Judicial Humor: A Laughing Matter

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Judicial Humor: A Laughing Matter?

by
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In 1975, a criminal defendant named Terry Brown appeared before the Georgia Court of Appeals.1 Sentenced to seven years of hard labor, Brown was a desperate man whose personal liberty rested perilously on the hope that a procedural error had been made at trial. Perhaps the state's attorney was also uneasy, worried that the conviction would be reversed on technical grounds. State funds, the defendant's future, and the public welfare were all at stake. The litigants must have been surprised when the court issued a versified opinion, part of which reads:

The D.A. was ready
His case was red-hot.
Defendant was present,
His witness was not.

"This trial was not fair,"
The defendant then sobbed.
"With my main witness absent
I've simply been robbed."

"If you still say I'm wrong,"
The able judge did then say
"Why not appeal to Atlanta?
Let those Appeal Judges earn part of their pay."

To continue civil cases
The judge holds all aces.
But it's a different ball-game
In criminal cases.2

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* A.B. 1987, Stanford University; Member, Third Year Class.
2. Id. at 773-74, 216 S.E.2d at 456-57 (footnotes omitted). Apparently, the court used verse on a "dare" from the trial judge, which arguably makes the court's conduct even more reprehensible. Id. at 772 n.3, 216 S.E.2d at 357 n.3.

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The poetic style of this unusual opinion may be startling, but it is far from unique. Rather, *Brown v. State* is one of many opinions exemplifying a legal curiosity known as "judicial humor."³

What is judicial humor and why is it worthy of examination? For purposes of this Note, the term "judicial humor" means anything amusing written or said by judges⁴ acting in their official capacity.⁵ As clever and entertaining as a judge's humor may be, its use in the context of an actual case—where real parties stand before the court with a great deal to win or lose—raises serious questions of propriety: Is ridicule of a litigant reconcilable with the judiciary's obligation to avoid even the appearance of impropriety? Can a balance be struck between proper judicial decorum and judicial freedom of speech? Are there viable ways of creating or enforcing mechanisms within the legal system to police the abuse of judicial humor?

Rather than play the unsavory part of spoilsport, many authors choose simply to entertain readers by presenting mere collections of judicial humor—conspicuously devoid of comment or criticism. Tough ethical questions are left either untouched or dealt with cursorily and evasively. The goal of this Note is to fill this void. It is time to present the victims' side of judicial humor.

Part I of this Note begins with a brief discussion of judicial humor as humor, considering some unique problematic aspects. Part I also presents a synopsis of judicial humor's history, with examples showing changes in form over the years. Modern judicial humor is featured, emphasizing the exigencies present in today's legal system.

Part II analyzes public and legal reactions to judicial humor. It considers several perspectives, including the disconcerting view of at least one commentator stating that simply because judges make difficult decisions every day, "they can surely be entrusted to determine if and when

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³ "Judicial humor" is the term employed by several writers in this field. See *The Judicial Humorist* vii (W. Prosser ed. 1952); Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 *Ark. L. Rev.* 197, 210 (1967).

⁴ Although law clerks and staff attorneys often take a major role in the creation of opinions, a judge has ultimate responsibility for content and style. Appending one's name to an opinion is itself a form of imprimatur. The judge who does not bother to read opinions issued under her name arguably deserves whatever flak such carelessness engenders.

⁵ The sort of "everyday humor" that a judge may use in his or her private life has only limited bearing on proper judicial conduct and is therefore beyond the scope of this Note. The only possible exception to this statement is *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973), *cert. denied*, 417 U.S. 932 (1974), in which the Commission on Judicial Qualifications removed Judge Geiler from office for his extremely vulgar practical jokes outside the courtroom (e.g., brandishing a dildo in chambers, making lewd sexual comments about court employees, and engaging in assorted off-the-record profanity). *Id.* at 277, 515 P.2d at 5, 110 Cal. Rptr. at 205. Arguably, such behavior constitutes "judicial vulgarity," not "judicial humor."
[their own] use of humor ... is proper.” The focus then shifts to the In re Rome case, perhaps the only time a judge in the United States actually was censured for writing a humorous opinion. Part II concludes by examining existing mechanisms for dealing with judicial humor to determine why they either do not work or simply are not being enforced.

Part III proposes a method of curbing inappropriate judicial humor—revising the Code of the Judicial Conduct by amending an existing subsection. Part III then tests this subsection against a variety of genuinely humorous opinions to determine its efficacy in dealing with judicial humor problems. Part III concludes with a discussion of the suggested amendment’s virtues: ease of enforcement by existing bar and judicial review panels; built-in allowances for innocuous forms of judicial creativity, including some humor, creation of a workable ethical standard, enabling judges to better gauge the propriety of their own humor, and allocation of substantial discretion to review boards so that the unique circumstances of any given case may be considered.

I. Judicial Humor

A. Setting the Stage

Rare is the attorney who has never encountered judicial humor. Judicial humorists are not merely judges who have a good sense of humor, for surely this quality would be found in many judges. Unlike other judges, judicial humorists seem to crave recognition of their wit by the legal community. Naturally, they use the most effective means at their disposal to show off their humor and gain a little notoriety—they write funny opinions.

8. Indeed, for most lawyers the exposure occurs within a few weeks after starting law school. The following “gratuitous commentary” humor (see infra text accompanying notes 34 & 122) is from Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198, 200-01 (1941) (considering whether a taxi driver’s actions while at gunpoint constituted negligence), featured in the classic first year text, W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 160 (8th ed. 1988):

There are those who stem the turbulent current for bubble fame, or who bridge the yawning chasm with a leap for the leap’s sake, or who “outstare the sternest eyes that look, outbrave the heart most daring on the earth, pluck the young sucking cubs from the she-bear, yea, mock the lion when he roars for prey” to win a fair lady, and these are the admiration of the generality of men; but they are made of sterner stuff than the ordinary man upon whom the law places no duty of emulation. . . . If the philosophic Horatio and the martial companions of his watch were “distilled almost to jelly with the act of fear” when they beheld “in the dead vast and middle of the night” the disembodied spirit of Hamlet’s father stalk majestically by “with a countenance more in sorrow than in anger . . . .”
Unable to limit their humorous outbursts to mere witty remarks in the courtroom, comic judges unleash in their opinions a humorous demon, whose banes are judicial decorum and legalese. Thus judicial humor is born—an enfant terrible that, like any undisciplined child, amuses its inordinately tolerant judicial “parents” at the expense and dismay of the rest of society.

Recall the opinion of Brown v. State quoted above. No doubt Mr. Brown and the other participants at his trial left the courtroom more than a little annoyed at having time, money, and personal freedom treated as subjects for amusement. One may query whether the judges in that case were ever criticized for their treatment of Mr. Brown. Also, what of the opinion itself? Was there any public reaction to it, or to other such opinions?

