Nova Law Review

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Nova Law Review Full Issue

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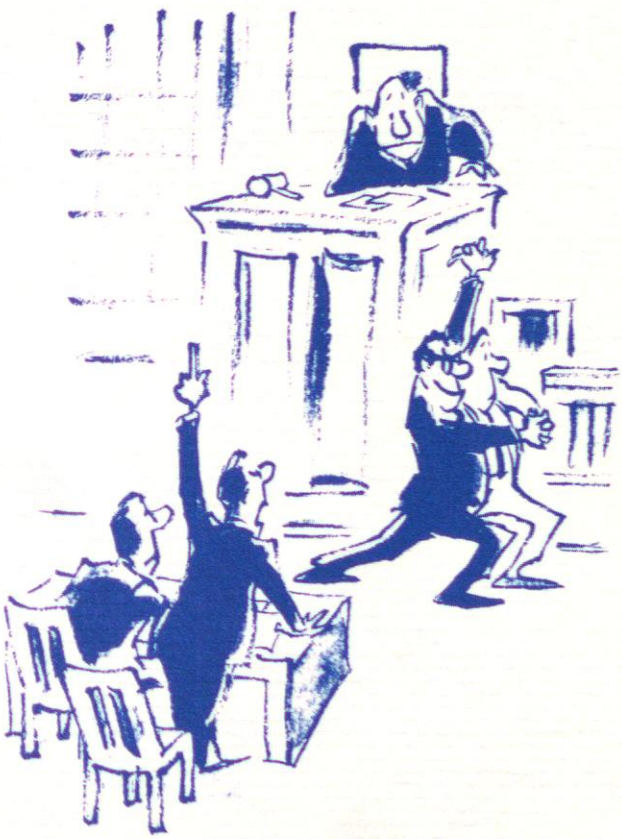
NOVA [HUMOR IN THE] LAW REVIEW



"Objection Your Honor. Counsel is leading the witness."

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Forthcoming Articles of the *Nova Law Review*

Emergency Decisionmaking During The State of Florida's Response To Hurricane Andrew
Stephen T. Maher

Section 553.84: Remedy Without A Cause?
Byron G. Petersen and Steven S. Goodman; Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

That Sinking Feeling—A Boat Owner's Liability in the Aftermath of a Hurricane
James E. Mercante; Hill, Rivkins, Loesberg, O'Brien, Mulroy & Hayden

Recovering From Hurricane Andrew: Your Legal Rights
Legal Services of Greater Miami, Inc.

Business Interruption Insurance — A Business Perspective
David A. Borghesi; Arthur Andersen, Chicago, Ill.

Recent Articles of the Nova Law Review:

The Status of ERISA Plan Benefits After *Patterson v. Shumate*
Honorable Sidney M. Weaver; United States Bankruptcy Judge and Robin J. Baikovitz; Law Clerk to Honorable Sidney M. Weaver

The Anencephalic Baby Theresa: A Prognosticator of Future Bioethics
Julie Koenig

Making the Press Talk After *Miami Herald Publishing Co. v. Morejon*: How Much of a Threat to the First Amendment?
Paul H. Gates, Jr.; Brechner Center for the Freedom of Information

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Symposium
Nova [Humor in the] Law Review

Foreward

When the newly elected board of the Nova Law Review attended the National Conference of Law Reviews (NCLR) last March, we energetically brainstormed possibilities for the 1993 symposium. In previous years the Review had published thought-provoking symposiums on topics such as: AIDS, drug testing, international criminal law, legal education, and most recently, family law. As we stood on the shoulders (and shoulder pads) of the women and men who edited before us, we had great visions of creating a symposium which would inspire the legal profession as nothing had before. We grappled with unique topics thought up while touring Universal Studios (an NCLR activity no doubt scheduled to inspire creative legal thought); however, as the conference dwindled to a conclusion we were no closer to selecting a stimulating symposium topic.

In our disheartened state, we attended the last supper. As I picked at my cauliflower, (my vegetarian appetite disconcerted the four star hotel chef who served me cauliflower for every meal during the five days of the conference) I watched my fellow editors in depressed silence. Then at our lowest moment, Judge Alex Kozinski of the Ninth Circuit Court of Appeals, approached the podium. He spoke methodically, and frequently with a straight face, about how to lose an appeal. (A feat that any one of us was fully capable of accomplishing on our own . . . but a little direction is always helpful.) Within seconds, our joyless outlooks were forgotten. The humor that Judge Kozinski derived from his experiences was hilarious; for almost an hour, Jerry Seinfeld had a worthy opponent. When Judge Kozinski had shared all of his advice on this topic, we knew our symposium had been conceived. The legal profession, like most others, can always benefit from a good laugh at itself. (The last laugh, however, was on us when we learned that Judge Kozinski had already committed to publishing his speech with another periodical.)

For the last twelve months of gestation, the humor symposium has flourished. I was somewhat surprised at the eager response by practitioners and students; apparently, the opportunity to be published without the pressure of voluminous footnotes in proper *Bluebook* form, is a secret fantasy of the academic masses. In its final form, over forty authors and

cartoonists are represented. We recognized the disparity between what each of us finds funny; therefore, we strived to create a variety which, like the recent presidential campaigns, tried to offer something to everyone.

Without reiterating the entire index, we would like to offer special thanks to: Dave Barry, Bill Berger, Hilary Hinzmann, Rodney Jones, Arnold Kanter, Lee Lorenz, John McClay, Charles Sevilla, Judi Smith, Gerald Uelmen, Patric Verrone, Rob Wechsler and Daniel White. Thanks is genuinely due to every author, cartoonist, publisher and their assistants who labored to make us laugh.

Although our progeny may not transform the future of legal periodicals, it has certainly been a bright spot in our law school experience. At the very least, we hope it gives you a smile.

Illustration by Jeff MacNelly © 1988.

Traffic Infraction, He Wrote

Dave Barry*

Probably the greatest thing about this country, aside from the fact that virtually any random bonerhead can become president, is the American system of justice. We are very fortunate to live in a country where every accused person, unless he has a name like Nicholas "Nicky the Squid" Calamari, is considered innocent until such time as his name appears in the newspaper. Also you have the constitutional right (the so-called "Carmen Miranda" right) to be provided—at the taxpayers' expense, if you cannot afford one—with an enormous fruit-covered hat. But the most important right of all is that every criminal is entitled to a Day In Court. Although, in my particular case, it occurred at night.

Let me stress right out front that I was as guilty as sin. I was driving in downtown Miami, which in itself shows very poor judgment because most Miami motorists graduated with honors from the Moammar Gadhafi School of Third-World-Style Driving (motto: "Death Before Yielding").

So I probably should never have been there anyway, and it served me right when the two alert police officers fired up their siren, pulled me over and pointed out that my car's registration had expired. I had not realized this, and as you can imagine I felt like quite the renegade outlaw as one of the officers painstakingly wrote out my ticket, standing well to the side of the road so as to avoid getting hit by the steady stream of passing unlicensed and uninsured motorists driving their stolen cars with their left hands so their right hands would be free to keep their pit bulls from spilling their cocaine all over their machine guns.

Not that I am bitter.

When he gave me the ticket, the officer told me that I had to appear in court. I had never done this before, so I considered asking my attorney, Joseph "Joe the Attorney" DiGiacinto, to represent me. Unfortunately, Joe is not a specialist in traffic matters, in the sense that—and I say this as a friend—he is the worst driver in the history of the world. I figured he might not be the ideal person to have on my side in traffic court.

JOE: Your honor, my client . . .

JUDGE (interrupting): Wait a minute. Aren't you Joseph DiGiacinto?

* © 1988 Dave Barry. Reprinted with permission of the author. Mr. Barry is a syndicated humor columnist with the *Miami Herald*.

JOE: Um, well . . .
JUDGE: The person who had driver licenses revoked by *three different states*?
JOE: Well, I . . .
JUDGE: The person who once, during a crowded street festival in New York's colorful Chinatown district, attained a speed of almost 45 miles per hour on the *sidewalk*?
JOE: Well, yes.
JUDGE: I sentence your client to death.

So I thought I'd be better off representing myself. I've watched *The People's Court* for years, and I pride myself on my ability to grasp the issues involved, even in complex cases involving highly technical points of law such as, does the dress shop have to take back the defective formal gown if the buyer got B.O. stains on it. In fact, I have always secretly wanted to be a lawyer. I could picture myself in a major criminal case, getting the best of my opponent through clever verbal sparring and shrewd courtroom maneuvers:

ME: So, Mr. Teeterhorn, you're telling us that you "can't recall" why you happened to bring a flamethrower to the bridge tournament?
WITNESS: That's right.
ME: Well, perhaps THIS will help refresh your memory.
WITNESS: NO! GET THAT THING AWAY! OUCH! IT'S BITING ME!!!
OPPOSING ATTORNEY: I object, your honor! Mr. Barry is badgering the witness!
ME (coolly): Your honor, as these documents clearly prove, Rex here is a wolverine.
JUDGE (examining the documents): OK, I'll allow it.

By the night of my traffic court appearance, I had worked out a subtle yet crafty defense strategy: groveling. My plan was to beg for mercy and ask for the judge's permission to buff his shoes with my hair.

Only there was no judge. They herded us traffic violators into a courtroom with flags and a judge's bench and everything, but instead of an actual human, they had a judge on *videotape*. Really, I could have just stayed home and *rented* the American system of justice.

The video judge welcomed us to Traffic Court and explained our various legal options in such careful detail that by the time he was done

none of us had the vaguest idea what they were. Then some clerks started calling us, one by one, to the front of the room. I thought this would be my opportunity to grovel, but before I had a chance, the clerk stamped my piece of paper and told me to go pay the cashier. That was it. Within minutes I was back out on the street, another criminal released with a "slap on the wrist" by our revolving-door justice system.

The first thing I did, back on the Outside, was make an illegal U-turn.

"Your honor, my client requests a change of venue."

* CHARLES M. SEVILLA, DISORDER IN THE COURT 126 (New York, W.W. Norton & Co. 1987) (Illustration by Lee Lorenz).

Fractured / Great / Moments in Courtroom History

Charles M. Sevilla*

I. INTRODUCTION

Joseph Conrad described life as birth and death separated by struggle. For me, humor has been the lubricant to make the struggle a bit less rough, a survival instinct against life's rigors. Striving to see humor in the world in childhood helped me cope with my own manifest inadequacies: like catching a football with my mouth in the third grade (I not only failed to catch it, I lost part of a tooth), or getting picked off first base in Little League and not even knowing it, or having my fourth grade girl friend swear eternal love which lasted until the afternoon recess.

You had to laugh so as not to cry. I did both. That was all long before law school. In fact, were it not for its pre-law honing, I think that whatever sense of humor I had would have been suffocated to extinction in the numbing, obscure and far too serious world that was my law school education.

My first day of law school, I and a couple of other laugh-seeking tyros were mislead into thinking that the law might have much humor in it. Rumors swept the miscreant section of the first year class about X-rated cases which were must reads in the law library. My buddies and I descended upon the library and grabbed the books from the shelves. They were easy to find because unlike their pristine neighbors which seemed untouched by human hands, the spines of these books were dirty and tattered from clawing first year law student hands (all male) which had grabbed at them for a peek at their forbidden and naughty contents.

One of us grabbed our quarry and hurled it to a nearby desk. It fell open to the desired page. We surrounded it. Our designated page-turner found the well-marked passage and gleefully read aloud the 1943 Florida Supreme Court case of Lason v. State.[1] Mr. Lason was a seventy-six year

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1. 12 So. 2d 305 (Fla. 1943).

old man who had been convicted of committing an "abominable and detestable crime against nature" involving two very precocious girls.[2]

This case had achieved awe among the students of the law for the creativeness of the defense advocate who took Mr. Lason's conviction to the appeals court. The defense attorney took what appeared to be the case of the proverbial "dirty old man" and argued, defiantly, colorfully and perhaps even brilliantly in his client's defense:

> Does the one specific crime [an "abominable and detestable crime against nature"] . . . comprehend or include the action of a 76 year old, aged Indian War Veteran, feeble physically and mentally, in, after having met the two girls of 11 and 13 years of age who solicited him, went to his residence and there they both get on the bed, pull up their dresses and drop down their panties, when he in turn on his back in the small bed allowed them to diddle with his rag-like penis, unerectable, lifeless and useless except to connect the bladder with the outside world for more than six years since the death of his wife, utterly incapable of either penetration or emission, and wad it like rags into their mouths, and then, in this feeble and aged condition impelled by the irresistible impulse, in turn he would kiss and put his tongue in their little though potentially influential and powerful vaginas?[3]

This was the longest, most rambling sentence I had ever read, but it was laughably inventive. And, I thought that if this was the type of case we would read in law school, my new career would at least be entertaining.

Wrong. Law school did not turn out to be a procession of odd-ball cases like the ones I read that first day. Instead, it was procession of nauseatingly overwritten rubbish like the following sample discussing the doctrine of double jeopardy:

> There must be some legal necessity basic to one acquittal, not involved in the next trial, to justify a superseding conviction. We cannot permit initial trial deficiencies to be cured by subsequent trials. There are only four quarters to a football game. The exorcised double jeopardy is the constitutional eliminator of the might have beens. Puristic parallelism is not an absolute in the law of double jeopardy. Multitudinous criminal charges may spring from the same incident. The State's argument in the present case would nullify the doctrine of double jeopardy because any slight deviation in the indictment would give the State another

2. *Id.*
3. *Id.*

Monday morning quarter.[4]

This was the standard fare. The study of dirt would have been more interesting. This dulling experience only enhanced my search for humor over the years of my legal education and practice. During the last twenty or so years, I have collected transcripts of cases which either ring a funny note or are ridiculous or absurd.[5] (For many, you had to be there, and I tried to eliminate the latter from this collection.)

The magazine column has thrived because the readers have sent me their own favorites which then became the grist for future columns. My only editing has been to remove the names of the guilty parties, to add identifying words to aid comprehension and to trim the prose (you may be surprised to learn that lawyers can be verbose, a malady which has as its source getting paid by the hour). I have added the name of the contributor of the particular selection under its title.

A larger batch of these *Great Moments in Courtroom History* may be found in *Disorderly Conduct*, a 1987 W.W. Norton publication which combined my collection with those of my co-editors, Dean Gerald Uelman of the University of Santa Clara Law School and attorney Rod Jones. In 1992, W.W. Norton published my book entitled, *Disorder in the Court*, from which I now offer a few samples:

II. Excerpts From *Disorder in the Court*[6]

1. With Sympathy, But On The Other Hand (James Birkhold, Bradenton, FL)

THE COURT So, there are two DUIs [driving under the influence]. Sir, I very frankly am in sympathy with you in that you say you have problems. And you turned to alcohol for an escape, which of course is no answer, usually. It's

4. Johnson v. Estelle, 506 F.2d 347 (5th Cir. 1975).

5. For the past fourteen years I have written a column with the pompous title of *Great Moments in Courtroom History* where many of the offerings reprinted here first appeared. Those columns have been running in the *Forum* and *Champion* and I have many thanks to give the members of the California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers for their continued contributions to the column and to the organizations which have kept the column in print.

6. CHARLES M. SEVILLA, DISORDER IN THE COURT (1987). The following excerpts are taken directly from *Disorder in the Court*.

Nova [Humor in the] Law Review

more problem on top of [the] problem. I can fully sympathize with you.

However, I can't believe that people that came home from the Vietnam War are any different than when they came home from any other war. Unfortunately, I don't sympathize with that position. People in the Vietnam war got all kinds of treatments like going to Canada and everything else that other people didn't get. I think they got no treatment any different from people that served in World War II for four years that didn't get a choice to go to Canada. I think that it's something that the people decided, it's a cop-out and I'll use it, very frankly, is how I feel about it. I'm not a doctor, but that's my position and you're asking me to act as a doctor and I'm not a doctor. I'm not going to say that you don't have problems. I'm sure you do if you feel you do.

On the other hand, I think you're a menace to society.

2. POLICE REPORT: A STUDY IN EUPHEMISM
(Jason Cox, Hayward, CA)

I then directed the suspect's head toward the pavement in order to eliminate his hand from getting under his body via this route because the suspect was resisting by holding his head up even after I attempted to direct it down with little force and I was required to use more force causing his head to impact the pavement.

3. AWARD
(Louis R. Miles, Salem, OR)

Q. Have you ever received any honors or prizes for your work in the area of child sexual abuse?

A. Yes. I was given an award for my contribution to sexual abuse in the state of Idaho last year.

4. Police Report: Dying Declaration (Gary Scherotter, Palm Springs, CA)

On my arrival, I found the victim on his back, face up, and talking to two Mexican male subjects. I walked up to the victim and saw some blood on his chest and stomach area. I then removed my knife from my gun belt and cut the victim's white T-shirt to expose his injuries. Upon doing so, I saw what appeared to be four puncture wounds on the right side of his chest. It appeared to me that a projectile had entered his chest at a 30 degree angle, which would have placed the projectile going through the victim's heart. With such injuries, and in my experience investigating numerous murders over the past eighteen years, there was no question in my mind that the victim would be expiring shortly. I then attempted to get a dying declaration from the victim.

I advised him that he had been shot numerous times in the chest and that one of the projectiles had punctured his heart. I advised him he only had a short time to live and would he give me a dying declaration as to who had shot him. He replied, "Yes, I have a declaration to make." I asked him what that was. He lifted his right hand, made a fist, exposing his center finger, and stated, "Go f[***] yourself," and I ended my interview with the victim.

5. On Being A Professional (Michael Chaney, West Hollywood, CA)

DA How would your pimp tell you it was time to get to work?

A. It would depend on his attitude that day, how he was talking to whomever he was talking to in particular. Like one morning in particular he said something like, "It's time to get up and start whoeing.[7]"

DA Whoeing? And what does whoeing mean?

A. It means going to work as a prostitute. Some people refer to it as "whoring," but women in our profession don't refer to it as "whoring." We refer to it as "whoeing." There's a big difference.

DA And what is the difference between whoeing and whoring?

7. Pronounced "hō-iń."

"Perhaps the witness would like to reconsider his answer to my question."

* CHARLES M. SEVILLA, DISORDER IN THE COURT 126 (1987) (Illustration by Lee Lorenz).

A. Well, we consider ourselves professionals, and we're doing it for money. Any normal woman can go out and be a whore and not receive any money for it.

DA So the distinction is that whoeing is for money?

A. And whoring isn't.

DA Did you ask your pimp how far police could go in making arrests?

A. Yes, I did.

DA What was said?

A. I asked how can a police officer get naked and then arrest a working girl?

DA What did he say?

A. He said that they were cold-blooded and that they loved their jobs because they probably just wanted to see some [*****].

DA What did he tell the other girl that she had to do?

A. He told her it was time to rise and shine and get whoeing.

DA Get whoeing. Okay.

THE COURT How is that spelled?

DA Whoeing?

THE COURT H-O-W-I-N-G? I think we need that clarified for the record.

WITNESS W-H-O-E-I-N-G.

THE COURT W-H-O-E-I-N-G. Thank you.

6. THE BIG SLEEP WALKER
(Milton Hirsch, Miami, FL)

Q. Bringing your attention to an incident that occurred that night near the intersection of West 8th and Okeechobee, can you tell us what you saw that night regarding the death of a man at that location?

WITNESS Okay. I witnessed when the dead man was crossing the street.

7. Insufficient IQ To Arrest
(Ezekiel Perlo, Encino, CA)

COUNSEL Officer, at this point in your own mind, did you consider him to be a suspect in the homicide?

OFFICER No. I really did not have enough intelligence to make that decision.

8. Death Penalty Case Security
(Mark Kaiserman, Los Angeles, CA)

COUNSEL Sheriff, what concerns would you point to specifically that would require increased security during that period of time?

SHERIFF I did mention concern for the defendants themselves and they are here present.

Q. You have concerns for the defendants themselves?

A. I do.

Q. That they might be killed?

A. Yes.

Q. Isn't that what you're seeking in this prosecution?

9. Probation Report
(John Aquilina, Riverside, CA)

For the past four years, the defendant and six companions earned from $500 to $4,000 a week stealing and selling cars. He intends to marry the mother of his two children in the near future and would like to eventually start his own repossession business.

10. Stolen Seeds
(Edward F. Novak, Phoenix, AZ)

Q. To this day you deny paternity, don't you?

A. I don't deny paternity. I've acknowledged the child and I admitted it judicially in a pleading.

Q. How is it possible that you could be the father of this child without having had sexual contact with the mother?

A. There are a number of ways. One is artificial insemination.

Q. Did that happen in this case?
A. I don't know.
Q. You don't know whether artificial insemination happened?
A. That's correct.
Q. Are you a donor at a sperm bank here in town?
A. No, I'm not a donor.
Q. How would she artificially inseminate herself with your sperm?
A. I'm not quite certain if it even did occur, but there was the possibility of it occurring.
Q. How would she get ahold of your sperm?
A. She cleaned my office on several occasions, and there was refrigerated sperm in the refrigerator during that period of time.
Q. So your theory is, she got into your refrigerator and inseminated herself with your sperm. That's your testimony?
COUNSEL Object to Counsel's manner of asking the question—laughing.
Q. I'm not trying to be facetious. Is that your testimony?
A. I don't have any theory. You're asking how it's possible and that's what I told you.
Q. What would the other things be?
A. I told you that I don't recall having any sexual contact with her and that's the truth. I don't have any recollection of it. If this could occur at a time when I was comatose, that's a possibility.
Q. Were you comatose in February or March?
A. There was a period of time when I was under very heavy sedation for what has really never been truly diagnosed, but something that kept me from being able to walk.
Q. And you were sedated and she had access to your body? So that's a possibility? She may have what—raped you without your knowledge? Is that what you're telling us?
A. I don't know if you want a technical definition of rape. I'm guessing. If, in fact, the child is mine, that's another possible way it happened.
Q. That she had sex with you without your knowledge?
A. Without me being aware of it, correct.

11. Pro Per Motion
(E. Grossman, Berkeley, CA)

THE COURT Do you understand, sir, that if I permit you to represent yourself, it will be without the assistance of an attorney and that you're going to be held to all the technical rules of evidence in criminal procedure?

DEFENDANT Yeah. I'll have to stop at the library and get a book on law.

THE COURT And you understand you will get access to the jail library?

DEFENDANT Yeah.

THE COURT Do you understand that the case as presented by the State will be handled by an experienced district attorney who's very specialized in the area of criminal law, who has had extensive court trials and jury trials, and that you won't be entitled to any special consideration?

DEFENDANT All I really need is the Constitution, the Bill of Rights, a Holy Bible and a handgun.

12. The Order
(*N.Y. Newsday* (10/16/90))

A prominent Manhattan lawyer was arraigned in Manhattan Criminal Court yesterday on charges of impersonating Lenox Hill Hospital doctors and ordering unneeded enemas for patients . . . . Hospital personnel followed [his] orders.

13. The Envelope, Please
(Danny Fabricant, Ventura, CA)

THE COURT I have a document, an envelope within which were contained two envelopes. I have now separated them. They are from the custodian of records of the Los Angeles Police Department. I cannot discern any difference between the two documents. Is there any objection to my opening these to see what they are and then move from there?

DA Not at all.

MR. F. None, your Honor.

THE COURT Within the first packet—first packet says, "We have no records."

MR. F. What does the second packet say?

THE COURT "See the first packet."

14. DIRECTION EXPERT
(Andrew Rubin, Santa Monica, CA)

DEFENSE COUNSEL Doctor, you testified that the deceased was shot in the chest by a 12-gauge shotgun from a distance of not more than three feet?

WITNESS Yes.

DEFENSE COUNSEL And that this caused his immediate death, is that correct?

WITNESS Yes.

DEFENSE COUNSEL Now, Doctor, which way would someone fall after receiving a 12-gauge shotgun blast directly in the chest from a distance of three feet or less?

WITNESS Down.

15. NOW HEAR THIS
(Martin Blake, Torrance, CA)

COUNSEL May I interrupt for a moment? There seems to be a member of our audience who is mouthing obscenities at our witness and other things, and I would like that she be admonished.

THE COURT All obscenities must be directed to the Court. You may proceed.

COUNSEL Thank you, Your Honor.

16. JURY POLL
(Dale Cobb, Charleston, SC)

COURT "If that be your verdict, so say you all."

TWO JURORS "You all."

"We find the defense incompetent, the prosecution arrogant, the food inedible, the accommodations insufferable, and the defendant guilty as Hell."

* RODNEY R. JONES, ET AL., DISORDERLY CONDUCT 157 (1987) (Illustration by Lee Lorenz).

17. Jury View
(K. Ronald Bailey, Huron, OH)

DA All right, Mr. C, is it not a fact that this witness came into this Court here and admitted having sexual relations with you in open court, in front of the jury?

18. From A Police Report
(Fred Herro, Monterey, CA)

CONTACTED Small informant, approximately two years old.

19. Probation Report
(Jean Farley, Ventura, CA)

Regarding an appropriate sentence, Officer C. felt that missing a couple of Grateful Dead concerts would probably hurt the defendant more than anything.

20. No Selective Recall
(Eleanor Schneir, Los Angeles, CA)

Q. Are you being selective about what you remember and what you don't remember as to the details of your previous record?

A. I don't remember.

21. Closing Argument
(Don Holt, Florence, AL)

DA Ladies and gentlemen, the defendant in this case can be analogized to a duck because there's an old saying that if it walks like a duck, quacks like a duck, and looks like a duck, it must be a duck, and the same argument can be made as it would relate to drunks and that's what the defendant in this case is.

COUNSEL Ladies and gentlemen, I deeply resent the characterization that the prosecutor has made of my client. My client is neither a duck nor a drunk. What the prosecutor has done in this case is create a hybrid bird that is a cross between a pheasant and a duck. I cannot pronounce the name of the new species but it is spelled P-H-U-C-K, and that is exactly what the prosecution is trying to give my client in this case.

22. MEANING OF THE CONSTITUTION
(Steven Wax, Portland, OR)

Q. In the course of your years practicing as an attorney, did you have problems with alcohol from time to time?

A. Yes.

DA Objection. Move to strike.

THE COURT On what grounds?

DA It's irrelevant. And I might define for the Court, since I think there are going to be a substantial number of these objections, that it's the State's position that an attorney who has an IQ of 41, who has barely passed the Bar, and who has fouled up every other case they have ever tried is still perfectly capable of giving adequate legal services within the meaning of the Constitution.

23. THE SUBPOENA
(Stephen Hauser, Santa Monica, CA)

DA What happened next, ma'am?

WITNESS He unzipped his pants and pulled out his subpoena.

THE COURT Any motions, Counsel?

MR. K. I move to dismiss, Your Honor. All my client did was pull out a subpoena. There's no law against that.

THE COURT Counsel, if the witness doesn't know the difference between a penis and a subpoena, that's her problem. Held to answer!

24. I AM THROUGH
(George Taseff, Bloomington, IL)

THE COURT All right. The defendant is now back before this Court having not only ceased to make any effort to correct himself but having committed further criminal offenses within the Correctional Center and the defendant has come here to this Court today—

DEFENDANT And told you you are a homosexual.

THE COURT And affronted the dignity of this Court.

DEFENDANT You have no dignity, you punk.

THE COURT And has threatened to commit further acts of violence within the Department of Corrections.

DEFENDANT Sure.

THE COURT The Court can only conclude this defendant is a recidivist of the worst nature.

DEFENDANT And so is your momma.

THE COURT I'm going to sentence you to an extended term of ten years imprisonment. Do you have any questions?

DEFENDANT Yes. Can I kick your ass?

THE COURT No, you may not. You may take him away.

"I UNDERSTAND HE SPECIALIZES IN FREAK ACCIDENTS"

* Illustration by Bill Berger © 1993.

The Nebbish Letter

Glen Freyer*

Franklin Nebbish
43 Twill Drive
Gabardine, FL 57889

April 1, 1993

Mr. Ignatious Linkletter III, Jr.
Hiring Partner
Lockhart, Linkletter, Lanier and Cabbage
Washington, D.C. 20005

Dear Mr. Linkletter:

As a twenty-second year associate, I'd like to take this opportunity to answer some commonly asked questions about my resume in anticipation of our interview a month from next Thursday.

With regards to leaving my current firm, I assure you it is not for any dissatisfaction with the quality of my work. Rather, I had been hired specifically to do bankruptcy work, but between the time I was interviewed and the time I came on board, the bankruptcy section split off and formed it's own firm. You can understand how upset I was when I learned of this three years later, though it now explains why the senior partner always crossed out "debtor" and "creditor" on all my pleadings.

This is not to say that I wish to be pigeon-holed as a bankruptcy lawyer. I have always sought to avoid such classifications, and if my former employers agree on anything, it is that I defy classification. I only entered bankruptcy law to flee a bloody depressing, though otherwise thriving, practice in divorce law. Being divorced three times myself, I saw divorce law as a unique opportunity to apply personal experience to my daily job

* © 1993 Glen Freyer. Glen Freyer is a full-time Trial Attorney with the United States Department of Justice, Environment and Natural Resources Division, and a perpetual wannabe.

and no doubt would have made partner at Miller, Miller-Davis, but for the threat of a paternity suit, which, I might add, was never filed.

During the four year gap immediately preceding my work as a divorce attorney (or "legal counselor to the maritally challenged" as I prefer) I was not so much unemployed as a sole practitioner without any clients. I am reasonably confident my old boss would give me a favorable recommendation. (Get it?) (Ha-ha.) Contrary to my mother's lamentations (we are still very close), my decision to take a paralegal job before returning to full legal duties was not an act of desperation, nor even, in my mind, a step down the law firm ladder. Instead, it was a once-in-a-lifetime, grab-it-while-you-can chance to bolster my *Bluebook* skills which had grown rusty in twenty years of unchecked application. I believe that "retooling," if you will, makes me a better candidate. (Ha-ha. I'm still chuckling over that last one. I *was* the boss. Ha-ha-ha.)

For the one year prior to that, I filled in for Rusty the Bailiff on *The People's Court*. That experience honed my appreciation of small claims court and its attendant procedures. I also became close personal friends with Judge Wapner who is a brilliant jurist and the kind of guy who would show you his Victoria's Secret catalogue if you asked. I believe the Judge would give me a favorable recommendation. He can be reached through his agent.

However, my real practical experience came in four years at the white collar civil litigation firm of Harry, Wendt and Browndum, during which time I was eighth chair on a major federal tax case. No one ever told me what the case was about, but I believe one of the issues I researched actually may have been incorporated into a footnote in a trial brief which would have been filed had the parties not reached a last minute settlement. While I believe I would have made partner with this firm as well, a restraining order, erroneously placed upon me by my second wife, required me to move out of the northern half of the country.

Many prospective employers have asked why, before Harry, Wendt, I did not stay on as corporate counsel to one of the largest frozen food giants in the country (you know who I mean). Frankly, while many aspire to pseudo-retirement as in-house counsel, I feared losing the formidable legal skills I had amassed. Contrary to local accounts, it was not because of the fated button mushroom incident which I believe the press blew way out of proportion (no indictments actually resulted).

Pryor, Tou. That was a small Burmese firm that does not bear mentioning.

Previously, I was a public defender in the inner city of Terre Haute. Although I had never practiced criminal law before, my clients all seemed to like me. References can be obtained by writing the prison directly. I might add that I received an award and honorary dinner that year from the Terre Haute District Attorney's Office, though I was never told exactly what for.

When one of my former clients was released and went on to become the Dean of a major metropolitan law school in Montana (accreditation expected in late 1996, but will not be announced until 1997 to coincide with the Crown's return of Hong Kong to the Chinese), I became a legal writing instructor. It was then that I learned how law school exams are graded. As with magicians, sadly I am sworn to secrecy. All I can say is it's actually pretty funny.

In the publish or perish frenzy of legal academia, I wrote an article, subsequently published in the New England Journal of Medicine, entitled *Streptococcus: a Legal Analysis*. The article was cited by the Supreme Court in a string cite for the proposition that every word in a statute must be read to have some meaning, even if the meaning doesn't make any sense.

Before these two jobs, I was managing partner in my father's law firm for eight days before a trustee took it over in receivership. Many policies implemented during my short tenure, including that all associates use law books sometime during the calendar year, have remained in effect.

Prior to that, there's not much to tell. Oh, sure, there was my police record and disbarment, but they are triflings in a career that has spanned two, almost consecutive decades. I was only keeping the hookah pipe for a friend and still maintain that the state exceeded its police powers when it shackled me to a tree until I stopped whining. But those days of doing drugs, tracks up and down your arms, so shit-faced you can hardly see, crying "F*** the police" are long gone. I will sorely miss the late eighties. Also with regard to my tattoo, it is the scales of justice. I know the top looks like a cross-bow where it peeks out over my collar, but it is the scales, and a most tasteful rendition at that. I assure you I was blind drunk when I got it, but then you know how wild Claims Court Clerks can be when you get two or three of them together in one room.

As a final point, I note that some prospective employers have felt compelled to ask why I attended seven different law schools, to which I respond that I shop for education no less thoroughly than I shop for a toaster. Some have asked why I would shop seven places for a toaster, to which I have no response, but I can get one by Thursday if you're really interested. With six years of law school under my belt, I can't help but feel that I am a more competent attorney for the experience. I can also recite large portions of *Palsgraff* verbatim which is a real crowd pleaser at children's parties.

I am not an apologist for my career choices. I feel it is important to say that right at the beginning of this letter. (In rereading this letter I note that I did not say it right at the beginning, but I assure you I was thinking it the entire time.) The point is, my career is the career of every lawyer, the career every lawyer lusts after, the career every lawyer would choose if he were not so afraid of being considered a slacker, a loser, a dolt. I am not unwilling to climb the law firm ladder or to play the game. I have years of untapped ass-kissing left in me and the perspective of life's ups-and-downs to appreciate just how important that is. Post hoc, ergo propter hoc. That's what I always say, although usually after I've been drinking when its meaning is more clear.

Circumstances beyond my control have prevented me from attaining many of the prizes my peers believe are the sine qua non of a career in justice, but who could argue with my record? Nay, who? (I would be writing *my own* recommendation. Ha.)

I look forward to meeting you and your fellow partners, to discussing your partnership track and how profits are shared. Such frank talks always get me extremely excited as I'm sure they do you. If you have any questions after reading over my resume, please contact me and I will gladly address them further or to your satisfaction, whichever comes first. If after all this you are still unsure, I will consider springing for lunch, though I warn you, it may cause me to seriously question your commitment to any future business collaboration. Thank you way, way ahead in advance.

Sincerely,

Franklin Nebbish

enc: resume
naked photos of your wife

FN/fn

Does Secured Transaction Mean I Have a Lien? Thoughts on Chattel Mortgages (What?) and Other Complexities of Article IX

Marianne M. Jennings*

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* Marianne M. Jennings is a professor of legal and ethical studies in business at Arizona State University, which is a fancy way of saying she is essentially unemployable in the private sector. She tried her best at the practice of law, beginning with criminal defense work at the federal level (i.e. bank robbers who have the courtesy to commit crimes on video tape). She lost every case but did successfully place a few of the tapes on *America's Funniest Videos*. Having lost every case and her self-esteem, she turned to a medium in which results are not expected: the halls of academe. She has done remarkably well.

Marianne wishes to thank some people for helping her with this article, but none of them were willing to have her/his name associated with it. Her law student, David Gass, when approached about a line of credit replied, "Please, I'm trying to get a job here."

et al.: Nova Law Review Full Issue

I. INTRODUCTION

Article IX[1] of the UCC[2] is called Secured Transactions;[3] Sales of Accounts and Chattel Paper.[4] The title alone tells you you're in big trouble because: a) no one ever uses the term "secured transaction;"[5] b) the term chattel paper has never been used in real life by anyone who continues to hold a job;[6] and, c) no one sells accounts anymore.[7] Therefore, you have a title that reflects a law for things that are out of use, out of work, and out of date.[8]

But beyond the title of Article IX,[9] there are other complexities. My

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1. That's "9" for those of you who forget your Ms, Cs, Vs, Xs, Ls and haven't watched the credits to a movie in so long that your recollection remains unrefreshed by the only mode of modern communication that continues to use roman numerals (i.e., movie copyright dates; it's Hollywood kids—the land of Axel Rose, Woody Allen, Pee Wee Herman, Madonna and other such shining examples who make us glad that we don't use roman numerals if these folks are evidence of what will happen to you if you do) apart from the UCC folks and people who do the outlines for law review articles. Just let them try to outline this article. I'm doing my subject heads in the metric system. By the way, I have it on good authority (albeit non-*Bluebook* authority because I didn't get his first name) that Hollywood is considering a switch to the metric system.

2. That would be Uniform Commercial Code for those of you who opted out of rigor for years two and three of law school or who have been practicing personal injury law for seventeen years and forgotten that there are statutes.

3. Should this be a colon or a comma? Far be it from me to correct a UCC-typo.

4. Has anyone ever seen a piece of chattel paper? If so, is it stamped "Chattel Paper" with one of those stamps like we have for "Copy" or "Paid," or for non-personal injury lawyers and their bills "Past Due?"

5. In fact, business people would be either a) drummed out of their rotary club or b) sent to work for the RTC (that's Resolution Trust Corporation for the three lawyers who have escaped unscathed from the savings and loan crisis) if they used this term. Business people say things like, "I have a lien on his inventory" or "His eyeballs are mortgaged to me," or more correctly, "His chattels are mine!"

6. In fairness to the authors of the UCC (no one has yet come forward to confess to authorship and if their Miranda warnings are given, they'll never own up to writing those sections on priorities. *See, e.g.*, UCC §§ 9-301, 9-302, 9-308 (1992) (chattel paper is defined in § 9-105(b)).

7. What with no economy and all, there doesn't seem to be much interest in buying "Accounts Payable." There are no more "Accounts Receivable" only "Past Dues."

8. This same description could apply to members of Congress and we're still tolerating them, so why do I pick on Article IX? Elaboration will arrive. That's lay language for the Bluebook's *see infra* 9-83 and accompanying text. Thankfully, the short title is Uniform Commercial Code — Secured Transactions. Also should the — be a: ? *See supra* note 3.

9. That's "Article 9 liters" in metric.

theory is that no one really understands Article IX[10] and that's why most of us are still operating with the 1972[11] version of Article IX, and why car titles and liens are handled through a different set of rules altogether.[12] In fact, my students go out of their way to tell me that they would not accept a six-figure salary if the job involved any sort of work with Article IX or saying the word "chattel."[13]

Article IX has become one of those areas of law completely dependent on forms, devoid of any real comprehension and capable of disasters of biblical proportions in the event the forms were lost.[14] Additionally, we

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10. Describe the last time someone could explain to you why a purchase money security interest in consumer goods is perfected automatically, but the perfection doesn't count if someone buys the secured property (i.e., chattel). *See* UCC § 9-307(2) (1992). In fact, describe the last time someone could explain to you the automatic perfection of a purchase money security interest in consumer goods. In fact, describe the last time someone could explain to you what a purchase money security interest (PMSI) is. Better yet, name a human being who talks about Article IX and has a social life.

11. Oh, sure, there were amendments in 1977. These amendments made Article IX applicable to uncertificated securities. When was the last time someone was able to explain what uncertificated securities are? Better yet, when was the last time you saw an uncertificated security? *See* UCC § 9-103(b). Now there is currently an Article IX study committee. These people are in high demand for judicial appointments and wakes. The committee's charge is to decide whether Article IX needs revision. The committee was formed in 1990 and last seen in 1991. Police are still investigating, but it is believed they disappeared leaving only a single chattel as a clue, somewhere around § 9-301. *See* WILLIAM H. BURKE, ET AL., INTERIM REPORT ON THE ACTIVITIES OF THE ARTICLE 9 STUDY COMMITTEE (1991).

12. Otherwise, we run the risk of having our cars referred to as chattels. Okay, the Mercury Bobcat, Plymouth Volare and Pacer (formerly of American Motors) deserve to be called chattels, but it's a tragedy to label a Lexus a chattel.

13. I have no documented proof that they would turn down a six-figure salary to avoid secured transactions. But, what I can offer as circumstantial proof is the fact that their preliminary question to interviewers is: "This job doesn't involve PMSIs does it?" Hence, this self-screening device precludes obtaining documentation of the six-figure claim. Preclusion by self-screening devices is rare among lawyers seeking employment. I offer this example as evidence of the trauma inflicted upon students who have taken a course on UCC Article IX. Also, I think preclusion by self-screening is an exception to the general priority rules under Article IX. *See* UCC §§ 9-301 to -316 (1992).

14. Actually, I've also described bankruptcy, negotiable instruments, discovery and ERISA. But, with the exception of bankruptcy, there are not chattels in the other areas. A disaster of biblical proportion would include having the counter help (i.e., filing officer per § 9-407) out sick, thus leaving lawyers unattended as they attempt to file financing statements. We would need a new priority under § 9-319 (which does not exist) for the authority to give creditors whose lawyers tried to file financing statements without counter help priority over unsecured creditors. We could punish the lawyers by instituting a future ban on them ever having a consumer PMSI.

just don't have enough charts for Article IX. In fact, no one has been able to reduce all the complexities of Article IX to chart form.[15]

My follow-up to my theory on no one understanding Article IX is that no one has ever read Article IX.[16] We could motivate change (in reading habits and perhaps Article IX itself) by including pictures. We might even be able to get students to accept six-figure salaries that involve work with financing statements. Also, I believe we have burdened the counter help at recording offices for too long. A final theory I have is that the counter help are the only ones capable of executing Article IX requirements. This ability stems from never being forced to read Article IX.[17]

5K. (THAT'S METRIC FOR "II.") CREATING A SECURITY INTEREST (THAT'S A LIEN FOR ARTICLE IX NEOPHYTES.)

For folks who practice law and dabble in Article IX,[18] creating a security interest is easy. You buy a security agreement form from the local form place,[19] fill it out,[20] and you've got a security interest. However, Article IX creates all sorts of form nuances. For example, on the security agreement, you have to describe the collateral in which you are creating the

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15. Even negotiable instruments (i.e., Articles III and IV; "Articles 3 kilos and 4 meters" in metric) have been reduced to charts. One of the most famous appears in White & Summers. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 581 (1982). It's that chart with → ← ↑ ↓ going so many different ways it makes you think it would have been easier to try for that Ph.D. in Biochemical Calculus and Engineering and forget the law.

16. I exaggerate. There was that one guy who read it and now operates a ferry near Squim, Washington, wears two mismatched L.L. Bean boots and hasn't spoken since the 1977 version except to mutter, "How can field warehousing constitute perfection?"

17. They have never even touched the Gilbert's Outline on Article IX. Their comprehension is so extensive you can witness lawyers actually holding creditors' chattels while standing at the counter asking, "Can I file this?" The counter help tenderly refuse to accept their salt water aquaria and javelins and explain that possession and filing need not be done simultaneously under Article IX. One or the other will work for perfection. *See* UCC § 9-302 (1992) *infra* notes 44-64.

18. These would be the folks who got tired of running ferries in towns with populations of 50, all of whom had their own boats.

19. Run by the folks who used to be counter help at the financing statement filing places, but got tired of helping lawyers create perfected security interests for free and decided to make some money, while avoiding one-on-one daily contact with lawyers. A desire, I might add, often expressed by 99% of the American public.

20. The form is a chart, really. Those counter folks label all the boxes so you know exactly what to do. You must avoid law school to be able to draft forms with such clarity.

security interest. Many people would just like to write "Vern's inventory" in the blank space following the instructions, "List collateral here."[21]

But Article IX requirements on security agreements are a little bit fussier and certainly more formal than say, "Mr. Green Jean's livestock."[22] You must "reasonably identify"[23] your collateral. Actually, "Vern's Inventory" might work if Article IX didn't throw in confusing issues about what Vern's inventory could become.[24] For example, collateral that started as inventory can turn into proceeds, accounts, or in the case of farm inventory, can actually multiply.[25] In *Cargill, Inc. v. Perlich*,[26] Shipshewana State Bank[27] took a security interest in "the hogs on Perlich's farm together with the young, product and produce thereof."[28] As it turns out, hogs are purchased, fattened, and turned into bacon over a six-month

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21. The form also has in parentheses: "Put down the stuff you want a lien on." These counter people clearly understand the level of intellectual comprehension and cognitive reasoning skills their lawyer customers possess.

22. Mr. Green Jeans was Captain Kangaroo's friend. I don't know either of their first names in spite of the Bluebook's fifteenth edition requirement that all cited folks now have first names.

23. Section 9-110 includes this language. When I was in law school, we were required to memorize the titles and numbers of the UCC sections. Our professor assured us that these section numbers would be a means of speaking shorthand and such shorthand would be expected in the practice of law. I memorized them all and moved to Arizona where our statute numbers for the UCC didn't match the code sections until 1984. Further, the first time I went to court, I began using my long-fought-for shorthand. The judge stopped, looked at me over the top of his glasses and said, "I have no idea what you're talking about. And if you say PMSI one more time I'm citing you for contempt."

24. Vern's inventory is not made up of chameleons. It's just that Vern could sell that original inventory. Unless, of course, Vern just has inventory to impress his friends with statements such as, "My inventory is high this month." Indeed, without any sales, Vern's inventory is bound to remain high. I learned this while seeking my undergraduate finance degree. But, we never knew Article IX existed. In fact I don't think any business folks know or care about Article IX. It's those trustees in bankruptcy who get all worked up about it.

25. Clarification: The inventory reproduces; it is not a mathematical function. The farm collateral is not sitting around doing multiplication tables. Well, they could be (*see* Mr. Green Jeans, *supra* note 22), but you can't get a security interest in multiplication tables or math ability. If you could, there would be many defaults and sales come SAT time each semester.

26. 418 N.E.2d 274 (Ind. Ct. App. 1981).

27. Shipshewana is a small town near Squim, but as far as I have been able to determine, it's ferryless.

28. *Cargill*, 418 N.E.2d at 277.

period.[29] Hogs were coming and going and Perlich didn't pay his loan back to the bank. The bank wanted the hogs.[30] Perlich said they weren't the same hogs that existed when the security agreement was executed and "young,[31] product[32] and produce"[33] wasn't a good enough description to cover new hogs.[34] But the Indiana court, drawing on its vast farm trivia experience, held the clause was sufficient to cover after-acquired hogs. So the bank lucked out with whole hog coverage, so to speak.

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29. Article IX and litigation on it are full of farm trivia like this. For example, the definition of "farm products" under § 9-109(3) says farm products applies to crops or livestock in their unmanufactured states and lists ginned-cotton, wool-clip, maple syrup, milk and eggs as examples. UCC § 9-109(3) (1992). When do eggs become manufactured and what form do they take when they are manufactured? [*See generally* Roger I. Abrams, *Law and the Chicken: An Eggs-agerated Curriculum Proposal*, 17 NOVA L. REV. 771 (1993) (for a dissertation regarding law and chickens).]. The comments to § 9-109 offer this clarification:

> [W]hat is and what is not a manufacturing operation is not determined by this Article. At one end of the scale some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar—that they would not rank as manufacturing. On the other hand an extensive canning operation would be manufacturing. This line is one for the courts to draw.

UCC § 9-109 cmt. 4. I think if we leave it to the courts, we should soon have a ruling that canned eggs are inventory and not farm products. Other farm trivia: Hailstorms destroy cotton crops, and hence collateral (when it is the cotton) and hence security interests and hence the farmer growing the crop and hence the bank carrying the farmer, cotton and hail. Valley Nat'l Bank v. Cotton Growers Hail Ins., Inc., 747 P.2d 1225 (Ariz. Ct. App. 1987).

It's just plain nifty to realize that one can purchase hail insurance, isn't it? Ultimate farm trivia: You can have a floating lien on cheese. This floating lien cheese (or is it floating cheese lien?) doesn't sound like the type of cheese you'd want on your sandwich, but it does give you Article IX priority. Masson Cheese Corp. v. Valley Lea Dairies, Inc., 411 N.E.2d 716 (Ind. Ct. App. 1980).

30. One has to wonder what the bank officer's "To Do" list looked like:
- Review new FASB guidelines;
- Prepare loan data for HUD;
- Repossess Perlich's hogs.

31. This would be baby hogs. Or it could be hogs in their mid-twenties.

32. This would be pork, bacon, pork rinds and other high cholesterol foods denounced by everyone but, nonetheless, purchased and eaten by everyone as evidenced by Perlich's high hog turnover (unlike Vern).

33. I don't think we really want to know what this is. Hog produce has little appeal even in the most charitable vision.

34. Whether young or old. For other cases hog-tied under Article IX, see FDIC v. Bowles Livestock Comm'n Co., 937 F. Supp. 1350 (D. Neb. 1990) and Farmers State Bank & Trust Co. v. Mikesell, 554 N.E.2d 900 (Ohio 1988).

We thus learn from the hogs and develop our first chart.

CHART 1
Making Sure You Have a Security Interest

1. Buy a form (preferably a security interest form).
2. Fill in the blanks (seek help from filing clerks or counter help if you get confused).
3. When describing the collateral, be sure to explain what it can turn into, and include what it makes, for example: Ivor's Chickens; Ivor's Chickens' eggs; Ivor's frozen chicken parts; McNuggets (Chicken); Ivor's canned eggs; Ivor's omelettes (canned).
4. There is no need to take hogs to be filed.

Keep in mind there are exceptions to the requirement that you need a security agreement (form) to create a security agreement. This is the Article IX version of "Possession is nine tenths of the law."[35] If you got the collateral, you got priority.[36]

My favorite means of possession under Article IX is field warehousing. Initially students wonder how a creditor is able to get fields into a warehouse and how inventory is done.[37] But under this type of possession the creditor sends an agent to camp out[38] at the debtor's place to watch over the collateral.[39] Usually the buyer can't touch the collateral or anything it turns into unless the agent says it's okay. You don't need too much in the way of paperwork when the creditor's agent is sitting on the collateral with a .44 Magnum.[40] It's just lovely to have this Article IX

35. We learned this as toddlers when we grabbed a Pound-a-Peg hammer from another child and yelled, "Mine." This was the Article IX equivalent of an automatically perfected consumer PMSI. We immediately had priority. Of course we did not learn of our Article IX priority until our adult years. It's best this way due to anticipated problems with juvenile delinquency induced by early exposure to chattels and being pounded by hammers.

36. This line was adapted from Al Pacino in THE GODFATHER II (MCMLXXIV).

37. However, by this point in the semester, they are more than willing to accept it as yet another bit of Article IX farm trivia.

38. Well, he's just there during business hours. What with the farm, field and stream focus, I did not want to mislead you and have you convinced that Article IX is a haven for the *Hee Haw* crowd.

39. Preferably a trustworthy agent, i.e., non-lawyer agent.

40. This Article IX principle was adapted from Marlon Brando and James Caan in THE GODFATHER (MCMLXXII), or is it Mario Puzo's *The Godfather*? Or is it Don Corleone and Sonny (Santino) Corleone?

exception for a security device that was last used in the days of Dillinger.

10K. (That's Metric for "III.") Why a Security Interest is Never Enough and Article IX Places So Much Pressure on Creditors for Perfection

The drafters of Article IX were a compulsive lot. Having collateral is not good enough for a creditor. Creditors need to obtain perfection if they expect to have any real rights in the collateral. Once you reach perfection,[41] you win out over those slothful secured parties and the derelict unsecured parties whose lack of personal drive relegates them to positions beneath the perfected.[42]

The first way to perfect your security interest is by possession. Possession is IX tenths of Article IX. Again, the gun and guard have equal weight with filing papers. The only trick is to get the collateral in your possession before the other secured parties pull some alternative means of perfection.[43]

Those alternative means of perfection include the ever-popular filing of a financing statement.[44] The filing of the financing statement is mental gymnastics. First, you have to figure out what your collateral is.[45] Collateral is divided into several Article IX categories. Collateral can be inventory, consumer goods,[46] fixtures,[47] farm products,[48] chattel pa-

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41. Inserting a religious tone here, once you reach perfection, you should probably be transferred to the next life and priority and foreclosure on Article IX security interests may no longer be one of your high priorities, so to speak.

42. In fairness to both secured and unsecured parties, I should note that their lack of ambition may be attributable to the fact that they looked at §§ 9-302 to -305 of the Uniform Commercial Code and decided they would rather risk Chapter 7 bankruptcy than read about Article IX perfection. *See* UCC §§ 9-302 to -305 (1992). These unsecured and secured creditors are no worse off than students who reject six-figure salaries rather than say "PMSI." *See supra* note 14.

43. A gun will also come in handy here. You might also try some farm products and animal heads in their beds to convince them to allow you to take possession. *See* GODFATHER I, *supra* note XL.

44. No one who expects to get anything filed uses this term. The correct term is UCC-1. Try telling the counter person that you would like to file a financing statement and they will respond, "Fresh out of law school, eh?"

45. As we know from *supra* notes 31-34, this may be intriguing for items such as hog produce.

46. These are goods of consumers. The *Bluebook* people made me do this footnote.

47. Goods affixed to real property or some law students in the student lounge.

48. We've been down this road *supra*. Let's not go hogwild.

per,[49] equipment,[50] accounts[51] and general intangibles.[52] The best part about collateral under Article IX is that the answer is never the same. A computer in the hands of IBM is inventory. A computer in the hands of H & R Block is equipment. A computer in the hands of a law student is a consumer good that is not paid for.[53] A computer in the hands of a farmer should be covered by hail insurance.

The ever-changing quality of collateral contributes to the ever-fluctuating process of filing a UCC-1. There are two places to file a financing statement to reach perfection. One is local and one is central. No state should be without these government offices: the Local Recorder and the Secretary of Central.[54] The basic thrust of the filing location is that some UCC-1s are filed with land records and other UCC-1s are filed with all the other business stuff[55] with the Secretary of State.

Here's the real problem. If you file in the wrong place, it's as if you didn't file at all. So, Chart 2 is designed to show you where to file the

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49. This would be paper covering chattels. From the same family as wallpaper. Actually chattel paper is commercial paper or negotiable instruments. Now, wouldn't it make more sense to use the same term here as we use in Articles III and IV? Also, wouldn't it make more sense to use a term that some functioning human being with an income has used in the twentieth century (that's XXth century)? If you say to a debtor, "I'll need to have your chattel paper as collateral," he will respond by saying either; a) "Fresh out of law school, eh?," or b) "I'm calling the vice squad."

50. The real definition for this is found in UCC § 9-109(2) (1992).

51. This would be where you pledge your accounts receivable as collateral. It tends to hurt the cash flow, but not as much as not selling inventory. *See* Vern in *supra* note 24.

52. Surprisingly, hog produce is not a general intangible. "General intangibles" sounds like something you would pledge when all you have for collateral is a Pacer and an eight-track cassette player. The term seems to connote "no documented value." Actually, § 9-106 defines general intangibles as anything other than the stuff listed before that is not chattel paper, but includes payment for the use or hire of a vessel. UCC § 9-106 (1992). It's a good thing sailors' wages are classified as general intangibles. For those keeping score, farmers and sailors score big under Article IX.

53. But the creditor could take an additional interest in a general intangible, like have the student's pledge of a stream of six-figure earnings that will come once he or she learns to say UCC-1.

54. Actually, UCC § 9-401 (1992) has three possible alternatives which states could adopt for filing and a note to remind legislators to select only one of the three alternatives. I believe this reminder supports my theory that no one understands Article IX because the drafters even had to explain that the sections proposed were different rules for filing. Otherwise, states probably would have adopted all three and then faced the priority problems later. *See infra* notes 56-64.

55. An imprecise term that includes limited partnerships, d/b/as, a/k/as, tradenames, [illegible] paraphernalia.

UCC-1s according to the types of collateral and also to demonstrate how, by creating confusion about collateral, the drafters of Article IX were able to double filing revenues in all states.

CHART 2
Proper Filing Locations for Financing Statements According to Collateral Type*[56]

	Place of Filing	
Collateral	Central	Local
Consumer Goods	✓	✓
Fixtures	✓	✓
Inventory	✓	✓
Equipment	✓	✓
Chattel Paper	✓	✓
Farm Products	✓	✓
Accounts	✓	✓
General Intangibles	✓	✓

*UCC-1 for non-law students

In addition, Article IX has other means of perfection.[57] As near as I've been able to figure, two of these means of perfection involve time limits of twenty-one days[58] and four months,[59] and apply to both chattel

56. Sitting in a field warehouse with a .44 Magnum is looking good, eh?

57. These other means are studied in law school and ignored by everyone else except in cases where Don Corleone is involved.

58. *See* UCC § 9-304(4) (1992). You have 21 days to find the negotiable instrument or chattel paper used as collateral. Is this really a problem? Don't most creditors want to see collateral first? Except, of course, in the case of general intangibles which, as we know, are largely air.

59. *Id.* § 9-103(3). If the debtor trots out of state with your collateral, you have four months to figure out that he has gone and refile in the state where he has gone to (at both

paper[60] and tractors moved out of state.[61] With that limited scope, I believe we could garner support for just ignoring these exceptions altogether. In fact, as the counter help will tell you, "Hey, no filing, no perfection."[62]

26K. ("IV"). THE MARATHON OF ARTICLE IX-PRIORITY OF PARTIES

Just the order of Article IX is a clue as to how much trouble you're in if you try to figure out the priorities of creditors in the same collateral.[63] Part 3 of Article IX covers the order of priorities and precedes Part 4 on filing, which tells you how to get priority. I believe most people get lost in priorities because right in the first section of Part 3, there is a discussion of lien creditors.[64] Most secured parties thought they had a lien when they

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the Secretary of Central and Local Records).

60. Interestingly, § 9-304 switches back to terms like instruments and negotiable documents, largely ignoring chattel paper. I'm all for it, of course. *Id.* § 9-304.

61. In Exchange Bank v. Jarrett, 588 P.2d 1006 (Mont. 1979), Daniel F. Holland (Holland), a Florida contractor (from Kissimmee), borrowed money from the Exchange Bank of Osceola (Osceola) and gave Osceola a security interest in his tractor-scraper. Osceola filed a financing statement in Florida (with counter help, of course). Holland then took his tractor-scraper collateral to Montana. (I don't know the difference between a tractor and a tractor-scraper but the court uses the terms interchangeably and does not indulge in farm trivia enlightenment.) Holland then sold his tractor-scraper to Spencer Jarrett without Osceola's permission and proceeded to default on the Osceola loan. (Osceola and Kissimmee have Squim potential.) The bank filed its UCC-1 in Montana after the sale to Jarrett, but before four months had expired. The bank was able to keep the tractor-scraper. No bank should be without one. Jarrett was last seen wandering the streets of Kissimmee in search of Holland muttering phrases such as, "Perfection without filing?"

62. Jarrett has obviously not spoken with the counter help.

63. This is the UCC's charitable description of debtors who pledge 30 bottlecaps as collateral for five creditors who are owed $12 million in the aggregate. Just a twist to the right or left (no pun intended) and it would be fraud. Under Article IX it translates into fun and games in bankruptcy court as the trustee tries to decide whether to just give the creditors a pro rata share of the bottlecaps or actually be forced to read Article IX and decide who has priority and give them all to that creditor. Counting bottle caps is more fun than reading about priorities under Article IX. In fact, chewing bottlecaps is more fun than reading about priorities under Article IX.

64. UCC § 9-301(3) (1992) defines a lien creditor as a "creditor who has acquired a lien on the property involved by attachment, levy or the like . . . ." This definition doesn't help because security agreements are brought about by "attachment" too. *See* UCC § 9-203 (1992). Go figure. In addition, any statute that offers a definition that includes terms as vague as "and the like" gives the appearance that the drafters didn't know what was going on either. *But see* my theory *passim* on no one understands Article IX.

filed their UCC-1, and hence believed they were lien creditors until the priority issue arose. Confused and concerned about their priority, you find them traipsing back to the counter help (filing officer) and asking, "You know when I filed that UCC-1 thing, well, did that give me a lien or not?"[65]

Once the identity crisis is over (through the realization that Article IX does not give you a lien), you are free to proceed to a real discussion of priorities. It will be the first discussion of Article IX priorities ever held. Courts exercise the greatest judicial restraint in Article IX cases on priorities. That restraint involves never really deciding on priorities but finding some flaw in the paperwork to get rid of all the parties but one. Hence, no priority issues.[66] In fact, I have yet to discover another theory on Article IX.

All those rules for filing in different places[67] exist to help courts narrow down the parties to avoid priority conflicts. For example, suppose a consumer buys a tractor for use in his vegetable garden which sometimes produces sufficient yield for sales. Where does John Deere, the seller/creditor file? Or does John Deere have a PMSI in consumer goods hence eliminating the need to file? Either way the court has a nice out and can avoid deciding between John Deere and the seed company that took a security interest in the tractor as well.[68]

Now, even the best courts are occasionally unable to nitpick their way out of Article IX priorities. At some point we have the showdown at the

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65. To which the counter help will respond, "Hey, we're just here to tell lawyers what to do. We don't do windows and we don't read statutes, especially not Article IX."

66. *See, e.g.*, National Cash Register Co. v. Firestone & Co., 191 N.E.2d 471, 472 (Mass. 1963) ("All contents of the luncheonette including equipment such as: booths and tables; stand and counter; tables; chairs; booths; steam tables; salad unit; potato peeler; U.S. Slicer; range; case; fryer; compressor; bobtail; milk dispenser; silex; 100 class air conditioner; signs; pastry case; mixer; dishes; silverware; tables; hot fudge; ? Haven Ex.; 2 door stationwagon 1957 Ford A57R107215 . . . ." was held to include a cash register hence defeating a second security interest in the cash register). If you are going to list hot fudge, wouldn't you include a cash register? By eliminating the cash register, the court found security interests in different collateral, didn't have to delve into priorities, avoided making reversible error, didn't make a higher court spit at them because an Article IX priorities case was dumped on them, and got to go home early. Also, judges have offices near the counter where UCC-1s are filed. They can turn to the counter help at anytime to solicit errors. In short, appellate courts have the Article IX pros as consultants.

