

January 2009

## The Judge as Author / The Author as Judge

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### Recommended Citation

Ryan B. Witte, *The Judge as Author / The Author as Judge*, 40 Golden Gate U. L. Rev. (2009).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol40/iss1/3>

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## ARTICLE

# THE JUDGE AS AUTHOR / THE AUTHOR AS JUDGE

*RYAN BENJAMIN WITTE\**

### INTRODUCTION

For federal judges, a life tenure also comes with a lifelong publishing deal. Most judges remain faithful to the rigid framework of judicial opinion writing that dominates the shelves of law libraries throughout the country. But some judges utilize certain cases to summon their inner novelist or poet to add life and flavor to the pages of the case reporters. These judges are both authors and artists.

The use of humor, poetry, and popular culture in judicial opinions has many benefits but is not without its critics. This Article analyzes the role of a judge as an author of judicial opinions and compares the costs and benefits of judges bringing their outside artistic skills and experience to bear on their judicial opinions.

The first section of this Article discusses the judge as an author. This section begins with an examination of the audience for judicial opinions and an outline of the different styles of judicial opinion writing. The second section of this

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Article examines the advantages and disadvantages of using literary tools to advance the law. The third section of this Article explores the role of the author as a judge. This section will study a small number of judges who, in addition to the law, maintain outside lives as authors or creative writers. Judges who fit into this category include authors of books, operas, and magazine articles, and their opinions are often written in a manner that reflects their experience. This section discusses the advantages and drawbacks of having these unique judges deciding cases dealing with a wide range of authors' issues, such as copyright and free speech.

## I. THE JUDGE AS AUTHOR

*"You have an obligation as a judge to be right,  
but you have no obligation to be dull."*

*- Justice J. Michael Eakin<sup>1</sup>*

Each branch of the federal government finds the source of its powers in the U.S. Constitution, and each of these branches is uniquely positioned to exercise its powers in distinctive ways. Article I grants the Congress the power to raise armies, control the purse, and declare war.<sup>2</sup> Article II provides the President with the power to direct the armed forces as the Commander in Chief and charges him or her with the duty to ensure that all laws are faithfully executed.<sup>3</sup> Article III, however, does not provide the courts with any explicit enforcement mechanisms to ensure that their judgments are respected.<sup>4</sup> For this reason, the "judiciary's power comes from its words alone."<sup>5</sup> Because the courts' power extends only so far as the pronouncements it makes through judicial opinions, the way in which those opinions are constructed is extremely important.

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<sup>1</sup> Adam Liptak, *Justices Call on Bench's Bard To Limit His Lyricism*, N.Y. TIMES, Dec. 15, 2002, at A41.

<sup>2</sup> U.S. CONST. art. I.

<sup>3</sup> U.S. CONST. art. II.

<sup>4</sup> U.S. CONST. art. III.

<sup>5</sup> Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008).

## A. THE AUDIENCE

Judicial opinions are written for a variety of audiences. Most noticeably, an opinion is directed at the lawyers and litigants whose controversy is the subject of the decision.<sup>6</sup> The opinion provides the parties with the rationale and legal reasoning behind the judge's decision. For most litigants, this is an extremely personal matter — many controversies involve deeply personal conflicts, while many others are the culmination of years of a rigorous and overwhelming journey through the criminal or civil justice system. Many litigants have also been stripped of their privacy — paraded through a seemingly never-ending schedule of depositions, interrogatories, or cross-examinations. Lawyers and litigants spend thousands of dollars seeking the judicial disposition of their rights. For those litigants who are lucky enough to actually get a judicial opinion, as opposed to a simple *per curiam* order without an opinion, it serves as the light at the end of a very long tunnel. Regardless of the outcome, a judicial opinion should provide the parties with satisfying evidence that the judge has made a thoughtful and thorough decision based on the merits of the case.

Beyond lawyers and litigants in the specific controversy, a judicial opinion provides guidance and binding precedent for other judges on the same court, as well as for judges on lower courts.<sup>7</sup> The opinion may be relied on in subsequent cases to decide controversies, resolve legal questions, and determine outcomes of similar factual situations. For this audience, it is equally important for the judicial opinion to be clear, thoughtful, and legally sound. In the absence of clarity, courts would struggle with keeping decisions consistent. A decision may also be subject to review by a higher court, which is another reason for clarity in opinion writing.

Judicial opinions are also directed at law students, serving a vital role in legal education. Opinions can both instruct on the law and “serve as building blocks on which future lawyers model their legal-writing skills.”<sup>8</sup> Because most legal textbooks

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<sup>6</sup> See Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597, 600 (2003).

<sup>7</sup> See Susan K. Rushing, Note, *Is Judicial Humor Judicious?*, 1 SCRIBES J. LEGAL WRITING 125, 128 (1990).

<sup>8</sup> See Lebovits et al., *supra* note 5, at 254.

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are simply collections of judicial opinions, a wide variety of different styles can contribute to the professional education of students.

The last audience of judicial opinions is the general public. Although the general populace rarely reads more of court opinions than the quotes they gather from the newspaper, it is nonetheless important that judges keep the layperson in mind when crafting their opinions.<sup>9</sup> “When used effectively, [a judicial opinion is] a vehicle of communication between the Court and the people.”<sup>10</sup> While an opinion most directly impacts the litigants in a particular case, the specific rationale and legal reasoning can inform laypersons about the nature of their rights.

## B. TYPES OF JUDICIAL OPINIONS

In describing the types of judicial opinions, Judge Richard Posner articulated the idea that there are essentially two types of opinions: the pure opinion and the impure opinion.<sup>11</sup> The “pure opinion” is the term used to describe the “formal opinion written with legalese and with a tone of high professional gravity.”<sup>12</sup> This opinion is described as being serious, impersonal, and matter-of-fact.<sup>13</sup> The judge writing in this manner will obscure his or her own literary style through the use of lengthy quotations from previous cases, conveying only the most abrupt explanation for the decision. “Although attorneys and judges might be able to decipher the pure opinion, it is inaccessible to the average reader.”<sup>14</sup>

The “impure” opinion is written in a more conversational tone, using simple and accessible language.<sup>15</sup> This type of writing tends to be more fact-based and directed toward the

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<sup>9</sup> Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 71, 101 (2003); see also FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 161 (1980) (“Finally, the opinion meets its public — and a deafening silence ensues.”).

<sup>10</sup> See Kapgan, *supra* note 9, at 101 (quoting William Domnarski, In the Opinion of the Court 88 (1983)).

<sup>11</sup> See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1426-28 (1995).

<sup>12</sup> See Lebovits et al., *supra* note 5, at 250-51 (internal quotations omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

general public.<sup>16</sup> Opinions that utilize humor, prose, poetry, or popular culture, including almost every opinion discussed in this Article, fall into this category.

