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Humor as the Enemy of Death, Or Is It "Humor as the Enemy of Depth"?

*Kenney Hegland**

Ring.

"Hello."

"Hello, Professor Hegland. This is the symposium editor at the *B.Y.U. Law Review*. We are planning an issue devoted to law and humor and would like you to contribute a piece."

Are you kidding? Too good to be true. Another year without having to write about widgets! One publication this year and I can stare down Peer Review. We all know that one a year is a torrid pace in this business, especially if you can achieve it every three or four years.

I cautioned myself to remain cool and not appear too anxious.

"A piece on law and humor, you say?" I responded, sounding very thoughtful. Sure, if I had to answer the phone all over again, I could have done better. "Who else is contributing?" But, then again, I could have done worse. "Do I have to have footnotes?" All things considered, not bad for someone giddy.

"Yes, a piece on law and humor."

Having preserved my dignity, but fearful of the ever-lurking widget piece, I pressed no further. "Yes, please, don't hang up. I'll do it. Bless you! . . . But can you be a little more specific? What exactly do you want me to write about?"

"We don't care, as long as you're funny."

It's hard being funny on purpose. "O.K. Funny, say something funny; we're all waiting."

* Professor of Law, University of Arizona. I would like to thank David Binder and Paul Bergman who, thankfully for the rest of us, have never figured out that you don't have to write a book to justify a clever acknowledgement.

Have you heard the one about the two law professors trying to be funny? "What, are you trying to be funny?" asked one and the other went home in tears.

So what is there to say about law and humor? I could justify myself, apologize as it were, for using humor. I considered it. I had a working title, *Humor as an Instrument of Pursuing Serious Goals*,¹ and some rough topics: the role of humor in problem solving, the role of humor in capturing the audience's attention so as to sneak in your *Irrefutable Refutation of Everyone Else* (once and for all), and, most importantly, for those of us committed to the life of the mind, the role of humor in increasing sales. There is an article there, and I hope that others writing for this symposium make the case.

But the question I would like to address is not why I use humor but rather why you don't.² I know you can. Law professors are, by and large, very witty folks. While struggling to put into words your insights on scholarly matters, I know that jokes, puns and ironies crowd into your awareness. "Write me, I'm a great dog joke!" Why don't you write it? After all, why did you go into teaching? Not, I submit, to lament *Ominous Trends in Recent Supreme Court Litigation*, nor to explore the *Economic Foundations of the Presumption Against Specific Performance*. You went into teaching because you enjoy playing with ideas. But your law review articles don't read that way. Instead, they read something like, "Sorry, Dear Reader, this might be a death march but I had to go first."³

1. I had another working title: *The Economic and Epistemological Foundations of Paradigmatic Shifts at the Interface of Tort and Contract: A Dissenting View*. I thought it was the perfect law review title but then someone pointed out that it wasn't; I hadn't mentioned pickup trucks, jail and blue eyes crying in the rain. Nonetheless, the title would have slayed Peer Review, perhaps even been a two-for. I thought that, once I was into the text, I could change the subject to law and humor with such grace that no one would even notice. After many hours of anglo-saxon mutterings, my best graceful transition was, "That reminds me of a joke." In tears and disgust, I threw the title out. In childlike fury, I blamed it all on Peer Review, and, fixing their wagon, began work on *My Ten Favorite Contract Jokes*. Well, that didn't work either; I only know nine.

2. One problem with justifying humor instrumentally is that it suggests that one uses humor for instrumental reasons. I don't think this is the way it happens; I know it doesn't work that way for me. Never do I think, "This point could be made better if I work in a good joke." Instead, what happens is that I will think, "This point could be made better," and, as I sit and ponder, sometimes a good phrase will come, sometimes a good analogy, and sometimes a good joke.

3. Jack Himmelstein, who teaches at CUNY, Queens, and who founded a

Dog jokes help; they're fun to read and great to write.⁴ But they are dangerous. Humorous is risky, perhaps even riskier than Serious. "You think that's funny?" triggers tears of bygone playgrounds.⁵ Dog jokes also trigger publication rejection. Where drab is king, why risk color? However, risk avoidance and increasing publication possibilities cannot alone account for the lack of humor in most law review publications. Something more basic is going on.