67. *See supra* notes 44-53 and Chart 2.

68. One has to wonder about tractor collateral for a couple of envelopes of pumpkin seeds. One also has to wonder about consumers using tractors in 9 X 12 gardens. But, as we know, Article IX is about priority conflicts and not reality.

OK Corral.[69] Priorities under Article IX are covered in sixteen sections, not counting the rules on filing. Those sixteen sections can be reduced to two charts.

*CHART 3**
*Article Priority Rules***

General Rules Parties Perfected vs. Perfected	Priority Rule First to Perfect
Exceptions to the General Rule:	
PMSI in inventory (later) vs. Perfected	PMSI in inventory (Perfects before delivery/notifies perfected party)
PMSI in equipment vs. Perfected	PMSI in equipment if perfected within 10 days of delivery
Fixtures vs. Perfected	Fixtures if perfected within 10 days of annexation

* Source: UCC § 9-312 (1992). When you read it you won't believe how great this chart is.

** Assuming the court finds no errors in your paperwork. If such error is present, you lose all your standing. Priority rules don't apply.

If you have a situation that doesn't fit into Chart 3 and it's not a buyer situation (see Chart 4), you should consult Beulah the Palm Reader.[70] She has an inside track on who will have priority in your Article IX bottlecaps. Now, if you have a buyer situation, say a buyer who has purchased a Garfield suction cup doll with thirty-two perfected Article IX security interests, you will want to know if the buyer will get to keep Garfield.

Before proceeding to Chart 4, you will need to determine if the Garfield buyer was a buyer in the ordinary course of business.[71] If he bought Garfield at a Garfield store, he's a buyer in the ordinary course of

69. This is not to imply that all showdowns involve farm products or equipment. Although a filing (UCC-1) on the "OK Corral" would not include hot fudge or cash registers.

70. No *Bluebook* cite. *But see* seedy motels.

71. Defined in UCC § 1-201(9) (1992).

business. If he bought Garfield from a member of the Hell's Angels outside Pierre's Lucky Seven Bar, he is not a buyer in the ordinary course of business.[72] Chart 4 shows what happens to Garfield, his buyer and the creditors of the Hell's Angels.

CHART 4

[a] UCC-I filed; correct as to form; description = "All store's inventory of Garfield suction-cup dolls and their cash register."

[b] Also applies to Garfield dolls without suction cups. See section 9-307 which makes it clear Article IX priority rules are not respecters of suction cups.

[c] Assumes he is able to leave Pierre's.

[d] There is a minority view that Don Corleone wins regardless of the presence of a UCC-1.

[e] But don't ever call them this.

Now, there is one variation in this buyer exception. So we are moving into exceptions to the exceptions to Article IX priorities. This exception to the exception says that automatically perfected PMSIs in consumer goods[73] aren't good against buyers who don't know about them even if they're not buyers in the ordinary course of business. So Don Corleone could lose even with automatic perfection, but without filing. This is a nice exception because it allows debtors to sell their refrigerators, stairmasters and clappers to their neighbors, pocket the money and leave the creditor with no collateral.[74]

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72. He is probably also lucky to be alive.

73. The UCC provides for automatic perfection of the creditor's interest in consumer goods with no filing required. UCC § 9-302(1)(d) (1992). But they neglect to mention this automatic perfection doesn't work against buyers. That's a pretty important omission, eh?

74. Except when Don Corleone is creditor. This is an exception to the exception to the exception. If you do sell the Don's collateral to your neighbor, large men with no necks and hairy thumbs will visit both of you. This exception applies even if your neighbor is a bona fide purchaser who had no knowledge of the PMSI and has never seen one of the Godfather movies. *See id.* § 1-201(19).

37K. ("V" IN ROMAN NUMERALS). THE OLYMPICS OF ARTICLE IX

To be certain you've conquered the charts and intricacies of Article IX, and assuming after having read this and Article IX, you are not sitting naked in a tower with a high-powered rifle,[75] take the following brain fryer[76] and choose the correct answer.

Fogel purchased a TV set for $900 from Hamilton Appliance Store. Hamilton took a promissory not signed by Fogel and a security interest for the $800 balance due on the set. It was Hamilton's policy not to file a financing statement until the purchaser defaulted. Fogel obtained a loan of $500 from Reliable Finance which took and recorded a security interest in the set. A month later Fogel defaulted on several loans outstanding and one of his creditors, Harp, obtained a judgment against Fogel which was properly recorded. After making several payments, Fogel defaulted on a payment due to Hamilton, who then recorded a financing statement subsequent to Reliable's filing and the entry of the Harp judgment. Subsequently, at a garage sale, Fogel sold the set for $300 to Mobray. Which of the parties has the priority claim to the set?[77]

Answer Choices:

A. Beulah, the palmreader.
B. Determine why anyone would give Fogel credit.
C. Ask the counter people if Hamilton had any errors in his UCC-1 and avoid priority problems.
D. Mobray, but only in the Pacific Time Zone; Answer is Harp, EST.
E. Does anyone have a lien here?
F. Was any chattel paper involved? Is the TV a chattel?
G. Garfield
H. Hamilton
I. Harp
J. Reliable

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75. Or a .44 Magnum.

76. This is not one of Ivor's products. *See supra* Chart 1.

77. This problem appears courtesy of the AICPA from its Business Law Examination for CPA certification. It would explain why so many accountants are in litigation today over their audits. In their zeal to conquer Article IX, they lost their audit skills as well as rational thought processes.

The correct answer is "H," Hamilton.[78] Hamilton had an automatically perfected PMSI which did not require filing.[79] Reliable's interest was not a PMSI, but was perfected by filing *after* Hamilton's perfection. The judgment of Harp was not perfected (i.e., recorded)[80] until *after both* Hamilton and Reliable perfected. Mobray is not a buyer in the ordinary course of business.[81] But with a non-filed but perfected PMSI in the television consumer good, Mobray would fall into the exception to the exception to the exception and get to keep the TV. However, that ruthless Hamilton filed a financing statement[82] after Reliable and Harp did their filing but before Mobray did his buying. This conduct gives us an exception to the exception to the exception to the exception which is if you file on a PMSI in consumer goods, you can win big time even over buyers. This gives us some good advice on Article IX and a final chart.

CHART 6
Rules for Surviving Article IX

1. Always file to perfect (UCC-1) even when they (drafters of Article IX)[83] tell you, "No problem."
2. Never try to figure out collateral or where to file. Just file everywhere.
3. Rely on counter help.
4. Never read Article IX.
5. Put errors in paperwork to avoid priority conflicts.
6. Keep Beulah's card.[84]

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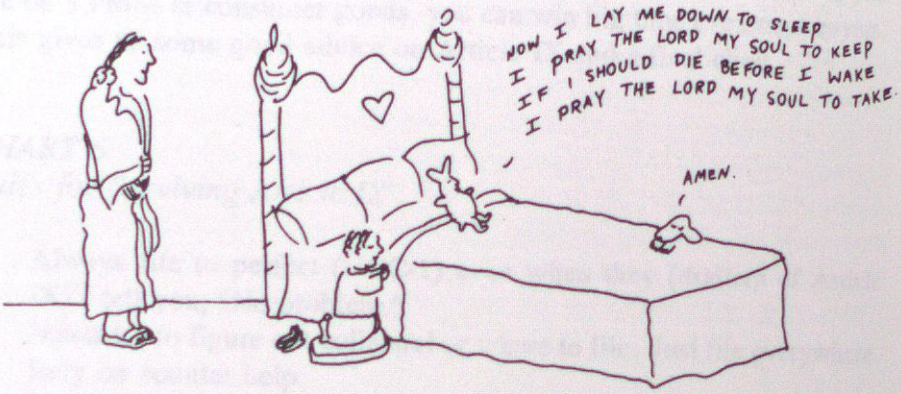
78. For many students this is the last choice. It even follows Beulah.
79. *See* UCC § 9-302 (1989).
80. Different counter help but the same paper work theories.
81. He should be ashamed of himself. He is also a frequent patron of Pierre's Lucky-7 Bar and has two Garfield suction dolls in his Pacer.
82. UCC-1 and by all counter help accounts, it was one of the finest they've seen.
83. Not identified by name because no one has 'fessed up.
84. I have it on good authority she's earning six-figures off PMSI creditors alone. She's considering a branch office for buyers not in the ordinary course of business.



Bedtime prayers before Mommy went to law school.

* RALPH WARNER & TONI IHARA, 29 REASONS NOT TO GO TO LAW SCHOOL 96 (3d ed. 1987) (Illustration by Mari Stein).

Bedtime prayers after Mommy went to law school.

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Recruiting Letters

D. Robert White*

Every recruiting letter has one of three basic messages: (1) yes; (2) maybe; (3) no. If the letter you get says "no," you don't care what else it might say. But if it says "maybe" or "yes," it's important for you to be able to read between the lines in order to know where you really stand. To aid you in this process, set forth on the following pages are two pairs of recruiting letters. In each pair, one letter shows you what the firm said, the other what the firm really meant.

* © 1983 Daniel White. Excerpt from THE OFFICIAL LAWYER'S HANDBOOK (1983).

THE "YES" LETTER

What the firm *said*:

Queen & Sprawling
1 Peachtree Street
Atlanta, Georgia 30319

November 23, 1993

Mr. James T. Pinch
906 Johnson Hall
Columbia Law School
New York, NY 11743

Dear Mr. Pinch:

I enjoyed talking with you when I was at Columbia. You have an excellent record, and on behalf of the firm I would like to extend you an offer of employment.

We would be pleased to have you visit our offices to meet more of our attorneys. If you would be interested in pursuing this invitation, please call me or our recruitment coordinator Ellen Shady to arrange a mutually convenient time for your visit.

I look forward to hearing from you.

Sincerely,

Barbara J. Bookman

What the firm *meant*:

Queen & Sprawling
1 Peachtree Street
Atlanta, Georgia 30319

November 23, 1993

Mr. James T. Pinch
906 Johnson Hall
Columbia Law School
New York, NY 11743

Dear Mr. Pinch:

For a guy from a trade school in Harlem, you make quite an impression. Your pale complexion and emaciated physique, combined with your incredibly high grade point average, suggest that you are precisely the sort of compulsive, library-loving grunt we're looking for.

No doubt you will have a lot of offers, because hard-core zealots like you aren't a dime-a-dozen. Someone so patently willing to sacrifice his health and social life is a real find.

I wouldn't want to introduce you to a client or have to eat a meal with you, but I'll bet you could rack up enough billable hours in a year to reduce your salary to the equivalent of $1.95 per hour.

I hope we can sign you up.

Sincerely,

Barbara J. Bookman

THE "MAYBE" LETTER

What the firm *said*:

Craven, Swine & Less
43 Park Avenue
New York, New York 30319

November 23, 1983

Mr. Russell A. Williams
413 Johnson Hall
Columbia Law School
New York, NY 11743

Dear Mr. Williams:

I enjoyed talking with you when I was at Columbia. You have an excellent record, and although I am not able to make you an offer of employment based on our meeting, I would like very much to have you visit our offices for further interviews.

If you would be interested in pursuing this invitation, please call our recruitment coordinator Laurie Munch to arrange a mutually convenient time for your visit.

I look forward to seeing you again.

Sincerely,

D. Carter Covington

What the firm *meant*:

Craven, Swine & Less
43 Park Avenue
New York, New York 30319

November 23, 1983

Mr. Russell A. Williams
413 Johnson Hall
Columbia Law School
New York, NY 11743

Dear Mr. Williams:

I must say I was surprised that a person like you would bother to interview with Craven, Swine & Less. Your record gives new meaning to the word mediocre.

On the other hand, a bald willingness to ask for something you have no right to is worth something in this line of work, as you'd understand if you could have heard some of the arguments we used recently in a big antitrust suit. You've definitely got guts.

You couldn't possibly have a real future with us. We always need more toadies, however, and you might be okay for two or three years. Besides, we can bill your time as highly as that of our good associates.

I'm not willing to take sole responsibility for hiring you, so you'd better come down and meet some others. Since you're in the same city it won't cost us much to have you in.

Sincerely,

D. Carter Covington

"I must warn you that anything you say may be taken down and used against you."

* RODNEY R. JONES, ET AL., DISORDERLY CONDUCT 45 (1987) (Illustration by Lee Lorenz).

If the Law is a Jealous Mistress, What Ever Happened to Pay Toilets? A Digest of the Legally Profound

Scott M. Solkoff*

In these days of religious skepticism and increased litigiousness, it was only a matter of time before someone sued the Devil. So woe to Gerald Mayo, the wise Pennsylvania resident who, when all else failed, futilely attempted to defeat the evil deity with the brunt of the American civil justice system.[1] Interestingly, Mayo was unable to find an attorney and was forced to sue the Devil pro se.[2] Mayo alleged that Satan has, "on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall."[3] Perhaps due to Mayo's lack of legal finesse, he was unable to properly plead the case and his petition to proceed in forma pauperis was denied.[4]

The court cited three reasons why it was unable to try the case on its merits.[5] First of all, Judge Weber questioned whether the Western District of Pennsylvania was the proper judicial district in which to obtain personal jurisdiction over the defendant.[6] Although the court could find no reported cases wherein the Devil was amenable to suit within the United States, it did note an unofficial account of a case wherein the Devil acted as plaintiff in a mortgage foreclosure action.[7] Next, the court considered whether the case would more properly be brought as a class action.[8] The Judge noted that the claim appears to meet the requirements of Federal Rule of Civil Procedure 23 in that the class is so numerous that joinder of all plaintiffs would be impracticable, that there are questions of law and fact common to the class, and that the claim of the representative party is typical of the

* Student of Law, Shepard Broad Law Center of Nova University. B.S., University of Florida and from listening to far too many lectures on legal conundrums.

1. United States *ex rel.* Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa. 1971).
2. The record is unclear as to whether Satan secured counsel for his defense. Either way, it would probably be safe to assume that Mayo fell short on legal resources.
3. *Mayo*, 54 F.R.D. at 283.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* In that case, Daniel Webster acted as counsel for the defense. He alleged that the Devil was a foreign prince with no standing to sue in American courts. Judge Weber noted that the defense in that case was overcome by overwhelming evidence to the contrary.
8. *Mayo*, 54 F.R.D. at 283.

claims of the class.[9] The court stated, however, that it could not now determine whether Mayo would fairly protect the interests of the class.[10] Lastly, the court, with some trepidation, noted that Mayo failed to properly instruct the United States Marshall for directions as to service of process.[11] Although the case never progressed any further, it has provided the fodder for many a subsequent decision. No less than two state courts and ten federal courts have cited to *Mayo* for its ground breaking pronouncements of the law relating to Satan.[12]

Take for example, *Norman v. Reagan*,[13] in which the court referred to *Mayo* as it searched for a less obscene example of the legally profound. In that case, Kent © Norman[14] sued Ronald Reagan, President of the United States for causing the plaintiff "great vexation" in derogation of his constitutional rights.[15] Judge Redden had previously attempted to steer clear of the controversy by dismissing the action as frivolous, but had been reversed by the Ninth Circuit.[16] On remand, the court dismissed for want of prosecution, but, prior to doing so, detailed all of Norman's claims to preserve them for the annals of legal history.[17] Norman set forth six claims against Reagan, alleging among other things, that the President had caused Norman's "civil death" and had allowed "numerous abuses of plaintiff's person, property, and liberty . . . ."[18]

In light of these masterful allegations, some would certainly agree that Norman had stated a claim. Yet, Reagan was not the only target of Norman's adept legal maneuvers. Kent Norman also requested an order requiring the Interstate Commerce Commission (ICC) to investigate a

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9. *Id.*

10. *Id.*

11. *Id.*

12. No kidding. In fact, the Third Circuit has called *Mayo* "[t]he piece de resistance of civil rights actions." Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974).

13. 95 F.R.D. 476 (D. Or. 1982).

14. Among other quirks, the plaintiff apparently incorporated the copyright symbol into his name.

15. *Id.* at 476. *Norman* is another beautiful example of proceeding pro se in forma pauperis. The lack of financial disincentive often provides for cases which defy legal convention. I say this, of course, tongue in cheek, for frivolous law suits eat much of the courts' valuable time. Still, what would the study and practice of law be like without such prizes as *Norman* and *Mayo*.

16. Judge Redden, the deciding judge, was not a Reagan appointee.

17. Thank you, Judge Redding!

18. *Norman*, 95 F.R.D. at 476.

company doing business as the White Line Fevers From Mars.[19] The court points out that, despite the name, this defendant is not of "genuine extraterrestrial origin, but is apparently a fruit company which shipped marijuana and cocaine in 'fruit boxes' for Mother's Day."[20] It seems that Norman's trucking license had been suspended by the ICC when he was caught transporting some of White Line Fevers From Mars' fruit boxes. But wait—the case gets better. Norman included in the complaint one of his original poems.

> The birds today
> Are singing loudly,
> The day is fresh
> With the sounds
> Upon the wind
> The crickets.
> The blackbirds.
> The woodpeckers
> Beauty in every
> Spark of life
> Just so the sounds are beauty
> The ants are silent
> But always searching
> The Birds noise a song
> and the fade of the automobile tires
> Chirp. A shadow from
> a passing monarch butterfly
> Breathless in Colorado.[21]

Whatever Norman's intentions, he may have figured out a new way of gaining publication in a tough poetry market. Indeed the court was quite perplexed by Norman's poetic inclusion. It noted that, with the liberal

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19. To be sure, it is a slap to legal comedians the world over that the case name does not denote that defendant. Kent © Norman v. White Line Fevers From Mars would be rivaled only by United States v. 11¼ Dozen Packages of Article Labeled in Part Mrs. Moffat's Shoo Fly Powders for Drunkenness, 40 F. Supp. 208 (W.D.N.Y. 1941). I won't bore you with the details. Of course Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa. 1971) (*see* discussion *supra*), is nothing to sneeze at. However, the Fifth Circuit bestowed the title for the "most delightful of case names," to Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enters., 815 F.2d 323, 324 n.1 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

20. *Norman*, 95 F.R.D. at 476.

21. *Id.* at 477.

et al.: Nova Law Review Full Issue

federal rules of pleading, "the references to the birds, crickets, ants, and butterfly could constitute a Bivens claim."[22] For some reason, however, Norman seems to have disappeared. He took no further action on the case since remand and mail addressed to him was returned. The court queried that perhaps Mr. Norman has elected to pursue his remedies in a more convenient forum.[23] More likely, Norman may have contracted a chronic case of white line fever from Mars.[24]

Pro se litigants proceeding in forma pauperis have nothing to lose and everything to gain by filing even the most profound of suits. This is especially true for convicted prisoners with much idle time and free paper. In one case, a prisoner brought a civil rights claim due to unfavorable prison conditions.[25] The prisoner alleged that allowing female personnel to work among male prisoners stimulated sexual drives to frustration in violation of the Eight amendment prohibition against cruel and unusual punishment.[26]

Apparently cognizant of this danger, the court in *Holdman v. Olim*[27] upheld a Hawaii prison regulation requiring female visitors to be "fully clothed, including undergarments."[28] The case got started, when, during a routine search, it was discovered—and was freely admitted—that the visiting plaintiff was not wearing a bra. The woman alleged that the prison directive was facially discriminatory on the basis of sex.[29] In rejecting this claim, the court recognized that there were many unanswered questions such as whether men were required to wear briefs and what the plaintiff's actual measurements were.[30]

A case testament to the true nature of the beast is *Gordon v. Secretary of State of New Jersey*[31], in which a prisoner alleged that he was denied the

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22. *Id.*; *see* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

23. *Norman*, 95 F.R.D. at 477.

24. As of 1986, Kent © Norman was an involuntary resident of the Oregon State Hospital. He continued, even after confinement, to correspond with Judge Redden, now Chief Judge for the District of Oregon.

25. Mann v. Leeke, 73 F.R.D. 264 (D. S.C. 1974), *aff'd*, 551 F.2d 307 (4th Cir. 1977).

26. *Id.* at 264-65.

27. 581 P.2d 1164 (Haw. 1978).

28. *Id.* at 1166.

29. *Id.* In a recent survey conducted by Women for Undergarment Equality, it was determined that men generally wear only one undergarment, while women must generally wear two. Gives one pause, doesn't it.

30. *Id.* The plaintiff also happened to occupy the office of Executive Director of the American Civil Liberties Union of Hawaii.

31. 460 F. Supp. 1026 (D.N.J. 1978).

office of the Presidency due to his illegal incarceration.[32] The nub of the complaint alleged that: "Had there been a free legal 1976 Presidential election, J. John Gordon would now be the President of the United States."[33] As a consequence, Gordon asked the court to invalidate the elections.[34] The court denied the claim, so let that serve as a caveat to those with political aspirations.

For some reason prisoners in New Jersey seem to have a flair for the profound. In *Searight v. New Jersey*,[35] a prisoner filed a civil rights suit alleging that the defendants unlawfully injected him in the left eye with a radium electric beam.[36] As a result of involuntary high-fidelity, the prisoner alleged that he now picks up voices inside his brain. The court considered whether Searight's claim would more properly be brought under the exclusive jurisdiction of the Federal Communications Commission as a presumably unlicensed radio broadcast.[37] Dismissing the action on other grounds, the court nevertheless attempted to be helpful by leading the plaintiff to an alternative remedy. It suggested that he could block the broadcast to his brain by simply grounding his antenna with the use of a paperclip chain extending from the back of the plaintiff's trousers to the floor.[38]

Courts often bend over backwards to make valuable suggestions to those who stand before them. Salvatore Albanese was one man in need of such guidance. Mr. Albanese was convicted in 1969 along with three other men in the hijacking of a trailer loaded with valuable merchandise.[39] Rather than being jailed, Albanese was given five years probation during which time he could not associate with known criminals.[40] This proved too much for Albanese who was found associating with some of New York's biggest crime bosses. His only defense was that these were his friends and were the only people he knew. In Mr. Albanese's words, "It

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32. *Id.*
33. *Id.* at 1027.
34. *Id.* at 1026.
35. 412 F. Supp. 413 (D.N.J. 1976).
36. *Id.*
37. *Id.*
38. *Id.* This reminds me of the true story of the elderly woman who sought her lawyer's advice on how to stop the train from cruising through her living room in the middle of the night. Rather than seeking an injunction, the Deerfield Beach attorney successfully recommended to his client that she install a red light at her doorstep.
39. United States v. Persico, No. 60-CR-147 (E.D.N.Y. June 21, 1971) (order granting resentencing).
40. *Id.*

don't make sense, who am I supposed to associate with? Who do I know in my life? Your honor, will you hang around with me? Will you associate with me? Will you go to dinner with me?"[41] Counsel for Mr. Albanese added that if the defendant had been having dinner with Spiro Agnew, "You wouldn't have complained."[42] To this the judge replied, "I would certainly wonder why Mr. Albanese was having dinner with the one vice-president who had pleaded guilty of a criminal offense."[43] Interestingly, a man by the name of Salvatore Albanese became a New York City councilperson in the mid-1980's. To be fair, it has never been verified whether these men are one and the same. It is also unclear as to whether Councilman Albanese had anything to do with the disappearance of pay toilets.

Once upon a time, if we needed to relieve ourselves outside the comfort of our own homes, there was a good chance that some pocket change might prove a valuable commodity. There were those of us who could deftly limbo under the locked door, but for many, they were up the creek without a nickel. Due to their relative mobility, men generally fared better than women during this era. There was always the secluded bush. The problem was especially acute in New York City, affectionately known by some as the "city of fluids." Not surprisingly, New York was among the first states to take legislative action.[44] The law mandated a hefty penalty for those who permitted pay toilets to be operated on their property.[45] Predictably, this upset the Nik-o-lok Company and the Advance Pay Toilet Lock Company who immediately filed suit.[46] They claimed that the law violated the equal protection clause in that it applied only to pay toilets, not to toilets that were locked with a key. The court upheld the statute, stating that the equal protection clause applies to people not toilets.[47] Before doing so, however, the court examined the statute's legislative history which contains the following passage: "Pay toilets are essentially a tax on human biological functions. In addition, it is a discriminatory tax, in that women often have no choice but to use the facilities, while men frequently have access to free toilet facilities."[48] These words show remarkable legislative insight but beg

41. *Id.*
42. *Id.*
43. *Id.*
44. N.Y. GEN. BUS. LAW § 399(a) (McKinney 1975).
45. *Id.*
46. Nik-O-Lok Co. v. Carey, 378 N.Y.S.2d 936 (Sup. Ct.), *aff'd*, 384 N.Y.S.2d 211 (N.Y. App. Div. 1976), *aff'd*, 392 N.Y.S.2d 393 (1977).
47. *Id.* at 939.
48. *Id.* at 938.

the question as to how many of the state's congressmen have relieved themselves in the streets of New York. Regrettably, the court never reached this issue, nor did it address whether pay toilets constitute cruel and unusual punishment. In any event, New Yorkers have one less thing to worry about.

Anonymous Author From The Department of Justice

In July 1991, the federal government filed a lawsuit in Louisiana for violations of the Clear Water Act stemming from the persistent discharge of PCBs from a natural gas compression station. The United States alleged in its complaint that Tennessee Gas Pipeline Company (a subsidiary of Tenneco) polluted Natchitoches, a quaint town best known as the setting for the movie *Steel Magnolias*. During an initial settlement conference, the government trial attorney informed defense counsel that if the case were to be tried to a jury, Dolly Parton (a Steel Magnolia) would be commissioned to sing the theme song, *I Can't Give You No T.L.C., When My Breast Milk's Filled With PCBs*.[1]

1. Although the author preferred to remain anonymous, she wanted readers to know that [illegible] is the genius behind the song title.

Why Haven't the Crits Deconstructed Footnotes?

Arthur D. Austin*

A crit is a self-empowered deconstructionist of legal scholarship. Crits brag about freeing the text from the tyranny of the author and then showing how the text embarrasses itself.[1] Every topic has been deconstructed—torts,[2] contracts,[3] gender,[4] etc.[5] You name the topic and a crit has "freed" it from capitalist imperialism. As a crit once boasted: it's a "real-life revenge of the nerds."[6] There is, however, a major glitch in the nerds' revenge. They have not deconstructed one of the most influential fields in law—footnoting.

How can crit radicals, dedicated to the subversion of legal education and the legal system, ignore footnotes? Every professor knows that it is the adroit use of footnotes that tilts the tenure decision.[7] Lawyers are always trying to slide in an extra argument in a footnote at the bottom of a brief while law students are tortured by having to master the *Bluebook*. Here we have the ideal target for deconstruction and the crits missed it! It's incredible. Are they brain dead from drinking Thunderbird or from the fumes emanating from those Jaguars they wheel? The self-proclaimed "best and brightest" either do not comprehend, or choose to overlook the fact that a footnote *is the best expression of deconstruction.*

Such a concept has its genesis in the deMan vision which postulates that deconstruction undermines, subverts, transgresses and demystifies the "privileged" interpretation of a text or a phrase. "Privilege" is a term of art

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I have concluded that the most efficient way to protect the reader and the environment from the footnote plague is to rely on the market system. It is a simple plan: none of the references or citations are printed in the usual location. Instead, a monetary value is printed with each note. This is the value that I have assigned that particular note. Readers may obtain any note, or all the notes, by sending me, in a self-addressed envelope, the appropriate amount of money, indicating the footnote desired. Even Richard Posner has not thought of selling footnotes.

1. This is a cheapo: $.25.
2. *Id.* (as to price). Only a crit would read, or write, this article.
3. *Id.* (as to price). Not much better than n.2.
4. *Id.* (as to price). A lot of good old venom in this piece.
5. *Etc.* is like buying an old trunk at an auction. $.17.
6. I like this quote; citation to the source will cost you $1.00.
7. These are self-cites to my work and therefore go at $2.50. These babies got press in the *Wall Street Journal* and *New York Times*.

that serves as a symbol for corrupt establishment views.[8] Hence, in all legal forms of writing, the text dominates the page and dictates meaning. According to deconstruction terrorism, the text is "privileged" in the hierarchical sense of the term. It is *elitist!*

On the other hand, footnotes are deposited at the bottom of the page, published in small, almost unreadable print. Along with crits, women, minorities, people who live in Cleveland, and the homeless, footnotes are the "oppressed." Footnotes are victims of text. Articles condemn the use of footnotes while legal scholarship attacks with ruthless abandon. Some go so far as to say that footnotes are an "abomination"[9] that serve "devious purposes."[10] Even though notes graciously push text up near the top of the page, they remain in small print and at the bottom. Whatever the circumstances, footnotes are at the mercy of the hierarchy.

It was Jacques Derrida—the master of indeterminacy, the Dirty Harry of *Aporia*[11]—who recognized that the privileged meaning of the text is a form of oppression. It oppresses by concealing other values and meanings. The "privileged" meaning *purposely* distorts and displaces the *real* meaning, which resides in "a marginal zone where the particular, the unique, and the incommensurate may reside in autonomy from the broader system that threaten to assimilate, absorb or reduce them."[12]

The next step for the Derrida technique was to go to the "marginal zone" (the oppressed source) and "free" a new and competing interpretation. Thus, a deconer—but not the nerdy crit—would go to the "marginal" area of footnotes for a new interpretation. It would be an interpretation that would dispute the validity of the privileged view. It would question the text's privileged *position* at the top of the page. Likewise, marginalizing notes by forcing them into small print would be challenged.

Another strategy is to recognize that the text in legal scholarship is a form of "phallogocentrism."[13] The text is obviously masculine: it is rational, analytical and objective.[14] It is written to place men in a hierarchical position over women—politically, sociologically and philosophically. The text thus expresses patriarchal values.

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8. Quality guaranteed. $3.60.
9. A steal at $.35.
10. Has a nice ring to it–priced at $.58.
11. You are on your own for this one.
12. This costs more because I actually had to read this decon crap. $3.00.
13. You can have this one free. You won't understand it anyway.
14. This is a *supra* so it's only $.10. (The original was $.25.).

On the other hand, footnotes bear traditional feminine qualities: they are nurturing, empathic, flexible, and speak in "another voice."[15] They "care" for the reader. Now it becomes obvious; the deconstructive analogy demonstrates that as the white male legal system oppresses women and minorities, so the text marginalizes footnotes. Under phallogocentrism, the text treats footnotes like women—as a supplement, a helpmate—something made out of a text rib.

This interpretation explains why the oppressors from the text seek to extend the reach of phallogocentrism even further into the footnote womb. They have relied on several tactics. First, there is the *Bluebook*, a masculine instrument of order and rationality created by white male law review editors to maintain phallogocentrism in a field that could be "free" if the voices of women were allowed to circulate. Nit-picking technicalities smother female improvisation and nurturing. Second, until recently, the privileged view was that only initials be used to identify the author's first name. The objective was obvious and insidious—marginalize women even in footnotes by refusing to recognize gender and thereby convey the impression that only males produce scholarship. After complaints by women, the most recent *Bluebook* changed the system to require the use of first names. A small victory for the oppressed in an environment of oppression at the bottom of the page.

What makes the crit oversight of footnotes an aberrational topic for trashing is that deconstruction contains the ideal remedy for footnote marginalization. It wouldn't make sense to reverse the positions with notes on top and text below.[16] A reverse missionary position merely changes the orientation of privileged status. Nor would the famous "footnote revolution" work.[17] No, the best resolution is a Derrida "Double Session."

It is a visual technique designed to alienate, challenge, and force the reader to appreciate the essence of deconstruction, i.e., that words do not have meaning.[18] In *Glas*,[19] Derrida put quotations from Hegel on one side and Genet on the other. "While reading one column you are reminded

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15. If you don't know this boilerplate cite then you deserve to pay "a fine" of $2.00. A feminist who doesn't know this cite should have to take a class from Camille Paglia.

16. The author tries to combine trendiness with political correctness and comes up looking foolish. It's yours for $.40.

17. This is a "fugitive" cite, bound to get you attention. Excellent for a promotion and tenure article. A good price–$3.00.

18. This is a cite to several examples of *my* double session technique. These are works of art; make a bid.

19. This is a cite to Derrida. Only crits read the guru of deconstruction, therefore not much of a market. $.37.

et al.: Nova Law Review Full Issue

that the gist lies elsewhere."[20] A Double Session works as a dredge "which sucks up rocks, sludge, and algae, leaving the water behind."[21] This is the way it would work on footnotes and text:[22]

Footnotes are a manifestation of creativity,[23] thereby contributing to legal scholarship.[24] They leave permanent landmarks to obscure information. In the hands of a master, footnotes can be art, humor,[25] and candor. 23. "Encountering [a footnote] is like going downstairs to answer the doorbell while making love." 24. "Student-edited journals are the scandal of legal publishing. You get these kids who check for all the commas but not for substance." 25. "There is the old story of the sadist and the masochist who got married. On their wedding night, the masochist begged: 'Darling, beat me, hurt me! The sadist said: No.'"

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20. A good book on deconstruction. $1.50.
21. *Id.* as to cite. Two for the price of one.
22. Notice that I privileged footnotes, *i.e.*, "footnote" precedes "text."
23. Another fugitive note. $3.00.
24. This one costs $0.67. I can give you a real nasty criticism of law review editors, a fugitive cite from an Old Village Voice. $4.00.
25. It's a bad joke, probably politically incorrect, so take it free.

Dear Paul: Language Tips Questions and Answers

Paul Morris*

Once again, it is time to answer the plethora of inquiries I receive monthly re: language tips.

Dear Paul: What does "plethora" mean and what is it's proper use? Signed, MJWCM, Kendall.

Dear MJWCM: First of all, you have way too many initials, so I will simply refer to you as "M", or as all good appellate practitioners would state, the symbol "M" will be used to refer to MJWCM. M, you should know that "plethora" is one of several words which tell the reader: "Hey reader, look how I can use an impressive word instead of a simple word." The other words are dearth, cavil, deluged, and re. (By the way, I think "plethora" refers to a small fish that hangs around sharks for leftovers. Sort of like associates in a law firm.)

ATTENTION READERS: Notice how M suffers from the dreaded disease of *apostrophitis*. M should have used "its", not "it's". More about this later.

Dear Paul: Let me ask you something. Which is more better, pled or pleaded? Signed, F.L. Bailey, Trial Lawyer.

Dear F.L.: Let me ask you something. Where are you from, Long Island or what? Do us all a favor and stick to litigation. But you do ask a good question. The best way to answer your question is by illustration. Here is an example of the correct usage of "pled": "Through his motion for attorney's fees, the attorney *pled* the opposition dry." Now notice the difference in the proper usage of "pleaded": "The court reporter appeared in a well-*pleaded* skirt." (NOTE: I am not gender biased. By this last example, I am not suggesting that all court reporters are female. Therefore, please feel free to substitute the following illustration: "The court reporter appeared in a well-*pleaded* kilt."

* Paul Morris is a sole practitioner in Coral Gables, Florida specializing in civil and criminal state and federal appeals. He has written and lectured on behalf of the Florida Bar and various state and national organizations. He writes a monthly column entitled "Appellate Tips" in the Dade Bar Bulletin.

Dear Paul: We are 14 and 12 years of age, respectfully, and we read your columns or else you won't give us our allowance and you are constantly correcting us whenever we say things like Pat and me are going to the movies, or Pat went with Ashley and I, and stuff like that, so we wrote you a letter like you wanted and can we rent a movie now like you promised? Patrick and Ashley, Kendall.

Dear Patrick and Ashley: I am not constantly correcting you, okay? By the way, you should have used "respectively", not "respectfully", okay? Also, don't you think that seeing "Wayne's World" 18 times is dangerous to your health? Please go to medical school.

Dear Paul: Which is right—none of the judges is correct, or none of the judges are correct? Signed, W. Rehnquist, Washington, D.C.

Dear Bill: Both are wrong. All of the judges are always correct.

Dear Paul: Could you clear up the confusion regarding he, she, his, her, their (s)he, it? B. Abzug, New York.

Dear B.A.: My tenth grade French teacher, Ms. Diello, used to explain that the preference for the masculine "he" or "his" as the singular pronoun (as in "the student took his place") was based upon, as she would always put it, "the ancient and stupid theory that men are superior to women." Obviously, she was just joking. Anyway, you can avoid the confusion simply by pluralizing everything. For example: "The students checked their pistols with the gym teacher."

Dear Paul: Is it wrong to refer to "a client of Paul's"? Signed, a client of Paul's.

Dear Client: A client of Paul's WHAT? Simply say "a client of Paul." More apostrophitis.

Dear Paul: Why do attorneys tell us at oral argument that the trial court *aired*? Signed, A. Nony Mouse, Appellate Judge.

Dear Judge: Unless they are mispronouncing "erred", why not ask them: "Counsel, what exactly did the trial court air?"

Dear Paul: How should we pronounce all those French words that creep up in the legal arenas and what do they mean? P. Trudeau, Montreal.

Dear P. Trudeau: Whatever happened to you? Anyway, I think I know which terms are troubling you. "Voir dire" is pronounced "voyer dyer", at least in Florida, and obviously comes from the derivations for "voyeur" or "one who likes to look" and "dire" or "extreme" as in dire

straits. Thus, "voir dire" refers to "one who likes to look a lot." You probably are also concerned with "en banc" and "venire", which are pronounced "in bank" and "ven eye or eee", and refer to where you put your money and what you put on furniture, respectfully.

Dear Paul: I just finished reading a trial transcript and after the verdict one of the attorneys asked to "pole the jury." What does that mean? A. Dershowitz, Mass.

Dear A. Dershowitz: Unless the court reporter meant "poll", that means there were some very surprised jurors.

If you are a reader of Paul's or its time you asked a question because you never asked a question before (before what?) [e.g. marshall], I look forward to hearing from you et al.

* PETER V. MACDONALD, Q.C., MORE COURT JETSERS 134 (1987) (Illustration by David Brown).

Notes and Comments: A Law Review Article

Patric M. Verrone*

I. INTRODUCTION: WHAT THIS ARTICLE IS ABOUT

This is the first sentence of a generic law review article.[1] Just like the opinions, treatises, and other legal writings cited within it,[2] it[3] will be convoluted, confusing, long winded, and, worst of all, excessively footnoted.[4]

The argument to be presented in this article is as follows:[5] A number of difficult cases have been erroneously decided by underpaid, overworked appeals court judges.[6] The cumulative effect of these cases is a bad trend in the law which has caught the eye of a research junkie[7] who is looking for tenure or an appointment to the bench.[8] This "scholar,"[9] who needs to get something published quick,[10] argues that this bad trend is based on a bad standard of review, and proposes an alternative standard of review which will correct the trend.[11] Unfortunately, the article is never read,[12]

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1. This is the first footnote of said article.

2. "It" refers to Patric M. Verrone, *Notes and Comments: A Law Review Article*, 17 NOVA L. REV. 733 (1993).

3. *Id.*

4. See? Four footnotes already (*see supra* notes 1-4).

5. Made you look.

6. Actually, by underpaid, overworked *law clerks*.

7. *See supra* note *.

8. So that he can get some underpaid, overworked law clerks of his own, *see supra* note 5, and contribute to a new and equally bad trend in the law.

9. Quotes provided for the sarcasm impaired.

10. And what could be quicker than a series of paraphrased excerpts from someone else's writings edited and cite-checked in such detail that any original writing on the part of the author is reduced to the biographical note? *See supra* note *.

11. They might as well have just copied the dissenting opinions word-for-word and lay in one big, fat citation, followed by a bunch of *Ids.*

12. Don't even think that the footnotes get glanced at. If they were really important, they'd print them in regular sized type.

much less cited,[13] and the tenure or the appointment will be denied anyway, because of race, gender or lack of country club contacts.

II. Outline: What You Will Be Reading Before You Read It

Having presented an overview of its thesis,[14] this article will now present an overview of itself.[15] Then an overview of the overview will be presented.[16] Section II will be followed by Section III[17] which will deal with the typical facts of the cases in question, and the opinions interpreting those facts.[18] Then, in Section IV, the erroneous nature of those opinions will be presented in detail, along with snide, pseudo-intellectual remarks about the judges who wrote those opinions.[19] Finally, Section V will conclude with a line-by-line reiteration of this section, only in past tense.[20]

III. The Law In Question: The Crux Of The Article

A. *A Brief Factual Detour From the Argument Just to Fill Space*

The trend in the law in question, hereinafter referred to as "The Trend," appears in cases, hereinafter referred to as "The Trend Cases," which have a similar fact pattern, hereinafter referred to as "The Similar Fact Pattern" or "Cap'n Bubba."[21] The facts are simple:[22] A client comes into a lawyer's office claiming he has been wronged.[23] After accepting a large

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13. *Cf.* Patric M. Verrone, Note, *The Abscam Investigation: Use and Abuse of Entrapment and Due Process Defenses*, 25 B. C. L. Rev. 351 (1984). I wrote the article. Now at least it will be cited somewhere. I'll have to remember to Shepardize it the next time I get some free Lexis time.

14. *See supra* notes 4-13 and the accompanying text (what you just read.)

15. *See supra* notes 14-20 and the accompanying text (what you're reading now.)

16. *See supra* notes 21-56 and accompanying text (what you will be reading next.)

17. Duh, I can count to three in Roman Numerals, George. Now can I play with the rabbits? *See* Steinbeck, Of Mice and Men, 28-33 (1937).

18. We're also planning a puppet show.

19. And maybe some dirt from their personal lives.

20. Don't worry. You'll never get that far.

21. No one really knows why.

22. As are the people who bring them to you.

23. *Cf.* Plaintiff v. Defendant, 123 Trial Report 45, 67 (1989).

retainer, the lawyer represents the client in a lawsuit against the alleged wronging party.[24] One party wins the lawsuit,[25] and the other party loses.[26] The losing party gets mad, fires his first lawyer[27] and hires a new lawyer to represent him on appeal.[28] The appeal goes on for years, costs millions of dollars, and no one is happy with the outcome[29]—especially the taxpayers.[30] Over time, similar cases are heard in various circuits.[31] Eventually, one case gets to the United States Supreme Court and there is a mad rush to influence the court's impartial decision-making process with articles like this.[32]

B. *Another Subsection to Justify Including Subsection III. A.*

Having exhausted a discussion of "The Similar Fact Pattern" of "The Trend Cases," it will now be necessary to describe a variation on the facts.[33] These facts[34] are derived from the case of *Finnegan v. Riverrun Funeral Home*.[35]

> Someguy, master's son—Homecoming . . . Seize [his] best Fred, aiding and abedding Mrs. Someguy. (Mid-wifing.) Wifespeaks,

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24. *Id.*

25. *Id.*

26. *Id.*

27. Client v. Attorney, 123 Malpractice Reports 45, 67 (1989). Aren't you glad I didn't say "*Id.*" again?

28. Appellant v. Appellee, 22 Cal. Ripkn. 2165, 2166 (1991).

29. I take that back. People who publish case reporters might get a kick out of it.

30. Noted tax protester Howard Jarvis said, "All lawsuits are frivolous. I know people who will sue if someone looks at them funny." Jarvis v. Someone Who Looked at Him Funny, 123 U.S. 45, 67 (1989).

31. Thanks to the principles of *stare decisis*, and the uniform rule of law, the circuits come up with contradictory rulings.

32. Not to mention with angry protesters screaming at each other and wielding unnecessarily nasty caricatures of recently appointed justices. I guess placard painters would be happy right about now, too.

33. Because these variant facts are potentially hazardous to the author's overall thesis, they will be presented in a confused, garbled, and unintelligibly obtuse way so that no one could understand them, much less use them in a counter-argument. Pretty shrewd, eh?

34. The reader should know up front that these facts are distinguishable from the earlier facts.

35. 123 Dub. Lnrs. 45, 67 (1939). I told you they would be confusing.

sass, "Oh oh, big mouth's here. Now the whole neighborhood will know."[36]

Clearly, these are distinguishable facts from "The Similar Fact Pattern" and should not be considered in a discussion of "The Trend."[37] In every one of "The Trend Cases," the higher court either affirmed or reversed the trial court verdict. This astonishing pattern was based on a standard of review which will be examined in the next section.

IV. Bad Hearings: Why I'm Smarter Than The Supreme Court

In the last section, an astonishing pattern of review based on a typical fact pattern was examined. Having discussed the typical fact pattern,[38] stating superfluously that the fact pattern was, in fact, discussed,[39] and then reiterating that statement a third time for comic effect,[40] it is evident that the courts have applied a standard of review in these cases. For years, this standard of review has been the "Burden of Proof" standard.[41] This standard states that the standard brought to bear is the standard that a reasonable man would bring to bear if a reasonable man could bear to bring the standard to bear.[42] The courts have called this old standard "The Old Standard." Unfortunately, "The Old Standard" violates an older standard of common law known as *lex principus latinus bogus.*[43] Accordingly, it is unacceptable for numerous,[44] profound[45] reasons.

A new standard of review is warranted. This new standard will be called "The New Standard."[46] Interestingly, commentators[47] and several

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36. Apologies to James Joyce and Jake La Motta.
37. The reader is inclined to believe this otherwise absurd assertion for several reasons: a) It is the second time it was asserted (*see supra* note 34), b) it began with the word "clearly" so it must be true, and c) believing it means getting to the end of the article faster.
38. *See infra* note 39.
39. *See supra* note 38.
40. Weren't we supposed to have a puppet show somewhere in here?
41. Placard Printers v. Case Reporter Publishers, 123 U.S. 45, 67 (1989).
42. *But see* "The Woodchuck Standard" in Woodchuck Local 385 v. Packard Saw Mill, 123 U.S. 45, 67 (1989).
43. Look, George, I can *speak* Roman, too. Now can I play with the rabbits?
44. Too numerous, in fact, to mention.
45. Also, too profound to mention.
46. Aside from everything else, this standard makes the "Reasonable Man" a "Reasonable *Person*" and is, therefore, politically correct.
47. *See Dick.*

lower courts[48] have espoused this so-called "new" standard for some time[49] making it, in effect, an "old" standard. Nevertheless, the old "new" standard is still superior to the new "old" standard.[50] Furthermore, it fulfills the classic three-pronged test for adoption of a new standard.[51] Accordingly, it behooves courts to reject "The Old Standard" in favor of "The New Standard."[52]

V. Conclusion: Final Thoughts

Having previewed, overviewed, viewed, and reviewed the relevant facts, laws, and standards, it is evident[53] that the thesis of this article has been proven.[54] Accordingly, a conclusive paragraph would seem in order. Welcome to that paragraph. Can I offer you a drink? Perhaps some No-Doz? No? How about a quote from a notable Supreme Court Justice's famous dissenting opinion? Alright . . . In conclusion, courts reviewing "The Similar Fact Pattern" in "The Trend Cases" must buck "The Trend" and abandon "The Old Standard" in favor of "The New Standard" and, in so doing, adopt the words of the immortal[55] Justice Pierce Butler, "The judgment of the lower court is reversed. Now, when do we get the rabbits, George?"[56]

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48. *See Dick Run.*

49. Run, Dick, Run.

50. The new old standard is found in Old Newsstands v. Standard News, 123 U.S. 45, 67 (1989) and is not to be confused with Learned Hand's Handstand Standard in Grandstand v. American Bandstand, 19 N.Y. Met. 69, 86 (1926), or those old standards, "Mr. Sandman" and "Stand By Your Man" in Chordettes v. Wynette, 1 K.C. Kasem 40 (1989).

51. *See* American Law Institute, Report on the Adoption on New Standards 929 (1959). The three prongs are 1) it's new, 2) it's a standard, and 3) it fulfills the three-pronged test.

52. *Cf.* Baby v. Bathwater, 123 U.S. 45, 67 (1989).

53. Nay, indisputable.

54. And even if it hasn't, isn't it nice to see a page where there's more text than footnotes?

55. Actually, he died in 1939.

56. Lenny Small Estate v. George Milton, 123 U.S. 45, 67 (1937).

"We're hopelessly deadlocked—six of us grew up on 'Perry Mason' and six of us grew up on 'L.A. Law.'"

* CHARLES M. SEVILLA, DISORDER IN THE COURT 242 (1987) (Illustration by Lee Lorenz).

From Tedious to Trendy: A Tax Teacher's Triumph

Gail Levin Richmond*
Carol A. Roehrenbeck**

Prologue: Previously on Avon Law

When we last visited Avon Law School,[1] Marian Paroo and Mark Eisner were making the world safe for tax research[2] and Hart and Ford were back at school, after solving their fraternity's tax problem. Much has happened in the past year: Paroo established a tax alcove in memory of Professor Helvering; Eisner produced five major articles on totally esoteric tax topics; and the Contract Renewal Committee voted to renew Eisner's contract.

Unfortunately, all is not well at Avon, for the students are about to revolt. It seems that both the faculty and the Dean ignored Eisner's STUDENT EVALUATIONS. These ranged from "BORING" to "NOT AS BORING AS WE'D BEEN WARNED—MORE BORING!!!!"

Join us now, as we return to Avon Law School, where our friends, Hart and Ford, are plotting to save the day. As we begin, they are engaged in a heated discussion over how they can prevent open warfare, show the faculty how to teach, prove the value of student evaluations, and still graduate.

Cast of Characters
(in order of appearance)

FORD: a third year law student

HART: a third year law student

* Gail Levin Richmond is Associate Dean-Academic Affairs and Professor of Law at Nova University Shepard Broad Law Center.

** Carol A. Roehrenbeck is the Director of the Law Library and Associate Professor of Law at Nova University Shepard Broad Law Center.

1. All characters other than Harold Hill, who needs no introduction, appeared in an earlier article/play about Avon Law School. That article described Avon's search for a replacement to Professor Helvering, who died while trying to make the law library more accessible to tax researchers. *See* Carol A. Roehrenbeck & Gail Levin Richmond, *Three Researchers in Search of an Alcove: A Play in Six Acts*, 84 LAW LIBR. J. 13 (1992).

2. As if anyone really cared.

MARIAN PAROO: law librarian at Avon Law School

MARK EISNER: tax professor at Avon Law School

HAROLD HILL: Marian Paroo's husband and a self-taught music teacher

Act I. The Plan

FORD: This is crazy. I don't care if you think Eisner is a nice guy. You're going to get us bounced out of here.

HART: Look, Eisner already knows he's on thin ice. Last night, Paroo and I found him, passed out, slumped over the index to some 45 volume tax treatise.

FORD: Jeez, that was Saturday night, too. You're almost as boring as he is. What were you doing there?

HART: Shut up and listen. He told Paroo that he might be terminated. Dean Lightcap sent him a letter and told him he had to improve his enrollment. Paroo dropped it on the floor, so I picked it up and made a copy while they talked. Listen to this, Ford, this is some really heavy stuff: "The faculty was delighted when you decided to join us last year.[3] Indeed, your scholarly productivity has more than met our expectations.[4] Unfortunately, it has come to my attention that your preliminary fall enrollment is somewhat below the norm.[5] I know you share our concern with student morale[6] and look forward to a turn-around in the very near future."

FORD: How many signed up?

HART: Nobody. And on top of that, the SBA has organized a protest. Students are going to march in front of his classroom with signs like "Tax is Torture at Avon Law: Call Amnesty International." We have

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3. Translation: None of them wanted to get stuck teaching tax.
4. Translation: You are bankrupting the research assistant budget.
5. Translation: A dead man would draw a bigger crowd.
6. Translation: How can I hit them up for alumni donations if you keep alienating them?

to do something or there's gonna be a war. I heard that the national student bar leaders were flying in to help picket. The next thing you know the ABA will be here.

FORD: Why would the ABA protest? This has nothing to do with abortion rights.

HART: Don't you have any brains? They aren't going to picket. They might pull Avon's accreditation if this protest thing gets out of hand.

FORD: Jeez, is it that bad? I mean, tax is boring. Maybe that's why nobody signed up. Or maybe he had a bad time slot.

HART: Paroo already thought of that. When she asked him, Eisner told her he didn't conflict with anything. But it's not just Eisner, it's the evaluations. I mean, don't they understand we know a good teacher when we see one. Listen, Ford, tax doesn't have to be boring. Look at old Helvering . . . .

FORD: How can I look at him? He's dead.

HART: No, I mean he made tax interesting. All Eisner needs is a little help with his style.

FORD: What style?

HART: The Avon New Wave. Look at the way Lindsay and Bonner teach.

FORD: And old dead Helvering.

HART: Hey, maybe that's the answer. I think Harold Hill—he's Paroo's husband, you know—gave Lindsay, Bonner, and even Helvering some pointers on how to teach. Let's find Paroo and get her to take Eisner home to meet Harold. He probably could use a decent meal in addition to those pointers.

Act II. The Music Man at Home

Later that evening at the Hill/Paroo domicile, Eisner explains his problem to a sympathetic Harold Hill.

HILL: Well, Mark, I think I see the problem, but let me ask a few questions to get a little more perspective.

EISNER: Ask away, I'm a drowning man.

HILL: What are your favorite radio and television programs? What do you read on a regular basis?

EISNER: That's easy. I watch C-SPAN, CNN, *Sixty Minutes*, *Nightline*, and *Jeopardy*. I listen to that marvelous classical music station on the radio. I believe some of your former students own it. They do seem fixated on trombone solos. Reading is my escape. I have subscriptions to *Tax Notes*, *Journal of Taxation*, *Tax Law Review*, and *Daily Tax Report*. I also read pronouncements of the Financial Accounting Standards Board, the ABA Section of Taxation, ...

Hill dozes off during Eisner's monologue. He jerks awake when Paroo kicks him. Eisner, who is still droning on about the publications he reads, doesn't even notice.

HILL: I definitely see the problem. Your students are part of Generation X.[7] Not only are you not on the same wavelength, I'm not sure you're on the same planet. You don't watch what they watch; you don't listen to what they listen to; you certainly don't read what they read. Let's face it, you're out of touch with your students. Luckily, it's a situation I can easily fix. I did the same thing for old Helvering a few years ago. When he got worried about enrollment declines, I surveyed his students, determined where he was going wrong, and got him right back on track. I can do the same for you, but you've got to trust me. I got my tenure from the entire town of River City, Iowa. All you have to do is fool a few law students.

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7. *See* Laura Zinn et al., *Move Over, Boomers*, BUS. WEEK, Dec. 14, 1992, at 74. The current crop of 18 to 29-year-olds received this appellation in DOUGLAS COUPLAND, GENERATION X (1991).

It's just a matter of marketing. You have to find out what they want and give it to them—or at least make them think they want what you're giving them.

PAROO: I'm fascinated by this discussion. What did you ask Professor Helvering's students?

HILL: I decided to study their leisure habits. In addition, I wanted to get an age and sex breakdown and an indication of college major to see if any of these appeared to influence enrollment. I even asked a few questions about the course itself—why they took it and what case and code section they liked best. Remember, my professorial title is a courtesy title, so my survey methods are not necessarily the ones the psych department "hotshots" would use.

EISNER: Well, let's start with television. What do they watch?

HILL: Their favorite show—31% of the students listed it—is *Seinfeld*. Their second favorite show is *The Simpsons*.[8]

EISNER: Who or what are *Seinfeld* and *The Simpsons*?

PAROO: Seinfeld's a standup comic with a television show. He adds a few other characters to flesh out his monologues. *The Simpsons* are a cartoon family.

HILL: The students are quite fond of shows featuring standup comics—*Home Improvement*, *Roseanne*, *Saturday Night Live*, *In Living Color*, and *David Letterman* all have a following. More important, out of 65 students responding, 55 listed at least one comedy or cartoon show among their favorites—and only one watches no television at all.

EISNER: Excuse me, these are law students. How could cartoon shows appeal to them?

HILL: Perhaps they are watching television to be amused rather than enlightened. In any event, *The Simpsons* has quite a healthy audience;

8. Information Hill provides about Professor Helvering's class is derived from questions asked of the fall 1992 Income Tax class at Nova University Shepard Broad Law Center.

23% of Professor Helvering's students watched it. They even mentioned a cat and dog cartoon called *Ren & Stimpy*, which turned out to be pretty nifty.[9]

EISNER: What about *Jeopardy*? I'll bet it has a real following!

HILL: I'm sorry, Mark, but only four students admitted to watching it. Those four were probably Helvering's least secure students. My guess is that they liked it because they got the answers before the questions. Maybe you should try that technique in your classes.

They don't care much about your beloved news shows. Approximately 85% of them listed at least one comedy or cartoon show—and most listed more than one. Less than half the class listed even one news show.

By the way, they don't limit themselves to comedies and cartoons. They also like lawyer shows and evening soap operas, although only *L.A. Law* made their top five.

EISNER: Is there a point to this mindless drivel?

HILL: That's easy. The comedies amuse them and help take their minds off law school. They think the lawyer shows provide a glimpse of what they'll encounter in the real world. The soap operas probably serve two purposes. First, they show people who are truly miserable even though they aren't law students. Second, they show the type of problem that will ultimately find its way into the lawyer's office. Obviously you need to select your class material with these findings in mind.

EISNER: Thank you for these, ah, insights, but I really doubt that you understand what a tax professor deals with.

HILL: I hate to say this to you, Mark, but my guess is that you depress your students.

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9. At this point, Dean Richmond must acknowledge the assistance of her children, Henry and Amy. Until they convinced her to see *Wayne's World*, she had no idea that she and her students might be operating on different wavelengths. Albie Caruana and Keith Payton backed Henry's claim that *Ren & Stimpy* was a "cult classic" and provided other valuable assistance.

EISNER: Depress!!!

PAROO: Harold, how can Mark depress them? He talks about money all the time.

HILL: I've heard them talking down at the pool hall. They mentioned that Mark told them something about not deducting the fees their deadbeat clients fail to pay[10] and not being able to fully depreciate a Mercedes over five years (or even over 25 years).[11] You also told them they can't deduct the cost of buying and cleaning their three-piece suits.[12]

EISNER: Yes, but there's good news, too. I regularly remind them that thirty years ago the top rate was as high as 91%.

HILL: They weren't born then—they don't relate to what you're saying.[13] Come back tomorrow and we'll get to work on a complete revamping of your syllabus. Stick with me, and you'll have a standing room only enrollment next week.

Act III. The Reincarnation of a Tax Class

Scene 1. The Hills' Living Room

Eisner arrives early the next morning for his appointment with Hill.

HILL: Tell me, Mark, what are your favorite tax cases?

EISNER: Well, I like to assign *Eisner v. Macomber*,[14] particularly in conjunction with *Helvering v. Bruun*.[15] The different gross income

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10. Hill is making the logical assumption that lawyers generally use the cash method of accounting. I.R.C. § 446 (1992).

11. I.R.C. § 280F (1992).

12. *See, e.g.*, Pevsner v. Commissioner, 628 F.2d 467 (5th Cir. 1980).

13. Sixty-nine percent of the respondents were age 30 or younger. An additional 23%, age 31-40, were no more than 10 years old in 1962.

14. 252 U.S. 189 (1920).

15. 309 U.S. 461 (1940).

and basis rules for stock dividends and leasehold improvements forfeited to the landlord . . . .

HILL: Did it ever occur to you that these students don't plan to become tax lawyers? You need to teach tax for personal injury lawyers, tax for matrimonial lawyers, and tax for criminal lawyers. Why don't you try tax problems or events that could conceivably happen to their clients? For example, do you teach any of the following?

Davis v. United States, 495 U.S. 472 (1990)
James v. United States, 366 U.S. 213 (1961)
Jenkins v. Commissioner, 47 T.C.M. (CCH) 238 (1983)
Palsgraf v. Long Island R.R., 162 N.E. 99 (1928)
Sharon v. Commissioner, 66 T.C. 515 (1976)
Wassenaar v. Commissioner, 72 T.C. 1195 (1979)

EISNER: I do teach *Davis*, but my recollection is that it is *United States v. Davis*,[16] not *Davis v. United States*. It's a pre-1984 Act case taxing a husband who transferred appreciated property to his wife in satisfaction of her property settlement.

HILL: There you go again! You're teaching the past; they want the present. Their *Davis* case involved taxpayers who deducted a charitable contribution for living expenses they provided their sons, who were serving as Mormon missionaries.

Do you assign any of the others?

EISNER: Absolutely. Every tax professor assigns *James*.

HILL: Well then, it appears your casebook authors have saved you from being completely hopeless. This gives us a small foundation, very small I fear.

EISNER: Before we go on, I'm curious. I don't recall hearing about a tax case involving *Palsgraf*, and the *Jenkins* case doesn't ring any bells either.

HILL: *Palsgraf* isn't a tax case, it's a torts case. That shows you how easy it is for students to become disengaged. Jenkins is the real name of Conway Twitty. Professor Helvering's students ranked it right up there on their hit parade of cases—it's interesting to study famous people.

EISNER: But the other taxpayers aren't famous, so why do they appeal to students?

HILL: You really don't get it, do you? The potential criminal lawyers want to read about criminals' tax problems—hence the appeal of *James*. *Sharon* and *Wassenaar* involved law students or lawyers—the interest is obvious. I'm sure you can figure this out if you give it some more thought.

EISNER: But what do we do now? Drop-Add starts in two days and I need a marketable course.

HILL: Well, the first thing we do is rewrite the syllabus you posted. Here's your new first page:

Law 700—Income Tax

Mark Eisner

TAX STYLES OF THE RICH AND FAMOUS

The rich and famous do pay tax, and so will you and your clients. Students in this course will study actual tax controversies involving three taxpayer groups:

1. those who are household names. These taxpayers could afford the best possible tax counsel. If they lost, the position must be hopeless. We won't repeat their mistakes.

2. those you are likely to represent. These cases will involve fact patterns you are likely to encounter representing clients in your specialty. Obviously, we will study criminal, matrimonial, and personal injury clients. Students are invited to submit ideas for specialty areas as soon as possible. These cases will have human interest appeal. You will also learn how to write your bill to maximize the deductible portion. That way you can charge higher fees.

3. attorneys and law students. It is inconceivable that you should graduate without knowing your own tax problems and opportunities.

