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James D. Gordon III

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Humor in Legal Education and Scholarship

*James D. Gordon III**

J. Golden Kimball, a General Authority of the Mormon Church many years ago, was well known for his sense of humor. Once at a church meeting, another General Authority spoke for nearly an hour, leaving J. Golden Kimball only five minutes. Elder Kimball arose and said, "B.H. Roberts is the senior president of the Seventy and has taken all the time. Someday he will be dead and I will be president. Then I will take all the time." Then he sat down.¹

Stories like this one play a valuable role in Mormon culture. Elder Kimball's use of wit in serious settings created incongruities that were somehow both startling and refreshing. The stories persist not only because they are delightfully amusing, but also because they reveal Elder Kimball's genuine humanity in a colorful and memorable way. They teach that, like us, he also struggled with weaknesses and frustrations. Despite his apparent imperfections, he was able to serve God in remarkable ways. If that was true of J. Golden Kimball, the stories tell us, perhaps there is hope for us as well.

Like religion (although not nearly as important), the study of law is a serious enterprise. It is difficult, frustrating,² and often intimidating. There is exhilaration in discovering new ways of thinking,³ in learning about the world,⁴ and in feeling

* Professor of Law, Brigham Young University Law School. Apologies and thanks to Dave Barry, Robert Byrne, Johnny Carson, Jesse Choper, Cliff Fleming, Redd Foxx, Fred Gedicks, Bruce Hafen, Jeffrey R. Holland, Greg Husisian, Rex Lee, Jay Leno, Mike McConnell, Doug Parker, Bud Scruggs, Barry G. Silverman, Steve Smith, John Tanner, Mark Twain, Gerry Williams, and others.

1. TRUMAN S. MADSEN, *DEFENDER OF THE FAITH: THE B.H. ROBERTS STORY* 350 (1980).

2. However, it's not as frustrating as making Kool-Aid. I still can't figure out how to get two quarts of water into that little paper envelope.

3. Straight thinking is generally preferred, based on the assumption that we live in a Euclidean universe. *Cf.* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (implicitly assuming that every point on the surface of a sphere is unique). *But cf.* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

4. I have always enjoyed learning about the world. When I was 18, I told my

one's understanding and abilities grow. However, there are also uncertainty, confusion,⁵ and even fear. Law school is like one of those movies in which somebody wearing a hockey mask terrorizes people at a summer camp and slowly and carefully slashes them all to pieces. Except it's worse, because the professors don't wear hockey masks, and you have to look directly at their faces.

Most law students initially find the Socratic method intimidating, if not potentially humiliating.⁶ Students struggle as they learn about stare decisis,⁷ precedent,⁸ and legislation.⁹ They sometimes feel that their professors are being condescending¹⁰ or are out to get them.¹¹ The competitiveness of law school and the fear of failure¹² can create debilitating anxieties. Students are sometimes terrified by the possibility of getting poor grades,¹³ and when final exams¹⁴ approach, the typical student can feel about as happy as a nine-lived cat run over by an eighteen wheeler. These things explain why law school has been compared to a besieged city: everybody outside wants in, and everybody inside wants out.

father that I wanted to join the Navy so I could see strange lands and meet strange people. My father replied, "You want to meet strange people? Go to St. Louis. Meet your mother's people."

5. Law professors like to confuse people. In their spare time they like to go to hockey games and throw Ding Dongs onto the ice.

6. Thanks to the Socratic method, law school is the only place where YOU LEARN TO HATE YOUR OWN NAME.

7. Latin for "We stand by our past mistakes." Seventy percent of all legal reasoning is the logical fallacy of appeal to authority. The other forty percent is simply mathematical error.

8. Which is important because, in the law, anything that has been done before may legally be done again. JONATHAN SWIFT, GULLIVER'S TRAVELS 242 (J. Ross ed., 19th printing 1964).