Enter Steve Kalish, a good friend, a funny man, and no doubt an inspired professor at the University of Nebraska. Long ago Steve and I were in the law and humanities program at Harvard Law School. Steve took a course from Roberto Unger, an intellectual leader of the critical legal studies movement. When it was time to turn in his term paper, Steve was asked by another student, "How is your paper?"

"Oh, I don't know if it's any good. But it's funny."

"Funny?" asked his incredulous friend.

"Of course," answered Steve. "Unger said, 'Humor is the enemy of death,' so I made it funny."

"Unger never said that," responded the friend. "He said, 'Humor is the enemy of depth.'"

Oh well.⁶

group focusing on the humanistic aspects (or lack thereof) of law teaching, made a great point about academic writing. (I hope I get it right. As far as I know, he has not published it.) In the early days, folks were looking around the academy and saw that the best teachers were those most intellectually alive and that this aliveness usually manifested itself in publication. The first Dean (forgive me Tom) seized upon this aspect of creativity and intellectual joy, and, for administrative convenience, turned it into a rule: You gotta' publish. What used to be an act of love became a chore, with time tables, the Top Twenty, and outside reviews. No wonder, after tenure, one finds the collective silence. So the second Dean invented Peer Review.

4. I am, of course, using "dog joke" as a metaphor for any joke concerning a domestic animal.

5. That we feel quite vulnerable in relation to our humor shows how much we equate it with ourselves. Perhaps, class standing to the contrary, we value our humor more than we do our analytical abilities.

6. Charlie Chaplin would be on Steve's side. Chaplin

believed that the underlying theme of his tramp character was mortality. "I am always aware that Charlie is playing with death. He plays with it, mocks it, thumbs his nose at it, but it is always there. He is aware of death at every moment of his existence, and he is terribly aware of being alive."

TIMOTHY FERRIS, *THE MIND'S SKY: HUMAN INTELLIGENCE IN A COSMIC CONTEXT* 123 (1992) (quoting Charlie Chaplin).

Simply put, if you write the dog joke, you risk coming across as a "light weight." This fear, more than anything else, mutes the mutt.⁷

Serious/Humorous (light weight), like masculine/feminine, hard/soft, mind/body, work/play, is a dualism that impacts on how we live our lives. Most dualisms are false: we are all of those things and our lives are richer when we live (and write) our complexity. In the remainder of this essay, I hope to convince you, both with serious analysis and perhaps with a dog joke or two, that Serious is not better than, more grown up than, more intelligent than, nor more difficult than Humorous.

I have two basic points.⁸ First, the Serious/Humorous dualism is false. Serious and Humorous are not separate and distinct; they are different manifestations of the same creative force. Neither has primacy nor is one "easy" and the other "hard." Second, while Serious and Humorous communicate differently, both can communicate matters of importance.

Put aside things written merely to be humorous.⁹ My argument concerns serious writing and I rely on my own experiences, assuming that they are shared. When I write, I start with a topic, a general idea of what I will say, such as "the Serious/Humorous dualism strikes me as false." I sit, get another cup of coffee, and then type for a while. I stop typing and sit, think back about what I have written and think ahead about what I might say. Occasionally, if I am lucky, an insight will suddenly come. I will see a relationship (or more likely the shadow of a relationship) between two things I had not seen before. I struggle to capture that insight in words. When I am lucky, the insight sharpens and takes form and the words come—first disjointed, then polished. *Exactly the same thing happens with humor.* Although humor often comes to the reader in a flash, it would be a mistake to assume that it comes that way to the author. Like serious insight, humor presents itself in rough form, as a possibility to be explored, as

7. Of course, even riskier than dog jokes are horrible puns. Even I would caution against using them.

8. My first instinct was to fight it out empirically, by listing big guns who are both deep and funny: Grant Gilmore, Arthur Leff, Mark Twain, Lewis Thomas, Stephen Jay Gould, and, indeed, Dr. Seuss. No doubt Professor Unger and those of his ilk could come up with their own list: Blackstone, Williston, Calvin Coolidge, Dick and Jane.