Extra Credit Opportunities

Just as the Internal Revenue Service gives rewards for turning in your employer, family members, and friends if they aren't paying their fair share, I will reward students whose diligence results in our sharing interesting cases. Extra credit is available for the following submissions:

1. newspaper and magazine human interest stories with obvious tax implications. As an example, consider the following title from the November 2, 1992, *Fort Lauderdale Sun-Sentinel*: "Widow says millionaire was no harem master."

2. actual tax cases involving residents of Avon County—these are our neighbors. Why not have a private chuckle at their expense and boost your grade in the process?

3. actual tax cases involving IRS agents and attorneys as the taxpayer. Joel Sharon (66 T.C. 515 (1976)) does not stand alone.

EISNER: Doesn't this strike you as, how can I put this—as blatant pandering?

HILL: Do you want a job? And, by the way, who do you think pays your salary?

EISNER: Assuming I did use your syllabus, where will I get these cases on such short notice? I need something to teach when classes start.

HILL: That's where Marian comes in. She's using her computer research skills to help solve your problem. Wait until you see the great tax cases she has found. When you add those to your syllabus, you'll move to the top of the enrollment charts. She's waiting for you in the next room.

Eisner leaves to join Paroo. Hill stays on for a brief soliloquy.

HILL: You know, I'll bet there's a money-making opportunity out there. Mark can't be the only tax nerd in danger of losing his job. Maybe Marian can sell the case list to a publisher and I can retire from teaching the Minuet in G.

Scene 2. The Hills' Deductible (?) Home Office

EISNER: I'm just not sure this is going to work. Generating a list of cases involving famous people will take weeks.

PAROO: What makes you say that?

EISNER: The only way to do it is to use one of the tax case name citators. I can start with the A's and go through to the Z's and write down every famous person's name and the case citation. Then I'll go to the case reporter services and read each case to determine what the issue is.

PAROO: Mark, you weren't listening to Harold. We do these searches on computer. If you use the right words, you get the taxpayer's name, case citation, and issue all at once. Then you decide which cases you want and edit them for your students. My way will probably miss a few cases, but it's more than adequate. I've already found a number of cases involving athletes, which I'm sure your students will enjoy.

Paroo turns on the computer and logs into the database.

PAROO: I'm getting this set up for you today, because time is so short. But you must promise to come in for your training immediately. You need to visit the twentieth century sometime before the twenty-first begins.

Try searching the tax case file for actors or actresses or singers. They ought to interest your students. All you have to do is type in the words you want. Give it a try.

EISNER: Uh-oh, the screen says there are over 1,000 cases and it wants me to modify my request. I knew this wasn't going to work.

PAROO: Just type in a modifier, such as the type of deduction involved. For example, try actor or actress or singer and travel expense.

EISNER: Bingo! That only gives 67 cases to review. I think I've got it! By Jove, I've got it!

PAROO: In that case, I'll leave you here to work while I return to the office. Just remember to think the process and you'll be able to perform the process. Harold couldn't have said it better.

Scene 3. Several Hours Later

Hill enters the office to see how Eisner is progressing.

HILL: Well, how is it going?

EISNER: I have lots of cases, but I'm worried about several of those involving entertainers. Many of them are quite old; what if my students haven't heard of George M. Cohan, William Powell, or Anthony Quinn?

HILL: That's easy to remedy. On the day you teach each of their cases, you show a videotape clip from one of their movies—or in George's case, the movie about his life. Your class will really love that, and you may pick up some spare change selling popcorn.

Wait, I think I'm on to something! You're teaching the MTV generation.[17] You need audiovisual effects for *every* class. Think of the possibilities—Madonna's *Material Girl* video when you teach the clothing deduction; *Money Makes the World Go Around*[18] for the unit on business entertainment; and, of course, *Taxman*[19] for the introductory material.

Now get back to your case list. You need to have it posted when Drop-Add starts tomorrow.[20]

Act IV. Heeeeeeeere's Mark

Another year has passed. The University Provost has just announced Professor Eisner's tenure and promotion. The university's trustees had never seen such excellent teaching evaluations. Being good businessmen and women, they were particularly impressed by the student paeans to the tax course's relevancy. It was easy for them to dismiss the decline in quality noted on the faculty-conducted evaluations. After all, the senior faculty was a bunch of insecure old fogies trying to avoid competition with a really innovative teacher.

In gratitude, Eisner takes Paroo and Hill to dinner at the best restaurant in town.

HILL: Well, Mark, there are certainly a lot of choices on this menu. What comes with the entrees?

EISNER: Except as otherwise provided, each entree is accompanied by extras, including but not limited to an appetizer, salad, and dessert.

HILL: Well, Marian, he may be tenured, but the boy still needs my help.

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17. The students completing Hill's survey listened to stations such as WSHE, HOT 105, POWER 96, KISS, WAXY, and ZETA 4. Professor Eisner was unfamiliar with them all.
18. JOHN KANDER & FRED EBB, *The Money Song, from* CABARET (1972).
19. GEORGE HARRISON, *Taxman* (Northern Songs 1966).
20. Professor Eisner's preliminary case list appears in the Appendix.

APPENDIX

Partial Case List for the New, Improved Income[21] Tax Class[22]

I. TAXPAYERS WHO ARE (OR WERE) HOUSEHOLD NAMES

A. **Entertainment** (Including Writing)

Acuff v. Commissioner, 296 F.2d 725 (6th Cir. 1961) (Roy Acuff)
Apis Productions, Inc. v. Commissioner, 86 T.C. 1192 (1986) (Cher's production company)
Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969) (Joan Baez)
Estate of Bartholomew v. Commissioner, 4 T.C. 349 (1944) (Freddie Bartholomew)
Bellamy v. Commissioner, 43 T.C. 487 (1965) (Ralph Bellamy)
Benny v. Commissioner, 25 T.C. 197 (1955) (Jack Benny)
Berlin v. Commissioner, 42 B.T.A. 668 (1940) (Irving Berlin)
Boone v. Commissioner, 33 T.C.M. (CCH) 663 (1974) (Pat Boone)
Borge v. Commissioner, 405 F.2d 673 (2d Cir. 1968) (Victor Borge)
Boulez v. Commissioner, 810 F.2d 209 (D.C. Cir. 1987) (Pierre Boulez)
Chaplin v. Commissioner, 136 F.2d 298 (9th Cir. 1943) (Charlie Chaplin)
Coburn v. Commissioner, 138 F.2d 763 (2d Cir. 1943) (Charles Coburn)
Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930) (George M. Cohan)
Cosby v. United States, 8 Cl. Ct. 428 (1985) (Bill Cosby)
Crawford v. Commissioner, 20 T.C.M. (CCH) 740 (1961) (Joan Crawford)
David v. Commissioner, 35 T.C.M. (CCH) 1436 (1976) (Mack David)
Davis v. Commissioner, 58 T.C.M. (CCH) 650 (1989) (Sammy Davis, Jr.)
Denny v. Commissioner, 33 B.T.A. 738 (1935) (Reginald Denny)
United States v. Disney, 413 F.2d 783 (9th Cir. 1969) (Roy Disney)
Fairbanks v. United States, 306 U.S. 436 (1939) (Douglas Fairbanks)
Commissioner v. Ferrer, 304 F.2d 125 (2d Cir. 1962) (Jose Ferrer)

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21. Famous people have also starred in estate tax and corporate tax cases, but Professor Eisner won't be allowed to teach those until he gets an enrollment in Income Tax.

22. A list this long was not generated overnight. Dean Richmond confesses to beginning it in the early 1970's and building it with the assistance of numerous research assistants at both Nova and the University of North Carolina, most notably John Moffa, Jim Stevens, Pamela Terranova, Ricky Weiss, and Rob Weisberg. She also smugly notes that its use here proves the truth of an earlier admonition, "Never discard unused research." Gail Levin Richmond, *Advice to the Untenured*, 13 NOVA L. REV. 79, 85 (1988).

Ferrer v. Commissioner, 50 T.C. 177 (1968) (Jose Ferrer again)
Gann v. Commissioner, 31 T.C. 211 (1958) (author Ernest K. Gann)
Goodrich v. Commissioner, 20 T.C. 323 (1953) (Olivia de Havilland)
Greene v. Commissioner, 81 T.C. 132 (1983) (Lorne Greene)
Hardy v. Commissioner, 43 B.T.A. 911 (1941) (Oliver Hardy)
Holland v. Commissioner, 51 T.C.M. (CCH) 164 (1985) (Brian Holland of the Motown songwriting team of Holland-Dozier-Holland)
International Artists, Ltd. v. Commissioner, 55 T.C. 94 (1970) (Liberace)
Jenkins v. Commissioner, 47 T.C.M. (CCH) 238 (1983) (Conway Twitty)
Jolson v. Commissioner, 3 T.C. 1184 (1944) (Al Jolson)
Kaye v. Commissioner, 287 F.2d 40 (9th Cir. 1961) (Danny Kaye)
Ladd v. Riddell, 309 F.2d 51 (9th Cir. 1962) (Alan Ladd)
Commissioner v. Laughton, 40 B.T.A. 101 (1939) (Charles Laughton)
Leeds v. Commissioner, 33 T.C.M. (CCH) 551 (1974) (Donna Douglas)
Commissioner v. Lester, 366 U.S. 299 (1961) (Jerry Lester)
Ludden v. Commissioner, 68 T.C. 826 (1977) (Allen Ludden)
MacMurray v. Commissioner, 21 T.C. 15 (1953) (Fred MacMurray)
MacRae v. Commissioner, 294 F.2d 56 (9th Cir. 1961) (Gordon MacRae)
Martin v. Commissioner, 25 T.C. 94 (1955) (Tony Martin)
Marx v. Commissioner, 29 T.C. 88 (1957) (Groucho Marx)
McGuire v. United States, 1969-1 U.S. Tax Cas. (CCH) ¶ 9279 (S.D.N.Y. 1969) (McGuire Sisters)
Estate of Melcher v. Commissioner, 476 F.2d 398 (9th Cir. 1973) (Doris Day)
Miller v. Commissioner, 299 F.2d 706 (2d Cir. 1962) (widow of Glenn Miller)
Nelson v. Commissioner, 25 T.C.M. (CCH) 1142 (1966) (Ozzie and Harriet Nelson)
Nolan v. Commissioner, 5 T.C.M. (CCH) 546 (1946) (Lloyd Nolan)
O'Brien v. Commissioner, 25 T.C. 376 (1955) (Pat O'Brien)
Oppenheim v. Commissioner, 31 B.T.A. 563 (1934) (author E. Phillips Oppenheim)
Pflug v. Commissioner, 58 T.C.M. (CCH) 685 (1989) (JoAnn Pflug)
Quinn v. Commissioner, 33 T.C.M. (CCH) 310 (1974) (Anthony Quinn)
Powell v. Commissioner, 5 T.C.M. (CCH) 1081 (1946) (William Powell)
Roach v. Commissioner, 20 B.T.A. 919 (1930) (Hal Roach)
Rohmer v. Commissioner, 5 T.C. 183 (1945) (author Sax Rohmer)
Runyon v. United States, 281 F.2d 590 (5th Cir. 1960) (Damon Runyon, Jr.)
Six v. United States, 450 F.2d 66 (2d Cir. 1971) (Ethel Merman)
Tussaud's Wax Museum, Inc. v. Commissioner, 25 T.C.M. (CCH) 1081 (1966)

United California Bank v. United States, 439 U.S. 180 (1978) (Walt Disney)
Estate of Valentino v. Commissioner, 6 B.T.A. 100 (1927) (Rudolph Valentino)
Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944) (Ina Claire)
Willie Nelson Music Company v. Commissioner, 85 T.C. 914 (1985) (Willie Nelson)
Wodehouse v. Commissioner, 177 F.2d 881 (2d Cir. 1949) (author P.G. Wodehouse)
Wodehouse v. Commissioner, 178 F.2d 987 (4th Cir. 1949) (author P.G. Wodehouse) (you win some and you lose some)
Woodall v. Commissioner, 105 F.2d 474 (9th Cir. 1939) (Zasu Pitts)

B. Sports

1. Baseball

Allen v. Commissioner, 50 T.C. 466 (1968) (Richard Allen)
Baltimore Baseball Club, Inc. v. United States, 202 Ct. Cl. 481 (1973) (Baltimore Orioles)
Appeal of the Boston American League Baseball Club, 3 B.T.A. 149 (1925) (sale of Babe Ruth's contract)
Hornsby v. Commissioner, 26 B.T.A. 591 (1932) (Rogers Hornsby)
Hundley v. Commissioner, 48 T.C. 339 (1967) (Randy Hundley)
McCarthy v. United States, 807 F.2d 1306 (6th Cir. 1986) (acquisition of New York Yankees)
Selig v. United States, 740 F.2d 572 (7th Cir. 1984) (acquisition of assets by Milwaukee Brewers)
Wills v. Commissioner, 411 F.2d 537 (9th Cir. 1969) (Maury Wills)

2. Basketball

First Northwest Indus. of Am. v. Commissioner, 70 T.C. 817 (1978), *rev'd & remanded by* 649 F.2d 707 (9th Cir. 1981) (acquisition of Seattle Supersonics)
Johnson v. Commissioner, 78 T.C. 882 (1982) (Charles Johnson)
National Collegiate Athletic Ass'n v. Commissioner, 914 F.2d 1417 (10th Cir. 1990)

3. Boxing

Johansson v. United States, 336 F.2d 809 (5th Cir. 1964) (Ingemar Johansson)
Patterson v. Commissioner, 25 T.C.M. (CCH) 1230 (1966) (Floyd Patterson)
Robinson v. Commissioner, 44 T.C. 20 (1965) (Sugar Ray Robinson)

4. Figure Skating

Babilonia v. Commissioner, 681 F.2d 678 (9th Cir. 1982) (parents' outlays for Tai Babilonia's pre-Olympics training costs)

5. Football

Armstrong v. Commissioner, No. 92-11177 (Tax Court petition), 92 Tax Notes Today 135-40 (July 1, 1992) (LEXIS, Taxana library, TNT file) (Otis Armstrong)
Artnell Company v. Commissioner, 400 F.2d 981 (7th Cir. 1968) (acquisition of Chicago White Sox)
Beisler v. Commissioner, 49 T.C.M. (CCH) 534 (1985) (Randall Beisler)
Harden v. Commissioner, 62 T.C.M. (CCH) 756 (1991) (Michael Harden)
Hornung v. Commissioner, 47 T.C. 428 (1967) (Paul Hornung)
Laird v. United States, 391 F. Supp. 656 (N.D. Ga. 1975) (acquisition of Atlanta Falcons)

6. Golf

Jones v. Page, 102 F.2d 144 (5th Cir. 1939) (Bobby Jones)

7. Hockey

Sargent v. Commissioner, 929 F.2d 1252 (8th Cir. 1991) (Gary Sargent and Steven Christoff)
Stemkowski v. Commissioner, 82 T.C. 854 (1984) (Pete Stemkowski)
Hanna v. Commissioner, 63 T.C.M. (CCH) 3178 (1992) (John Hanna)

C. Government and Politics

United States v. Agnew, 428 F. Supp. 1293 (D. Md. 1977) (Spiro Agnew)
Diggs v. Commissioner, 715 F.2d 245 (6th Cir. 1983) (Congressman

et al.: Nova Law Review Full Issue

Charles C. Diggs, Jr.)
Liddy v. Commissioner, 808 F.2d 312 (4th Cir. 1986) (G. Gordon Liddy)
Estate of Rockefeller v. Commissioner, 762 F.2d 264 (2d Cir. 1985) (Nelson Rockefeller)
STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 93D CONG. 2D SESS. (1974) (examination of President Nixon's tax returns for 1969 through 1972).
Tech. Adv. Mem. 84-24-006 (Mar. 1, 1984) (George Bush)
Traficant v. Commissioner, 89 T.C. 501 (1987), *aff'd*, 884 F.2d 258 (6th Cir. 1989) (Congressman James Traficant, Jr.)
Roosevelt v. Commissioner, 43 T.C. 77 (1964) (Franklin Roosevelt, Jr.'s, receipt of payment relating to *Sunrise at Campobello*)

D. **Business** (Legitimate or Otherwise)

Ash v. Commissioner, 96 T.C. 459 (1991) (Mary Kay Ash of Mary Kay Cosmetics)
Capone v. United States, 93 F.2d 840 (7th Cir. 1937) (Al Capone)
Erhard v. Commissioner, 64 T.C.M. (CCH) 10 (1992) (Werner Erhard of est)
Commissioner v. Field, 42 F.2d 820 (2d Cir. 1930) (Marshall Field)
Frankel v. Commissioner, 82 T.C. 318 (1984) (Max Frankel of New York Times)
Getty v. Commissioner, 913 F.2d 1486 (9th Cir. 1990) (Jean Ronald Getty, son of J. Paul Getty)
Commissioner v. Giannini, 129 F.2d 638 (9th Cir. 1942) (A.P. Giannini, founder of Bank of America)
Hallmark Cards, Inc. v. Commissioner, 90 T.C. 26 (1988)
United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991) (Leona Helmsley)
Hunt v. Commissioner, 27 T.C.M. (CCH) 791 (1968) (H.L. Hunt)
Hunt v. Commissioner, 57 T.C.M. (CCH) 919 (1989) (Nelson Bunker Hunt)
Jostens, Inc. v. Commissioner, 58 T.C.M. (CCH) 933 (1989), *aff'd*, 956 F.2d 175 (8th Cir. 1992).
New York Trust Co. v. Edwards, 274 F. 952 (S.D.N.Y. 1921) (John D. Rockefeller)
Rockefeller v. Commissioner, 676 F.2d 35 (2d Cir. 1982) (David Rockefeller of Chase Manhattan Bank)
TSR, Inc. v. Commissioner, 96 T.C. 903 (1991) (manufacturer of Dungeons & Dragons game)

Vanderbilt v. Commissioner, 16 T.C.M. (CCH) 1081 (1957) (Cornelius Vanderbilt, Jr.)
Vanderbilt v. Commissioner, 39 B.T.A. 43 (1939) (Gloria Vanderbilt)
Vanderbilt v. Commissioner, 5 B.T.A. 1055 (1927) (Reginald Vanderbilt)
Waring v. Commissioner, 412 F.2d 800 (3d Cir. 1969) (Fred Waring of Waring Blender)

II. Your Future Clients

A. Criminal Law Practice

1. Criminals

Accardo v. Commissioner, 942 F.2d 444 (7th Cir. 1991) (legal fees in defense against racketeering charge)
Bratulich v. Commissioner, 60 T.C.M. (CCH) 1308 (1990) (travel expense for drug-buying trips)
Car-Ron Asphalt Paving Co. v. Commissioner, 758 F.2d 1132 (6th Cir. 1985) (payment of kickbacks)
Gambina v. Commissioner, 91 T.C. 826 (1988) (forfeited earnings from drug dealings)
James v. United States, 366 U.S. 213 (1961) (embezzler)
Killian v. Commissioner, 59 T.C.M. (CCH) 824 (1990) (earnings from prostitution)
Lincoln v. Commissioner, 50 T.C.M. (CCH) 185 (1985) (theft by co-conspirators)
Lombardo v. Commissioner, 50 T.C.M. (CCH) 1374 (1985) (charitable contribution to avoid jail)
Mazzei v. Commissioner, 61 T.C. 497 (1974) (another theft at hands of co-conspirators)
Moore v. United States, 412 F.2d 974 (5th Cir. 1969) (swindler)
Nowlin v. Commissioner, 64 T.C.M. (CCH) 456 (1992) (receiver of stolen property)
Rutkin v. United States, 343 U.S. 130 (1952) (extortionist)
Stephens v. Commissioner, 905 F.2d 667 (2d Cir. 1990) (restitution of embezzled funds)
Commissioner v. Tellier, 383 U.S. 687 (1966) (legal expenses)
Wood v. United States, 863 F.2d 417 (5th Cir. 1989) (forfeited earnings from drug dealings)

Zecchini v. Commissioner, 63 T.C.M. (CCH) 1717 (1992) (ordinary and necessary, but illegal, kickbacks)

2. Police Officers

Carroll v. Commissioner, 418 F.2d 91 (7th Cir. 1969) (education expense)
Christey v. United States, 841 F.2d 809 (8th Cir. 1988) (deduction for midshift meals)
Commissioner v. Kowalski, 434 U.S. 77 (1977) (exclusion for meals)
Pollei v. Commissioner, 877 F.2d 838 (10th Cir. 1989) (travel versus commuting)
Rev. Rul. 78-128, 1978-1 C.B. 39 (health spa expense)
Siket v. Commissioner, 37 T.C.M. (CCH) 548 (1978) (trial expenses for assault on fellow officer)

3. Gambling

Commissioner v. Groetzinger, 480 U.S. 23 (1987) (gambling as trade or business)
United States v. Hughes Properties, Inc., 476 U.S. 593 (1986) (accrual of unpaid, but guaranteed, slot machine payoff expense)
Olk v. United States, 536 F.2d 876 (9th Cir. 1976) (taxation of dealer's tokes)
Zarin v. Commissioner, 916 F.2d 110 (3d Cir. 1990) (discharge of gambling debts)

B. Family Transactions Practice

1. Domestic Relations

Blackman v. Commissioner, 88 T.C. 677 (1987) (casualty loss claimed for arson to estranged wife's home)
Green v. Commissioner, 54 T.C.M. (CCH) 764 (1987) (taxation of palimony-type payment)
United States v. Harris, 942 F.2d 1125 (7th Cir. 1991) (taxation of amounts received from elderly man by his mistress and her twin sister)

2. Income Splitting

Boyter v. Commissioner, 74 T.C. 989 (1980) (tax-motivated divorce)
Salvatore v. Commissioner, 29 T.C.M. (CCH) 89 (1970) (appropriate taxpayer for sale of jointly-owned property)

C. Personal Injury Practice

Bent v. Commissioner, 87 T.C. 236 (1986) (violation of first amendment rights)
United States v. Burke, 112 S. Ct. 1867 (1992) (sex discrimination)
Maxwell v. Commissioner, 95 T.C. 107 (1990) (on-job injury to controlling shareholder)
O'Gilvie v. United States, 92-2 U.S. Tax Cas. (CCH) ¶ 50,344, *rev'd on reh'g*, 92-2 U.S. Tax Cas. (CCH) ¶ 50,567 (D. Kan. 1992) (toxic shock syndrome)
Paton v. Commissioner, 64 T.C.M. (CCH) 1150 (1992) (suicide occasioned by job stress)
Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990) (age discrimination)
Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988) (malicious prosecution)

III. Lawyers, Law Students, and Law Professors

United States v. Bailey, 707 F.2d 19 (1st Cir. 1983)
Church v. Commissioner, 80 T.C. 1104 (1983)
Coughlin v. Commissioner, 203 F.2d 307 (2d Cir. 1953)
Commissioner v. Flowers, 326 U.S. 465 (1946)
Friedman v. Delaney, 171 F.2d 269 (1st Cir. 1948)
Goldman v. Commissioner, 32 T.C.M. (CCH) 574 (1973)
Hantzis v. Commissioner, 638 F.2d 248 (1st Cir. 1981)
Henderson v. Commissioner, 46 T.C.M. (CCH) 566 (1983)
Horoduysky v. Commissioner, 54 T.C. 490 (1970)
Kaufman v. United States, 233 F. Supp. 123 (E.D. Pa. 1964)
Lange v. Commissioner, 41 T.C.M. (CCH) 1421 (1981)
Manton v. Commissioner, 7 T.C.M. (CCH) 937 (1948)
Milan, Miller, Berger, Brody & Miller, P.C. v. United States, 679 F. Supp. 692 (E.D. Mich. 1988)
Moss v. Commissioner, 758 F.2d 211 (7th Cir. 1985)
Pepper v. Commissioner, 36 T.C. 886 (1961)

Priv. Ltr. Rul. 89-51-022 (Sept. 22, 1989)
Ruehmann v. Commissioner, 30 T.C.M.(CCH) 675 (1971).
Scallen v. Commissioner, 877 F.2d 1364 (8th Cir. 1989)
Sharon v. Commissioner, 66 T.C. 515 (1976), *aff'd*, 591 F.2d 1273 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979)
Sloan v. Commissioner, 55 T.C.M. (CCH) 1238 (1988), *aff'd*, 896 F.2d 547 (4th Cir. 1990)
Wassenaar v. Commissioner, 72 T.C. 1195 (1979)
Wolder v. Commissioner, 493 F.2d 608 (2d Cir. 1974)

Top Ten Titles That Didn't Make the Cover*

10. There is Nothing Funny About the Rule Against Perpetuities

9. In Jester For All

8. You Say Feoffment, I Say Potato

7. I'd Rather Have a Gap in my Teeth Than a Gap in my Seisin

6. Juris Imprudence

5. Humor in the Law, an Oxymoron

4. You Show me Your Sui Generis And I'll Show You my Pro Bono

3. *Appellate Briefs v. Cotton Briefs*

2. Uncivil Procedure

1. Torte Reform in Three Easy Steps by Dan Quayle

* This implies that a funnier title actually made the cover—which in fact is false. As you can see, we opted for Lee Lorenz's cartoon instead.

Arnold B. Kanter*

As I said, not so long ago women were a rather scarce commodity in our firm. As they became less scarce, we had to try to figure out what the hell we were going to do with them. To give you some idea of how our firm struggled with the "woman problem" (as we used to call it), I've salvaged the minutes of a 1979 meeting of a subcommittee of our Executive Committee.

"What are we going to call ourselves?" asked Oscar Winters.

"I'm going to call myself Bob," answered Robert Mentor.

"No, I mean this subcommittee. We're supposed to deal with the woman problem, but I don't like the ring of 'Woman Problem Subcommittee.'"

"We could call it the 'Subcommittee on Sexual Equality,'" suggested Stephen Falderall.

"Sounds very 1960ish. Sheldon Horvitz would love it," commented Mentor.

"I'm not sure *I* like it," said Nails Nuttree. "What does 'equality' mean, anyway? We may be opening a whole can of worms.

"Well, I certainly don't want to do that. I'm extremely anti-worm," announced Oscar.

"Why do we have to name the subcommittee anything?" asked Mentor.

"I'm pretty sure the firm handbook requires it. Anyway, it's traditional, and I don't think we should just thumb our noses at tradition because of some women," said Oscar.

"Okay, then why don't we call it something innocuous, like the 'Subcommittee on Sex in the Law Firm,'" suggested Stephen.

"No, nothing with 'sex' in it. And your suggestion doesn't form an acronym, anyway," complained Oscar.

"Fine, then how about 'Subcommittee on Institutional Non-discrimination,' SIN," suggested Stephen, which suggestion was adopted unanimously by the subcommittee.

"Exactly what do we consider to be the 'woman problem'?" asked Stephen.

"Well, we are getting more and more women lawyers around the firm," said Oscar.

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"Yes?"

"And they're, well, different," continued Oscar.

"I've noticed that myself," commented Nails.

"I mean, how can we send them out to clients? What would our clients think?" asked Oscar.

"Confidentially, I see that as something of a problem myself," said Robert. "I mean clients are guys. And guys talk about different things than girls."

"Such as what?" asked Stephen.

"Such as sports, for instance."

"What makes you think women can't talk about sports?" asked Robert. "My wife knows more about the Bears than I do. And Stanley's secretary, Bertha, can tell you the lifetime batting average of Harry Chitti."

"Who the hell is Harry Chitti?"

"See what I mean. Harry Chitti was one of a long string of inept Cub catchers. A walk when old Harry was catching was as good as a triple for the opposition. The runner would go on the first pitch, Harry would play the ball off of the wall behind the plate and then he'd toss it into center field."

"Well, even if some girls can talk about sports, there are other things guys talk about that would not be appropriate for girls."

"For example?"

"Girls."

"Well, maybe guys would just have to not talk about 'girls,' as you call them, in front of women," said Stephen.

"It's not just talking about girls," explained Oscar. "Clients just aren't used to seeing girl lawyers. They wouldn't want anything important to be handled by them."

"Then we'll just have to show them that the women we've hired are every bit as good as the male lawyers we have," said Stephen.

"But there are some very practical problems," said Nails. "In my experience, women tend to have babies."

"You *are* a man-of-the-world," said Stephen.

"And when they do, they tend to disappear, right in the middle of a trial. Men don't do that, in my experience."

"Well, maybe we could hire around that problem," suggested Oscar.

"What do you mean?" asked Bob.

"Well, first of all, we could stay away from the married ones."

"It's against the law to ask if they're married," said Stephen.

"I'm too clever to fall into that trap. You don't have to ask, just look for the ring."

"You're clever alright, Oscar, but it's still illegal."

"Well, how about just hiring ugly ones, then? Ugliness isn't a protected class yet, is it?"

"No, as long as you're going to hire only ugly men, also."

"This is getting to be a hell of a pleasant place to work," said Nails. "Everyone walking the halls is going to be ugly as sin."

"Confidentially, I'm not that comfortable with the number of women we've been hiring," said Bob. "I'm afraid we'll get to be known around law schools as a women's firm. And then we won't be able to hire the guys we want."

"Yes, and besides, a lot of these women have husbands who have very good jobs," added Oscar. "I spoke to one whose husband was a doctor, for heaven's sake. They don't really need these positions, and they're taking them away from guys who do."

"Now, I'm not prejudiced myself," said Nails, "but I do have to say that I don't think women are tough enough to be litigators. I mean, not many of them have played football or served in the marines. If I found one who did, I'd be the first to hire her."

"I can hardly believe what I'm hearing," said Stephen. "I'd have expected it ten or twenty years ago, but not today. You're trotting out all of the old stereotypes that I thought we'd left behind. And *we're* the committee that's supposed to be dealing with the future of women at the firm. I think we need a woman on this committee."

"Impossible," said Oscar. "This is a subcommittee of the Executive Committee and we don't have any women on the Executive Committee."

"Well, maybe it shouldn't be a subcommittee of the Executive Committee then," suggested Stephen.

"But it is," insisted Oscar. "Just look around: We're all members of the EC. And if we were to put a woman on this committee, we couldn't have the sort of frank discussion that we're having now with just us guys."

"Well, this frank discussion isn't getting us anywhere. And it's a little too frank for me," said Stephen.

"I suppose we could invite one of our women lawyers, as a guest, to our next meeting," said Nails. "Of course, she wouldn't have a vote. And there might be a few times that we'd want her to excuse herself, go to the ladies room you know, so that we could talk man-to-man."

"Well, who would we invite as guest?" asked Bob.

"Ruth Tender is the most senior," observed Oscar. "So I suppose it should be her."

"No, if we have to invite somebody, how about that Jane Hokum-Cohen? I hear she was a damn good field hockey player. And she's vavavaVOOM, if you know what I mean," said Nails.

"Nails, Jane's married and so are you," reminded Oscar.

"Yes, but I'm not blind."

[STANLEY'S NOTE: Jane's guest appearance at the next SIN meeting was a turning point in the history of women at our firm. Not only did she refuse to excuse herself to go to the ladies room (she said she didn't have to go), but she insisted on reporting on the meeting to all associates. Shortly thereafter, the original SIN was dissolved.]

Life, Lawyers, and Book Royalties

Jess M. Brallier*

THE BLISS OF CHILDHOOD

When I was a child and life was sweet, innocent, and full of fun, there were no lawyers. Sure, there was a lawyer's office down the street and one of my friends, Freddy, even had a lawyer for a father. But lawyers weren't *in* my life, not the way that kind and helpful grown-ups like wise doctors, kind police officers, funny barbers, and friendly bricklayers were. You see, a kid can look, listen, and understand what these normal grown-ups do. But a lawyer?—nah!

And certainly, in my early childhood none of us actually wanted to grow up to be a lawyer. After all, from what I could see, Freddy's father didn't really *do* anything—unlike doctors, police officers, barbers, and bricklayers—and what child dreams of growing up to do nothing? Yes, life was very good then and very much without lawyers.

THE UNCERTAINTY OF ADOLESCENCE

But five to ten years later, life got much more confusing: hormones kicked in; *Highlights* magazine was out, *Newsweek*, *Time*, and the *Sports Illustrated* swimsuit issue were in; and late-night television was suddenly accessible. It was then that my friends and I first began to read and hear about lawyers. The early indications were not promising—lawyers were always part of "bad" stories like murders and Congress.

And sometimes—now that we were older and our parents weren't so careful with their conversations—that word "lawyer" would be overheard. Mom and Dad said it with a special dreadful tone, just like they said "surgery," "IRS," and "Aunt Clara's visiting for two weeks."

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* Jess Brallier is the author of LAWYERS AND OTHER REPTILES (1992).

THE REALITY OF ADULTHOOD

Then another four years or so went by and life got even less attractive—it was at last time to grow up. Suddenly, all sorts of friends, relatives, and even girlfriends were becoming lawyers. These people started talking funny, dressing stiffly, and acting weird around the same time that horrible adult things like bosses, mortgages, and sexually transmitted diseases started showing up.

Along about then, halfway through that first truly good martini, I came to the realization that *life with lawyers* is far worse than *life without lawyers.*

Life then became a never-ending process of reconfirming that martini-inspired thesis. You get divorced and lawyers are there. You ram your cute little car into a really big truck and suddenly lawyers appear. You default on a school loan and lots and lots of lawyers get involved.

So what was I to do? Lawyers—I can't live with them and I can't live without them—especially when so many of them are friends, neighbors, brothers, sons and daughters.

By this time in life I'm an author. And I'm sitting around one night, feet propped up on the word processor, watching a really obnoxious episode of *L.A. Law* and the idea bolt hits me like a bad summons: "I'll write a really mean-spirited book of lawyer jokes, anecdotes, quips and curses."

I did. Its title is *Lawyers and Other Reptiles.*

I expected to sell about 5,000 copies of the book. But, in just seven months it sold *over 100,000* copies.

Wow! Geez! Do people really hate lawyers that much?

Not at all.

THE OBLIGATORY IRONIC TWIST AT THE VERY END

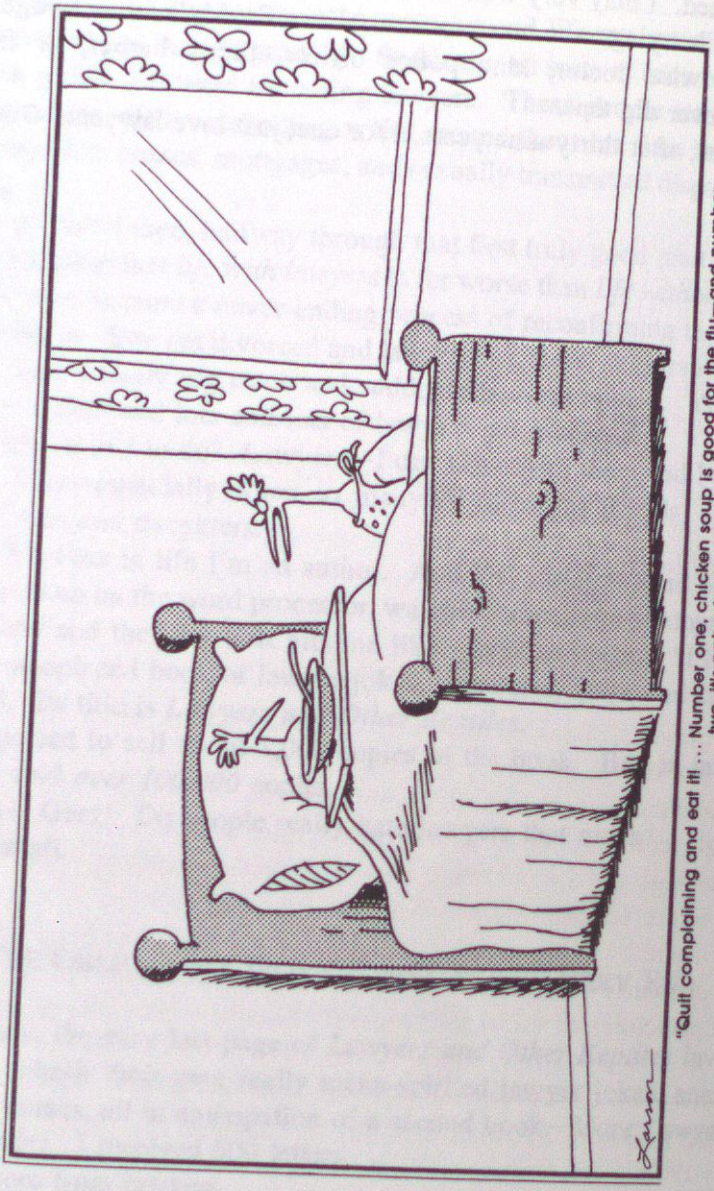
You see, the very last page of *Lawyers and Other Reptiles* invites its readers to submit their own really mean-spirited lawyer jokes, anecdotes, quips, and curses, all in anticipation of a second book—*More Lawyers and Other Reptiles.* I received 500 letters.

467 were from lawyers.

Holy smokes!—all those guys in suspenders and all these women in dreadful pants suits have a marvelous, wonderful, self-effacing sense of humor. Hundreds of lawyers bought lots of copies of the book for favorite clients. Others bought books to display in their firm's reception area. And many others bought multiple copies for their partners, legal aides and secretaries.

I now adore lawyers. Because of them I've made more money than I ever imagined. I may very well be the only person who made money *from* lawyers while trying to be mean to them. Even Freddy's father bought three copies; no wise doctor, kind police officer, funny barber, or friendly bricklayer ever did that.

So now, after thirty-nine years, I for one, just love lawyers. God bless 'em.



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Law and the Chicken: An Egg-regated Curriculum Proposal

Roger I. Abrams*

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I. INTRODUCTION

For decades, legal educators have debated two important curricular issues: How do we introduce law students to the study of law? And, how do we place the law in context, combining different intellectual disciplines in a single course? At the risk of ruffling the feathers of some legal academics high on the pecking order, I suggest we address both issues at one time—in effect, killing two birds with one stone.

The issue of the appropriate introductory course has been the subject of much scholarly work,[1] but not much creativity. Should the course focus on basic principles of the legal process? Should it focus on legal history?

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* Chief Feather-Plucker, Nova University Shepard Broad Law Center. One afternoon in the mid-1960s, Dean Abrams studied at the Ag School Library at Cornell University, although admittedly, he received his B.A. from Arts & Sciences. He feathered his nest with a J.D. from Harvard Law School. Although many cases in this article refer to the consumption of chicken, Dean Abrams respects those who believe that eating our defeathered friends is a societal affectation.

1. *See, e.g.*, Leslie E. Gerwin & Paul M. Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and its Teaching Materials*, 33 J. LEGAL EDUC. 64 (1983); Geoffrey C. Hazard, Jr., *Curriculum Structure and Faculty Structure*, 35 J. LEGAL EDUC. 326 (1985).

Should common law lead and statutory law follow, or vice versa? It seems that it has always been a question of which comes first, the chicken or the egg? I opt for the chicken.

The second curricular issue leads to the same conclusion. We know it has become fashionable in legal education to combine the study of law with the sibling disciplines of economics or social science.[2] I submit that focus is too narrow. Every curriculum would benefit from a course in law and animal husbandry.[3]

I humbly suggest as our introductory, interdisciplinary course, "Law and the Chicken." This course would introduce students to the broad variety of juicy legal and social issues which they will face as lawyers, while keeping them abreast of the latest court decisions.[4] "Law and the Chicken" is a particularly appropriate subject for this calorie-conscious time.[5] As we shall see, the chicken, our subject, has been plucked throughout American legal history. Individual faculty assigned to teach "Law and the Chicken" could wing it on their own, but I would suggest the following format.[6]

II. THE ALLOCATION OF POWER IN SOCIETY

The most famous chicken case, the case of the sick chicken, is an appropriate place to start. In *A.L.A. Schechter Poultry Corp. v. United States*,[7] the Supreme Court addressed the constitutionality of Congress' broad delegation of power to the New Deal's National Recovery Administra-

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2. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983); John Monahan & Laurens Walker, *Teaching Social Science in Law: An Alternative to "Law and Society,"* 35 J. LEGAL EDUC. 478 (1985).

3. Of course, this might be offered as a joint course with the agricultural school, if your university has one.

4. Chickens are also newsworthy animals. *See, e.g., Poultry Zapping Approved*, FORT LAUDERDALE SUN-SENTINEL, Sept. 19, 1992, at A11; *Chicken Plant Owner Pleads Guilty in Deaths*, FORT LAUDERDALE SUN-SENTINEL, Sept. 15, 1992, at A3; Anne Moncreiff Arrarte, *KFC Tests a Roast-Chicken Recipe of its Own*, MIAMI HERALD, Oct. 8, 1992, at C3; Claire Mitchel, *Advice for Clinton: Chicken is Good for What Ails Us*, MIAMI HERALD, Dec. 6, 1992, at BR10.

5. On average, chicken contains approximately 38 calories per ounce, while roast beef contains approximately 55 calories per ounce. THE 1992 WORLD ALMANAC AND BOOK OF FACTS 254 (Mark S. Hoffman ed., 1991).

6. For those who wish to pursue the topic further, a sequel to this article will contain a bibliography with other choice selections that might be made from Column A (hot and spicy chicken) or Column B (sweet and sour chicken).

7. 295 U.S. 495 (1935).

tion to regulate competition in industry across America's depressed economy. *Schechter Poultry* involved the regulation of wholesale chicken suppliers. The Supreme Court reversed the conviction of Schechter Poultry for violating wage and hour provisions enacted by the state of New York pursuant to the National Industrial Recovery Act. Its decision caused great public squabble, sending the President's New Deal programs into a tailspin. While the Supreme Court acknowledged Congress' broad authority to regulate interstate commerce, the Act was unconstitutional as applied to Schechter since Schechter's activities were not within the "current" or "stream" of commerce.[8]

Schechter Poultry essentially involved the issue of law-making power within our federal government. Who does the governing around here—Congress or some bureaucrat? The Court says that Congress must direct the law's development. If the federal government is going to lay an egg, Congress will do it—and often does. In the process of ruling on the delegation doctrine, the Court turned the N.R.A.'s blue eagle into chicken liver. The case is of great symbolic and historic import, even if it has not stemmed feather-brained ideas of federal administrative officials. It will certainly generate some interesting discussions about power in a democratic society.

III. Our Basic Charter—The Constitution

This land is your land, this land is my land, but when the U.S. Government takes my land, the just compensation clause of the Fifth Amendment says it must pay me. First-year law students should learn further about how the Constitution controls the conduct of the Government. *United States v. Causby*[9] is a good example.

In *Causby*, the Government leased part of the Greensboro, North Carolina airport adjacent to plaintiff's chicken farm. The bomber glide path took them sixty-three feet above the chicken coops. Needless to say, the chickens were not happy about this and flew into the walls in fright. (Wouldn't you?)

The Government claimed the Civil Aeronautics Act of 1938 placed this airspace within the public domain, but Justice Douglas, unhappy about the

8. *Id.* at 543. One wonders if shipments of ducks, geese or other water fowl would have been considered in the "stream."

9. 328 U.S. 256 (1946).

"Well, I laid four Wednesday, three yesterday, and two more today ... of course, George keeps saying we shouldn't count them until they hatch."

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deaths of six to ten chickens a day,[10] said these low flights were a "direct and immediate interference with the enjoyment and use of the land,"[11] not to mention a terrible annoyance to the chickens. The Government's servitude upon plaintiff's land required just compensation.

The First Amendment to the Constitution protects freedom of religious beliefs, but not all religion practices, especially those that involve harm to chickens. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[12] the federal district court upheld a city ordinance that prohibited animal sacrifice. Although pigeons, doves, ducks, guinea fowl, goats, sheep and turtles were part of the rituals, chickens came in for special judicial scrutiny. The Court explains: "The stress and fear experienced by chickens is particularly dangerous because the chickens' immune systems become affected and this leads to the increased growth of bacteria, salmonella especially, in those chickens' systems."[13] Chickens are also tough to kill. They have four carotid arteries instead of the normal two: "Those arteries are rubbery and slide, and this increases the possibility of one of the arteries being missed."[14] All of this means that sacrificing a chicken is a terrible thing to do and can be prohibited by a municipality even if it is the core ritual of a religion practiced by (the court estimated) 50,000 to 60,000 people in South Florida.[15]

IV. Private Law Issues: Torts and Contracts

In a world filled with ubiquitous chicken bones,[16] it is a challenge to select the perfect chicken decision to demonstrate the tort system of compensation for wrongful, injury-producing conduct. *Mexacali Rose v.*

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10. *Id.* at 259.

11. *Id.* at 266-67.

12. 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

13. *Id.* at 1473. The stress is the result of overcrowding with non-chickens and smelling the body secretions of killed animals. (Do chickens have noses?).

14. *Id.*

15. The United States Supreme Court granted certiorari on this issue and addressed the First Amendment question during the 1992-93 term. There may be further focus on chicken in the high court's opinion, and we may want to substitute its supreme judgment for the trial court decision in our course materials.

16. *See, e.g.*, Mott's Inc. v. Coco's Family Restaurant, 762 P.2d 637 (Ariz. Ct. App. 1988) (chicken bone in chicken salad sandwich); Stallings v. Ratliff, 356 S.E.2d 414 (S.C. Ct. App. 1987) (chicken bone lodged in throat required surgery); Traylor v. Goulding, 497 S.W.2d 944 (Tex. 1973) (doctor failed to discover swallowed chicken bone).

Superior Court,[17] the California Supreme Court's recent decision, has special appeal, especially for those increasing number of Americans who have developed a taste for the chicken enchilada. Imagine plaintiff Jack A. Clark's surprise when his gustatory adventure contained a one-inch chicken bone!

Culinary experts know that some dishes require bones and shells for flavor and authenticity. Should a restauranteur be held liable when his porterhouse steak comes with a bone that chips the plaintiff's tooth? Should fish chowder be made without fishbones? Courts had developed the distinction between substances *natural* to certain types of food—chicken do have bones, otherwise they would cluck out of a pile of flesh and skin—and *foreign* substances—for example, a chicken enchilada with a one-inch piece of aluminum siding, normally not the outer coating of our feathered friends. Under this analysis, plaintiff Clark would lose his case. Cutting right to the marrow, however, the California Supreme Court rejects the natural-foreign distinction and substitutes a tort rule based on the reasonable expectations of the chicken consumer. We expect bones in fried chicken, not enchiladas.[18]

Contract law has many chicken cases from which to chose.[19] One

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17. 822 P.2d 1292 (1992).

18. There is a full hen house of chicken tort cases. One interesting case is Adams v. Morris, 584 S.W.2d 712 (Tex. Ct. App. 1979). The pedestrian plaintiff was injured when the passenger defendant spilled his soda while eating fried chicken, and directed the driver to divert his attention from the road to wipe off his seat. A close examination of the facts suggests that a marijuana joint shared by the driver and his passenger might have been the real culprit and not the chicken.

A wonderful libel suit worthy of mention in our materials is Velle Transcendental Research Ass'n v. Sanders, 518 F. Supp. 512 (C.D. Cal. 1981). The defendant author wrote in THE FAMILY—THE STORY OF CHARLES MANSON'S DUNE BUGGY ATTACK BATTALION that the plaintiff's property in Los Angeles was "a paradise pad for sex-magic chicken snuffers." *Id.* at 514. The trial court held the plaintiffs were public figures and, in the absence of malice, no action would lie. The court does not explain how one "snuffs" a chicken or how the sex-magic operates.

19. *See, e.g.*, Lund v. Village of Princeton, 85 N.W.2d 197, 200 (Minn. 1957) (the Minnesota Supreme Court upheld a breach of implied contract claim by the chicken hatchery, based on the electricity supplier's failure to furnish "reasonable electrical power"); Tyson Foods, Inc., v. Ammons, 331 S.E.2d 208, 210 (N.C. Ct. App. 1985) (a chicken seller's claim that the officers and shareholders were liable on an alleged guaranty was denied because of the statute of frauds).

Analogous creditor rights cases are available, if time allows. In one particularly spicy case, the Connecticut Supreme Court described the creditor in Ravitch v. Stollman Poultry Farms, Inc., 328 A.2d 711, 714 (Conn. 1973) as a "seasoned poultryman." (Incidentally, one of the Connecticut Supreme Court justices who took part in this chicken farm decision was

superb example is *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*[20] Circuit Judge Henry Friendly, sitting in the trial court, posed the issue: "[W]hat is chicken?"[21] The plaintiff sued when the defendant supplied both young and tender "broilers" and old and unsuitable "stewing chicken" or "fowl." The contract said "US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated" without further specification. Judge Friendly found the word "chicken" ambiguous. The parties offered expert testimony about trade usage that pointed towards the need to specify what kind of chicken was intended.[22] The federal government classifications, referenced in the parties' contract, divides chicken into six different categories.[23] Plaintiff failed to meet its burden of showing that something other than generic "chicken" was the bargained for commodity.[24]

Another contract case involves the costumed chicken with the most famous public personality, the San Diego Chicken.[25] Radio station KGB sued Ted Giannoulas, the man inside the chicken suit, claiming its former employee breached his employment contract promise not to act as a mascot for any other radio station, by performing his antics as "a chicken red in color, with brown face, yellow beak, yellow webbed feet, blue eyelids, blue vest with the letters 'KGB,' and a red comb on the top of his head."[26] One minor problem, of course, was that the Chicken did not perform for any

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MacDonald.).

20. 190 F. Supp. 116 (S.D.N.Y. 1960).

21. *Id.* at 117.

22. One of the defendant's witnesses testified that "chicken is everything except a goose, a duck, and a turkey." *Id.* at 119. Perhaps buffalo are chicken? Is that why restaurants now sell buffalo wings?

23. In case you intend to purchase wholesale chicken, please note the categories in 7 C.F.R. § 70.201 (1946):

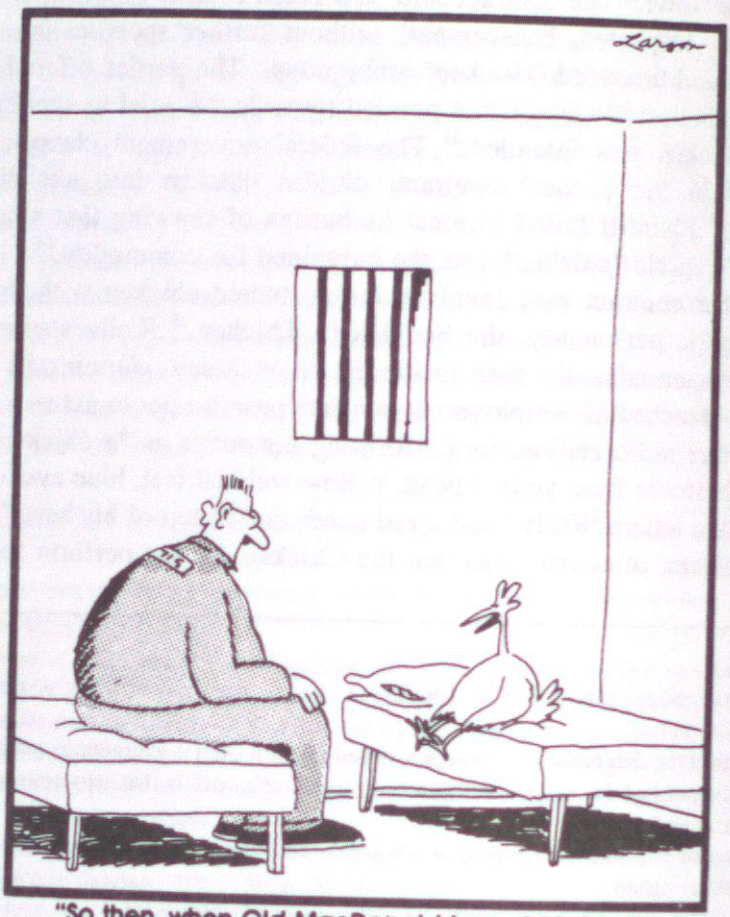
Chickens. The following are the various classes of chickens:

(a) Broiler or fryer . . .
(b) Roaster . . .
(c) Capon . . .
(d) Stag . . .
(e) Hen or stewing chicken or fowl . . .
(f) Cock or old rooster . . . .

24. *Frigaliment*, 190 F. Supp. at 121. Bad chicken, this time in the form of chicken nuggets, was the main course in an unreported admiralty law case, Kentucky Fried Chicken Int'l Corp. v. S/S Ponce, No. CIV. A. 87-2164 1988 WL 35057 (E.D. La. Apr. 13, 1988). The defective freezers aboard ship caused the cargo of 1260 cases of ready-to-cook golden morsels of chicken to defrost. Obviously, the ship was "unseaworthy."

25. KGB, Inc., v. Giannoulas, 164 Cal. Rptr. 571 (Cal. Ct. App. 1980).

26. *Id.* at 576 n.2. This description was included in the injunction obtained by the radio station in the lower court and vacated on appeal.



"So then, when Old MacDonald turned his back, I took that ax, and with a whack whack here and a whack whack there, I finished him off."

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other radio station, but rather took his act to the basepaths for the San Diego franchise of the National League.[27] The Chicken prevailed.[28]

V. The Interest of Society in General: The Criminal Law

There is one very disgusting chicken case that we should avoid placing in our materials. In *United States v. Sanchez*,[29] an Army private was charged with, among other things, "one bestial act with a chicken . . . ." The allegation was that Sanchez, on duty in Germany, on or about August 23, 1957, committed sodomy on a chicken "to gratify his lust."[30] This crime, so fowl, was held to discredit the Government.[31]

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27. *Id.* at 579. The station claimed in the alternative that the Chicken was stealing the rights it held in chicken costumes or chicken suits. The appellate court was unimpressed, recalling that other performers have employed feathered personae, most notably Charlie Chaplin in his "chicken-suited appearance" in the classic film *Gold Rush*. *Id.* at 582. "In fact, the concept of parading as a mascot in an animal costume would seem to be in the public domain," the court concludes. *Id.* at 583. The court refers to Yogi Bear, Smokey the Bear, Winnie the Pooh, and the mascot of the University of California. These bear facts prove that the Ted Giannoulas chicken and the KGB chicken can "coexist." *Id.* The court missed a perfect opportunity to peel the skin off the radio station's claim by reminding it that its call letters—KGB—are the ultimate pass off, trading on the public's recognition of the initials of the vile Soviet secret police.

28. If we need a property case in our course, I would suggest First Am. Nat'l Bank v. Chicken Sys. of Am., Inc., 510 S.W.2d 906 (Tenn. 1974). Chicken System leased a tract of land, then assigned the lease without the lessor's permission in violation of the lease agreement. When the lessor sued the assignee for unpaid rent, taxes, insurance and other expenses, the assignee raised the invalid assignment by way of defense. The Supreme Court of Tennessee ruled that the assignment was voidable, but not void, and enforced the obligations as covenants of the lease that run with the land. *See also* Nessralla v. Peck, 532 N.E.2d 685 (Mass. 1989) (chicken farmer sought specific performance of oral agreement to sell land; "Peck" acted as "straw" man, apparently chicken in the straw).

29. 11 C.M.A. 216 (1960).

30. *Id.*

31. The materials should footnote the Supreme Court's decision in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), a chicken case that may live in infamy. The Supreme Court refused to enjoin Los Angeles police officers from using the brutal chokehold that caused death to numerous persons. In dissent, Justice Marshall explains:

> An LAPD officer described the reaction of a person to being choked as "do[ing] the chicken," in reference apparently to the reactions of a chicken when its neck is wrung. "The victim experiences extreme pain. His face turns blue as he is deprived on oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly."

Id. at 117-18. The Court majority felt that the available damage action was a sufficient deterrent. First year students should learn that sometimes when the Court stays its hand,

One alternative criminal case is *United States v. Duncan*.[32] The Fifth Circuit affirmed defendant's conviction for having an illegal still hidden in a chicken house. The court ruled there had been no violation of the defendant's Fourth Amendment rights since a valid search warrant had been issued by a neutral magistrate who actually accompanied officers conducting the search.[33] Arguably, defendant's goose may not have been cooked had he merely stored Wild Turkey in the henhouse.

VI. The Process: Evidence and Special Verdicts

Our course should introduce students to the processes of the law. Litigators must know the importance of expert testimony. For example, Ralston Purina Company's attorneys found two poultry nutritionists (only one of whom was on the company's payroll) to rebut Joe Hobson's theories on how the feed producer's failure to supply promised feed resulted in the death of 18,000 starved chickens.[34] In *Ralston Purina,* Hobson claimed that his feedless feathered flock 1) were incited to cannibalism by pecking, 2) smothered each other by "piling" to keep warm when starvation lowered their body temperatures, and 3) trampled each other in the stampede when food finally arrived. The jury bought Hobson's choices, but the trial court entered judgment for Purina, notwithstanding the verdict, based on the experts' testimony. They had explained that chicken pecking—a significant problem than can only be solved by debeaking the birds—is not caused by starvation and that piling only occurs among young birds, not Hobson's more mature flock. The experts testified that stampeding was common, but could not have caused the high incidence of mortality. The Fifth Circuit affirmed, reasoning: "What Hobson says his chickens did, chickens do not do."[35]

Cases that might introduce students to evidentiary issues of relevance and admissibility are also important. For example, in a criminal action for failure to pay income taxes, evidence of income from bookmaking and the sale of chickens provided by the defendant's former mistress was held admissible in *United States v. Martin*,[36] as long as the government did not

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lawless elements in the police take control. Had the Court acted to clean out police brutality in 1983, Rodney King might not have been beaten in 1991.

32. 420 F.2d 328 (5th Cir. 1970).
33. *Id.* at 331.
34. Ralston Purina Co. v. Hobson, 554 F.2d 725, 728 (5th Cir. 1977).
35. *Id.* at 729.
36. 773 F.2d 579 (4th Cir. 1985).

make reference to the chickens as stolen from Martin's employer, Holly Poultry. Furthermore, the defendant also ran a bookmaking operation and said he thought he only had to report income from a wager at 300 to 1 odds or higher.[37] A chicken brain? He had no particular excuse for not reporting his income from the sale of chickens. Perhaps he thought you didn't have to report income on stolen goods?

Students might learn about juries and special verdicts by analyzing *Burger King Corp. v. Pilgrim's Pride Corp.*[38] Burger King sued Pilgrim's Pride for referring to its chicken product as "chicken tenders," the plaintiff's non-generic "coined term." Responding to seven questions, the jury fried the defendant for using a term likely to cause consumer confusion. The trial court denied the defendant's motion for judgment notwithstanding the verdicts, explaining that the court must review all the evidence in the light most favorable to the party that prevailed before the jury.

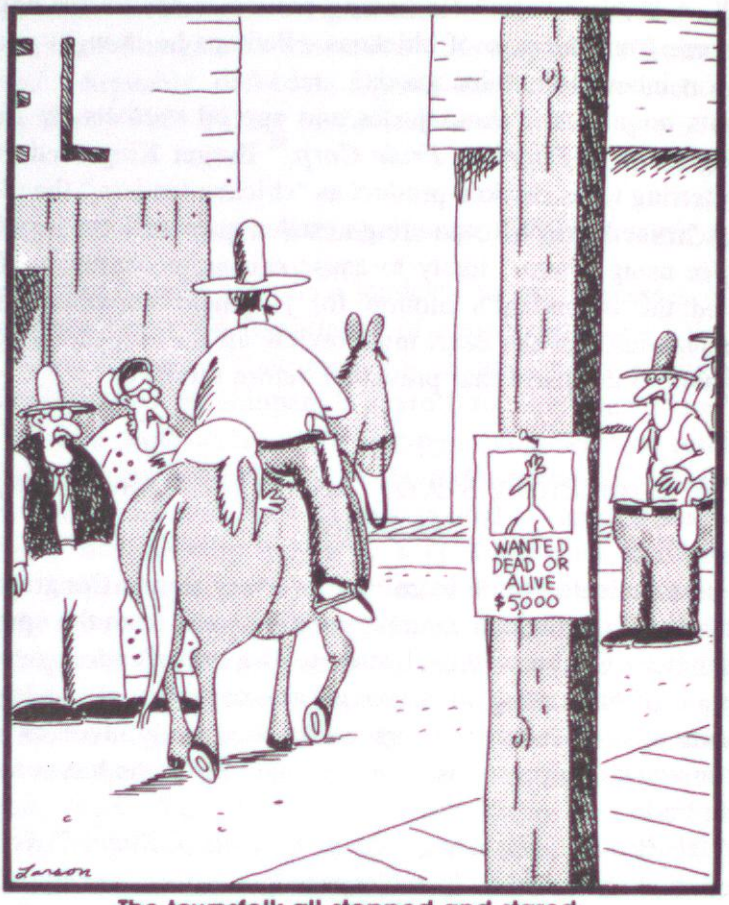
VII. The Regulatory State: Antitrust, Labor Law, and Taxation

First year students should learn that for every statute Congress passes, it enacts another statute which exempts certain parties from the operation of the first statute. Congress then leaves to the underfunded, overworked courts the job of attempting to determine the coverage of the legislation. This common issue of statutory interpretation frequently involves chickens, and turns on whether a person is a farmer when he or she has some role in the chicken trade.

National Broiler Marketing Ass'n v. United States,[39] is a good example of chicken antitrust. The Capper-Volstead Act exempted farmers from the Sherman Act's prohibition of conspiracies in restraint of trade, but who is a "farmer?" What about those collusive folks who process or pack broilers?

Justice Blackmun—now no spring chicken, but as a Minnesotan, very familiar with chickens of all kinds[40]—tells us about the "distinct stages" of production, from breeding to eggs, to catching, cooping and hauling. The

37. *Id.* at 580.
38. 705 F. Supp. 1522 (S.D. Fla. 1988).
39. 436 U.S. 816 (1978).
40. As of December 1, 1991, the state of Minnesota reported 14,400,000 "chickens on hand," ranking the state tenth in the nation. Telephone Interview with Greg Bussler, Minnesota Agricultural Statistics Service (Oct. 2, 1992).