With the utmost respect for Judge Posner, the terms “pure” and “impure” convey a misleading connotation regarding these judicial writing styles. The term “impure” suggests that the opinion that is written in a more conversational, easy-to-understand tone is imperfect, flawed, and incorrect. Despite the “high, dignified place the judicial system has in American society,”<sup>17</sup> courts must be perceived as accessible and fair to all members of society. The same characteristics that may render an opinion “impure” are the very characteristics that make decisions understandable to a broader base of the American public. Branding these easy-to-understand opinions with the scarlet letter of “impurity” may dissuade judges from utilizing these useful and important literary tools. So long as judges strike the appropriate balance, there is a great benefit to be gained by injecting humor and candor into judicial opinion writing.

To avoid the unnecessary and unwarranted stigma associated with labeling an opinion “pure” or “impure,” the remainder of this Article will instead use the terms “traditional” and “nontraditional” opinions to describe the different writing styles.<sup>18</sup>

## II. ARGUMENTS FOR AND AGAINST NONTRADITIONAL OPINIONS

### A. ARGUMENTS AGAINST NONTRADITIONAL OPINIONS

Various literary tools have been used in judicial opinions, ranging from humor to poetry, popular culture, and music. Although each of these tools draws its own criticisms, arguments have been made collectively against the use of any nontraditional literary technique in judicial opinions.

Most criticism of nontraditional opinion writing begins with one of two primary contentions: 1) the high honor of the judicial system is degraded by the use of nontraditional

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<sup>16</sup> *Id.* at 252.

<sup>17</sup> *Id.*

<sup>18</sup> To my knowledge, these terms are my own creation.

opinions, or 2) the relative position of power a judge has over the litigants requires restraint from these types of opinions.

### 1. *Undermining Respect for the Judicial System*

The first argument against the use of nontraditional judicial opinions is premised on the idea that the judicial system's importance requires the utmost decorum and solemnity. For these critics, "the bench is not an appropriate place for unseemly levity."<sup>19</sup> For the justice system to work effectively, these critics argue, the judge must be seen as an impartial arbiter, rendering only opinions that are consistent with the law.<sup>20</sup> Critics argue that a nontraditional opinion can give the appearance that a judge is giving a personal opinion rather than basing his or her decision on legal grounds.<sup>21</sup>

In addition, the nontraditional style risks turning the opinion into a spectacle and not a legal tool. For a judge whose urge to be flashy overwhelms the legal reasoning in the opinion, this can certainly be true. For instance, in the case of *In re Love*,<sup>22</sup> Bankruptcy Judge (and nonfiction author) Ahron Jay Cristol issued a judgment modeled after Edgar Allan Poe's "The Raven," complete in lingo, meter, and rhyme.<sup>23</sup> While this

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<sup>19</sup> See THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES vii (William L. Prosser ed., 1952).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> *In re Love* 61 B.R. 558 (Bankr. S.D. Fla. 1986).

<sup>23</sup> *Id.*

Once upon a midnight dreary, while I pondered weak and weary  
 Over many quaint and curious files of chapter seven lore  
 While I nodded nearly napping, suddenly there came a tapping  
 As of some one gently rapping, rapping at my chamber door,  
 "Tis some debtor" I muttered, "tapping at my chamber door—  
 Only this and nothing more."  
 Ah distinctly I recall, it was in the early fall  
 And the file still was small  
 The Code provided I could use it  
 If someone tried to substantially abuse it  
 No party asked that it be heard.  
 "Sua sponte" whispered a small black bird.  
 . . . .  
 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?

opinion is certainly entertaining to read, the time and effort necessary to “quoth” “The Raven”<sup>24</sup> could arguably have been better spent on the incorporation of some citation to case law or legal doctrine.<sup>25</sup> While literary tools can be used to liven a judicial opinion, substance must never be lost to style.

## 2. *Abusing the Power of the Court*

The next criticism of nontraditional judicial opinions is concerned with the feelings of the actual litigants who are the subjects of the nontraditional opinion. As Dean Prosser noted, “[a litigant has] vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.”<sup>26</sup> Dean Prosser’s concerns are well placed. There is, however, a clear difference between humor used within a judicial opinion to make light of a particular legal issue or set of facts for readability’s sake and a jab directed at the litigant or the attorney involved in the case in order to insult or belittle the participants.

Behind each judicial opinion is a plaintiff or plaintiffs who believe they were wronged in some way. These plaintiffs trust in the legal system to provide them with a fair and unbiased

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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 foresaken.  
 Now my motion 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.

<sup>24</sup> Pun intended.

<sup>25</sup> See also Judge Cristol’s attempt at replicating Dr. Seuss’s meter and rhyme in *In re Hal Ray Riddle*, Sua Sponte Order Determining Debtors’ Compliance with Filing Requirements of Section 521(a)(1), Case No. 06-11313-BKC-AJC (Bankr. S.D. Fla. 2006), available at [http://en.wikisource.org/wiki/The\\_Riddle\\_Bankruptcy\\_Decision](http://en.wikisource.org/wiki/The_Riddle_Bankruptcy_Decision).

<sup>26</sup> THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES vii (William L. Prosser, ed. 1952).



determination of rights and to treat their case seriously. If the opinion they are handed at the end of litigation is crafted entirely in poem form, how are they to feel? The litigants may feel that the court did not take their case seriously or did not engage in thoughtful consideration of their problems.<sup>27</sup> Especially in the case of poetic opinions, the litigants and the public may feel as if the judge spent more time crafting the poem than contemplating the law.<sup>28</sup>

Take, for example, the case of *Zangrando v. Sipula*.<sup>29</sup> This sixty-paragraph opinion, which was written entirely in rhyme by Judge Michael Eakin, involved an action brought by a dog owner to recover veterinary fees after the defendant motorist struck the animal.<sup>30</sup> Judge Eakin, who now sits as an associate justice on the Supreme Court of Pennsylvania, is known for his rhyming opinions.<sup>31</sup> Unlike the rhyming opinion in *Fisher v. Lowe*,<sup>32</sup> this decision offers no succinct legal analysis and leaves the reader (and certainly any court applying the case) bewildered as to the precedential value. However, unlike Judge Cristol in *In re Love*, Judge Eakin in *Zangrando* at least includes seven citations in footnote form to direct the reader to the appropriate case law.<sup>33</sup> Nevertheless, it is hard to argue that Judge Eakin and Judge Cristol could not have dedicated the extra time that it took to craft the rhymes to some other pressing legal matter or to clarify their opinions for posterity.

In actions for personal injury or wrongful death, where emotions can run extremely high, the use of humor or poetry

<sup>27</sup> See Lebovits et al., *supra* note 5, at 272.

<sup>28</sup> *Id.* at 275.

<sup>29</sup> *Zangrando v. Sipula*, 756 A.2d 73 (Pa. Super. 2000).

<sup>30</sup> *Id.*

<sup>31</sup> See Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L. J. 597 (2003) (highlighting Judge Eakin's poetic opinions, and discussing generally the propriety of poetry in judicial opinions).

<sup>32</sup> In *Fisher v. Lowe*, 333 N.W. 2d 67 (Mich. Ct. App. 1983), the Michigan Court of Appeals was confronted with a plaintiff who sued the driver of an automobile that struck and damaged his oak tree. The rhyming opinion concludes with a succinct footnote that explains the legal rationale for the decision. This case is also notable because the headnote writers of the Northwest Reporter got in on the act and took poetic license in their headnote descriptions. See 333 NW. 2d 67 at HN1 ("Defendant's Chevy struck a tree, There was no liability; The No Fault Act comes into play, As owner and the driver say; Barred by the Act's immunity, No suit in tort will aid the tree; Although the oak's in disarray, No court can make defendants pay, M.C.L.A. § 500.3135.?).