In fact, the treatment of Mr. Brown—like that of others in his position—went unrebuked and largely unnoticed. Worthless as precedent, the court’s opinion lives on today only in the pages of legal magazine “potpourri columns” and books. Unfortunately, the reactions of people such as Mr. Brown to a judge’s amusing behavior generally are unavailable. One would imagine the typical response to be disapproval—as mild as irritation or as strong as rage. Yet one commentator suggests that, considering the high ratings of shows like “Night Court,” the American public actually feels comfortable with a “practical joker turned

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9. There is a small but interesting distinction between wit and its first cousin, humor. Wit, as distinguished from humor generally, makes its point by a clever or insightful epigram. The purpose may or may not be to amuse. The distinction is described in The American Heritage Dictionary 1470 (W. Morris ed. 1969):

Wit especially implies mental keenness, ability to discern those elements of a situation or condition that relate to what is comic, and a talent for making an effective comment on them. Humor, closely related, suggests the ability to recognize the incongruity and absurdity inherent in life and to use them as the basis of expression in some medium. Both wit and humor are associated with amusement or laughter, but wit often implies brilliant, pointed, or cutting statement, whereas humor is also applicable to what is kindly or broadly funny.

10. “Legalese” is pejorative slang for the archaic Latin argot that makes lawyers sound like lawyers. For an interesting discussion of the legalese problem and the steps being taken to correct it, see Lawyers Try to Say it in English, Los Angeles Times, Sept. 10, 1989, Part II, at 1, col. 1. See supra text accompanying notes 1-2.

11. Only in one case, In re Rome, 218 Kan. 198, 542 P.2d 676 (1975), was a judicial humorist actually censured for an opinion he wrote.

12. Books and articles of collected legal and judicial “war stories” are plentiful. An abbreviated list includes the following: C. Edwards, Pleasantries about Courts and Lawyers of the State of New York (1867); M. Green, It’s Legal to Laugh (1984); F. Heard, Oddities of the Law (1885); S. Howard, Jurisimprudence (1976); The Judicial Humorist (supra note 3); R. Meggary, Miscellany-At-Law (1955); and The Oxford Book of Legal Anecdotes (M. Gilbert ed. 1986).

13. This is a television situation comedy on NBC featuring the humorous antics of a comedy-prone judge played by Harry Anderson.
judge.” On the other hand, many popular and ostensibly realistic law-related television shows, such as “L.A. Law” and “Perry Mason,” tend to depict humor only outside the courtroom; the court scenes themselves are usually not funny. This observation suggests that our society expects a very high degree of seriousness from its judiciary and would be surprised to discover anything to the contrary in “real life.” In any case, it seems unlikely that society ever expects humor from a judge. It is probably this “unexpectedness factor” that makes judicial humor funny.

Like a tortious nuisance, judicial humor is basically “the right thing in the wrong place.” People should enjoy a good laugh, but not in the traumatic and expensive context of litigation. However amusing someone else’s dispute may be, it is anything but funny to have one’s own right to property, liberty, or good reputation determined by a judge who apparently is as interested in doing spoofs of “A Visit From St. Nicholas” as solving legal problems. Of course, not all judicial humor is outrageous: like humor in general, judicial humor varies greatly in form and potency. The ultimate propriety of judicial humor really depends on its effect. A judicial humorist may not intend to ridicule litigants, but if the humor has that effect, then intent is irrelevant.

Basic regard for other people's feelings and the gravity of some situations dictate that one must at times resist the temptation to make a joke. The resolution of any legal dispute, however humorous to the judge, is a serious matter to the parties involved. Unfortunately, the temptation to parade one's sense of humor is difficult for some judges to resist, and opinions such as that found in Brown v. State are the result.

B. Laugh Tracking

As with the common law, the roots of judicial humor are in England. One early example of judicial humor is Baron Edward Alder-
son's remark in the early nineteenth century to a defendant charged with stealing sheep. Counsel for the defense claimed that a sheep, whose bones were found buried in the defendant's yard, had fatally injured itself by rubbing its neck on a sharp rock. Baron Alderson reportedly commented:

'That is a very plausible suggestion to start with, but having commenced your line of defence on that ground, you must continue with it, and carry it to the finish. And to do this you must show that not only did this sheep commit suicide, but that it skinned itself and then buried its body, or what was left of it, after giving a portion to the prisoner to eat, in the prisoner's garden, and covered itself up in its own grave. I don't say the jury may not believe you; we shall see. Gentlemen, what do you say? Is the sheep or the prisoner guilty?'

Alderson's humor doubtlessly invigorates an otherwise prosaic case. Yet even in this tame example, the humor is at the expense of a criminal defendant. By ridiculing the defendant's admittedly flawed alibi, Alderson trivialized the whole proceeding and may have communicated to the jury: "Don't spend much time on this matter—he's guilty."

By the early nineteenth century, the American judiciary was well-established and judicial humor could be found on both sides of the Atlantic. In most cases, however, the humor was innocuous, tending to add verve to a court's holding. For example, in 1855 the Supreme Court of California gave this dash of wit to one of the shortest opinions on record:

If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.

This is a good example of how a moderate, well-considered dose of humor can enhance a holding without sacrificing its utility.

By the late nineteenth century, some judges were well-known for their humorous opinions and apparently reviled in their infamy. One such judicial humorist of that era was Judge John S. Wilkes. His favorite subjects for humor were animals, as illustrated by his comment in an 1898 case involving a dog that had been hit by a train:

It is attempted to show that this dog's descent may not have been entirely pure, and it is intimated that he may have had terrier blood in him, but the only foundation for this inference [was] that he "tarried" so long on the track when the car was approaching. But it appears

26. Id. at 7-8.
27. M. GREEN, supra note 13, at 75 (claiming that this is one of the shortest opinions on record).
29. See, e.g., Hale, John S. Wilkes: Judicial Humorist, 23 TENN. L. REV. 255 (1954) (a tribute by one admirer to a famous (infamous?) judicial humorist of the previous century).
30. Id.
from the record that it is a characteristic of the pointer, when he sets, to become oblivious to all earthly surroundings, and the bluer his blood the more absent-minded he becomes on such an occasion.31

Another of Wilkes' opinions dealing with run-over animals involved a goose.32 In addressing the question of which animals qualify as obstructions under a state railway statute, he wrote:

But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at. . . . Snakes, frogs, and fishing worms, when upon railroad tracks, are, to some extent, obstructions; but it was not contemplated by the statute that for such obstructions as these trains should be stopped, and passengers delayed.33

Such gratuitous commentary, Wilkes' specialty, continues to be a popular form of judicial humor in the twentieth century, although not always with such harmless results.

