

# COMEDY COLLIDES WITH THE COURTROOM

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## ABSTRACT

*The adversarial system of litigation in many common law countries follows the model of a ritualized battle between opponents. Interspersed throughout the litigation process are inflection points where interpersonal conflict becomes particularly prominent. These conflicts are an integral part of the system's design—with attorneys each acting independently to fulfill their professional obligation to advocate zealously for disputing clients.*

*How does humor operate in this system? Tracing an overview of key conflict points in the litigation process, this Article analyzes the effect of different humor types identified by communication scholars as having the effect of diffusing or exacerbating those conflicts. This Article describes real-life examples to illustrate how participants in the legal process (lawyers, clients, judges, and jurors) use aggressive humor, ad hominin humor, sarcasm, and affiliative humor. While some humor styles may soften and humanize the interpersonal interactions among the participants, the question arises whether other styles are more effective in achieving the system's ultimate goal of obtaining legitimate, just, and fair dispute resolution. Questions further emerge about the circumstances when humor backfires and undermines the goals of litigation.*

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### INTRODUCTION

Does humor have any role in adversarial litigation? If so, what is its proper role? As with wisecracks in any context, the answer is nuanced and tricky. For the formal judicial process of resolving disputes, the answer is even more difficult. Perhaps the most crucial factor is the identity of the litigating party who is making the joke: judges get away with far more than lawyers. That is not to say that judges are funnier than lawyers.<sup>1</sup> They are not. After some time wearing black robes, sitting on high benches, deliberating in private, being called “Your Honor,” and enjoying the power of putting people in jail who do not comply with their orders, judges tend to take themselves very seriously—a quality not conducive for fostering a sense of humor.<sup>2</sup> Benefitting from their prerogative of running the show, judges are simply freer to indulge the impulse to crack a joke at their whim.<sup>3</sup> Lawyers need to be more careful for fear of alienating judges, juries, or clients.<sup>4</sup> As for other litigation participants—witnesses and juries—the question of whether they can get away with wise cracking is less certain.

Aside from the clear observations about the power of judges and the submissive position of lawyers, other more nuanced factors exist that influence the effectiveness and propriety of humor in litigation. Take, for example, the particularly combative approach to litigation in the United States.<sup>5</sup> The U.S. view of litigation envisions a ritualized battle between two opposing sides and a judge as the umpire in this battle.<sup>6</sup> On one hand, one would think this creates a rough-and-tumble atmosphere, which gives full license for unbridled comic barbs.<sup>7</sup> One might even observe that an occasional injection of the levity of a joke is welcome by all participants, who are tense from the antagonism that often accompanies litigation.<sup>8</sup> Humor can be equalizing and energizing: “A good joke is a moment of togetherness,” well needed through the labored interactions among litigation participants.<sup>9</sup> Yet the U.S. litigation system also

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1. *But see* Norman Tabler, *Bad Jokes from Judges? Are You Kidding Me?*, ABA J. (Aug. 22, 2019, 6:00 AM), <http://www.abajournal.com/voice/article/the-cape-of-good-humor> [https://perma.cc/H766-N338] (“Time and again a lawyer who retires the black robe discovers that the gift for humor somehow got packed away with the robe. The lawyer is now no funnier than before first donning the robe.”).

2. *But see id.*

3. *See id.*

4. *See* Norman L. Greene, *A Perspective on “Temper in the Court: A Forum on Judicial Civility,”* 23 *FORDHAM URB. L.J.* 709, 711 (1996) (“Where a judge is abusive, however, the remedies are fewer. If a lawyer responds in kind, he risks prejudicing his client’s rights or being subjected to a disciplinary proceeding.”).

5. *See, e.g.*, Jennifer A. Freyer, *Women Litigators in Search a Care-Oriented Judicial System*, 4 *AM. U. J. GENDER & L.* 199, 209 (1995).

6. *Id.* (describing the personality of some attorneys as “legal warriors” with a “relentless drive to ‘win’”).

7. *See* John G. Browning, *Humor in the Courtroom: No Laughing Matter*, ABA J. (July 11, 2019, 6:30 AM), <http://www.abajournal.com/voice/article/humor-in-the-courtroom-no-laughing-matter> [https://perma.cc/Q6KA-6LSM].

8. *But see id.*

9. Kenney Hegland, *Humor as the Enemy of Death, or Is It “Humor as the Enemy of Depth”?*, 1992 *BYUL REV.* 375, 382.

embodies a strong ethic in favor of highly controlled, serious decorum—thereby sending a contrasting message of restraint on matters of comedy.<sup>10</sup>

The structure of the adversarial system further complicates the litigation dynamics. The system requires lawyers to fight as hard as they can for one point of view and the fact finder (either a judge or jury) to weigh the presentations in an impartial manner.<sup>11</sup> Whether the fact finder is a judge or jury, the stakes are high for the lawyers—who must leave to the fact finder the question of whether their presentation is effective.<sup>12</sup> Humor of course is highly personal.<sup>13</sup> One person's lighthearted joke can be another person's offense.<sup>14</sup> Given the vulnerable position of lawyers within the process, the success of a joke can be difficult to predict and the consequence of a joke that falls flat can be significant.<sup>15</sup>

Consequences can also vary according to the type of lawsuit at issue: whether it be criminal (a proceeding prosecuted by the government and leading to punishment) or civil (generally a proceeding between two private parties, one of whom is seeking a remedy such as money damages). With liberty hanging in the balance, greater constitutional protections surround criminal cases: the right to effective assistance of counsel, the right to a jury, the right to impartial proceedings—to name a few.<sup>16</sup> A joke that misfires can threaten these protections.<sup>17</sup> This poses a risk for both lawyers and judges—both of whom may commit reversible error with a lighthearted quip.<sup>18</sup> Along similar lines, rules of ethical conduct—governing both judges and attorneys—implicate humor's propriety.<sup>19</sup>

This Article begins with a brief overview of humor theories from nonlegal scholarship.<sup>20</sup> It then traces the stages of the litigation process, starting with jury selection, trial proceedings, and finally, appellate arguments.<sup>21</sup> The Article also provides a review of sanctions imposed on judges for out-of-court jokes.<sup>22</sup> Each

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10. Browning, *supra* note 7.

11. See Freyer, *supra* note 5, at 209.

12. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 218–19 (2006).

13. GISELINDE KUIPERS, *GOOD HUMOR, BAD TASTE: A SOCIOLOGY OF THE JOKE* 90–91 (Kate Simms trans., 2006).

14. *Id.* at 68.

15. See Browning, *supra* note 7.

16. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1329 (1991) (discussing “the rigorous constitutional protections associated with criminal trials” that do not encumber civil trials).

17. Browning, *supra* note 7.

18. See *id.* (discussing *Glickman v. Wileman Brothers & Elliot Inc.* and the defense attorney's use of “potty humor” in front of the Supreme Court that resulted in the defendant losing the case and subsequently suing his attorney for malpractice).

19. See MODEL RULES OF PROF'L CONDUCT r. 3.5 (AM. BAR ASS'N 1983) (“A lawyer shall not . . . engage in conduct intended to disrupt a tribunal.”).

20. See *infra* Section I.

21. See *infra* Sections II–VII.

22. See *infra* Section VIX.

Section features real-life samples of wit (or attempts at wit), analyzing both the efficacy and propriety of each.

### I. HUMOR AND COMMUNICATION THEORY

Myriad tools are available for analyzing whether judges and lawyers violate rules of decorum when using humor in the litigation process. For the task of identifying what *constitutes* humor, centuries of scholars have concocted many credible theories designed to explain what makes things funny.<sup>23</sup> Superiority theory, release theory, and incongruity theory rise to the top as salient descriptive guides.<sup>24</sup> As is the case with many theories of humor, however, these do not provide a guide for understanding the social, communicative effect of different types of jokes.<sup>25</sup> For guidance on this, communication theory provides a useful taxonomy of humor's various functions in connecting—or alternatively—alienating people.<sup>26</sup> Wherever it may fall between these two poles, humor can clarify the meaning of a statement from one person to another, including both what the speaker intended and what the listener interpreted.<sup>27</sup>

According to leading communication scholars, humor performs four separate functions: identification, clarification, enforcement, and differentiation.<sup>28</sup> These functions fall along a continuum ranging from the most unifying (identification and clarification) to the most divisive forms (enforcement and differentiation).<sup>29</sup> This continuum, as Figure 1 depicts, delineates the varying degrees of positive and negative outcomes resulting from humorous interactions.<sup>30</sup>

FIGURE 1  
FUNCTIONS OF HUMOR



23. See, e.g., *Philosophy of Humor*, STAN. ENCYCLOPEDIA PHIL. (Nov. 20, 2012), <http://plato.stanford.edu/entries/humor/> [<https://perma.cc/6GV5-D8XU>] (discussing various theories of humor and philosophers who have commented on and proposed these theories).