<sup>33</sup> See *Zangrando*, 756 A.2d at 75-77.

can be not just wasteful but wholly inappropriate. Even in seemingly sterile cases, such as breach-of-contract or a copyright-infringement cases, the litigants have a much greater personal stake in the outcome of the litigation than the judge. While a judge may see thousands of cases over the course of his or her career, a typical litigant may only file one claim. The personal attachment of each litigant to his or her cause can be difficult for a judge to empathize with. Without the appropriate measure of self-awareness, a judge runs the risk of appearing to trivialize an important legal matter. Some argue that the risk of potential harm means that the safest course is to entirely eliminate humor and poetry from judicial opinions.<sup>34</sup> However, the benefits clearly show that some good can result from nontraditional opinion writing. So long as judges are subject to scrutiny by their contemporaries, some of the most egregious examples of misplaced humor and poetry can be curbed.

When it comes to judicial opinions that use humor at the expense of the parties, the concerns are greatest.<sup>35</sup> The argument over the inadequacy of nontraditional opinions to articulate legal rationale gives way to a much greater issue: *respect*. A judge who uses humor to belittle a litigant or attorney loses all of the potential benefits associated with nontraditional opinions. It conveys a message that judges are petty and willing to settle personal grudges at the expense of justice.

Take, for instance, Judge Kent from the Southern District of Texas. In *Bradshaw v. Unity Marine Corp.*,<sup>36</sup> the plaintiff brought a personal injury action against a dock owner for injuries sustained while working aboard a boat. The legal issue was whether Texas's two-year statute of limitations for personal injury claims would apply, or whether federal maritime law would apply, extending the limitations period to three years.<sup>37</sup> Despite being able to state the issue and the

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<sup>34</sup> See Lebovits et al., *supra* note 5, at 274. ("Litigation is not funny. Humor serves no purpose in an opinion meant to create legal precedent and reflect reasoned judgment.") (citations omitted).

<sup>35</sup> See Alex B. Long, *[Insert Song Lyrics Here!]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 564-66 (Spring 2007).

<sup>36</sup> *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668 (S.D. Tex. 2001).

<sup>37</sup> See *id.*

resolution to the case in one paragraph,<sup>38</sup> Judge Kent nonetheless took the opportunity to belittle and insult counsel for both parties over the course of his four-page opinion.<sup>39</sup> While a more comical example of judicial prose is hard to come

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<sup>38</sup> See *id.* at 672 n.3.

<sup>39</sup> *Id.* at 670-72.

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact-complete with hats, handshakes and cryptic words-to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. . . . Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. . . . The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!). . . . Despite the continued shortcomings of Plaintiff's supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon-Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig. Now, alas, the Court must return to grownup land. . . . Take heed and be suitably awed, oh boys and girls-the Court was able to state the issue and its resolution in one paragraph . . . despite dozens of pages of gibberish from the parties to the contrary! . . . . Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for Summary Judgment is GRANTED.

At this juncture, Plaintiff retains, albeit seemingly to his befuddlement and/or consternation, a maritime law cause of action versus his alleged Jones Act employer, Defendant Unity Marine Corporation, Inc. However, it is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action. In either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand-he could put his eye out.

by, the harm done to the attorneys in this case — economically, professionally, and emotionally — cannot be squared with the benefits of nontraditional opinion writing. Judge Kent's legal analysis in *Bradshaw* is contained within a few paragraphs. He reviews the facts at the beginning of the opinion and explains the law near the end — everything else in between is simply a tirade against the attorneys. Even worse, the attorneys in a scenario such as this have no real recourse against this kind of damaging attack.<sup>40</sup> The use of humor overshadows the real issue in the case; the plaintiff's personal injury action is being dismissed. Judge Kent neglects the fact that a real litigant, with a real injury, is being foreclosed from righting a perceived wrong in a court of law. Regardless of how seriously Judge Kent took this matter, the opinion that he penned in *Bradshaw* seems to show nothing but contempt for the parties and the litigators. The use of humor in this case does nothing to advance the opinion's reasoning or the law. This case is a perfect example of why nontraditional legal opinion writing is criticized for its informality and tactlessness.

## B. ARGUMENTS FOR NONTRADITIONAL OPINIONS

Despite the possible problems outlined above, there are several positive attributes of the nontraditional opinion. Overall, it is important to keep in mind that “the judicial opinion is an essay in persuasion. The value of an opinion is measured by its ability to induce the audience to accept the judgment.”<sup>41</sup> Depending on the audience, a different style may be necessary to maximize the opinion's impact. One place where the nontraditional opinion could be most useful is with the general public.

One reason the general public may avoid reading judicial opinions is the perception that they are written in such a way as to befuddle and bewilder the layperson. Indeed, Judge Posner's description of the “pure” or traditional opinion describes a style that is beyond the understanding of the nonlawyer.<sup>42</sup> Insofar as the general public is a target audience

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<sup>40</sup> See Lebovits et al., *supra* note 5, at 272 (“It is not a fair fight: The judge gets to have the first and the last word on the matter. The subject of the judge's ridicule has no recourse but to accept the joke and the accompanying humiliation.”).

<sup>41</sup> See Kappan, *supra* note 9, at 97 (internal citations omitted).

<sup>42</sup> See Posner, *supra* note 11.

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of judicial opinions, the nontraditional style may be best at conveying legal doctrine to the masses. Laws that apply to all should be understandable by all. Since “style and substance are intimately connected,” the opinions that are easiest to understand are often written in a manner that grabs the reader’s attention with humor, poetry, or popular culture.<sup>43</sup> It is no mystery that the judges who also have careers as authors craft some of the most quoted and most understandable opinions. Judge Posner acknowledges that “[t]he power of vivid statements lifts an opinion . . . out of the humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, and provokes thought.”<sup>44</sup> Opinions that use humor can help “demystify” the law and make it accessible to the average reader. Because transparency is an essential component to confidence in the government, the more transparent and readable the decision, the more confident the public can be in the courts.

By making decisions accessible to the general public, judges are also able to humanize themselves. Despite the high place that courts hold in our society, there is no reason why judges have to be seen as faceless automatons only concerned with formality and tradition. In a case that appears to waste judicial resources or amount to an injustice, the public would want to know that the judge shares those concerns. Similarly, a judge who uses references to popular culture can be seen as in touch with society. Allowing a judge to utilize humor to put the issues into perspective may also allow the public to gain a greater respect for the judge and the judicial process.

Insofar as the audience of the opinion consists of law students, the use of humor, poetry, music, or popular culture can also serve to teach the law in a novel or exciting way. Because law is currently learned by reading opinion after opinion, the rare gem that breaks free from formality is more likely to resonate with the student and be remembered. So long as the opinion does not elevate style over substance, there is no reason why nontraditional opinions should not be used to advance the law.<sup>45</sup>

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<sup>43</sup> See Kapgan, *supra* note 9, at 72.