9. Congress's Gramm-Rudman deficit-reduction law has been described as a law saying, "Stop me before I kill again."

10. "Condescending" means talking down to people.

11. This view may seem paranoid. However, the fact that you're paranoid doesn't mean that people are not out to get you. Also, some forms of mental illness are not so bad. For example, schizophrenia beats dining alone.

12. My first-semester grades were four F's and a D. The Dean called me into his office and said, "Kid, you've got to stop spending all your time on one subject."

13. It is alleged that law school grades have no predictive ability on success in law practice. Psychics have no predictive ability, either. If they do, why do you never see a headline that says "Psychic Wins Lottery"?

14. Law schools give only one exam at the end of the semester, the FINAL EXAM OF THE LIVING DEAD.

Humor can relieve some of these tensions. It reminds students not to take everything (including themselves) so seriously, and helps them find more enjoyment in what they are doing. The ability to laugh at oneself and to find absurdities¹⁵ in everyday life can help a person to cope with stressful situations and difficult challenges. Psychologists say that laughter makes people feel better both physically and psychologically.¹⁶

Several years ago Norman Cousins, an editor of the *Saturday Review*, wrote a now famous account of how he contracted an incurable and life-threatening disease of the body's connective tissues, which he believed was precipitated by adrenal exhaustion. In his article, *Anatomy of an Illness (as Perceived by the Patient)*,¹⁷ Cousins recounted how he decided to introduce more hope, faith, and laughter into his life. His theory was that laughter and other positive emotions could affect his body chemistry for the better. He obtained films of classic "Candid Camera" television shows and had a nurse read to him out of a trove of humor books. He discovered that the laughter sessions enabled him to get a few hours of sleep without pain. The nurses took sedimentation-rate readings (blood tests indicating infection levels) just before as well as several hours after the laughter episodes. Each time, there was a drop of at least five points. Cousins wrote, "I was greatly elated by the discovery that there is a physiologic basis for the ancient theory that laughter is good medicine."¹⁸

Although laughter was not the only treatment used, it was a major part of the therapy. Eventually the connective tissues stopped deteriorating and began regenerating, and Cousins recovered. One endocrinologist told Cousins that she was convinced that creativity produces brain impulses that stimulate the pituitary gland, triggering effects on the whole endocrine system.¹⁹ Humor's beneficial effects on a person's

15. For example, it's absurd that there are so many different kinds of dog food. After all, they all taste the same to me.

16. Jamie Talan, *Laughing on the Outside: Sick Humor May Be a Way We Release Our Tensions*, DESERET NEWS MAG., May 4, 1986, at 8.

17. Norman Cousins, *Anatomy of an Illness (as Perceived by the Patient)*, SATURDAY REV., May 28, 1977, at 4.

18. *Id.* at 48.

19. *Id.* at 51.

emotional and physical health²⁰ can improve his or her ability to meet challenges and perform in stressful situations.

Humor can also improve the students' receptivity in the classroom. While humor helps students to feel more at ease, it also encourages them to listen more closely so that they don't miss the fun.²¹ Students are likely to be more alert if they enjoy what they are doing, and humor can make dry material more palatable. A study²² at Stanford University found that laughter causes significant increases in catecholamines, the so-called alertness hormones that include adrenaline.²³ The need for more alertness in university classes has been long recognized. W.H. Auden defined a college professor as "a person who talks in someone else's sleep."²⁴

Humor can also help us to look at situations in new ways, break free of ordinary thinking, and challenge conventional wisdom. For example, humor has long been an effective tool of social and political commentators.²⁵ Writers such as Jonathan Swift, Mark Twain, H.L. Mencken, Art Buchwald, and Dave Barry have used satire to help us take critical and fresh looks at ourselves and our society. Their message would probably fall on deaf ears if they simply said, "Listen up, I think such-and-such-a-thing is dumb." Instead, they delightfully show us the sillier side of things.