24. See, e.g., LAURA LITTLE, *GUILTY PLEASURES: COMEDY AND LAW IN AMERICA* 9–20 (2019) (surveying these three major theories of humor).

25. See *id.* at 10.

26. See Owen H. Lynch, *Humorous Communication: Finding a Place for Humor in Communication Research*, 12 COMM. THEORY 423, 430 (2002) (discussing how “humor is a message sent by an individual or group with psychological motivations, but [it] depend[s] on the interpretation by another individual or group”).

27. See John C. Meyer, *Humor Functions in Communication*, in *HUMOR COMMUNICATION: THEORY, IMPACT, AND OUTCOMES* 21, 22–23 (Rachel L. DiCioccio ed., 2012) [hereinafter Meyer, *Humor Functions*] (discussing the role of humor in relationships).

28. *Id.* at 24.

29. *Id.*

30. Rachel L. DiCioccio, *Humor as Aggressive Communication*, in *HUMOR COMMUNICATION*, *supra* note 27, at 93, 93–108.

At the positive and unifying end of the continuum are the functions of identification and clarification.<sup>31</sup> Identification humor highlights the participants' shared experiences or beliefs and thereby increases the bond between them.<sup>32</sup> Such humor can take a variety of forms, such as an inside joke or self-deprecation that discloses a shared weakness or common mistake.<sup>33</sup>

As a more prickly or nervy form of joking, clarification humor "encapsulates an opinion or belief in a sharp phrase or anecdote."<sup>34</sup> Although more edgy in their approach, such remarks can unify participants by clarifying shared beliefs or social norms.<sup>35</sup> A shared laugh at a sassy or unorthodox quip can reinforce collective norms or beliefs as well as shed a new light on a particular topic.<sup>36</sup> Take the following exchange:

Q: How much did your marriage cost?

A: I don't know, I'm still paying for it.

The snappy response casts marriage in a different way than the questioner intended, focusing on something other than monetary cost.<sup>37</sup> The response adds a new angle to the question posed, tapping into the belief that marriage is hard work, not all romance.<sup>38</sup>

The enforcement and differentiation functions of humor reside at the divisive and negative end of the continuum.<sup>39</sup> Enforcement humor is characterized by put-down humor and teasing employed to highlight a receiver's violation of a social norm.<sup>40</sup> Lastly, differentiation humor demonstrates the most divisive form of humor.<sup>41</sup> Demeaning the receiver through ridicule and mocking, the differentiation function aims to distinguish and isolate the receiver from the speaker.<sup>42</sup> This continuum shows how humor operates on a span of functions with prosocial quips at one end and antisocial quips at the other end of the spectrum.<sup>43</sup>

Application of these theories helps to illuminate when humor serves the advocate's goals and when it does not. Writing on the subject presents conflicting conclusions on the general advisability of humor during litigation—with legal materials

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31. Meyer, *Humor Functions*, *supra* note 27, at 24.

32. *Id.* at 24–25.

33. *Id.*

34. *Id.* at 25.

35. *Id.* at 26.

36. *Id.*

37. *See id.*

38. *See id.*

39. John C. Meyer, *Humor as a Double-Edged Sword: Four Functions of Humor in Communication*, 10 COMM. THEORY 310, 320–21, 326–27 (2000) [hereinafter Meyer, *Humor as a Double-Edged Sword*]; Meyer, *Humor Functions*, *supra* note 27, at 24.

40. Meyer, *Humor Functions*, *supra* note 27, at 27.

41. *Id.* at 28.

42. *Id.* at 28–29.

43. Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 315–29.

admonishing that litigation participants best avoid humor, with other materials taking a more salutary view of joking during litigation.<sup>44</sup> Analysis of examples of litigation humor in light of the four social communicative functions of humor gives more subtlety to this question.

## II. JOKES DURING JURY SELECTION

At the beginning of a trial in the United States, attorneys often pick a jury and make pretrial motions that generally concern introducing key evidence. Since pretrial motions occur outside the presence of a jury, jury selection provides the first opportunity for the jurors to form an impression of the attorneys and the case.<sup>45</sup> This raises the stakes on the possibility that an attorney's joke during jury selection may backfire and have serious consequences for the attorney's success with the rest of the trial.<sup>46</sup>

Yet several factors suggest that jury selection presents a context in which humor may be particularly helpful to a lawyer. The process of questioning potential jurors—known as voir dire—can be intimidating to a lay person.<sup>47</sup> The formality of the courtroom and the jury selection process may cause a potential juror to close up and be less forthcoming with full answers to questions.<sup>48</sup> A lawyer's joke can help send the jury panel the message that the process entails only a human conversation in which the potential juror is simply required to share impressions and experiences well known to them.<sup>49</sup>

Voir dire seeks to enable lawyers to “suss out” the prejudices and biases that a juror might possess, bearing on the juror's potential to evaluate the case facts

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44. Compare Pamela Hobbs, *Lawyers' Use of Humor as Persuasion*, 20 HUMOR 123, 126–27 (2007) (listing many beneficial uses of humor by litigating attorneys, including increasing rapport, facilitating cooperation, and general “indicators of a lawyer's professional efficacy”), with ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 5:38 (2019), Westlaw NAVFEDT (“Few lawyers are smart and quick enough to use humor to their advantage during trial. . . . Lawyer humor usually falls flat at trial. Worse, even when a joke is funny, the opposing lawyer may take it and make the comedic lawyer eat those same words . . . .”), and Erin Coe, *Courtroom Humor Has Risks But Also Benefits for Attys*, LAW360 (Jan. 6, 2014, 9:33 PM), <http://www.law360.com/articles/497835/courtroom-humor-has-risks-but-also-benefits-for-attys> [<https://perma.cc/Z39X-FXM5>] (“When a joke falls flat, the courtroom magnifies it . . .”).

45. THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWERS OF PERSUASION 39 (2d ed. 2009). The U.S. Constitution ensures the right to trial in all criminal cases and some civil cases. U.S. CONST. amends. VI, VII.

46. See Browning, *supra* note 7.

47. MAUET, *supra* note 45, at 45.

48. See *id.*

49. See *id.* at 45–47 (observing that “[e]ffective jury selection requires juror self-disclosure, but that will not happen unless there is a comfortable, relaxed environment in which self-disclosure can occur”); Ken Broda-Bahm, *Share a Laugh . . . in Order To Promote Disclosure in Voir Dire*, PERSUASIVE LITIGATOR (Aug. 8, 2016), <http://www.persuasivelitigator.com/2016/08/share-a-laughin-order-to-promote-disclosure-in-voir-dire.html> [<https://perma.cc/UMC2-W7EV>] [hereinafter Broda-Bahm, *Share a Laugh*] (arguing that voir dire presents a situation where a lawyer wants “panelists to feel a reduced perception of threat and a willingness to engage in greater self-disclosure”).

impartially.<sup>50</sup> Human beings, however, are not always in touch with their biases—and even when they are fully cognizant of their biases, they are not inclined to disclose them to others.<sup>51</sup> A joke can help break down this barrier.<sup>52</sup> Studies have established that an individual is more apt to communicate about oneself to another person after participating in a mutual laugh. In some cases, shared laughter may even prompt participants to divulge “highly sensitive information (such as personal fears and deeply held religious convictions).”<sup>53</sup> The reasons for this include laughter’s effect of prompting endorphin release (and the consequent physiological effect of relaxing tension and increasing a sense of well-being), the ability to distract from awareness that participants are disclosing sensitive facts, the tendency to inspire risk-taking, and the proclivity for forging closer social bonds between those who share the laugh.<sup>54</sup> Interestingly, studies have established that shared laughter not only increases the amount of sensitive facts a participant discloses but also decreases the participant’s awareness of how much they are disclosing.<sup>55</sup> Presumably, this latter effect increases the participant’s inclination to disclose.<sup>56</sup>

The importance of juror self-disclosure during jury selection and the “newness” of the courtroom experience for many jurors suggest the wisdom for a lawyer to confine any jokes to identification humor.<sup>57</sup> The shared commonality arising from identification humor reduces juror anxiety, enhances juror attention to the substance of questions, and begins the process of developing a lawyer’s bond with those who will actually serve on the jury.<sup>58</sup> Identification humor serves to establish and strengthen the cohesion between communicators.<sup>59</sup> By sharing a funny anecdote or joke, lawyers can reduce the psychological distance between themselves and the potential jury.<sup>60</sup> Using identification humor can help humanize lawyers, intimidating figures to many, and help them appear more affiliative.<sup>61</sup>

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50. See LARSEN, *supra* note 44, §§ 5:26–5:28. Suggestive of the purpose of voir dire, consider the following question used in some courts, which seeks to unveil a potential juror’s orientations and potential biases: “If you have any bumper stickers on your car, what do they say?”