<sup>44</sup> *Id.* (quoting RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 136 (U. Chi. Press 1990).

<sup>45</sup> For a collection of humorous opinions (many of which are noted in this Article), see Andrew McClurg’s Legal Humor Headquarters, <http://www.lawhaha.com> (last

Disposing of certain cases in a humorous way can also act as a deterrent against the filing of baseless claims. It is no shock that judicial resources are continually strained with growing dockets, and many of the claims that judges are asked to decide should be resolved by the common sense of attorneys rather than judges' pronouncements. In such cases, the use of humor to dispose of baseless actions could encourage attorneys for future plaintiffs or defendants (and even lower courts) to think twice before wasting the court's time.

Just as punitive damages can be awarded to deter certain conduct, so too should the court be permitted to deter frivolous claims and arbitrary judicial action with the use of wit. In *Oil & Gas Futures, Inc. of Texas v. Andrus*, the U.S. Court of Appeals for the Fifth Circuit was asked the simple question whether “.82” meant the same thing as “82%” for the purpose of a competitive bidding process for an oil and gas development lease off the coast of Louisiana.<sup>46</sup> Clearly unhappy with counsel's consumption of the valuable resources of the court to decide this issue, the panel struck back in its opinion.<sup>47</sup> In reversing the district court's finding that the state acted arbitrarily and capriciously in finding that the two numbers were synonymous, the court of appeals cited as the chief legal authority a ‘*treatise*’ entitled “Growth in Arithmetic (Revised Edition, Grade Eight).”<sup>48</sup> The court declared that “[h]aving successfully completed grammar school, we are able to answer the question in the affirmative.”<sup>49</sup> The use of humor in this opinion clearly serves a deterrent function to future litigators in evaluating the merits of their lawsuit. In addition, an opinion like this can clearly signal lower courts to take more care in ruling on the cases before them. Unlike the opinion by Judge Kent in *Bradshaw v. Unity Marine*,<sup>50</sup> the panel in this case used humor to shed light on the absurdity of the legal issue without personally attacking any of the parties. Moreover, the use of humor in a government contract dispute is

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visited Dec. 30, 2008).

<sup>46</sup> *Oil & Gas Futures, Inc. of Texas v. Andrus*, 610 F.2d 287 (5th Cir. 1980).

<sup>47</sup> *Id.* at 287. (“We find it quite incredible that not only was this suit ever brought, but that the appellee convinced the district court that the Secretary abused his discretion.”).

<sup>48</sup> *Id.* at 288.

<sup>49</sup> *Id.* at 287.

<sup>50</sup> *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 688 (S.D. Tex. 2001).

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much less objectionable than in a personal injury lawsuit, because of the nature of the injury.

Despite the many drawbacks, the nontraditional opinion can certainly be a useful tool for advancing the law. Provided the judge uses his or her literary flair in a way that preserves the integrity of the opinion, maintains readability, and displays respect for the attorneys and the litigants, there is no reason why these artistic tools cannot be used for the improvement of judicial opinion writing.

### III. THE AUTHOR AS JUDGE

Justice Oliver Holmes once remarked that “[t]he law is not the place for the artist or poet. The law is the calling of thinkers.”<sup>51</sup> With the utmost respect for Justice Holmes, it seems that this statement does not account for the large number of judges who make the successful transition from judging to writing and back, without any adverse impact on their success in either field. In addition to the skills that are brought to bear on their written opinions, judicial authors can bring to the table a nuanced understanding of their particular specialty; this can be seen clearly when these judges address legal issues important to artists, especially in the fields of copyright and free speech. While “[t]he law is the calling of thinkers,” there is no reason why that moniker is incompatible with the label of “artist.”

This section will survey some of the authors who reside on the bench, paying particular attention to how they utilize their knowledge and experience both substantively and stylistically to advance the law. Whether the judge’s experience as an author helps resolve a substantive issue, like a complex copyright problem, or is used stylistically to advance a particular belief, even in a dissent, the judicial author might have an advantage over her or his non-artistic colleagues. Since all judges essentially are professional writers, these three examples illustrate how the judge and the artist can coexist and result in improved legal decisionmaking. This section evaluates the use of humor, poetry, music, and popular culture by judges who are also known for their involvement in the arts. The following cases are prime examples of using nontraditional

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<sup>51</sup> Oliver Wendell Holmes, *Case & Comment*, Mar.-Apr. 1979, at 16.

opinions to resolve issues encountered by artists, such as copyright infringement, appropriation of likeness, or freedom of speech.

#### A. THE OPERA COMPOSER: JUDGE RICHARD OWEN

Judge Richard Owen, a federal judge from the Southern District of New York, has had a remarkable career, both on the bench and off.<sup>52</sup> In addition to his twenty-plus years of practice and his thirty-plus years on the bench, Judge Owen has penned the words and music for eight operas, all of which have been produced.<sup>53</sup> While serving in his position with the Department of Justice, Owen began taking night classes with “Vittorio Giannini, who wrote the opera ‘The Taming of the Shrew,’ and, in the early 1960s, [Judge Owen] attended composition classes at the Manhattan School of Music every Thursday he wasn’t in the courtroom.”<sup>54</sup>

One case in particular presented Judge Owen with an opportunity to combine his musical skills and judicial experience. In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, Judge Owen was asked to parse musical notes and harmonies to decide if George Harrison’s song “My Sweet Lord” infringed upon the copyright of the song “He’s So Fine” by the Chiffons.<sup>55</sup> Because this case was decided at a bench trial, it is uniquely suited to demonstrate the advantages of having an artist decide artistic issues.<sup>56</sup>

The facts of *Bright Tunes* alone required some understanding of musical composition. Judge Owen was able to break both songs down into their musical components to compare them for the infringement claim.<sup>57</sup> Showing his

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<sup>52</sup> Christine Perkins, Courtrooms and Dramas: Richard Owen ’50 Has a Noteworthy Career in Both, [http://www.law.harvard.edu/news/bulletin/2006/summer/cn\\_01.php](http://www.law.harvard.edu/news/bulletin/2006/summer/cn_01.php).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (1976).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 178. (Judge Owen found that “He’s So Fine” was a “catchy tune consisting essentially of four repetitions of a very short musical phrase, sol-mi-re [motif A]. . . followed by four repetitions of another short basic musical phrase, sol-la-do-la-do [motif B]. . . . [I]n the second use of the motif B series, there is a grace note inserted making the phrase go sol-la-do-la-re-do.” “My Sweet Lord” also uses “the same motif A four times, followed by motif B . . . , with the identical grace note in the identical second repetition. The harmonies of both songs are identical.”).



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genuine interest in the subject matter, Owen engaged in a colloquy with George Harrison covering forty pages of the transcript in an attempt to discover “the wellsprings of musical composition — why a composer chooses the succession of notes and the harmonies he does,” something Owen describes as a “fascinating inquiry.”<sup>58</sup>

Another way in which Judge Owen’s background assisted him in rendering his judgment was his ability to evaluate expert witness testimony. In *Bright Tunes*, experts testified as to the similarities between the two songs. But relying on his own understanding of musical construction, Judge Owen noted that the differences described by the experts “essentially stem . . . from the fact that different words and number of syllables were involved . . . which . . . has nothing to do whatsoever with the essential musical kernel that is involved.”<sup>59</sup> A less knowledgeable judge might have credited the defendant’s expert’s testimony, leading to a drastically different result.