In a 1915 Iowa divorce case, a court used gratuitous commentary in a rather uncomplimentary way:

The parties did not drift into love unconsciously as sometimes happens with younger and less experienced couples. Both knew from the start exactly what they wanted. She wanted a husband with money—or money with a husband. He wanted a wife to adorn his house and insure that conjugal felicity of which fate . . . had repeatedly deprived him. . . . Strategy and management in securing an eligible matrimonial partner are not the exclusive privilege of the man, and the game law of the state provides no closed season against the kind of "trapping" of which appellant complains.34

To an extent the court's commentary ridicules the litigants. The court should have kept its opinion of the litigants to itself, or at least out of the public record. Belittling marital difficulties may amuse judicial colleagues, but it does nothing to help the troubled couple resolve its dispute.

Majority opinions are not, of course, the only expressionary vehicles at a judicial humorist's disposal. The nonprecedential nature of dissenting opinions understandably has made them a popular forum.35 The following dissent from the early twentieth century is also one of the first opinions to employ poetry, albeit by another writer:

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.

. . . .

But how the wise old wood-gods laugh,

33. Id. at 1050.
who saw the first primeval calf!
Ah! many things this tale might teach;—
But I am not ordained to preach.\(^{36}\)

Although not amusing in itself, this fable becomes humorous through its unexpected appearance in a judicial context. This type of incongruity humor—humor derived by using an unexpected literary device, such as a fable, to convey the court's holding—is popular in contemporary judicial opinions.\(^{37}\) Versified opinions in particular, jokingly referred to by some as "poetic justice,"\(^ {38}\) are a mainstay of modern judicial humorists.\(^ {39}\)

Poetry can function as a vehicle for humor in several ways. Sometimes the humorous verse is simply famous poetry brought to the judge's mind by the facts or issues at hand. For example, a judge recently used this ditty\(^ {40}\) as a catchy opening paragraph:

Not drunk is he who from the floor
Can rise alone and still drink more;
But drunk is he, who prostrate lies,
Without the power to drink or rise.\(^ {41}\)

Other times a judicial humorist's verse is entirely original, as in this doggerel conclusion to an opinion otherwise written in conventional prose:

Dogs will howl and cats will yowl
When placed in congregation.
These grating sounds may oft result
In human aggravation.
Laws passed to curb such pesky noise
Should fit the situation
And be so phrased in artful ways
To cause no obfuscation.
In other words, the laws so passed
Must plainly be effective.
Inaptly framed, they lack the force
To meet their planned objective.\(^ {42}\)


\(^{37}\) See, e.g., id.

\(^{38}\) J. George, supra note 17, at 146.

\(^{39}\) Although it is rare to find versified opinions written before 1960, there are literally dozens in more recent state and federal reporters.

\(^{40}\) Peacock, Not Drunk Is He... Who From The Floor, from The Misfortunes of Elphin, reprinted in 2 The Viking Book of Poetry of the English-Speaking World 716 (R. Aldington ed. 1958).


\(^{42}\) Columbus v. Becher, 173 Ohio St. 197, 200, 180 N.E.2d 836, 838 (1962). However proud most judicial humorists may be of their poems, a few actually apologize to readers for their lack of literary talent. The author of Brown v. State, Judge Evans, wrote "I am not a poet, and the language used, at best, is mere doggerel. I have done my best but my limited
Although original verse is popular, the more common method of twentieth century judicial versification involves tailoring a famous poem to fit the facts and names of a particular case. Such well-known poems as Edgar Allen Poe's "The Raven,"43 Clement Clarke Moore's "A Visit From St. Nicholas,"44 and Ernest Lawrence Thayer's "Casey at the Bat"45 have been customized for comic effect in modern judicial opinions.46 Consider this send-up of Joyce Kilmer's "Trees":47

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.
Affirmed.48

This bit of fun is the entire text, save for a footnote in which the real opinion is tucked. A "suit to compensate a tree" may not be a weighty matter to some people, nevertheless, it deserves a serious response from a judge. The clear message imparted to the litigant in the case was that the court did not consider the complaint of much import and was put out by having to resolve a trivial dispute.

Although verse seems the most widely-used type of incongruous humor by contemporary judges, there are also opinions featuring unexpected forms of prose. For example, Biblical spoofs have been tried, as in the following case:

In the beginning, Zim created the concept of the Golden Guides.
For the earth was dark and ignorance filled the void. And Zim said,
let there be enlightenment and there was enlightenment. In the Golden Guides, Zim created the heavens (STARS)(SKY OB-

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44. Id. at 410.
45. Id. at 282-84.
SERVER'S GUIDE) and the earth. (MINERALS)(ROCKS AND
MINERALS)(GEOLOGY).

And together with his publisher, Western, he brought forth in the
Golden Guides knowledge of all manner of living things that spring
from the earth, grass herbs yielding seed, fruit-trees yielding fruits after
their kind, (PLANT KINGDOM)(NON-FLOWERED PLANTS)
(FLOWERS)(ORCHIDS)(TREES), and Zim saw that it was good....

And they put upon the district judge hard tasks. And the district
judge listened to long testimony and received hundreds of exhibits. So
Zim did cry unto the district judge that he might remember the
promises of the Settlement Agreement. And the district judge heard
Zim's cry . . . .49

The Biblical treatment in this opinion was employed chiefly as a humor-
ous opening and closing.50 This technique of placing one's judicial hu-
mor in select areas of an opinion is fairly common, as if to show the legal
community that the judge did in fact take the case seriously. Despite
such a noble intention, one might disagree with the assumption that the
litigants' annoyance decreases simply because the judge makes less fun of
the dispute than she might have.

Another form of incongruity humor, reflecting the influence of
twentieth century mass culture, is the use of popular song titles and
lyrics. For instance, some judges have equated a given dispute to the
chorus of a popular song, such as “Ac-cent-tchu-ate the Positive (Mister
In-Between):”51

"You've got to accentuate the positive, eliminate the negative; latch on
to the affirmative, don't mess with Mr. In-Between" were words of
wisdom written by Savannah's famed song-writer, Johnnie [sic] Mer-
cer. That lyric applies to the instant appeal where we are called upon
to decide [whether] . . . “positive” affirmative evidence . . . “negatives”
any activity . . . . Here there was no evidence to indicate any “messing
with Mr. In-Between.”52

Occasionally, judges use song titles as section headings. In one such
case, a judge employed them as shorthand for the litigants' problems:53
“Summer in the City,”54 “‘We Can Work It Out’: The Deceptive Trade

49. Zim v. Western Publishing Co., 573 F.2d 1318, 1320-21 (5th Cir. 1978) (footnotes
omitted), spoofing Genesis 1:1-12 (King James). The opinion, far too lengthy to quote in full,
was written by Judge Goldberg, one of today's foremost judicial humorists.