51. MAUET, *supra* note 45, at 49.

52. Alan W. Gray et al., *Laughter’s Influence on the Intimacy of Self-Disclosure*, 26 HUM. NATURE 28, 30 (2015) (“[L]aughter, more than just signaling the appropriate conditions for disclosure, may actually encourage disclosure through physiological relaxation induced by the opioid response of the endorphin system.”).

53. *Id.* at 28, 35–41.

54. *See id.* at 38–40.

55. *Id.*

56. *Id.* at 39–40.

57. See Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 318–19 (discussing how identification humor “reduces tensions or makes a speaker seem a part of the group [and] serves to identify that audience with the communicator, as they may laugh together at some relief of tension”).

58. *See id.*

59. *Id.*

60. Broda-Bahm, *Share a Laugh*, *supra* note 49.

61. Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 318–19; Broda-Bahm, *Share a Laugh*, *supra* note 49.

## III. OPENING STATEMENT HUMOR

Formal trial proceedings begin with each attorney giving an opening statement, which provides attorneys with further opportunity to ensure that jurors develop a favorable impression of themselves as well as their version of the case facts. The jurors' job is to form conclusions about "what happened, how it happened, and why it happened."<sup>62</sup> The opening statement is a lawyer's chance of providing the jury with her representation of these case components.<sup>63</sup> But the lawyer must confine the opening statement to what the evidence will show during the trial: she must not be argumentative, vouch for the credibility of a witness, explain what the facts mean, and share personal opinions about the evidence.<sup>64</sup> Because humor usually contains personal—and nonfactual—elements, these limitations make cracking a joke during opening statements particularly dangerous.<sup>65</sup>

One relatively safe approach is for a lawyer to conjure a memorable, witty one-liner that captures the theme of a lawyer's theory of the case and grabs the jury's attention. A particularly famous one-liner comes from the trial of football player O.J. Simpson.<sup>66</sup> The defense's theory of the case was that investigating law enforcement planted a bloody glove near the scene of the crime, which was far too small to fit on Simpson's hand: "If it doesn't fit, you must acquit."<sup>67</sup> Indeed, the jury acquitted.<sup>68</sup> Other snappy one-liners that likely did not backfire include "If she couldn't have him, no one would . . ." and "Swan's don't swim in the sewer . . ."<sup>69</sup>

Perhaps the most notorious opening statement in recent years came from the George Zimmerman homicide trial. In a highly publicized incident, George Zimmerman (a white man) shot a Black high school student—Trayvon Martin—under circumstances that Zimmerman claimed were self-defense.<sup>70</sup> After much controversy and an extensive inquiry, authorities charged Zimmerman with second-degree murder and manslaughter.<sup>71</sup> The shooting, the charging, and the media coverage leading up to trial captured the public's attention.<sup>72</sup>

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62. CHARLES H. ROSE III, *FUNDAMENTAL TRIAL ADVOCACY* 72 (3d ed. 2015).

63. *Id.*

64. *Id.* at 77, 79.

65. *See id.* at 72 ("When done poorly, it reflects on everything else that you do."); Browning, *supra* note 7.

66. Lindsay Denninger, *Why Didn't the Gloves Fit O.J. Simpson? This Iconic Trial Moment Lives On*, BUSTLE (Mar. 15, 2016), <http://www.bustle.com/articles/147445-why-didnt-the-gloves-fit-og-simpson-this-iconic-trial-moment-lives-on> [<https://perma.cc/RVJ3-E7QL>].

67. *Id.*

68. *Id.*

69. ROSE, *supra* note 62, at 72.

70. Douglas O. Linder, *The George Zimmerman Trial: An Account*, FAMOUS TRIALS, <http://famous-trials.com/zimmerman1/2319-home> [<https://perma.cc/7PVT-XPJW>] (last visited Apr. 1, 2020).

71. *Id.*

72. *Id.*



Apparently alluding to this media attention, George Zimmerman's lawyer made the following joke to the jury in his opening statement: "Knock-knock. Who's there? George Zimmerman. George Zimmerman who? Ah, good. You're on the jury."<sup>73</sup>

What is the gag here? In order for citizens to serve on a jury, they must not have prejudged the case facts. For highly publicized cases, finding such citizens can be difficult and the jury selection process can become long and arduous.<sup>74</sup> The more someone knows about the case, the more likely that they have already formed conclusions about the facts.<sup>75</sup> Zimmerman's attorney was effectively saying, "If you, honorable jury member, have not heard of George Zimmerman, then there is a chance you might be impartial. Welcome to the jury."

Stone-still faces and stunned silence from the entire courtroom responded to this joke.<sup>76</sup> Trying to retrieve the awkward moment, Zimmerman's attorney responded to the silence saying, "Nothing?"<sup>77</sup> He then mumbled, "That's funny."<sup>78</sup> Legal commentators ruthlessly criticized the attempt at a joke. One said, "If you're defending your client for second-degree murder, you . . . shouldn't start out your opening with a joke," and Harvard law professor Alan Dershowitz opined, "This is a murder case. . . . The victim's family is sitting in the courtroom with tears in their eyes and he's telling a knock-knock joke? I just don't get it."<sup>79</sup> Adding insult to injury, the joke not only could insult jury members who quite understandably *had* heard of George Zimmerman but also those jurors who were selected because of their ignorance.<sup>80</sup> This joke was the lawyer's attempt at identification. For the reasons mentioned, the humor failed.<sup>81</sup> What the lawyer intended as a means to connect with the jurors and highlight their value,<sup>82</sup> instead appeared to disparage their intellect as well as to question whether they were engaged in current events and capable of making an impartial judgment about Zimmerman's guilt.<sup>83</sup>

By contrast to the failed knock-knock joke, the following example of opening statement humor appears to have succeeded. The young lawyer's joke foiled on the

73. Jelani Cobb, *George Zimmerman's Trial Begins, with a Knock-Knock Joke*, NEW YORKER (June 24, 2013), <http://www.newyorker.com/news/news-desk/george-zimmermans-trial-begins-with-a-knock-knock-joke> [https://perma.cc/EHX8-96ZG].

74. Interview by Robin Young, Host of Here & Now, WBUR, with Jo-Ellan Dimitrius, Jury Consultant (Feb. 9, 2015), <http://www.wbur.org/hereandnow/2015/02/09/high-profile-cases-make-it-difficult-to-find-impartial-juries> [https://perma.cc/2EVG-LZZL] (discussing the difficulties in finding impartial jurors for high-profile trials).

75. See MAUET, *supra* note 45, at 48.

76. Ken Broda-Bahm, *Rely on Humor, but Not on Jokes*, PERSUASIVE LITIGATOR (June 27, 2013), <http://www.persuasivelitigator.com/2013/06/rely-on-humor-but-not-on-jokes.html> [https://perma.cc/386M-RP72] [hereinafter Broda-Bahm, *Rely on Humor*].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. See Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 318 ("[C]ommunicators try to release tension through humor and make their audiences feel superior in the sense that they are brought up to a more equal relationship with the speaker.").

83. Broda-Bahm, *Rely on Humor*, *supra* note 76.

stereotype that lawyers are controlled experts, sophisticated, slick, and rarely willing to admit error.<sup>84</sup> When standing up before the jury for an opening statement in a criminal case, the young lawyer said the following:

YOUNG LAWYER: Ladies and Gentleman of the jury: This is my first jury trial. I'm telling you this just by way of warning—I am likely to make mistakes today.