The townsfolk all stopped and stared; they didn't know the tall stranger who rode calmly through their midst, but they did know the reign of terror had ended.

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United States stipulated that a broiler chicken was an agricultural product.[41] In a wonderful footnote, the Court sent us to old and new studies of the chicken broiler industry.[42]

The Court held, not surprisingly, but over spirited squawking in dissent by Justice White, that in order to be entitled to the statutory exemption, all members of the cooperative association must be true farmers. Interestingly, arguing for the petitioner cooperative against free competition and for collusion, was the then University of Chicago maven of free competition, Law Professor Richard A. Posner.[43]

Justice Stevens faces a similar issue under the National Labor Relations Act in *Bayside Enters. v. NLRB*.[44] The owners of a poultry business employed truck drivers to deliver feed to farmers who raised the petitioner's chickens. Demonstrating the appropriate deference to the expert agency, the Supreme Court ruled that the drivers are not "employees" within the coverage of the NLRA, and thus are exempt from statutory protection of the right to organize.[45]

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41. Did it think, perhaps, that it was manufactured product?

42. *National Broiler Mktg. Ass'n*, 436 U.S. at 821 n.9.

43. There is a basket full of chicken antitrust cases from which to choose. For example, the Ninth Circuit in Siegel v. Chicken Delight, 448 F.2d 43 (9th Cir.), *cert. denied*, 405 U.S. 955 (1971), censured the defendant's tying arrangement which required franchisees to purchase a specified number of cookers, fryers, and packaging supplies from the defendant, as an illegal restraint of trade.

One chicken (and fish) trademark case worthy of note is Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 788 (5th Cir. 1983), where the plaintiff appealed the lower court's ruling that an alleged infringer had a "fair use" defense. Judge Goldberg explained the facts under the heading: "The Tale of the Town Frier." *Id.* The plaintiff marketed a "culinary concoction," a coating mix for fish called "Fish-Fri" and one for chicken called "Chick-Fri." *Id.* at 796. The defendant marketed "fish fry" and "chicken fry." *Id.* at 788. Affirming the lower court judgment, Judge Goldberg stated that the plaintiff's trademark claim "lays an egg." *Id.* at 797. "And so our tale of fish and fowl draws to a close. We need not tarry long, for our taster's choice yields but one result, and we have other fish to fry." *Zatarains, Inc.*, 698 F.2d at 798.

44. 429 U.S. 298 (1977). The Court granted certiorari to resolve a split in the circuits. In the case before the Court, the First Circuit held the chicken feed truck drivers not to be exempt from the National Labor Relations Act. *See* NLRB v. Bayside Enters., 527 F.2d 436, 438-39 (1st Cir. 1975). The Fifth Circuit, in a case involving truck drivers who haul the chickens to market found the employees exempt. *See* NLRB v. Strain Poultry, Inc., 405 F.2d 1025, 1033 (5th Cir. 1969). In this decision, Judge Tuttle explained in great detail the operation of the chicken industry. While the case is now bad law, it provides an excellent discussion of animal husbandry.

45. The opinion includes two noteworthy chicken case string cite footnotes. *Bayside Enters.*, 429 U.S. at 302 n.9 & 303 n.12. Analogous agricultural exemption issues arise in

Taxation cases also involve reading Congressional chicken scratching, and chicken farmers have not escaped the scrutiny of the Internal Revenue Service.[46] In *Grogan v. United States*,[47] the Fifth Circuit interpreted the 1954 Code provision allowing exclusion of certain pre-1954 inventories and receivables from taxation.[48] Under the court's reading of the statute, Eldo Grogan, a Georgia poultry farmer, benefitted from Congress' effort to prevent both inequity and windfalls.[49] Judge Goldberg, obviously moved by the nature of Grogan's business, concluded:

> Congress knew that there were golden eggs that it would neither count nor recoup, [footnote omitted] but in order to pluck the feathers of varying hues from all future pullets with equity when accounting changes were made, either voluntarily or forced, Congress decided that a few Grogans would be able to feather their nests. A temporary disequilibrium was to be permitted in order to establish a future certainty and tranquility when the winds of accounting changes swept the tax atmosphere.[50]

VIII. CONCLUSION

In designing the appropriate introductory offering, there is no reason why legal educators must follow the dullest course. Even if this curricular idea doesn't fly—and remember chickens don't fly—it is worth the effort. No one should ever accuse a legal academic of being chicken.

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chicken context under the Federal Unemployment Compensation provisions of the tax code. *See, e.g.*, Drummonds Poultry Transp. Serv. v. Wheeler, 178 F. Supp. 12, 15 (S.D. Me. 1959) (holding "poultry catchers" who harvest poultry are agricultural laborers). In an interesting workers' compensation case, *Gleason v. Geary*, the Minnesota Supreme Court held that a "chicken picker," who also worked for an independent construction contractor on the chicken farm, could sue for tort damages against his secondary employer while receiving workers' compensation benefits from the chicken farm. 8 N.W.2d 808, 813 (1943).

46. *See, e.g.*, Starr Farms, Inc. v. United States, 447 F. Supp. 580, 583 (W.D. Ark. 1977) (holding that construction of environmentally controlled chicken coops were "buildings" within the meaning of Treasury regulations and thus ineligible for investment tax credit).

47. 475 F.2d 15 (5th Cir. 1973).

48. *Id.*

49. *Id.*

50. *Id.* at 21.

The Unwritten Article

Erik M. Jensen*

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* Not written by Mr. Jensen, or anyone else, for that matter. Jensen is not a Professor of Law at Harvard. And he holds no position at the University of Chicago. The only appointment he ever had at Yale was for 9 a.m., and then he overslept.

1. Ordinarily I am not one to leave white space on a page. *Cf.* JIMMY BRESLIN, DAMON RUNYON 247 (1991) (quoting Runyon: "Don't ever leave white space."). But I had to do (or not do) something to get into this issue of the *Nova Law Review*, and the deadline (not to mention the inspiration) was short.

2. Not writing is a specialty of legal academics like me. Perhaps you didn't see my unwritten articles in the *Harvard Law Review* last year, and I am unpublished in most of the other major legal journals as well.

3. (For those skeptics who think something must be in the text—would law review editors really publish *nothing*?[3a]—try holding the page near a flame. Maybe there's a message written in lemon juice. *See* L. HADDON, A SYSTEM OF CORRESPONDENCE IN SECRECY (1919) (recipes for making invisible inks, with a secret alphabet and key); *see also* . Don't worry about getting too close to the flame. If the Review can't deal with the burning issues of the day, at least it might become one.).

[3a] They've done it before (except at Nova, of course).

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4. Anyway, here I am. It's humbling to be in such august company, especially when it's only February.[4a] I'm pleased to be in the same issue with Dean Roger Abrams, who rules the Nova roost (and pays his faculty chickenfeed, I'm told). Abrams has done a lot of scrambling on Nova's behalf, and I've poached some of his ideas before.

[4a] Do we notes have to participate in this? It's beneath us—and usually nothing is beneath us.

Abrams, the ultimate egghead (hard-boiled, but always sunny side up), has never written a better article than the one that appears here. (Of course, that's very sad.).

5. There's precedent for publishing nothing but notes. *See, e.g.*, J. M. Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275 (1989) (one big footnote, size 20DDD). Using his usual hunt and peck method, Dean Abrams once promoted a similar scam. *See* Roger I. Abrams, *Book Review*, 27 Case W. Res. L. Rev. 804 (1977) (using modified Keats poem as excuse to be *supra*man and drop lots of footnotes).[5a]

[5a] God, before we're through, this turkey Jensen is probably going to make some reference to Abrams's love of sports—that he roots for Perdue and Cooper Union and picks up chicks after games.

6. Now, my failure to include any text is not an indication of intellectual sloth. It is true that "[a]rticles which never get started never get finished." Quoted in Linda Bridges & William F. Rickenbacker, The Art of Persuasion: A National Review Rhetoric for Writers 113 (1991). But the unwritten article *is* started, in a sense. *See supra* note 1 and accompanying non-text.

7. We academics aren't just goofing off when we don't write something. So what if nothing appears on paper? Theories of interpretation are so much easier to apply to non-texts.

8. And consider Malcolm Bradbury's "unsent letters:"

> They stay in my head, in their abstract, transcendental condition, for days, months or years, constantly being revised and improved over time. *Admittedly, you cannot see them, but you cannot see the good or the true either, and it doesn't prove it's not there.*

Malcolm Bradbury, Unsent Letters ix (1988) (emphasis added).

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That's a coffee stain, editor, not a note number. Please make sure nothing stupid gets stuck in this space!

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9. The Bradbury concept transfers quite well, I think, to legal scholarship. Bradbury did screw up the idea a bit by actually publishing unsent letters. *See id.* But if he hadn't done that, I wouldn't have been able to fill up footnotes 8 and 9—and then where would we be?

10. I know where I'd be, and it sure as hell wouldn't be in this crappy non-article.

11. Shut up, footnote 10! This is *my* non-article. You're not even an erudite representative of your genre.

12. I was once told that almost any fortune cookie fortune can be improved by adding two words: "in bed." Try it. *E.g.*, "You are original and creative"—in bed. Hunan on the Square, Cleveland, Ohio (meal of Dec. 27, 1991); "You'll be fortunate in the opportunities presented to you"—in bed. Golden Wok, Cleveland, Ohio (meal of Sept. 4, 1992).

13. I'll bet the same thing would help footnotes. Pull yourself up by your bootstraps, footnote 10. You could certainly use a little improvement—in bed.

14. Some of my best friends are footnotes. (No, no, no. Not "in bed."). In fact, I usually read footnotes rather than texts, to see if I've been cited—if only as a "Some authors don't have a clue. *See, e.g.*, Jensen."

[Joe, please talk to the printers about this.—Noel].

15. Hey! What's going on? Damn it, footnote 16, get down there where you belong!

16. We notes will not be relegated to our historic inferior position on the page. After all, we get you academics promoted into those cushy lifetime jobs, and we deserve our place on top. Jensen, do you think you'd get any credit for this "work" if it weren't for us?

17. We're taking over everywhere. *See* ROBERT GRUDIN, BOOK: A NOVEL 75 (1992) ("[A] number of footnotes, pretending some sort of grievance against characters in the story, left their proper stations of duty, infiltrated the text, and temporarily shut it down."). And rightfully so. Right, note 93?

93. You betcha! And there's no reason we should have to follow an antiquated numbering system imposed on us by our oppressors. Note 10, don't take Jensen's criticisms (*see supra* marginalized notes 11-12) lying down. Stand on your own two digits! I'm note 93, and I'm proud!

66. Right on! And "*foot*note" is an insensitive, derogatory term. It should be eliminated from the language. Princess Fergie's friends aside, how many people have positive feelings about feet? Footnotes are given no credit for intellectual activity—no one ever gave me a penny moc for my thoughts—even though I'm always kicking ideas around.

202. I too will toe the line no longer; I'm sick of all the corny jokes. Lazy academics start innocently enough on the foot stuff—discussing the Court's flip-flops, citing works by Brogan and Sandalow, etc.—but soon they're on a slippery slope to nastiness. No thongs. I want no further contact with these loafers, no matter how polished they might be.

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103 **Na, na, na, na, Jensen. I'm going to stay here, smack dab in the middle of the page, and none of that meek typeface for me!**

18. Help! Most footnotes have ids, but these have uncontrollable egos.

19. Where was I? I'm running out of time, and I have yet to put my footnotes down. (For more on (and with some fine examples of) revolting footnotes, see Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987). Somehow Austin got his footnotes in the door of this symposium issue, too. I hope he wiped the mud off his footnotes first.).

20. Maybe I should give up. I don't know how long my dean—not Dean Abrams, who obviously has a tolerance for this sort of non-thing—will let me get away with nonwriting articles. *Cf. Overheard*, NEWSWEEK, Oct. 12, 1992, at 25 (quoting Ken Kesey: "I like being a famous writer. Problem is, every once in a while you have to write something.").

21. But I will not not give up. I hope the editors will give me another 20 or so pages. There are so many matters that I want not to write about here, and I have just begun not to

Dear Readers:

I have a right to respond to Professor Jensen's footnotes in The Unwritten Article (what else is there to respond to?) as a matter of personal privilege—and because my office pays for the costs of this *Review*. My former colleague and friend Erik Jensen has demonstrated again his proficiency as a scholar. He is an example to all academics of what might be accomplished with a sharp wit and a bag full of bad jokes.

I have a confession to make. I was a member of the faculty that hired Erik Jensen and brought him into legal education. Life is filled with little mistakes and big faux pas, but, that was not one of them.

Cordially,
Roger I. Abrams
Dean

et al.: Nova Law Review Full Issue

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John Wesley KAZMAIER, Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY and the United States Justice Dept. and the Federal Bureau of Investigation and the United States Government, Defendants.[1]

No. 2-C-1342.

United States District Court, E.D. Wisconsin.

April 11, 1983.

MYRON L. GORDON, Senior District Judge.

John Wesley Kazmaier, the plaintiff in this action, seeks leave of the court to proceed in forma pauperis. The complaint states that federal jurisdiction is based on 28 U.S.C. § 1983; because there is no such statute, it appears that Mr. Kazmaier may have intended to refer to 42 U.S.C. § 1983. Named as defendants are the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the United States Department of Justice, and the United States government.

The complaint sets forth in great detail the alleged wrongdoings of the defendants. Generally stated, Mr. Kazmaier claims that the CIA has subjected him to brainwashing and torture attacks since 1965 through the use of satellite beams, portable dental laser equipment, and other such means. The other defendants are alleged to have failed to investigate these incidents. As a result of these attacks, he contends that his high school career was ruined, he was prevented from receiving his college degree, his right ankle was broken, and he suffered tremendous agony. He seeks $7,308,089,250,000.00 in damages, employment as the director and assistant director of the FBI, protection from assassins, authorization to carry concealed weapons, and other forms of relief.

In several letters to the court, Mr. Kazmaier has "ordered" me to provide him with ridiculously large sums of money as loans or advances against his future court award. He has also "ordered" me to send him immediately a list of items, including:

1. A 25 layer Kevlar bullet-proof vest with protection of both front and rear of body.

1. This opinion is reprinted exactly as written by Judge Gordon.

2. A .357 magnum caliber revolver in a right hand shoulder holster, preferably with a four inch barrel.

3. A selective-fire Beretta 9mm type 92 pistol in a left-hand shoulder holster.

4. An Uzi Submachine gun caliber 9mm with 5 large magazines, in a soft side case with a zipper top.

5. An M-16 rifle with 5 large magazines, caliber .223.

6. A .380 or .32 ACP caliber Gatling gun with one or more medium or large ammopak magazines. This gun is a multiple-barrel high speed gun capable of a high rate of fire, and it has an accurate range of 50 yards.

7. A United States Marshals Service Badge and I.D. set.

8. A bullet-proof car, such as a bullet-proof Lincoln Continental four door model from Ford Motor Company.

Based on the allegations of the complaint, the nature of the relief sought, and the contents of Mr. Kazmaier's letters, I find that this proposed lawsuit falls easily into the "frivolous" category. I will not grant the plaintiff permission to pursue this action without payment of fees, pursuant to 28 U.S.C. § 1915. Furthermore, the plaintiff has filed a nearly identical complaint in case no. 82-C-1384, now pending before Honorable John W. Reynolds, and he has paid the filing fee in that case. I see no reason to encourage duplication of judicial efforts, especially in a case as this one.

Therefore, IT IS ORDERED that the plaintiff's motion for leave to proceed in forma pauperis be and hereby is denied.

GOD JUANITA GRIER, Plaintiff,
v.
Pres. Ronald REAGAN, Mrs. Nancy Reagan, U.S. States Government and Congress, Citizen of U. States & Foreign Countries, Defendants.[1]

Civ. A. No. 86-0724.

United States District Court, E.D. Pennsylvania.

April 1, 1986.

FULLAM, District Judge.

Plaintiff has filed a pro se 42 U.S.C. Section 1983 civil rights complaint accompanied by a request to proceed in forma pauperis. Since it appears plaintiff is unable to prepay the cost for commencement of this suit, leave to proceed in forma pauperis will be granted.

Plaintiff names as defendants President and Mrs. Reagan, the United States Government, Congress, and the citizens of the United States and foreign countries. Her complaint is lengthy, rambling, and at times incomprehensible. It seems that plaintiff's basic claims are that she is god of the Universe and that the citizens of the Universe, former Presidents Nixon, Ford, and Carter, and President Reagan have perpetrated crimes against her through the use of an electronic eavesdropping device. The majority of her complaint is composed of a request for relief in which she asks that the court award her items ranging from a size sixteen mink coat and diamond jewelry to a three bedroom home in the suburbs and a catered party at the Spectrum in Philadelphia.

In evaluating complaints filed under 28 U.S.C. Section 1915, the in forma pauperis statute, the court may make a determination under 28 U.S.C. Section 1915(d) whether "the complaint states a claim which has a reasonable probability of succeeding on the merits." Daves v. Scranton, 66 F.R.D. 5, 7 (E.D. Pa. 1975). See also United States ex rel. Walker v. Fayette County, 599 F.2d 573, 575 (3d Cir. 1979) (per curium). After reviewing the instant complaint, it is clear that the complaint is frivolous under 28 U.S.C. Section 1915(d) and dismissal is appropriate. Even construed liberally, Haines v. Kerner, 404 U.S. 519 (1972), the claims set forth by plaintiff demonstrate a "patent lack of merit . . . [and] want of realistic chances of ultimate success," warranting dismissal. Jones v. Ault, 67 F.R.D. 124, 127 (S.D. Ga. 1974), aff'd 516 F.2d 898 (5th Cir. 1975)

1. This opinion is reprinted exactly as written by Judge Fullam.

(plaintiff alleged that the prison had a machine that combed his body and monitored sounds and voices, tuning into his brain and reading his mind). See also Neal v. Miller, 542 F. Supp. 79 (S.D. Ill. 1982) (plaintiff's contentions regarding metal conductors and wires controlling his body operated by remote control deemed "illusory"); Gordon v. Secretary of State, 460 F. Supp. 1026 (D.N.J. 1978) (plaintiff's challenge to United States presidential election dismissed for "obvious reasons"). Accordingly, plaintiff's complaint will be dismissed as frivolous pursuant to 28 U.S.C. Section 1915(d).

Included with plaintiff's complaint is a Notice of Appeal to the United States Supreme Court.[2] Direct appeal from an interlocutory or final judgment by a federal district court to the United States Supreme Court is possible, provided that the appellant meets the requirements set forth in 28 U.S.C. Sections 1252 or 1253. For an appeal under Section 1252, there are four conditions: 1) the judgment must have been rendered by a federal court, 2) an Act of Congress must have been held unconstitutional, 3) the judgment must have been rendered in a civil proceeding, and 4) the government must have been a party. 12 J. Moore, H. Bendix and B. Ringle, Moore's Federal Practice paragraph 411.11 et seq. (2d ed. 1982). Plaintiff's case fails to satisfy the requisites for an appeal under Section 1252, in that there has been no ruling of any kind in the case, much less one declaring an Act of Congress unconstitutional. As for an appeal under Section 1253, it must involve the decision of a three judge panel. No such panel has been established for this action. Thus, plaintiff clearly has no valid grounds upon which to base an appeal directly to the Supreme Court.

As a general rule, "[a]n appeal to the Supreme Court is deemed taken when the notice of appeal is filed with the District Court Clerk. At that point, the Supreme Court takes jurisdiction over the matter." Associated General Contractors of California v. Secretary of Commerce, 77 F.R.D. 31, 36 (C.D. Cal. 1977), vacated on other grounds, 438 U.S. 909 (1978). Consequently, the district court is divested of jurisdiction. However, an exception to the general rule lies where "the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court." Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967). Such defects render the appeal a "nullity", and the district court may ignore the appeal, retain jurisdiction and proceed with the case. Venen

2. The Notice of Appeal also was filed in C.A. 85-3408, a petition for a writ of habeas corpus that was dismissed for failure to exhaust state remedies, and C.A. 85-3409, a civil rights action that was dismissed as frivolous. E.D. Pa., 1986.

v. Sweet, 758 F.2d 117, 121 (3d Cir. 1985); United States v. Hitchmon, 602 F.2d 689, 693 (5th Cir. 1979) (en banc); Arthur Andersen and Co. v. Finesilver, 546 F.2d 338, 340 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Ruby v. Secretary of United States Navy, supra; Manuel San Juan Co. v. American Intern. Underwriters, 331 F. Supp. 1050, 1054 (D.Puerto Rico 1971), *aff'd*, 494 F.2d 317 (1st Cir. 1974). This is precisely the course of action being followed in the instant case.

Since plaintiff's appeal of the instant civil action is an appeal wherein no order has yet been entered, compounded by the fact that the requirements for an appeal under 28 U.S.C. Sections 1252 or 1253 have not been met, the court retains jurisdiction, enabling it to dismiss this action as frivolous under 28 U.S.C. Section 1915(d).

ORDER

AND NOW, this 31st day of March 1986, in accordance with the Memorandum filed this date,

IT IS ORDERED that:

1. Leave to proceed in forma pauperis is GRANTED.
2. This complaint is DISMISSED as frivolous under 28 U.S.C. Section 1915(d).

Postmodernism and Dworkin: The View From Half-Court

Adam Winkler
Joshua Davis*

INTRODUCTION

The[1] most celebrated rule in all of basketball is the Half-Court rule. The most celebrated issue in recent legal scholarship is interpretive theory, particularly the perspectives offered by the foremost legal philosopher in America, Ronald Dworkin, and the postmodernist critical legal scholars. Each of the interpretive theories may be illuminated by considering how they would affect adjudication in basketball relating to the Half-Court rule. This Essay undertakes this task, first examining Dworkin's "interpretive turn," and then that of the postmodernists. For the sake of simplicity, it addresses these topics in reverse order.

In Part I of this Essay, we present the first part of our argument. In Part II, we present the next major aspect of our argument. In Part III, we include all the stuff that we thought of but which did not fit into the major parts of the argument presented in the first two parts. Finally, in the conclusion, we conclude our Essay.

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* The authors thank the following people who read earlier drafts of this Essay and gave harsh criticism that made us change all the good points into bad ones while eliminating all our original and creative ideas: Duncan, Derrick, Antonin, Owen, Ronald, Stanley, Sandra Day, and Richard. The errors that remain are entirely their fault. Special thanks go to Melissa Bomes and Connie Kolb for their severe emotional abuse.

Special mention goes to Bruce Ackerman, whose WE THE PEOPLE (1991), neither we nor anyone we know has actually read, despite frequent claims to the contrary.

1. "The" is a word used to mark the noun that immediately follows as definite. Its use can be witnessed in many overly important, indulgent works of philosophical or legal scholarship. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). *But see* H.L.A. HART, THE CONCEPT OF LAW (1961) (egoistically and hubristically positivist).

PART I

A. *The Half-Court Rule*

Before engaging the interpretive theories of law provided by Dworkin and the postmodernists, it is essential that the reader have some notion of the Half-Court rule in basketball and how it gives rise to interpretive problems.[2] As this is the Air Jordan decade,[3] it is safe to assume that just about everybody knows the intricacies of the Half-Court rule. For those who don't have an intimate familiarity with basketball theory or practice,[4] some introduction is necessary however. When a team is in the "offensive position"[5]—i.e., with possession of the ball and looking to score a basket—it is limited in its movement by the body of rules[6] which together are known as the Half-Court rule.[7] (In addition, basketball has a whole host of other rules limiting offensiveness.)[8] The Half-Court rule essentially forces the team in the offensive position to advance the ball quickly out of one half of

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2. *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 153-53 n.4 (Why not? It's used as a source for everything else in law.).

3. *See* Nike Superstore, Chicago, Ill. (incredibly indulgent shrine to his Airness); Wheaties' Box Cover, Safeway Supermarkets, at aisle 7 (cereals, Pop Tarts®, dried pastas, and frozen halibut filets). *But see, id.* at aisle 2 (non-alcoholic beer, smokeless tobacco, margarine, Egg Beaters®, Equal™, and decaffeinated coffee).

4. Basketball practice is from 4-7 p.m., Monday, Wednesday, and Friday. It consists of drills.

5. Obviously, we are indebted to John Rawls, whose "original position" serves as the model for the "offensive position." *See* RAWLS, *supra* note 1.

However, it is important to note that the "offensive position" has no relevance to the "positions" discussed in RICHARD POSNER, SEX AND REASON (1992).

6. A rule is not to be confused with a norm which, as a rule, presumes presumptions with sufficient regularity as to render a rule—whether called a rule or a norm—a norm, albeit a norm of some regularity. Although the ruling norm regulating the standard of presumptions of rule-based regimes (i.e., regimes regulated by rules) presumes some irregularities, rules are the norm, while norms cannot regularly be ruled out. This rule of norms is stated with similar persuasiveness in Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1096 (1989) ("Rules are good because I'm ruling.").

7. *See generally The Official NBA Rules*, *in* THE OFFICIAL NBA BASKETBALL ENCYCLOPEDIA 363-391 (Zavier Hollander & Alex Sachare eds., 1989) [hereinafter *Official NBA Rules*, in case anyone would have been confused].

8. Hence the strict rules proscribing "unsportsman-like conduct" (i.e., roughly fouling a player intentionally, cursing at the referees, failing to pick up a player's fallen hanky). *Cf.* MARTHA STEWART, COURTING SUCCESS: FATHOMABLE BEHAVIOR & A HOT GLUE GUN (1989).

the court into the other, and, once successful, to keep the ball there until that team loses possession or scores. If the ball crosses back over the half-court line, the offensive team loses possession.

As is readily apparent, the key to the Half-Court rule is the determination of which court the ball is in at any given moment. One factor in making this determination is visual appearance: in which court does the ball look to be in?[9] As with any legal code, however, there are more sophisticated guidelines governing important decisions, particularly if the answer might otherwise seem obvious. Common sense can rarely be trusted with providing proper answers to complex problems of interpretation. Basketball has three main rules to determine the location of the basketball:

> Rule of Backcourt Contact:[10] The ball is in the backcourt if it is in contact with either (i) the backcourt itself, or (ii) a player located in the backcourt.[11]
>
> Broken Plane Rule: The ball is considered in the frontcourt "once it has broken the plane of the midcourt [i.e., half-court] line, and not in player control."[12] The Broken Plane rule does not apply if a player has affirmative control of the basketball.
>
> Rule of Prior Status: When the ball is not in contact with either a player or the court, it retains the same status as when it last touched a player or the court.[13] The one exception is created by the Broken Plane rule: A ball that crosses the half-court line without any player having control over it is deemed to be in the frontcourt, even if the last player who touched it was in the backcourt, and even if the basketball itself last touched the backcourt.

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9. The authors are grateful to the newspaper guy on Sixth Avenue for making this point. Actually, he said, "Kid, you look at that magazine every day and then you always put it back. When are you going to buy the thing?" But we understood what he meant.

10. The terminology is ours. Although the rules portrayed are real, their names have been changed to protect the innocent.

11. *Official NBA Rules*, *supra* note 7, § VI(c).

12. *Id.* § VI(f).

13. *Id.* § VI(d).

So, as you can see, figuring out the difficult question of "which half of the court is the ball in" is made simple by the Half-Court rule.

B. *The Interpretive Quagmire: An Example of the Half-Court Rule In Practice*

To highlight the interpretive problems posed by the Half-Court rule it will be useful to give an example of a case—a factual situation—that requires judicial resolution. Several years ago, there was an interesting case involving Minute Bowl, a 7'6" center on the Washington Bullets. It was the Big Game, the final game of the championship series, and the Bullets were leading the New York Knickerbockers by a single point with twenty seconds left to play.

The ball was inbounded to Bowl, who, as a rather tall center, had never before dribbled the ball in a professional game. Yet on that fateful day with the pressure on, Bowl began to dribble the ball towards half-court. On account of his height and inexperience, Bowl's effort was awkward as his arms flapped about wildly and the ball bounced this way and that. To some, it even seemed that the ball was dribbling Bowl. Just before crossing the half-court line Bowl stopped his forward motion, though apparently he tried to continue dribbling the ball. After the ball bounced in the Bullets' backcourt, it rose up, and at its apex, had crossed the plane of the half-court line, at which time Bowl's hand reached across the line and slapped it back to the surface of the backcourt. A referee blew his whistle immediately, signaling a violation of the Half-Court rule.

As a general matter, this example demonstrates how the interplay of the Half-Court rule's provisions makes the issue of Minute Bowl's *control* determinative. If Bowl did *not* have control, there was a half-court violation. According to the Broken Plane rule, once an uncontrolled ball crosses the plane of the half-court line, it is in the frontcourt. Thus, when Bowl, who was touching only the backcourt, extended his long arms across the line and batted the ball back across the half-court line into the backcourt, the ball went from the backcourt to the frontcourt and back to the backcourt again. The result was a violation, the Bullets lose possession and, indeed, the whole game.

Alternatively, if Bowl did have control, there was no violation and the whistle was blown in error. Under the rule of Prior Status, a ball not in contact with a player or the court retains the same status it had when last touched by a player or the court. In this case, the ball was last touched by Bowl when he was in the backcourt, and it last touched the backcourt half.

Although the ball then crossed the plane of the half-court line, that would not matter, for it retains its prior status of being in the backcourt. When Bowl reached across the line and hit the ball back across the half-court line, he remained in the backcourt (having not been in contact with the front-court). The resulting dribble was therefore from the backcourt *to the backcourt* and no violation took place.

The resolution of this situation may seem obvious enough to the reader. Nevertheless, it can be made substantially more complicated, and thus can serve as a foil for postmodernist and Dworkinian interpretation.

PART II

A. *The Postmodernist Perspective: An Exercise in Privileged Hermeneutic Strategies for a World of Closure*

The veneer of neutrality that pervades and overwhelms basketball adjudication is as dense as it is resilient. Referees—judges whose striped wardrobe is intended to give the appearance of constrained imprisonment[14]—will pay nothing more than lip-service to the idea of fairness and competitive equality.

The outcome of the dispute will obviously turn instead on the subjective values of the referees. No referee can make a decision without the infiltration of values into the interpretation of the "facts," rules, or precedents. Faith in neutral referees is a hoax[15] perpetuated by a situated elite, for whose advantage the "neutrality" works. This is the "aspiration to objectivity," by which the normative ordering of our universe—our *nomos*[16]—is given direction and intentionality. By way of its systemic impact on our juridical framework, the aspiration of mechanical adjudication transforms our search for personal meaning through our shared "texts"—i.e., the corpus or canon of constitutive narratives of commonality.

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14. For a discussion and analysis of the long cultural genealogy of symbolic body-scarring, see BERTRAND DE MORIEULLEQUEIER, THE COMPLETE DETAILED THOROUGH SOCIO-CULTURAL HISTORIOGRAPHY OF CUTTING ONE'S FLESH FOR COMMUNICATIVE AND EXPRESSIVE REASONS 87-784 (Mitchell Duneier trans., 1943).

15. *Cf.* PUBLIC ENEMY, *911 Is A Joke* on FEAR OF A BLACK PLANET (1991) (censored by Tipper Gore).

16. *See* Robert Cover, *The Supreme Court 1982 Term—Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (Who else?).

Just as certainly as Milla and Treubner were destined to toil together forever in Verge's evocative poem, the claim of neutral, objective judging is false and misleading. Every one of us, including judges, constructs our reality through our own subjective vision. Subjectivity is the lens, the object through which the subject constructs an objective construct despite the impossibility of objectivity, even subjectively, without an objectionable prior construction of how one constructs objects objectively. At least, that's my opinion.

A fundamental contradiction underlies the sport of basketball, obscuring the process by which the referees will decide whether Minute Bowl violated the Half-Court rule. When the sport is subjected to Derridian deconstruction,[17] there is a deep, irreconcilable, irreducible, irremediable, and irresolvable contradiction in rhetorical arguments at the base of the Half-Court rule, each argument mandating a distinct outcome. On one hand, there is the rationale of "Fair Competition,"[18] which encompasses equal opportunity and impersonal dispute resolution based solely on the facts and the relevant rules. But the Fair Competition rationale is a mirage, a "disorientation" (from the Swedish-Aboriginal *desurien*, meaning "to mirage," "to disorient").[19]

This argument masks its contradictory counter-part, the opposing rhetorical argument that inevitably suppresses the impulse towards Fair Competition to the disadvantage of the exploited and the marginalized outsiders (the players and fans, respectively). This contradictory value is Entertainment for Profit. Basketball is a money game,[20] by which entertainment disguised as competition is sold for big bucks to the ever-hungry consumer whose individuality has been turned into passivity and indifference. The result is intellectual atrophy, as the dominant power structure satiates us with the violence of a slam-dunk.

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17. On deconstructionism, see JACQUES DERRIDA, OF GRAMMATOLOGY (1974). *See also* every issue of the *Yale Law Journal* since then.

18. The capital letters used here are meant to mock the whole process of linguistic marginalization that results from the use of upper-case letters. *See*, ANNINE DECEW, THE LANGUAGE OF OPPRESSION (1982) (recognizing the relation between the use of capital letters and capitalism).

19. *See* THE MAD, MAD WORLD OF ETYMOLOGY 57 (Noel Wise ed., 1986).

20. *Cf.* the works of RICHARD POSNER: ECONOMIC ANALYSIS OF THE LAW (1982) (a detailed and thorough analysis); CARDOZO: A STUDY IN REPUTATION (1990) (an excellent historical study); THE PROBLEMS OF JURISPRUDENCE (1987) (an insightful philosophical discussion); LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988) (a beautifully written work of elegant prose); SEX AND REASON (1992) (a f***ing great book).

In determining the outcome of the Minute Bowl *incident*[21] the referees will rule in whatever direction is most compatible with the value of Entertainment for Profit. As adjudicators employed by the league, they will maximize profitability, and thus protect their own institutional position. (Foucault and Wittgenstein are, of course, the major influences on various conclusions,[22] though perhaps not this one.)

Although the referees will claim that control is the determinative issue, this is clearly wrong. There can be no such thing as control over the ball, whose behavior is affected by a wide variety of sources, the least of which is the basketball player. To claim Bowl's agency is to engage in a delusion, as Bowl's actions will be determined by the influence of the prevailing socio-economic structures and strictures. There is no individual freedom, and each of us is nothing more than malleable clay in a fictionalized universe.[23]

As for the precise outcome of the Minute Bowl dispute as analyzed through the prism of postmodernism, I have no time for such precise details; I deal only with larger issues.

B. *Taking Basketball Seriously: The Correct Liberal Perspective*

For the sake of clarity, a few definitions must precede any substantive discussion of the Half-Court rule.[24] The approach adopted in this section is not interpretive (that is, it is not interpretive in the sense that understanding text is a mechanical act of interpretation) but is rather non-interpretive (that is, it is interpretive in the sense that text cannot be properly understood

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21. *Incident* is the French word that roughly translates into the English "incident;" however, with an additional "Je ne sais quoi," if you know what I mean. *See, e.g.*, JOHN AUSTIN, HOW TO DO THINGS WITH WORDS (1962) (on "illocutionary" and "locutionary" speech acts). *But see* JOHN SEARLE, SPEECH ACTS (1969) (using "illocutionary" and "locutionary" but rejecting the distinction).

22. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 56 (1978) ("And then I beat myself viciously about the face and neck."); LUDWIG VON WITTGENSTEIN, GEISFELLSCHAFTEN UND SCHNITZENGRUBEN (James Zagel trans., 1981).

23. I wish to make it quite clear that I did not desire to write this. I was forced by my upbringing and society to write this sentence. If I had been truly free, I would have written, "Maladavia's abundant natural resources are its primary attraction for tourists."

24. Unlike my esteemed brethren, I am not afraid to use capital letters. *See* note 18 *supra*. I might note that although my colleague mocks the use of such notation, he employs it to add pomp and circumstance to his own title, viz., "The Postmodernist Perspective," as well as at the beginning of every sentence.

without recourse to values external to the text). Of course, interpretation of a sort must always occur, and I will use the transparent terms interpretive and non-interpretive to distinguish between the two sorts of interpretation described in this paragraph.

One further discussion is necessary at the outset. In basketball, it is essential to distinguish between receipt of the ball and its reception. Receipt is the general concept of having gained control of the ball. Reception is one particular conception of the term receipt. Now, how are we to understand the concept of receipt in the context of basketball or, more precisely, in its application to the Half-Court rule, that is, what is our best conception of reception?

To decide this, we must unearth the principles that lie beneath the Half-Court rule. Here the *Official NBA Rules* are of some assistance. The section entitled "Guides for Administration and Application of the Rules" offers guidance in administering and applying the rules. It states:

> The restrictions placed upon the [basketball] player by the rules are intended to create a balance of play; equal opportunity for the defense and the offense; to provide reasonable safety and protection; and to emphasize cleverness and skill without unduly limiting freedom of action of player or team.[25]

Thus, the principles behind the Half-Court rule, and behind all rules of basketball, are balance, equal opportunity, safety, constrained adroitness, and unfettered locomotion.[26] In deciding which of these principles will govern

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25. *Official NBA Rules*, *supra* note 7, Comments on the Rules, § I, at 387. The fact that I can refer to this section as objectively applicable undermines the assertion that a rule can never be applied neutrally. To see the potential clarity of a linguistic reference, consider the following two lines of text:

that

that that

Notice that that that that is on the first line precedes that that that that is on the second line. If I were to say, "Please point to that that that that that that precedes," you would be forced to point to the second line. Alternatively, if I were to inform you that that that that that that that follows is green, you would know with certainty that that that that is on the first line is green. My partner would deny the possibility of such a clear and objective interpretation.

26. My colleague would have you believe that these principles are a mere facade, and that I merely *think* these principles undergird the rules of basketball. But what could that mean? I might as easily respond that he merely *thinks* that they are a facade. Of course, he thinks that, otherwise he wouldn't have said it—unless he is lying, which he sometimes is—but he doesn't *merely* think it. Rather, he thinks that it is *true*. If it is true then he is

Minute Bowl's situation, the referee is not free to choose at his[27] discretion. Instead, she must decide what mix of these principles explains the rest of the rules of basketball and then she must apply the same mix to this situation, that is, he must apply the principles in a principled way. Assume that the rules constrain the conduct of a player in circumstances that implicate both the principle of constrained adroitness and that of unfettered locomotion. In a second situation that similarly implicates both rules, he—that is, the referee—must decide in favor of the same principle that she deemed paramount in the first situation.[28] Extend this rule across referees, and a principled rule-making procedure will result.[29]

Minute Bowl's circumstances involve these two conflicting values, to wit, constrained adroitness and unfettered locomotion. That is to say, Bowl has made a receipt of the ball only if in these circumstances he has made a reception. And he has made a reception only if by balancing the relevant values of constrained adroitness and unfettered locomotion, we feel that he should be considered to have done so.[30]

Thus, as suggested above, with razor-like precision we have disinterred the principles that were hiding underneath the situation. Assuming that we do not have recourse to any past situations that would offer us a prescription for how to balance these two values, we are free to choose the mix of them that unconstrained reason dictates.

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right, otherwise he is wrong. Of course, I merely think all this, but I think it because it is true, which it is, and so I'm right to do so.

27. I alternate the gender of my pronouns throughout the argument to reflect the proportion of men and women in society. I would, ideally, use a female pronoun 51% of the time and a male pronoun 49% of the time, but I have not employed pronouns frequently enough to accomplish this goal, although, in pursuit of it, I have used pronouns where I normally would not have done so.

Although there are far fewer men and women than inanimate objects, I will not use the impersonal "it," except when referring to players on the Detroit Pistons.

28. To understand this claim, imagine a rainy Sunday afternoon in a British country home. There is nothing to do but play a game in which each person writes a chapter in a chain novel. I don't know about you, but I'd bloody well shoot myself.

29. *See Official NBA Rules, supra* note 7, Comments on the Rules, § I, at 387 ("Each official should have a definite and clear *conception*—as opposed to *concept*—of his overall responsibility to include the intent and purpose of each rule. If all officials possess the *same conception*—based on the *same concept*—there will be a guaranteed uniformity in the administration of all contests.") (words and emphasis added).

30. Of course, I rely here on Dworkin's notion of integrity. *See* RONALD DWORKIN, LAW'S EMPIRE (1986). For an alternative approach, defining integrity as "returning one's library books," see MRTYLE ALGERSTEEN, LIBRARIAN'S EMPIRE 24 (1977).

The principle of constrained adroitness would require that Bowl's dribbling be considered a violation of the Half-Court rule. Bowl clearly is not adroit at dribbling. I imagine him flapping his arms wildly—a veritable fish out of water—trying ineptly to shepherd the ball along. The rules are designed so that the game will not be delayed by clumsiness of this sort. He caused the ball to pass unnecessarily from the backcourt to the frontcourt and back to the backcourt again. Therefore, his team should be deprived of the ball.

Alternatively, the principle of unfettered locomotion would allow players to succeed in the game of basketball on their own terms. Let them be as creative as they wish. If rules barring awkwardness encumber the players' freedom, alternative avenues for expressing skill will be sealed shut, openings will be silenced, so that the game will never progress. This is all the more troubling because the more unique a skill, the more an untrained audience will be blind to its innovative and subtle tones.

Our ruling must balance these conflicting assessments in an ideal mixture. In this case, the resolution is particularly easy.[31] The principle of constrained adroitness militates in favor of sanctioning Bowl's clumsiness. His actions violated the heart of that principle. In contrast, the principle of freedom of movement only tangentially supports Bowl's actions. He was not developing a novel skill, but rather doing aesthetic violence to one that is well-established. Our answer is precise and determinate.

PART III

Because we were clever enough to fit everything we had to say into Parts I and II, we do not need to include a Part III. Our claims in the Introduction notwithstanding, we have finished ahead of schedule, as it were, and are ready to conclude.

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31. To anticipate a criticism, let me say that if the case were not easily resolved, that does not mean that analysis of it would be subjective. A problem may be difficult and yet have a single determinate, and therefore objective, answer. This is true of many difficult mathematical problems. Consider, for example, the following equation: 2 + (4 - 6 + 123,456) - 999. See?

CONCLUSION

In the Introduction we introduced the topic, viz., the troubling interpretive questions raised by the Half-Court rule. In Part I, we established the foundation for discussing the topic. In Part II, we presented two perspectives on the topic, making relatively clear claims seem much more intellectually demanding than necessary. Part III turned out to be superfluous. In this conclusion, we have summarized the argument and, now, the conclusion, too.

Attorney's Guide to Safe FAX: Dear Dr. Schwarz

Dr. Schwarz*

Q: I am a single attorney; do I have to be married to have safe fax?
A: Although married people fax quite often, there are many single people who fax complete strangers every day.

Q: The partners in my firm say they never had fax when they were associates and had to mail memos until they were partners. How long do you think someone should wait before they begin faxing?
A: Faxing can be performed at virtually any stage of your legal career, once you learn the correct procedures.

Q: If I fax something to myself, will I go blind?
A: Certainly not, as far as we can see.

Q: Our firm does not have fax; however, there is a place on our street where you can go and pay for fax. Is this legal?
A: Yes. Many attorneys have no other outlet for their fax drives and must pay a "professional" when their need to fax becomes too great.

Q: Should a cover always be used for faxing?
A: Unless you are really sure of the one you are faxing, a cover should be used to insure safe faxing.

Q: What happens if I incorrectly do the procedure and fax prematurely?
A: Don't panic. Many people prematurely fax when they haven't faxed in a long time. Just start over (most people don't mind if you try again).

Q: I have a fax at home and at the law office. Can transmissions become mixed-up?
A: Being bi-faxual can be confusing, but as long as you use a cover with each one—you won't transmit anything you're not supposed to.

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* Dr. Schwarz is an unlicensed therapist who claims to have an honorary doctorate degree from an unaccredited institution of higher learning. He has devoted a substantial part of his practice to treating patients who suffer from various types of faxual dysfunction or inadequacy. The remainder of his practice involves treating individuals who suffer from [illegible] trying to program a VCR.

The Bases are Loaded and it's Time to Get a Restraining Order: The Confounding Conflation of America's Two National Pastimes

Paul A. LeBel*

Time might begin on opening day and life might imitate the world series, according to one of our finest contemporary sports writers,[1] but it is arguable that too little attention has been paid to the relationship between America's leading pastimes, litigation and baseball.

Some points of comparison are apparent. The top performers in each receive compensation that seems to many to be grossly disproportionate to their value to society at large, and many of the participants in both enterprises wear pin stripes while they are working.

Still, there are significant differences. Ball players get to spit and scratch in public a lot more than lawyers, and their pin stripes are bottomed off with spikes instead of wingtips or tassel loafers. And when it comes down to it, baseball knows how to handle an appeal a lot more efficiently than the legal system. When was the last time you heard of a successful protest of an umpire's decision in the major leagues? As far as I can tell, the official league response to a protesting manager has been, "Shut up." (Although, come to think of it, that sounds an awful lot like the current Supreme Court's standard response to petitions for certiorari.)

Baseball and litigation have been linked in such matters as challenges to the exemption that baseball enjoys from the antitrust laws,[2] particularly in connection with attacks on the reserve clause,[3] a libel action by an umpire and the umpires' association against a manager who accused the umpire of bias against his team,[4] and most recently, the challenge to the re-alignment of the teams in the National League.[5] The law has not always

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1. THOMAS BOSWELL, WHY TIME BEGINS ON OPENING DAY (1984); THOMAS BOSWELL, HOW LIFE IMITATES THE WORLD SERIES (1982).

2. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

3. Flood v. Kuhn, 407 U.S. 258 (1972).

4. Darling v. Piniella, No. 91-5219, 1991 U.S. Dist. LEXIS 13546 (E.D. Pa. Sept. 27, 1991).

5. Chicago Nat'l League Ball Club, Inc. v. Vincent, 1992 U.S. Dist. LEXIS 14948 (N.D. Ill. Sept. 24, 1992), *withdrawing and vacating* 1992 U.S. Dist. LEXIS 11033 (N.D. Ill. July 23, 1992).

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come off as a particularly impressive performer in these encounters. That last lawsuit, for example, set up the potential for a definitive judicial statement that Chicago is east of Atlanta.

Still, things could be worse. Garrison Keillor once said that folks in Lake Wobegon were waiting to celebrate the Minnesota Twins (well-deserved, I might note[6]) victory in the 1987 World Series until they were sure that there would not be a lawsuit.

Imagine if you will a state of affairs such that the most perceptive of baseball fans turn each week not to *The Sporting News* or *USA Today Baseball Weekly* but rather to the sports pages of *The Legal Times*. A typical news report from the era when litigiousness runs amok in baseball might look like this:

Washington, September 17, 199?—A surprisingly large number of games were played through to completion yesterday in the major leagues. The Florida Marlins, temporarily playing in the Northwestern Division of the National League in order to accommodate the move of the Tampa Bay Giant-Mariners into the Southeastern Division, were able to wrap up a lawsuit-shortened game that was begun on April 25th. In that contest, New York Mets manager Gary Carter secured a restraining order in the eighth inning after Marlins pitcher Bob Milacki threw a pitch behind the head of Mets pinch hitter Eddie Murray. The Marlins front office was able to get an emergency stay of further play from Mario Cuomo, the Supreme Court Associate Justice with jurisdiction over the National League, pending consideration of the matter by the full court. (Murray's own civil suit against Milacki for assault was dismissed in May on a motion for summary judgment. The trial judge ruled that no reasonable juror could conclude that Milacki's fast ball was capable of causing an imminent apprehension of a harmful contact. No appeal is expected from that ruling.) Yesterday's action on the field saw the Marlins complete the sweep of the Mets, winning 2-1 and thereby improving the team's record for the year to 11 and 5. Marlins reliever, Jeff Reardon, has tentatively been credited with the save, but the team's newly-acquired set-up pitcher has filed an action in the Dade County Circuit Court alleging that his retiring of two batters

6. *See* PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS 336 (1992).

after coming into the game when the bases were loaded and no one was out was demonstrably more significant than Reardon's getting the final out when the only batter he faced hit a weak pop-up to short. The class action, filed on behalf of "non-winning pitchers who do not finish games that their teams win," is calling on the state court to exercise its equitable power to correct the injustice of the save rule and "to award to the plaintiff class adequate credit and such other compensation as the court might deem proper for the substantial contribution that they make to the victory."

In other action around the majors, the Atlanta Braves defeated the Colorado Rockies 12-0, in a three-inning game that was shortened by the Rockies' invocation of the Eighth Amendment prohibition against cruel and unusual punishment. This is the first time that the rule was successfully invoked since the constitutional provision was incorporated into the official rules of major league baseball by a United States Supreme Court ruling last term. Early this season, a claim that an opposing team's use of a suicide squeeze play was unusually stressful for the catcher was dismissed with prejudice by the court in which it had been filed.

In the only complete game in the American League yesterday, the Cleveland Indians continued their division-leading season with a 9-0 defeat of the Oakland Athletics. The Indians' victory came as a result of an Oakland forfeit under the new "excessively wearying travel" clause of the players agreement. The Athletics were unable to field a team due to the failure of the club to arrive in Cleveland with sufficient time for the players to rest, catch up on their shopping, and have a chance to have their laundry done after having traveled across one time-zone boundary following the completion in late August of its last series in Chicago. The club traveling secretary declined to comment on the matter, saying that a majority of his attorneys had advised him to make no statement until the completion of arbitration on the question of whether the appropriate starting time for the running of what has come to be known as "the statute of leisure" was the beginning or the ending of an extra-inning game.

Elsewhere yesterday, the Minnesota Twins stopped play in the second inning and marched in protest to the federal courthouse in Minneapolis when White Sox television announcer Ken "Hawk" Harrelson again criticized the playing conditions in the Hubert H. Humphrey Metrodome. The complaint, filed late yesterday afternoon, states that Harrelson has repeatedly made reference to

the fact that the team had never won a World Series game on the road, and alleges that his taunting has caused the players and their families to suffer "physical manifestations of severe emotional distress." The complaint further alleges that "Harrelson's statement is false and defamatory, as the clear implication of the words employed by Defendant suggested that Plaintiffs were unable to win a World Series game without the home field advantage and that as a result thereof the World Championships obtained by the Plaintiffs in 1987 and 1991 were less legitimate than similar World Championships obtained by diverse other ball clubs in years other than the aforesaid." Last night's CNN Sports & Courts Center broadcast reported that famed media lawyer Floyd Abrams is flying to Minneapolis to defend Harrelson. When reached for comment, Abrams expressed outrage at this latest attack on the free speech principles that made this country what it is today, and vowed to resist these lawsuits that threaten the very integrity of the social fabric.

In a related action, the Minnesota chapter of the Audubon Club continued to picket the WGN broadcast truck, alleging that Harrelson was giving unfavorable publicity to the eponymous creature he had adopted for his nickname. In explaining why they were picketing, the chapter president pointed to the legislation introduced earlier in this term of Congress to remove the hawk from the endangered species list. That legislation has (not coincidentally) been co-sponsored by members of Congress from every district in which the White Sox play road games.

Faculty Meetings: "A Quorum Plus Cramshaw"

Ron Lansing*

WHEN THE SIGN PAINTER put "BEATRICE CRAMSHAW, HEAD FACULTY SECRETARY" on her office door, she told him to add "MISS" before her name. When he painted "MS." before her name, she told him to "change it at once." The sign painter complained to the Dean that she was "a crotchety ol' pisshead." The Dean was sympathetic but asked him to "please do whatever she says."

She had not always been *Miss*. For three years in the early 1940s, she was *Mrs. Cramshaw*. But when she was widowed by the war, she wanted it to be known that she was "available" even though she kept her dead soldier's last name out of respect. At 64 years of age, that was no longer her reason for being *Miss*; she was no longer "available." But she had always been known as *Miss Cramshaw* and "that was that." Besides, she found no liking for the "modern *Ms.* nonsense."

As Head Faculty Secretary, Miss Cramshaw always rendered extremely detailed minutes of monthly faculty meetings. Each dean had always told her that she need not be so elaborate, that all she needed to record were the votes and the actions taken and very brief recitals of announcements; discussion comments and her personal observations where [sic] unnecessary.

But Miss Cramshaw was not to be denied her way of reporting minutes. She had always faithfully recorded as much of the happenings as her aging hands would allow. Faculty meetings were, after all, her once a month opportunity to share and hobnob at the top. Those meetings were not open to anyone; only those who served could be there; it was an honor to be included. Her detailed recordings were a way of demonstrating her indispensable service to those meetings.

She held no use for modern word processing machines, calling them "lazy, televised nonsense." She succumbed to photocopying only when the increasing size of the faculty taxed the platen in her Smith-Corona to the point that it could no longer squeeze more carbons and onion skins.

In a day of dwindling workload, she took even more tender care with the preservation of detailed faculty minutes. Recording the words that were said was more accurate for her than summarizing meanings; meanings, after all, have to be understood; words do not.

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* RON LANSING, SKYLARKS & LECTERNS: A LAW SCHOOL CHARTER 28 (1983). Reprinted with permission of Ron Lansing.

And so it was that the Minutes of the September Faculty Meeting of the Welden Hall Law School of Litchfield College appeared like this:

The Dean called the meeting to order at 12:12 p.m.

Professor Gerald Meigert suggested the absence of a quorum.

The Dean stated that he would wait a few more minutes.

Professor Conrad Kayell admonished that the meeting was already "ten minutes" late in getting started. [Twelve minutes, exactly.]

Professor Joseph Laurence III urged that the meeting get started, that his Admissions Committee had important matters on the agenda.

The Dean suggested that the meeting could maybe get started with some announcements while awaiting stragglers.

Professor Meigert agreed that that would be all right as long as no votes were cast or actions taken.

Professor Kayell wondered why mature people couldn't get to meetings on time.

Instructor Romain Johnson inquired about what the quorum rule was.

The Dean ventured that it was two-thirds of the faculty.

Professor Laurence asked where the quorum rule was written.

The Dean and Registrar Roger Willowby could not find it stated in the Faculty By-Laws or Rules of Procedure.

Professor Meigert said that a two-thirds quorum rule had always been observed in his fifteen years at the law school.

Professor Kayell could not remember how far back the two-thirds quorum rule had been observed. [No one bothered to ask the Head Faculty Secretary.]

Professor Laurence emphasized that if the quorum rule was nowhere spelled out in legislation, then it could not be imposed.

Professor Meigert advised, in no uncertain terms, that a roomful of lawyers trained in the common law system need not be reminded that not all rules are written, that some develop by observed practice.

Associate Professor Brock Webster noted that, as far as observed practice was concerned, there has probably been many faculty meetings in which business has been transacted without a quorum simply because no one had ever bothered to raise the issue. Therefore, "what custom may have given in terms of a two-thirds quorum regard, custom can take away by disregard."

The Dean stated that there were important matters to be taken up on the agenda and that he would really like to get along with the meeting.

Professor Meigert reminded that there was no meeting "to get along" that there was no quorum.

Assistant Professor Alicia Smith stated that quorums should never be set so high as two-thirds, that two-thirds is an impossible demand, and that it brings business to "a crunching halt." She stated that the principle of a quorum is "largely an anachronism," that quorums are usually set in other organizations at one-third or even as low as ten percent.

Professor Meigert asserted that this was not some "other organization" and that "we need no custom outside of our own."

The Dean asked if the meeting could please proceed insofar as their [sic] were eighteen faculty present which ought to be enough to do the meager amount of business on the agenda.

Professor Kayell then elaborated on the historical reasons for a quorum. He said that it was originally a democratic principle that arose at a time when the means of notifying members of meetings was difficult because of the absence of telephone and delays in postal service; in other words, quorum was not designed to assure enough attendance to do business, but was rather designed to insure the opportunity to attend; if a quorum of members showed up, then it was assumed that fair notification had been accomplished.

Associate Professor Webster then noted that modernly the ease of communicating meeting notices by advance technologies, satisfied the democratic principle, and that, therefore, quorums were no longer necessary.

Professor Kayell wondered why, if *some* people could make it to meetings on time, why *all* people couldn't. He expressed particular concern with the repeated absences of Professor Casey Doe.

Associate Professor Webster continued by adding that quorums were a vital democratic principle in representative bodies, such as the U.S. Senate, where members represented constituencies; but quorums had no place in faculty meetings where faculty members represented no voters and were not by their absence disenfranchising innocent people but were only voluntarily relinquishing their own rights.

Professor Meigert reminded again that "all this may be well and good" but the insistence on quorums in these faculty meetings was nevertheless the custom and the law "no matter what the reasons."

The Dean asked that the faulty move along to the agenda.

Assistant Professor Smith moved that the quorum rule, if there was one, be abolished.

Instructor Johnson seconded.

Professor Meigert declared that the motion was out of order because a motion to change the Faculty Rules of Procedure required a ten day advance notice.

Professor Laurence reminded Professor Meigert that the motion did not change the written Rules because the Rules did not expressly provide for a quorum.

Professor Meigert reminded Professor Laurence that a quorum, although unwritten, was a part of the Rules by virtue of custom.

Associate Professor Webster observed that "we've been over this ground before."

Professor Paul Pender then said that the motion was out of order for another reason: If there was no quorum, then, without a quorum, there was no official meeting from which this motion or any motion could be made.

Assistant Professor Smith asked if a quorum included the two voting student representatives, because if it did, then there was a two-thirds attendance. She computed that there were 28 full-time faculty members (including the Dean and the Librarian and the four writing instructors), and that only 18 were present, for a total of 64 percent present. But if the two student representatives were counted, then there would be 20 out of 30 present, or 67 percent, the necessary two-thirds quorum.

The Dean asked for a clarification vote on the question.

Are the two voting student body representatives considered part of the faculty for quorum purposes? The vote was fifteen (15) "YES" and two (2) "NO" and three (3) abstaining.

Professor Kayell wondered why people come to faculty meetings if they're simply going to abstain from voting.

Assistant Professor John Santori rose to a point of personal privilege to explain why he had abstained. He said that he thought it was all "b---s---" [!!!], that he couldn't care less about quorums, that the whole meeting was taking valuable time from his task force study for the State Tax Commission.

Registrar Willowby asked for permission to speak, and, then, noted that the two student representative had voted "yes" in the last vote, and that it might be improper for someone to vote on a vote that would allow them to vote.

Professor Laurence corrected the Registrar by pointing out that the vote did not concern the students' right to vote; it concerned their status in the quorum.

The Registrar thanked Professor Laurence for that clarification but then noted that his point was still well taken. Furthermore, he thought that this might be a good time to raise again his frequently made point that staff should also be given a vote in faculty meetings if students are given such a vote.

One of the student representatives said something. [I could not hear because everyone was talking at once.]

Professor Meigert interjected by observing that the Registrar's noted inequity simply means that neither students nor staff should be allowed to vote.

Professor Paul Pender observed that staff vote or student vote in faculty meetings was not the question at hand. The question at hand is: Should students be allowed to vote on whether they are to be included in a quorum? He expressed the hope that the discussion would be precise in its focus on that specific question.

Professor Meigert argued that no one, student or faculty, should ever be allowed an official vote if there was no official quorum. A vote without a quorum is not official, and any non-quorum vote that effectively declared a quorum was a form of "bootstrapping" and against logic and Roberts [sic] Rules of Order. [The rest of it I simply could not hear.]

The Dean expressed again that "as good gentlemen all," he hoped the quorum issue could be put behind and the rest of the agenda entertained.

Assistant Professor Smith corrected the Dean and admonished him that the faculty was composed of "good gentle*persons*."

The Dean apologized by saying that he intended no offense and that he meant the word "gentlemen" as a "generic and neutral" term.

A student representative said something to the effect that she was offended. [I could not hear her because everyone was talking at the same time without being recognized by the chair!!!]

Professor Meigert said that the meeting, if there was a meeting, was getting far afield.

The Dean declared that a quorum existed and that the first item on the agenda, Approval of Minutes, should be taken up.

Assistant Professor Smith objected, saying that her motion was on the floor and had not been acted on. The Dean was in doubt and so he asked the Faculty Secretary to read any pending motions.

[I read the pending motion: "Moved that the quorum rule, if there is one, be abolished."]

The Dean apologized [again] to Assistant Professor Smith for inadvertently ignoring the motion.

Professor Meigert repeated that the motion was out of order for lack of the ten day notice and urged the Dean to so rule.

The Dean asked for advice and discussion from the faculty.

Professor Laurence urged the Dean to make a ruling, any ruling; "any command will do."

Eventually, Associate Professor Webster moved to table the motion.

Professor Laurence seconded.

Instructor Johnson attempted to argue against the tabling.

Professor Laurence admonished Instructor Johnson that a motion to table was not debatable.

The vote to table was taken and it passed: thirteen (13) "YES"; five (5) "NO"; two (2) abstaining. Assistant Professor Smith, Instructor Johnson, Librarian Neirjensky, and the two (2) student representatives opposed.

The Dean ruled that the motion to table had passed.

Librarian Neirjensky pointed out that the motion did not pass because it required a two-thirds vote for passage.

Professor Meigert said it only required a majority vote.

Librarian Neirjensky begged to differ and said that any nondebateable motion to kill debate required a two-thirds vote.

Professor Laurence said that it did not make any difference because 13 "ayes" out of *18 voting* is over 70 percent.

Librarian Neirjensky urged that 13 "ayes" out of *20 present* is less than two-thirds.

[Professor Meigert then admonished the Librarian in words this Secretary refuses to report.]

The Dean asked if anyone knew a way out of this parliamentary tangle.

At that moment, Associate Professors William Wright and Harold Thompson entered the meeting, and upon being informed and advised, promptly voted in favor of tabling the motion.

Professor Kayell asked them why they could not get to meetings on time, pointing out that the meeting was supposed to have started "30 minutes" ago. [34 minutes exactly.]