For instance, although economic analysis is a powerful tool for evaluating legal rules, it does have critics. The allegation that some economic analysis rests on unrealistic assumptions is a standard one, almost perfunctorily made. However, the lesson is more memorable if illustrated with a story: An economics professor was walking across campus with a student. "Look," said the student, pointing at the ground, "a five-dollar bill." "It can't be," responded the professor. "If it were there, somebody

20. Scientists have shown that a laugh a day is worth a pound of fiber.

21. When students are having fun, the class time virtually flies by, and the 50 minutes of class seem like a mere 48.

22. The study compiled lots of data. "Data" is a Latin word meaning "the plural of anecdote."

23. Talan, *supra* note 16, at 51.

24. I have no idea where he said this. If I provided a citation, would you really look it up? OK, then stop complaining.

25. See Catherine L. Amspracher & Randel S. Springer, Note, *Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701, 723 (1990).

would have picked it up by now."²⁶ One could add, "Economics is a closed system; internally it is perfectly logical, operating according to a consistent set of principles. Unfortunately, the same could be said of psychosis."²⁷

On the other hand, this example raises an objection to the use of humor:²⁸ humor can present unfair and distorted pictures.²⁹ However, reasonable listeners realize that a humorous observation is not intended to be taken completely at face value. Temporarily blowing things out of proportion sometimes helps us focus³⁰ on a particular aspect of a problem, much like looking at one area of a painting with a magnifying glass temporarily exaggerates that area and distorts the painting as a whole. Similarly, sometimes we are so busy scrutinizing details that we need to put the whole painting in a broader perspective; humor can help us step back and question the work's overall importance. It helps us change our angle of vision.

Humor also serves other analytical functions. It permits people to roam more freely, to be iconoclastic without being threatening, to express frustration, and to speak their mind without having to resolve all of their feelings on a subject. It permits the slaughtering of sacred cows without the spilling of too much blood.³¹ Humor can also remind us that the contradictions and subtle ironies in a particular problem might not be ultimately resolvable, and that it is permissible for the world to be that way. It is not completely surprising that "[r]esearchers have found a connection between a well-developed sense of humor and problem-solving."³²

26. JUDY JONES & WILLIAM WILSON, AN INCOMPLETE EDUCATION 125 (1987).

27. *Id.* at 124.

28. I will explain the objection to you slowly, because that's the way people always explain things to me.

29. *Cf. The National Enquirer.* Calling the *Enquirer's* articles "distorted" is much like calling winters in northern Alaska "cool." Recently the *Enquirer* published a diet that is supposed to raise one's IQ. This was pretty brave of the tabloid, since it risked losing most of its readership. However, the *Enquirer* doesn't know the meaning of the word "fear." It doesn't know the meaning of a lot of other words, either.

30. *Cf. the Hubble telescope,* which cost a billion and a half dollars to build and send into orbit, but which, because of a design flaw, makes everything look fuzzy. However, perhaps there is no design flaw at all. Perhaps the universe really is fuzzy.

31. Yuck. The painting analogy was more sanitary.

32. Dyan Machan, *What's Black and Blue and Floats in the Monongahela*

Of course, humor can stop people from thinking, too.³³ It can be derisive, mocking, or dismissive. It can be used to reinforce our own views by belittling the views of others, to exalt ourselves by tearing others down. Humor should therefore be used carefully and sensitively, and we should frequently examine both the purposes of our humor and its effects on ourselves and those around us. Like many other tools, humor can be used in the service of both good and bad causes.

Humor in the classroom should be used gently and responsibly, not in ways that inflict emotional injury or damage reputations.³⁴ In the movie *The Paper Chase*,³⁵ Professor Kingsfield's³⁶ demeaning humor was designed to get a laugh at the expense of some poor victim in the class.³⁷ His humor was selfish³⁸ and callous, an instrument of verbal and emotional abuse. Sarcasm in the classroom can be simply another way of putting students down. Humor must be used much more lovingly, with a delicate touch. Jokes based on racial, sexual, or religious bias are also inappropriate; they injure people and relationships, reinforce uncharitable

River?, FORBES, Nov. 2, 1987, at 216.