OPPOSING COUNSEL: Objection, Your Honor.

JUDGE: Sustained.

YOUNG LAWYER: [Turning to jury] See, there's my first one.  
[Laughter throughout the courtroom]<sup>85</sup>

In this example, the young lawyer successfully used clarification humor to engage the jury. He invited them to recognize his error as an inexperienced lawyer and in doing so, laugh with him and move on without holding it against him.<sup>86</sup> The power of self-deprecation here endeared the jury and minimized the mistake made in his opening statement.<sup>87</sup>

#### IV. CROSS-EXAMINATION HUMOR

Most of a trial is consumed with questioning witnesses. A lawyer asks direct examination questions of the witnesses that help to establish the lawyer's version of the facts.<sup>88</sup> These questions are open-ended and the demeanor or vibe between witness and lawyer is generally friendly.<sup>89</sup> Occasionally a witness of direct examination may be hostile, and judges allow a more aggressive tack in questioning. In the usual direct examination, the lawyer's job is to introduce the witness, to humanize the witness, to have the witness establish a connection with the case, and to have the witness tell a personalized story.<sup>90</sup>

Cross-examination, however, is an entirely different matter: cross-examination rarely seeks to make a witness look good in the eyes of the fact finder. That said, an effective cross-examination should rarely act as a front-on attack on the witness.<sup>91</sup> The primary purpose of cross-examination is either to have a witness admit facts or to

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84. See Ken Broda-Bahm, *Don't Be Afraid of a Little Humiliation in the Courtroom*, PERSUASIVE LITIGATOR (Oct. 3, 2011), <http://www.persuasivelitigator.com/2011/10/courtroom-humiliation.html> [https://perma.cc/V6JU-KC2Q] (commenting on how a jury often expects "attorneys to convey distance, superiority, and arrogance").

85. A colleague who witnessed this exchange relayed this dialogue to the authors.

86. See Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 319–20 ("No specific party is corrected or differentiated in such humor, as it seeks to unify receivers of such messages in mutual enjoyment of a mild violation of normal messages or norms.").

87. See *id.*

88. SCOTT BALDWIN, ART OF ADVOCACY: DIRECT EXAMINATION § 1.01 (2016), LexisNexis.

89. *Id.* § 1.09.

90. MOLLY TOWNES O'BRIEN & GARY S. GILDIN, TRIAL ADVOCACY BASICS 88–103 (2d ed. 2016).

91. See MAUET, *supra* note 45, at 210.

impeach a “witness who dares to deny [a] fact.”<sup>92</sup> Common cross-examination strategies for lawyers include the following: (1) prompting a witness to admit a fact helpful to the lawyer’s client or damaging to the opponent; (2) suggesting that the witness is honest, but mistaken; (3) destroying the witness’s credibility; and (4) casting the witness’s answer as dubious.<sup>93</sup>

The following is a fictional account of a cross-examination in a British trial in the High Court of Justice. The trial concerns a man who bears the name Chrysler.<sup>94</sup> Authorities accuse Chrysler of stealing more than forty thousand coat hangers from hotels around the world.<sup>95</sup> He admits his guilt to the crime of theft but provides what one might loosely characterize as a “necessity” defense.<sup>96</sup> Here is part of Chrysler’s cross-examination.

COUNSEL: What is your name?  
 CHRYSLER: Chrysler. Arnold Chrysler.  
 COUNSEL: Is that your own name?  
 CHRYSLER: Whose name do you think it is?  
 COUNSEL: I am just asking if it is your name.  
 CHRYSLER: And I have just told you it is. Why do you doubt it?  
 COUNSEL: It is not unknown for people to give a false name in court.  
 CHRYSLER: Which court?  
 COUNSEL: This court.  
 CHRYSLER: What is the name of this court?  
 COUNSEL: This is No 5 Court.  
 CHRYSLER: No, that is the number of this court. What is the *name* of this court?  
 COUNSEL: It is quite immaterial what the name of this court is!  
 CHRYSLER: Then perhaps it is immaterial if Chrysler is really my name.  
 COUNSEL: No, not really, you see because . . .  
 JUDGE: Mr Lovelace?  
 COUNSEL: Yes, m’lud?  
 JUDGE: I think Mr Chrysler is running rings round you already. I would try a new line of attack if I were you.  
 COUNSEL: Thank you, m’lud.  
 CHRYSLER: And thank you from ME, m’lud. It’s nice to be appreciated.  
 JUDGE: Shut up, witness.  
 CHRYSLER: Willingly, m’lud. It is a pleasure to be told to shut up by you. For you, I would . . .

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92. *Id.* at 107.

93. *Id.* at 221–61; O’BRIEN & GILDIN, *supra* note 90, at 109–11.

94. Miles Kington, *High Court Hang Ups*, INDEPENDENT (Oct. 15, 2002), <http://www.independent.co.uk/voices/columnists/miles-kington/high-court-hang-ups-747313.html> [<https://perma.cc/RBD4-ZJXJ>].

95. *Id.*

96. *See id.*

- JUDGE: Shut up, witness. Carry on, Mr Lovelace.
- COUNSEL: Now, Mr Chrysler—for let us assume that that is your name—you are accused of purloining in excess of 40,000 hotel coat hangers.
- CHRYSLER: I am.
- COUNSEL: Can you explain how this came about?
- CHRYSLER: Yes. I had 40,000 coats which I needed to hang up.
- COUNSEL: Is that true?
- CHRYSLER: No.
- COUNSEL: Then why did you say it?
- CHRYSLER: To attempt to throw you off balance.
- COUNSEL: Off balance?
- CHRYSLER: Certainly. As you know, all barristers seek to undermine the confidence of any hostile witness, or defendant. Therefore it must be equally open to the witness, or defendant, to try to shake the confidence of a hostile barrister.
- COUNSEL: On the contrary, you are not here to indulge in cut and thrust with me. You are only here to answer my questions.
- CHRYSLER: Was that a question?
- COUNSEL: No.
- CHRYSLER: Then I can't answer it.
- JUDGE: Come on, Mr Lovelace! I think you are still being given the run-around here. You can do better than that. At least, for the sake of the English bar, I hope you can.
- COUNSEL: Yes, m'lud. Now, Mr Chrysler, perhaps you will describe what reason you had to steal 40,000 coat hangers?
- CHRYSLER: Is that a question?
- COUNSEL: Yes.
- CHRYSLER: It doesn't sound like one. It sounds like a proposition which doesn't believe in itself. You know—"Perhaps I will describe the reason I had to steal 40,000 coat hangers . . . . Perhaps I won't . . . . Perhaps I'll sing a little song instead . . . ."
- JUDGE: In fairness to Mr Lovelace, Mr Chrysler, I should remind you that barristers have an innate reluctance to frame a question as a question. Where you and I would say, "Where were you on Tuesday?", they are more likely to say, "Perhaps you could now inform the court of your precise whereabouts on the day after that Monday?". It isn't, strictly, a question, and it is not graceful English but you must pretend that it is a question and then answer it, otherwise we will be here for ever. Do you understand?
- CHRYSLER: Yes, m'lud.
- JUDGE: Carry on, Mr Lovelace.

COUNSEL: Mr Chrysler, why did you steal 40,000 hotel coat hangers, knowing as you must have that hotel coat hangers are designed to be useless outside hotel wardrobes?

CHRYSLER: Because I build and sell wardrobes which are specially designed to take nothing but hotel coat hangers.<sup>97</sup>

A large measure of this transcript's amusement comes from the wacky, fictional case facts. Yet part comes from the character of the interchange among Chrysler, the judge, and counsel. The dominant humor in this example is differentiation humor, which generally is not effective in the litigation context.<sup>98</sup> Yet the combative character of cross-examination gives more license to this approach.<sup>99</sup> Within this context, one must admit that, if real, Chrysler would have done an effective job of declawing the lawyer attacking him.