50. Id. at 1320-21, 1329.


(1975).

(involving allegedly deceptive air conditioner sales).

54. Id. at 725 (referring to “Summer in the City,” words and Music by J. Sebastian, S.
Boone & M. Sebastian (The Hudson Bay Music Co., 1966)).

In another case, slogans from television commercials inspired the headings of the opinion, including “The Friendly Skies—Filled With Litigants”58 and “Scope of Review—We’re The Administrative Agency, Doing What We Do Best.”59 Such mild humor might tempt one to dismiss protests against it as being overly sensitive. Yet one could argue that no litigant should have to tolerate any ridicule from the bench. In fact, the losing counsel in the “friendly skies” case cited above was furious over the headings, calling them “beyond the bounds of proper judicial demeanor” and criticizing the judge for spending more time trying to be comical than analyzing the facts of the case.60

In addition to song titles and commercial jingles, judicial humorists occasionally find amusing material in product slogans and brand names. In one case dealing with federal preemption of a local detergent labeling ordinance, the judge made puns using brand names of detergent after dispatching his clerk to the local supermarket to write down all the detergent names he could find.61 The following is is a sample of the result:

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 in uniformity . . . .62

The humor is worth a smirk, but at what cost? The judge in this case undoubtedly devoted a lot of time working the detergent names into his opinion. One might ask whether that time could have been better spent. More importantly, however, the humor impairs the opinion’s readability and weakens the court’s analysis.

It is unreasonable to expect taxpayers to sponsor the extra time necessary to write an opinion in verse, or other similarly creative fashion,

55. Id. at 725 (referring to “We Can Work it Out,” words and music by J. Lennon & P. McCartney (Northern Songs, Ltd., England, 1965/Maclen Music Inc., 1965)).
56. Id. at 727 (referring to “Promises, Promises,” words by H. David, music by B. Bacharach (Blue Seas Music Inc., 1968/Jac Music Co., Inc., 1968)).
57. Id. at 728 (referring to “The Second Time Around,” words by S. Cahn, music by J. Van Heusen (Miller Music Corp. 1960)).
58. City of Houston v. FAA, 679 F.2d 1184, 1189 (5th Cir. 1982) (referring to United Airlines’ slogan: “Fly The Friendly Skies (of United)” (involving federal prohibition of non-stop flights between Washington National Airport and any airport within a 1,000 mile perimeter).
59. Id. at 1190 (referring to American Airlines’ slogan: “We’re American Airlines, Doing What We Do Best”).
simply because some members of the judiciary feel the need to derive more satisfaction from writing their opinions. At a time when dockets are overflowing, and many worry that justice is taking a backseat to efficiency, it is ironic that these supposedly overworked judges are able to lavish hours of their precious time on assorted bons mots. Such humor is truly at the "expense" of litigants, who sacrifice valuable time and money for the privilege of having legal solutions to their problems.

Humorous opinions can now be found in all areas of law, and at all levels of the judiciary. It is not difficult to imagine why judicial humor has gained in popularity among judges. Surely it is more fun to set a decision to verse, or load it up with puns, instead of simply turning out an opinion that anyone could have written. Or perhaps judicial humor is an unconscious way that some judges communicate boredom or lack of satisfaction with their work.

Whatever the motivation, judicial humor has become more than a mere wild oat sown by an occasional judge. Writing funny opinions is practically a hobby to some modern judicial humorists. As judicial humor proliferates and appears in increasingly brazen forms, one wonders how perverse justice may become before the public or the legal profession exclaims, "Enough!"

II. Responses to Judicial Humor: Who Has the Last Laugh?

To determine the effect of judicial humor one must consider the views of relevant groups that encounter judicial humor: namely, judges, lawyers, laypersons, and, in particular, those litigants and counsel whose cases become the subjects of humorous opinions. As one might expect, the tenor of these views ranges from avid support of judicial humor to harsh criticism. Ironically, the view that is arguably most relevant—that

63. See Note, supra note 6, at 701.
65. Films like Death Wish, in which a New York businessman takes the law into his own hands after his family is assaulted, and vigilantes like Bernhard Goetz promote the notion that justice cannot be had in today's legal system. Those citizens who trust legal solutions, and take their problems to court, should be applauded for their civility. It is unfortunate that our system may betray that trust by treating some litigants' disputes as a subject for amusement.
67. Even the Supreme Court has been humorous on occasion, and not necessarily with respect for the litigants. For example, in Parker v. Randolph, 442 U.S. 62 (1979), the Court likened the parties in a homicide case to characters out of a Bret Harte novel, taking up the court of appeals' suggestion that the defendants' ordeal had "the flavor of the Old West." Id. at 64 (quoting Randolph v. Parker, 575 F.2d 1178, 1179 (6th Cir. 1978)).
68. See Note, supra note 6, at 701.
69. Among such habitual humorists are Judge Goldberg (Fifth Circuit), Judge Clark (Georgia Court of Appeals), and Judge Brown (Fifth Circuit).
of the general public—is the least available. This absence is because the public is essentially unaware of judicial humor's existence. Nevertheless, the recent reprinting of a humorous opinion in one state's newspapers indicates the American public would be outraged if it knew the sort of judicial humor currently tolerated—if not implicitly endorsed—by the legal community.

A. Humoring the Judiciary

The existence of judicial humor is generally well-known to the legal community: Law students discover it in casebooks and while doing research assignments; lawyers and judges encounter it in their work or in books on the subject, some of which date back to the nineteenth century. Thus, one might imagine the propriety of judicial humor to be a "hot issue" in some legal circles, particularly considering the potential for abuse inherent in it.

In fact, despite numerous books of collected judicial humor, judges and scholars alike seem reluctant to delve into the question of propriety. Perhaps they do not consider it a serious problem. Such a laissez-faire attitude was probably well-taken in earlier years, but the modern appearance of truly outrageous judicial humor demands attention.

A cynical view of this misguided tolerance would find simply that no one wants to be a wet blanket. The few legal writers who have commented on judicial humor often deny the existence of any problems it creates by regarding the negative effects as harmless. Yet, the potential for injury to litigants as a result of judicial humor is ever-present because the parties are likely to have liberty or property interests at stake.

One renowned legal scholar willing to speak out against judicial humor was William Prosser. Prosser, who saw nothing wrong with judges being humorous, so long as they did so outside their official capacity, prefaced his book on judicial humor with the following caustic remarks:

Judicial humor is a dreadful thing. . . . [T]he 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.

Prosser's view advocating the confinement of judicial humor to casual discussions outside the courtroom and to the pages of legal journals seems reasonable: The presumed audience still receives and enjoys the

70. See supra note 8.
71. See supra note 13.
72. See Note, supra note 6, at 727.
73. See THE JUDICIAL HUMORIST, supra note 3.
74. Id. at vii.
humor, but without the appearance of impropriety that exists when hu-
more is employed in an official context.

