).
14. United States v. Sproed, 628 F. Supp. 1234, 1235 (D. Or. 1986).

in the law. After a letter from the defendant had alerted the court about the effect of the prosecution on the son, the prosecutor moved to dismiss the case, and the magistrate below did so. Judge Burns exercised his power to review the magistrate's ruling only to write this opinion for the boy. The unusual focus of the opinion also explains, in part, an appendix to the opinion, a copy of a *Bloom County* comic strip.

When it comes to hiding the logic of opinions, the extended metaphor is a frequent culprit. Although overwrought metaphors have "been out of fashion for more than a century,"[15] they thrive in modern judicial opinions. Judges sometimes continue a metaphor throughout entire opinions. In *S.E.C. v. Fox*, for example, Judge Goldberg of the Fifth Circuit compared the proceedings to the theater. The defendants, who had prevailed in an S.E.C. action charging them with insider trading, sought attorneys' fees from the S.E.C. Judge Goldberg began his opinion with the observation: "'All the world's a stage,' and this drama was played in two acts: the first set in the financial centers of Dallas and Wall Street; and the second set in a courtroom in Lubbock, Texas.... The curtain closed, the actors now wish to be paid."[16] The metaphor makes no sense because its tenor—the defendants' lawyers—does not match its vehicle—the actors—because *actors* should include all parties to the action.[17] After all, by the terms of the metaphor, the lawyers had bit parts up until the second act. Moreover, the phrase "wish to be paid" is misleading; it appears to refer to damages. By announcing that the "actors now wish to be paid," before explaining that this is an action for attorneys' fees, the opinion confuses the reader. After explaining that the court would not award fees because

15. B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 359 (1987).
16. S.E.C. v. Fox, 855 F.2d 247, 248 (5th Cir. 1988).
17. *See* B. GARNER, *supra* note 15, at 357, for an explanation of the distinction between the tenor and the vehicle of a metaphor.

the S.E.C.'s decision to bring the suit was substantially justified, Judge Goldberg concluded by saying:

> A contested trial is not a set piece. Unlike a play it is not scripted in advance. One day a litigant and his lawyer leave the courtroom happy people, pleased with the progress of the case. The next day, surprising facts may come to light which turn the tide. Like great plays, trials have their high moments and their lows. Many a dramatis personae first appears full of high hopes, aspirations, and expectations of future happiness, only to have those hopes dashed before the final curtain.[18]

In combining the theater metaphor with the tide metaphor, Judge Goldberg further confounds the reader. No "surprising facts" about attorneys' fees had come to light, but the reader is compelled to reread the opinion for reassurance that the court did not take into account facts that the trial court considered irrelevant to the action.

Metaphor is not always bad. In fact, "[s]killful use of metaphor is one of the highest attainments of writing."[19] The apt metaphor can clarify an argument and lend color to writing. An occasional silly metaphor, such as that used by Justice Stevens in *F.C.C. v. Pacifica Foundation,* may actually be funny. In that case, addressing the F.C.C.'s censorship of George Carlin's "Filthy Words" routine, Justice Stevens continued a metaphor used earlier by Justice Sutherland, who had written: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[20] In *Pacifica,* Justice Stevens added that "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that

18. *Fox,* 855 F.2d at 253-54 (citing *Romeo and Juliet).*
19. B. GARNER, *supra* note 15, at 357 (1987).
20. Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

the pig is obscene."[21] This concise, silly metaphor is not as likely to baffle the reader as is an extended, intricate metaphor.

Perhaps the most immediate function of judicial opinions is to justify the outcome to parties and their counsel. The audience for this purpose comprises, naturally, the parties and their lawyers. Oddly, the judges in the 1960 survey overlooked this segment of their readership. Judges should demonstrate to the parties that they have listened to the side they have voted against and have "felt the pull of the arguments both ways."[22] Some argue that humor, shorn of legalese, renders legal opinions more comprehensible, and thus more accessible to the parties.[23] When, however, humor insults a litigant or criminal defendant, or leads the party to believe that the judge did not take the action seriously, the detriments of humor outweigh any possible benefit.

Insulting humor is particularly egregious in criminal cases. One such case involved disciplinary proceedings against a Kansas trial judge who had placed a prostitute on probation. He had filed this memorandum:

> 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.
> . . . . . .
> From her ancient profession she'd been busted,
> And to society's rules she must be adjusted.

21. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 750-51 (1978).
22. J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 47 (1985).
23. *See, e.g.*, Miami Note, *supra* note 1, at 727 (asserting that "[f]igurative language . . . helps bring law back to its most elemental form, the panoply of human experiences from which it arose").

> If from all of this a moral doth unfurl,
> It is that Pimps do not protect the working girl![24]

The court censured Judge Rome for holding the defendant up to public ridicule and scorn.

Even when an opinion does not directly ridicule the parties, it may offend them by using puns and metaphors based on their names or occupations, or the nature of the cause of action. The practice is particularly harsh when the losing party bears the brunt of the "fun." The use of the losing party's job, name, or grievance as fodder for humor abounds in Judge Bruce Selya's opinions.[25] An example is the opinion in *Rodriguez-Antuna v. Chase Manhattan Bank Corp.*, a case in which employees of the bank asserted that a vice-president of the bank had invaded their privacy and caused them emotional distress by falsely accusing them of making "dial-a-porn" toll calls on the bank's telephones. He forced them to listen, in the presence of others, to a recording of a call that "present[ed] a woman having sexual relations with a man, and telling him how she wanted him to do it."[26] In upholding a decision that the plaintiffs' claims were untimely, Selya said: "Enforced exposure to salacious dialogue notwithstanding, the record establishes no justification for us to rescue these six suitors from their self-dug hole. In calling upon us for extrication, plaintiffs have dialed yet another wrong number."[27] How shocked the plaintiffs' must have been to find the court extending their employer's cruel joke!

Another of Selya's opinions abused a grocery worker claiming sex discrimination. The opinion concluded: "Hav-

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24. *In re* Rome, 218 Kan. 198, 200-01, 542 P.2d 676, 680-81 (1975).
25. *See* Garner, *Cruel and Unusual English: When Judges Play with Words,* DALLAS B. HEADNOTES 12 (Feb. 20, 1989).
26 Rodriguez-Antuna v. Chase Manhattan Bank Corp., 871 F.2d 1, 1 (1st Cir. 1989).
27. *Id.* at 3.

ing taken stock of plaintiff's case, we find the shelves to be bare."[28] Selya also forced a window-washer to endure window metaphors throughout an opinion denying him pension benefits under ERISA. The sections of the opinion were entitled "Through a Glass, Darkly," "Windows on the Act," "Looking Backward," "Restitution: There's the Rub," and "Drawing the Curtains." Selya was happy to add that the provisions of ERISA have "proven less than transparently clear," but that "[i]mmersion in the ammonia of appellate analysis dispels much of the fog," and that "[a]ny lingering smudges on the pane of insight vanish" in the examination of certain regulations.[29] Although logic and legal analysis are not lacking in these Selya opinions, the humor hardly helps the parties to understand the disposition of their claims and to feel that the claims have been justly decided.

When litigants have little at stake, humor is less likely to offend. For example, after parachuting into Shea Stadium in the first inning of game six of the 1986 World Series, Michael Sergio was fined and required to perform community service. Judge Flug, of Queens Criminal Court, filed her opinion in doggerel mimicking "'Twas the Night Before Christmas":

> 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.
> Happy holiday to all, and to all a good day.[30]

28. Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 187 (1st Cir. 1989).
29. Kwatcher v. Mass. Serv. Employees Pension Fund, 879 F.2d 957, 958, 961 (1st Cir. 1989).
30. Opinion reprinted in N.Y. Times, Dec. 20, 1986, § 1, at 1, col. 2.

The judge's opinion is harmless; it adds to the spirit of Sergio's own prank.[31] While such opinions have no merit as literary or humorous works, at least they do not impede the parties' understanding of the disposition of their cases.

Can it be said that humor helps the writing judge think better? Many judges verify that indeed the writing process aids them in deciding the case. Judge Traynor said: "In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest."[32] The extent to which including humor in an opinion distracts a judge from the task at hand probably varies from judge to judge. One can only conjecture that too much attention to being witty, especially on the part of a judge working under a time constraint, may reduce the time the judge spends on the decision itself.

There are cases that lend evidence to the conjecture. Take *Hampton v. North Carolina Pulp Co.*[33] The *Hampton* court dismissed the plaintiff's complaint that the defendant contaminated the water of the Roanoke River, thereby killing fish and damaging the plaintiff's fishery business. Judge Meekins spent more than half the opinion pontificating about fish:

> Well, Fish is the subject of this story. From the fifth day of the Creation . . . fish have been a substantial factor in the affairs of men. After giving man dominion over all the Earth, God gave him dominion over the fish in particular, . . . reserving unto Himself only one certain fruit tree in the midst of the Garden, and Satan smeared that—the wretch! Whatever else we may think of the

31. Sergio's case became more serious later on, however, when he was jailed for contempt of court for refusing to divulge the name of the pilot of the plane. *See* N.Y. Times, May 13, 1987, § 8, at 9, col. 1.

32. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

33. 49 F. Supp. 625 (E.D.N.C. 1943), *rev'd*, 139 F.2d 840 (4th Cir. 1944).

> Devil, as a business man he is working success. He sat in the original game, not with one fruit tree, but with the cash capital of one snake, and now he has half the world grabbed and a diamond hitch on the other half.[34]

Judge Meekins explained his decision to use humor as follows:

> Yes, I am fully aware that my fall from the Woolsack, and my break over time's old barrier growth of right and fit; my reluctance to plod on with the solemn brood of care, and my impatience of professional solemnity, may cause the Big Wigs of the Bar to scowl down their displeasure. So be it. Permit me to interrupt myself: Wigs were introduced in the Courts of England in 1670. A little more than a century ago the modern article was invented, and is made of the manes and tails of horses . . . .[35]

The judge clearly devoted much time and thought to this opinion, but less to the substance of the decision than to his tomfoolery.

In addition to taking time away from the serious part of the opinion, writing an opinion in the form of a poem, or contriving to work in metaphors, may constrain the judge to conform the substance of the opinion to the humorous format. By sending a clerk to a supermarket to copy the names of every detergent product on the shelves,[36] Judge Brown committed himself to including as many of the names as possible in a concurrence. He wrote:

> 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

34. *Id.* at 625-26 (citation omitted).
35. *Id.* at 627-28 (citations omitted).
36. J. BASS, UNLIKELY HEROES 105 (1981).

> 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 *Bold*ly chosen the course of uniformity in reversing the lower Court's decision . . . . And, having done so, we are *Cheer*ed by the thought that striking down the regulation by the local jurisdiction does not create a void. . . . .[37]

Did Judge Brown want to accomplish anything with his concurrence other than providing some light reading? If he wanted to show how his reasoning differed from that of the majority, the humorous references probably hampered his efforts to express his thoughts.

What about ensuring the acceptance of the law in the society it governs? In fulfilling this function, the judicial opinion enables the law to grow without abandoning society's continuity with its past; it assures the members of society that the judge is enforcing customary morality through objective or external standards. In performing this function, the judge addresses a wide audience, but aims primarily at the readers of newspapers, the public in general, and perhaps law students. In one way, humor may be particularly well suited to this purpose. An opinion will not exert an influence beyond the immediate case unless it is read.[38] Proportionally more humorous opinions are publicized in newspapers than dry opinions. Yet humor may defeat this purpose—just as surely as it does the precedent-announcing and party-mollifying functions—by rendering the logic of the opinion unclear or by offending the reader. Still, the general public probably does not scrutinize the logic of a decision as closely as a lawyer or

37. Chemical Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325, 328 (5th Cir. 1973) (Brown, J., concurring).

38. A.B.A., INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS (1961) (cited in R. LEFLAR, *supra* note 9, at 171, 177).

judge attempting to use it as precedent. One not a party to the case is less likely to be personally offended by humor.

The only form of humor that may go unscathed by this analysis is the use of witty headings. Judge Brown of the Fifth Circuit often employs humorous headings. In *Wilson v. Lynaugh*, a civil rights action by a prison inmate complaining of his exposure to environmental tobacco smoke in prison, Judge Brown entitled the sections of the case, "Round 1," "Round 2," "Put up Your Dukes," "Rhodes to Victory?," "Technical Knockout," "In the Res Judicata Corner," and "Recap of the Bout."[39] In a case in which physicians sought a temporary order restraining the Secretary of Health and Human Services from carrying out a plan to recover Medicare overpayments, Judge Brown devised these headings: "Patient's Medical History," "Symptoms," "Take Two Aspirin and Call Me in the Morning," "Curing the Illness but Losing the Patient?," "Seeking a Second Opinion," and "Can We Ease the Pain?"[40] Although the value of the headings as amusement is elusive indeed, they have no effect on the logic of the opinion or on the parties' perception of serious consideration. Much of the time, such headings have nothing to do with the case.