Although a judge need not be a doctor to rule on a medical malpractice claim, nor a stockbroker to decide a securities fraud case, such professional expertise would certainly be helpful in reaching a decision. The same is true here. The legal issue in *Bright Tunes* was a novel one: whether George Harrison engaged in “subconscious infringement” of “He’s So Fine.”<sup>60</sup> In the end, Judge Owen found that “it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase.”<sup>61</sup> Whether the non-artistic judge could have identified the similarities of the musical motifs, or whether the average judge could have effectively parsed the musical notation in the opinion is unclear. But, in this case, the artistic judge was able to effectively combine his understanding of musical construction and his knowledge of the law to shed light on a complex issue.

One significant observation about Judge Owen is that, despite his expertise in the composition of operas, he makes no attempt to dazzle readers with the incorporation of rhyme or music into his judicial opinions. Unlike many of the judges described in this Article, Judge Owen appears to maintain a

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<sup>58</sup> *Id.* at 180.

<sup>59</sup> *Id.* at 178 n.6.

<sup>60</sup> George Harrison was of course a member of The Beatles’ Fab Four.

<sup>61</sup> *Bright Tunes Music Corp.*, 420 F. Supp. at 180.

strict separation between his two roles.

#### B. THE BOOK AUTHOR: JUDGE MICHAEL MUSMANNO

One of the best examples of a judge utilizing his or her literary skills for the advancement of their legal opinions can be seen in the writings of Judge Michael A. Musmanno.<sup>62</sup> Judge Musmanno sat on the Pennsylvania Supreme Court from 1952 until 1968 and penned over a dozen books ranging from biographies to novels.<sup>63</sup> While many of his majority opinions are considered legendary, his dissents tend to draw the majority of legal commentary. Two dissents in particular juxtapose Judge Musmanno's role as a judge and his role as an author and show that a judge's experience as an author does not always benefit the author standing before him in court.

Under modern constitutional jurisprudence, works of print authorship are considered one of the most protected forms of speech under the First Amendment to the U.S. Constitution.<sup>64</sup> But in the 1960's, a number of cases challenged that assumption on obscenity grounds. In two cases before him, Judge Musmanno ruled decisively in favor of censorship.

There are two possible conclusions about how a judicial author might rule on issues of censorship. The first possibility is that an experienced author would understand the creative elements inherent in writing and would find it hard to impose legal or creative restrictions on publication of those works.

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<sup>62</sup> Even Judge Musmanno's gravestone is eloquent: "There is an eternal justice and an eternal order, there is a wise, merciful and omnipotent God. My friends, have no fear of the night or death. It is the forerunner of dawn, a glowing resplendent dawn, whose iridescent rays will write across the pink sky in unmistakable language — man does live again.' (Final words of Michael A. Musmanno in his debate with Clarence Darrow, 1932.)" See <http://www.arlingtoncemetery.net/mamusman.htm>.

<sup>63</sup> Judge Musmanno's creative works include: *Black Fury* (film script) (Trinacria, 1935); *After Twelve Years* (Knopf 1939); *The General and the Man* (Mondadori, 1946); *Listen to the River* (Droemersche Verlagsanstalt, 1948); *War in Italy* (Valecchi, 1948); *Ten Days to Die* (Doubleday, 1950); *Across the Street from the Courthouse* (Dorrance, 1954); *Verdict!: The Adventures of the Young Lawyer in the Brown Suit* (Doubleday, 1958); *The Eichmann Kommandos* (Macrae, 1961); *Was Sacco Guilty?* (1963); *The Story of the Italians in America* (Doubleday, 1965); *Black Fury (novel)* (Fountainhead, 1966); *Columbus Was First* (Fountainhead, 1966); *That's My Opinion* (Michie Company, 1967); *The Glory and the Dream: Abraham Lincoln, Before and After Gettysburg* (Long House, 1967).

<sup>64</sup> See generally *Near v. Minnesota*, 283 U.S. 697 (1931); *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1964); and *Cohen v. California*, 403 U.S. 15 (1971) (highlighting the importance of free speech in our society).

Although the judge might find the underlying work personally repulsive, the judge's personal preferences would give way to a general respect for an author's creative freedom. The other possibility is that Judge Musmanno has a sense of superior understanding from his artistic experience. Unlike the judicial author who empathizes with artists from a wide range of backgrounds, this judge compares the writing in question to his own personal understanding of a writer's role. This judge views a questionable work through his own artistic lens and decides the case according to his or her own subjective beliefs. Unlike *Bright Tunes Music*, where a judge's experience as an author gives valuable insight into complex copyright issues, the cases below deal instead with subjective artistic beliefs about what constitutes "worthy" art. On the other hand, a judge's experience as an author might allow him to critique the work to an extent that many judges would dare not do.

Two of Judge Musmanno's cases that illustrate the differing effect that his artistic experience has on his judicial opinions were decided within one year of each other, and both involved injunctions against the distribution or sale of certain books. In each case, Judge Musmanno found himself in the dissent, and in both cases, his literary and artistic talent played a role in crafting what have to be some of the most blistering and poetically written dissents ever written. Regardless of the correctness of his legal findings, Judge Musmanno demonstrates how an artistically written nontraditional opinion can explain and advance the law better than a rigid adherence to formal writing.

### 1. *Tropic of Cancer*

In *Commonwealth v. Robin*, the Pennsylvania Supreme Court was asked to rule on the propriety of an injunction against the sale and distribution of Henry Miller's famous work, "Tropic of Cancer."<sup>65</sup> Relying on the decision of the U.S. Supreme Court in *Grove Press v. Gerstein*, which specifically prohibited the injunction of the exact book in question,<sup>66</sup> the Pennsylvania Supreme Court ultimately reversed the decision of the county court, which had enjoined the book. In dissent

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<sup>65</sup> *Commonwealth v. Robin*, 218 A.2d 546 (Pa. 1966).

<sup>66</sup> *Grove Press v. Gerstein*, 378 U.S. 577 (1964).

and undeterred by the U.S. Supreme Court's pronouncement, Judge Musmanno registered his disagreement:

The decision of the Majority of the Court in this case has dealt a staggering blow to the forces of morality, decency and human dignity in the Commonwealth of Pennsylvania. If, by this decision, a thousand rattlesnakes had been let loose, they could not do as much damage to the well-being of the people of this state as the unleashing of all the scorpions and vermin of immorality swarming out of that volume of degeneracy called 'The Tropic of Cancer.' Policemen, hunters, constables and foresters could easily and quickly kill a thousand rattlesnakes but the lice, lizards, maggots and gangrenous roaches scurrying out from beneath the covers of 'The Tropic of Cancer' will enter into the playground, the study desks, the cloistered confines of children and immature minds to eat away moral resistance and wreak damage and harm which may blight countless lives for years and decades to come. From time immemorial civilization has condemned obscenity because the wise men of the ages have seen its eroding effects on the moral fiber of a people; history is replete with the decadence and final collapse of mighty nations because of their descent into licentiousness and sloth.<sup>67</sup>

Relying on his deft skills as an author, Musmanno's expert use of prose, analogy, and illusion saturate his dissent.<sup>68</sup> While

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<sup>67</sup> *Robin*, 218 A.2d at 547.