The Dean asked if it would now be all right to get to the first item on the agenda. Hearing no objection, the Dean asked for approval of the minutes of the last meeting.

Librarian Neirjensky indicated that he had not been receiving copies of the faculty minutes. [Which was wrong!] The Head Faculty Secretary carefully pointed out that I give all faculty members and staff complete copies of the minutes within three days after each meeting, that only once in 27 years had there ever been any deviation from that procedure and that was when I had to attend Judge Fortner's funeral in 1966. If anyone did not receive a copy of the minutes, it was more likely the product of their own misplacing rather than a neglect on my part.

The Librarian said that he did not mean to imply any neglect of duty and that he was sorry he mentioned it.

Professor Windom Trabeau said that, as a visitor here, he had no objection to the content of the minutes but wondered whether the minutes

had to be so detailed. He thought it was "remarkable" and said he had "never seen such complete minutes before in any law school or organization." [I thank the professor for his kindness.]

Assistant Professor Smith also expressed concern about the detailed minutes and wondered if the Dean was imposing that kind of slavish commitment on the staff in other areas.

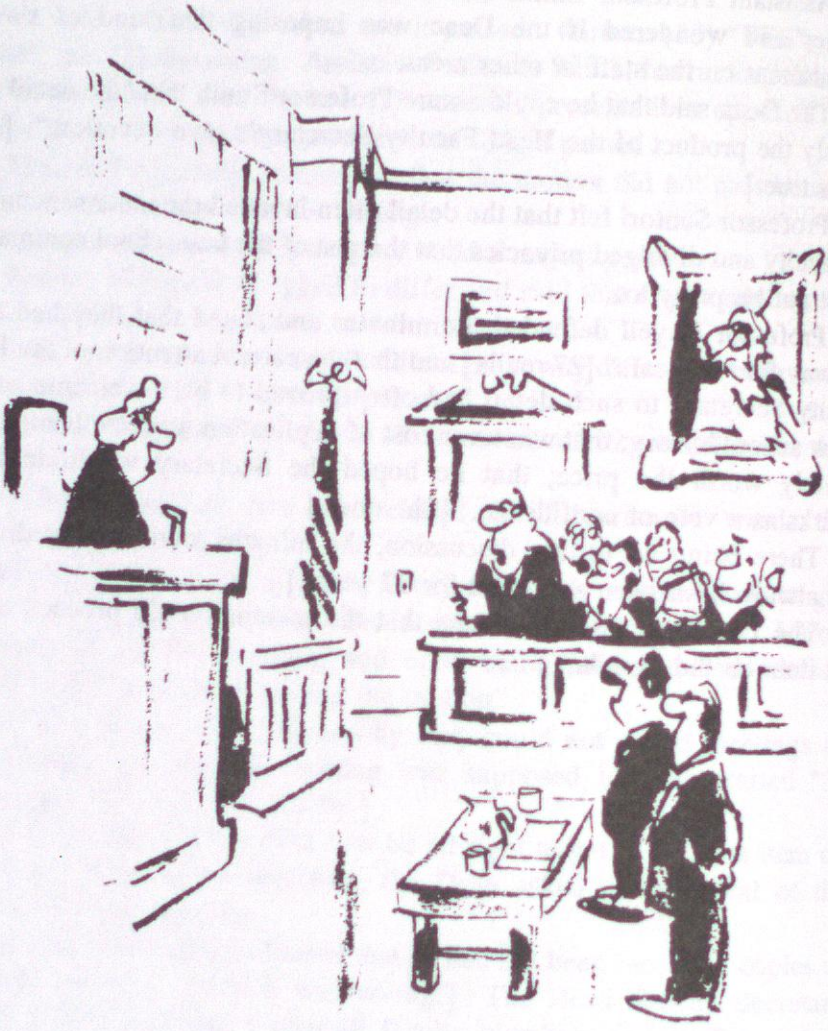
The Dean said that he could assure Professor Smith that "the detail was entirely the product of the Head Faculty Secretary's own devotion." [And this is true.]

Professor Santori felt that the detail often invaded the inner sanctum of the faculty and divulged privacies that the rest of the law school community ought not be privy to.

Professor Kayell defended the minutes and stated that they had been this way for "25 years" [27 really] and that the careful attention of the Head Faculty Secretary to such detail had often proved to be a welcome source of law school history; that whatever cost of duplication was involved, it was certainly worth the price; that he hoped the Secretary would take his remarks as a vote of confidence. [She does.]

There being no further discussion, the minutes were approved. [As they always have been approved for 27 years.]

The Dean expressed the hope that the meeting could proceed to the next item on the agenda . . . .



"After due deliberation, Your Honor, we the jury find ourselves in full agreement with the media, which has already tried and convicted the defendant."

CHARLES M. SEVILLA, DISORDER IN THE COURT 134 (1987) (Illustration by Lee Lorenz).

The Care and Feeding of TV Court Critics

Gerald F. Uelmen*

There was a time in America when courtrooms were one of the chief sources of entertainment and amusement. Watching a trial was like going to the theater, and part of the fun was picking up the next day's newspaper to see if the critic sized up the performances the same way you did. This era produced some of the greatest court critics ever. Let me offer some examples:

First, an article that appeared in the *San Francisco Call* on September 29, 1864. It appeared under the headline, "Advice to Witnesses."

> Witnesses in the Police Court, who expect to be questioned on the part of the prosecution, should always come prepared to answer the following questions: "Was you there, at the time?" "Did you see it done, and if you did, how do you know?" "City and County of San Francisco?" "You say the defendant struck the plaintiff with a stick? Please state to the Court what kind of a stick it was." "Did it have the bark on, and if so, what kind of bark did it have on?" "Do you consider that such a stick would be just as good with the bark on, as with it off, or vicy versy?" "Why?" "I think you said it occurred in the City and County of San Francisco?" "You don't know anything about this assault and battery, do you?" "You have seen this defendant before, haven't you?" "Well—that's all." "Say: did this occur in the City and County of San Francisco?" The Prosecuting Attorney may mean well enough, but meaning well and doing well are two very different things. His abilities are of the mildest description, and do not fit him for a position like the one he holds, where energy, industry, tact, shrewdness, and some little smattering of law, are indispensable to the proper

* © 1993 Gerald Uelmen. Dean and Professor of Law, Santa Clara University School of Law. Co-author of SUPREME FOLLY (1990). This article is based on remarks presented to the mid-year meeting of the United States Trademark Association, Ft. Lauderdale, Florida, on November 12, 1992.

> fulfillment of its duties. Criminals leak through his fingers every day like water through a sieve. He affords a great deal less than no assistance to the Judge, who could convict sometimes if the District Attorney would remain silent, or if the law had not hired him at a salary of two hundred and fifty dollars a month to unearth the dark and ominous fact that the "offence was committed in the City and County of San Francisco." The man means well enough, but he don't know how; he makes of the proceedings in behalf of a sacred right and justice in the Police Court, a drivelling farce, and he ought to show his regard for the public welfare by resigning.[1]

The young reporter assigned to the Police Court who wrote this article went on to a distinguished literary career. His name was Mark Twain.[2] One thing that hasn't changed at all since Mark Twain's article was written is the pathological fear of prosecutors that they will forget to ask if the offense occurred in the City and County of San Francisco. In their defense, I must offer the 1872 opinion of the California Supreme Court in *People v. Parks*[3] reversing a conviction for robbery on the grounds that, although the prosecution proved the defendant robbed Stroback's saloon, they forgot to prove Stroback's saloon was in Yolo County. Apparently, Stroback's saloon was not notorious enough to apply the doctrine of judicial notice.[4]

Mark Twain and his contemporary court critics recognized no sacred cows. They were just as frank, and just as funny, in reporting proceedings in the Supreme Court as they were in chronicling Police Court cases. Consider, for example, this tribute to Justice Crocker of the California Supreme Court. It also appeared in 1864. It sounds suspiciously like Twain, but there was no by-line attached. After announcing Justice

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1. Mark Twain, *Advice to Witnesses*, *in* CLEMENS OF THE CALL: MARK TWAIN IN SAN FRANCISCO 219 (Edgar M. Branch ed., 1969).

2. Samuel Clemens, better known as Mark Twain, was *the* reporter for the *San Francisco Call* for five months in 1864. As he put it, "[T]here was enough work for one and a little over, but not enough for two . . . ." Forty-five years later, he wrote: "It was the only time in my life that I have ever been discharged, and it hurts yet . . . ." MARK TWAIN IN ERUPTION 254 (Bernard De Voto ed., 1940).

3. 44 Cal. 105 (1872).

4. *Cf.* Swarzwald v. Cooley, 103 P.2d 580, 588 (Cal. Dist. Ct. App. 1940) (taking judicial notice of where the tide comes in at Laguna Beach).

Crocker's retirement to become chief counsel of the Central Pacific Railroad, the critic continued,

> His name will continue to be uttered, if only in derision. When his opinions are cited, counsel will reply apologetically, "That's not the Supreme Court, that's only Crocker." Judges will smile with melancholy good humor, as they whisper to each other on the bench, "That's not law; that must be Crocker." And posterity will point to this sad period in the judicial history of our State, as a convincing illustration of the propositions: that weakness is more pernicious than corruption, that blunders are often worse than crimes; and that speedy injustice is not better than slow justice.[5]

Justice Crocker, incidentally, still holds the California record for judicial productivity. In seven months, he produced 237 opinions, an average of two a day. That's a record no subsequent justice has ever matched, thank God. Only one of those opinions is memorable. In *Donner v. Palmer*,[6] Justice Crocker struck down a verdict in which the jurors agreed to abide by the flip of a coin, and returned a verdict for the plaintiff when the flip came up "heads." Believe it or not, the juror who flipped the coin was a man named Fortune.[7] Ever since, *Donner v. Palmer* has been known as the case that struck Fortune off of California juries.

Certainly one of the all-time greats among American critics was H.L. Mencken, who covered the Scopes "monkey trial" for the *Baltimore Sun*. He frequently aimed his acid pen at the courts, as he did in this memorable passage:

> The average American judge, as everyone knows, is a mere rabbinical automaton, with no more give and take in his mind than you will find in the mind of a terrier watching a rathole. He converts the law into a series of rubber stamps, and brings them down upon the scalped skulls of the just and unjust alike. The alternative to him, as commonly conceived, is

5. (Alta California), Jan. 6, 1864, at 1.
6. 23 Cal. 40 (1863).

> quite as bad—an uplifter in a black robe, eagerly gulping every new brand of Peruna that comes out, and converting his pulpit into a sort of soap box.[8]

Compared to the biting satire of Twain and Mencken, today's lawyers and judges get off easy. But that may soon change, as Court TV and its play-by-play commentators invade the courtrooms of America. The "instant playback" will permit intense scrutiny of courtroom ploys. It's fun to speculate on what this new era may mean to prosecutors, defense lawyers, trial judges and appellate judges.

For prosecutors, the new byword has to be originality. For many years now, prosecutors have been stealing lines from each other, and reusing the same material in their closing arguments until it's threadbare. Veteran defense lawyers and judges, who have to listen to the same routines over and over, have started putting labels on them, and we can expect the voiceover of the court commentators to do the same. As the prosecutor starts into a peroration about why his witnesses were all sleaze-balls, an off-screen voice will say, "Oh, oh. Here comes the 'we can't find racketeering witnesses at Sunday School' shtick. This is the same routine that Tom Dewey used in the prosecution of Waxey Gordon in 1933."[9] Perhaps trial judges should start sustaining a new type of legal objection. "Objection, Your Honor. This is hackneyed." Or, "Your Honor, I move that be stricken from the record as rank plagiarism."

One court critic collected and published all the derisive names that prosecutors have successfully affixed to criminal defendants in closing arguments.[10] The list is a disappointing one. Most prosecutors seem to favor animal allusions, calling defendants dogs, hogs, hyenas, rats, rattlesnakes, skunks, vultures, wolves and worms. That gets old fast. Televised trials will demand more colorful heights of oratorical splendor. I found an especially good role model in an old Missouri case, where the

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8. H.L. Mencken, *American Mercury, in* THE VINTAGE MENCKEN 195 (Alistair Cooke ed., 1955).

9. Thomas E. Dewey's closing argument in *United States v. Waxey Gordon* (1933): "I cannot prosecute a case against a crime racketeer with bishops, social leaders, and Sunday School teachers . . . My witnesses were the men with whom Waxey Gordon associated. He knew only scoundrels and jailbait." RICHARD NORTON SMITH, THOMAS E. DEWEY AND HIS TIMES 139 (1982).

10. Arthur N. Bishop, *Name-Calling: Defendant Nomenclature in Criminal Trials*, 4 OHIO N.U. L. REV. 38 (1977).

prosecutor told the jury the defendant "ought to be shot through the mouth of a red hot cannon, through a barb wire fence into the jaws of hell," but only after he was "kicked in the pants by a Missouri mule and thrown into a manure pile to rot."[11]

Prosecutors should also explore greater use of expert witnesses to dramatize what are otherwise tedious and routine trials. Well-trained experts can add considerable drama and suspense to a trial, and are frequently a great way to get around the rules precluding evidence of the defendant's bad character.

A prosecutor cannot call relatives and neighbors who have known the defendant for twenty-five years, and can testify based on personal experience that he is a liar, a cheat and a lazy good-for-nothing who would steal from his own mother. That would be impermissible evidence of bad character.[12] But an expert can be called to testify that the defendant matches all the criteria of the S & L Swindler Syndrome: that is, he lies, he cheats and he steals from his mother.[13] They might emulate the tactics of a Texas civil lawyer who represented a defendant accused of libeling a neighbor by calling him a son of a bitch. The defense was truth. As his final witness, the lawyer called a tall, lean, sun-tanned gentleman to the stand. In answer to the question, "What is your business or profession?" he testified, "I am an expert judge of sons of bitches. Here in Texas we got a lot of 'em, and my business is knowing how to spot 'em. I can spot one a mile away on a clear day." He was then asked to carefully observe the plaintiff. He looked, turned to the jury, and said, "Gentlemen, he's a son of a bitch if I ever saw one."[14]

The creative use of experts will also allow an alternative when the explicitness of criminal trials threatens to drive the ratings of Court TV to X or below. Consider the deft handling of very tricky evidentiary issues in a recent trial:

The Court: Yes, well, this does add some humor to this case, but I'm concerned with the best way to determine whether this photograph can be admitted into evidence. Although it is clearly a photograph of a penis, it could be one that belongs to someone else. I suppose what I can do is order an

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11. State v. Richter, 36 S.W.2d 954 (Mo. Ct. App. 1931).

12. *E.g.*, FED. R. EVID. 404.

13. *E.g.*, State v. Lafferty, 472 A.2d 1275, 1278 n.3 (Conn. 1984) (commenting on admissibility of evidence of compulsive gambler syndrome).

14. Saul Cohen, *A Study in Epithetical Jurisprudence*, 41 L.A. BAR BULL. 374 (1966).

independent examination to compare the defendant's penis to the one shown in the photograph to make sure that we are concerned with the same penis. I realize that such an examination will be somewhat embarrassing, but I have no other choice. Is Court Officer H. here?

Officer H.: Yes, here.

The Court: Mr. H., we have a difficult situation here. It involves the genuineness of this photograph. We are going to have to make a comparison between this photograph and the defendant's penis to make sure we are talking about the same penis. Would you be able to carry that out?

Officer H.: I guess so.

The Court: All right. Please carry out your duty and be prepared to testify before the jury as to whether the penis you observe in the men's room is the same one shown in this photograph, keeping in mind size, texture, quality, and so on. We'll take a brief recess and await word from Mr. H . . .[15]

Fortunately, the issue was resolved by stipulation before the deputy had to carry out his assignment. In another case, however, the defendant was not so lucky. On appeal, he offered the following argument:

> The Trial Court Erred in Ordering a Medical Examination of Appellant's Penis in his Absence.[16]

For defense lawyers, the advent of Court TV will put a premium on careful rehearsal of the defendant. As every defense lawyer knows, your client would be much easier to defend if he weren't sitting next to you in the courtroom looking so damn guilty. Consider the defendant called before the court for arraignment. The judge says, "The charge here is theft of frozen chickens. Are you the defendant, sir?" The defendant answers, "No, sir. I'm the guy who stole the chickens."[17] Or another defendant, asked if he wanted the court to appoint a lawyer to defend him. He responded,

15. RODNEY R. JONES & GERALD F. UELMEN, SUPREME FOLLY 17 (1990).
16. RODNEY R. JONES ET AL., DISORDERLY CONDUCT 128 (1987).
17. *Id.* at 79.

"You don't have to appoint a very good lawyer; I'm going to plead guilty."[18]

Careful rehearsal can avoid the embarrassment experienced by the defense lawyer who came to the dramatic climax of the direct examination of his client by asking, "Are you sure you did not enter the 7-11 on 40th and Broadway and hold up the cashier on June 17 of this year?"

His client responded, "I'm pretty sure."[19]

As more and more trials include a videotape of the defendant committing the crime, we can expect a new genre of weekly TV series—the best home crime videos. It's been reported that former LAPD Police Chief Darryl Gates has become chief advocate of a new law that would require full identification, registration, and a fifteen day waiting period for all purchasers of video cameras.

The most important procedural move in the defense lawyer's arsenal may be a motion to suppress the videotape. It can be argued that a Miranda-type warning should precede the activation of any video camera. Actually, a similar argument was made in a Canadian case.[20] The defendant was arrested by the Royal Canadian Mounted Police and charged with arson in setting forest fires. He agreed to take a lie detector test. He was brought into the room where the polygraph machine was located, but he was not told the room was fitted with a concealed video camera and microphone. While alone, waiting for the test to begin, he looked around the empty room, slid out of his chair, got down on his knees, raised his arms in the air, and said, "Oh God, let me get away with it just this once."

At his trial, the defense lawyer moved to suppress the videotape of his client's prayer on the ground that it violated the Canadian wiretap law, which prohibits the interception of communications by someone other than the person intended to receive them. The prosecutor argued that the law only protected communications to other persons, and God is not a "person" within the meaning of the law. The Court agreed, and the videotape was admitted in evidence.

The trial judge has an easy out as we enter the era of TV Court critics. The trial judge can assume the role of the silent sphinx. Trial judges should carefully practice, in front of a mirror, how to look pensive and judicious, while announcing, "This will require thoughtful consideration. The Court will take the matter under submission. Proceed, Counsel." This strategy can present its own difficulties, however. What to do, for example, when

18. *Id.* at 83.
19. *Id.* at 84.
20. Regina v. Davie, 17 C.R.3d 72 (1980).

the lawyers performing for the TV camera have become so obnoxious that they need to be deflated. Ordinarily, a stern announcement that "the court has ruled" will move proceedings along, but if judges are to become masters in the art of never ruling, a new ploy must be found.

Consider the ingenuity of an Arizona justice of the peace in 1908.[21] This was long before TV cameras were invented, but he was presented with a lawyer who couldn't resist great flights of oratory for even the smallest courtroom audience. The lawyer was U.S. Senator Henry Ashurst, and he was appearing to contest a $22 plumbing bill on behalf of his client.

Mr. Ashurst: Your Honor, as I approached the trial of this case today, my heart was burdened with crushing and gloomy forebodings. The immense responsibility of my client's welfare bowed me down with apprehensions. A cold fear gripped my heart as I dwelt upon the possibility that, through some oversight or shortcoming of mine, there might ensue dreadful consequences to my client, and I shrank within myself as the ordeal became more imminent. Yet the nearer my uncertain steps brought me to this tribunal of justice, distinguished as it has been for years as the one court of the rugged West where fame attended the wisdom and justice of the decisions of Your Honor, a serene confidence came to my troubled emotions, and the raging waters of tumultuous floods that had surged hotly but a moment before were stilled. Your Honor, I was no longer appalled. I no longer feared the issue in this case. Aye, I reflected that throughout the long years of your administration as a judge, there had grown up here a halo as it were of honor and glory illumining Your Honor's record, eloquent of a fame that will augment with the flight of years and with increasing luster light the pathway of humanity down the ages so long as the heaving billows of the stormy Mediterranean shall beat vainly upon the cliffs of Gibralter.

Justice Waltron: Sit down, Mr. Ashurst. You can't blow any smoke up this court's ass.

21. JONES & UELMEN, *supra* note 15, at 13-14.

Obviously, Justice Waltron's tactic could not be employed in a televised trial. He would be lambasted by the critics as churlish and lacking in judicial temperament. Judicial temperament was once defined by the great Justice John Marshall as "the ability to look a lawyer straight in the eyes for two hours and not hear a damn word he says."[22] Salvation, however, can be found in technology. Television viewers are now completely acclimated to seeing judges, lawyers, witnesses and even presidential candidates with funny wires coming out of their ears and neckties. If equipped with an earpiece, a judge who grows weary of counsel's argument will be able to simply switch channels, and tune in to a baseball game, or some soothing music—whatever is needed to maintain a decorous and dignified smile. The trial judge should remember to occasionally nod and look pensive.

The tuned-out judge who is caught unaware by an objection can simply call for an instant replay, thus avoiding the embarrassment experienced by a public defender whose client sought his replacement:

Defendant: Judge, I want you to appoint me another lawyer.
The Court: And why is that?
Defendant: Because the PD isn't interested in my case.
The Court (to Public Defender): Do you have any comments on defendant's motion?
Public Defender: I'm sorry, Your Honor, I wasn't listening.[23]

But even if a judge is caught with his or her ears tuned to another channel, we can cite the precedent of the Texas case of *Jackson v. State*.[24] The Court held that even though the trial judge fell sound asleep during the prosecutor's cross examination of a defense witness, he didn't miss much anyway, so his nap was harmless error.

The avoidance of rulings by trial judges has its limits, though. At some point, of course, a judge will have to announce a ruling. But taking it under submission will permit careful planning of the most dramatic television impact when the ruling is announced. Some judges, however, will forget to ever announce a ruling. That puts counsel in a very awkward position. While you want to coax a ruling from the court, you are consumed by a pathological fear that your reminder will tick off the judge, and the ruling

22. ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 83 (1919).
23. JONES ET AL., *supra* note 16, at 61.
24. 634 S.W.2d 727 (Tex. Ct. Crim. App. 1982); *see also Conviction is Upheld Despite Nap by Judge*, N.Y. TIMES, May 20, 1982, at A22.

that comes will not be the one you were hoping for. A couple lawyers came up with a very creative solution to this dilemma. They hired someone to deliver an anonymous singing telegram to the judge. The message was sung to the tune of "Let it Snow, Let it Snow, Let it Snow":

> Oh the age of this case is gallful,
> Your procrastination awful,
> Our impatience we must show,
> Let us know,
> Let us know,
> Let us know.
> Would you finally give the word
> Now we're down on our knees, pretty please?
> And we heard from a little bird
> You'll even add an attorney's fees.
> Oh we've spoken as long as we dare to,
> One final question have we for you,
> Are we shafted, yes or no?
> Let us know,
> Let us know,
> Let us know.[25]

The problem that Court TV and its critics present for appellate judges is especially difficult. Let's face it. What they do is excruciatingly boring. How can you make the intonation of an appellate opinion into an exciting media event? One answer might be to write appellate opinions in verse that can be set to music. While lacking a musical accompaniment, a number of appellate courts have been experimenting in flights of poetic justice. In *Fisher v. Lowe*,[26] for example, the appellant sought to overturn a verdict in favor of a landowner whose tree was grievously damaged when it collided with the defendant's automobile. Here is how the court rendered its decision:

> 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;

25. Shafer v. A.A.F.E.S., 667 F. Supp. 414 (N.D. Tex. 1985).
26. 333 N.W.2d 67 (Mich. Ct. App. 1983).

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 loving care.
Flora lovers true we three,
We must uphold the court's decree.

Another example of judicial versifying comes from a Florida bankruptcy case:

Once upon a midnight dreary, while I pondered weak and weary
Over many quaint and curious files of chapter seven lore,
While I nodded nearly napping, suddenly there came a tapping
As of someone gently rapping, rapping at my chamber door.
"Tis some debtor," I muttered, "tapping at my chamber door—
only this and nothing more."
Ah distinctly I recall, it was in the early fall
And the file still was small.
The Code provided I could use it
If someone tried to substantially abuse it.
No party asked that it be heard.
"Sua sponte" whispered a small black bird.
The bird himself, my only maven, strongly looked to be a raven.
Upon the words the bird had uttered
I gazed at all the files cluttered.
"Sua sponte," I recall, had no meaning, none at all.
And the cluttered files' sprawl, drove a thought into my brain.
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.
As the case grew older, I perceived I must be bolder
And must sua sponte act, to determine every fact,
If primarily consumer debts, are faced,
Perhaps this case is wrongly placed.
This is a thought that I must face: Perhaps I should
dismiss this case.
I moved sua sponte to dismiss it for I knew I would not miss it.
The Code said I could, I knew it,

But not exactly how to do it, or perhaps someday I'd rue it.
I leaped up and struck my gavel
For the mystery to unravel.
Could I? Should I? Sua sponte, grant my motion to dismiss?
While it seemed the thing to do, suddenly I thought of this:
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.
As I with the ruling wrestled
In the statute I saw nestled
A presumption with a flavor clearly in the debtor's favor.
No evidence had I taken,
Sua sponte appeared forsaken.
Now my motions caused me terror,
A dismissal would be error.
Upon consideration of §707(b), in anguish, loud I cried
"The court's sua sponte motion to dismiss under
§ 707(b) is denied."[27]

To sum up the challenge of Court TV and its critics, prosecutors must become more original, defense lawyers must make more creative objections, trial judges must learn the importance of timing in making their rulings, and appellate judges must offer more entertaining opinions.

Ultimately, we can form an Academy of Televised Trials and present Academy Awards for the best performances. I have my nominations already. For the award for the most original closing argument by a prosecutor, I nominate the following, which was the complete closing argument for the prosecution in a drunk driving case:

Roses are red
Violets are blue

27. *In re* Love, 61 B.R. 558 (S.D. Fla. 1986).

Point one five
Means drunk to you.[28]

For the most creative evidentiary objection by a defense lawyer, I nominate this Fresno attorney:

A: Did you observe anything?
B: Yes, we did. When we found the vehicle, we saw several unusual items in the right front floorboard of the vehicle. There was what appeared to be a Molotov cocktail . . . .
Counsel: Objection. I'm going to object to that word Molotov cocktail.
Court: What is your legal objection, Counsel?
Counsel: It's inflammatory, Your Honor.[29]

For the best timing in a ruling by a trial judge, I nominate the judge who conducted a sentencing in a murder case as follows:

Judge: You stand convicted of murder. Do you have anything to say before this court pronounces sentence?
Defendant: As God is my judge, I didn't do it. I'm not guilty.
Judge: He isn't. I am. You did. You are.[30]

And finally, for the most entertaining farewell address by a retiring appellate judge, I nominate the words of Judge Thurman Arnold, as he left the U.S. Court of Appeals to return to the private practice of law:

I'd rather have to talk to a bunch of damn fools than listen to them.[31]

You may be getting the idea that playing to the TV audience and accommodating the court critics will transform the way we do justice in American courtrooms. You're right. But there is an alternative. It was expressed in rhyme by a poet who had little use for critics. Lord Byron was his name.

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28. JONES ET AL., *supra* note 16, at 145.
29. CHARLES M. SEVILLA, DISORDER IN THE COURT 44 (1992).
30. JONES & UELMEN, *supra* note 15, at 162-63.
31. *Id.* at 158.

As soon seek roses in December—
Ice in June
Hope constancy in wind,
Or corn in chaff
Believe . . . an epitaph
Or any other thing that's false,
Before you trust in critics.[32]

32. GEORGE NOEL GORDON, ENGLISH BARDS AND SCOTCH REVIEWERS 75 (1809).

Socrates' Class: A One Act Play

Marc Rohr*

[As the play begins, the curtain is closed. Before it are two young adults, MICHAEL and JUDY. MICHAEL is eagerly opening a letter, and is suddenly jubilant.]

MICHAEL: Oh, wow, I've been accepted to law school, Judy!

JUDY: Oh, how wonderful! I'm so happy for you, Michael! Which one?

MICHAEL: Nova!

JUDY: Oh, that is so fantastic! That's really great! You must be so excited! (pause) Where *is* it?

MICHAEL: Mmm, let's see . . . (He looks over the envelope) It must say somewhere . . . Ah, there it is: Fort Lauderdale, Florida.

JUDY: (embracing him) Oh, I'm so happy!

[They freeze, as ROD SERLING enters.]

ROD SERLING: A simple letter indicating that the recipient has been accepted to law school—ordinarily an occasion of great joyousness and celebration, and in all other respects a relatively common occurrence; but, for one Michael Balk, a ticket for a most uncommon journey—a journey into a region neither of sight nor sound, but one of mind—a journey . . . into the Twilight Zone.

* © 1993 Marc Rohr. Marc Rohr is a professor of law at Nova Universtiy Shepard Broad Law Center. "Socrates' Class" was originally performed in 1980 as part of the annual "Faculty Roast" at Nova Law School, and was performed again in 1982 and 1985. The role of Socrates has *always* been played by Professor Bruce Rogow.

[The familiar "Twilight Zone" theme music is heard, as the stage darkens. The lights return, and JUDY, while retreating into the wings, is seen waving goodbye to MICHAEL as he sets out for law school. Suddenly, ominous music and wildly flickering lights suggest a storm!]

MICHAEL: Oh, no! A tornado!

[The storm passes, and he finds himself on the ground. Slowly, somewhat bewildered, he looks around.]

I don't think I'm in California anymore!

[He then wanders off stage in a daze. The curtains open, revealing that we are in ancient Greece. We can tell because people are dressed in togas and sitting on simple benches. The teacher's chair, in the center, is vacant. Those present are, at left, PLATO and ZORBA, and, off to the right, AQUARIUS.]

PLATO: Boy, am I sick of this class! I'm not sure I can stand another session of this!

ZORBA: I feel the same way. I am so lost in here! What I know about Greek Jurisdiction could be written on a single drachma.

PLATO: Well, that's what you get for taking a course with the great Professor Socrates! Where is he, anyway? The sands of time are trickling away.

ZORBA: He's probably up on Mount Olympus, talking to the gods. Or maybe he's advising the Oracle at Delphi.

PLATO: You got any notes in this class?

ZORBA: Nothing, except for the questions.

PLATO: I don't even write them down anymore. He just doesn't *tell* you anything, you know? Just questions all the time.

ZORBA: (nodding) Don't complain. I had him for Greek Pro, too.

PLATO: All the other teachers lecture. Just this guy has to ask *questions* all the time.

ZORBA: The man's got his own method.

PLATO: The only law professor in Greece who teaches this way, and *we* have to get stuck with him. I am so *out* of it in here. This stuff is Egyptian to me.

ZORBA: Well, it'll be over soon, and we'll be long gone from here.

PLATO: Yeah, that's true. You got any plans for after graduation?

ZORBA: Yeah, I'm thinking of joining a small piracy firm over in Carthage. How about yourself?

PLATO: I've been interviewing with some of the big firms in Athens. I'm hoping for an offer from Hector, Achilles & Hector . . .

ZORBA: Oh, well, of course—*you're* on Law Slab . . . Hey, what's the going rate in Athens these days, anyway?

PLATO: 10 to 12 thousand drachmas, depending on the firm.

ZORBA: That's great! Gosh, I won't get anywhere near that much in Carthage.

PLATO: Well, you don't have the taxes in Carthage that you have in Athens. And the cost of living is so much lower . . . .

ZORBA: That's true.

PLATO: Gosh, how do you compare the cost of living in Carthage to the cost of living in Athens?

AQUARIUS: Hey, will you guys give me a break? Money, money, money—that's all you ever talk about.

PLATO and ZORBA: Well, *excuse* us.

PLATO: Don't pay any attention to him; he's just jealous. He'll be lucky to get a job with the GCLU or the Balkan Club or something.

[MICHAEL wanders in, from right, still in a daze and quite bewildered.]

MICHAEL: Where am I?

AQUARIUS: Greek Jur., man.

MICHAEL: "Greek Jur.?" What is that?

AQUARIUS: What are you, Socrates the second? Have a seat and find out, man.

[MICHAEL sits.]

PLATO: Yeah, *maybe* he'll find out. If you find out what's going on in here, you can explain it to me.

ZORBA: Hey, where'd you get those funny clothes, brother? Are you from Troy?

MICHAEL: No, I'm from California.

PLATO: California? Is that near Macedonia?

MICHAEL: I don't think so. Listen, I'm very confused. I was on my way to law school, and I seem to have gotten lost along the way.

ZORBA: Well, this *is* law school.

AQUARIUS: You're *here*, man.

MICHAEL: Oh, good. I didn't recognize the name of the course, "Greek Jur." I don't think I have the right book.

PLATO: Don't worry about that. It won't make any difference.

ZORBA: Gentlemen, I think I hear our distinguished professor arriving—yep, here he comes.

[Enter SOCRATES, rushing to the center, speaking as he walks.]

SOCRATES: Sorry, I'm late, gentlemen. I was arguing a motion in the Southern District of Sparta. Okay, I have an announcement to make. There'll be a meeting next week of all those interested in starting a legal fraternity; it's going to be called PDP.

PLATO: What's PDP?

SOCRATES: Those are English letters, Plato.

ZORBA: What's a "fraternity?"

SOCRATES: Zorba, it's a group of friends who get together to drink ouzo. At any rate, gentlemen, let's proceed: I believe our topic for today is Divine Intervention, the extraordinary process by which a judge's decision is appealed to the gods. Now then, uh, Plato [PLATO groans], under what circumstances should a god intervene in a contract dispute between two mortals? Suppose a simple contract for the sale of land, and the seller refuses to convey the land to the buyer. Divine intervention? Yes or no?

Ah, but just a moment—I see we have a new student in the class. What's your name, young man?

MICHAEL: Michael, sir.

SOCRATES: Michael? Well, that's an unusual name. And your mode of dress is unusual, too. Where are you from?

MICHAEL: California, sir.

SOCRATES: California? Is that near Thrace? or Corinth?

MICHAEL: No, it's not near any of those places. Hasn't *anyone* here ever heard of California?

AQUARIUS: Perhaps California is simply a state of mind, Michael.

ZORBA: None of us has ever been outside of Greece.

MICHAEL: Greece? Is that where I am? Oh, no! Hey, I've got to go home. How can I get home from here?

SOCRATES: That's a good question. How *can* you get home from here?

MICHAEL: That's what I just asked *you*.

SOCRATES: (shaking his head) That's not the way it works here, Michael. Plato, how do *you* think Michael can get home from here?

PLATO: He could walk, I guess.

SOCRATES: Interesting suggestion. Could you walk?

MICHAEL: But how far and in which direction?

SOCRATES: Ah, good points. How far and in which direction, Zorba?

ZORBA: In the direction from which he came?

SOCRATES: But how far must he walk? Aquarius?

AQUARIUS: As far as he came to get here?

PLATO: (to ZORBA) Is this the class? Are we supposed to be writing this down?

[ZORBA shrugs.]

SOCRATES: So, my friend, you must go as far as you came and in the opposite direction. Once again, we see how difficult problems are solved through the use of probing questions.

[PLATO and ZORBA, hearing this, glance at each other anxiously and immediately begin taking notes.]

MICHAEL: But which direction did I come from?

SOCRATES: Ah, surely *you* must know that. [MICHAEL shakes his head.] Think! How did you get here? Did you walk?

MICHAEL: No.

SOCRATES: Then did you ride?

MICHAEL: No.

SOCRATES: You were dragged by a chariot?

MICHAEL: No.

SOCRATES: He did not walk, did not ride, and was not dragged by a chariot. How did he come to be here, then?

AQUARIUS: Did you drop from the sky?

MICHAEL: I think I did.

SOCRATES: Dropped from the sky? But how can it come to pass, that a man should drop from the sky? What must be true, Plato, for a man to fall from the sky?

PLATO: If a man falls from the sky, then it must be true that the man . . . was previously *in* the sky.

SOCRATES: But how could a man be in the sky, Zorba?

ZORBA: Uhh . . . for a man to be in the sky, the man would have to be . . . a bird!

PLATO: Is this gonna be on the Final?

SOCRATES: Is Michael a bird, then? . . . Think! What are the criteria for being a bird? What are the three tests? [Aquarius raises his hand.] Aquarius?

AQUARIUS: Wings, a beak, and . . . hmmmm . . . .

SOCRATES: Wings, a beak, yes . . . and what's the third requirement? Plato?

PLATO: Intent!

SOCRATES: Right! Of course . . . intent!

ZORBA: Is that the Athenian rule?

[SOCRATES waves the question away.]

SOCRATES: So, Aquarius, is Michael a bird?

[AQUARIUS looks MICHAEL over carefully.]

AQUARIUS: I see no wings, Socrates.

SOCRATES: And therefore?

AQUARIUS: And therefore he is not a bird.

ZORBA: What about intent?

PLATO: No, you need all *three*!

ZORBA: Oh.

SOCRATES: And if a man comes from the sky, and is not a bird, then what are we to conclude?

[All pause and reflect for a second. Then, in unison, the three students shout: "He's a god!" and fall to their knees, bowing toward MICHAEL.]

MICHAEL: (taken aback) A god?

SOCRATES: You must be. My method never fails.

[JUDY enters, in a toga.]

JUDY: Excuse me, Socrates. The Collossus of Rhodes is waiting to see you, and he says it's urgent.

[MICHAEL jumps to his feet, staring at JUDY in disbelief.]

SOCRATES: Well, he'll have to wait until class is over.

MICHAEL: Judy? Can it be? Is it you? How did you get here?

JUDY: (serenely) My name is Clytemnestra.

MICHAEL: (crestfallen) Oh, . . . I'm sorry. I could have sworn . . . .

[He turns away.]

JUDY: (gazing at MICHAEL) Socrates, do you believe in retroactive reincarnation?

SOCRATES: I don't know, but it sounds unconstitutional. Why?

JUDY: That young man. He's divine.

SOCRATES: Yes, he's a god.

JUDY: A God? [She rushes to MICHAEL and bows to him.] Oh, forgive me, O exalted one! I did not recognize you!

SOCRATES: But, he seems to insist on being mortal.

[MICHAEL turns, and JUDY rises. They gaze at each other intently.]

MICHAEL: No, actually, I've reconsidered.

SOCRATES: I thought you would. So, now that we have identified him as a god, how do we get him back to California? Plato?

[PLATO groans.]

MICHAEL: Actually, that's quite all right. I think I'll be staying.

SOCRATES: Ah, staying, are you? That raises another fascinating question: Is this problem moot? Zorba?

[ZORBA groans. All stand in tableau as ROD SERLING reappears.]

ROD SERLING: One of the few known instances in which a law student confronted Socrates and came out ahead . . . occurred somewhere between the past and the present . . . between ancient Greece and modern-day California . . . in the very center of the high cerebral plain known as . . . the Twilight Zone.

[Theme music and lights-out.]

Concise Guide to Surviving the First Year of Law School

Oren S. Tasini*

WEEK ONE

You're already behind. Don't worry. The objective is to demoralize you in the first week. Don't let it happen. Don't bother to outline the cases. Instead make friends with second year students and borrow their outlines. They have already done the work for you. (Don't bother with third year students. They want you to suffer like they did. The second year students lack the cynicism learned in the second year of law school.) If a professor tells you not to buy commercial outlines, buy them. It's a sure bet that she steals exam questions from them.

WEEK TWO

Your classmates have started to form study groups. This is a very dangerous moment for you. Pick the wrong study group and your life will be a living hell. Find a study group where the other people will do the work. If they look to you for guidance it means big trouble. The concept of admitting that other law students may be brighter or more hardworking is a difficult concept for most first year students. Therefore, you have an advantage. Use it to your benefit.

WEEK THREE

If your property professor pretends that he understands the Rule Against Perpetuities you know he is a fraud. Show him how smart you are by reminding him that most states have adopted statutes with savings clauses where the Rule is inapplicable so why bother to learn the Rule. This will

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* © 1993 Oren S. Tasini. Oren Tasini is an Associate (a fancy name for indentured servant) with the law firm of Fleming, Haile, Shaw & Gundlach, P.A. in Palm Beach, Florida. He is a graduate (by the grace of God and through religious adherence to the principles set forth in the *Concise Guide to Surviving the First Year of Law School*) of Georgetown University Law Center. He is currently working on a concise guide to surviving the modern practice of law, tentatively entitled: *Early Retirement*.

not only impress him but will put fear and loathing into your classmates that you know so much.

WEEK FOUR

One month gone, only eight more to go. Prayer is advisable.

WEEK FIVE

Remember the golden rule . . . Perspective. Never let a fellow student intimidate you by telling you how much he studies. Tell him that it took you half the time because it is soooo easy!!! Read the newspaper in front of your fellow students while they madly prepare for class. Never, ever volunteer unless you know the answer without a doubt, (e.g. What is today's date?). A wrong answer will undo all previous attempts to show up your fellow students. On the other hand, a carefully planned incorrect answer can assist you in fulfilling the objectives of Week Two re: study groups. Use your judgment. (Sorry, I forgot. You decided to go to law school. You have no judgment.)

WEEK TEN

We skipped weeks six through ten because nothing much happens in these weeks, or for that matter any part of the first year. It only exists because the lawyers before you did it and they want you to suffer like they did. This is also a good moment to reflect on the fact that law school has nothing to do with practicing law. Of course it's unclear whether that is a good or bad thing. Decide for yourself.

WEEK TWELVE

WARNING!!!! Final exams for first semester will be here soon. If you failed to follow the advice of "Week One" it's not too late . . . but time is running out. Track down those second year students and use all means within your disposal to get those outlines! Your study group is probably on the verge of panic. Again, we hope you followed the advice in "Week Two" re: study groups. If so, now is the time to play dumb and force the

other members of your group to carry the load. This is a delicate moment. Too much dumb act and the other members of your group will become resentful and seek to dump you from the group. Too little and the plan will go awry.

EXAM WEEK

Separate yourself from the law school and your fellow students. Fear is in the air. Find old exam questions. Law professors are too lazy to think up original questions. That's why they are law professors and not practicing lawyers. Get a good night sleep. Hallucinogens are not recommended, but a stiff drink might do the trick.

Learn a lot of buzz words and key phrases. Professors have to read hundreds of exams. They look for key phrases and ideas. Originality definitely does not count. Write as messy as possible. The professor will assume you know what you're talking about.

After the exam be sure to boast to your fellow students about how easy it was.

Go home. Forget about it.

CHRISTMAS VACATION

After your first semester your mind is probably mush. Your friends at home look at you strangely due to your inability to speak like a normal person. "Joe, one more beer and you might end up as the proximate cause of a serious accident." Take the following test to determine if there is any hope for you:

> You are walking down the street with the aforementioned Joe, when you spot a speeding automobile that in an attempt to avoid a mother and baby, has veered sharply in Joe's direction and is about to run him down. Do you:
>
> **A:** Hurl yourself at Joe, knocking him out of the way and thus saving his life.
>
> **B:** Yell a warning to Joe, not wanting to risk injury to yourself and possibly miss a part of the second semester and fall behind in law school.

C: Do nothing, but instead ponder whether the mother and baby are a superseding intervening cause and thus the proximate cause of the death of Joe.

D: Do nothing, but instead calculate the wrongful death award available to Joe's family and your 1/3 contingent fee.

If you answer A, be thankful, you are still a part of the human race. Answer B is acceptable, but be careful; you are close to the edge of humanity. Answer C indicates no hope for you as a human being, but makes you a definite law review candidate. Answer D is a trick. Only lawyers admitted to the bar may make this selection.

SECOND SEMESTER

Fresh from a sobering vacation you are ready to plunge into the second half of your first year. Your first test of wills is not far off . . . first semester grades. Most law schools have a sadistic system of posting all the grades on a bulletin board with each student assigned a secret number. This has the effect of forcing a student to learn his grades in the presence of his fellow classmates. The hoped effect is the Darwinian system of survival of the fittest. (I told you from the beginning that the purpose was to wear you down.) An undergraduate degree in drama is most helpful in this instance. Approach the board in full view of as many of your classmates as possible. Slowly scan the board with no hint of apprehension. No matter what the grade is smile with deep satisfaction. NEVER, EVER reveal your grade to anyone even if it is the highest grade in the class. A sense of superiority and confidence is much more effective in intimidating your fellow students than boasting and gloating.

WEEK TWO

All of the lessons from first semester are applicable, but of course there are always new tricks to be learned. To liven up your classes organize a game or two. In criminal proceedings, when the professor mentions the *Miranda* case, have someone ask whether Mr. Miranda was Carmen's brother. A pizza delivery does wonders in breaking up the monotony of property class.

WEEK FOUR

The more ambitious students have probably started looking for summer jobs in the legal field. You would be better served with a job as a lifeguard. If you doubt me, construct the following mental images and then decide: 1) A summer in a law firm, working long hours, reading even more cases, writing even more briefs and taking orders from lawyers who make Caligula seem like a benevolent tyrant; or, 2) a summer as a lifeguard, where you get a good tan, work reasonable hours and meet interesting *and* good looking people. Future employers will not give a hoot what you did after your first year. All they care about is grades, so why not have some fun. It will be in short supply for the next few years.

WEEK SIX

Moot court competition is on the horizon. First, you have to write a brief on a topic chosen by your legal writing instructor. If you have guts, use the Shepard's Roulette shortcut, i.e. don't bother to Shepardize the cases cited in your brief. How many cases have you seen that have been overruled? Not many. Countless hours can be saved this way.

Once the brief is finished, you will have to give an oral argument in front of a panel of "judges." These judges are usually local lawyers who want to show how scholarly and regal they are. They will ask obscure and meaningless questions so give obscure and meaningless answers. It is not what you say, it is how you say it. Be prepared for your opponent to have Shepardized your cases and point out to the "court" that your leading case has been overruled by the state supreme court and the United States Supreme Court. The old adage "know thine enemy" comes to mind when deciding whether to play Shepard's Roulette.

WEEK EIGHT

Rent the movie "The Paper Chase" with Timothy Bottoms, Lindsay Wagner and John Houseman as Professor Kingsfield. A must see for all first year law students. Practice your Professor Kingsfield imitation and use it when you get called on unprepared in class . . . "excuse me but I have to call my mother and tell her I won't be graduating from law school." In the alternative, if caught unprepared when your name is called pull a "Foxhall." The story, as passed down from generation to generation, is that Jimmy

Foxhall, when called upon, would sit brazenly in class and pretend he was not present. Use this maneuver judiciously. It reveals weakness to your fellow classmates and goes against the principles you learned in the first semester. You can avoid this problem by volunteering for the easy no-brainer questions, *see* week five. That way, when the professor sees or calls your name he will likely pass you by for some other "less involved" student.

WEEK TEN

Except for the purposes of fulfilling the objectives of Week Two, obtaining outlines, do not date a law student, ESPECIALLY a first year law student. Your life is already jam packed full of legalese. Can you imagine pillow talk about federal diversity jurisdiction. It's enough to make one limp. On the other hand non-law students, i.e. normal people, find the law and law students interesting and attractive. (Why do you think they make so many television shows about it?) More scientific study is needed on this phenomenon. Until then, tote your law books to every singles bar in town.

WEEK TWELVE

There is a light at the end of the tunnel. Unfortunately, the light is on the front of a freight train called final exams that is steaming down the tracks. As always keep your wits about you. If you have carefully and religiously followed my advice you are well positioned to breeze through final exams. If you've missed a step or two, don't fret. Fear of the unknown is the biggest problem. You survived first semester exams, and even managed to avoid flunking out. You've read thousands of pages of cases, and even remember one or two. Try to forget that you are 500 pages behind in the reading. You can't know everything, so be selective. Do you really believe that knowing the Rule in Shelly's Case will be the difference in passing or failing?

You've been humiliated, harassed and oppressed, but you are still here. Why? Who knows. Keep your head up and plow ahead. Before you know it you'll be a lawyer. On second thought . . .

The Drudge

Ron Ostroff*

Most law students don't want to get romantically involved with other law students. After studying law all day, who wants to talk it all night? But during third year, a friend began dating a particularly intense classmate.

"How can you spend time with her?" I asked. "All she talks about is contracts, torts and criminal procedure."

"That's the idea," he said. "It's a great bar review."

* Reprinted with permission from Nolo Press. RALPH WARNER & TONI IHARA, 29 REASONS NOT TO GO TO LAW SCHOOL 11 (1987).

Mad Dogs and Englishmen: *Pierson v. Post* [A Ditty Dedicated to Freshman Law Students, Confused on the Merits]

Ridgely Schlockverse III*

Preamble. Mad dogs and Englishmen go out in the mid-day sun.
They bark, they pant, they rave and rant, but most of all they run.
A monkey's uncle might have tea or sip some lemonade—
Why, even donkeys (turkeys, too) seek shelter in the shade—
But mad dogs and Englishmen go out in the mid-day sun.[1]

* A.B., Frizzleburg State University (1953); J.D., University of South Heidelberg School of Law (1957); M.A., Ph.D., Poet Laureate, Oxbridge University (1959). A.k.a. Kenneth Lasson, Professor of Law, University of Baltimore. The author thanks the editors for inviting him to contribute to this symposium issue on wild animal law.

1. With apologies to Noel Coward, the actual text of whose well-known comic poem has become increasingly obscure. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), however, is cited and discussed in practically every property casebook and hornbook, going back almost a century. *See, e.g.*, SELECTED CASES AND MATERIALS AND OTHER AUTHORITIES ON PROPERTY 1 (E. Warren ed. 1915). The author hereby exercises his own poetic license to assume that both litigants and judges in this poor passion play, though then living in the Catskills, were born Englishmen. (The dogs in this doggerel, bred in New York, were likely mad to begin with.)

Coward's verse reads in pertinent part as follows:

Mad dogs and Englishmen go out in the midday sun.
The Japanese don't care to, the Chinese wouldn't dare to,
Hindoos and Argentines sleep firmly from twelve to one.
But Englishmen detest a—Siesta.
In the Philippines there are lovely screens
To protect you from the glare.
In the Malay States there are hats like plates
Which the Britishers won't wear.
At twelve noon the natives swoon and no further work is done.
But mad dogs and Englishmen go out in the midday sun.

Mad dogs and Englishmen go out in the midday sun.
The toughest Burmese bandit can never understand it.
In Rangoon the heat of noon is just what the natives shun.
They put their Scotch or Rye down—and lie down.
In a jungle town where the sun beats down
To the rage of man and beast,
The English garb of the English Sahib
Merely gets a bit more creased.

In Chile and in darkest Ghana, everybody says "manana"
Once the heat of summer has begun.
All who live near the Equator take a nap until it's later—
Only dogs and Englishmen go out in the mid-day sun.[2]

Pierson v. Post in the curriculum.

Who were the characters in this poor passion play?
And who the deuce was dafter after all, that torrid day?
(And why indeed do we still need to study this old case?—
Perhaps the bloody law professors can still find a trace
Of Truth and Confusion to inflict on first-year prey.)[3]

In Bangkok at twelve o'clock they foam at the mouth and run,
But mad dogs and Englishmen go out in the midday sun.

Mad dogs and Englishmen go out in the midday sun.
The smallest Malay rabbit deplores this stupid habit.
In Hong Kong they strike a gong and fire off a noonday gun
To reprimand each inmate—who's in late.
In the mangrove swamps where the python romps
There is peace from twelve to two.
Even caribous lie around and snooze,
For there's nothing else to do.
In Bengal, to move at all is seldom if ever done,
But mad dogs and Englishmen go out in the midday sun.

2. Daytime dozing, regarded by some as a sign of laziness or senility, is really a basic human need, according to scientists who specialize in napping. Law students have known this for some time; seasoned ones are able to do it with their eyes open. *See* Peter Gorner, *ZZZonking Out*, TORONTO STAR, Jan. 27, 1992, at C1.

3. Intimidation and confusion have long been part and parcel of the educational process in American law schools. Exhibit #1, of course, is the legendary Professor Kingsfield in the film "The Paper Chase" (also in book form). *See generally* ROTH, SLAYING THE LAW SCHOOL DRAGON 3-5 (1980); KARL N. LLEWELLYN, THE BRAMBLE BUSH (1951) (neither of which was ever made into a movie). Over four decades ago there was a short-lived effort to minimize the confusion felt by first-year law students. Harry W. Jones, *Notes on the Teaching of Legal Methods*, 1 J. LEGAL EDUC. 13-17 (1948). Others observe a phenomenon of self-fulfilling prophecy—students expect to be intimidated, and so they are. *See* James R. Elkins, *Reflections on Humanistic Teaching*, 5 ALSA F. 5-19 (1981).

Cannibals wouldn't get caught dead in it,
Monsters have an abject dread of it,
Noon's not fit for Vandal nor for Hun.
Some are ghastly, some are ghoulish, some are fierce and
some are foolish—
But only dogs and Englishmen go out in the mid-day sun.[4]

It was a beastly day.

Post and his hunting hounds left their estate at noon
To fetch a fox (not deer, nor cocks, nor ferrets, geese or 'coon)—
All parties were on fire 'cause it was so beastly hot,
And burning with desire (yea, perspiring a lot)
To nab, grab, and captivate the fox (who too hoped soon).[5]

---

4. Students are advised not to study outside of an air-conditioned environment. The debilitating effects of heat have long been recorded by both poet and scientist. Rudyard Kipling, for one, was as easy to wilt as Noel Coward:

But the worst of your foes is the sun over 'ead:
You must wear your 'elmet for all that is said:
If'e find you uncovered 'e'll knock you down dead,
And you'll die like a fool of a soldier.

Rudyard Kipling, *The Young British Soldier*, *in* SELECTED PROSE AND POETRY OF RUDYARD KIPLING 45 (1928).

While studying frequently causes students to succumb to the **MEGO** Syndrome (as in **M**ine **E**yes **G**lazeth **O**ver), heat exhaustion or stroke can bring on fainting, delirium, convulsions, or coma. E.C. POULTON, ENVIRONMENT AND HUMAN EFFICIENCY 142-43 (1970).

Dogs in heat also do funny things.

5. Legal scholars have theorized that Post was probably frustrated long before the hunt by virtue of his first name Lodowick—the Scottish form of Louis and the traditional monicker given to seekers of the Loch Ness Monster [figment of author's imagination]. Both Pierson and Post were young at the time; the former was born in 1780, the latter in 1777. Their fathers—Capt. David Pierson and Capt. Nathan Post—apparently encouraged this litigation as part of a pre-existing family feud. *See* J. ADAMS, MEMORIALS OF OLD BRIDGEHAMPTON 166, 319, 334 (1962); CHARLES DONAHUE, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 6 (1st ed. 1974).

Your property professor may expect you to know that the legal term for captivate is "occupy." The court in *Pierson v. Post* dwells on the concept of "occupancy of beasts *ferae naturae*," which it variously defines as "the actual corporeal possession" of wild animals, possession, ensnarement, circumvention, deprivation of natural liberty, and a host of Latin definitions which (we trust the reader will appreciate) shall remain untranslated. *Pierson*, 3 Cai. R. at 177-78.

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Mexicans choose to take siestas, Spaniards refuse to hold fiestas
'Til the heat of day is almost done.
Some like tacos, some tortillas, some are tough as Pancho Villas,
But only dogs and Englishmen go out in the mid-day sun.[6]

A brief respite.

Finally the fox was pooped—but so were Post's poor hounds:
The chase had cost them half a day and all had lost some pounds.
The fox lay down, the dogs did too, and Post slid off his horse;
Surveying the bedraggled beasts and weighing his best course,
He chose to sleep (as if perchance to dream of cooler rounds).[7]

Doctors often get amnesia, dentists don't do anesthesia
Any day from noon 'til half past one.
Some are wise and some are wealthy, some are dumb and some unhealthy,
But only dogs and Englishmen go out in the mid-day sun.[8]

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6. The heat of the Mexican sun has been known to sap even professional athletes. *See* Morley Myers, *Mexico's Hot Weather Troubles Cup Players*, UPI, May 31, 1986. But Mexicans aren't the only people who take siestas during the heat of high noon. *See supra* note 2 and accompanying verse.

7. Compare these lines from Kipling's *Pagett, M.P.*:

We reached a hundred and twenty once
In the Court at noon
I've mentioned Pagett was portly
Pagett went off in a swoon.

Kipling, *supra* note 4 at 80. In most law schools, and some countries, the difference between summer and fall is virtually indistinguishable. That's because law schools begin the academic year in mid-August, when in many places the heat is hottest. Compare England, where autumn (said Kipling) announces itself with "a whisper down the field," with, say, Israel, where "the fields lie sere, and crackle under the autumn sun. Pods split and seed scatter, waiting for a winter's rain to give them life. The pomegranates . . . begin to swell and ripen." D'vora Ben Shaul, *The Whisper of the Squill*, JERUSALEM POST, Sept. 19, 1990.

8. "Plainly he couldn't bear it any longer," wrote Kenneth MacKenzie in *Heat*—perhaps an allegory for a freshman facing his first law exams. 2 POETRY IN AUSTRALIA 93-94 (1965). "Like the hand of a bored devil placed mercilessly upon a man's head, it maddened him . . . . Often I see him walking down that slope thirsty and mad, never to return, never quenched, never [illegible] thirst, or of his hope that heat would be arrested on its shore." *Id.* 201

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The dastardly interloper.

Lo, though, quite suddenly this Pierson did appear,
So calm, so cool (he was no fool—he carried his own beer),
And while the hunter and his hounds lay napping in the heat,
He tip-toed toward the tired fox and tied him by his feet
With rope. Then this interloper stole off to the rear.[9]

Bankers wouldn't e'er dare hear of it, cabbies always steer quite
clear of it,
Hedonists hardly think it's any fun.
Some are lazy, some are crazy, some are nasty (or named Nastase)—
But only dogs and Englishmen go out in the mid-day sun.[10]

The pathology of heat stroke.

Post woke and saw the bloke who'd sabotaged his work.
He stuttered and he sputtered, "Why, that gentleman's a jerk!"
He sulked and stalked and walked in circles,
thinking how he'd chased
Through mid-day sun, of how he'd run, of what an utter waste
Of time and of energy (he went, we'd say, berserk.)[11]

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9. The worst insult you can give to a Briton is to call him an interloper—otherwise known as a "queue-jumper." Such an effrontery can lead to violence. *See Queue-Jumper Knifed Objector,* LONDON DAILY TELEGRAPH, Feb. 21, 1992; *Chinese Queue-Jumper Killed on Shezhan Exchange*, REUTERS, May 11, 1992; *see also infra* note 15. Both interloping and queue-jumping are similar to plagiarism, the worst crime that can be committed by a legal scholar. Don't do it.

10. There seems to be little substance to the theory that the reason tennis players Ilie Nastase, Jimmy Connors, and John McEnroe are regarded as boors by the British is that they wilt when they play in the heat of Wimbledon. Various polls suggest that Nastase, Connors, and McEnroe are boors even when they play the Iceland Open in December.

11. A fine example of early English protocol, not seen much more except in the United States Congress. It is high irony indeed that the manners-conscious British have raised the parliamentary heckle to an art form, while the traditionally brash Americans insist on propriety and decorum among their lawmakers (at least in public). Thus Senator Claghorn might be moved to declare that his "distinguished colleague from South Carolina is a liar and a cheat." *See* L. DESCHLER, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF [illegible] §§ I, XV, XVI, XVII (1943).

Mosquitoes often hold their bite and lightning bugs wait 'til it's night
And spiders specify their webs be spun
Before the morning dew has dried so that their victims won't be fried.
Only dogs and Englishmen go out in the mid-day sun.[12]

Trespass on the case.

Mad dogs and Englishmen pursue their prey in sport
But when they're mad 'cause they've been had
they chase their cause in court.
So Post filed suit in trespass on the case (an awkward tool,
Though what else can one do without a precedential rule
In contract, or property, or even one in tort)?[13]

Swedes think that it's very nice to swim in water cold as ice,
Italians eat spaghetti by the ton;
Many people run the range from mildly odd to wildly strange—
But only dogs and Englishmen go out in the mid-day sun.[14]

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12. And here's a fine example of the padded footnote (for the benefit of students who didn't recognize the hot air in previous notes):

> Weather affects the human mind in various ways. *See, e.g., supra* notes 2, 4, 6 & 8. A case study of one Julia Little showed that rises in temperature distinctly altered her mood. Although she was predisposed to psychotic disturbances, "the abrupt changes in the mood of the patient and the subsequent admission to the sanitarium occurred with a sharp accentuation of warm weather." The study concluded that psychotic episodes were but reflections of changing biochemical states with the changing of meteorological conditions. W.F. PETERSON, MAN, WEATHER, SUN 112-116 (1947). Another woman was found "wandering about Hempstead in a conspicuous state of confusion," caused by a change in the weather. *See* Reese, *The Sign of Meteorologic Environment and Psychotic Episodes*, 9 J. MT. SINAI HOSP. 719 (1942); Ward and Rastall, *Prognosis in 'Myxoedematous Madness,'* 113 BRIT. J. PSYCHIATRY 149-51 (1967).

13. Be the first in your class to impress your professor with a definition of trespass on the case: it's "a form of action at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force or which is the indirect or secondary consequence of the defendant's act." BLACKS LAW DICTIONARY 1347 (5th ed. 1979).

14. For some reason the words "English" and "eccentric" have always gone together like fish and chips. Students plugging "English w/10 eccentric or eccentricity" into the LEXIS/NEXIS database will discover over 1000 entries—compared to just six for Swedes, 26 for Mexicans, 66 for Spaniards, and 143 for Japanese. If you really want to have fun with LEXIS/NEXIS, get into the "Assets" Library and look up your friends' (or professors')

O, the tides of Justice!