#### V. IN-COURT JOKES BY JUDGES

Judges enjoy more latitude than lawyers in cracking jokes during litigation. After all, judges are in control, serving as the master of ceremonies.<sup>100</sup> Enhancing this license for judges to throw out a joke if they want is the ever-present mystique that U.S. society grants to the role of judges.<sup>101</sup> That said, numerous checks exist preventing judges from full liberty of indulging their comic inclinations.<sup>102</sup> To begin, trial judges are subject to the general supervision of appellate judges.<sup>103</sup> Both formal and informal pressure can come to bear.<sup>104</sup> And then—particularly in criminal cases—emerges the possibility of appellate courts nullifying a verdict because the trial judge uttered too many comic quips.<sup>105</sup> The verdict reversal standard is difficult to satisfy, but the prospect of undoing a trial's work stands as a restraint—a significant restraint on the apparent impulses of some judges to indulge a comic impulse.<sup>106</sup>

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97. *Id.*

98. See Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 321–23.

99. See *id.* at 322–23 (describing that it is “[t]he differentiation function of humor [that] serves rhetors by making clear divisions and oppositions among opinions, people, and groups”).

100. See Tabler, *supra* note 1.

101. Browning, *supra* note 7; Tabler, *supra* note 1 (discussing what the author termed the “black-robe effect”).

102. See Browning, *supra* note 7.

103. See *id.* (providing examples of appellate court review of trial court judges’ attempts at humor); *infra* note 105 and accompanying text.

104. *E.g.*, LARSEN, *supra* note 44, § 16:3 (identifying the appellate court standards of review of trial court determinations); Browning, *supra* note 7 (highlighting the example of a defense attorney laughing at and “egging” on a judge’s jokes).

105. In one particularly celebrated case, the judge asked the prosecution to participate in a practical joke played at the expense of defense counsel at the end of a trial. Under pressure, the judge later granted a mistrial as a result of this conduct and an appellate court disqualified him from presiding over the retrial. *Drayton v. Hayes*, 589 F.2d 117, 118–20 (2d Cir. 1979). For an example where the appellate court agreed that the joking was inappropriate but declined to reverse, see *Mello v. DiPaulo*, 295 F.3d 137, 150 & n.10 (1st Cir. 2002). See *infra* notes 110–113 for a further discussion of *Mello*.

106. See, *e.g.*, *Mello*, 295 F.3d at 150; see also LARSEN, *supra* note 44, § 16:3 (discussing the “harmless error” standard of review).

Disciplinary consequences may hang in the balance. The *American Bar Association Model Code of Judicial Conduct*, which governs most judges in the United States, is ambiguous when it comes to humor.<sup>107</sup> The relevant canons and rules speak of a judge's duty of fairness; impartiality; and avoiding abusive, discourteous, or intemperate behavior. Unless a judge's jokes are bullying, highly offensive, or cruel, disciplinary authorities generally avoid imposing sanctions.<sup>108</sup> But exceptions to this hands-off approach have emerged. Sexual harassment has risen to the top as providing a common mode for humor leading to professional sanctions.<sup>109</sup>

One interesting example of a judge's misbehavior comes from a first-degree murder case in which the judge uttered a number of jests (if you can call them that) through the course of trial:

- The judge described members of the jury pool who were not picked for the jury as having "escaped" and referred to the empaneled jurors as "you lucky people."
- The judge explained to empaneled jurors that breaks would occur because "it gets kind of tiresome just sitting here, for all of us."
- The judge remarked that a drawing shown to the jury "won't win any art prizes."
- The defendant's former girlfriend testified and was asked to identify the defendant. Apparently, she had sex appeal. When she pointed to the defendant who was sitting next to the defendant's trial counsel, Harrington, the judge said, "Harrington, you wish."<sup>110</sup>

On appeal from his conviction, the defendant argued that the comments amounted to reversible error.<sup>111</sup> The appellate court agreed that the judge's conduct was inappropriate—particularly for a first-degree murder trial—but nonetheless declined to grant the defendant any relief.<sup>112</sup> Noting the extremely high bar for providing relief within the procedural posture of the case, the appellate court grudgingly decided that the trial would not have turned out differently had the judge not uttered these comments.<sup>113</sup>

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107. The relevant canons state as follows:

CANON 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

CANON 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.

CANON 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

MODEL CODE OF JUDICIAL CONDUCT Canons 1–3 (AM BAR ASS'N 1990), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/) [https://perma.cc/AF7C-2EQQ].

108. Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817, 837 (1991).

109. See generally *id.* at 819–37.

110. *Mello*, 295 F.3d at 150 n.10.

111. See *id.* at 150.

112. *Id.*

113. *Id.* at 142, 150. The appellate court invoked the rigorous standard for ineffective assistance of counsel from *Strickland v. Washington*, 466 U.S. 668, 688 (1984), requiring that the defendant establish (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable

This humor does not fall neatly into the four major functions on the humor continuum. Rather it is sarcasm. Sarcasm is an alienating form of humor that may be emotionally useful to those who utter it. Sarcasm is baldly alienating to its audience. For that reason, it rarely provides an interesting or positive social function.

## VI. FORMAL LITIGATION WRITINGS

Litigation filings consist of a variety of documents, including indictments, pleadings, briefs, orders, and opinions—to name a few. Below are two examples: one reflects the effect of a brief's humorous opening on the court's opinion and disposition,<sup>114</sup> the other reflects unbidden humor appearing in a judicial opinion.<sup>115</sup>

### A. Attorney Filings in Court

Perhaps out of lawyerly caution, the appearance of jokes in court papers is far less frequent than in heat-of-the-moment oral courtroom exchanges. The success record on humor in court filings is mixed. Heat-of-the-moment cracks are more likely to backfire,<sup>116</sup> but the process of creating a written submission provides the opportunity for a “sober second thought” that might suppress the impulse to inject comedy into written submissions.

An unusual exception to the general advice to avoid wise cracks is a civil lawsuit, informally named the “Monkey Selfie” case, and formally captioned *Naruto v. Slater*.<sup>117</sup> The suit arose when a crested macaque ape named Naruto snapped self-portraits after handling a camera owned by a primate scholar—who had been studying Naruto and his troop.<sup>118</sup> The primatologist had placed his camera on the ground in order to record notes about the troop.<sup>119</sup> Curious and intelligent, Naruto picked up the camera and explored its operation.<sup>120</sup> Funny, huge-grinned monkey snaps resulted. The primatologist ultimately discovered them on the camera, and he posted them on the Internet.<sup>121</sup>

Disputes arose over the ownership of the pictures. More to the point: a group of animal rights specialists—a nongovernmental organization known as People for the Ethical Treatment of Animals (PETA)—took up the cause of asserting Naruto's

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probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Mello*, 295 F.3d at 142 (citing *Strickland*, 466 U.S. at 688, 694).

114. See *infra* Part VI.A.

115. See *infra* Part VI.B.

116. See Geoffrey Sant, *8 Horrible Courtroom Jokes and Their Ensuing Legal Calamities*, SALON (July 26, 2013, 10:42 PM), [http://www.salon.com/2013/07/26/8\\_horrible\\_courtroom\\_jokes\\_and\\_their\\_ensuing\\_legal\\_calamity/](http://www.salon.com/2013/07/26/8_horrible_courtroom_jokes_and_their_ensuing_legal_calamity/) [<https://perma.cc/V75N-H5TD>].

117. No. 15-cv-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan 28, 2016), *aff'd*, 888 F.3d 418 (9th Cir. 2018).

118. *Naruto*, 2016 WL 362231, at \*1.

119. See *id.*

120. See *id.*

121. *Id.*

rights.<sup>122</sup> Yes, it is true, PETA filed suit as “next friend” of Naruto (the legal term for someone who files suit for a party such as a minor child who does not have the capacity to do so themselves).<sup>123</sup> PETA asserted that it was entitled to assert Naruto’s right to copyright ownership in the photos, alleging that the primatologist infringed that right.<sup>124</sup> In the written motion to dismiss PETA’s lawsuit claiming that the primatologist infringed Naruto’s copyright privileges, lawyers for the primatologist included an unusual beginning.<sup>125</sup> The motion began:

A monkey, an animal-rights organization and a primatologist walk into federal court to sue for infringement of the monkey’s claimed copyright. What seems like the setup for a punchline is really happening. It should not be happening. Under [appellate precedent], dismissal of this action is required . . . . Monkey see, monkey sue is not good law . . . .

. . . .