Dissenters may have a freer hand with humor than writers of majority opinions. Dissenting opinions aim at changing the law in the future, and thus the dissenter's "voice is pitched to a key that will carry through the years."[41] Presenting arguments in an ironic tone may help the dissenter garner support without risking offense to the parties to the action. Sarcasm in the dissent usually aims at the majority, not at the parties. The beginning of Judge Goldberg's dis-

39. Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989).
40. Texas Medical Ass'n v. Sullivan, 875 F.2d 1160 (5th Cir. 1989).
41. B. CARDOZO, *supra* note 9, at 36.

sent in *Jones v. Caddo Parish School Board* provides an example:

> This is a ghost story, a tale better suited for campfires and dark, stormy nights than for the pages of the *Federal Reporter*. It is a story of a disembodied class of black students of Caddo Parish seeking vainly to vindicate their constitutional right to attend desegregated schools. It is a story of the Fifth Circuit, refusing to grant even a hearing to the proposed intervenor-class representative, acting more like a child whistling in the dark than a court of justice, afraid to look out the window and see if the mournful cries actually emanate from somebody or are just the products of a frightened imagination.[42]

A common criticism of dissents, however, is that by exhibiting disagreement among members of the court, they engender dissatisfaction with the judiciary in general.[43]

Humor may aggravate the dissatisfaction, particularly if it takes the form of cheap shots and petty dialogue unrelated to the issues of the case, as in *People v. Arno*.[44] In *Arno*, a California court overturned a conviction for possession of obscene films with intent to distribute. The court held that the search leading to the discovery of the films was unconstitutional. Justice Hanson filed a dissent, arguing that the search was legal and that none of the appellant's other arguments had merit. The dissent enraged the majority, and Jus-

42. Jones v. Caddo Parish School Bd., 704 F.2d 206, 224 (5th Cir. 1983) (Goldberg, J., dissenting).

43. *See, e.g.*, Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 796 (1953) ("To justify an elaborate dissenting opinion the question of law should be one of at least considerable importance."); Simpson, *Dissenting Opinions*, 71 U. Pa. L. Rev. 205, 216 (1923) (asserting that judges should not file dissents unless "it is reasonably certain a public gain, as distinguished from a private one, will result").

44. 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979).

tice Alarcon placed the following footnote in his majority opinion:

> We feel compelled by the nature of the attack in the dissenting opinion to spell out a response:
> 1. *S*ome answer is required to the dissent's charge.
> 2. *C*ertainly we do not endorse "victimless crime."
> 3. *H*ow that question is involved escapes us.
> 4. *M*oreover, the constitutional issue is significant.
> 5. *U*ltimately it must be addressed in light of precedent.
> 6. *C*ertainly the course of precedent is clear.
> 7. *K*nowing that, our result is compelled.
> (See the Funk & Wagnall's The New Cassell's German Dictionary, p. 408, in conjunction with fn. 6 of dis. opn. of Douglas, J., in *Ginsberg v. New York* (1967) 390 U.S. 629, 655-56 . . . .)[45]

In addition to being totally unrelated to the issues discussed in the dissent, the footnote is entirely inappropriate. The Supreme Court dissent to which the footnote refers the reader includes a quotation from a book on abnormal psychology, which states that those attempting to suppress the "dissemination of popular knowledge concerning sex matters betray themselves unwittingly as the bearers of the very impulses they would so ostentatiously help others to avoid." The page of the German dictionary defines the word *schmuck* as an ornament or decoration—but the better-known definition of the word derives from Yiddish. The majority is telling the dissenter: "You have a dirty mind." Even if the footnote were clever, it would have no place in a judicial opinion.

Justice Hanson expressed his outrage in his own footnote. Although he did not respond in kind, he said he construed the footnote "as a personal affront to every California citizen and their duly elected representatives in the California State Legislature who have deemed it a wise public policy to

45. *Id.* at 514 n.2, 153 Cal. Rptr. at 628 n.2 (emphasis added).

enact our criminal obscenity laws."[46] Unfortunately, Hanson's response only emphasized the majority's tasteless footnote.

Judges who tailor each of their opinions to its individual purpose and audience will likely achieve their goals. Before using an opinion as a vehicle for humor, judges should carefully consider the effect of their fun on the clarity of expression, as well as on the parties, who want an explanation. A new form of judicial restraint is required of judges who are prone to abuse their opinions for a laugh.

46. *Id.* at 538 n.14, 153 Cal Rptr. at 644 n.14 (Hanson, J., dissenting).