<sup>68</sup> *Id.* at 546. "To say that 'Cancer' has no social importance is like saying that a gorilla at a lawn party picnic does not contribute to the happiness of the occasion." *Id.* at 550. "No decomposed apple falling apart because of its rotten core could be more nauseating as an edible than 'Cancer' is sickening as food for the ordinary mind." *Id.* at 553. "To say that 'Cancer' is worthless trash is to pay it a compliment. 'Cancer' is the sweepings of the Augean stables, the stagnant bilge of the slimiest mudscow, the putrescent corruption of the most noisome dump pile, the dreggiest filth in the deepest morass of putrefaction." *Id.* "Cancer' is not a book. It is malignancy itself. It is a cancer on the literary body of America. I wonder that it can remain stationary on the bookshelf. One would expect it to generate self-locomotion just as one sees a moldy, maggoty rock move because of the creepy, crawling creatures underneath it." *Id.* at 556-57. "Cancer' is not a book. It is a cesspool, an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity. And in the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, cavorts and wallows a bifurcated specimen that responds to the name of Henry Miller. . . . I would prefer to have as a visitor in my home the most impecunious tramp that ever walked railroad ties, a tramp whose raggedy clothes are held together by faith and a safety pin, a tramp who, throughout his entire life, always moved at a lazy pace, running only to avoid work, a tramp who rides the rods of freight cars with the

a judge may have more artistic freedom in crafting a dissent than a majority opinion,<sup>69</sup> some of these same tools can be used when advancing legal arguments for the majority. For example, in explaining the First Amendment concerns, Judge Musmanno dismisses the legal argument that “anything printed is protected by the Constitution” as “arrant nonsense.”<sup>70</sup> He notes that “[i]t is the most bizarre notion imaginable that a printing press constitutionalizes every paper that passes between and beneath its rollers. Filth does not lose its stench or its bubonic characteristics because it is formed into letters of the alphabet.”<sup>71</sup> Although this is a dissent, this artistic language would give the reader a clear understanding that printed material does not enjoy absolute constitutional protection — a notion that is accurate. When it comes to remembering legal concepts, these artistic tools can help the reader commit concepts to memory as well as remember key words for conducting a search of case law.<sup>72</sup> Justice Musmanno seems to believe that long, formal opinions do not necessarily advance the law as well as common sense and literary flair.<sup>73</sup>

One drawback of Judge Musmanno’s experience as an author could be the nature in which he applied the legally relevant test to determine whether “Tropic of Cancer” was legally obscene. In *Roth v. United States*, the Supreme Court articulated the three-prong test for obscenity.<sup>74</sup> The first two prongs ask whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest.<sup>75</sup> Although Judge Musmanno reviewed testimony of different

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aplomb of a railroad president in his private train, a tramp who knows as much about Emily Post’s etiquette as a chattering chimpanzee . . . .” *Id.*

<sup>69</sup> Kappan, *supra* note 9, at 101-103.

<sup>70</sup> *Robin*, 218 A.2d at 555.

<sup>71</sup> *Id.*

<sup>72</sup> Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597, 615 (2003) (“A good [piece of literature] says something worth knowing in a way that people understand and remember.”).

<sup>73</sup> In *Commonwealth v. Dell Publications*, 233 A.2d 840, 860 (Pa. 1967), Justice Musmanno chastises the majority for their formalist opinion while never answering what he thinks is the key to the litigation. (“The Majority Opinion is a long one; it is erudite, complicated, and as studded with citations and footnotes as a broken plank with bent nails, but it never comes to grips with the problem the litigation presents.”).

<sup>74</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>75</sup> *Id.*

individuals to answer the question above,<sup>76</sup> his experience as an author might preclude him from thinking like the “average person.” Coloring his findings were his experiences as a published author — an author whose books were far from the material contained in “Tropic of Cancer.” Whether a successful author could ever qualify as the “average person” as defined by the law is unclear.<sup>77</sup>

The counter-argument is that an experienced author might have more of a tolerance to different topics and writing styles than the average person would. If this is the case, the author/judge could be more willing to accept works that the average person might not.<sup>78</sup> Provided the legal justifications in a case dealing with the average-person standard are clearly addressed in the judge’s decision, it seems that both of these risks are outweighed by the contribution an author can make to the advancement of the law with his or her literary experience.

## 2. *Candy*

The second example of Judge Musmanno finding against a fellow author was in *Commonwealth v. Dell Publications, Inc.*<sup>79</sup> This case involved an injunction against Terry Southern’s work, “Candy.”<sup>80</sup> The book, challenged as an obscene piece of literature, was found to be protected by the First Amendment. Judge Musmanno dissented:

The Supreme Court of Pennsylvania had an opportunity in this case to unlimber some heavy artillery in fighting for American morality; it had unlimited freedom to pour

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<sup>76</sup> *Robin*, 218 A.2d at 548-49.

<sup>77</sup> Judge Musmanno takes issue with the idea that literary critics should comprise the relevant “community” for determining what is obscene; perhaps the same can be said of professional writers. “What is a community? . . . The Supreme Court has ignored the moral standards of the American people as a whole. It has fashioned most of its decisions on obscenity on the views and attitudes of an infinitesimal minority, literary critics and book reviewers, who, with their admitted talents, cannot possibly speak for the masses not so sophisticated as those who made the reviewing of books their profession.” *Id.* at 864.

<sup>78</sup> See Kagan, *supra* note 9. This is clearly what Justice Musmanno thinks the problem is with judging community standards according to the beliefs of critics and book reviewers.

<sup>79</sup> *Commonwealth v. Dell Publications, Inc.*, 233 A.2d 840 (Pa. 1967).

<sup>80</sup> *Id.*

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devastating fire into the forces that would destroy the very foundations of decency, purity and wholesome conduct upon which our American society is founded; it had the clearest chance to draw from the armory of the law the weapons which would beat back those who, for greed and lucre, would poison the minds of the youth of our Commonwealth. The Supreme Court, however, did none of these things. The Majority of this Court retired from the field of battle without firing a shot. It did more. It encouraged the foul foe to smash more effectively at the bastions of American decency; it unfurled a flag of impeccability and authority over the invading filthy battalions; it supplied to each hoodlum in the putrid expeditionary force a bar of Ivory Soap which made him, according to the Majority's reasoning, 99 1/2% Pure! I disassociate myself, as far as I can, intellectually, jurisprudentially, and philosophically, from the decision of this Court in this case.<sup>81</sup>

The *Candy* case is another plain example of where Judge Musmanno's flair as an author culminated in an unbridled assault on the majority opinion. Like *Robin*, this case is also full of analogy and poetry.<sup>82</sup> Musmanno's experience as an author no doubt helped him to craft these memorable dissents. He serves as a fine example of how the dual roles of a judge as poet and thinker can coexist for the advancement of the law.