. . . Accepting Plaintiff’s . . . argument would present the bizarre possibility of protracted family and probate court battles when the offspring of non-human authors scrum over the rights to valuable works.<sup>126</sup>

This is cheeky stuff for a court filing. But it apparently worked. One cannot tell whether it was the clever introduction or the general ridiculousness of the claim that worked to the defendants’ favor, but the court dismissed the case as requested.<sup>127</sup> Also suggesting that the humor might have worked in favor of the primatologist attorney’s advocacy, press coverage and other commentary on the motion often quoted the language approvingly.<sup>128</sup>

This example successfully demonstrates both identification and enforcement humor based on the intended audience. The author of the brief accomplished a unifying exchange when he wrote, “A monkey, an animal-rights organization and a primatologist walk into federal court . . . .”<sup>129</sup> The bonding resides in the expression from lawyer to judge that we should not have to put up with such silliness, highlighting the shared perception of the plaintiff’s absurd claim. By not criticizing the attorney’s use of humor, the judge effectively endorsed the ridicule of PETA for its absurdity and therefore successfully demonstrated enforcement humor.

122. *Id.* (discussing factual background); see also Anderson J. Duff, ‘Let’s Take a #Selfie,’ *Said the Monkey: A Case of Questionable Copyrights*, WIRED, <http://www.wired.com/insights/2014/09/questionable-copyrights/> [<https://perma.cc/8USB-TFE4>] (last visited Apr. 1, 2020).

123. *Naruto*, 2016 WL 362231, at \*1.

124. *Id.*

125. Motion to Dismiss the Complaint for Lack of Standing and Failure to State a Claim Upon Which Relief Can Be Granted [Fed. R. Civ. P. 12(b)(1), 12(b)(6)] at 2, *Naruto*, 2016 WL 362231 (No. 15-cv-4324-WHO), 2015 WL 9843651 [hereinafter Motion to Dismiss].

126. *Id.* at 2–3.

127. *Naruto*, 2016 WL 362231, at \*4.

128. See, e.g., Howard Wasserman, *A Monkey, An Animal Rights Organization and a Primatologist Walk into Federal Court*, PRAWFSBLAWG (Nov. 12, 2015, 3:08 PM), <http://prawfsblawg.blogspot.com/prawfsblawg/2015/11/a-monkey-an-animal-rights-organization-and-a-primatologist-walk-into-a-federal-court.html> [<https://perma.cc/4VP8-N5XE>] (discussing why this joke “works” in the context of the motion and the case).

129. Motion to Dismiss, *supra* note 125, at 2.



### B. Jokes in Judicial Opinions

The life of a judge is often isolated—some might even say “sleepy.” By contrast with life on the job, common sense about the political nature of getting a job in the U.S. judiciary suggests that having a personable, affable personality assists mightily in the process of getting the job.<sup>130</sup> This (often organic or hardwired) appreciation for the company of other people—and the skill for monopolizing on it—is especially useful in court systems where judges are elected to their jobs as part of a democratic, political process during which they must campaign. Social skills also serve a judicial candidate well in attracting the attention necessary of those who make appointment decisions to take notice of the candidate.

As a result, a disconnect often emerges because social, sometimes even outgoing, individuals find themselves in a job with monastic qualities. Reinforcing the monasticism of this job are principles of ethics and propriety, which give judges pause when they might be enthusiastically inclined to reach out to members of the practicing bar for relationships that include intimacy or confidence sharing.<sup>131</sup> Boredom may emerge from this disconnect. How does an intelligent, creative person deal with boredom? One option is for judges to deploy humor in their work. Hence one can occasionally encounter a judicial opinion speckled with humor—or at least attempts at humor.

Although humor in opinions comes off as well planned and well edited, the result often does not succeed. Nonetheless, opinions that attempt comedy usually find triumph in garnering much attention. Perhaps this is the result of the cult of the black robe: if a judge does it, whatever “it” happens to be deserves attention. To be fair, one must acknowledge that witty, intelligent minds are at the root of comedy—and at the very least—most comedy is clever. Often judicial attempts at comedy are pedantic, lame, and decidedly not knee-slapping. But clever they often are.

*Gonzalez-Servin v. Ford Motor Co.*<sup>132</sup> is an example of a satire-laced opinion by one of our nation’s most talented judges, the now-retired Judge Richard Posner. In this opinion, Judge Posner expressed exasperation with lawyers for ignoring earlier case law that would serve to control the decision.<sup>133</sup> His thoughts turned to the analogy of the avoidance behavior of an ostrich.<sup>134</sup> Apparently to emphasize this analogy between the lawyer and an ostrich burying its head in the sand, Judge Posner included two photographs in the opinion: one photograph of an actual ostrich (head buried) and the

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130. See, e.g., Laura E. Little, *The ABA’s Role in Prescreening Federal Judicial Candidates: Are We Ready To Give Up on the Lawyers?*, 10 WM. & MARY BILL OF RTS. J. 37, 50 (2001) (describing political nature of the appointments process); Dahlia Lithwick, *The Head and Heart of Elena Kagan*, SABATO’S CRYSTAL BALL: UVA CTR. FOR POL. (May 13, 2010), <http://centerforpolitics.org/crystalball/articles/dx12010051301/> [<https://perma.cc/VYT7-48BK>] (describing the benefits of being affable during and after the appointments process for U.S. Supreme Court Justices).

131. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canons 1–3 (AM BAR ASS’N 1990), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/) [<https://perma.cc/AF7C-2EQQ>].

132. 662 F.3d 931 (7th Cir. 2011).

133. *Gonzalez-Servin*, 662 F.3d at 934.

134. *Id.*

other of a suited, human male (also with head buried).<sup>135</sup> Judge Posner's opinion stated, "The ostrich is a noble animal but not a proper model for an appellate advocate."<sup>136</sup> The ridicule got the bar's attention. Lawyers around the United States characterized Judge Posner's approach negatively, even as bullying.<sup>137</sup> To be sure, however, the satire imposed its intended regulatory effect: one must assume that a lawyer would not lightly choose to omit discussion of possibly binding precedent when arguing before Judge Posner or his acolytes.

Another retired federal court of appeals judge, Alex Kozinski, wrote numerous satirical opinions famous for attracting criticism. Particularly memorable was Judge Kozinski's lacerating ridicule of a copyright suit by Mattel challenging a parodic song about Barbie.<sup>138</sup> Among the colorful language in the opinion is the following description of the dispute: "[I]f this were a sci-fi melodrama, it might be called Speech-zilla meets Trademark Kong."<sup>139</sup> Both of these examples demonstrate differentiation humor used to criticize and demonize the receiver. The judges successfully utilized negative humor to call out the attorneys for their less than winning behavior.

Not all judicial opinions that crack jokes tend to capitalize on differentiation humor. One can also discern occasional identification humor in an opinion, which seeks to unite rather than chastise or divide.<sup>140</sup> An excellent example of identification humor appears in a case evaluating whether federal law preempts a county ordinance regulating household products.<sup>141</sup> In navigating the issue, the concurring judge peppered his opinion with the italicized names of well-known household products.<sup>142</sup>

135. *Id.*

136. *Id.*

137. See, e.g., Diane Karpman, "An Ostrich Is a Noble Animal . . .," CAL. BAR J., <http://www.calbarjournal.com/January2012/EthicsByte.aspx> [https://perma.cc/42WG-2SAP] (last visited Apr. 1, 2020).

138. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898–99 (9th Cir. 2002); see also LITTLE, *supra* note 24, at 166–67 (describing reactions to Judge Kozinski's opinion).

139. *Mattel*, 296 F.3d at 898.

140. Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 318–19 (discussing the ability of identification humor to unite the speaker and the audience, reduce tensions, and develop shared bonds).

141. *Chem. Specialties Mfg. Ass'n v. Clark*, 482 F.2d 325, 328 (5th Cir. 1973) (Brown, C.J., concurring).

142. The concurrence stated as follows:

As soap, now displaced by latter day detergents is the grist of Madison Avenue, I add these few comments in the style of that street to indicate my full agreement with the opinion of the Court and to keep the legal waters clear and phosphate-free.

As *Proctor* of this dispute between the representative of many manufacturers of household detergents and the Board of Commissioners of Metropolitan Dade County, Florida, who have promulgated regulations which seek to control the labeling of such products sold within their jurisdiction (largely to discourage use which pollutes their waters), the Court holds that Congress has specifically preempted regulatory action by Dade County. Clearly, the decision represents a *Gamble* since we risk a *Cascade* of criticism from an increasing *Tide* of ecology-minded citizens. Yet, a contrary decision would most likely have precipitated a *Niagara* of complaints from an industry which justifiably seeks uniformity in the laws with which it must comply. Inspired by the legendary valor of *Ajax*, who withstood Hector's lance, we have *Boldly* chosen the course of uniformity in reversing the lower Court's decision upholding Dade County's local labeling laws. And, having done so, we are *Cheered* by the thought that striking down the regulation by the local

The resulting narrative was far too chocked with puns for some tastes, but the narrative nonetheless built bridges with those affected by the opinion. By highlighting the shared understanding and experience of every citizen, the simple puns and quips become a unifying message.