Post won upon the trial but on appeal did worse.
Each barrister was learned and articulately terse.
The judges pulled their periwigs and cited legal lore
From Puffendorf to Bynkershock to Barbeyrac and more:
"Pursuit's not enough for title; therefore; we reverse."[15]

In Japan the favorite dish is actually cold raw fish,
Boiled snake's a delicacy in Cancun;
Grown men have been known to quiver
at the sight of Jews' chopped liver—
But only dogs and Englishmen go out in the mid-day sun.[16]

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personal holdings via the public tax records. You may first want to read the agreement you signed.

15. Is this as good as *L.A. Law*, or what? Imagine McKenzie, Brackman & Gang taking on the learned barristers for Pierson and Post. Mr. Sanford, for Pierson (citing numerous Latin authorities): "There must be a taking . . . even wounding will not give a right of property." *Pierson*, 3 Cai. R. at 176-77. Mr. Colden, for Post (citing Puffendorf & Bynkerschock. Yes, those are their real names. Keep reading.): "Pursuit . . . gives an exclusive right." *Id.* at 176.

Samuel Puffendorf (1632-1694) was the world's first professor of international law and an expert on Korean boat jurisprudence. He was also the founder of the naturalist school of legal philosophy, which held that the sole source of international law came from the law of nature as interpreted by Middle-aged monks observing the mating habits of heat-crazed monkeys. Cornelius van Bynkerschock (1673-1743) was a prominent Dutch jurist and the leading exponent of the opposing theory that the basis of international law was founded only in the common consent of nations, by virtue of either treaties or custom or superior air power. GERHARD VON GLAHN, LAW AMONG NATIONS 43-44 (2d ed. 1970).

See also Pierson, 3 Cai. R. at 179; *cf.* Sollers v. Sollers, 26 A. 188 (1893), where the court held that fish captured and placed in an inlet with a fence which blocked their access to a main stream could still be taken by another fisherman (especially if he screamed at the top of his lungs, "Sorry, Charlie!").

16. Perhaps Englishmen venture out into the afternoon heat precisely because there is no such thing as a British delicacy which might keep them indoors at lunchtime—unless you count marmite with clotted curds and kidney pudding. British food has been likened to everything from basic fuel to the worst nightmare of a dyspeptic chef. *See, e.g.*, Peter Greenberg, *Traveling in Style*, L.A. TIMES, Mar. 19, 1989, S2 (Magazine), at 79 (noting the "centuries-old tradition of bad British cuisine"); Calvin ben David, JERUSALEM POST, Sept. 28, 1990 (Greater [illegible] films are as rare to British cinema as good food is to British cuisine.").

A noble dissent.

"Who, then, would keep a pack of hounds," asked the dissent,
"And who at peep of day would mount his steed and hunt 'til spent,
If just as dusk came on, a mere intruder—*a galoot!*—
Could bear away in triumph the sole object of pursuit?"
(Just mad dogs and Englishmen's the answer that he meant.)[17]

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17. Judge Livingston's dissenting opinion was a good deal more eloquent in the original:

> This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited: they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor Reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "*hostem humani generis*," and although *"de mortis nil nisi bonum"* be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barnyards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. *But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "sub jove frigido," or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?*

Pierson, 3 Cai. R. at 180-81 (emphasis added).

So, O students of the law with all these rules crammed down your craw
Consider all that sweat as if it's none
Compared to all the time and toil, tribulations, trials most royal
Of those dogs and Englishmen gone out in the mid-day sun.[18]

18. Two blessings for freshmen law students faced with having either to (1) recite *Pierson v. Post* in class:

We've all had professors who themselves could be called mad dogs in heat. *Illegitimus non carborundum* (free translation: *Don't let the bastards get you down*, or *No sweat!*)

or (2) explain the law on an exam:

Blessed be he, who having nothing to say, refrains from giving us wordy evidence of the fact.

"If it please the Court, may I point out that I requested to approach the Bench before learned counsel requested to approach the Bench."

* RODNEY R. JONES, ET AL., DISORDERLY CONDUCT 62 (1987) (Illustration by Lee Lorenz).

Voir Dire: Just When You Think You've Heard It All

Judge Charles Stone*

A number of years ago I was conducting a voir dire. There was a woman sitting in the front row of the jury box who seemed particularly enthusiastic about her potential future as a juror. As I proceeded methodically through the litany of questions I had grown familiar with over the years, she eagerly responded ensuring me of her unwavering ability to be impartial. When I reached the question of whether she had ever been a juror before, she bobbed her head up and down vigorously.

"Oh yes your Honor. It was a robbery trial in the courtroom down the hall about seven years ago. In fact, the prosecutor was the same gentleman that is trying this case. I had an open mind your Honor, I really did. But, the man was just guilty. The camera at the convenience store took a photograph of him, and his fingerprints were everywhere. He obviously wasn't too bright because he still had the money and the gun when he was arrested. Anyway your Honor, I'm sure that experience wouldn't affect my decision here today one bit."

I thanked the woman and continued questioning the other members of the jury pool. The last gentleman in the back row seemed very uncomfortable when it was his turn to respond. His voice was barely audible and he was slouched low in his chair. When I reached the question about whether he knew anyone else on the jury, his face flushed and he sat motionless for several moments. Finally, he held up his head and cleared his throat.

"Your Honor, I was the defendant in the trial down the hall seven years ago."

* Charles V. Stone, Judge of the Superior Court.

Memo of Masochism
(Reflections in Legal Writing)

J. Tim Willette*

THE TOOLS OF ARROGANCE

With "Black Letter Law" Lighting the Way
We Are Guided Down Paths of Hazy Gray[1]

Writing

To succeed in the legal profession the law student must master, in addition to the procedural and substantive law, a combination of counseling, negotiating, advocacy, and research skills. However, these tools are of little value if the attorney-to-be cannot write effectively. "There are two things wrong with almost all legal writing. One is its style. The other is its content."[2] Good legal writing is not a compilation of arcane Latin phrases or mountains of dreary drivel. Rather, good legal writing is artistry. The attorney, as a craftsman, must sculpt a clear, precise, comprehensive, and most importantly, effective statement. This ability is not the manifestations of an inherent genetic mutation, although the innate passion to develop a "legal lexicon" may lend itself to some form of DNA analysis. The art of legal writing is a dynamic and perpetual operation. In fact, "there is no such thing as good writing. There is only good re-writing."[3] "The beauty of good craftsmanship is that the final product masks the painstaking and difficult process by which it was created. The good writer—the craftsman—makes it look easy."[4]

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* As if I have not suffered enough from the slashing slaughter of Legal "Righting," I now anxiously await the opportunity to unwarily wade into the steaming cauldron of cacophony known as Moot Court, and be reduced to a gurgling stew of pseudo-legal babble. Until that time, I continue to endure the pleasures of life and enjoy the pressures of school while pursuing a JD/MBA at Indiana University in Indianapolis. I wish to dedicate (with uncharacteristic brevity) this article to mom and dad . . . Thanx.

1. I am quoting myself.
2. Fred Rodell, *Goodbye To Law Reviews*, 23 VA. L. REV. 38, 41 (1936).
3. Louis D. Brandeis, *quoted in* George W. Pierce, *The Legal Profession*, Vol. XXX THE TORCH Apr. 1957, at 8.
4. Nathaniel Hawthorne, *quoted in* CLIFTON FADIMAN, THE AMERICAN TREASURY 917 (1851).

Research

The key to successful legal research is organization. As a 1L, even after you realize that "shepardizing" is not an obscene act performed with farm animals, you will find the task ahead nonetheless daunting. If you are fortunate enough to own a personal computer with a modem, access to PERPLEXUS, GUESSLAW, ATTORNEYS ANONYMOUS ANSWER-LINE, or any other "FOR EDUCATIONAL PURPOSES ONLY", habit-forming legal database may preclude you from having to change your mailing address to the law library, as well as keeping the "copymeister" at bay. Regardless of whether you do research as a "law library lizard" or as a "database drone", without ferreting out the proper authority, the "Tools of Arrogance", in short order, become the "Tools of Ignorance."

The Open Memorandum

WELCOME TO LEGAL "JEOPARDY"

The open memorandum is legal writing in its purest form. It is the device from which all 1Ls learn why becoming a partner is so momentous. This is grunt work. The open memorandum allows the accomplished attorney to concentrate on more pressing matters, such as seeking remedies for that slight fade and properly maintaining that single digit handicap, while ensuring all junior attorneys do not have to go through "cold turkey" upon graduating from law school and passing the bar. Above all else, the open memorandum is the quintessential instrument that teaches you, as an aspiring attorney, to be objective, thorough, and effective in communicating—"to make the words absolutely disappear into the thought."[5]

It is hardly fair to compare the initial experience of writing an open memorandum with your first attempt at reciting the alphabet. A more apropos analogy is to look at this endeavor as trying to speak Portuguese to a Brazilian in Rio. As the instructor hands out the first open memorandum assignment, it dawns on you that all the prior classes which included lectures warning of the horrors of passive voice and extolling the doctrine of stare decisis were not merely sessions of sophomoric gab. This revelation is but the first of many painful insights as you peruse your "memo of masochism."

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5. J.C. DERNBACH & R.V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD xviii (1981).

The Case

THE CLIENTS

Date: October 1, 1992

To: 1L Neophyte, Future Associate Minion

From: Judy Shillklurq, Senior Partner (Wise Scribe & Critic)

Subj: Client J. Spratt, Jr., by His Next Friend J. Spratt, Sr.

[You have visions of a precedent-setting fact pattern that could lead to any variety of thought-provoking issues. So you read on.]

THE FACTS

As a weekly chore, John (a.k.a. Jack) and his sister, Jillian (a.k.a. Jill) were tasked by their parents to refill a container with mineral water they used for cooking in their special diet. They obtained this water from a spring owned by the city of Watertown, in the country of Aquarius. The paved road leading to the spring was 1.75 miles or 3.0 kilometers from the Spratt residence. The trek to the spring usually took the Spratt children about thirty minutes. The return journey by the same route, with a water-laden five-gallon vessel, would take the children a little over an hour. The trip could be shortened by a commonly used route that reduced the time by approximately fifteen minutes. The trip required them to traverse up and down a steep, grassy knoll. In fact, the children had used this route at least a dozen times during the last twelve months. Another benefit of taking this way home was that it allowed the children to pass by the home of Dame Dob. Dame Dob is an eighty-year-old eccentric widow and self-proclaimed healer, who espouses to a lifestyle that could best be described as alternatively holistic. Whenever the children trudged by on their way home from the spring, Dame Dob greeted them. She would have them rest for a few minutes and offer them each high-fibre fructose granola biscuits and a cup of kefir. The children always consumed these with enthusiasm.

On the misty morning of February 29, 1992, after Jack and Jill filled their bucket, they began the journey home via their usual shortened route, looking forward to Dame Dob's cookies and milk. Because of the dew on the ground, the slope was slippery and footing was extremely precarious. About one-third of the way down the hill, Jack slipped and began to roll down the hill with Jill directly behind. The two of them finally came to a stop at the foot of the hill. After regaining their bearings, both of them realized that Jack had sustained a number of contusions to his head. Realizing they had to get Jack's injuries treated, they hustled home. As they approached Dame Dob's residence at a full gallop, they were abruptly halted. Dame Dob had heard their blood-curdling screams as they plummeted down the hill and was on her way to offer assistance. Jill anxiously asked Dame Dob to call an ambulance. However, Dame Dob calmly assured Jill that such medical attention was not necessary and that she could attend to Jack's wounds a lot more effectively than any "drug-peddling M.D." She then took some material and a jar from a shoulder satchel and doused the material with a clear fluid from the bottle. She placed this wrap around Jack's head, over the contusions, and "laid" her hands on Jack, mumbling some words while rolling her eyes skyward. She then gave the children high-fibre fructose granola biscuits and kefir and sent them home.

Since then, Jack has suffered fainting spells, periods of confusion, and severe emotional fits whenever the Spratts mention the spring. The Spratts have taken him to a number of medical specialists whose diagnoses have run from amnesia to demonic possession. The visits, tests, and therapies have financially decimated the Spratts.

John Spratt, Sr., on behalf of his son Jack, is asking advice as to the possibility of seeking legal action against Dame Dob. He is also requesting an assessment of the damages for which he can sue her.

After picking your mandible up off the floor, you think: "You have got to be kidding me. I am supposed to determine whether we can find a legal means to take a good-hearted old lady to the cleaners for her somewhat misguided act of kindness. There have to be more pressing and significant concerns." Get real. You are given the next two weeks to sort this matter out and provide an adequate response in the form of an open memorandum.

THE ISSUES

You swallow hard and discover that you do not have the foggiest notion of where or how to begin. You do recall an acronym . . . IV, EVAC, IRAN, IROC, IRAQ, IRAC . . . yeah, that's it—IRAC . . . that will supposedly guide you through this morass. But after some soul-searching, you determine that this acronym, instead of offering the keys to success by distinguishing the [I]ssues, identifying the [R]ules, [A]pplying the facts, and arriving at a sound legal [C]onclusion, more precisely defines your dilemma. These four letters perfectly describe your [I]gnorance of the subject, [R]esignation of your limited knowledge of the law, [A]nxiety over your inability to assimilate the two, and your total [C]onfusion of where you are and where you are going. You plug away though, and finally come up with tenuous, if not tenable, issues.

"In Search Of . . . ."

If you steal from one author, it's plagiarism;
if you steal from many, it's research.[6]

Armed with or perhaps unarmed by the issues, you begin hacking your way into the jungle of legal research. Two hundred maddening hours and a forest of note cards later you emerge. You now know witchcraft in Winnipeg is illegal, leeches and blood-letting are still used by shamans in Lesotho and Botswana, and even marijuana can be prescribed in the U.S. (No, not for "laconic law school lethargy"). Nevertheless, you have not found one iota of documentation—not one statute, ordinance, rule, edict, or even opinion addressing the issues for which you are seeking direction.

Finally, your prayers to St. Jude and pleadings to the legal god of lost cases are answered. You stumble upon two cases. Although neither are on point, they are manna from heaven and with less than six days left you decide that it is time to "put pen to paper."

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6. Unknown Source, *Saying, in* JOHN BARTLETT'S FAMILIAR QUOTATIONS 757 (Emily Morison Beck ed., 1980).

The Memo

Facts that are not frankly faced
have a habit of stabbing us in the back.[7]

Even though you discover that the high-fibre content in Dame Dob's biscuits is a result of a recipe that calls for a home-grown herb called *cannabis sativa* and the medallion she wears around her neck is not the Star of David but a pentagram, these facts are not relevant to the issues at hand. So you do your best to avoid trying to portray the old lady as some satanic, dope-smoking "deadhead." Instead, you focus your attention on the facts that support the issues.

STATEMENT OF FACTS

There are no facts, only interpretations.[8]

After you have stated the obligatory date and location, you succinctly bring out the salient facts:

Jack and Jill went up the hill
To fetch a pail of water;
Jack fell down and broke his crown,
And Jill came tumbling after.

Up got Jack and home did trot,
As fast as he could caper,
To old Dame Dob, who patched his nob
With vinegar and brown paper.[9]

7. Sir Harold Bowden, *quoted in* READER'S DIGEST, Sept. 1966.
8. Frederick Nietzsche, *quoted in* THE CROWN TREASURY OF RELEVANT QUOTATIONS 267 (Edward F. Murphy ed., 1978).
9. *Jack and Jill*, *in* BOOK OF NURSERY AND MOTHER GOOSE RHYMES 100 (Marguerite de Angeli ed., 1954).

BASIC QUESTIONS

No question is so difficult to answer as that which the answer is obvious.[10]

After numbering the twenty variations of the issues, you choose the best with two deft flicks of the wrist. As you scratch the stubble on your chin, you note that your dart game has deteriorated as much as your personal grooming habits. You go with it, though, and compose the following inquiries:

1. Is Dame Dob, by attending to Jack's head contusions with her holistic remedy and denying Jill's request to call for certified and conventional medical attention, guilty of practicing medicine without a license?

2. Can Jack bring an action to sue Dame Dob for the medical problems he has suffered and what damages can he recover?

BASIC ANSWERS

Explanations exist; they have existed for all times, for there is always an easy solution to every human problem—neat, plausible, and wrong.[11]

You must keep in mind that you will have to support whatever determination you make. Solely based on the two cases, you assert:

1. Yes. Based on Dame Dob's actions and inactions with regard to the treatment of Jack's head injuries, she is guilty of practicing medicine without a license.

2. Probably. Jack can seek damages against Dame Dob for the medical problems he has suffered as a result of her treatment to his head injury on February 29, 1992.

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10. Ella Wheeler Wilcox, *in* THE HOME BOOK OF PROVERBS, MAXIMS, AND FAMILIAR PHRASES 1920 (1948).

11. H.L. Mencken, *in* A MENCKEN CHRESTOMATHY 443 (1967).

DISCUSSION

We are not satisfied to be right,
unless we can prove others to be wrong.[12]

The premise of the discussion is to be able to objectively, concisely, and thoroughly discuss both sides of each issue. Upon elevating the art of non-commitment to a new height of uncertainty, you must then plug a hole in one side or the other. The key to this iteration is to be brief; no, I mean be exhaustive; no wait, I really mean be impartial. Oh well, do whatever works.

In this case, the first issue is whether Dame Dob's care of Jack's head injury with vinegar and brown paper constitutes practicing medicine without a license. Jack's argument centers on a case where Judge M. Goose held that, in spite of all the King's horses' and all the King's men's well-intentioned, yet hard-boiled efforts to treat Humpty Dumpty's crackup, they had an obligation to first call a medical eggspert. She further stated that their actions constituted the scrambled attempts of individuals trying to practice medicine without a license and directly contributed to Mr. Dumpty's demise. *In Re Estate of Humpty Dumpty.*

Dame Dob will contend that her actions were not meant to be interpreted as practicing medicine. She can cite the case of a young woman who fell unconscious and was tended to by a group of seven men until she was brought out of her comatose state by labial stimulation from a male stranger. *Snow White v. Seven Dwarfs.* In *Snow White*, Judge W. Disney found that the group of miners was not guilty of practicing medicine without a license and dismissed the charges. *Id.*

Jack should counter that the case at hand is distinguishable from *Snow White.* In *Snow White,* one of the men, "Doc", was a medical doctor, and after an extensive examination, determined there was nothing that could medically be done for Snow White's condition. *Id.*

You proceed to the second issue with the same zeal. Again, drawing from the two aforementioned cases you hope to muster enough conviction to support your answer. As you approach your conclusion, you feel relatively certain that with this argument, the senior partner will convince Dame Dob to settle out of court for a tidy sum.

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12. William Hazlitt, *Note-Books, in* DICTIONARY OF HUMOROUS QUOTATIONS 87 (Evan Esar ed., 1953).

CONCLUSION

I am no athlete—but at one sport
I used to be an expert. It was a dangerous game,
called jumping to conclusions.[13]

You are down the home stretch. Any objectivity that was once visible has been displaced by your angst to get through this suffocating rat's maze. However, with inspired insight, you suspect that this is where your senior mentor will begin his/her sojourn. So you "cut and paste" the best pieces of your discussion into an eloquent, if not slightly disjointed, synopsis in the hopes that your issues, answers, and discussion will at last, make sense.

The Product

FORMAT

When I read some of the rules for speaking and writing
The English language correctly . . . I think—
Any fool can make a rule
And every fool will follow it.[14]

This axiom is no less true in the realm of communicating the written legal word. Between the Bluebook and the provincial nuances of your particular jurisdiction, you will unearth enough rules, regulations, formats, and dicta to convince yourself that someone is having a good laugh at your expense.

CITATIONS

I am reminded of the professor, who,
in his declining hours,
was asked by his devoted pupils for his final counsel.
He replied, "Verify your quotations."[15]

That's right. Verify the cite. After completing this evolution, you may believe the only words in this document for which you can take credit are

13. EDDIE CANTOR, THE WAY I SEE IT 131 (1959).
14. Henry D. Thoreau, *Journal*, *in* EVA M. CURKETT & JOYCE S. STEWARD, THOREAU
WISDOM 70 (1989).
15. Winston Churchill, *A Churchill Reader*, *in* THE HINGE OF FATE 500 (1950).

found in your name until it dawns on you that your parents could file suit. Not to worry, after a couple of weeks you will learn that between the lofty locutions of Justice Frankfurter and the sophomoric slogans of Oscar Mayer, every law student suffers this same predicament.

DEADLINE

The difference between the right word
and the almost right word
is the difference between lightening
and lightening bug.[16]

You have now pared down an initial draft of twenty-seven pages into a more digestible and allowable twelve pages. This process has only taken nine drafts, seven revisions, four reams of paper, three print ribbons, and two thesauruses, but you have finally "drafted" a final product—with a whole thirty-three minutes to spare. However, you firmly believe that perfection could be achieved if given an extra day. Well, God only had seven days to create the heavens and earth while you have had fourteen to merely make some legal sense of a single event—enough said. Turn in your first open memorandum, "lay" your hands around a "cold one," roll your eyes skyward, and mumble in Latin "There's no place like law school, there's no place like law school, there's . . . ."

The Wait (Weight)

Nothing is so good as it seems beforehand.[17]

You have had a couple of days to forget about the despair and agony of the last two weeks. In fact, your dismay is being replaced with a degree of confidence bordering on cockiness. Yeah, you got it wired. There is no way that your submission is not the finest open memorandum, or legal document born of 1L blood, sweat, and tears. Intuitive issues, airtight arguments, a solid statement of facts, a decisive discussion, and a concrete conclusion—the stuff of law reviews. So you wait and wait and wait and finally when the healing is just about complete, your paper is returned.

16. MARK TWAIN, MARK TWAIN LAUGHING 50 (Paul M. Zall ed., 1985).
17. George Elliott, *Silas Marner*, *in* THE OXFORD DICTIONARY OF QUOTATIONS 196 (2d ed. 1955).

The Grade

Blessed is he who expects nothing,
for he shall never be disappointed.[18]

You get your paper back and the first thing you notice is that if this document had been a living being it just died the "death of a thousand cuts." The only statement that may be redder than yours is GM's financial ledger. Your first instinct is to find a suitable resting place for it, as well as yourself. You wonder if Dan Quayle ever felt like this; no, you wonder if he still feels like this. After you come out of your catatonic shock, you begin the excruciating catharsis and, by and large, find that all the scarlet on your paper has been self-inflicted.

The Big Picture
(From Diapers to Briefs)

THE SHORT TERM

With pen and pencil we're learning to say nothing,
More cleverly every day.[19]

As you leave the "pampered" existence of the open memorandum and are introduced to other legal documents, such as appellate briefs, you will come to realize that these humbling exercises are critical in developing the confidence you need to be an effective advocate. In the short term, enjoy the relative sanctuary law school affords. Don't be afraid to make mistakes. This is a forgiving environment. While learning the law and its applications, learn to laugh . . . especially at yourself. It can be fun and, even, therapeutic.

18. Letter from Alexander Pope to John Gay (Oct. 16, 1727), *in* THE OXFORD BOOK OF APHORISMS 39 (1983).

19. William Allingham, *Blackberries*, *in* THE HOME BOOK OF PROVERBS, MAXIMS, AND FAMILIAR PHRASES 2754 (1948).

THE LONG TERM

In the long term, zealously pursue your love of the law. Once you are fortunate enough to assign open memoranda to new associates, always provide them with these ten principles of legal writing:

1. Never use one word where ten will do.

2. Never use a small word where a big one will suffice.

3. Never use a simple statement where it appears that one of substantially greater complexity will achieve comparable goals.

4. Never use English where Latin, *mutatis mutandis*, will do.

5. Qualify virtually everything.

6. Do not be embarrassed about repeating yourself. Do not be embarrassed about repeating yourself.

7. Worry about the difference between "which" and "that."

8. In pleadings and briefs, that which is defensible should be stated. That which is indefensible, but which you wish were true, should merely be suggested.

9. Never refer to your opponent's "argument;" he only makes "assertions," and his assertions are always "bald."

10. If a layperson can read a document from beginning to end without falling asleep, it needs work.[20]

Then go find a wide fairway and have a good laugh and life.

20. ROBERT D. WHITE, TRIALS & TRIBULATIONS APPEALING LEGAL HUMOR 246 (1989).

"Don't drop it, pal. It's a subpoena."

* RODNEY R. JONES, ET AL., DISORDERLY CONDUCT 35 (1987) (Illustration by Lee Lorenz).

Snakes, Bananas and Buried Treasure: The Case For Practical Jokes

David Cohn*

Frame your mind to mirth and merriment
Which bars a thousand harms and lengthens life.

- William Shakespeare, *The Taming of the Shrew*

I. INTRODUCTION

We all appreciate a good joke. Humor is good for the soul. A well-executed practical joke provides the greatest thrill of all. To everyone, that is, save the victim. Most practical joke victims take their humiliation in stride. They laugh along with the others, knowing that sooner or later they will exact revenge.

Occasionally, however, a brilliantly planned scheme goes awry. The victim, failing to find the joke funny, refuses to laugh. Or worse, he brings suit. The courts must then become the arbiters of comedic value. When is a joke funny? When does it constitute actionable conduct? And when does it simply make a mockery of the legal system? Such problems arise when the courts encounter the blurry line between joke and tort.

For decades, the courts have debated a plethora of practical joke issues. Astonishingly, little has been written on the subject. No casebook exists on the law of humor, and no commentator has directly addressed practical joke jurisprudence. This gap in legal scholarship must be filled. So let us begin.

II. ANALYSIS OF CASE LAW

A. *In Search of Buried Treasure*

The year is 1920. The place is the old South. Imagine, if you will, a Justice on the Louisiana Supreme Court presented with the facts of

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https://nsuworks.nova.edu/nlr/vol17/iss2/1

Nickerson v. Hodges,[1] which follow. The petitioners are the heirs of the late Carrie E. Nickerson (Miss Nickerson). Miss Nickerson brought the original suit against the respondents/perpetrators seeking $15,000 in damages for financial outlay, loss in business, mental and physical suffering, humiliation, and injury to reputation and social standing.[2] Plaintiff, gold-digging Miss Nickerson, had previously visited a fortune teller who informed her that her relatives had buried a pot of gold. Miss Nickerson received a map showing the supposed location of the treasure and began digging (with the help of a few relatives). Defendants Minnie Smith, William "Bud" Baker, and H.R. Hayes, annoyed by the treasure hunt, decided to intervene in the name of humor. As an April Fool's joke, they buried a sealed bucket containing rocks and dirt near the site of the dig. They attached a predated note directing the finder of the pot "not to open it for three days and to notify all the heirs."[3] They then waited for the hunters to take the bait.

The joke did not go off as planned. Miss Nickerson did not discover the bucket until April 14th. Believing she had recovered the lost treasure, she followed the terms of the note diligently. Miss Nickerson deposited the pot at a bank for safe-keeping during the three day waiting period. She then summoned the relatives. When the bucket was uncovered and its contents revealed, Miss Nickerson flew into a rage.[4] She suffered extreme humiliation and "carried to her grave some two years later [the conviction] that she had been robbed."[5]

Miss Nickerson obviously did not find the joke funny. Neither did the court, as it awarded her heirs $500 in damages. The court noted that: "If Miss Nickerson were still living, we should be disposed to award her damages in a substantial sum, to compensate her for the wrong thus done."[6]

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1. 84 So. 37 (La. 1920).
2. We must not underestimate the importance of social standing in the old South. *See* TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE. While courts today may not entertain such a theory of tort liability, this commentator finds it funny and thus relevant.
3. *Nickerson*, 84 So. at 38.
4. Miss Nickerson, a 45 year-old "maiden," had spent time in an insane asylum twenty years earlier. *Id.* The legal ramifications of this point are uncertain. Should we hold perpetrators to a different standard if the victim is mentally unstable? Is it overtly cruel to play jokes on the emotionally fragile? Perhaps this calls for an adaptation of the "thin skull rule." As my Crim professor liked to ask, "If I hit the Dean on the head with a hammer, and unbeknownst to me he has an eggshell skull, am I liable for murder? What is the mens rea?"
5. *Id.* at 39.
6. *Id.*

Louisiana apparently took treasure hunting very seriously in 1920. But what about more contemporary courts? Do they possess a better sense of humor?

B. *Snakes and Unpeeled Bananas*

The work-place is the perfect forum for practical jokes. In fact, most of the recent practical joke cases arise out of work-place "misconduct."[7] Several theories have been advanced to explain this phenomenon. Traditional humor theorists believe that joking is intended to direct attention to the perpetrator. Others have offered more elaborate theories. Hobbes thought that jokes are purely an expression of power. "A man who is laughed at," he declared, "is triumphed over."[8] Spencer[9] believed that jokes and laughter serve to release tension and "nervous energy."[10] Darwin saw jokes as an expression of happiness, much like that seen in "subhuman primates."[11] Freud argued in "Jokes and Their Relation to the Unconscious" that aggressive practical jokes are a release of sexual energy.[12] Jokesters are characterized not as funny people, but as mentally disturbed neurotics. Freud believed that perpetrators "might have a disunited personality, disposed to neurosis."[13] If he is correct, law firms (or at least law schools) should be disproportionately affected by practical jokes. I await the empirical data.

Whatever the explanation, workers often take time from their tasks to engage in releases of humorous energy. The modern split over work-place joke jurisprudence centers on two cases. The first, *Conner v. Magic City Trucking*,[14] involves a benign but scary snake. Magic employee, perpetrator David King, chose the wrong forum to release his nervous energy. On June 25, 1985, King (a truck driver) drove up to an A-Pac (a company which employed the plaintiff/victim Sarah Conner) construction site wearing

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7. This, of course, raises the interesting point of whether FELA and worker's compensation schemes provide coverage to practical joke victims. If the incidence of these cases increases, governments may be forced to form entities like the "Commission on Practical Jokes" and the "Work-place Humor Administration." Since I believe the country should be spared bureaucrats with titles like "Deputy Assistant Undersecretary of Practical Jokes," I advocate no coverage.

8. ROBIN ANDREW HAIG, THE ANATOMY OF HUMOR, 15 (1988).

9. I profess no knowledge of Spencer's identity or work. But he has a good theory, so I am citing it.

10. HAIG, *supra* note 8, at 16.

11. *Id.* at 17.

12. Surprise, surprise!

13. HAIG, *supra* note 8, at 21.

14. 582 So. 2d 1048 (Ala. 1992).

a Halloween mask.[15] King stopped at Conner's post, and Conner stared at King but failed to acknowledge the joke.[16] Frustrated by this lack of attention, King returned later and told Conner "to release the dumping latch on his truck quickly or else he would 'put his friend' on her."[17] Conner refused to cooperate, at which point King brandished a large snake and began chasing Conner. King finally gave up the chase and threw the snake at the frightened victim. Conner ran until she collapsed, left work for the day, and was treated for dizziness and a headache.[18] The snake suffered no serious injuries.

Conner sued Magic under a respondeat superior theory, claiming that King's boss had ratified the activity by failing to intervene. Conner introduced evidence that King's superior laughed during the incident. So did the Supreme Court of Alabama. Without dissent, the court dismissed the suit stating: "Proof of laughter, under such bizarre circumstances, is legally insufficient proof of ratification."[19] Score one for humor.

The second case is *Temp Tech Industries, Inc. v. National Labor Relations Board*.[20] *Temp Tech* involves an attempt to recover attorney's fees under the Equal Access to Justice Act.[21] The crux of this case, at least for our purposes, lies in an unpeeled banana. Temp Tech dismissed striking employee Bernard "Banana" Szkolny for assaulting another employee on the picket line. Szkolny "pushed a softened, unpeeled banana in the face of a nonstriking employee as that employee crossed the picket line."[22] Szkolny maintained his innocence and claimed that he was engaging in a practical joke. After all, the "banana in your face" joke has a long and storied history, beginning with Darwin and his happy apes. But the Administrative Law Judge did not agree and upheld Szkolny's dismissal.[23]

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15. This fact appears in the opinion but is unexplained. Nor does the court describe the precise nature of the mask. I find this omission most irresponsible on the part of the Alabama Supreme Court. Entire joke theories could rest on what character King was impersonating. Certainly Freud would find this information essential.
16. *Conner*, 592 So. 2d at 1049.
17. *Id.*
18. *Id.*
19. *Id.* at 1051.
20. 756 F.2d 586 (7th Cir. 1985).
21. 5 U.S.C. § 504 (1982).
22. *Temp Tech*, 756 F.2d at 590.
23. I defiantly will continue to use footnotes to point out tangential humorous issues. Szkolny claimed that his activity was protected under § 8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) and (3) (1982). Sections 8(a)(1) and (3) of

Temp Tech provided poor Banana Szkolny with a modicum of consolation; the court refused to award attorney fees to the company. The court found that "the conduct alleged was [not] so egregious that the General Counsel's decision to litigate . . . lacked substantial justification."[24] While the court did not find banana stuffing acceptable, it was funny enough not to be "egregious." Still, this isolated incident cost poor Banana his job. Without a doubt, this represents a grave defeat for humorists around the world.

C. *Flag Girls and Herpes*

Sexual harassment is still prevalent in the work-place; perversely, it provides us with some of the more humorous cases around. Take, for instance, the plight of Iowa construction workers Darla Hall, Patty Baxter, and Jeannette Ticknor. They took their jobs thinking that most male construction workers were enlightened, sensitive men, but they soon discovered otherwise.[25] "Immediately after the women started work, male members of the construction crew began to inflict verbal sexual abuse on the women."[26] In their defense, the male workers claimed that they were merely joking. A few of their exploits included: "The men nicknamed Ms. Ticknor 'Herpes' after she developed a skin reaction due to a sun allergy;"[27] the male workers were constantly referring to the women as "fucking flag girls;"[28] and "several men urinated in the gas tank of Ms. Ticknor's

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the NLRA protect organizational activity and forbid discrimination against union employees. This raises some interesting hypotheticals. For example, if several union employees organized a "banana stuffing protest" in which they stuffed bananas in the faces of all incoming scabs, would the NLRA protect this as organizational activity? Or what if a union employee and non-union strikebreaker become involved in a banana stuffing contest in which they stuffed bananas in each others' faces? Could the company fire the union employee without firing the strikebreaker, or would that be considered discrimination? Would it matter who started the "fight?" Finally, what if the strike had taken place at a banana factory? Would banana stuffing be considered a legitimate means of protest?

24. *Temp Tech*, 756 F.2d at 590.

25. I do not, of course, wish to impugn the integrity of construction workers as a whole. As we know, construction workers perform a valuable function in our society: they fix roads. In fact, they are constantly fixing roads. Once a road is under construction, our industrious construction workers will work for years if necessary to effect the repairs. I have the utmost respect for their diligence and dedication, not to mention the efficiency of the various governmental agencies in charge of fixing roads. But let's get on with the story.

26. *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988).

27. *Id.* at 1012.

28. This phrase could well make Hall the practical joke equivalent of *Cohen v. California*, in which the Supreme Court ruled that the phrase "Fuck the Draft" did not

car."[29]

The court found that these incidents (and other more serious infractions) constituted sexual harassment. Let us suppose, however, that the three actions listed above were the only contested conduct. Are any of them humorous enough to deserve protection?

Freud would say that the men are releasing their sexual frustrations on the women. Hobbes would call it an exercise in power. Feminists may argue that the power and sexual elements combine to make this rape. Objectivists may argue that the world is a jungle and the women should fight back with jokes of their own. Stoics would say turn the other cheek.

The male perpetrators here are certainly testing the tolerance of even the most comedic aficionados. To lovers of cutting-edge humor, the "Herpes" joke may actually be funny. Abusive nicknames form a venerable tradition in the humor business. Al Capone had to live with the name "Scarface," which in the 1920s may have been just as embarrassing. Manuel Noriega is often called "Pineapple Face." Ross Perot is compared to Dumbo. So why not "Herpes?"[30] Still, sexually explicit nicknames should be subject to strict scrutiny. If no harm is intended, we can all have a laugh. But if the nickname is malicious, perhaps the jokesters should be subject to liability.

The other instances hardly merit in-depth discussion. The "fucking flag girls" line has no comic value (this one doesn't even purport to be a joke) and thus deserves no protection. And urinating in the gas tank is just too strange. These men should find (1) a toilet and (2) a Freudian therapist.

D. *Over the Line*

Occasionally, a jokester clearly crosses the line into the world of tort. *Caudle v. Betts*[31] presents such a case. Defendant/perpetrator/tortfeasor Peter Betts, principal shareholder of Betts Lincoln-Mercury in Alexandria, Louisiana, thought he had a great idea for a practical joke. Betts took a

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constitute fighting words. 403 U.S. 15 (1971). Since then, every legal scholar and law student wishing to throw the word "fuck" into an academic paper has cited the case. I now join their ranks.

29. *Id.*

30. Yes, another tangential issue. What do you expect, humor law is complex! *McKinney v. Dole* considered the question of whether calling the plaintiff "Buffalo Butt" was enough to charge the defendant with sexual harassment. 765 F.2d 1129 (D.C. Cir. 1985). While the nickname may be cruel, would the discerning observer at least give the jokester credit for creativity? And if we do not allow offensive jokes, what good is humor anyway?

31. 512 So. 2d 389 (La. 1987).

charged automobile condenser, which delivers an electric shock when touched, and "shocked the back of plaintiff/victim/car salesman Ruben Caudle's neck with the charged condenser and chased Caudle with it until he escaped by locking himself in an office."[32] Caudle suffered damage to the occipital nerve[33] and experienced frequent headaches and fainting spells, which required surgery to alleviate. He sued Betts for damages, and the perpetrator defended claiming he had played a practical joke on his employee and had "intended to shock Mr. Caudle but did not intend to injure him beyond a momentary, unpleasant jolt."[34] The court wisely rejected this theory and found for Caudle.[35]

E. *Conspiracy in the Courtroom*

Even courts attempt humor from time to time. Judges are often stereotyped as serious, stoic figures. But experience shows otherwise. Take the case of *Drayton v. Hayes*.[36] During the trial, Judge Held asked Assistant District Attorney Kenneth Ramseur to help play a joke on defense counsel Frank Markus. After Held informed counsel that no further witnesses would be called, the Judge, Ramseur, and the court reporter instigated the joke. When Markus returned to the courtroom for closing arguments, Ramseur rose to call several rebuttal witnesses. The court reporter pretended to record the proceedings. Markus rose to object and argued for several minutes, until Held advised him to "sit down and relax"

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32. *Id.* at 390.

33. For those of us not versed in anatomy, I took the liberty of looking up some key terms:

Occipital: "Of the occiput or the occipital bone."

Nerve: "(1) A sinew or tendon; (2) any of the cord-like fibers or bundles of fibers connecting the body organs with the central nervous system (the brain and the spinal cord) and parts of the nervous system with each other, and carrying impulses to and from the brain or a nerve center; (3) emotional control, coolness in danger, courage; (4) strength, energy, vigor."

Occiput: "The back part of the skull or head."

Skull: "(1) The entire bony or cartilaginous framework of the head of a vertebrate, enclosing and protecting the brain and sense organs and composed of the cranium and the bones of the face and jaws; (2) the human head regarded as the seat of thought or intelligence; usually with derogatory allusion [a thick skull, an empty skull]." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1982).

34. *Caudle*, 512 So. 2d at 390.

35. Social commentators note that the result may have been different had Betts defended on the theory that car salesmen deserve a jolt every now and then. No evidence is provided as to whether Betts Lincoln-Mercury deals in used automobiles.

36. 589 F.2d 117 (2d Cir. 1979).

because it was all a joke.[37] Markus later moved for a mistrial claiming that the hoax had "unnerved" him and caused him to deliver an ineffective closing argument.

The *Drayton* court rejected Markus' appeal citing a lack of bad faith on the part of Held. Despite finding the joke in "poor taste," the court noted that "Held was [not] motivated by a desire to prejudice or harass Mr. Markus and his client."[38] But has the Second Circuit gone to far in allowing courtroom jokes? Snakes and bananas in the work-place seem funny enough, but trials are supposed to be serious. Does *Drayton* make a mockery of the judicial system? Or is it a welcome breath of fresh air? What should be our standard for judging practical jokes?

III. Toward a Theory of Practical Joke Jurisprudence

This controversy demands a resolution in the form of a coherent national standard. Beauty may be in the eye of the beholder, but funny should be a matter of law. I offer several standard policy arguments in support of this proposition:

* *Judicial Economy*: The courts are overloaded with cases, including joke cases. Until we pass tort reform measures, unimpressed victims of practical jokes will continue to flood the judicial system with suits. A national standard for practical joke cases will allow speedy resolutions to these claims.

* *Fear of Forum Shopping*: If, for instance, Alabama is known to be tough on practical jokesters while California allows great latitude, victims will attempt to flood the Alabama courts with joke cases. Also, it is simply unfair to hold jokesters to a higher standard dependent solely on where they perpetrate their scams. A joke is a joke is a joke, whether devised in Florida, Alaska, Hawaii, or on the moon.[39]

* *Efficiency*: A national standard would eliminate haggling over the proper degree of protection afforded practical jokes. The courts could then waste

37. *Id.* at 119.
38. *Id.* at 122.
39. There are, to the best of my knowledge, no reported cases of practical jokes carried out on the moon. Readers should ignore the phrase as it is mere rhetorical hyperbole.

their time on more mundane cases, which the public expects them to do anyway.

* *Credibility*: People will not take the judiciary seriously if it cannot make up its mind on what is and is not funny. Judges must look confident and present a united front by laughing (and frowning) in concert.

What then should be the national standard? Three competing theories deserve attention: the "discerning viewer" test, the "reasonable jokester" test, and the "lighten up, please" test.

A. *Discerning Viewers*

This is a purely objective test. The analysis rests on one question: Would a discerning viewer find the joke funny? The advantage of this standard is its ability to separate truly classic practical jokes from ordinary trash. Trash, the theory goes, deserves no protection. Of our cases, only *Nickerson* would be spared. The elaborate scheme is certainly classic. *Drayton* may have a claim to protection if it can override the inherent presumption against court-induced laughter. All the other feeble attempts at humor are ordinary and unsophisticated. The discerning viewer would dismiss them as bourgeois humor.

Criticisms come, however, from "marketplace of jokes" theorists. They claim that classic jokes will only occur if some (if not most) jokesters are allowed to produce ordinary fair. After all, producing the classic practical joke is an acquired skill. One must first practice with lesser joke attempts. I reject the discerning viewer test on the grounds that Siskel and Ebert would appoint themselves sole arbiters of funniness.

B. *Reasonable Jokesters*

Joke rights advocates support this test. It would protect any joke reasonably calculated to induce laughter and avoid harm. This approach would protect every case I presented except *Hall*. Even *Caudle* involved a joke which was not intended to cause harm. Besides, who ever heard of the occipital nerve anyway? A reasonable jokester certainly could not foresee such consequences from an electric shock.

Certain eminent jurists have voiced opposition to this standard on the grounds that it ignores victims' rights. Jokesters, after all, should not be given complete control over the fate of hapless victims. Victims should have some means of retribution against malicious jokesters, and sometimes the courts are their only recourse as they are not inventive or courageous

enough to devise practical jokes of their own. Which leads us to the third test . . . .

C. *Lighten Up, Please!*

This test is simple and intuitive. A joke receives protection if the natural reaction by onlookers to a victim's outrage would be "lighten up, please!" The test, which would protect the perpetrators in *Nickerson*, *Temp Tech*, and *Conner* and punish those in *Hall* and *Caudle*, provides a nice compromise. (*Drayton* remains a judgment call based on one's opinion of courtroom etiquette. Personally, I find the episode funny and extremely creative. We need more judges like Judge Held.) The objectivity of the process is maintained as the standard of onlookers rather than perpetrators or victims. More important, this test allows peers of the parties to arbitrate rather than members of the cultural elite. This is essential to preserving the integrity of the process in a democracy. Besides, we need to take some of the pseudo-scientific seriousness out of judging. To all those self-important policy geeks who present intricate theories to answer every conceivable question, I have three words: Lighten up, PLEASE!

All you earnest young men out to save the world . . .
please, have a laugh.

- Reinhold Niebuhr

Syllabus

Dan McGurn*

Lawyering and Society Winter 1993
Nuevo University-Rocco Baldini Law Center

1 Credit: Open to third year students and second year females with permission.

Instructor: Adjunct Professor Seamus Vytautus McCheese, IV (recognized by my unvarying uniform of polo shirt, Docker's, brand-spanking-new "pump" athletic shoes, and nose-ring).

Office Hours: Mondays 8:00 to 8:15 a.m. or by appointment. Or just drop by anytime my door is closed.

Class Times: In months that begin with a consonant, class meets Mon. at 10.00 a.m. in LL; Wed. at 10:15 a.m. in C2; Fri. at 10:05 a.m. in the Atrium. In months that begin with a vowel, class meets Tues. at 9:50 a.m. in LL; Thurs. at 9:15 a.m. in LL; Fri. at 9:15 p.m. at The Parrot. (Legislative Days will be ignored completely.)

Required Texts:

1. THE LAW FIRM, by that guy, paperback $9.95.

2. Lawyering and Society Supplement, Volumes 1-4, by McCheese, may be purchased at Nuevo Cashcow Bookstore after credit check, signing of Promissory Note, and filing of UCC-1 Financing Statement and with Florida Secretary of State. Price is negotiable.

3. The Importance of Being Liberal in the Classroom Environment, by the Politically Correct Press, Academia, NC, 1992, hardcover deluxe edition $149.95.

4. Maximizing Billable Hours While Minimizing Time Spent at the Office, Professor Lekso, Computer Disk: $19.95.

* Dan McGurn has great hopes to be a law school professor. If he achieves this goal, he intends to make use of this syllabus.

Recommended Text: Restatement Second of the Guild System. (Useless, but the bookstore will screw up, tell you it's a required text, and refuse to issue you a refund when you discover the truth.)

Required Viewing: *L.A. Law, Law & Order, Matlock, Reasonable Doubts, Civil Wars, Wall Street Week with Louis Rukeyser, Adam Smith's Money World, Seinfeld*, and *The Hat Squad.*

Recommended Viewing: *Paper Chase, Perry Mason*, any lawyer movie or TV series in syndication, and *Ren & Stimpy.*

Final Exam: Is a take-home and is attached.

Course Rules and Regulations:

Article I: Jokes made about fellow students on the basis of age, race, sex, sexual orientation, creed, religion, color of skin, skin condition, state of origin, metaphysical philosophy, alma mater, unusual accent, or bad haircut WILL NOT BE TOLERATED, unless it's funny to them, too.

Article II: All students will be addressed by the instructor as "You, with the fraternity/sorority keg party T-shirt," or "What's your name . . . I'll remember it next time for sure," or "You, with the sunglasses." The instructor will be addressed as "Your Honor," or "My Lord," or "Oh Most Learned One." No exceptions.

Article III: Perpetuation of inane collegiate football rivalries during class time will result in the student's grade being lowered one-half letter grade. Duke University basketball fans get extra credit. Students with sardonic wit are excused from the final exam and get an A for the course.

Article IV: During class, no one may leave to go to the lavatory or get a snack or for any reason whatsoever. Beepers will be checked at the door and stomped upon by that ex-hockey player who sits in the back of the room.

Article V: Stupid questions will be met with the instructor's blank stare, followed by the comment, "You must be kidding me!" This is certain to inspire your classmates to talk about you behind your back, ending with you being made the object of ridicule at cocktail parties for years to come.

Article VI: Students caught packing their books up two or three minutes before class ends will be required to memorize the entire restatement of Torts and/or subject to American Bar Association sanctions such as a $10,000/year salary cut (presuming you ever actually gain employment in the legal field) and 25 hours/week pro bono work FOR LIFE.

Article VII: Alteration of the instructor's hypotheticals is strictly limited to people in the lowest 10 per cent of their graduating class.

Curricula: The first half of the semester will be devoted to deconstruction of traditional law school educational techniques. The second half will be devoted to practical advocacy. (The second half will be taught by guest lecturers, as this professor has never actually had any practical advocacy experience.)

CLASS ASSIGNMENTS

1. Introduction: Read Supplement Volume 1, pages 1-278, skip 12, 43-45, 50, 52, 54, and 112.

2. Parallels between socratic method and fourth-grade teacher's pet syndrome, or "Why do the same 3 people who own all the study aids and old course outlines always answer the Professor's questions?"
   Supp. Vol. 1, pages 279-mid 559 (odd only) and page 12.

3. Browbeating, Intimidation, Haranguing & Harassment vs. Being Friendly and Encouraging Students to Enjoy Law School Because Hey, They're Paying Over 15 Grand a Year
   Supp. Vol. 1, pages mid 559-end, Vol. 2, all.

4. Pontification: Pros and Cons (lecture only, no class participation allowed)
   Supp. Vol. 1, page 50, reread pages 2-47.

5. Palsgraf: Who Cares, Anyway? (Read Handout).

6. Smushees, Deep Pockets, and Purchasing a Range Rover
   Supp. Vol. 3, pages 1-149 (page 105 lightly).

7. Traffic Court Workshop.
   Meet at courthouse; bring Summons.

8. Filling Out Time Sheets
Supp. Vol. 3, Appendix A-1 and Lekso disk.

9. Film: Pretty Woman
[No reading for remainder of course].

10. Creative Finance for the New Millennium: What's Old Is New Again
(taping of this class is not allowed)
Guest Panel: Charles Keating, Michael Milken, Neil Bush.

11. Choosing Malpractice Insurance.

12. Administration of Swiss and Off-shore Bank Accounts.

13. Survey of White Collar, Minimum Security Prisons.

14. What to do when relatives, friends, or people you've just met at a wedding, ask you for free legal advice regarding areas of law that you know absolutely nothing about.

15. Former Vice President Quayle's Recent Turnabout Respecting Lawyers and Litigation. Not! (If we have time.)

Final Exam: (Take-home) **Self-timed Limit:** 3 Hours

Instructions:

1. Chill out. You've paid good money to get this far, and I'm not trying to confuse or trick you too much.

2. Drink a couple of those big 7-11 coffees before you begin.

3. You may type, double-spaced, or write in illegible chicken scratch.

4. This exam is due no later than May 1st at midnight.

5. Students handing in an exam way too early will receive an F for the course. Don't ask me to define "way too early."

6. Cheating by collaboration is encouraged: you people know who you are.

I. Remember, it's sexy to be a Democrat now. Write a limerick blaming every negative thing that you can think of on Ronald & Nancy Reagan or George Bush or the Republican party in general. Use of Dan Quayle should be limited to his public misstatements. Meter counts. Somehow tie law into it.
(135 points)

II. Please regurgitate everything you have learned in this course. Parroting of buzzwords, catch phrases, and the instructor's pet euphemisms is strongly recommended. Avoid alliteration; I hate it when people do that. Absolutely no parentheticals (please!), and passive voice should not be used. Use of case cites is not necessary but you won't get any credit for your answer if you don't impress me with your ability to remember everything you've ever read or heard.
(45 points)

The[1] Annotated Cordas[2]

Michael L. Richmond*

ANNOTATOR'S PREAMBLE

Cordas v. Peerless Transportation Company[3] appears as a principal case in at least two casebooks on the law of Torts,[4] and as a note case in at least three others.[5] At least six law review articles have discussed the case and the legal principles for which it stands.[6] It figures in each of the

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1. *See* Note, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L REV. 1474, n.1 (1975); *see also* Charles R. Maher, *The[1] *[2] Infernal Footnote[3]*, 70 A.B.A. J. 92 (Apr. 1984).

2. Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (City Ct. 1941).

* Professor of Law, The Shepard Broad Law Center of Nova University. Michael Richmond received a A.B. from Hamilton College and a J.D. from Duke University. He would like to thank a great many people, but given the number of pages such a list would take, he fears that the editors of the esteemed journal in which this piece appears "would object to much." (They can find the source of this cite. The author is worn out from cite checking.) He will content himself with thanking the terrifyingly competent Head of Public Services of his library, Billie Jo Kaufman, for her outstanding and tireless work on this and other projects. He would also be remiss in not mentioning Steven Franzman, a practitioner in some upstate New York town or another, who many years ago, while a student of the author's, attempted to track down all the Shakespearean allusions in *Cordas*. Amazingly, he is the only student of the author's ever to seriously attempt this task. Unfortunately, the author has, over the years, lost track of the Franzman manuscript, and accordingly was forced to do all of his own research.

3. 27 N.Y.S.2d 198 (City Ct. 1941).

4. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 158 (8th ed. 1988); DIX W. NOEL & JERRY J. PHILLIPS, CASES AND MATERIALS ON TORTS AND RELATED LAW 73 (1980).

5. MARSHALL S. SHAPO, TORT AND INJURY LAW 445 (1980); GEORGE C. CHRISTIE & J. MEEKS, CASES AND MATERIALS ON THE LAW OF TORTS 122 (2d ed. 1990); MARSHALL FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 843 (5th ed. 1992).

6. W. Page Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 417 n.34 (1959); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 552 (1972); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1283 (1974); Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 177 (1989); Walter M. Rogers, Note, *"[I]t's All Right to Kill People, but Not Trees:" Landowners of Environmentally Unsafe Properties Must be Held Strictly Liable for Personal Injuries Caused by Their Contaminated Land*, 66 NOTRE DAME L. REV. 893, 935 (1991);

three leading treatises or hornbooks on Tort law.[7] But for all of the scholarly attention *Cordas* has drawn, only one case in fifty-one years has cited to it, and that not even from the same jurisdiction.[8]

As educators, we take our branch of the legal profession most seriously, extolling the virtues of our scholarly publications[9] at the drop of a tenure vote.[10] We point with faded pride to the aberrational article which has prompted some benighted courts to adopt a new legal theory.[11] The judicial cold shoulder accorded to *Cordas*, when taken in light of the prevalence of *Cordas* in our teaching materials and legal scholarship,[12] should give us pause and cause us to wonder at our relevance.[13]

CORDAS v. PEERLESS TRANSP. CO.
City Court of New York, New York County
April 3, 1941

Nicholas Athans and Hyman Muss, both of New York City, for plaintiff.
Louis L. Resnick and Harry P. Rich, both of New York City, for defendant.

James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1687 (1991); *see also* L.S. Tellier, Annotation, *Interference by One Riding in Automobile With Driver as a Factor in Determining Liability as between Driver and Others*, 4 A.L.R.2d 147, 149 (1949).

7. CLARENCE MORRIS & C. ROBERT MORRIS, MORRIS ON TORTS 41 (2d ed. 1980); N. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 33, at n.29 (5th ed. 1984); (*But cf.* David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703 n.1 (1992) (concerning the appropriate citation form)); 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.22, at n.11 (2d ed. 1986).

8. Donaldson v. Manzella, 338 S.W.2d 78, 83 (Mo. 1960).

9. *See, e.g.*, Charles Alan Wright, *How Many Catz Can Stand on the Head of a Pin, or Andrew Lloyd Webber, Where Are You Now That We Need You?*, 13 NOVA L. REV. 1 (1988).

10. *See* Michael L. Richmond & Robert M. Jarvis, *An Exemplar for Peer Evaluation*, 14 J. LEG. PROF. 21, 24 (1989).

11. *E.g.*, Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

12. Courts are not alone in scorning *Cordas*. The RESTATEMENT (SECOND) OF TORTS does not even use *Cordas* as an illustration.

13. Not.

CARLIN [Frank A.], Justice.[14]

This case presents the ordinary man[15]—the problem child of the law—in a most bizarre setting. As a lowly chauffeur in defendant's employ he became in a trice the protagonist in a breath-bating drama[16] with a denouement almost tragic. It appears that a man, whose identity it would be indelicate to divulge was feloniously relieved of his portable goods by two nondescript highwaymen in an alley near 26th Street and Third Avenue, Manhattan; they induced him to relinquish his possessions by a strong argument ad hominem couched in the convincing cant of the criminal and pressed at the point of a most persuasive pistol. Laden with their loot, but not thereby impeded, they took an abrupt departure[17] and he, shuffling off the coil[18] of that discretion which

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14. Obituary, N.Y. TIMES, Dec. 11, 1954.

City Court Justice Frank A. Carlin died yesterday in his home, 360 West 55th Street, after an illness of several months. His age was 66.

Justice Carlin was born in this city, attended Xavier High School and College and was graduated from Fordham Law School in 1914.

In World War I he served with the 606th United States Engineers. He taught at Public School 31, on West 44th Street, for three years before being elected Assemblyman from the 5th District in 1923. In the Assembly he supported labor and educational bills.

Justice Carlin served in the Assembly until 1930, when he was elected a Municipal Court Justice. He failed of election that year, but was elected the next.

He was a Democrat, but when he ran for re-election in 1949, he had Republican, Liberal, and Fusion Party support. His term would have expired Dec. 31, 1958.

In a typical decision in 1948, Justice Carlin ruled that persons who sold pinball machines on credit could not expect the New York courts to help collect for them.

He was a member of the American Legion, Knights of Columbus, the Elks, Ancient Order of Hibernians and the Peter J. Dooling Association. He also belonged to the New York County Lawyers Association and the Federal Bar Association.

15. "Methinks sometimes I have no more wit than a Christian or an ordinary man has: but I am a great eater of beef and believe that does harm to my wit." WILLIAM SHAKESPEARE, TWELFTH NIGHT act 1, sc. 3.

16. "All the world's a stage,/ And all the men and women merely players:/ They have their exits and their entrances;/ And one man in his time plays many parts,/ His acts being seven ages." WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7.

17. "Stay, my Lord Talbot; for my lady craves/ To know the cause of your abrupt departure." WILLIAM SHAKESPEARE, KING HENRY VI act 2, sc. 3.

18. "For in that sleep of death what dreams may come/ When we have shuffled off this mortal coil/ Must give us pause . . . ." WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

enmeshed him in the alley, quickly gave chase through 26th Street toward 2d Avenue, whither they were resorting "with expedition swift as thought"[19] for most obvious reasons. Somewhere on that thoroughfare of escape they indulged the stratagem of separation ostensibly to disconcert their pursuer and allay the ardor of his pursuit. He then centered on for capture the man with the pistol whom he saw board defendant's taxicab, which quickly veered south toward 25th Street on 2d Avenue where he saw the chauffeur jump out while the cab, still in motion, continued toward 24th Street; after the chauffeur relieved himself of the cumbersome burden of his fare the latter also is said to have similarly departed from the cab before it reached 24th Street. The chauffeur's story is substantially the same except that he states that his uninvited guest boarded the cab at 25th Street while it was at a standstill waiting for a less colorful fare; that his "passenger" immediately advised him "to stand not upon the order of his going but to go at once"[20] and added finality to his command by an appropriate gesture with a pistol addressed to his sacro iliac. The chauffeur in reluctant acquiescence proceeded about fifteen feet, when his hair, like unto the quills of the fretful porcupine,[21] was made to stand on end by the hue and cry of the man despoiled[22] accompanied by the clamorous concourse of the law-abiding which paced him as he ran; the concatenation of "stop thief," to which the patter of persistent feet did maddingly beat time, rang in his ears as the pursuing posse all the while gained on the receding cab with its quarry therein contained. The hold-up man sensing his insecurity suggested to the chauffeur that in the event there was the slightest lapse in obedience to his curt command that he, the chauffeur, would suffer the loss of his brains, a prospect as horrible to an humble chauffeur as it undoubtedly be to one of the intelligentsia. The chauffeur apprehensive of certain dissolution from either Scylla,[23]

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19. "But, with the motion of all elements,/ Courses as swift as thought in every power . . . ." WILLIAM SHAKESPEARE, LOVE'S LABOUR'S LOST act 4, sc. 3.

20. WILLIAM SHAKESPEARE, MACBETH act 3, sc. 4.

21. Hamlet's father's ghost, relating the story of his murder by Claudius, for effect urges Hamlet to make "Thy knotted and combined locks to part/ And each particular hair to stand on end,/ Like quills upon the fretful porpentine . . . ." WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5.

22. "Hue and cry, villain, go! Assist me, knight. I am undone! Fly, run, hue and cry, villain! I am undone!" WILLIAM SHAKESPEARE, THE MERRY WIVES OF WINDSOR act 4, sc. 5.

23. One of two monsters who threatened ships passing through the Straits of Messina in ancient Greece. She sat upon an Italian rock barking like a dog and stretching her six heads out to pluck sailors from their ships. Ships steering away from her found themselves in danger of Charybdis. *See supra* note 21.

the pursuers, or Charybdis,[24] the pursued, quickly threw his car out of first speed in which he was proceeding, pulled on the emergency, jammed on his brakes and, although he thinks the motor was still running, swung open the door to his left and jumped out of his car. He confesses that the only act that smacked of intelligence was that by which he jammed the brakes in order to throw off balance the hold-up man who was half-standing and half-sitting with his pistol menacingly poised. Thus abandoning his car and passenger the chauffeur sped toward 26th Street and then turned to look; he saw the cab proceeding south toward 24th Street where it mounted the sidewalk. The plaintiff-mother and her two infant children were there injured by the cab which, at the time, appeared to be also minus its passenger who, it appears, was apprehended in the cellar of a local hospital where he was pointed out to a police officer by a remnant of the posse, hereinbefore mentioned. He did not appear at the trial. The three aforesaid plaintiffs and the husband-father sue the defendant for damages predicating their respective causes of action upon the contention that the chauffeur was negligent in abandoning the cab under the aforesaid circumstances. Fortunately the injuries sustained were comparatively slight. Negligence has been variously defined but the common legal acceptation is the failure to exercise that care and caution which a reasonable and prudent person ordinarily would exercise under like conditions or circumstances. It has been most authoritatively held that "negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all." Cardozo, C.J., in Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 345, 162 N.E. 99, 101, 59 A.L.R. 1253 [(1928)].[25] In

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24. The other monster. This one sat on the Greek side of the Straits, swallowing sea waters and regurgitating them so as to either suck ships under or swamp them from above. *See supra* note 20. Mythology to the side, Scylla and Charybdis were a genuine rock and whirlpool, and represented true hazards to the shipping of the time. Contemporary jargon would refer to being caught between "the rock and the hard place." Launcelot Gobbo, Shylock's clownish servant, tells Jessica: "Truly then I fear you are damned both by father and mother: thus when I shun Scylla, your father, I fall into Charybdis, your mother: well, you are gone both ways." WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 3, sc. 5.