Another commentator echoing Prosser's critical view of judicial hu-
mor is Joyce George, who has stated that "the judge should know that a
judicial writing is not a true creative endeavor. . . .

Litigation should not be treated lightly or flippantly. The written
decision is a matter of grave importance to the parties involved."75

George continues, "the judicial writing is not intended to offer
amusement for the public, nor should it be written in a satirical, sarcas-
tic, or scornful manner."76 Despite the logic of this position, its pro-
nonents in the United States apparently have had little impact on their
fellow lawyers and judges.77

In England, however, those sharing the views of Prosser and George
are more numerous. Consider the attitude of one Theobald Mathew:

Theobald Mathew was a lawyer who delighted all who knew him. He
was, said Patrick Hastings, 'a man with a mind that saw humour in
everything', and his clerk, Sydney Aylett, described him as 'a sunny
wit, with a unique and delightful sense of the ridiculous'. But this was
out of court. 'In court', adds Aylett, 'he never attempted humour. Ju-
dicial joking and jesting was a habit he abhorred.'78

These sentiments also appear in commentary by other British legal writ-
ners, including Sir Gervais Rentoul, who comments: "Courts of Law do
not lend themselves to facetiousness. For the most part the matters dealt
with are too serious. And, not unnaturally, there is nothing the parties to
them resent more than that they should be treated with
levity."79

Not surprisingly, the most avid supporters of judicial humor are its
practitioners.80 Judge Brown, whose humorous headings adorn virtually
all his opinions, has stated on at least one occasion that he realizes the
embarrassment his humor sometimes causes others and regrets it.81 De-
spite such contrition, judicial humorists like Brown continue their en-
deavors at humor, apparently too caught up in the fun of it to see any
real harm.

If the legal community itself has had mixed reactions, what of the
public? For the most part, this aspect of judicial humor remains a mys-
tery because case opinions rarely appear in morning papers or on the
evening news. Sometimes, however, judicial humorists have the bad for-

75. J. GEORGE, supra note 17, at 144 & 145.
76. Id. at 145.
77. Far from stemming the tide of judicial humor, Prosser's remarks in 1952 actually
preceded a tremendous flood of humorous opinions beginning in the early '60s.
78. THE OXFORD BOOK OF LEGAL ANECDOTES, supra note 13, at xiii.
79. Id. at xii. Whether the harsh
words of Rentoul and other critics have had any effect
on English judicial humor is beyond the scope of this Note.
81. See Note, supra note 6, at 719 n.134 (citing a 1987 telephone interview).
tune of unwittingly playing their tricks on the friend of a celebrity, whose impression of the affair eventually reaches the public. Celebrated novelist Evelyn Waugh, in his usual wry style, wrote to a friend about the courtroom humor of one Mr. Justice Stable: "The jury were [sic] not at all amused by the judge. All the 300 pound-a-day barristers rocked with laughter at his sallies. They glowered. This was not what they paid a judge for, they thought."82

In the United States, the judiciary has gone to considerable lengths to keep complaints about judicial humor and other forms of misconduct out of the public spotlight. One commentator has observed that in California, "few government agencies . . . are as shrouded in mystery as the agency that handles misconduct complaints by lawyers and the public against the state's 1,406 judges."83 Despite this panoply of secrecy, there are times when the media does get wind of judicial misconduct via a third party and runs the story.

B. The Fall of Rome

The only occasion in the United States of media exposure of the use of judicial humor triggered grave public indignation and reproach toward the authoring judge and state judiciary in general. The local bar, to save face, was forced to take disciplinary action. The offending case involved a routine prostitution conviction in Kansas, heard on appeal by Judge Richard Rome.84

The opinion might have gone unnoticed had it not been mailed anonymously to the local newspaper. The opinion reads:

This is the saga of ______ ________
Whose ancient profession brings her before us. . . .

...;

On February 26, 1974,
The State of Kansas tried this young whore.
A prosecutor named Brown,
Represented the Crown.
____ ____, her freedom in danger,
Was being defended by a chap named Granger.
Testimony was presented and arguments heard,
Poor ______ waited for the Judge's last word.
The finding was guilty, with no great alarm,
And ____ was sentenced to the Women's State Farm.
An appeal was taken, to a higher court _____ went,
The thousand dollar fine was added to imprisonment.
Trial was set in this higher court,
But the route of appeal _____ chose to abort.

82. THE OXFORD BOOK OF LEGAL ANECDOTES, supra note 13, at xii-xiii.
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 the men she used to cajole.
From her ancient profession she'd been busted,
And to society's rules she must be adjusted.
If from all of this a moral doth unfurl,
It is that Pimps do not protect the working girl!  

Soon, the opinion had been reprinted in newspapers throughout the state and public reaction was strongly negative. A citizen's group complained to the state bar, protesting that Judge Rome had held the defendant up to public ridicule.  

In a gesture aptly characterizing the temerity of many judicial humorists, Judge Rome had members of the citizen's group brought before him to show cause why they should not be held in indirect contempt of court. The writers appeared and, in a packed courtroom, the judge dramatically dismissed the charges. 

Eventually, the commission on judicial qualifications decided to proceed against Judge Rome. Arguably, the public reaction to the opinion left the commission no choice but to discipline the judge. Whether the commission would have done so anyway is doubtful—action was taken only after public outcry, and there have been no other proceedings against judicial humorists before or since this case, despite the plethora of Rome-like opinions floating around.  

Judge Rome raised a number of interesting defenses during his disciplinary proceeding. The court's response to Rome's arguments is instructive. There were no previous cases upon which to base a criticism of Rome, thus the court had to find some violation in the American Bar Association (ABA) Code of Judicial Conduct. Unfortunately for the court, there is little in the Code to indicate that judicial humor is actually a form of misconduct. All the court could use was aspirational language from Canon 3(A), subdivision 3, suggesting that "[a] judge should be
patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity. . . ."^{90}

Because Canon 3 seems to deal with judicial behavior rather than judicial speech, the court had considerable trouble extending the Code to Rome's opinion:

[C]anon 3 A., mandating that a judge be patient, dignified and courteous to litigants with whom he deals in his official capacity, relates to the manner in which a judge conducts his court. . . . In the strictest sense, it does not deal with the exercise of judicial discretion. But in the manner of exercising judicial discretion a judge still is governed by the provisions of canon 3 A. no matter what his decision on the merits of a matter might be.^{91}

Having thus transformed Canon 3(A)'s aspirational suggestion of courteous courtroom behavior into a proscription of humorous opinion-writing, the court berated Rome for making the defendant "a subject for public amusement."^{92}