33. Cf. Curly of the Three Stooges ("I try to think, but nothing happens.")

34. Cf. slander ruining a law professor's reputation, which can usually be pursued in small claims court.

35. *The Paper Chase* is as accurate a depiction of law school as *Perry Mason* is of law practice. I used to watch *Perry Mason*, but the ending was always predictable. Mason would be brilliantly cross-examining a witness, and somebody in the courtroom would jump up and blurt out that he or she was actually the guilty party. I could never figure out why the murderers always attended the trial. Why weren't they halfway to Rio de Janeiro?

The long-running *Perry Mason* series left a generation of Americans believing that most criminal defendants are innocent, that district attorneys are whining incompetents, and that lawyers and private investigators have shoulders as large as sides of beef. It also left them believing that lawyering is an exciting lifestyle, since Mason never sat through endless depositions, answered interrogatories, supervised document productions, or even spent much time at his desk. Fortunately, these misconceptions were corrected by the *cinéma vérité* of *L.A. Law*.

36. When Professor Kingsfield died he donated his heart for transplantation. The hospital charged an outrageous sum for the heart. It justified the cost on the theory that the heart had never been used.

37. This can make students want to drop out, which would cause their student loans to become due. The government has proposed withholding wages to recover student loan payments. Under this program, for example, if you graduate with a Ph.D. in Renaissance Literature, every week the government can withhold some of the tips you earn as a waiter.

38. Some people don't appear to care about self-interest. Joe Louis said, "I don't like money actually, but it quiets my nerves." (I don't have a citation for this. Just trust me.)

attitudes, and promote bigotry. Similarly, vulgarity debases both the speaker and the listeners. Before using humor, one must consider whether it will offend reasonably sensitive people. Offensive humor can find a person skating on hot water, and that's when the sacred cows come home to roost with a vengeance.³⁹ Like other aspects of human relations, the boundaries between appropriate and inappropriate humor are not always easy to discern⁴⁰; one person's good-natured humor can be another person's offense.⁴¹

While using humor in the classroom does present certain risks, I believe that this problem, like Wagner's music, is not as bad as it sounds.⁴² Teachers can help control it by laughing at themselves, by making it clear that they are only joking, by trying to avoid injuring people, and by presenting contrasting points of view.

Used appropriately, humor can open minds, rather than close them. In some cases, when a frontal assault would fail, humor can cause a person to open his or her mind voluntarily. Narrow minds⁴³ can be broadened. Humor can help people relax, be less defensive, and become more open to change.

Humor in the classroom is one thing, but humor in legal scholarship is something else.⁴⁴ Legal scholarship is much too serious an enterprise⁴⁵ for this kind of kidding around, right?

39. See GYLES BRANDRETH, *THE JOY OF LEX* 227 (1980). Cf. *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (Stewart, J., concurring) ("This case presents a double-barreled dilemma, which in all candor I think the Court's opinion has not succeeded in papering over.").

40. However, "I know it when I see it." Justice Potter Stewart once joked that he thought that these words would be chiseled on his gravestone. Cf. the words on a hypochondriac's gravestone: "I told you I was sick."

41. Occasionally I cross over the line, and that's when the can of worms hits the fan. As much as I try to be careful, it's not easy for a zebra to change its spots.

42. Cf. bagpipe music, which is. Studies have shown that it is virtually impossible to distinguish the music of a world-class bagpipe band from the sound made by 300 cats and a blowtorch. *Hear also* Yoko Ono's music (*The Bluebook* apparently left this signal out. It also left out some other very useful signals, such as *read and weep* and *try to distinguish this one*. For contrary authority, it omitted *disregard*, *ignore also*, and *for a really bizarre view*, see.).