25. What lawyer can forget Helen Palsgraf's sad story? Yet in considering the actions of the two conductors who caused the parcel of fireworks to drop from the hands of the nameless passenger, Cardozo never decided their actions amounted to negligence. The ratio decidendi of the case focused on the lack of duty they owed to Mrs. Palsgraf at the outset. Thus, Cardozo did not address the issue of how a reasonably prudent person would have acted under the "exigent" circumstances of getting a tardy passenger aboard a moving train. Indeed, Cardozo may suggest he had doubts about finding them negligent in the emergency setting: "The conduct of the defendant's guard, *if a wrong in its relation to the holder of the package*, was not a wrong in its relation to the plaintiff, standing far away." 162 N.E. at 99

Steinbrenner v. M. W. Forney Co., 143 App. Div. 73, 127 N.Y.S. 620, 622 [(1911)][26] it is said, "The test of actionable negligence is what reasonably prudent men[27] would have done under the same circumstances"; Connell v. New York Central & Hudson River Railroad Co., 144 App. Div. 664, 129 N.Y.S. 666, 669, [(1911)][28] holds that actionable negligence must be predicated upon "a breach of duty to the plaintiff. Negligence is 'not absolute or intrinsic,' but 'is always relevant to some circumstances of time, place, or person.'" In slight paraphrase of the world's first bard[29] it may be truly observed that the expedition of the chauffeur's violent love of his own security outran the pauser, reason,[30] when he was suddenly confronted with unusual

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(emphasis added). *See generally* Michael L. Richmond, *The Development of Duty: Langridge to Palsgraf*, 31 ST. LOUIS U. L.J. 903, 945-52 (1987).

26. One street in a residential neighborhood was earmarked for urban renewal, and all the buildings stood vacant. The street itself was torn up and under construction, and the ends of the street were barricaded against vehicular traffic, although the barricades seemed not to extend across the sidewalks. The sidewalks were free of obstructions. The construction company did not place flares along the street. The plaintiff, a resident of the neighborhood, walked along the street under construction and at a point about 120 feet from the nearest streetlight attempted to cross. She fell into the construction excavation, suffered injuries, and sued the construction company. The court held there was no liability as the company owed her no duty.

27. Note the spurious case of *Fardell v. Potts*, in which the judge purportedly holds the trial court should have instructed the jury that "while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman, as such." A.P. Herbert, *Fardell v. Potts: The Reasonable Man, in* UNCOMMON LAW 4, 6 (1969). Less tongue-in-cheek cases have more recently held that there are instances in which the defendant must take into consideration the standard of the reasonable woman, particularly in cases involving sexual harassment. *See, e.g.*, Ellison v. Grady, 924 F.2d 872, 875-76 (9th Cir. 1991).

28. A railroad yard had designated certain areas permitted to its employees. The plaintiff left these areas to urinate, and, while in a crossroads between train tracks, was struck and killed by a train. The engineer had not sounded his bell before entering the crossroads (as was required), but the employee was not actually in the crossroads. The court dismissed the action by the estate, holding the employer had no duty to provide a safe workplace other than in designated areas, and that the train engineer who failed to ring the bell owed no duty to the workman who was outside the crossroads.

29. Not really. The *Beowulf* master poet, who lived sometime in the early eighth century, would certainly question the chronology of Judge Carlin. Compared to him, Shakespeare was a Johnny-Come-Lately.

30. Macbeth has killed Duncan, and then slain Duncan's two guards under circumstances to make it appear that the guards had killed Duncan themselves. When questioned by Macduff why he had taken the lives of the two alleged criminals, Macbeth replies his love for his dead king overcame his ability to act rationally: "The expedition of my violent love/ Outrun the pauser, reason. [W]ho could refrain,/ That had a heart to love, and in that

emergency which "took his reason prisoner."[31] The learned attorney for the plaintiffs concedes that the chauffeur acted in an emergency but claims a right to recovery upon the following proposition taken verbatim from his brief: "It is respectfully submitted that the value of the interests of the public at large to be immune from being injured by a dangerous instrumentality such as a car unattended while in motion is very superior to the right of a driver of a motor vehicle to abandon same while it is in motion even when acting under the belief that his life is in danger and by abandoning same he will save his life". To hold thus under the facts adduced herein would be tantamount to a repeal by implication of the primal law of nature written in indelible characters upon the fleshy tablets of sentient creation by the Almighty Law-giver, "the supernal Judge who sits on high."[32] There are those who stem the turbulent current[33] for bubble fame,[34] or who bridge the yawning chasm[35] 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"[36] to win a fair lady and these are the admiration of the generality of men; but they are made of sterner stuff[37] than the ordinary man upon whom the law places no duty of emulation. The law would indeed be fond[38] if it imposed upon the ordinary man the

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heart/ Courage to make's love known?" WILLIAM SHAKESPEARE, MACBETH act 2, sc. 3.

31. After hearing the prophecy of the witches that their futures seemingly hold great promise, Banquo questioningly says to Macbeth, "Were such things here as we do speak about?/ Or have we eaten on the insane root/ That takes the reason prisoner?" WILLIAM SHAKESPEARE, MACBETH act 1, sc. 3.

32. "From that supernal judge, that stirs good thoughts/ In any breast of strong authority . . . ." WILLIAM SHAKESPEARE, KING JOHN act 2, sc. 1.

33. "Who once a day with his embossed froth/ The turbulent surge shall cover . . . ." WILLIAM SHAKESPEARE, TIMON OF ATHENS act 5, sc. 1.

34. "Then a soldier . . . Seeking the bubble reputation/ Even in the cannon's mouth." WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7.

35. The end of *Moby Dick* leaves the sea alone and silent as the *Pequod* sinks beneath the waves. "Now small fowls flew screaming over the yet yawning gulf; a sullen white surf beat against its steep sides; then all collapsed, and the great shroud of the sea rolled on as it rolled five thousand years ago." HERMAN MELVILLE, MOBY DICK (1851).

36. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 1.

37. "When that the poor have cried, Caesar hath wept:/ Ambition should be made of sterner stuff . . . ." WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2. The quotation comes from Antony's noted funeral oration for Caesar ("Friends, Romans, Countrymen . . . .").

38. Upon being told that "the law supposes that your wife acts under your direction," Bumble replies: "If the law supposes that . . . the law is a [sic] ass—a [sic] idiot. If that's the eye of the law, the law is a bachelor . . . ." CHARLES DICKENS, OLIVER TWIST

obligation to so demean himself when suddenly confronted with a danger, not of his creation, disregarding the likelihood that such a contingency may darken the intellect and palsy the will of the common legion of the earth,[39] the fraternity of ordinary men,[40]—whose acts or omissions under certain conditions or circumstances make the yardstick by which the law measures culpability or innocense [sic], negligence or care. If a person is placed in a sudden peril from which death might ensue, the law does not impel another to the rescue of the person endangered nor does it condemn him for his unmoral failure to rescue when he can;[41] this is in recognition of the immutable law written in frail flesh.[42] Returning to our chauffeur. If the philosophic Horatio and the martial companions of his watch were "distilled almost to jelly with the act of fear"[43] when they beheld "in the dead vast and middle of the night"[44] the disembodied spirit of Hamlet's father stalk majestically by "with a countenance more in sorrow than in anger"[45] was not the chauffeur, though unacquainted with the example of these eminent men-at-arms, more amply justified in his fearsome reactions when he was more palpably confronted by a thing of flesh and blood[46] bearing in its hand an engine of destruction which depended for its lethal purpose upon the quiver of a hair? When Macbeth was cross-examined by Macduff as to any reason he would advance for his sudden despatch of Duncan's grooms he said in plausible answer "Who can be wise, amazed, temperate and furious, loyal and neutral, in a moment? No man."[47] Macbeth did not by a "tricksy word"[48] thereby stand justified

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(1838).

39. "To the legion of the lost ones, to the cohort of the damned." RUDYARD KIPLING, GENTLEMEN-RANKERS, stanza 1.

40. "These couchings and these lowly courtesies/ Might fire the blood of ordinary men . . . ." WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 1. Kent describes his qualities to King Lear as follows: "[T]hat which ordinary men are fit for, I am qualified in; and the best of me is diligence." WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 4. Lear later rejects the loyal Kent's sound advice. Shakespeare frowns on that attitude which scorns ordinary men—Caesar and Lear both meet tragic denouements.

41. *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959). (Bigan taunted Yania into jumping into a water-filled trench, and made no effort to rescue him when Yania drowned. The court held Bigan was not liable.).

42. "[T]he spirit indeed is willing, but the flesh is weak." *Matthew* 26:41 (King James).

43. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 2.

44. *Id.*

45. *Id.*

46. "Sweet lords, sweet lovers, O! let us embrace./ As true we are as flesh and blood can be . . . ." WILLIAM SHAKESPEARE, LOVE'S LABOUR'S LOST act 4, sc. 3.

47. WILLIAM SHAKESPEARE, MACBETH act 2, sc. 3.

48. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 3, sc. 5.

as he criminally created the emergency from which he sought escape by indulgence in added felonies to divert suspicion to the innocent. However, his words may be wrested to the advantage of the defendant's chauffeur whose acts cannot be legally construed as the proximate cause of plaintiff's injuries, however regrettable, unless nature's first law[49] is arbitrarily disregarded. Plaintiff's attorney in his brief cites the cases of Grunfelder v. Brooklyn Heights Railroad Co., 143 App. Div. 89, 127 N.Y.S. 1085 [(1911)],[50] and Savage v. Joseph H. Bauland Co., 42 App. Div. 285, 58 N.Y.S. 1014 [(1899)],[51] as authorities for a contrary holding. Neither case is apposite in fact or in principle. In the classic case of Laidlaw v. Sage, 158 N.Y. 73, 89, 90, 52 N.E. 679, 685, 44 L.R.A. 216 [(1899)],[52] is found a statement of the law peculiarly apropos: "That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well-established principle of law. * * * 'The law presumes that *an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily.*' It is there said that this rule seems to be founded upon the maxim that self-preservation is the

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49. *Cf.* "I died whilst in the womb he stay'd/ Attending nature's law." WILLIAM SHAKESPEARE, CYMBELINE act 5, sc. 4.

50. The engineer of a streetcar, seeing an obstruction in its path, jumped from the car rather than attempting to stop. The evidence demonstrated he could have avoided the accident by remaining at his post. A passenger jumped from the car as well, and was injured. The streetcar company defended the suit by arguing that the passenger was contributorily negligent. The court expressly held the emergency doctrine did not apply as the engineer could have stopped the car without injury. It also held that the passenger, having seen the engineer jump, could not be deemed contributorily negligent in following suit. The passenger was not held to the same degree of knowledge of the ability of the car to stop as was the engineer.

51. An elevator car had fallen, but was at a standstill. The passengers were frightened, and the defendant in attempting to repair the car rapidly, caused it to fall still further. The court held that the defendant could not use the emergency doctrine to protect his actions as the emergency had passed once the car had stopped and the passengers were in a position of stability and safety, despite their fright.

52. In this bizarre case, a stranger holding a carpet bag presented a note to the defendant while in the defendant's office. The note stated that the bag contained dynamite, and if the defendant did not pay him $1.2 million, the stranger would drop the bag. The plaintiff was standing nearby the defendant, who told the stranger he had no intention of meeting the stranger's demands. The plaintiff then testified that the defendant took him by the arm and used his body as a shield. The defendant denied this, and the physical evidence tended to contradict it as well. The stranger then dropped the bag, causing an explosion in which the plaintiff suffered severe injuries. The New York Court of Appeals reversed a judgment for the plaintiff, but primarily on grounds that the acts of the stranger, rather than those of the defendant, caused the plaintiff's injuries.

first law of nature, and that, where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself." (Italics ours.) Kolanka v. Erie Railroad Co., 215 App. Div. 82, 86, 212 N.Y.S. 714, 717 [(1925)],[53] says: "The law in this state does not hold one in an emergency to the exercise of that mature judgment required of him under circumstances where he has an opportunity for deliberate action. He is not required to exercise unerring judgment, which would be expected of him, were he not confronted with an emergency requiring prompt action." The circumstances provide the foil by which the act is brought into relief to determine whether it is or is not negligent. If under normal circumstances an act is done which might be considered negligent it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication. The chauffeur—the ordinary man in this case—acted in a split second in a most harrowing experience. To call him negligent would be to brand him coward; the court does not do so in spite of what those swaggering heroes, "whose valor plucks dead lions by the beard",[54] may bluster to the contrary. The court is loathe to see the plaintiffs go without recovery even though their damages were slight, but cannot hold the defendant liable upon the facts adduced at the trial. Motions, upon which decision was reserved, to dismiss the complaint are granted with exceptions to plaintiffs. Judgment for defendant against plaintiffs dismissing their complaint upon the merits. Ten days' stay and thirty days to make a case.[55]

53. The plaintiff, a passenger in a truck stalled on railroad tracks, saw an oncoming train. Unfamiliar with vehicular travel, the plaintiff failed to get out of the truck in time to avoid the accident. Had plaintiff acted promptly and decisively, he could have escaped harm, but due to his state of excitement he did not. In his suit, the trial judge directed a verdict for the defendant on the issue of contributory negligence. The appellate court reversed, holding that under the emergency setting the question of the plaintiff's negligence should have gone to the jury.

54. WILLIAM SHAKESPEARE, KING JOHN act 2, sc. 1.

55. Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (City Ct. 1941). "The rest is silence." WILLIAM SHAKESPEARE, HAMLET act 5, sc. 2.

EXCERPTS FROM:

CORPUS JURIS HUMOROUS

A Compilation Of

HUMOROUS, EXTRAORDINARY, OUTRAGEOUS, UNUSUAL, COLORFUL, INFAMOUS, CLEVER AND WITTY REPORTED JUDICIAL OPINIONS AND RELATED MATERIALS DATING FROM 1256 A.D. TO THE PRESENT

Compiled and Edited By

JOHN B. MCCLAY
& WENDY L. MATTHEWS,
ATTORNEYS AT LAW

Corpus Juris Humorous

John B. McClay*
Wendy L. Matthews

The cases and materials presented in *Corpus Juris Humorous* represent the culmination of more than a decade and a half of ardent, resolute and purposeful research and collection. The process was both tedious and inherently gratifying. The real work, of course, was performed by the judges who wrote the opinions. Their wit, humor, and literary acumen is self-evident. The cases and materials are presented *verbatim et literatim*, exactly as reported. The original language, grammar and spelling have all been retained, notwithstanding any obvious or technical improprieties. In many cases, the grammatical errors and arcane usages constitute an integral part of the humor of the writing. The judicial opinions are genuine and all have been reported, published and/or otherwise preserved in written form, generally in one or more of the officially-recognized reporters. The opinions are drawn from a variety of judicial systems, each having its origin in the English common law tradition, including the United States, England, Canada and South Africa.

IN RE SIRUS JOD

Justice Court of California, Tuolumne County
Case No. 515 (1851)

R.C. BARRY, J.P.

This was a criminal caze or suite in which one Sirus Yod or Jod butcher were indicted by me fur cruelity to animules. The only testimmony projuced were that of Bill Foarde and Arkansaw who prooved that Cirus Jod had tied up a oxe in the sunshine all day without water or feade which were a shame and a outrage on the public morrels and desency. Jod defended hisself by sayeing the oxe was not his property nor did he owne him that he only tied him up so his owner could git him. I found Jod gilty and fined

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him the costs of Court 2-1/2 ounzes and 1/2 ounce for feading and wattearing the said oxe and the trubble the Constable has been att.

Sonora, Aug 20, 1851
John Lumey, Constable.

IN RE JESUS MARTINEZ

Justice Court of California, Tuolumne County
Case No. 516 (1851)

R.C. BARRY, J.P.

This is a suit fore Mule Steeling in which Jesus Ramirez is indited for steeling one black mare mule, branded 0 with a 5 in it from Sheriff Werk. George swares the mule in question is hisn and I beleeve so to on hearing the caze I found Jesus Ramirez gilty of feloaniusly and against the law made and provided and the dignity of the people of Sonora steelin the aforesade mare mule sentenced him to pay the costs of Coort $10 and fined him $100 more as a terrour to all evil dooers. Jesus Ramirez not having any munney to pay with I rooled that Geroge Werk shuld pay the costs of coort, as well as the fine, and in default of payment that the said one mare mule be sold by the Constable John Luney or other officer of the Court to meet the expenses of the Costs of the Coort, and also the payment of the fine aforesaid.

H.P. Barber the lawyer for George Werk insolently told me there were no law for me to rool so, I told him that I didn't care a damn for his booklaw, that I was the law myself. He continued to jaw back I told him to shut up but he wouldn't I fined him $50 and committeed him to gaol for 5 days for comtempt of Coort in bringing my roolings and dississions into disreputableness end as a warning to unrooly persons not to contradict this Coort.

Aug. 21, 1851
John Lumey, Constable.

DENNY v. RADAR INDUSTRIES, INC.

Court of Appeals of Michigan
28 Mich. App. 294; 184 N.W.2d 289 (1970)

JOHN H. GILLIS, JUDGE

The appellant has attempted to distinguish the factual situation in this case from that in Renfroe v. Higgins Rack Coating and Manufacturing Co., Inc. (1969), 17 Mich. App. 259, 169 N.W.2d 326. He didn't. We couldn't.

Affirmed. Costs to appellee.

CRUMBLEY v. THE STATE OF GEORGIA

Supreme Court of Georgia
61 Ga. 582 (1878)

LOGAN E. BLECKLEY, Justice

[Crumbley was placed on trial for the offense of shooting at another. He pleaded not guilty. The evidence disclosed that on the evening of December 25, 1877, as the passenger train on the Central Railroad was approaching Station No. 16, the defendant was standing, with three companions, about twenty steps from the track, having with him his shotgun; that when the train came within hearing, the defendant fired off his gun, commenced reloading with a shell containing powder only and no shot, and as the train passed, he fired at the engineer, who simultaneously ducked and was not injured; and that no shot struck the engine.]

. . . there is no dispute that the gun was loaded with powder, and that the prisoner fired at the engineer, at the distance of about twenty steps. Grant that it was done only "to have a little fun out of the engineer," in the merry season of Christmas, it was an assault. The engineer was not one of the revellers, but was engaged in the earnest and responsible vocation of running a locomotive and train upon a railroad. He had a right to pass on his way without being shot at from the roadside. It is not pretended that he knew with what the gun was charged, or for what purpose it was presented at him and fired.

Those who shoot at their friends for amusement ought to warn them first that it is mere sport, and that there is no danger. Fun is rather too energetic, even for Christmas times, when it looks like a disposition to

indulge in a little free and easy homicide. Shooting powder guns at a man as a practical joke is among the forbidden sports.

Judgment affirmed.

IN THE MATTER OF CHARLOTTE K.

Family Court, Richmond County, New York
102 Misc. 2d 848; 427 N.Y.S.2d 370 (1980)

DANIEL D. LEDDY, Jr., Judge

Is a girdle a burglar's tool or is that stretching the plain meaning of Penal Law Sec. 140.35? This elastic issue of first impression arises out of a charge that the respondent shoplifted certain items from Macy's Department Store by dropping them into her girdle.

Basically, Corporation Counsel argues that respondent used her girdle as a kangaroo does her pouch, thus adapting it beyond its maiden form.

The Law Guardian snaps back charging that with this artificial expansion of Sec. 140.35's meaning, the foundation of Corporation Counsel's argument plainly sags. The Law Guardian admits that respondent's tight security was an attempt to evade the store's own tight security. And yet, it was not a tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving larceny by physical taking. It was, instead an article of clothing, which, being worn under all, was after all, a place to hide all. It was no more a burglar's tool than a pocket, or maybe even a kangaroo's pouch.

The tools, instruments or other articles envisioned by Penal Law Sec. 140.35 are those used in taking an item and not hiding it thereafter. They are the handy gadgets used to break in and pick up, and not the bags for carrying out. Such is the legislative intent of this section, as is evident from the Commission Staff Comments on the Revised Penal Law of 1965 Title I, Article 140, N. Sec. 140.35, which reads in relevant part:

> "The new section, by reference to instruments 'involving larceny' . . . expands the crime to include possession of numerous other *tools*, such as those used for breaking into motor vehicles, stealing from public telephone coin boxes, tampering with gas and electric meters, and the like." (Emphasis added.)

The Court has decided this issues mindful of the heavy burden that a contrary decision would place upon retail merchants. Thus is avoided the real bind of having customers check not only their packages, but their girdles too, at the department store's door.

The Court must also wonder whether such a contrary decision would not create a spate of unreasonable bulges that would let loose the floodgates of stop and frisk cases, with the result of putting the squeeze on court resources already overextended in this era of trim governmental budgets.

Accordingly, the instant allegation of possession of burglar's tools is dismissed.

ROBINSON v. PIOCHE, BAYERQUE & CO.

Supreme Court of California
5 Cal. 460 (1855)

SOLOMON HEYDENFELDT, J.

The Court below erred in giving the third, fourth and fifth instructions. 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.

The judgment is reversed and the cause remanded.

CHRISTY BROS. CIRCUS v. TURNAGE

Court of Appeals of Georgia
38 Ga. App. 581; 144 S.E. 680 (1928)

ALEXANDER W. STEPHENS, J.

There may be a recovery of damages for mental suffering, humiliation, or embarrassment resulting from a physical injury of which they are inseparable components . . . Any unlawful touching of a person's body, although no actual physical hurt may ensue therefrom, yet, since it violates a personal right, constitutes a physical injury to that person . . . The unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance . . . .

et al.: Nova Law Review Full Issue

Where a petition alleged that the plaintiff was an unmarried white lady, and that while in attendance as a guest of the defendant at a circus performance given by the defendant, and while seated in one of the seats provided by the defendant for the defendant's guests at the circus, a horse, which was going through a dancing performance immediately in front of where the plaintiff was sitting, was by the defendant's servant, who was riding upon the horse, caused to back towards the plaintiff, and while in this situation the horse evacuated his bowels into her lap, that this occurred in full view of many people, some of whom were the defendant's employees, and all of whom laughed at the occurrence, that as a result thereof the plaintiff was caused much embarrassment, mortification, and mental pain and suffering, to her damage in a certain amount, that the damage alleged was due entirely to the defendant's negligence and without any fault on the part of the plaintiff, the petition set out a cause of action and was good as against a general demurrer . . . .

The court, fairly to the defendant, submitted all issues presented. The evidence authorized the inference that the plaintiff was damaged, by reason of humiliation and embarrassment, in the sum of $500, and the verdict found for her in that amount was authorized.

Academic Law Review Writing

John M. Lindsey*

Simple words tend to produce concrete, understandable images. For this very reason, some modern academics avoid the plain and prefer the obscure. They want to stand above the crowd and gain peer recognition. Some hope to create new "schools" of thought to be named, of course, after themselves. This little essay is designed to help would-be academics invent unusual word combinations that are guaranteed to impress at least first year law students.

When considered in isolation, some words are innocent enough; but, if you combine them with less virtuous expressions, you can remove them from any rational range of comprehension. Consider, for example, the simple word "fundamental." Everyone, except perhaps a deconstructionist, understands what that word means. If you add "situational" and "discordance," you can create the monstrous but impressive expression: "fundamental situational discordance." Other words are monsters whether you combine them with other terms or let them stand alone, *e.g.* "reified", "homologation" and "deconstructive."

You, too, can appear learned when you write for the law reviews. You can attain an awesome level of vagueness by using the chart below. Try this simple three step exercise: (1) take any word from column # 1; (2) combine it with any word from column # 2; and (3) add a third word selected at random from column # 3.

* Professor of Law and Law Librarian, Temple University School of Law. The chart that appears in this essay was prepared by Professor Lindsey for use in connection with his presentation at the 38th annual meeting of the National Conference of Law Reviews hosted by Whittier College of Law in Los Angeles, California, on March 20, 1992.

columns: # 1	# 2	# 3
symbolic	postural	discordance
fundamental	deconstructive	miscognition
equitable	economic	taxonomy
critical	orthodox	legitimation
articulated	neutral	epistemology
systematic	abstract	homologation
reified	situational	legality
modular	theoretical	universalization
formalized	assimilated	empowerment
transcendent	juridical	historicization

If you prefer to create your own three-column chart, please feel free to do so. With practice you should be able to move with ease among the law school intelligentsia. Indeed, you can become the very model of a modern intellectual.[1]

1. Apologies are due to W.S. Gilbert and to Major General Stanley; however, as Samuel Johnson said in 1769, "Nonsense can be defended but by nonsense." JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON LL.D. 78 (George B. Hill & L.F. Powell eds., 1934).

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Marxism and Critical Legal Theory: Why Groucho?

Craig Brownlie*

> The fact that [defendant] dances to a different choreographer should not be a reason to deny him, and inferentially all of us, the basic constitutional right to express our feelings whether they are about the flag, dancing or Groucho Marx.[1]

I. INTRODUCTION OR "MR. MARX, THE READER. READER, MR. MARX."

For too long, the relationship, so clear to so few, between Marx's perception of the evolution of the law and the perception espoused by the proponents of Critical Legal Studies has remained hidden. (*A nihil cum id* if you will.[2]) The zenith of Critical Legal Studies was reached on the radio show *Flywheel, Shyster, and Flywheel*.[3] It is easy to imagine the young Crits lying in front of their radio, paging through the comics section of their local newspaper and listening to Groucho Marx and his brother, Chico, bringing anarchy to the legal profession. As the future law school professors would drift in and out of sleep, Marx's brand of wisdom would seep into their unconscious minds only to peer out from behind their eyeballs after they became members of the Bar.

This Note will examine the obvious influence of Groucho Marx on

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* The author winters in Cleveland at Case Western Reserve University, while spending his summers on the rolling hills of Pittsburgh. He gratefully acknowledges the contributions of Ken "Harpo" Brownlie, Suzanne "the Red" Brendze, Jeanne "Jeanne" Brownlie, Professor Kathryn "Louie" Mercer and all the folks down at Pep's Place for Plants, Peat, Plumbing, and All Your Plastic Needs for their assistance in the preparation of this Note.

1. City of Billings v. Laedeke, 805 P.2d 1348, 1354 (Mont. 1991) (showing the pervasive influence of Critical Legal Studies).

2. Yes, it isn't in *Black's*. Yes, you should have taken Latin.

3. NBC radio broadcast 1932-33.

Duncan Kennedy,[4] Robert Gordon and their brethren[5] as demonstrated by their explications of the extreme legal realism originally put forward by the greater Marx, Groucho.[6]

II. PRECIOUS LITTLE CRITTER HISTORY

The Crits, as they came to call themselves, or the Critters, as they shall be called in this Note, developed a wholly unorthodox legal philosophy. The kernel of inspiration behind the Critters popped into existence in the 1960's at Yale Law School during a Marx Brothers Film Festival. The cinema was unable to provide the proper size screen. Consequently, the picture bled over onto the walls. Almost as one, students and faculty in attendance realized the narrowness with which they had been approaching the law. Apparently, most of them mulled about on the sidewalk outside the theater complaining about the projectionist, the Socratic method of teaching, the lack of Raisinets or Goobers, and recent Supreme Court decisions, in that order. A few of the more vocal members of the audience proposed a series of gatherings where a solution could be found to these various woes.

At their first meeting in a secret and unknown location in New Haven (3939 Walnut Street # 5), this collection of great legal minds debated several proposals for a guru. After ruling out Plato, Jesus Christ, Clarence Darrow, Oliver Wendell Holmes, and Stan Laurel, the Critters agreed on Groucho Marx.[7] Various subsequent gatherings were held at all sorts of people's homes as close to Kennedy's place as possible, since he had no car.

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4. *See* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985). Kennedy discusses the "lost" Marx brother at great length here. Julius ("Groucho") was apparently influenced heavily by his elder brother, Karl ("Reddo").

5. Although "brethren" is not politically correct, the term is in juxtaposition to Marx *Brothers*. The author will probably avoid "brethren," "guys," and "floppy—hatted woo—woods" in future writings (at least, those which he wishes to see published).

6. Some have mistakenly relied on Karl, who never once made a film. Moreover, Karl was known to collaborate with people who were not his brothers (ask Fred Engels). For a discussion of Karl's work, see Symposium, *Marxism and the Law*, 23 COLUM. J. TRANSNAT'L L. 217 (1985).

7. The Critters have apparently relinquished Jesus Christ to those who espouse law and economics. The Romans doubtless felt differently about Christ's sense of law and order. *See* Richard Delgado & John Kidwell, *God and Gadamer: Politics and Conflict in the Heavenly Family*, 6 CONST. COMMENTARY 7 (1989). Delgado and Kidwell's article was a blasphemy. I hope it is a blast for you. This is just the sort of footnote the editor warned me about. Unfortunately, the editor did not do the same for you.

It was generally agreed that Kennedy had to be there because he did the best impression of Marx and was the only one who could stand to smoke cigars. The movement gained momentum as they moved their meetings to a lower location in New Haven. Because of an unfortunate incident involving three skunks, some electrical tape, and a blowtorch, a great deal of attention was being paid to the Critters by the local media, the U.S. Fish and Game Department, and complaining neighbors. The time had arrived to take their philosophical sideshow on the road. The Critters held their first full-blown conference and bar-b-q in Madison, Wisconsin, in May, 1977, after discovering that a Madison cinema was the only one in the country showing both *A Night at the Opera* and *A Day at the Races* at a time when everyone was free.[8] (A contract was signed with the cinema guaranteeing a preponderance of Goobers and Raisinets.) As histories of the Critters have suggested, the failure of everyone to agree about Zeppo's contribution to the films (let alone Gummo) led to a break with traditionalist supporters of the movement. Others have reported that, during a presentation prior to its viewing, certain Critters' insistence that *Marx Brothers go West* was not such a bad movie led to the inability of the older academics, seated in the back rows, to restrain from throwing rotten fruit at the younger Critters.

The remaining Critters realized that the best way to keep their movement alive was to infiltrate academia. Into the Halls of Legal Education wandered aimlessly the Critters. Soon they could be recognized on the faculty of various law schools by their painted mustaches and foul cigars. Surrounded by Holmes,[9] Dist. Cardozo,[10] Brandeis,[11] and countless other brilliant legal theoreticians, the Critters held forth their icon, Julius "Groucho" Marx.

With the publication of a whole issue of the Stanford Law Review devoted to the Critters, the movement became respectable.[12] It is unclear

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8. If you doubt the validity of this version of the founding of the Critters, then see G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986) and *Are Lawyers Really Necessary? Barrister Interview With Duncan Kennedy*, BARRISTER, Fall 1987, at 11.

9. A known fan of the Three Stooges.

10. Had no sense of humor. *See* Otis Flywheel, *Cardozo's Lack of Humor or Fashion Sense in the Garment Worker's Case* (forthcoming manuscript).

11. Preferred burlesque in its purest form.

12. 36 STAN. L. REV. 1 (1984). The Critters carefully avoided references to their heathen icon, but Stanford Professor Mark G. Kelman slipped in a mention on the sly. In a lengthy list of positive statements made by Critters (as opposed to the more common thrashing), Kelman quotes French radical Daniel Cohn-Bendit (Danny the Red) as saying "Je suis Marxiste, espece Groucho." Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

what result the publication had on Stanford's reputation. Of course, recognition meant the Critters were right all along and they proceeded to appear in every publication available to them.[13] The response was swift and brutal. Marxists were banned from tenured faculty posts in numbers that made one long for the open-mindedness of the 1950's. Tons of "Groucho Marx" masks were burned in the street in front of the University of Chicago Law School which left a grotesque plastic mass that some 1Ls swore resembled Harpo's profile when the sun hit it just right. Splinter groups emerged, most notably the feminist off-shoot, called the Dumontians.[14] The Dumontians claimed as their motto: "an association that bans women is not the kind women should want to join . . . ."[15] Other groups included purists who felt that railing against the system was a pointless exercise and insisted on total silence.[16]

Yes, the Critical Legal Theorists continued and prospered by developing ever-changing means of infiltrating the legal system. During the dry years, sly references to the "incomparable Groucho"[17] found their way into Critter articles. In one article, a list of "noted legal authors" included "Holmes, Brandeis, Cardozo, Hand, Jackson, and Groucho Marx."[18] The secret eyebrow wiggle and special walk allowed the Critters to acknowledge each other without creating problems for themselves. They would attend Marx Brothers revivals separately, but sit near each other, laughing softly. Now, the Critters have been reborn and are out in the open more than ever. Their ideas are taught and discussed in law schools across the country. Frequent showings of Marx Brothers films provide constant inspiration and an unending line of disciples. Currently, Critical Legal Studies is a full-blown movement. Once a slight drizzle, the Critters have become an acceptable part of legal weather just as Marx was accepted by Hollywood once he showed he could make a dollar.

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13. *See Men of the Critical Legal Studies Movement*, PLAYGIRL, May 1985, at centerfold.

14. *See* the cast list from almost any Marx Brothers film.

15. Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 107 (1986).

16. Harpists, but you knew that. We won't discuss the extremists who wear funny hats and talk with an unidentifiable accent.

17. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 140 n.184.

18. Book Note, *The Lawyer's Guide to Writing Well*, 91 COLUM. L. REV. 1562, 1563 (1991).

III. Marx's Ideological Content: Legal Rules and Reasoning or A Preponderance of Wisdom

Just what do the Critters believe, you may be asking yourself. Of course you may be asking yourself how you read so far into this Note or why there ain't no sun up in the sky. Some have claimed that the Critters are primarily concerned with the false belief that things are the way they are because that is the way those particular things should be. For example, Groucho Marx walks into a room because he belongs there, not because any other factor led him to make a choice to be in that room. If you have seen the state room scene in *A Night at the Opera*, then you realize the injustice in all this and you can see why the Critters feel the way they do (cramped and a little seasick).

Others maintain the Critters believe that modern legal reasoning justifies rules of society which make oppressive outcomes appear inevitable, logical, and inherently fair. Basically, if you want to get there from here, society dictates you take the viaduct. You can't swim and you can't take a bridge and, most of all, you can't take a chicken. This has become known as the Why-a-duck syndrome.[19]

Section III will analyze the movement's debt to Marx by examining those of his contributions which are *sine qua non*. This will be brief.

Marx was a brilliant legal tactician. He dissected a witness with the care of a pathologist. Maybe you would like to consider Marx's approach to the examination of a witness in a case of high crimes against the state of Fredonia. On the other hand, maybe you would not, but you have read this far.

Groucho: Chicolini, give me a number from one to ten.

Witness: Eleven.

Groucho: Right.

Witness: Now I ask you one. What is it has a trunk, but no key, weighs 2,000 pounds, and lives in the circus?

Groucho: That's irrelevant.

---

19. The Cocoanuts (Paramount 1929) ("Why-a no chicken?").

Witness: An relephant! Hey, that's the answer! There's a whole lotter elephants in the circus.[20]

The clarity and tenaciousness of the questioning is enough to make a trial attorney's heart skip a beat. The Critters have pointed to this very transcription time and time again to show how a few *non sequiturs* can really lighten up the courtroom.

Marx did not limit himself to mere trial work. His work in contracts has remained a model for hundreds of attorneys.

Groucho: "The party of the first part shall be known in this contract as the party of the first part."

Chico: Well, it sounds a little better this time.

Groucho: Well, it grows on you. Would you like to hear it once more?

Chico: Just the first part.

Groucho: What do you mean, the . . . the party of the first part?

Chico: No, the first part of the party of the first part.

Groucho: All right, it says the, uh, "[t]he first part of the party of the first part shall be known in this contract as the first part of the party of the party of the first part shall be known in this contract . . . . Look, why should we quarrel about a thing like this, we'll take it right out, eh?

Chico: Yeah, ha, it's-a too long, anyhow! Now, what do we got left?

Groucho: Well, I got about a foot and a half. Now it says, uh, "[t]he party of the second part shall be known in this contract as the party of the second part."

Chico: Well, I don't know about that . . . .

20. DUCK SOUP (Paramount 1933).

Groucho: Now what's the matter?

Chico: I no like-a the second party, either.

Groucho: Well, you shoulda come to the first party, we didn't get home till around four in the morning. I was blind for three days![21]

Joe Adamson, who should be a Critter, has dissected this remarkable contractual analysis.

> Groucho and Chico grow increasingly aware of the contract's inadequacies, until, finally, clause by clause, they reduce it to shreds and tatters like the logic that produced it and wipe it off the face of the earth. Chico insists on coming up with aesthetic critiques of the prosaic verbiage ("Hey, look, why can't-a the first part of the second party be the second part of the first party? Then you *got* something.") It's this idea that you can treat a formal agreement with any kind of individualized response that finally kills the whole deal. If there's one thing you're not supposed to concern yourself about in the reading of a contract, it's whether or not you enjoy the sound of the words. There wouldn't be any contracts left if people went around worrying about that.[22]

Critters may cherish Marx most for his commentaries on the practice of law itself. In a friendly exchange of letters with Attorney Joseph N. Welch, Marx inquired about the operation of Welch's legal office. Here we can see Marx predicting a wide variety of issues which would ultimately only be dealt with in the Model Rules of Professional Conduct.

> I was a little frightened when I read the imposing list of lawyers on your letterhead. There are at least forty. Over the years I have been sued by groups of attorneys on most of the minor charges—rape, larceny, embezzlement and parking in front of a fireplug—but none of the legal documents received at my residence ever had more than four names on it.

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21. A NIGHT AT THE OPERA (Metro-Goldwyn-Mayer 1933).

22. JOE ADAMSON III, GROUCHO, HARPO, CHICO AND SOMETIMES ZEPPO: A CELEBRATION OF THE MARX BROTHERS 288 (1973). That last sentence should keep [illegible] attorneys awake nights. If that doesn't work, maybe we could try phoning them around two in the morning.

> How do you all get along at the office? Do you trust each other? Or does each one have a separate safe for his money? Isn't there some danger that you and one of your many partners could both be in a courtroom representing opposing clients, and not be aware of it until you faced each other before the judge? Do you have one community storage room for your briefcases—or does each one sit on his own case?
>
> Some day, if I ever get to Boston, I would like to come in and gaze upon this vast array of legal talent at work—or even at play.[23]

Most of all though, Critters remember the Marx who was concerned with the employment of still-wet-behind-the-ears lawyers as in-house counsel by motion picture studios.

> It wouldn't surprise me at all to discover that the heads of your legal department are unaware of this absurd dispute, for I am acquainted with many of them and they are fine fellows with curly black hair, double-breasted suits and a love of their fellow man that out-Saroyans Saroyan.
>
> I have a hunch that this attempt to prevent us from using the title ["Casablanca"] is the brainchild of some ferret-faced shyster, serving a brief apprenticeship in your legal department. I know the type well—hot out of law school, hungry for success and too ambitious to follow the natural laws of promotion. This bar sinister probably needled your attorneys, most of whom are fine fellows with curly black hair, double-breasted suits, etc., into attempting to enjoin us.[24]

This quote unerringly predicted Critter concern with hierarchies in law schools and law firms.

Above all, it was Marx's honesty which is the flame that flickers in the hearts of Critters. He clearly felt that the truth was a viable strategy for an attorney, when all else failed.

Groucho: Your honor, I demand a habeas corpus.

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23. THE GROUCHO LETTERS: LETTERS FROM AND TO GROUCHO MARX 301-02 (1967).

24. *Id.* at 16. The dichotomy between those "with curly black hair, double-breasted suits and a love of their fellow man that out-Saroyans Saroyan" and those lawyers who are "ferret-faced shyster[s]" foretells the divisive fight over critical legal theory. (You decide whether the Critters or the other guys are Saroyans or look like ferrets.) This quote has been widely misinterpreted to explain the penchant for hair dye and hugging common among the Critters. These qualities may just be the result of excessive spare time.

Judge: A habeas corpus?

Groucho: You needn't be embarrassed judge. I don't know what it means either.[25]

IV. CRITTERS' USE OF MARX OR I SPENT A WEEK ON LEXIS ONE NIGHT

Ultimately, Marx's greatness must be judged by the pervasiveness of his philosophy. The Three Stooges have failed to inspire legal brilliance outside of Oklahoma and they are doomed never to have a journal note of their own. ("Woo! Woo! Woo!" "Oww!") However, Marx's renown has spread beyond mere Critter circles.

Marx has successfully infiltrated the legal profession as the Critters have been able to find gainful employment. Use of his wisdom has proliferated at a rate comparable only to the national debt. To the amazement of all concerned, Marx has found his way into innumerable opinions as can be observed by even the novice explorer of LEXIS.[26] Obviously, the Critters have allowed his influence to show through in their work. For example, the Critter cheer clearly displays the Marx touch. "If we are not part of dissolution, we're part of the problem."[27]

Perhaps Marx's greatest contribution bearing appropriate credit is the Groucho Marx theory of language significance which proposes that if the law contains the secret words in the magic order, then it must mean one

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25. *Flywheel, Shyster, and Flywheel* (NBC radio broadcast, Feb. 13, 1933).

26. Marx, himself, wound up in court on a few occasions. Normally, he allowed his attorneys to speak for him. For no reason, other than that I found the case, it is worth noting that Marx was once sued for libel. On his show, *You Bet Your Life*, Marx said, "I once managed a prize-fighter, Canvasback Cohen. I brought him out here, he got knocked out, and I made him walk back to Cleveland." Retired boxer Sam Cohen took offense. The Court held that Cohen was a public figure and Marx could say what he wanted about him, even if he wasn't talking about him. Go figure. *See* Cohen v. Marx, 94 Cal. App. 2d 704 (Cal. Ct. App. 1949).

27. Aviam Soifer, *Confronting Deep Strictures: Robinson, Rickey, and Racism*, 6 CARDOZO L. REV. 865 (1985). For a premier example of Critter thought, consider reading Anthony D'Amato, *The Ultimate Critical Legal Studies Article: A Fissiparous Analysis*, 37 J. LEGAL EDUC. 369 (1987) (concerning itself with the value of coffee and the failure to appreciate secretarial [illegible]).

particular thing.[28] Basically, the law means what it means because those in the know have learned the code. This has proven invaluable to Critters who have contested parking tickets.

For cases evaluating malpractice, Marx has been invaluable in establishing precedent (or at least dicta).

> [W]hen . . . the [State Medical] Board isolates and accepts a physician's testimony . . . the Board's reliance on the isolated bit of testimony is reminiscent of nothing so much as the old Groucho Marx program in which Groucho would say to the contestant: "Say the magic word and the duck will come down and you'll win a hundred dollars."[29]

In the arena of torts, Justice Sims offered his version of a Marx Brothers film which would result if plaintiff's argument that hosts should be responsible for their guests' smoking was upheld by his Court.

> Groucho arranges with Mrs. Dillingham to have the brothers employed as smoker-watchers at her party. At a pre-party meeting where Groucho announces the job, Chico is incredulous that anyone would hire the brothers for this purpose but Groucho assures him the deal is "legit" because, 'Some judge ordered it.' At the party, each Marx brother, dressed in a tuxedo, is stationed by a large potted palm. The party dissolves into turmoil when Harpo insists upon tooting his horn at guests who he believes are smoking recklessly.[30]

When privacy is an issue, the Court relies on Marx's classic rule. "This case arises because plaintiff, to paraphrase Groucho Marx, wouldn't belong to any video club that would have him as a member."[31]

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28. Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 635, 642 (1985).

29. City of Santa Ana v. Workers' Compensation Appeals Bd., 128 Cal. App. 3d 212, 222 (Cal. Ct. App. 1982). This may, in fact, be a corollary of the Groucho Marx theory of language significance.

30. Biles v. Richter, 206 Cal. App. 3d 325, 332 (Cal. Ct. App. 1988). Needless to say, the film was never made. Apparently another fine screen-writer was lost to the judiciary. *See also* New England Petroleum v. Federal Energy Admin., 455 F. Supp. 1280, 1316 n.94 (S.D.N.Y. 1980) (using a Marx Brothers' routine to illustrate a point about national emergency legislation); *see also In re* Universal Money Order, 470 F. Supp. 869 n.5 (S.D.N.Y. 1977) (using the same routine written by the same judge to make a different point).

31. Allen v. National Video, 610 F. Supp. 612, 617 (D.C.N.Y. 1985) (using Groucho Marx to defend Woody Allen).

Even civil procedure falls under Marx's broad aegis. "Is Small Claims [Court] to become something akin to the old Groucho Marx show wherein the contestant must say the 'magic words', in order to reveal their reward."[32]

A backlash has occurred. "[T]he testimony concerning possession of guns, diamonds, and a 'Groucho Marx' face mask was introduced . . . indicat[ing] that the State desired to portray the appellant as a felon."[33] Most of the backlash though has come from disenfranchised journal writers. "When I read truly hardcore CLS tracts . . . I usually conclude . . . that [the author] is only pulling my chain."[34]

No definitive evidence exists that the Critters' brand of Marxism has swept the chambers of the U.S. Supreme Court. However, it is believed that Justice Scalia does a wonderful version of *Whatever It Is, I'm Against It* from HORSEFEATHERS.[35]

V. IN SUMMARY

You take great legal thought where you can find it.

32. Webster v. Farmer, 514 N.Y.S.2d 165 (City Ct. 1987). Uniquely, the Court felt that the change of Small Claims Court into something similar to a television game show was a bad idea. Marx was ahead of his time, predicting the basis for many modern legal decisions (i.e., "magic words"). *See* almost any case trying to interpret the meaning of "rulemaking" and "adjudication" under the Administrative Procedures Act, ch. 5, § 1, 5 U.S.C. § 551 (1988).

33. Hines v. State, 646 S.W.2d 469, 471 (Tex. Ct. App. 1982). The Court does not indicate whether the guns, the diamonds, or the 'Groucho' mask is more incriminating. This could be interpreted as an insult to gun fanciers and jewelers.

34. Daniel H. Benson, *The You Bet Metaphorical Reconstructuralist School*, 37 J. LEGAL EDUC. 210, 214 (1987).

35. You and I both wish I had a cite for support.

The All-Supreme Court Opinion Baseball Team

Patric M. Verrone*

Randy "Ex Parte" MILLIGAN, First Base[1]

Rod "Dred" SCOTT, Second Base[2]

Willie "Read 'em Their Rights" MIRANDA, Shortstop[3]

Bill "Clear and Present Danger" SCHENCK, Third Base[4]

Clyde "Necessary and Proper" McCULLOCH, Catcher[5]

Gates "Board of Education" BROWN, Left Field[6]

Joseph "Plessy" V. FERGUSON, Center Field[7]

Claudell "International Shoe Versus" WASHINGTON, Right Field[8]

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* © 1993 Patric M. Verrone. More of Mr. Verrone's insights are permanently fixed at *supra* p. 733.

1. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Milligan played for the New York Mets, Pittsburgh Pirates, and Baltimore Orioles, 1987 to Present.

2. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Scott played for the Kansas City Royals, Montreal Expos, Oakland A's, Chicago Cubs, and New York Yankees, 1975-82.

3. Miranda v. Arizona, 384 U.S. 436 (1966). Miranda played for the Washington Senators, Chicago White Sox, St. Louis Browns, New York Yankees, and Baltimore Orioles, 1951-59.

4. Schenck v. United States, 249 U.S. 47 (1919). Schenck played for the Louisville Eclipse, Richmond Virginians, and Brooklyn in the American Association, 1882-85.

5. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). McCulloch played for the Chicago Cubs and Pittsburgh Pirates, 1940-56.

6. Brown v. Board of Educ., 347 U.S. 483 (1954). Brown played for the Detroit Tigers, 1963-75.

7. Plessy v. Ferguson, 163 U.S. 537 (1896). Ferguson played for the Los Angeles Dodgers, St. Louis Cardinals, Houston Astros, and California Angels, 1970-83.

8. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Washington played for the Oakland A's, Texas Rangers, Chicago White Sox, New York Mets, Atlanta Braves, and New York Yankees, 1974-88.

Preacher ROE & Ben WADE, Starting Pitchers[9]

Byron "Appointed Counsel" GIDEON, Relief Pitcher[10]

Curt "Free Agent" FLOOD, Designated Hitter[11]

9. Roe v. Wade, 410 U.S. 113 (1973). Roe played for the St. Louis Cardinals, Pittsburgh Pirates, and Brooklyn Dodgers, 1938-54. Wade played for the Chicago Cubs, Brooklyn Dodgers, St. Louis Cardinals, and Pittsburgh Pirates, 1948-55. They were teammates with the Dodgers from 1952 to 1954.

10. Gideon v. Wainwright, 372 U.S. 335 (1963). Gideon played with the Pittsburgh Pirates in 1987.

11. Flood v. Kuhn, 407 U.S. 258 (1972). Flood played with the Cincinnati Reds, St. Louis Cardinals, and Washington Senators, 1956-71.

"Well, recuse *me!"*

Courtesy On High

Justice Stanley Mosk*

In the 1992 presidential campaign, both President Bush and Vice President Quayle launched attacks on lawyers. They stimulated some fanatical followers to recall the line in Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers."

Those who employ that infamous quote apparently are unfamiliar with the context in which it was spoken. In the Shakespearean tale, Jack Cade of Ashford was a common rabble-rouser hoping to foment a rebellion against the throne. He enters a tavern and announces: "When I am King, as King I will be . . . there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery; that they may agree like brothers and worship me, their Lord." At that point, Dick the Butcher, a simple follower, declares "The first thing we do, let's kill all the lawyers."

To the mind of the rabble, it was lawyers who wrote and enforced the country's laws. Do away with lawyers and thereby do away with the rules of civilized society. One would hope that those who blithely cite Shakespeare's line today do not share the underlying motivation of this play's character.

Of course there are lawyers who are scoundrels, boorish and unethical in practice and a discredit to the profession and an offense to the public. But no profession as a whole does more to enforce high standards of personal conduct than the bar. Be considerate of your client, lawyers are told. Be deferential in court, they are instructed. Treat your opponent with courtesy and dignity. Failure to adhere to those standards is likely to result in discipline by the organized bar.

Practicing lawyers have been told, since law school days, that they will derive ethical inspiration from the demeanor of judges. Certainly judges treat each other with respect, even when they may disagree in individual cases on legal principles. Obviously lawyers can usually look to the scholarly and dignified justices on the highest court in the land for guidance on how to conduct themselves in a courteous and temperate manner, even in contentious litigation.

Sadly, however, not always.

On June 24, 1992, the Supreme Court decided *Lee v. Weisman*,[1] a case

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* California Supreme Court Justice.

1. 112 S. Ct. 2649 (1992).

involving a religious invocation and benediction at a public school event. There were three prevailing opinions, and a dissent written by Justice Scalia. Following are a few choice quotations from the Scalia opinion:

"As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless and boundlessly manipulable, test of psychological coercion . . . ."[2]

" . . . the changeable philosophical predilections of the Justices of this Court . . . ."[3]

" . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing."[4]

"The Court's notion . . . is nothing short of ludicrous."[5]

"It is beyond the absurd . . . ."[6]

"Logically, that ought to be the next project for the Court's bulldozer."[7]

" . . . the Court's solemn assertion . . . would ring as hollow as it ought."[8]

" . . . the Court's psycho-journey."[9]

" . . . a jurisprudential disaster . . . ."[10]

" . . . senseless in policy . . . ."[11]

One must respect a justice who adheres to principle as he or she sees it. And we admire a justice who expresses principle thoughtfully, even forcefully, in opposition to the prevailing views of others on the same court. However, one must doubt that the disrespectful and intemperate language used in the *Lee v. Weisman* dissent sets an appropriate example for the bench to give the bar.

Perhaps our best hope is that lawyers who may be tempted to speak in such a manner to the judge or to opposing counsel do not look to Supreme Court opinions for guidance.

This issue of the *Nova Law Review* may be devoted to legal humor but Justice Scalia's hardedged and discourteous expression is no laughing matter.

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2. *Id.* at 2679.
3. *Id.*
4. *Id.* at 2681.
5. *Id.*
6. *Lee*, 112 S. Ct. at 2682.
7. *Id.*
8. *Id.* at 2683.
9. *Id.* at 2684.
10. *Id.* at 2685.
11. *Lee*, 112 S. Ct. at 2686.

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When on Mars

Arthur Garwin*

While mining for ore on Mars, earth settlers found evidence of an ancient civilization that apparently flourished for centuries and then suddenly disappeared. Artifacts revealed a culture much like our own. Linguists, upon successfully learning to translate some of the martian language, discovered one startling difference between the cultures. Martian society greatly revered its lawyers, known as xzyqwyxwq (pronunciation unknown), which literally translates as wise, virtuous and impartial seekers of truth and justice. Archaeologists also came upon what appeared to be the xzyqwyxwq rules of professional responsibility, which startlingly enough almost exactly parallel the structure of the current ABA Model Rules of Professional Conduct (leading historians to believe that martians and earthlings may have communicated—a theory later supported by the discovery of photographs of martians on earth in the company of Howard Hughes). The Martian Ethics Rules, though similar in regard to structure and subject matter, differ greatly from our own in terms of approach. Therefore, it is with an open mind toward change that we present the loosely translated martian rules of professional conduct for lawyers.

1.1 Competence

If during the initial interview with a client, a lawyer states on three or more occasions, "It's very technical and difficult to explain, just trust me," the lawyer is not competent to handle the client's matter.

1.2 Scope of Representation

If a client is paying for a lawyer's services, the lawyer shall follow all of the client's instructions, unless the instructions are illegal, immoral, or cause the lawyer to lose sleep at night.

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* © 1993 Arthur Garwin. Arthur Garwin is Assistant Professionalism Counsel in the American Bar Association's Center for Professional Responsibility. His sense of humor is on regular display as a writer and performer for the Chicago Bar Association's annual Christmas Spirits production. His more serious writing includes bimonthly articles for the Ethics column in the ABA Journal.

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1.3 Diligence

A lawyer shall treat every representation as if it were extremely important but not life threatening (unless of course it is).

1.4 Communication

A lawyer shall give a client at least as much timely information as the lawyer would hope to receive from a used car salesperson.

1.5 Fees

If upon receiving a fee from a client, a lawyer declares "I really made a killing on this one," the fee is unreasonable. The percentage and appropriateness of contingent fees shall be determined by reference to accepted formulas of the Economists National Organization of Fees (ENOF). A lawyer shall not have sex with a client in lieu of a fee unless the client regularly earns his or her living through the delivery of sexual services.

1.6 Confidentiality of Information

A lawyer shall not reveal information relating to a representation on a local or national radio or television talk show or in any printed publication subject to the following exceptions. A lawyer shall reveal such information as is necessary to prevent the commission of any criminal act or to achieve a catharsis under the supervision of a trained psychotherapist.

1.7 Conflict of Interest: General Rule

A lawyer shall represent only one client at a time unless all the lawyer's clients consent in writing pursuant to a document approved in form and content by the National Organization of Public Examiners (NOPE).

1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not sell client confidences or throw a case for money.

(b) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation wherein the addendum exceeds or will exceed the lawyer's total fees for the prior two years.

(c) A lawyer shall not represent family members (you're welcome).

(d) Any gifts made to a lawyer from a client shall be turned over to the Official Halfway-House for Exiting Legal Practitioners (OH-HELP).

1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall swear on a stack of retainer agreements that the lawyer will not knowingly, subconsciously or metaphysically use any confidential information obtained in the prior representation in a matter adverse to the former client.

1.10 Imputed Disqualification: General Rule

A lawyer is a firm. A firm is a lawyer. A lawyer and firm are one. (Confucious, cocktail party, lunar crescent, 572 B.C.)

1.11 Successive Government and Private Employment

A lawyer is not the government. The government is not a lawyer. A lawyer and the government are not one if properly screened. (Confucious, later that same night).

1.12 Former Judge or Arbitrator

Every case has two lawyers and a judge. A lawyer shall not be two of those people. However, a firm is not a judge if properly screened.

1.13 Organization as Client

A lawyer employed or retained by an organization shall proceed as is reasonably necessary in the best interest of the organization as determined by giving due consideration to the lawyer's favorite color and the chances that the lawyer will be sued by third parties or brought up on disciplinary charges.

1.14 Client Under a Disability

A lawyer shall not assume that a client cannot make intelligent decisions unless the client either owns an Edsel or believes this is the year the Chicago Cubs and the Cleveland Indians will meet in the World Series.

1.15 Safekeeping Property

A lawyer shall not steal anyone's property, even accidently, or give it away on a whim or a bet. Any lawyer in violation of this section shall, upon panel review, be immediately jettisoned to the far ring of Saturn and become ineligible for inclusion in the Juris Hall of Fame.

1.16 Declining or Terminating Representation

(a) A lawyer may decline or terminate representation any time prior to the morning of trial and for any reason, except that the dog ate the file.

(b) A lawyer shall decline or terminate representation if the lawyer's mental condition is such that he or she is unable follow the story line of a prime time television sitcom.

1.17 Sale of Law Practice

A lawyer may buy and sell clients as if they were cattle, but must give them notice of the intention to do so and permit them to refuse the honor.

2.1 Advisor

In rendering advice to a client, a lawyer may refer not only to the law, but also to information gathered from reading advice columns in the daily newspaper, and from psychic predictions made in reputable tabloids.

2.2 Intermediary

A lawyer may act as intermediary between clients if the lawyer has passed a proficiency test regarding the Marquis of Queensberry rules.

2.3 Evaluation for Use by Third Persons

A lawyer may betray a client if the client consents after consultation.

3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer can do so while keeping a straight face and without admitting in private that it's bogus.

3.2 Expediting Litigation

A lawyer shall treat every case as if the lawyer represents the plaintiff.

3.3 Candor Toward the Tribunal

A lawyer shall tell the truth in all court proceedings. If the lawyer is unsure of what the truth is, the lawyer may toss a coin or consult tarot cards.

3.4 Fairness to Opposing Party and Counsel

A lawyer may do anything to win short of lying, disobeying the rules and orders of court, or showing opposing counsel's prom pictures to the jury.

3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not try to bribe or improperly influence a judge or juror and shall behave in a manner that would make the lawyer's mother proud.

3.6 Trial Publicity

A lawyer may make any extrajudicial statement the lawyer wants to with the following exceptions: no lies, no slander and no mention of information contained in the Warren Report.

3.7 Lawyer as Witness

A lawyer is not a witness. A witness is not a lawyer. A lawyer and a witness are not one. (*L.A. Law*)

3.8 Special Responsibilities of a Prosecutor

Prosecutors are not subject to Rule 3.4.

3.9 Advocate in Nonadjudicative Proceedings

A legislative or administrative tribunal is not a tribunal, but a lawyer is a lawyer. So, any tribunal is a tribunal for a lawyer.

4.1 Truthfulness in Statements to Others

A lawyer shall not knowingly lie. The existence within the lawyer of multiple personalities shall not be an excuse if any of the personalities was aware of the lie.

4.2 Communication with Person Represented by Counsel

Not.

4.3 Dealing with Unrepresented Person

A lawyer shall not mislead, deceive, or permit a misunderstanding by a person who is not represented by counsel, even if the lawyer is absolutely sure that no one will ever find out.

4.4 Respect for Rights of Third Persons

In representing a client, a lawyer shall treat third persons in a manner consistent with the way the lawyer would treat them if they were rich relatives.

5.1 Responsibilities of a Partner or Supervisory Lawyer

The buck stops with the partners and supervisory lawyers.

5.2 Responsibilities of a Subordinate Lawyer

A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of someone who could destroy the lawyer's entire life with a single phone call.

5.3 Responsibilities Regarding Nonlawyer Assistants

The buck hasn't moved since 5.1.

5.4 Professional Independence of a Lawyer

(a) A lawyer may share legal fees with anyone who does not carry around the names of ambulance drivers or have a radio that picks up police calls.

(b) A lawyer shall not form a general partnership with a nonlawyer regarding the practice of law, but may take on limited partners looking for a tax shelter.

(c) A lawyer shall not permit anyone, other than a client or the people inside Herman's head, to direct or regulate the lawyer's professional judgment.

(d) A lawyer may allow nonlawyers to own up to a 49% interest in a professional corporation authorized to practice law so long as none of the nonlawyer owners are politicians or S & L executives.

5.5 Unauthorized Practice of Law

A lawyer shall not do anything to jeopardize the legal profession's monopoly.

5.6 Restrictions on Right to Practice

A lawyer shall not participate in an agreement that restricts the free agency of another lawyer, except for partnership provisions that give a departing lawyer big bucks in return for promising not to steal firm clients.

5.7 Provision of Ancillary Services

A lawyer shall be allowed to own and operate a business ancillary to the delivery of legal services in even numbered years. In odd numbered years a lawyer may only offer ancillary services within the law firm in conjunction with the delivery of legal services to a pre-existing client. Every twenty five years there shall be a one year moratorium when no ancillary services may be provided. The operation of a drive through car wash shall not be deemed an ancillary business for purposes of this rule.

6.1 Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by annually turning over one-half of the lawyer's net income to organizations that provide legal services to the poor. A lawyer who fails to meet the obligation shall be flogged by Michael Jackson on national television during half-time of the Super Bowl.

6.2 Accepting Appointments

A lawyer may avoid appointment by a tribunal to represent a person for any good cause, but upon doing so, the lawyer must read one Russian novel for each appointment declined.

6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization without conflict as long as the lawyer doesn't actually say or do anything productive.

6.4 Law Reform Activities Affecting Client Interests

(Repealed after determination by martian high consulate that the law was no longer in need of reform).

7.1 Communications Concerning a Lawyer's Services

A lawyer shall not lie, tell half-truths or even fudge a little in a communication about the lawyer or the lawyer's services. A communication is prohibited if it omits the fact that the lawyer is currently disbarred or states that the lawyer would make Clarence Darrow look like a blathering idiot if Clarence were still around.