Rome's primary defense was that under the first amendment right to freedom of speech, he could not be disciplined for the form and manner of his opinions.^{93} The court, however, rejected this argument stating:

Although a judge has a right of free speech, that right, like those of nonjudicial persons, is not without limits. In taking his office a judge assumes added responsibilities and is held to a higher standard of conduct than the lay person. For a judge the right to speak freely is circumscribed by the Code of Judicial Conduct, just as that of the lawyer is subject to the Code of Professional Responsibility, and first amendment rights do not exempt a judge from discipline for proven judicial misconduct.^{94}

The court also rejected Rome's follow-up contention—that the opinion was an act of judicial discretion, the abuse of which is remedied by appeal, not discipline.^{95}

Rome naturally saw the court's censure as punishment for writing poetically.^{96} The court, however, considered its reprimand more of a sanction against judicial humor than an assault on judicial poetry.^{97} It supported this position with remarks from a primer on opinion-writing:

[J]udicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of

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90. 218 Kan. at 199, 542 P.2d at 680.
91. Id. at 206, 542 P.2d at 684 (emphasis added).
92. Id. at 208, 542 P.2d at 686.
93. Id. at 205, 542 P.2d at 684.
94. Id. Interestingly, the court cited no authority to support this proposition.
95. Id.
96. Id. at 207, 542 P.2d at 685.
97. Id. at 207-08, 542 P.2d at 685.
his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he’s down. The court condemned judicial humor by noting “a judge should be . . . mindful that the damaging effect of his improprieties may be out of proportion to their actual seriousness.” It concluded that Rome’s opinion portrayed the defendant as “someone to be laughed at and her plight found amusing.”

The court also noted that judges’ intentions regarding their use of humor is irrelevant: “[Rome] may not have intended to ridicule her or hold her out to public scorn yet that appears to be the effect of that which was done. . . . Neither veniality nor criminality is present nor can it be said the memorandum decision was written with deliberate intent to harm anyone.” Interestingly, neither the defendant nor her parents participated in bringing the complaint against Judge Rome. The court, however, said this fact did not change the opinion’s effect in making the defendant the subject of public ridicule.

The court’s message to judicial humorists seems clear. Language suggesting that a litigant’s situation is humorous is inappropriate in a judicial opinion since mere implication of ridicule could deny the litigants’ right to “even-handed treatment.” Furthermore, judges who refuse to be sensitive to these issues should risk disciplinary sanctions.

C. While Rome Burned

One would think the unquestionable condemnation of Rome’s poetic opinion, and of judicial humor in general, would have a chilling effect on the judicial humorist community. Instead, the Rome case seemingly has been ignored as a weapon for attacking judicial humor. Far from discouraging judicial humorists in their “creative” endeavors, the years since Rome seem to have yielded more outrageous opinions than ever. Consider this opinion from a 1983 nuisance case:

The People have alleged that within an R-2 Zone defendant harbors a donkey in a garage that it calls home. Complainant resides next door within 100 feet. She finds the view unsightly; the odor less than sweet. . .

98. Id., 542 P.2d at 685 (quoting Smith, supra note 3).
99. Id. at 208, 542 P.2d at 685.
100. Id.
101. Id.
102. Id.
103. Id.
104. Rome has been cited for its general discussion of judicial discipline, but never for its criticism of judicial humor. See e.g., In re Dwyer, 223 Kan. 72, 76, 572 P.2d 898, 901 (1977).
Though defendant is not guilty, there is a lesson to be learned by inconsiderate pet owners whose neighbors' tempers burn. When nothing else succeeds, and as a last resort, as in the case at hand, they'll drag your a$$ to court.05 "donkey"

The donkey dispute was important to the parties involved. Yet the judge proceeded in Rome-like fashion to portray the litigants as people "to be laughed at."06 That the authoring judge may have meant no harm is, by the reasoning of Rome, unimportant—the opinion has the effect of making the dispute a subject for public amusement.07

It seems strange that Rome has failed to attract any followers. Perhaps the legal community enjoys judicial humor too much to raise a hand against it. The problem with Rome may go deeper, to the heart of its reasoning. The Rome court based its condemnation of judicial humor on a supposed proscription in Canon 3(A) of the ABA Code of Judicial Conduct.08 Yet the language of Canon 3(A), like the rest of the Code, is aimed at behavior, not opinion writing.09 As one commentator describes, "By his elevation to the bench, the judge's conduct and activities become governed by canons, rules, statutes, and constitutional provisions. However, none of these seems particularly applicable to the function of judicial writing."10

In short, perhaps the Rome court's broad interpretation of Canon 3(A), subdivision 3, as an implied prohibition against judicial humor is unsound. If so, then the plethora of judicial humor today is easy to explain—there is no codified prohibition against it, no mechanism in place to curb its abusive effects. In any case, the burgeoning of contemporary judicial humor forces one inescapable conclusion: Even if a mechanism for curbing its abuse is in the Code, it is not working. Canon 3(A) either does not apply to judicial humor, or is simply too vague to be enforced.

Since first drafting its rules and canons of legal conduct, the ABA has amended several areas in which additional guidance or modification were needed.11 The evolution of codified legal ethics during the past

106. 218 Kan. at 208, 542 P.2d at 685.
107. Id.
108. Id.
109. Id.
110. J. GEORGE, supra note 17, at 143.
111. The continuing evolution of ethical rules and standards is shown by the ABA's attempts in the last several decades to provide a workable set of guidelines for attorneys and judges. The ABA Code, promulgated only 20 years ago, has been amended several times and
twenty years suggests that what is ethically acceptable one day may not be so the next, and vice versa. As proof, one need only look at the recent evolution of rules governing attorney advertising and solicitation.\textsuperscript{112} The infancy of the ABA Code of Judicial Conduct is further put in proper perspective upon realization that the \textit{Rome} court issued its opinion only three years after the Code was promulgated.

The ABA Code of Judicial Conduct should be updated to address judicial humor problems. Some suggest that the \textit{Rome} case proves that an effective means of handling inappropriate judicial humor already exists and that judicial humor is limited to only a small number of cases.\textsuperscript{113} This position is untenable since ethical abuses almost always are limited to a small number of cases. Using that argument, the ABA Code itself would be unnecessary. Rather, our system of ethical rules is based on the proposition that the current level of conduct may be satisfactory, but we should look for ways to do even better in the future.\textsuperscript{114}

There is simply no justification for ignoring a genuine ethical problem with the hope that it will go away or at least not worsen. Judicial humor abuses exist and the time to address them is now. The appropriate way of doing so is to amend the current guidebook of judicial ethics—the ABA Code of Judicial Conduct.