43. Some people are so narrow-minded they can see through a keyhole with both eyes. Cf. my upper body, which is also too narrow. I once went to a gym to lift weights, but the laughter made it difficult to concentrate. One weight lifter called me a wimp, which made me angrier than I have ever been in my entire life. I was so angry that I almost said something. I have concluded that the reason weight lifters wear those big leather belts is that, basically, they're invertebrates.

44. I have been accused of having a firm grasp of the obvious.

45. Cf. the *Starship Enterprise*. In the latest *Star Trek* movie, the crew runs

*Au contraire!*⁴⁶ In my opinion, satire and other forms of humor can make legal scholarship more readable,⁴⁷ more memorable, and more powerful.

Humor can be an effective way to reveal inconsistencies or other weaknesses in an argument. For example, in *Employment Division v. Smith*,⁴⁸ the Supreme Court held that the free exercise clause no longer mandates exemptions from generally applicable criminal laws. The Court departed from a line of cases which held that the free exercise clause required an exemption unless enforcement of the law was necessary to the accomplishment of a compelling governmental interest.⁴⁹

The *Smith* Court reasoned⁵⁰ that "[a]ny society adopting [the compelling interest test] would be courting anarchy."⁵¹ The straightforward counterargument is that the compelling interest test does not lead to anarchy. However, the point is sharpened with a little irony:

The Court's argument is a self-negating assertion, an analytical impossibility. Because there is a compelling governmental interest in preventing anarchy, the compelling interest test cannot logically produce it. Any free exercise exemption that seriously threatens the civil order flunks the test immediately. The Court's self-contradictory argument is not unlike the bumper sticker that says "Anarchists for good government."⁵²

Kenney Hegland has used paradox to offer a concise deconstruction of deconstruction:

Two Chinese philosophers at the Summer Palace . . . stopped to admire the goldfish. "The fish are swimming happily," remarked one. "How do you know they are swimming happily?" replied the other, in a brilliant deconstruction of

into difficulty when William Shatner's hairpiece turns out to be an alien life form (a "Tribble"). Halfway through the film, Mr. Spock has to perform the Vulcan Mind Meld to discover whether the movie has any plot.

46. French for "Give this conehead some air!"

47. The FDA has announced that most legal scholarship is a safe alternative to the sedative Halcion.

48. 494 U.S. 872 (1990).

49. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

50. Using the term loosely.

51. *Smith*, 494 U.S. at 888.

52. James D. Gordon III, *Humor in Legal Education and Scholarship*, 1992 B.Y.U. L. REV. 313, 320.

fishhood, "you are not a goldfish." "True," replied my hero, "but how do you know what I know, you are not me."⁵³

Dan Farber has similarly used paradox to argue against certain "brilliant" theories of constitutional interpretation.⁵⁴ He asserts that "brilliance" should count heavily against a legal theory,⁵⁵ and gives the following examples:

First, Dean John Hart Ely argues that certain portions of the Constitution, notably the privileges and immunities clause of the fourteenth amendment and the ninth amendment, are open-ended and have no fixed limits. Allowing judges simply to make policy under these clauses would be undemocratic, but to ignore the clauses would also be improper. Hence, Ely argues, judges should apply the clauses to strengthen democracy by striking down legislation that in some way encumbers the democratic process. This is Ely's famous "representation-reinforcing" theory of judicial review, so-called because the courts reinforce representative democracy. Second, Professor Ronald Dworkin argues that the open-ended clauses of the Constitution are based on specific conceptions of equality, freedom, and justice. In interpreting these clauses, however, judges should not rely on the particular conceptions of the framers, but rather on the deeper philosophical concepts that lie behind these conceptions. Thus, in exercising judicial review, judges should not be concerned with how the framers of the equal protection clause construed the concept of equality, or even with how the average citizen today understands equality, but rather with the true meaning of equality. Both theories take the constitutional text as the starting point, but then add a brilliant gloss of their own.