C. THE POPULAR MAGAZINE CONTRIBUTOR:  
JUDGE ALEX KOZINSKI

The final judge examined in this section serves as an example of a man whose experience as an author for widespread, popular publications tends to influence his opinion writing. Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit has written essays for publications such as *Slate*, *The New Yorker*, *The New Republic*, and *National*

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<sup>81</sup> *Id.* at 858.

<sup>82</sup> *Dell Publications*, 233 A.2d 840. "Whom would such a decision [to enjoin publication] have hurt or offended? No one but those who are heaping up sordid dollars, as a rake gathers up rotten leaves in an abandoned and unseeded garden." *Id.* at 858. "[The majority] apparently advances the theme that a community of people should not object to being pushed into a mud pond because there are other communities which permit cesspools where frogs and lizards revel in natatorial slime." *Id.*

*Review.*<sup>83</sup> Not only are many of his opinions extremely funny and stylistically written, but Judge Kozinski's expertise as an author comes out in many of his intellectual-property cases. Judge Kozinski uniquely includes a large number of references to popular culture in his opinions, drawing on his experience (and humor) to add to the law substantively.

### 1. *Vanna White*

The first, and possibly the most famous, example of Judge Kozinski's humorous opinions is his dissent from the denial of rehearing en banc in *White v. Samsung Electronics*.<sup>84</sup> This dispute arose out of a VCR commercial that depicted a robot in a dress and wig standing in front of a Wheel of Fortune game board.<sup>85</sup> Vanna White, one of the stars of Wheel of Fortune, who is known for her dresses and blond hair, sued Samsung for a misappropriation of likeness and other intellectual-property rights.<sup>86</sup> In the Ninth Circuit's decision (a decision in which Judge Kozinski was not involved), the court held for Ms. White on the misappropriation of likeness claim.<sup>87</sup> In his dissent from a denial for a rehearing en banc, Judge Kozinski used humor to describe what he believed to be the absurdity of the majority's legal rationale:

Consider how sweeping this new right is. What is it about the ad that makes people think of White? It's not the robot's wig, clothes or jewelry; there must be ten million blond women (many of them quasi-famous) who wear dresses and jewelry like White's. It's that the robot is posed near the "Wheel of Fortune" game board. Remove the game board from the ad, and no one would think of Vanna White. But once you include the game board, anybody standing beside it — a brunette woman, *a man wearing women's clothes, a monkey in a wig and gown* — would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune"

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<sup>83</sup> See Cato Unbound, Alex Kozinski, Nov. 28, 2005, <http://www.cato-unbound.org/contributors/alex-kozinski/>; see also Alex Kozinski's 1996 Slate Diary, <http://www.slate.com/id/3700/entry/78715/>; Alex Kozinski, *Tinkering with Death*, THE NEW YORKER, Feb. 10, 1997, p. 48.

<sup>84</sup> *White v. Samsung Elecs.*, 989 F.2d 1512 (9th Cir. 1993) (emphasis added).

<sup>85</sup> *Id.* at 1514.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1512.



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set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.<sup>88</sup>

Judge Kozinski's humor and use of popular culture pervades the opinion from the first line. In one footnote, he mentions dozens of pop-culture references from Monty Python to the Dead Kennedys, to Kool-Aid, to Prince.<sup>89</sup>

## 2. Cheers

*Wendt v. Host International* involved a right-of-publicity claim quite similar to that at issue in *White*.<sup>90</sup> In *Wendt*, the defendant "decided to tap into [a] keg of goodwill," and create a chain of airport theme bars capitalizing on the fame of the television show "Cheers."<sup>91</sup> For those readers who were unfamiliar with the show, Judge Kozinski described the characters in detail.<sup>92</sup> The legal issue centered on the

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<sup>88</sup> *White*, 989 F.2d at 1515 (emphasis added).

<sup>89</sup> *Id.* at 1513 n.6.

Trademarks are often reflected in the mirror of our popular culture. See Truman Capote, *Breakfast at Tiffany's* (1958); Kurt Vonnegut, Jr., *Breakfast of Champions* (1973); Tom Wolfe, *The Electric Kool-Aid Acid Test* (1968) . . . Hear Janis Joplin, *Mercedes Benz*, on *Pearl* (CBS 1971); Paul Simon, *Kodachrome*, on *There Goes Rhymin' Simon* (Warner 1973) . . . *Dance to Talking Heads, Popular Favorites 1976-92: Sand in the Vaseline* (Sire 1992); Talking Heads, *Popsicle*, on *id.* *Admire Andy Warhol, Campbell's Soup Can. Cf.* REO Speedwagon, 38 Special, and Jello Biafra of the Dead Kennedys.

The creators of some of these works might have gotten permission from the trademark owners, though it's unlikely Kool-Aid relished being connected with LSD, Hershey with homicidal maniacs, Disney with armed robbers, or Coca-Cola with cultural imperialism. Certainly no free society can *demand* that artists get such permission.

<sup>90</sup> *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284 (9th Cir. 1999).

<sup>91</sup> *Id.* at 1285.

<sup>92</sup> *Id.*

Though a bit dated now, *Cheers* remains near and dear to the hearts of many TV viewers. Set in a friendly neighborhood bar in Boston, the show revolved around a familiar scene. Sam, the owner and bartender, entertained the boys with tales of his glory days pitching for the Red Sox. Coach piped in with sincere, obtuse advice. Diane and Frasier chattered self-importantly about Lord Byron. Carla terrorized patrons with acerbic comments. And there were Norm and Cliff, the two characters at issue here. Norm, a fat, endearing, oft-unemployed

defendant's use of animatronics characters that were made to resemble two of the show's main characters — Norm and Cliff. The actors who played those characters, George Wendt and John Ratzenberger, sued Host International for unfair competition and for violation of the right to publicity.<sup>93</sup> Host International responded that it had properly secured a license from Paramount, the copyright holder of the "Cheers" characters.<sup>94</sup> The Ninth Circuit panel majority found the defendant liable for evoking the images of the actors themselves.<sup>95</sup>

In evaluating the issue, Judge Kozinski drew on his experience as an author for mass media and his knowledge of popular culture to provide common sense examples to highlight the flaws in the majority's logic.<sup>96</sup> Using the popular show "Seinfeld" as an example,<sup>97</sup> Judge Kozinski described what he believed to be the consequence of abiding by the law as the majority construed it:

[P]roducers will have to cast new actors who look and sound very different from the old ones. A *Seinfeld* spin-off thus ends up in a bizarro world where a skinny Newman sits down to coffee with a svelte George, a stocky Kramer, a fat Jerry and a lanky blonde Elaine. Not only is goodwill associated with the old show lost, the artistic freedom of the screenwriters and producers is severely cramped.<sup>98</sup>

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accountant, parked himself at the corner of the bar, where he was joined by Cliff, a dweebish mailman and something of a know-it-all windbag.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997), *reh'g denied*, 197 F.3d 1284 (9th Cir. 1999).