## VII. SENTENCING

The topic of sentencing changes channels back to criminal law and the end of a criminal trial. After the jury has convicted the wrongdoer, the judge has the ominous job of determining the appropriate punishment. In this instance, some judges savor the opportunity to pass judgment and impose their will—others find the task distasteful. In the following short quip, it is hard to tell exactly which side of the line then-Judge Harold H. Burton fell, but most conclude that his approach was apt and witty<sup>143</sup> (Burton ultimately became a U.S. Supreme Court Justice). You can decide whether Burton’s statement best befits one human being passing judgment on another, but (you have to admit) it is funny.

In a dialogue with a convicted homicide defendant, then-Judge Burton asked the defendant if he had anything to say.<sup>144</sup> The defendant replied, “As God is my judge, I didn’t do it. I’m not guilty.”<sup>145</sup> To which, then-Judge Burton replied, “He isn’t, I am.

jurisdiction does not create a void which is detrimental to consumers, but rather merely acknowledges that federal legislation has preempted this field with adequate labeling rules.

Congress, of course, has the *Cold Power* to preempt. Of the three situations discussed by the Court, the first (direct conflict) is easy, for it is *Crystal Clear* that the state law must yield. The third, in which the ordinance may *supplement* the federal law and thereby extend or increase the degree of regulation, is more troublesome. For where Congress has chosen to fashion a regulatory scheme that is only the *Head and Shoulders*, but has not opted to regulate every aspect of the area, the states have implied power to flesh out the body. It is where Congress fails to clearly signify, with an appropriate preemption clause, its intent to fully occupy the area regulated that the problem arises. With some *Joy*, the Court finds there is such a clause.

Concerning the precautionary labeling aspect, this is *SOS* to consumers. If we *Dash* to the heart of the question, it is apparent, as the Court points out, that the 1966 Amendments to FHSA indicate an explicit congressional purpose to preempt state regulation of the labeling of these substances. Undoubtedly, this unequivocal congressional *Salvo* was directed at such already existing regulations as those of the Fire Department of New York City relating to pressurized containers. Indeed, Congress intended to wield its *Arm and Hammer* to *Wisk* away such local regulations and further, to preclude the growing *Trend* toward this proliferation of individual community supervision. Its purpose was at least two-fold: (i) to put day-to-day responsibility in the hands of local government, but (ii) at the same time to impose detailed identical standards to eliminate confusion or overlapping.

With this clear expression of congressional intent to create some form of preemption, the only thing remaining was whether the meaning of the term “precautionary labeling” is sufficiently broad to embrace the words of the Dade County ordinance, *Vel non*. In making this determination, the Court is furnished with a *Lever* by our *Brothers* of the Second Circuit. And so we hold. This is all that need be said. It is as plain as *Mr. Clean* the proper *Action* is that the Dade County Ordinance must be superseded, as *All* comes out in the wash.

*Id.* at 328–29 (citations omitted). For analysis of this case, see Mary B. Trevor, *From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions*, 45 U. TOLEDO L. REV. 291, 315 (2014).

143. LANCE S. DAVIDSON, LUDICROUS LAWS & MINDLESS MISDEMEANORS 192 (1998).

144. *Id.*

145. *Id.*

You did. You are.”<sup>146</sup> This is a perfect example of successful enforcement humor.<sup>147</sup> The judge does not hesitate to put the defendant in his place with a condescending statement that highlights who is on the right side and who is on the wrong side. This admonishment is short and sweet, but the silliness of the statement is still biting and to the point.

#### VIII. APPELLATE ARGUMENTS

After trial, the loser can usually file an appeal (because of the Double Jeopardy Clause in the U.S. Constitution, the prosecutor often cannot appeal an acquittal in a criminal case). After parties file briefs in the appellate court, the court may schedule oral argument. The following two examples come from U.S. Supreme Court arguments.

The proceedings in the Supreme Court are particularly solemn and intimidating. No cameras are allowed in the courtroom, proceedings are dripping with stoic tradition, and the high-ceilinged room is particularly august with red velvet curtains, hard wooden seats, and glowing white marble all around. The Justices hear oral argument only about seven times a year for eight days at a time, so there is a sense that something special is occurring. Humor is a treacherous endeavor for attorneys during those arguments. In fact, the Supreme Court’s guidebook for attorneys actually admonishes that attempts to crack a joke usually fail.<sup>148</sup>

The first example comes from the oral argument in one of the most famous cases in U.S. history, *Roe v. Wade*.<sup>149</sup> In this landmark abortion case, a representative of the Texas attorney general argued that the blanket Texas restriction on abortion was consistent with the U.S. Constitution.<sup>150</sup> His opposing attorneys were women, both young civil rights attorneys.<sup>151</sup> He began his argument with a joke that inspired several seconds of stunned silence: “It’s an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.”<sup>152</sup>

The oral argument recording reflects nothing but silence at this point.<sup>153</sup> What happened in the end? The attorney general representative ultimately lost in a big way: the Justices voted against him seven to two.<sup>154</sup> Did the joke’s throwback to an earlier era (pre-1960s) cause this seven-to-two ruling? Probably not. But the attorney general representative certainly stained his legacy by including such a gendered joke in

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146. *Id.*

147. See Meyer, *Humor as a Double-Edged Sword*, *supra* note 39, at 320–21.

148. GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 10 (2015), <http://www.supremecourt.gov/casehand/guideforcounsel.pdf> [<https://perma.cc/ZKV4-3U2Z>] (stating that “[a]ttempts at humor usually fall flat”).

149. 410 U.S. 113 (1973).

150. *Roe*, 410 U.S. at 115, 156–57.

151. Sant, *supra* note 116.

152. Oral Argument at 34:17, *Roe*, 410 U.S. 113 (No. 70-18), <http://www.oyez.org/cases/1971/70-18> [<https://perma.cc/C7SA-M5P7>].

153. *Id.*

154. *Roe*, 410 U.S. at 113–15.

a landmark women's rights case. In the words of one commentator, the joke amounted to "spoiled icing on the collapsed cake."<sup>155</sup>

In this example, the attorney attempted to employ identification humor as a way of bonding with the male judges hearing the case. His dated joke about women, however, was derogatory and inappropriate, incorporating aspects of differentiation humor and therefore demonstrating failed humor in the litigation context.

The second example of jokes during U.S. Supreme Court arguments reflects a more positive result. This example comes from the oral argument in *Barnes v. Glen Theatre, Inc.*,<sup>156</sup> which reckoned with the scope of the U.S. Constitution's First Amendment protection of expressive conduct. At issue in *Barnes* was a state law outlawing nude dancing, and the Supreme Court grappled with whether this law unconstitutionally prohibited expression.<sup>157</sup> The oral argument in the case, featuring multiple riffs on nude dancing, was in fact so entertaining that it provided the script (a verbatim script, not just the inspiration) for *Arguendo*, a comedy play presented to great critical acclaim at the Public Theater in New York by the Elevator Repair Service troupe.<sup>158</sup> The play's dialogue reflects nothing but the precise words of the oral transcript.

In the actual *Barnes* oral argument, State Attorney General Wayne Uhl argued in favor of upholding the public nudity prohibition, which the state had used to prosecute a nude dancing establishment.<sup>159</sup> Uhl's argument at the Supreme Court was unusually frolicky as far as oral arguments go. The oral argument transcript reflects frequent notations showing that courtroom laughter followed most of Uhl's comments.<sup>160</sup> In the Supreme Court, an oral advocate generally receives the courtesy of a few minutes of introduction—but in this case, Justice John Paul Stevens jumped in almost immediately with the suggestion that one could get in trouble for giving a public speech in a park while naked.<sup>161</sup> The Attorney General rose to the occasion: "He would get in trouble, Your Honor, if he walked into a public place such as a bar or a bookstore without his clothes on."<sup>162</sup>

Justice Stevens next said, "He can evidently sing in an opera without his clothes one [sic]."<sup>163</sup> The attorney general responded with a suggestion that it would be ridiculous to insulate from liability all naked movement on stage.<sup>164</sup> When Justice Stevens asked whether the Free Expression Clause of the Constitution was "the good-taste clause of the Constitution," he then clarified that a sense of irony inspired

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155. Sant, *supra* note 116.