Both theories also share a common flaw, a flaw endemic to brilliant constitutional theories. Most theories of constitutional law rest on some notion of the consent of the governed, either through tacit institutional acquiescence or through some kind of social contract theory. A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not

53. Kenney Hegland, *Indeterminacy: I Hardly Knew Thee*, 33 ARIZ. L. REV. 509, 515 n.24 (1991).

54. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

55. *Id.* at 924.

conceive of. Who would know better than the average person what the average person has consented to? How can someone have consented to a position that is so novel and clever that only one person on earth has ever thought of it?⁵⁶

Even judges occasionally use sarcasm to make a point.⁵⁷ For example, in *Mescalero Apache Tribe v. New Mexico*,⁵⁸ New Mexico claimed the right to enforce its game laws against nonmembers of the tribe on the reservation. The Tenth Circuit rejected the claim, holding that the tribe had sovereignty over hunting and fishing on its territory.⁵⁹ Astonishingly, the state argued that the tribe had no traditional territory, and therefore no rights associated with territory, because "the Mescaleros were being swept from their lands by a tide of white settlers."⁶⁰ Writing for the court, Judge Monroe G. McKay responded,

If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights do not cease to exist because a government fails to secure them. See The Declaration of Independence (1776).⁶¹

To say that humor can be a powerful method of argument is not to say that humor is always that way. It can also be shallow, emphasizing cleverness over substance. Because it addresses issues in a light way, humor has a special risk of superficiality. Humor can also be distracting, drawing the mind

56. *Id.* at 924-25 (footnotes omitted).

57. See David A. Golden, Comment, *Humor, the Law, and Judge Kozinski's Greatest Hits*, 1992 B.Y.U. L. REV. 507.

58. 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *decision on remand*, 677 F.2d 55 (10th Cir. 1982) (reinstating previous opinion), *aff'd*, 462 U.S. 324 (1983). I clerked for Judge Monroe G. McKay, the opinion's author. During my clerkship he met my father. After that meeting, Judge McKay asked me, "How could such a bright, colorful, imaginative man like your father have such a dull, cloddish, boring son like you?" I am not making this up. I tried to answer his question, but he fell asleep before I was able to finish.

59. *Id.* at 728-36.

60. *Id.* at 730 (quoting Brief for Appellants at 37).

61. *Id.*

away from the more serious matters at hand. However, similar criticisms can be made of other rhetorical devices, such as analogies and metaphors; these also can be superficial, distracting, and consequently misleading. At the same time, when skillfully used, these devices can make a point effectively and assist in understanding an issue.

I submit that Humor and the Law can be a "voice" for discussing and analyzing legal issues. Like Law and Narrative and Law and Literature, it broadens the world of legal discussion and understanding to include additional literary techniques. Having said this, I will now nervously change the subject. High-minded scholarly respectability would probably kill the Humor and the Law movement more quickly than anything. So I'll just conclude.

While it may not be completely possible (or even desirable) to analyze something as spontaneous as a laugh, I believe it is possible to identify some benefits of appropriate humor in the classroom and in legal scholarship. Humor allows a professor to reveal his or her humanity to the students, which can improve teacher-student relations. It helps reduce tension and stress that can interfere with learning. It improves the students' receptivity and increases their alertness in class. Humor's playful juxtapositioning of ideas engages the intellect and draws the mind into the subject. In addition, as a form of pointed, provocative, and occasionally even outrageous discourse, humor can stimulate thinking in imaginative and creative ways.

In some Hebrew schools a special ceremony occurs on the first day of class. The teacher places a drop of honey on the cover of a book and gives the book to the student, who licks the honey off. The symbolic message is that learning is sweet. Like other things that increase our awareness and understanding, legal education and scholarship have both bitter and sweet elements. I believe that a little humor, and occasionally even a lot, can help people savor the sweetness a little more.