\section*{III. A Curb on Inappropriate Judicial Humor}

The ABA Code of Judicial Conduct is comprised of seven basic canons espousing rules of behavior for judges. Sections subsumed under each canon set forth specific ethical duties. It is unclear which rubric is proper for judicial humor. The \textit{Rome} court apparently thought Canon 3 most suitable.\textsuperscript{115} Canon 3 proclaims that, "A Judge Should Perform the Duties of His Office Impartially and Diligently." Yet the judicial humor problem does not center around a lack of impartiality or diligence—a judge may easily write an impartial and diligently prepared opinion in a humorous format. Nevertheless, the devotion of Canon 3 A(3) to dignity and courtesy (on which the \textit{Rome} court focused) makes it a possible candidate.

Because the real problem with judicial humor is impropriety, however, the most appropriate heading is clearly Canon 2, which reads: "A

\begin{thebibliography}{9}
\bibitem{112} See, e.g., Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988). This opinion is the latest word on attorney advertising from the Supreme Court and includes an edifying discussion of previous holdings.
\bibitem{113} See Note, supra note 6, at 703 (Rome was censured by the court for the manner by which he held the defendant up to public ridicule).
\bibitem{116} CODE OF JUDICIAL CONDUCT, Canon 3 (1983).
\end{thebibliography}
Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.\textsuperscript{117} The current text of Canon 2, though, is also not entirely satisfactory because it is targeted at everyday behavior, not at opinion writing. As Canon 2 states:

\begin{itemize}
  \item[A.] A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
  \item[B.] A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.\textsuperscript{118}
\end{itemize}

Section B is inapplicable since judicial humor has nothing to do with personal relationships or undue influence; therefore section A must be relied upon. Although judicial humor does not involve breaking the law, it \textit{does} pertain to public confidence in the integrity of the judiciary.\textsuperscript{119}

Whether included as an amendment to Canon 2(A) or Canon 3(A)(3), a new subsection dealing specifically with the issue of judicial humor is the surest way to raise the judiciary’s awareness regarding judicial humor problems. A new subsection also would provide a convenient yardstick by which the judiciary might assess the propriety of its own humor. A viable amendment to the subsection should incorporate the following two-part test:

The use of humor in a judicial opinion is \textit{inappropriate} if:

\begin{itemize}
  \item[(A)] a reasonable litigant would feel that he or she had been made the subject of amusement, or
  \item[(B)] opinion utility would be compromised by the humor.
\end{itemize}

The test is designed to cull out those opinions most prone to ridicule litigants.

“Opinion utility” is a catch-all provision targeted at judicial humor too innocuous to satisfy requirement A, but so pervasive that it erodes the opinion’s fundamental usefulness. The actual meaning of “opinion utility” is intentionally vague so that local jurisdictions will have discretion to impose their own notions of judicial decorum on an ad hoc basis. Perhaps the most basic utility requirement a state could adopt is conveyance of the holding’s rationale.

Because the proposal employs an objective “reasonable litigant” standard, judges need not worry about offending overly-sensitive parties.

\textsuperscript{117} Id., Canon 2.

\textsuperscript{118} Id.

\textsuperscript{119} 218 Kan. at 207-208, 542 P.2d 685. “‘Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue.’” \textit{Id.} (quoting “Ancient Precedents” in the Canon of Judicial Ethics adopted by the American Bar Association in 1924). The \textit{Rome} court does not explain why it chose not to apply Canon 2.
By the same token, however, a judge whose humor is inappropriate can be disciplined even in the absence of complaint by a litigant, as in the *Rome* case.\(^{120}\) Thus, the language of the proposed subsection is specific, but allows room for discretion.

The efficacy of this proposal is demonstrated by its application to a cross section of actual humorous opinions. Consider its application to this opinion concerning the alleged destruction of fish in the Roanoke River:\(^{121}\)

> Well, Fish is the subject of this story. From the fifth day of the Creation down through the centuries, some of which lie behind us like a hideous dream, 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, naming them first in order...

> The most notable group of fishermen of all time was that headed by Peter, the impulsive Apostle, and his followers Thomas, Nathaniel, the sons of Zebedee...

> Considered solely as a food product, fish have unlimited possibilities—quantitative and qualitative. We are told that a few little fishes and seven loaves, five loaves and two fishes, according to St. Luke, were more than sufficient to feed a hungry multitude...

> Professor Agassiz, the eminent Harvard scientist said: “Fish is a good brain food.” One wrote to know “in what quantities should it be taken?” The great scientist wrote back: “In your case, a whale a day for thirty days...”

> The fish industry is among the foremost in World Trade. Indeed, in some countries it is the chief occupation of the people and the main source of national income. Through the ages it has developed a lore and nomenclature peculiar unto itself. What is more expressive of failure than, “A Water Haul?” What more charming password for an Ananias Club than, “What A Whopper?”... Land Shark suggests Shylock, and Shylock is a type. They are synonymous and offer a perfect illustration of a distinction without a difference... Everybody knows that “Fishy Smell” as well as the man “With the Codfish Eye.”... Codfish Tongues and Codfish Sounds mean one and the same thing...

The judge’s comments are reasonably certain to provoke a humorous response in the reader. Therefore, the opinion falls within the purview of the proposed amendment. Furthermore, it seems likely that reasonable litigants in the above case would feel their dispute had been made the subject of amusement, thereby satisfying requirement A. Thus, the humor is inappropriate. If, however, one determined that reasonable litigants would not feel this way, consideration of requirement B is necessary, and one must decide whether the utility of the opinion been

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\(^{120}\) 218 Kan. at 208, 542 P.2d at 686.

\(^{121}\) See *supra* text accompanying notes 33-34.

compromised by the humor. If so, the humor is not appropriate and a reviewing commission has proper grounds to invoke suitable discipline.

Another major form of judicial humor, the poetic opinion, is typified by the following takeoff on Poe's "The Raven:"  \footnote{123}{Reprinted in *Best Loved Poems of the American People*, supra note 43, at 209-11.}

Once upon a midnight dreary, while I pondered weak and weary
Over many quaint a 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." . . .
Eagerly I wished the morrow—vainly I had sought to borrow
From BAFJA, surcease of sorrow—and an order quick and plain
That this case would not remain as a source of further pain.
The procedure, it seemed plain. . . .
Looking, looking towards the future and to what there was to see
If my motion, it was granted and an appeal came to be,
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.
Tell me raven, how to go. . . .

It seems hard to imagine that this poem was written for any other purpose than amusement of the reader. If a reasonable litigant would not feel that he or she had been made the subject of amusement (which seems unlikely), then the issue is simply whether the opinion meets utility requirements of the particular jurisdiction.