<sup>96</sup> *Wendt*, 197 F.3d at 1286 ("Can Warner Brothers exploit Rhett Butler without also reminding people of Clark Gable? Can Paramount cast Shelley Long in *The Brady Bunch Movie* without creating a triable issue of fact as to whether it is treading on Florence Henderson's right of publicity? How about Dracula and Bela Lugosi? Ripley and Sigourney Weaver? Kramer and Michael Richards?").

<sup>97</sup> See <http://www.classictvhits.com/tvratings/1997.htm> ("Seinfeld" was the most popular show from 1997-1998, the year it ended, with a viewership of 21,266,000 households).

<sup>98</sup> *Wendt*, 197 F.3d at 1287 n.6. Somewhat prophetically, Judge Kozinski described the fate of every "Seinfeld" spinoff.

In this quintessential artist's suit based on popular culture, the artistic judge who also writes for the general public can craft an opinion that is both legally sound and enjoyable to read. Judge Kozinski's experience as an author allows him to blend humor into an opinion without making it appear forced. His ability to interweave examples that a layperson could understand does wonders for advancing the law.

### 3. *Barbie*

A final example of Judge Kozinski putting his touch on a case involving issues of authorship in popular culture is in *Mattel v. MCA Records*, a trademark-infringement suit over the use of the "Barbie" doll name.<sup>99</sup> In this case, Mattel, the owner of the "Barbie" trademark, sued MCA Records over a song by a Danish band named "Aqua," entitled "Barbie Girl."<sup>100</sup> Mattel claimed that the song infringed on its trademark and was likely to dilute the market for Barbie products.<sup>101</sup> The district court found that the use of the name "Barbie" was a not trademark infringement because it did not tend to mislead consumers.<sup>102</sup> In addition, the court found that the use constituted a nominative fair use.<sup>103</sup>

Once again, Judge Kozinski used his skills as an author to draw the reader into the opinion: "If this were a sci-fi melodrama, it might be called Speech-Zilla meets Trademark Kong."<sup>104</sup> And then, in the same manner as he set the scene for the "Cheers" case, he described the Barbie Doll:

Barbie was born in Germany in the 1950s as an adult collector's item. Over the years, Mattel transformed her from a doll that resembled a "German street walker," as she originally appeared, into a glamorous, long-legged blonde. Barbie has been labeled both the ideal American woman and a bimbo. She has survived attacks both psychic (from feminists critical of her fictitious figure) and physical (more

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<sup>99</sup> *Mattel v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

<sup>100</sup> *Id.* at 898.

<sup>101</sup> *Id.* at 902.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 898.

than 500 professional makeovers). She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon.<sup>105</sup>

Judge Kozinski's strongest suit is probably his ability to "set the scene" for a given case. Be it through the description of the characters in "Cheers," or the background of the Barbie Doll, Judge Kozinski grabs readers' attention and draws them into the opinion. His opening and closing lines also serve to make the court appear less stuffy by injecting some levity into the opinion.<sup>106</sup>

As noted previously, one reason for humor in judicial opinions is the levity of the issue itself — or the court's discontent with being forced to resolve petty disputes. In this case, that petty dispute was a counterclaim filed by MCA against Mattel for defamation.<sup>107</sup> At some point after Mattel filed suit, an MCA spokesperson noted that each "Barbie Girl" album contained a disclaimer that the album was "social commentary" and had no affiliation with the makers of the doll.<sup>108</sup> The Mattel representative responded by saying: "That's unacceptable. . . . It's akin to a bank robber handing a note of apology to a teller during a heist. [It n]either diminishes the severity of the crime, nor does it make it legal."<sup>109</sup> Taking exception to the use of the words "crime," "theft," "piracy," and "robbery," MCA filed its counter claim. Noting that all of these terms are protected hyperbole, Judge Kozinski reminded the parties that "no one hearing this accusation understands . . . infringers are nautical cutthroats with eyepatches and peg legs who board galleons to plunder cargo."<sup>110</sup> He concluded by

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<sup>105</sup> *Id.*

<sup>106</sup> See *White v. Samsung Elecs.*, 989 F.2d 1512 (9th Cir. 1993) (opening the opinion by stating that "Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. . . ." and closing the opinion by including photos of Vanna White and her robot counterpart back to back — with the caption "Ms. C3P0?" on the robot); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997) (opening the opinion with "Robots again. . . ." and ending with "We pass up yet another opportunity to root out this weed. Instead, we feed it Miracle-Gro."); and *Mattel*, 296 F.3d 894 (opening with "If this were a sci-fi melodrama, it might be called Speech-Zilla meets Trademark Kong. . . ." and closing with "The parties are advised to chill.").

<sup>107</sup> *Mattel*, 296 F.3d at 908.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

advising the parties “to chill.”<sup>111</sup>

Unlike Judge Musmanno’s votes against authors’ rights, Judge Kozinski has consistently voted in a manner that ensures a robust public domain. I suspect that his experience as an author helped to shape his judicial philosophy regarding the rights of authors to use and expand on existing material. For instance, in both *Wendt* and *White*, Kozinski found himself in dissent, promoting the idea that there is no right of publicity for individuals who play particular characters — he decided in each case that the constraints on future authors would be too prohibitive. The same is true in *Mattel*. Although Judge Kozinski did not decide the issue of fair use, his application of the *Rogers v. Grimaldi* test for trademark infringement showcased his idea that creators should be free to draw from existing material to advance social commentary.<sup>112</sup> *Rogers* stated that “the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”<sup>113</sup> In *Mattel*, Judge Kozinski conclusively held for the defendant, finding that the right to free expression trumped Mattel’s concern that the song was inappropriate for the girls who would typically buy their doll.<sup>114</sup> This affinity for subsequent creators seems to be a theme throughout Judge Kozinski’s jurisprudence.

Judge Kozinski’s knack for weaving popular culture into his decisions shows why nontraditional opinion writing can be used to make judicial pronouncements accessible and interesting. He gives the reader the impression that he is in touch with the issues involved, thus enhancing his credibility. Judge Kozinski is a prime example of a judge who uses his experience as an author to advance the law and make his judicial opinions more accessible to readers of all stripes.

#### IV. CONCLUSION

The use of humor, poetry, and popular culture in judicial opinions has drawn praise, and attracted criticism, from jurists

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 901-02 (applying *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 906-07.

and academics alike. Depending on the type of case being decided, the criticisms may carry more weight. But, so long as judges take care to ensure that their legal analysis never suffers at the expense of style, the use of literary tools can be a vital component in communicating important legal principles. Especially when it comes to legal issues involving artists, judges with experience as authors seem to have two major advantages over their non-artistic counterparts. First, they appear to be best suited for striking the appropriate balance between substance and style. Second, their unique experience informs their decisionmaking. Whether it is the composer of operas parsing musical notes, or the magazine contributor incorporating popular culture as instructive examples, the judge who is also an artist has an understanding of factual and legal issues that non-artistic judges may not have. While there may not be a clear answer to where nontraditional opinions are best, their place in jurisprudence cannot be flatly denied. Some judges will always try to summon their inner artist when crafting their opinions, and so long as judges have a guaranteed publisher, nontraditional opinions are here to stay.