156. 501 U.S. 560 (1991).

157. *Barnes*, 501 U.S. at 563–64.

158. See, e.g., *Arguendo*, ELEVATOR REPAIR SERV., <http://www.elevator.org/shows/arguendo/> [<https://perma.cc/5MDE-GH3R>] (last visited on Apr. 1, 2020).

159. Transcript of Oral Argument at 3, *Barnes*, 501 U.S. 560 (No. 90-26), [http://www.supremecourt.gov/pdfs/transcripts/1990/90-26\\_01-08-1991.pdf](http://www.supremecourt.gov/pdfs/transcripts/1990/90-26_01-08-1991.pdf) [<https://perma.cc/476T-D6WR>].

160. *Id.* at 3, 10–11, 16, 19, 24, 29–30.

161. *Id.* at 3.

162. *Id.*

163. *Id.*

164. *Id.* at 4.

him to suggest that the prohibition could extend to go-go dancing but not to opera.<sup>165</sup> Other Justices joined the fray as well—speaking of sunbathing, “song and dance,” and nudist colonies.<sup>166</sup> Uhl did not need creative genius to inject the argument with entertaining humor. The subject matter of the case did that work for him. But he did not squander the opportunity to ingratiate himself to the Justices. If this panel of mostly males was going to have a little fun, Uhl would do the same, alluding, for example, to the pasties (sticky fabric covering breast areolas) worn by the go-go dancers at issue in the case.<sup>167</sup> The law requires that any limitation on expression be “narrowly tailored” to a proper reason for regulation.<sup>168</sup> Uhl argued that the prohibition was “sufficiently narrowly tailored, just as the clothing on the dancers is narrowly tailored, to accomplish the State’s interest in prohibiting public nudity.”<sup>169</sup>

Attorney General Uhl won the case by a five-to-four margin.<sup>170</sup> One cannot know whether Uhl’s comic approach—playing part straight man and part comic “fellow guy”—helped with the win. Nonetheless, the oral argument tape shows that he read his audience well.<sup>171</sup> The Justices wanted to have a little fun, and he obliged.

This example demonstrates successful identification humor. Although the attorney led the charge, several Justices drove this pun-filled humor to success by continuing the repartee.<sup>172</sup> Rather than ignoring the attorney’s attempt at humor, the Justices engaged and bonded over the “naked” interchange.<sup>173</sup> Although they joked about naked women, the “pasties” comment (unlike in the *Roe v. Wade* example) did not necessarily disparage women. Rather it focused on the awkwardness and taboo around nudity. Comparing these two examples identifies the clear distinction between identification and differentiation humor on closely related subject matter. What is attacked—and the manner of the attack—sets the tone for how humor is received.

#### IX. JUDGES SANCTIONED FOR OUT-OF-COURT JOKES

Although we hold judges in high esteem in the United States and elsewhere in countries with a common law system, we also ask them to pay for that honor with ethics. We hold them to a high standard. When they breach that standard, we remove judges from their jobs, leaving them “defrocked” and shamed. Anecdotal observation suggests that judges throughout the United States tend to be less respected and more misbehaved in states where they face election than judges from states where a merit system chooses them for appointment. Since U.S. federal judges are generally appointed for life, they are thus held in the highest esteem.

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165. *Id.* at 4–6.

166. *E.g., id.* at 11, 14.

167. *Id.* at 13.

168. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1039 (6th ed. 2020) (quoting *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting)).

169. Transcript of Oral Argument, *supra* note 159, at 16; Hobbs, *supra* note 44, at 146.

170. *Barnes*, 501 U.S. at 562.

171. *E.g.*, Transcript of Oral Argument, *supra* note 159, at 10–11.

172. *E.g., id.* at 3.

173. *See id.*

Here is an example from Kansas—a relatively conservative, midwestern state with a merit system of appointed judges. Kansas apparently does not put up with salacious behavior as a general matter:

A hearing panel on judicial qualifications found that a Kansas state court judge committed at least fifteen incidents of sexual harassment, including (1) telling a court employee that the judge's wife's obstetrician offered to add "an extra stitch" to the wife after childbirth in order to ensure the judge's later pleasure, (2) mentioning to female attorneys that their legs rubbed together, and (3) asking another female attorney whether she would return from vacation pregnant.<sup>174</sup>

The hearing panel sanctioned the judge.<sup>175</sup>

Another scandal based on out-of-court sexualized jokes entangled Pennsylvania Supreme Court Justice J. Michael Eakin. The Pennsylvania Judicial Conduct Board charged Justice Eakin with myriad violations of the Pennsylvania judicial ethics code.<sup>176</sup> Here are some of the specifics: Justice Eakin participated enthusiastically in multiple email chains.<sup>177</sup> Participants included his golfing buddies, a group of judges, prosecutors, and private attorneys.<sup>178</sup> Eakins apparently sent some of the emails from his state-owned computer; most of the emails featured racy humor—digital clips, lewd jokes, and sexualized images.<sup>179</sup> Not all of the emails simply made jokes based on men having sex with women. Justice Eakin's emails (sent and received) contained a wide-ranging potpourri of content—including racist and homophobic jokes.<sup>180</sup> The bottom line is that the Pennsylvania Judicial Conduct Board removed Justice Eakins from his post on the highest court of the Commonwealth of Pennsylvania.<sup>181</sup>

The judge from Kansas engaged largely in differentiation humor. His message is the following: "I will put you down woman because you are different from those of us in power." Arguably, Pennsylvania Justice Eakins both differentiated and identified. Clearly, his jokes were vulgar and demeaning to women (and others), but he focused instead on bonding with other judges and friends over shared appreciation of how they were different from a group of "others."

174. LITTLE, *supra* note 24, at 165 (citing *In re Henderson*, 343 P.3d 518, 520–21 (Kan. 2015)).

175. *In re Henderson*, 343 P.3d at 529.

176. See Steve Esack, *Kathleen Kane Lets Public Judge J. Michael Eakin's Emails*, ALLENTOWN MORNING CALL (Oct. 22, 2015), <http://www.mcall.com/news/pennsylvania/mc-p-pa-kathleen-kane-eakin-emails-1022-2-20151022-story.html> [<https://perma.cc/7H5R-TBAJ>].

177. *See id.*

178. *See id.*

179. *Id.*

180. See, e.g., David Gambacorta, *3 Eye-Opening Parts of Michael Eakin's Deposition*, PHILA. MAG. (Mar. 3, 2016, 1:58 PM), <https://www.phillymag.com/news/2016/03/18/michael-eakin-deposition/> [<https://perma.cc/7869-BJVH>].

181. Angela Coulombis, *Justice Eakin Suspended over Emails*, PHILA. INQUIRER (Dec. 22, 2015), [http://www.inquirer.com/philly/news/politics/20151223\\_Pa\\_Supreme\\_Court\\_Justice\\_Eakin\\_suspended\\_over\\_quot\\_Porngate\\_quot\\_.html](http://www.inquirer.com/philly/news/politics/20151223_Pa_Supreme_Court_Justice_Eakin_suspended_over_quot_Porngate_quot_.html) [<https://perma.cc/3XDX-Q9R3>]. Justice Eakin later resigned rather than face further proceedings. Associated Press, *Pennsylvania: Second Justice Quits over Email Scandal*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/us/pennsylvania-second-justice-quits-over-email-scandal.html> [<https://perma.cc/7ADF-56UL>].

## CONCLUSION

Comedy during litigation is indeed a high-risk endeavor. Yet all humans agree that comedy is one of the great pleasures in life. To the extent that litigation participants can use that human inclination to their advantage, they may come closer to their short- or long-term life goals. There is no doubt that humor is a powerful communication tool, and the many nuanced messages one can craft make it an edgy yet valuable mechanism for exerting control, influencing, and persuading others in the world of adversarial litigation. In the context of the formalized rituals of battles both inside and outside the courtroom, the chances of achieving life's goals are not good. Attorneys, judges, and other participants in the process are well advised to take caution, whether their humor tends to be affiliative (identification or clarification) or alienating (enforcement or differentiation). The former categories are more likely to succeed than the latter.