In setting a utility standard, jurisdictions may consider opinion readability as a factor. For example, in the "Raven" takeoff above, the reader is forced to pry the judge's reasoning out of the poetry. It is unreasonable to expect readers to go to such trouble simply to understand why the judge ruled as he did. Thus, a panel should consider the price poetry exacts on an author's choice of words. The judge in the "Raven" case had to craft the language of his opinion to fit particular rhymes at particular places. It is likely that he occasionally omitted precise language and terminology because they did not rhyme as well.

Consider application of the test to more structural forms of humor, such as the following headings: "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." \footnote{124}{In re Robin E. Love, 61 Bankr. 558, 558-59 (Bankr. S.D. Fla. 1986).}
\footnote{125}{United States v. Ven-Fuel, Inc., 602 F.2d 747, 749-50, 752-53 (5th Cir. 1979).} These headings are obviously humorous, but a reasonable litigant probably would not feel that she had been made the subject of
amusement. Furthermore, the humor does not undermine basic utility because readability of an opinion's text generally is unaffected by headings. This use of humor seems permissible.

Interestingly, the headings above come from a case introduced by the following bit of original verse:

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.\textsuperscript{126}

By placing this poem in the introduction, away from the text of the actual opinion, utility arguably is preserved. Accordingly, this humor would be improper only if a reviewing panel found a breach of the requirement A "reasonable litigant test."

The proposed Code subsection also would be effective in ferreting out more abstruse forms of judicial humor. Consider the following excerpt from a drug-trafficking case:

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 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.\textsuperscript{127}

Assuming for argument's sake that the humor does not affect the utility of the opinion, the real issue is whether the litigants are portrayed as subjects for amusement. The answer would be a resounding "yes" were the drug agent a litigant, since comparison of a United States agent to a dog is clearly meant to amuse. Although the agent is not a litigant, there

\textsuperscript{126} Id. at 749.

\textsuperscript{127} United States v. Sentovich, 677 F.2d 834, 835-36 (11th Cir. 1982) (footnotes omitted).
still may be grounds for complaint since the United States arguably is being ridiculed indirectly through the mockery of its employee.

One can hardly fault judicial humorists for their discretionary abuses when the Code itself offers little or no guidance. Likewise, the judiciary cannot be blamed for failing to police itself when judicial humor apparently violates no provision of the current Code. The preceding application of the proposed subsection shows how a simple two-part test could be used to regulate abusive judicial humor without denying judges some room for humorous expression. Its adoption would alert the judiciary to the unique ethical problems associated with writing humorous opinions, and provide a means of disciplining those judges whose humor gets out of hand. Lastly, while current review boards have discretion to interpret the vague Canon 3 as inapplicable to humor, adoption of language dealing specifically with judicial humor leaves virtually no room for nonenforcement.

Conclusion

The abuse of judicial humor is a minor flaw in our legal system; if it were not minor, the problem presumably would have been dealt with already. Yet, because our system strives for perfection, even small problems deserve a remedy. While the personal sacrifices necessary to improve any system of justice are rarely easy to make, such sacrifices virtually are required by the legal community's avowed commitment to self-regulation and self-improvement.

We must recognize that the judiciary is composed of human beings who, like lawyers, stands to benefit from a set of enforceable ethical guidelines. The problem is not that the judiciary is unethical and

128. Continual fine-tuning and re-evaluation of legal conduct better serves the public. This meliorist philosophy flows from the proposition that if one corrects enough separate "minor flaws," one will soon have made a major improvement in the system as a whole. Like many unsolved problems, judicial humor is a controversial matter—humor and justice, two of humanity's most cherished creations, find themselves temporarily at odds. Of course, between the two, justice must always prevail.

129. Consider, for example, that the current Code of Judicial Conduct (CJC) requires, among other things, the following personal sacrifices of members of the judiciary: limitations on a wide variety of financial activities (CJC 3C(1)(e), CJC 5c) restrictions on one's participation in judicial and extra-judicial activities (CJC 4, 5); denials and restrictions on gifts, loans, and favors (CJC 5C(4), (5)); and the duty to make annual reports of one's financial affairs (CJC 6C).

130. This statement was true when the very first Canons of Judicial Ethics were formulated in the early 1920s, just as it remained true in 1969 when the Code of Judicial Conduct was promulgated. The judiciary must display the very highest standards of conduct, since "public and professional confidence in the integrity of the judiciary is close to the heart of the respect for law." T. MORGAN & R. ROTUNDA, PROBLEMS & MATERIALS ON PROFESSIONAL RESPONSIBILITY 483 (4th ed. 1987). We trust the judiciary to look after itself because we respect the integrity of its members. How unfortunate it would be if this august group,
needs close supervision, but rather that the ramifications of judicial humor's abuse are sometimes apparent only upon close examination and reflection. It is time for the judiciary to recognize the problematic ethical consequences of judicial humor, and take ameliorative action. One course of action is to amend the Code of Judicial Conduct, the ABA's current manual of judicial ethics.

The amendment this Note proposes would permit judicial humor so long as its two harmful effects—litigant ridicule and vitiation of opinion utility—are avoided. Adoption of this amendment, as a part of Canon 2 or Canon 3, would serve two important purposes: 1) it would help judicial humorists gauge the propriety of their humorous opinions; and 2) it would establish an enforceable basis for discipline when judicial humor goes too far. Fundamentally, the proposed subsection reflects the notion that while judges should enjoy a great deal of freedom to write as they wish, this freedom is secondary to the rights of litigants to have disputes handled fairly and seriously.

Knowing how to exercise self-control when the temptation to be humorous arises should be noblesse oblige for the judiciary. The reason for this rule is clear: there are times when the public desires humor, but an adjudication is not one of them. It is an unfortunate truism that not all of life's moments are happy occasions; nor can one artificially impose humor where it naturally does not belong. To pretend otherwise would be akin to living in Monty Python's "Happy Valley," where anyone found breaking the law by not being happy at all times is brought before the merriest of judges and sentenced to "hang by the neck until you cheer up."

through an implied refusal to address problems like judicial humor, were to breach society's trust and become the proverbial fox in charge of the chicken coop.

131. There is no reason why judicial humorists could not continue to delight us with their wit and creativity by simply channeling their humor into the ABA Journal or other publications. For example, after delivering a conventional opinion at the conclusion of a real trial, the judicial humorist could let loose with a spoof opinion in the pages of one of these "alternative forums." His or her intended audience—the legal community—still would be entertained.

In fact, such publications probably would reach more readers than an official opinion. Of course, those judicial humorists deriving pleasure merely from being naughty in the public record would be discouraged by publication in a mere legal magazine. That kind of person, however, probably should not be a judge in the first place.

132. Monty Python is the name of a celebrated, albeit now defunct, television show and comedy team.

133. The Happy Valley sketch is found on Monty Python's Previous Record, Charisma CAS 1063 (1972).