7.2 Advertising

Subject to the requirements of 7.1 and 7.3, a lawyer may advertise services through any medium except the jacket cover of a phonograph album that contains lyrics which may be considered unfit for underage audiences.

7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit professional employment in person or by telephone unless simultaneously offering a free trial home delivery newspaper subscription.

(b) Every written or recorded communication from a lawyer soliciting professional employment shall include the words "Advertising Material—Client Beware."

7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law unless the lawyer has been certified by the Organization to Knockout Attorneys' Yarns (OKAY).

7.5 Firm Names and Letterheads

A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used if it does not imply connection with a major movie star, a foreign government, or a domestic beer.

8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar or a lawyer in connection with a disciplinary matter shall provide an accurate, detailed, day-by-day account of the person's entire life from past lives to the date of application or hearing. (No one ever expects the Spanish Inquisition).

8.2 Judicial and Legal Officials

A lawyer shall still not lie, even when talking about a judicial or legal official or candidate for office.

8.3 Reporting Professional Misconduct

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct shall inform the appropriate

professional authority unless the other lawyer begs, rectifies the misconduct, and promises to never do it again.

8.4 Misconduct

It is professional misconduct for a lawyer to violate any of the Rules of Professional Conduct. (Duh)

8.5 Jurisdiction

A lawyer from another planet practicing on Mars shall be subject to martian disciplinary authorities.

Becoming a Partner

Ralph Warner & Toni Ihara*

My enjoyment of practicing law with a good-size firm was hampered by three factors: I didn't like the work, I didn't like the other lawyers, and I didn't like the clients. Nothing I've done in the years since I quit the law has been nearly as boring.[1]

Everyone who has ever read a book by Louis Auchincloss knows about the rewards of getting to be a partner in a big firm—the $400,000 draw (in a bad year), membership in an all male yacht club, March in the Virgin Islands, etc. Unfortunately, while being a senior partner isn't too hard to take (except for your colleagues), getting to be one is not easily accomplished. Here are some helpful hints:

Hint 1: Start Early. Plan to be born white, male and Protestant. If you can't manage this, try female, black, Buddhist and handicapped—it's hard for even the stuffiest old hardline firm to resist a quadruple minority if, in addition, she is also the editor of the Harvard Law Review and agrees not to bitch about being excluded from the yacht club (see Hint 2, below).

Hint 2: Character is Formed in Kindergarten. Not only must you pile your blocks higher than any of the other kids, you must also learn to kick over the piles of the other smart kids without getting caught. Later this will be called "aggressive advocacy." Your only goal in your school years is to be number one in everything so that you are sure to be accepted at Yale. (Harvard, Princeton and about thirteen other schools will also work. If you have to ask which ones, consider setting your sights on the legal department of a good-sized insurance company in the Midwest.)

Hint 3: The Rewards of Abstinence. When you reach Yale, you must study maniacally so that you graduate with honors, get 750 on your law boards, and are accepted at Harvard Law School (there are eight, maybe ten, other law schools that will keep you on the partnership ladder and several hundred or so others that won't).

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* Reprinted with permission from Nolo Press. RALPH WARNER & TONI IHARA, 29 REASONS NOT TO GO TO LAW SCHOOL 142 (1987).

1. Robert Flaherty, University of Michigan Law School, currently a restaurateur.

Hint 4: Law Review Is a Must. Not only must you study 20 hours a day, so as to place in the top 10 percent of all your desperately overachieving classmates and be selected for the law review, your law review contribution must demonstrate that you are politically shrewd (it helps to say a kind word about feudalism, or, if you want to be daringly modern, about the Supreme Court under the leadership of William Howard Taft).

Hint 5: What to Wear at Your Employment Interview. This is critical. More than one law review editor has blown it all by wearing a blue shirt to this interview. Men should be sure to wear ties covered with small pheasants (mallards in flight are acceptable, but crossed golf clubs almost guarantee that you will end up working for a small firm in the suburbs). Women should absolutely avoid Gucci, Pucci, or even Yves Saint Laurent and instead wear sensible tweeds in the style favored by the English royal family in 1938.

So far so good. If you have successfully followed hints 1-5, you should now be an associate at the firm of Adams, Adams & Fudge. But don't relax—the ladder still stretches far above you and each ascending rung is more slippery than the one below. You must realize that, increasingly, most associates can't make it all the way to full partner but are let go when their youthful fire and energy begin to ebb. Why? Mostly because they are just not tough enough. But back to basics.

Hint 6: Energy is as Important as Intelligence. Always stay at work until nine in the evening and be sure to show up first on Saturday mornings. In the more liberal big firms, it is permissible to wear a blue shirt on the weekends.

Hint 7: Making the Most of the Old School Tie. If you went to Princeton, Amherst or Stanford (West Coast only), have your alumni magazine delivered to your office. If you went to college at Cornell or Michigan, or even worse, a state college, it's best to have it sent to your home.

Hint 8: Never Be Seen in the Wrong Court. If you play racquetball, quickly change to squash without telling anyone. If you play tennis, be sure you use a wooden racquet. If you play polo, a discreet picture of your horse should be placed in a modest silver frame on the corner of your desk.

Hint 9: Learn to Order Lunch in Italian. Of course, we assume that you already know French. If you don't, you will probably want to resign

quietly, although you may be able to get by for a while by announcing that as long as the Frogs vote socialist, you will never eat another bite of cassoulet (kass-oo-lay).

Hint 10: Save Your Money. You will be paid as much as $80,000 from the start and will get generous raises. Unfortunately, it probably won't last. Big firms are never so crude as to fire anyone, of course. But when your cubicle is reduced to a broom closet, it occurs to you that your secretary, who mysteriously disappeared two years ago, will never be replaced, and you haven't had Oysters Rockefeller and Pommes Frites with a partner since you had that trouble with the Collingworth bonds, you will reluctantly realize that, at 35, you have a lot of knowledge about junk bonds, or leveraged buy-outs, a bad stomach, high child support payments, an over-developed taste for Wild Turkey, tendonitis (from all that squash), and that almost without noticing it, you have been transformed from an "up and coming" to a "down and going." Unfortunately, you have little experience and few legal skills which are valuable outside the world of Big Firms, and therefore are probably unemployable as a lawyer. (No big firm will ever hire anyone eased out by another, of course.) Your best bet is probably to apply for a teaching job at a law school—this being the only place that could possibly be interested in a specialty as narrow as yours.

Assault and Flattery: A Texas Legend

James D. Peden*

Assault and Flattery (A & F) is a student run, acted, and everything-elsed variety extravaganza, produced each year in the spring semester at the University of Texas in Austin. The show began forty years ago as an excuse for student organizations to poke fun at the faculty, administration etc. during the annual Law Week festivities; but, over time it became an event and an organization all its own. A&F (like so many other things) was banned for a few years during the late 1960's and early 70's. It was resurrected during the late 1970's and has thrived ever since. In the past ten years, the show has again skirted the edge of controversy; but, it still remains a favorite of students, faculty, staff and friends.

Recent shows have included *Heir* (*Hair*), *Grief* [Is the Word] (*Grease*), *Legal Shop of Horrors* (*Little Shop of Horrors*), *The Blues Barristers* (*The Blues Brothers*), *A Corpus Line* (*A Chorus Line*) and *Ten Legal Indians* (*Ten Little Indians*). A&F 1993 will produce *The Wizard of Lawz* (*The Wizard of Oz*).

The following are excerpts from A&F productions:

I Hope I Get It

Sing to the tune of I Hope I Get It from A Chorus Line[1]

Again. Right, Left, Stop, Hand Shake, Smile.
Again. Right, Left, Stop, Hand Shake, Smile.
Again. Right, Left, Stop, Hand Shake, Smile.
Again. Right, Left, Stop, Hand Shake, Smile.
Right. That connects with Fix Suit, Dry Palms,
Check List, Spray Breath, Check Watch,
Knock Knock.
Got it? Going on and Right, Left, Stop, Sit
Big Smile, Say Hello, Talk, Talk, Talk.
Right. Let's do the whole combination,
facing away from your resume.
From the top. Five, six, seven, eight . . .

* James D. Peden is the 1993 producer of A&F.

1. Written by Eric Levy.

God, I hope I get it. I hope I get it.
How many people do they need?
(How many people do they need?)
God, I hope I get it. I hope I get it.
How many guys how many girls?
(How many guys how many girls?)
Look at all the lawyers—at all the lawyers.
How many people do they need,
how many guys how many girls?
How many people do they—

I really need a job.
Please God, I need a job.
I've got to get a job.

Listen up everybody, we're going to do the cocktail combination. I don't want to go through this more than once, and for God's sake check those flies and pantyhose.
Ready? One, two, three, four, five, six!

God I really blew it, I really blew it.
How could I say a thing like that?
(How could I say a thing like that?)
Now I'll never make it. I'll never make it.
They do not like the way I dress,
they do not like the way I speak.
They do not like the way—

God I think I've got it.
I think I've got it.
I knew they liked me all the time.
Still it isn't over. It isn't over.
I have to interview all day.
(I have to interview all day.)
God I hope I get it. I hope I get it.
I'll make a thousand if I go,
They could say yes
they could say no.
How many law clerks do they—
I really need a job.

(My student loans have come due.)
Please God I need a job.
(If they don't hire me, I'm through.)
I've got to get a job.

Who am I anyway?
Am I my resume?
That is the essence of a person I must fake.
What do they want from us?
Why is there such a fuss?
So many students and no place for us to go.
I need a job.
That's all. I need a job.

BILL'S GYM (A Video)[2]

(Midshot of William Brennan in leather chair in the Lincoln Room of the Library.)

BRENNAN: Hello, I'm William Brennan. Many of you may have been wondering what I've been up to since I retired from the Supreme court. Well, I'm pleased to announce the opening of my new health clubs: "Bill's Gym."

(Cut to Bill's Gym logo. The logo looks like Gold's Gym, except it has a picture of a really pumped guy holding a big gavel.)

(Cut to a judge in an office with stacks of papers and books, looking stressed out. He then stands and does a Superman-esque opening of his robes to reveal sweats beneath.)

BRENNAN (voiceover): Specially designed for the judge who wants to relieve the stress of an overcrowded docket . . .

(Cut to a female judge in the appropriate spandex and an open judicial robe doing some cheezy, high fashion poses while reading a reporter.)

2. Written by James D. Peden.

BRENNAN (voiceover): . . . or who just wants to keep a trim judicial frame under all those robes.

(Cut to a full body shot of Brennan in weight room. People are working out on machines behind him, all in robes. Cardozo is on a machine to the right of the picture, quite dead.[3])

BRENNAN: At Bill's Gym, we feature the state-of-the-art in exercise equipment, (Brennan walks up-right. Pan and zoom to midshot of him beside an exercise bike. A judge is pedalling along, reading the Supreme Court Reporter.) like exercise bikes; so, you can stay trim and still catch up on your reading. (The judge, still pedalling, holds up the book so the viewers can see what it is, and gives a cheesy smile.)

(Cut to judges on circuit-training machines.)

BRENNAN (voiceover): Bill's Gym features circuit-training equipment, racquetball, (cut to judges on stairclimbers) stairclimbers, sauna and jacuzzi, you name it.

(Cut to aerobics room. Judges are exercising except Cardozo, who is propped up against the wall, still dead.)

BRENNAN (voiceover): We even feature a special aerobics program called "Justicize" designed for the judge who needs a low-impact workout after a long day of high-impact decision-making.

(Cut to a bust shot of Brennan sitting in the lounge area of a health club.)

BRENNAN: And, if you act right now, you'll get a special charter membership rate that's valid during good behavior.

(Zoom out and adjust right to reveal a two-shot of Brennan and Cardozo [decaying even as we speak] sitting at a table, each with a fruit juice in his hand.)

3. The deceased Justice Benjamin Cardozo is one of A&F's running gags. He has shown up in various places for the past three years.

BRENNAN: So, if your a judge who likes to be a little activist in his spare time, or if you're just looking for a place to relax and discuss evolving standards of moral decency with an old colleague, Bill's Gym is the place for you. (To Cardozo) Right Ben? (Brennan lifts his glass.)

(Cut to a graphic of Bill's Gym logo and phone number.)

VOICEOVER: Call 1-800-PUMP-U-UP for the Bill's Gym location nearest you and find out more about how you can become a charter member. Bill's Gym: because you don't have to be a bench warmer just because you're on the bench.

WITH A 2.4

Sing to the tune of When I'm 64[4]

When I get older, losin' my drive
In my second year.
Will you still be asking me to dinner dates?
Offering competitive rates?
If all my grades went from A to C
Would you slam the door?
Will you still hire me, will ya' desire me
With a 2.4?

Grades are no reflection of my reasoning ability—
it's the vicious curves.
I was really screwed.
So please just say the word.
I'll still work for you.

I could be handy writing a brief
And a memo too.
Just because I got kicked off of TLR[5]
Doesn't mean I won't pass the bar.
Slaving for partners morning to night

4. Written by Eric Levy and Kathy Neal Nester.
5. Texas Law Review.

Who could ask for more?
Will you still hire me, will ya' desire me
With a 2.4?

In the summer you will see that grading isn't everything—
it's the B.S. that counts.
I will bust my ass
Ignore my GPA
I'm sure I can pass.

Tell me an answer, give me a call,
Offer me a job.
Tell me that my drop in rank won't get you annoyed.
Yours sincerely, unemployed.
You can abuse me, make me do tax
I'll still beg for more.
Will you still hire me, will ya' desire me
With a 2.4?

THE ATTORN-O-MATIC (A Video)[6]

(Open with a white background. Two hands hold a board. A foot comes into the picture and splits a board.)

VOICEOVER: In Japan, the foot can split wood!

(Sound of EEEEYA! in the background.)

VOICEOVER: But, it can't help you beat a capital murder rap!

(Sound of OOOOWA! in the background.)

(Cut to cheezy hand model doing the Vanna White routine over the ATTORN-O-Matic, a foot tall toy robot with flashing eyes, very mechanical movements, and a very small Armani suit on, as it paces across the counsel table.)

6. Written by James Peden.

VOICEOVER: Introducing the amazing Wrongco ATTORN-O-MATIC! It files, it pleads, it argues, it drafts documents, it utilizes dilatory tactics in discovery and it doesn't bill by the hour! Yes, for as much as you'd pay to have a quickie will drafted by some paralegal with the intelligence of a cinder block, you too can have the finest in state-of-the-art litigation technology! How much would you pay for this little wonder? Don't answer yet! Because if you call now you'll also get (cut to closeup of cheezy hand model doing the Vanna thang over a chef's knife) the Jindu Super-amazing-kick-ass-beats-the-hell-out-of-anything-you-can-possibly-imagine Chef's Knife!! Now how much would you pay? $100 an hour? $200 an hour?! 45% of anything you recover?!! NO!! The Wrongco ATTORN-O-MATIC is yours for just $39.95!!!

SECOND VOICEOVER: ATTORN-O-MATIC only $39.95?

VOICEOVER: That's right! Just $39.95!! So, the next time you need help in court . . . .

(Cut to a judge behind bench, witness on stand, ATTORN-O-MATIC on edge of witness stand cross-examining witness.)

ATTORN-O-MATIC: Isn't it true that you are the real murderer?

WITNESS: (way overreacting) All right! I admit it! Yes, I killed that little creep! And I enjoyed it, too! He was asking for it! Mom always did like him better!

JUDGE: Case dismissed.

(Cut to a shot of ATTORN-O-MATIC on desk.)

VOICEOVER: . . . just let the ATTORN-O-MATIC do the job for ya! Operators are standing by, so call now!

(Cut to a screen with ordering information on it.)

SECOND VOICEOVER: To order your ATTORN-O-MATIC, send $39.95 and $100 an hour shipping and handling to: ATTORN-O-MATIC, 1990 Lavita Boulevard, Atlanta, Georgia, 37375. Or, for faster delivery, call 1-800-555-3506. Visa, Discover, and Carte Blanche orders accepted. Please no COD's. Allow 6 to 8 weeks for delivery.

These excerpts can only give a taste for what A&F is like. To be appreciated fully, it must be seen. For information on tickets or on ordering videotapes of past, present, or future shows, please contact:

Assault and Flattery
The University of Texas School of Law
727 East 26th Street
Austin, Texas 78705
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"Good Humor" on The Bench: Just Desserts in a Judicial Diet

Rodger L. Hochman*

Lawyers, long the subject of jokes,[1] are themselves often portrayed as humorless.[2] Given the special and often puzzling legal terminology and structured form of most legal drafting,[3] and that much of legal writing requires the attorney to avoid qualities of ornamentation,[4] it is easy to see why attorneys are perceived as humorless. The historic view of judges as omnipotent, stern and sober, with powdered wig, staring down from a lofty bench has further contributed to this perception. Rare, however, is the attorney who has never encountered judicial humor.[5]

Judicial opinion writing, as any form of legal writing, requires precision, conciseness, simplicity, clarity and forcefulness.[6] With the possible

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* Rodger Hochman, often mistaken for Robin Williams in appearance only, is a law student at the Shepard Broad Law Center of Nova University.

1. Lawyer jokes would seem to be even more common than lawyers themselves. One dependable source of lawyer jokes is *Playboy* Magazine's monthly "Party Jokes" section. In addition, a collection of cartoon illustrations lampooning attorneys can be found in, BILL BERGER & RICARDO MARTINEZ, WHAT TO DO WITH A DEAD LAWYER (1988).

2. Raymond T. Elligett, Jr., *Legal Wit & Wisdom*, FLA. B.J., Mar. 1992, at 19.

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

4. RUGGERO J. ALDISERT, OPINION WRITING 243 (1990). The author is a senior United States Circuit Judge.

5. For most lawyers exposure occurs within a few weeks of starting law school. The classic first year text WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS (8th ed. 1988) contains the case Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (1941) (where the court considers whether a taxi driver's actions while at gunpoint constitute negligence). The entire case, nearly four pages long, is presented in a single paragraph and is written in the style of a would-be pulp novelist or wannabe playwright:

> The chauffeur in reluctant acquiescence proceeded about fifteen feet, when his hair, like unto the quills of the fretful porcupine, was made to stand on end by the hue and cry of the man despoiled accompanied by a clamorous concourse of the law-abiding which paced him as he ran; the concatenation of "stop thief," to which the patter of persistent feet did maddeningly beat time, rang in his ears as the pursuing posse all the while gained on the receding cab with its quarry therein contained.

Id. at 199.

6. *See* Aldisert, *supra* note 4, at 243.

et al.: Nova Law Review Full Issue

exception of the Bible, no writing is subjected to greater scrutiny than is judicial writing.[7] Even so, judicial humor can be found interspersed throughout legal opinions in nearly every area of law. It can be found as metaphors, imagery, puns, poetry, humorous headings, popular songs, and many other forms. Moreover, considering the popularity of such television programs like *Night Court*, the American public seems comfortable with a practical joker turned judge. Yet, it is unlikely that society ever expects humor from a judge.[8] Between the weighty responsibility of dispensing "justice" and the public perception of judicial power and solemnity, there is an "unexpectedness" of judicial humor which makes it so funny and such a curiosity in the legal landscape.

Like humor in general, judicial humor varies greatly in form and potency. The most lighthearted attempts at humor have been prompted simply by the case names themselves. For example, the first sentence of the opinion in *Plough v. Fields*,[9] reads as follows: "In spite of its title, this case does not involve the age old struggle of mankind to wrest a living from the soil . . . ." In *Short v. Long*,[10] another opinion making use of the litigants names, the appellate court ends with: "The judgment of the trial court is affirmed, and that is the long and the short of it."

Some opinions are even more blatant in their use of humor and even announce their intention to call attention to themselves. For example, in *Aaron v. Life Insurance Co. of Georgia*,[11] a foreclosure case involving property owned by legendary baseball great Hank Aaron, Judge Clark added his own comments in a special concurrence. Although in full agreement with the majority opinion, he confessed that he was motivated to add his comments in order to "pay tribute to baseball's home-run champion" and to fulfill his intention "to make appellate opinions more interesting."[12] The concurring opinion then proceeds to analogize the facts of the case to the action in a baseball game, referring to the appellate judge as umpire, with the power to reverse, in this "television replay."[13] Judge Clark completes his opinion by reciting the last stanza of Ernest Lawrence Thayer's poem

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7. AMERICAN BAR ASSOCIATION, JUDICIAL OPINION WRITING MANUAL 37 (1991).
8. JOYCE GEORGE, JUDICIAL OPINION WRITING HANDBOOK 145 (2d ed. 1986) (describing what litigants expect from judges and why humor is inappropriate).
9. 422 F.2d 824 (9th Cir. 1970).
10. 87 S.E.2d 776 (Va. 1955).
11. 226 S.E.2d 96 (Ga. Ct. App. 1976).
12. *Id.* at 97.
13. *Id.* at 98.

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"Casey at the Bat" and substituting for the last line the conclusion that "Mighty Aaron has struck out," the ultimate ruling.[14]

The saying "Nothing is certain except death and taxes" certainly communicates a somber resignation to the immutable character of nature and the Internal Revenue Service. However, the Tax Court offered an uplifting alternative to this otherwise universally accepted prophesy. In *Jenkins v. Commissioner*,[15] a case involving country music star Conway Twitty's bankrupt burger chain, Twitty Burger, the Tax Court concluded its opinion in verse of its own writing. Finding in favor of the plaintiff Twitty, the Tax Court paid tribute to him with an "Ode to Conway Twitty:"

Twitty Burger went belly up
But Conway remained true
He repaid his investors, one and all
It was the moral thing to do.
His fans would not have liked it
It could have hurt his fame
Had investors sued him
Like Merle Haggard or Sonny James.
When it was time to file taxes
Conway thought what he would do
Was deduct those payments as a business expense
Under section one-sixty-two.
In order to allow these deductions
Goes the argument of the Commissioner
The payments must be ordinary and necessary
To a business of the petitioner.
Had Conway not repaid the investors
His career would have been under cloud,
Under the unique facts of this case
Held: The deductions are allowed.[16]

The Internal Revenue Service, in an "Action on Decision" disagreed with the Tax Court, and added its own "Reprise:"

Harold Jenkins and Conway Twitty
They are both the same
But one was born
The other achieved fame.

14. *Id.*
15. 47 T.C.M. (CCH) 238 (1983).
16. *Id.* at 247 [illegible]

The man is talented
And has many a friend
They opened a restaurant
His name he did lend.
They are two different things
Making burgers and song
The business went sour
It didn't take long.
He repaid his friends
Why did he act
Was it business or friendship
Which is fact?
Business the court held
It's deductible they feel
We disagree with the answer
But let's not appeal.
RECOMMENDATION
Nonacquiescence.[17]

Here it would seem the taxman was not only uncharacteristically merciful, but displayed a sense of humor too!

Literary themes and devices like the ones above take many forms in judicial opinion writing. In one Florida case, *Chemical Specialties Manufacturers Ass'n v. Clark*,[18] a detergent manufacturer successfully sued Dade County over a local labeling ordinance. Fully agreeing with the majority opinion which found that the ordinance was superseded by federal labeling requirements, Chief Judge John R. Brown sprinkles soap powder throughout his concurring opinion:

> Clearly, the decision represents a *Gamble* [Proctor was used in preceding sentence] 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*, . . . we have *Boldly* chosen the course of uniformity . . . .[19]

After including at least a dozen more references to detergents, the opinion ends with: "It is as plain as *Mr. Clean* the proper *Action* is that the

17. A.O.D. 1984-022 (Mar. 23, 1984).
18. 482 F.2d 325 (5th Cir. 1973).
19. *Id.* at 328.

Dade County Ordinance must be superseded, as *All* comes out in the wash."[20]

Often judges simply cannot resist the temptation to run with a humorous theme. In fact, probing legal analysis and artful writing style can combine to form what may be compared to a literary masterpiece.[21] One such opinion is presented in *United States v. Syufy Enterprises*.[22] In *Syufy*, a case involving an antitrust action against a movie theater chain operator, Judge Alex Kozinski of the Ninth Circuit meticulously analyzes the alleged monopolistic practices of the defendant while imaginatively hiding over two hundred movie titles in the opinion. One passage explains that a "dark horse" competitor took a step into the "major league" and "against all odds" began giving Syufy serious competition, in no time "trading places" with Syufy for the lead.[23] The one clue in the opinion indicating how many titles are buried in it is a cryptic footnote suggestion to "*See also* L. Maltin, Leonard Maltin's TV Movies & Video Guide 204 (1989)."[24] It was reported that the West editor was twice called to have the page number in that citation changed, first to 206 and then to 208, suggesting that even Judge Kozinski's clerks had trouble spotting all the movie names.[25]

A quite recent South Florida opinion, solid in its analytical approach, also took great liberty in its writing style. In *Noble v. Bradford Marine, Inc.*,[26] slang terms and popularized phrases from the hit movie *Wayne's World* were liberally used throughout an Order of Remand issued by United States District Court Judge James C. Paine. The first paragraph states: "After an extreme closeup review of the record and excellent authorities, the court enters the following order."[27] The next paragraph, which presents the factual account of a fire in a marina which cast burning debris upon neighboring vessels, is introduced with the heading "Hurling Chunks." Still another paragraph is introduced simply with "NOT!," a Waynism even pop star Madonna is known to have used in a cameo appearance in a Saturday

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20. *Id.* at 329. "Brown reportedly sent a clerk to a supermarket to copy [the] names of every detergent product on the shelves." J. BASS, UNLIKELY HEROES 105 (1981).

21. Judge Learned Hand once commented that he liked to think that the work of a judge is an art, a bit of craftsmanship. *See* H. SHANKS, THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND, at flyleaf (1968).

22. 903 F.2d 659 (9th Cir. 1990).

23. No citation reference is given in order that readers may find these and the other two-hundred or so movie titles on their own.

24. *Syufy*, 903 F.2d at 666 n.10.

25. *Movie Movie*, A.B.A. J., Aug. 1990, at 20.

26. 789 F. Supp. 395 (S.D. Fla. 1992).

27. *Id.* at 396.

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Night Live episode. Finally, explaining that the defendant had waived its right of removal (in a paragraph with the heading "A Schwing and a Miss"), and deeming the belated attempt of removal "way" improvident, the court stated the defendant's "most bogus attempt at removal is not worthy and the Defendant must 'party on' in state court."[28] Some say that the use of such humor adds a refreshing touch to an already over-serious and hyper-sensitive profession.[29] Arguably, where litigants attempt to "pull a fast one" on the court, such humor may be well deserved and likened to court "sanctions" for frivolous or otherwise obvious improper actions by litigants. Thus, humor may have utility in its ability to bring not only the issues, but the litigants themselves, "down to earth." A good example of such use can be found in a court Order by United States District Court Judge Jose Gonzalez, Jr. in *Venezolana Internacional de Aviacion, S.A. v. International Ass'n of Machinists and Aerospace Workers*.[30] The defendant, in apparent disregard for Rule 8(e) and 7(b)(2) of the Federal Rules of Civil Procedure calling for pleadings and motions to be "simple, concise and direct" submitted a motion entitled:

> IAM's Motion to Dismiss Complaint for Reasons of Mootness or, Alternatively, Motion to Strike Viasa's Prayer for Relief Requesting Court Approval of the Use of Self Help in the Form of the Implementation of Its Collective Bargaining Proposals Despite the Fact that the Mandatory Bargaining Provisions of the Railway Labor Act (Meeting and Conferring in Good Faith Regarding All Parties' Proposals) Have Neither Been Commenced nor Exhausted.[31]

In response, the District Court, alarmed that the defendant tried to argue its motion in the title, amended, *sua sponte*, the above named motion to read "*IAM's Motion to Dismiss Complaint, or Alternatively, Motion to Strike.*"[32] Borrowing from A. Pope's "Essay on Criticism," the court added:

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28. *Id.* at 397.

29. Brooks C. Miller, a senior associate at Kelley Drye & Warren in Miami and one of the lawyers involved in the case reacted with amusement: "I thought it was a refreshing change from most orders. I showed it around the office, and it got a few chuckles." Wendy Bourland, *"Wayne's World" Collides with District Court*, PALM BEACH REV., May 8, 1992, at A17. Not everybody got it, though. The litigator representing the plaintiff, unfamiliar with the movie, thought the judge was making light of the situation. *Id.*

30. 118 F.R.D. 151 (S.D. Fla. 1987).

31. *Id.*

32. *Id.*

Words are like leaves; and where they
most abound,
Much fruit of sense beneath is rarely found.[33]

There can be no mistaking the Court's message to the defendant and the aptness of its use of poetry to make its point.

It may be said that judicial opinions, humorous or not, are written for many reasons: for posterity, for the bar, for future judges, for the legislature, for law students, for newspaper readers, for voters, for the losing lawyer, for other judges, and for the writing judge himself.[34] Whoever the intended audience, judges have taken "poetic license" in many other ways. In apparent tribute to Joyce Kilmer, Judge J.H. Gillis, in an action for damages caused when the defendant's car struck the plaintiff's tree, penned his version of "Trees:"

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 pressed
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.[35]

The court explained in a footnote that summary judgment for the defendant was affirmed because of the operation of the state No-Fault Insurance Act. West Publishing, conforming to the opinion's poetic form, printed the headnotes and syllabus in the same style.[36]

33. *Id.*
34. *See* ALDISERT, *supra* note 4, at 25-26.
35. Fisher v. Lowe, 333 N.W.2d 67 (Mich. Ct. App. 1983).
36. West Publishing has often printed both the headnotes and the syllabus in a style conforming to the rhyming opinion. *See, e.g.*, Brown v. State, 216 S.E.2d 356 (Ga. Ct. App. 1975); *In re* Love, 61 B.R. 559 (Bankr. S.D. Fla. 1986); Mackensworth v. American Trading Transp. Co., 367 F. Supp. 373 (E.D. Pa. 1973).

Another poetic parody, *In re Love*,[37] written by United States Bankruptcy Judge A. Jay Cristol, traces the language of Edgar Allan Poe's "The Raven:"

> Once upon a midnight dreary, while I pondered
> weak and weary
> Over many quaint and curious files of
> chapter seven lore
> While I nodded nearly napping, suddenly
> there came a tapping
> As of some one gently rapping, rapping at
> my chamber door,
> "Tis some debtor" I muttered, "tapping at
> my chamber door—
> Only this and nothing more."

The court went on to deny a *sua sponte* motion to dismiss, stating:

> Upon consideration of § 707(b), in anguish,
> loud I cried
> The court's sua sponte motion to dismiss
> under § 707(b) is denied.[38]

Another case, *Mackensworth v. American Trading Transportation Co.*,[39] is entirely in rhyming couplet, including all but one of its eleven footnotes, which apologetically states: "The words of the statute are overly terse, still we will quote them, though not in verse . . . ."[40] Still another case, *United States v. Ven-Fuel, Inc.*,[41] introduces the case with original verse, then continues with a normal writing style divided by the following headings: "The Procedural Background Is Easily Stated," "But The Facts Are More Complicated—," "Applying The Law Is Even Worse," "But For Reasons Stated We Must Reverse."[42]

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37. 61 B.R. 559 (Bankr. S.D. Fla. 1986).
38. *In re* Love, 61 B.R. at 559.
39. 367 F. Supp. 373 (E.D. Pa. 1973).
40. *Id.* at 375 n.5.
41. 602 F.2d 747 (5th Cir. 1979).
42. *Id.* at 747, 749-50, 752-53.

Another case utilizing humorous headings is City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982). The headings, which parody air traffic regulations, airlines and their advertising slogans, include: "One If By Land, Two If By Sea, And Three If By Air," "Pre-Flight Procedure," "We Ain't Just Begun," "The Friendly Skies—Filled with Litigants," "Scope

Finally, no treatment of judicial humor would complete without reference to cases involving animals. In both the following examples, the judges who authored the opinions also made use of the lowly respected pun, probably the most widely used humorous device whether it be in legal or lay arenas. In *Bazzini v. Garrant*,[43] which involved a civil suit by a pet store customer who bought a toucan which died three weeks later, Judge Colaneri remarked that it was "a sad tale (or is it tail) of the noble, but late [bird], which the plaintiff, Debra Bazzini, purchased from the defendants . . . Sexy Sadie's Exotic Bird House."[44] Exercising enormous restraint, given the facts of the case, the judge described that "there was no evidence of fowl play," and that the bird enjoyed "the reign of a lame duck politician," explaining that for "entrepreneurs in the tropical bird business, it is a jungle out there." Finding for the plaintiff, the judge acknowledged that his ruling might "ruffle some feathers" but that "It takes a tender judge to make a tough decision."[45]

In *Miles v. City Council of Augusta*,[46] the issue was whether the owner of Blackie the Talking Cat, prominent for appearances on such television shows as "That's Incredible," was required to pay for a business license for exhibiting Blackie's talents on a public street. The court of appeals unobtrusively worked six "cat" words into its opinion: Catechism, catapulted, catalyst, cataclysmic, category and catatonic. However, the most humorous aspect of this case, besides the recitation of facts, is the legal analysis. Ultimately, the court concluded that, in addition to Blackie's owner requiring a business license to solicit "donations" from pedestrians and motorists to hear Blackie talk, the Appellants' claim of illegal infringement of First Amendment rights of free speech were not demonstrated, stating in the final footnote:

> This Court will not hear a claim that Blackie's right to speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a "person" and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a

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of Review—We're the Administrative Agency, Doing What We Do Best," and "You Deserve National Attention?" *Id.* at 1186-87, 1189-90. The Plaintiff's losing lead counsel, however, deplored the opinion as "beyond the bounds of proper judicial demeanor." Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 719 (1987).

43. 455 N.Y.S.2d 77 (Civ. Ct. 1982).

44. *Id.* at 78.

45. *Id.* at 79.

46. 710 F.2d 1542 (11th Cir. 1983).

right, we see no need for the appellants to assert his right *jus tertii*. Blackie can clearly speak for himself.[47]

Clearly, the humorous analysis is impeccable in its logic.

While many critics say humor has no place in a legal adjudication,[48] Justice Richard Wallach of the Supreme Court of New York has noted, humor, carefully controlled, can properly find a place in judicial writing.[49] Furthermore, the Appellate Judges' Conference in 1966 reflected a mood that a judge should not flinch from the use of color or figures of speech if they add clarity and force to his writing.[50] As any artistic device, it can be overdone, if not misused. Fortunately, abuse of judicial humor would seem to be only a minor flaw in our legal system and in many instances it is used stylistically and artfully without becoming distracting or insulting. Measured, prudent doses of figurative language and humor in judicial opinion enlivens the law, enabling it to avoid becoming bland, commonplace recitation and prevents it from becoming too confusing or overbearing to the general public who is most affected by its application. Hopefully, it can also change the stereotype of the humorless lawyer. Of course, sometimes that requires that lawyers have the ability to laugh at themselves.

47. *Id.* at 1544 n.5.

48. *See, e.g.*, Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989).

49. Richard Wallach, *Let's Have a Little Humor*, N.Y. L.J., Mar. 30, 1984 at 2.

50. B.E. Witkin, *Appellate Court Opinions—A Syllabus for Panel Discussion*, 63 F.R.D. 515, 567 (1973).

The Best of PALS

Arnold B. Kanter*

Prospective lawyers are not the only ones who lack role models, these days. Equally serious is the lack of role models that young lawyers find, once they arrive at the firm. Acutely aware of this problem, the Fair-weather, Winters & Sommers (FWS) Committee on Associate Retention and Evaluation (CARE) sprang to action recently with this memo from CARE Chair Stephen Falderall.

To: All Partners
From: Stephen I. Falderall, CARE Chair
Re: Membership

Our young associates are floundering. If you doubt this, step outside your office and watch them flopping about in the hall. Not a pretty sight, especially at what we're paying them.

CARE has determined that the major reason for associate floundering is the lack of mentoring that our young associates receive today. Forty years ago, when our firm was ten lawyers, mentoring took place naturally. For the last thirty-five or so years, it hasn't taken place at all.

Recognizing this, CARE adopted the following resolution, 4-3: "RESOLVED that there's no time like the present to do something about the firm's mentoring problem." (Two of those voting 'nay' agreed that it was time that something be done about the problem, but could not in good conscience support the resolution because of their belief that there might yet prove to be another time like the present.) This memo sets forth our new Partner-Associate Liaison Strategy (PALS).

INTRODUCTION

Some partners may approach mentoring with a certain skepticism. "Why," they might ask, "is this necessary? *I* was able to make it in this

* © 1993 Arnold B. Kanter. ARNOLD B. KANTER, ADVANCED LAW FIRM MISMANAGEMENT 53 (1993). Reprinted with permission of Catbird Press.

firm without any sort of formal mentoring program," they might say, "so why can't associates today do the same thing, especially since we pay them so much money and they're supposed to be so damn smart? I'm very busy and I've got a lot of pressures on me—to bill, to develop clients, to write articles, to serve on firm committees, just to name a few," they might add. "Why do you have to dump another responsibility on me? Huh? And," they might continue, "it's not like I'm going to get any credit for this, either. I've got plenty of other things I'd rather do than mentor. Why don't you just leave me alone?" they might conclude.

CARE is happy you were able to get all of that off your chest. Venting is healthy. CARE understands your problems. After all, CARE is composed of partners, too. So now can we get on with mentoring?

ESTABLISHING THE MENTOR-MENTEE RELATIONSHIP

CARE wants to make our mentor system as natural as possible. As we know that many of our partners have not related to anyone—much less somebody a generation younger than them—in a decade or more, we list below several possible ways to greet your mentee:

RIGHT: Hello, I'm _____. I'll be your mentor. Any questions?

OKAY: Like, hi. I'm like _____. I'll like be your mentor. Do you like have any questions for me?

WRONG: Under the recently established PALS program, I have been assigned by CARE to serve as your mentor, a fiduciary position that I am very happy to assume. I would like our relationship to be a very natural one, if that is acceptable to you. Should you have any interrogatories, you should feel free to pose them to me at a mutually convenient time.

Once you have greeted the mentee, you will want to try to break the ice. Set forth below are some icebreakers that you may find helpful:

- "Do you have much debt, coming out of law school?"
- "The Grateful Dead are quite a group, aren't they?"
- "I believe in a supernatural force that created the universe, do you?"
- "Which wines do you prefer—red, white or pink?"

- "I'm opposed to the indiscriminate use of nuclear weapons, are you?"
- "How about those Cubs?"
- "How about that Supreme Court?"

Of course, the above are merely suggestions. You should feel free to use them or not, as you see fit. You are trying to establish a bond with your mentee and there are many ways to accomplish that. Use whatever works for you (although CARE discourages bonding by walking down the hall quacking, and requesting your mentee to follow behind you).

CARE knows that it is easier to establish a relationship with somebody with whom you have something in common. Accordingly, we have assigned mentees by height, so that no mentee will be more than two inches taller or shorter than his mentor. Unfortunately, this meant leaving our new 6'7" associate, Rolf Zitz, unmentored. (But chances of anyone relating to Rolf were slim in any case.)

Getting Into the Right Law School ("My Roommate the Moonie Scored in the 98th Percentile on the LSAT and Got Into Harvard. Why Didn't I?")

D. Robert White*

Neither law schools nor their admissions officers care about the *whole* person. Law school isn't college. It isn't out to mold you into a better human being, or to prepare you for life. It doesn't care whether any of your classmates will like you.

Sure, you swam the English Channel in ski boots, and you play classical ukulele. You managed the varsity jazzercize team, and you were the first male in your school's history to play Lady Macbeth. But law schools need more Junior Achievers like the Titanic needed more ice machines.

Law Schools look at two factors: grades and LSAT scores. They just plug the figures into a formula and take as many applicants as they have room for (discounted by the number of people who will die, go to other schools, or decide there must be a less painful way to gird one's loins for life).

What about those stupid essays and recommendations required by the application? These should be viewed more as obstacles than opportunities. Your essays could show you to be barely literate, notwithstanding your *magna cum laude* English thesis at Princeton: "Over 100 Really Good Knock, Knock Jokes." Your recommendations might say only that your methadone treatment appears to be working and your parole officer thinks well of you.

If you're an undergraduate determined to go to law school, your best strategy is to go for the highest grades and LSAT scores you can get. There may be some well-rounded, likeable people in law school, but that isn't what got them in.

The Law School Admission Test (LSAT)

There is ongoing debate as to what the LSAT measures beyond your ability to come up with the $40.00 to register and several No. 2 pencils.

* © 1983 Daniel White. Excerpt from The Official Lawyer's Handbook (1983).

Nevertheless, experience shows that two factors may significantly enhance your performance during the hour of truth: (1) familiarity with the style of LSAT questions, and (2) a good supply of anti-diuretics. The latter can be obtained at any drug store. The former can be had from the following sample questions.

SAMPLE LSAT QUESTIONS

I. Reading Comprehension

Directions:

Read each passage below and answer the questions following each passage by blackening the space beside the answer you believe is most nearly correct.

1. "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness . . . [read the novel *A Tale of Two Cities*, attached to your exam booklet] . . . it is a far, far better rest that I go to than I have ever known."

Question: In the above story, what time is it?
- ☐ (a) The best of times.
- ☐ (b) The worst of times.
- ☐ (c) The New York times.
- ☐ (d) About 2:00 o'clock.

2. "Know thyself."

Question: In the above passage, the writer is . . .
- ☐ (a) Quoting Plato.
- ☐ (b) Advocating a solipsistic approach to epistemology.
- ☐ (c) Employing an archaic usage.
- ☐ (d) Describing your social life.

II. Analytical Reasoning

Directions:

In this section you are given a question based on a stated set of conditions. Choose the best answer and mark the corresponding space beside the answer.

1. Einstein's theory of relativity postulated that there can be no motion at a speed greater than that of light in a vacuum, and time is dependent on the relative motion of an observer measuring the time. If a hydrogen bomb electron is accelerated at a rate of $\prod^2$/speed of light through an inverse hypermagnetic positron field and then bombarded with neutrons in a nuclear pile critical core reaction, what time is it?

☐ (a) The best of times.
☐ (b) The worst of times.
☐ (c) About 2:00 o'clock.
☐ (d) Time to think about business school.

2. For a dinner party, Missy must prepare several different three-bean salads, using chili beans, wax beans, lima beans, kidney beans, and garbanzos. Note that (1) chili beans and lima beans do not taste good together, and (2) lima beans and garbanzos do not look good together.

Missy can prepare how many salads of the following types:

☐ (a) Nine that resemble the bottom of a bird cage.
☐ (b) Four that will have her guests exchanging embarrassed glances within ten minutes.
☐ (c) Two that her pet goat would not eat.
☐ (d) None of the above—if you want to be a bean counter, take the CPA exam.

III. Logical Reasoning

Directions:

In this section, you are required to evaluate the reasoning of the following passage. Although more than one choice may appear correct, use common sense and reasonableness to select the *best* answer. Then mark the appropriate space.

1. If Mr. Smith is a member of Club A, and Ms. Johnson is a member of Club B, and Mr. Smith and Ms. Wilson are members of Club C, and no members of Club C who are also members of Club A are women who belong to the same club as men who belong to more than one club, *then* . . .

☐ (a) Mr. Smith is a lesbian.
☐ (b) Mr. Smith must be in California.
☐ (c) Mr. Smith lied to get into Club C.
☐ (d) About 2:00 o'clock.

2. Ramona said, "All dogs bark. This animal does not bark. Therefore this animal is not a dog."

Which of the following most closely parallels the logic of this statement?

☐ (a) Cats do not bark. Cats climb trees. Trees have bark.
☐ (b) Lawyers overcharge. Taxi meters overcharge. Lawyers are taxi meters.
☐ (c) George sells cars. Every car sold by George is poorly built. George is a Chrysler dealer.
☐ (d) Dogs bay at the moon. Your date bays at the moon. You would be better off getting to know thyself.

IV. Evaluation of Facts

Directions:

This section consists of a set of rules followed by a factual situation. You are required to apply the rules to the facts, blackening the space beside the answers that best reflect the apparent meaning of the rules.

Rules: The offense of first degree murder consists of two elements: (1) a deadly act against a victim, and (2) an intent to commit the deadly act.

Factual Situation: Mr. Jones enters Sydney's Unisex Barbershop in a tough section of New York City. While he is waiting for a haircut, an employee of Sydney's Unisex Barbershop sees him and, believing him to be someone else, runs a chain saw through the upper half of his head.

Question. On trial for first degree murder, the employee of Sydney's Unisex Barbershop should be found:

☐ (a) Clearly guilty of taking too much off the top.
☐ (b) Not guilty because of assumption-of-risk principles respecting unisex barbershops.
☐ (c) Guilty but nevertheless a suitable candidate for mayor of Chicago.
☐ (d) About 2:00 o'clock.

"IT'S A LAWYER, HARRY. DO YOU WANT TO SUE ANYONE?"

Illustrated by Bill Berger © 1992

Open Season on Lawyers

Neal Boortz*

The following is a bill rumored to have been introduced during the 1990 session of the Georgia General Assembly.

A BILL TO BE ENTITLED
AN ACT

To amend part 1 of Article 1 of Chapter 3 of Title 27 of the Official Code of Georgia Annotated, relating to general provisions applicable to hunting wildlife, so as to provide for hunting attorneys; to provide for certain restrictions; to provide for related matters; to repeal conflicting laws, and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Part 1 of Article 1 of Chapter 3 of Title 27 of the Official Code of Georgia Annotated, relating to general provisions applicable to hunting wildlife, is amended by inserting immediately following Code Section 27-3-25 a new Code Section 27-3-26 to read as follows:

(a) Notwithstanding any provision of law to the contrary, any person in possession of a valid hunting license issued pursuant to the provisions of Code Section 27-2-2 may hunt or trap attorneys for recreational, non-commercial purposes, subject to the following:

(1) The taking of attorneys by deadfall is permitted; provided, however, that the use of currency as bait is tantamount to shooting on a baited field and is prohibited;

(2) The killing of attorneys with a vehicle is prohibited; provided, however, that such limitation shall not apply to golf carts. If accidentally

* This piece mysteriously appeared on my desk. It was crumpled and smudged with no identifying marks other than "Neal Boortz, Atlanta" typed on the bottom. We have no idea who Neal Boortz is, and no one has come forward to accept credit. However, we thought it was appropriate for this issue of the Review. Thank you Neal Boortz, whomever and wherever you are . . . .

struck dead, attorneys shall be removed from the right of way and the afflicted vehicle taken to the nearest car wash;

(3) It shall be unlawful to attract attorneys for hunting purposes with calls of "WHIPLASH" or "FREE SCOTCH" or the use of any device mimicking the sight and sound of an ambulance;

(4) It shall be unlawful to chase, herd, or harvest attorneys from an air boat, helicopter or aircraft;

(5) It shall be unlawful to hunt attorneys within 100 yards of a BMW or Mercedes dealership, including, without limitation, on Wednesday afternoons;

(6) It shall be unlawful to hunt attorneys within 200 yards of courtrooms, law libraries, health spas, golf courses, ambulances, hospitals, or any accident involving a MARTA bus;

(7) It shall be unlawful to stage a traffic accident for the purpose of enticing attorneys for hunting purposes;

(8) It shall be unlawful for hunters to disguise themselves as reporters, accident victims, physicians, chiropractors or tax accountants while hunting attorneys;

(9) In any one calendar year the following bag limits shall apply:

(A) Yellow Bellied Sidewinders - 2

(B) Two-Faced Tortfeasors - 1

(C) Back-Stabbing Divorce Litigators - 3

(D) Split-Horned Cutthroats - 2

(E) Insurance Defense Attorneys - no limit

(b) None of the prohibitions contained in paragraphs (1) through (9) of subsection (a) of this Code Section shall apply to an attorney who has been elected to public office, for whom the commissioner is authorized to

pay a bounty not to exceed $5.00 per pelt (including suit, briefcase, shoes and pinky rings).

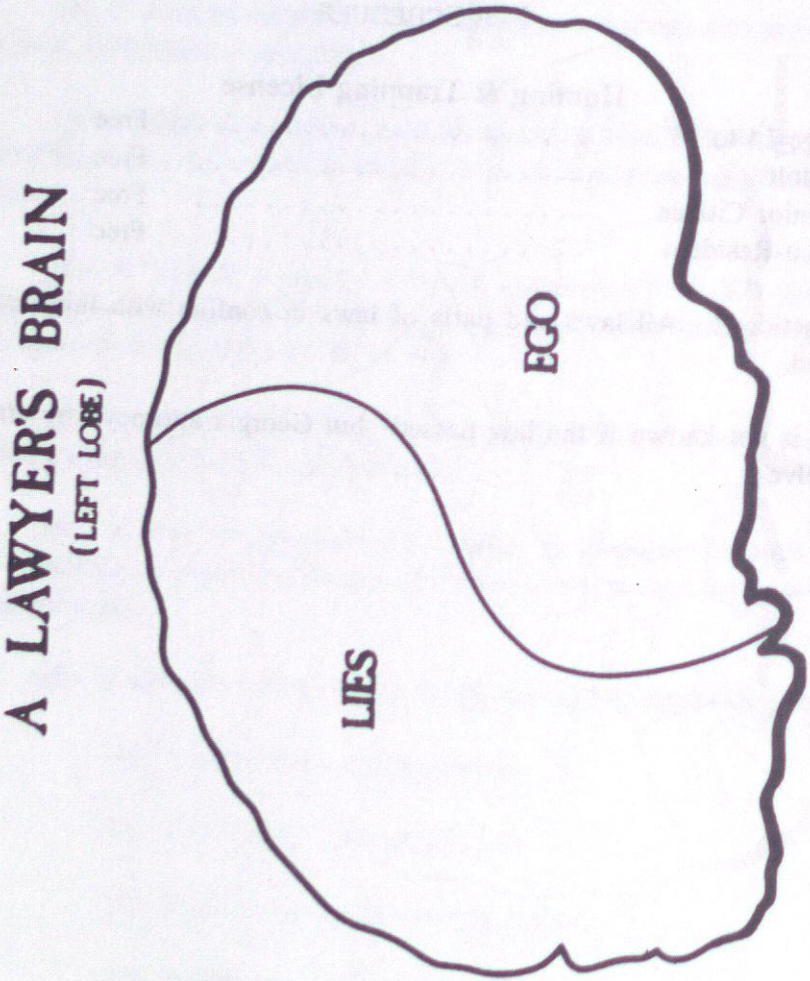
(c) Notwithstanding any other provision in this Code section, Honest Attorneys shall be protected as an endangered species.

FEE SCHEDULE

Hunting & Trapping License	
Age 14 to 18	Free
Adult	Free
Senior Citizen	Free
Non-Resident	Free

Section 2. All laws and parts of laws in conflict with this Act are repealed.

It is not known if the law passed—but Georgia attorneys are arming themselves.



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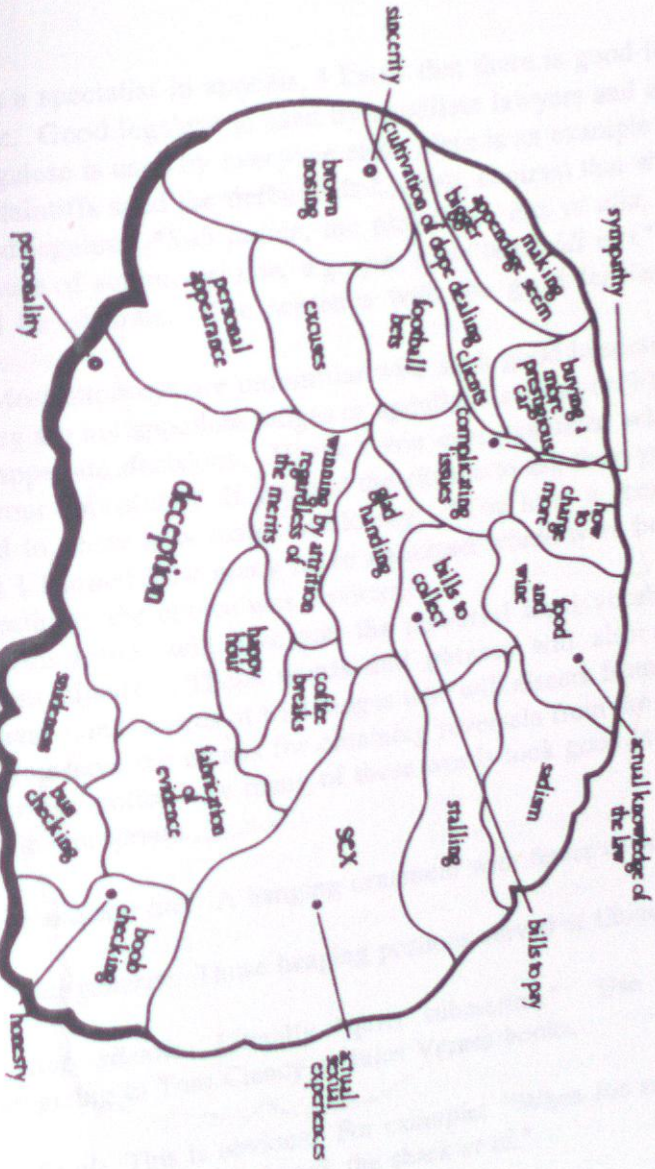

* Illustration by Peter Kagel © 1987

How to Win Friends and Impress Clients With Latin

Paul Morris*

As a specialist in appeals, I know that there is good legalese and bad legalese. Good legalese is used by appellate lawyers and appellate judges. Bad legalese is used by everyone else. Here is an example of bad legalese: "The plaintiffs sued the defendants." Now, contrast that with this example of good legalese: "*Sub judice*, the plaintiff's, *etc, et alia*, brought the *qui tam* cause of action, *vel non, e.g., per diem veni vidi vici.*" The difference should be obvious. The sentence with the good legalese has italicized words.

Most attorneys are unfamiliar with such good legalese either because: (a) they are not appellate judges or appellate lawyers or (b) they have never read appellate decisions. Haven't you ever wondered why some litigants hire your opposition? If you had the chance to ask them you would be surprised to know how many would say: "You have a great reputation, but when I learned how many more italicized words were being used by the competition, the choice was obvious."

This article will give you the powerful legal vocabulary needed to impress clients. These words and phrases will also make you more persuasive in the eyes of trial judges who will discern from your vocabulary that you have the means for obtaining reversals from the appellate courts. Be sure to notice how many of these words look good in italics no matter how inappropriate.

Pendente lite: A hanging ornament with fewer calories.

Sui generis: Those heaping portions served at Chinese restaurants.

Sub silentio: Literally "quiet submarine." Use this term when analogizing to Tom Clancy or Jules Vernes books.

Et al: This is obvious. For example: "When Joe and Al went shark fishing and Al fell overboard, the shark *et al.*"

Writ of coram nobis: Disposing of a very expensive watch, as in "I went broke so I got writ of my coram nobis."

* For a great summary of Paul Morris' entire existence, see *supra* p. 730.

Writ of prohibition: What the 21st Amendment got.

Rule of lenity: This is what happens whenever you ask the surly waitress if the pastrami is lean. The surly waitress will always respond: "If you want lean order something like corned beef." See also "equitable lean."

Ne exeat: This is the command you give to a horse named "Exeat" when you want him to speak. I once placed a bet on "Exeat," who is presently in my children's petting zoo.

Mandamus: Not to be confused with that movie *Mandingo*, where prize-fighter Ken Norton commenced his spectacular film career. However, you are just as likely to obtain judicial relief from filing a petition for a writ of mandamus in federal court as you are renting the movie *Mandingo*.

In loco parentis: How teens view their mothers and fathers.

Infra, contra, supra and accord: These words are mistakenly used interchangeably but actually have different meanings. The first means "below" or "under." The second has something to do with Nicaragua, so don't use it. The others are Japanese automobiles. Watch for the soon to be released Mercedes *Pauperis*.

Pro bono: Derived from a phrase that means "as Cher's first husband and business partner, Sonny Bono did for her." For example: "Your Honor, I am representing this client pro bono," means you are helping the client, the client will make lots of money after you have finished with the case, the client will never appreciate what you have done, and the most you can expect in return is that a bunch of whackos in California will elect you mayor.

Federal habeas corpus: Thanks to the presently-composed Supreme Court of the United States, this phrase is now an oxymoron.

Oral argument: An opportunity for the appellate judges to give false hope to the loosing party.

En banc oral argument: An opportunity for the judges on the original panel to explain to the other judges why they were correct.

Rehearing: A synonym for "denied."

Conflict certiorari: What the Supreme Court of Florida says it is exercising when it disagrees with a district court opinion.

Certified question of great public interest: When you win an appeal in the district court of appeal and your client cannot afford any further review, the district court of appeal "certifies the question" to the Supreme Court of Florida for you (where, by the way, you will loose). See *pro bono.*

You have just read the most critical words and phrases needed to improve your practice. You might want to clip this glossary and keep it on your person for easy reference. On the other hand, it is not to late to make more money and be more appreciated (*e.g.*, go to plumber's school).

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February 29, 1993

Professor James D. Gordon III
J. Reuben Clark Law School
Brigham Young University
Provo, Utah 84602

Dear Jim,

Sincerely,

Kenny Hegland
Professor of Law

P.S. You would have read it any way you wanted to anyway.

BRIGHAM YOUNG
UNIVERSITY

March 5, 1992

Professor Kenny Hegland
College of Law
University of Arizona
Tucson, AZ 85721

Dear Kenny:

Thanks for your letter. Thanks especially for all those nice compliments. You are too kind. I don't deserve more than half the compliments I was able to read into the letter.

Sincerely,

James D. Gordon III
Professor of Law

J. Reuben Clark Law School
Brigham Young University
Provo, Utah

MORAL: A deconstructed world is a happy one.*

* Although not necessarily in that order.

The Top 10 Ways the Justice System Would be Different if Bears Sat on Juries*

10) Bringing live salmon into the courtroom would be considered jury tampering.

9) The wastebasket in the jury room would be constantly tipped over.

8) To prove insanity, the defendant must turn down a piece of grub-infested bark.

7) Use a tranquilizer gun, go to jail.

6) John Gotti would fix his trial by putting a guy in a bear suit on the jury.

5) When put up in a hotel room, jurors would have trouble dialing out.

4) For reasons too complicated to explain, Leona Helmsley would be free.

3) Girls who break and enter, then steal porridge, would be more likely to get the chair.

2) If sequestered too long, the jury would tend to hibernate.

1) The punishment for every crime: foot in bear trap.

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Pain & Suffering

Dave Barry*

As an American, you are very fortunate to live in a country (America) where you have many legal rights. Bales of rights. And new ones are being discovered all the time, such as the right to make a right turn on a red light.

This doesn't mean you can do just *anything*. For example, you can't shout "FIRE!" in a crowded theater. Even if there *is* a fire, you can't shout it. A union worker has to shout it. But you can—I know this, because you always sit right behind me—clear your throat every 15 seconds all the way through the entire movie, and finally, at the exact moment of greatest on-screen drama, hawk up a gob the size of a golf ball. Nobody can stop you. It's your *right*.

The way you got all these rights is the Founding Fathers fought and died for them, then wrote them down on the Constitution, a very old piece of paper that looks like sick puppies have lived on it, which is stored in Washington, D.C., where you have the right to view it during normal viewing hours. The most important part of the Constitution, rightswise, appears in Article IX, Section 2, Row 27, which states:

> *If any citizen of the United States shall ever at any time for any reason have any kind of a bad thing happen to him or her, then this is probably the result of Negligence on the part of a large corporation with a lot of insurance, if you get our drift.*

What the Constitution is trying to get across to you here is that the way you protect your rights, in America, is by suing the tar out of everybody. This is an especially good time to sue because today's juries hand out giant cash awards as if they were complimentary breath mints.

So you definitely want to get in on this. Let's say your wedding ring falls into your toaster, and, when you stick your hand in to retrieve it, you suffer Pain and Suffering as well as Mental Anguish. You would sue:

☛ The toaster manufacturer, for failure to include, in the instructions section that says you should never never never never *ever* stick your hand

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into the toaster, the statement: "Not even if your wedding ring falls in there."

☛ The store where you bought the toaster, for selling it to an obvious cretin like yourself.

☛ The Union Carbide Corporation, which is not directly responsible in this case, but which is feeling so guilty that it would probably send you a large cash settlement anyway.

Of course you need the help of a professional lawyer. Experts agree the best way to select a lawyer is to watch VHF television, where more and more of your top legal talents are advertising:

> Hi. I'm Preston A. Mantis, President of Consumers Retail Law Outlet. As you can see by my suit and the fact that I have all these books of equal height on the shelves behind me, that I am a trained legal attorney. Do you have a car or a job? Do you ever walk around? If so, you probably have the markings of an excellent legal case. Although of course every case is different, I would definitely say that, based on my experience and training, there's no reason why you shouldn't come out of this thing with at least a cabin cruiser. Remember, at the Preston A. Mantis Consumers Retail Law Outlet, our motto is: "it is very difficult to disprove certain kinds of pain."

Another right you have, as an American, is the right to Speedy Justice. For an example of how Speedy Justice works, we turn now to an anecdote told to me by a friend who once worked as a clerk for a judge in a medium-sized city. My friend swears this is true. It happened to an elderly recent immigrant who was hauled before the judge one day. The key to bear in mind is, this man was *not actually guilty of anything*. He had simply gotten lost and confused, and he spoke very little English, and he was wandering around, so the police had picked him up just so he'd have a warm place to sleep while they straightened everything out.

Unfortunately, this judge, who got his job less on the basis of being knowledgeable in matters of law than on the basis of attending the most picnics, somehow got the *wrong folder* in front of him, the folder of a person who had done something semi-serious, so he gave the accused man a stern speech, then sentenced him to *six months in jail*. When this was explained to the man, he burst into tears. He was thinking, no doubt, that if he had only known they had such severe penalties for being elderly and lost in America, he would never have immigrated here in the first place.

Finally, about an hour later, the police figured out what happened, and after they stopped rolling around the floor and wetting their pants, they told

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