9. *E.g.*, U.C.C. § 2-207 (1977).

words and ideas to be tried out. Humor requires focus, revision and sweat. But that's the fun of it.¹⁰

Serious and Humorous are children of the same creative impulse; both take work, love and care if they are to turn out properly. Given common parentage, how can we nourish one and scorn the other? My appeal is not to a theory of parenting but rather to one of communication, perhaps of knowledge. Serious tells us that to communicate important stuff, what we write must be logical, relevant, and have an articulable connection to the point being made. Since dog jokes simply "are," they seem irrelevant, besides the point, distracting and, indeed, superficial. But there is more to communication, I believe, than we can precisely describe or understand.

I recall, from my undergraduate days, an essay on Kafka's *The Trial*.¹¹ *K*, the main character in Kafka's novel, is arrested and tried for a crime that he knows nothing of; yet, by the end of the novel, he seems to agree with his accusers that he should be executed. What is one to make of that? Was *K* here admitting guilt? Or was he instead giving in to an irrational world, where guilt or innocence do not matter? What did Kafka intend? The essayist suggested that Kafka probably didn't know. Kafka wrote it, not to make a self-conscious philosophic point, but because it made artistic sense for *K* to feel as he did. As readers, perhaps we do not logically understand the scene, but we do feel its artistic and emotional impact; we somehow "get" the philosophic point.

"That's literature!" scowls Serious, "where ambiguities and fools abound. But we have serious work to do—Justice, Antitrust, the Rule Against Perpetuities."

But is legal writing really that different? Aren't we too

10. If you are convinced to try humor in your own writing but feel a little rusty, take a hard look at plagiarism. My colleague, Jamie Ratner, points out that few jokes, if any, are original. I take it that he is making a general point rather than merely commenting on his own style. To illustrate Ratner's point, take the material in footnote 1; the general structure was inspired by Mark Twain. In an afterword to his novel, *PUDD'NHEAD WILSON* (Airmont Classic ed. 1966), Twain describes how the original scheme of the book changed radically as he wrote it. Once it was completed, he had to go back and get rid of some of the characters who started off as main characters but who got shoved aside as the novel progressed. He had one character go out in the back yard, fall in a well and drown. He then quickly changed the subject so that the reader wouldn't notice. He thought that was a good way to get rid of other stranded characters, but he felt that the reader would get suspicious and, besides, the well wasn't very deep.

11. FRANZ KAFKA, *THE TRIAL* 228-29 (Willa Muir et. al. trans., 1968).

trying to communicate a vision of how things are or how they might be better? If our vision includes a gag, to cut the gag weakens and misrepresents. We try to convince others that our understandings are more just, more compelling, more true. We rely on logic as our main oar, but there are others. Science is serious, important work; logic and sequence reign supreme. However, even there, more is involved. Kuhn tells us that the clash of scientific paradigms is not resolved so much on scientific grounds as on artistic ones; theories are accepted not because they make more logical sense but because they are more elegant.¹²

While Serious will never be able to articulate the work a good gag does, Laughter knows (and probably doesn't care).¹³

Serious and Humorous both communicate but, of course, do so differently. Serious invites response: "I don't buy your Serious/Humorous dualism and here's why." As for Humorous, well, it's either funny or it isn't—no argument. The virtue of Serious lies precisely in its ability to trigger response and rebuttal; further analysis and development deepens our understanding.

Serious has a flaw, however. Indeed, all serious articles are alike. Serious, by its very nature, is distancing, hierarchical and somewhat adverse. The writer is "teaching" and it is the reader's job to "understand."¹⁴ The really nice thing about

12. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970). While writing this essay I recalled Jerome Frank's discussion of early judicial hostility to arbitration. The rational, logical reason for the hostility was greed (arbitrators would get fees that judges wanted). Frank, however, favored a more artistic, emotional explanation: someone once said that arbitration "ousted" the court's jurisdiction. Realizing that the editors would insist upon footnotes, I found the case and confirmed my recollection; Frank wrote of the "hypnotic power of the phrase 'oust the jurisdiction.'" And I kid you not, immediately after writing that, a dog analogy popped into Frank's mind: "Give a bad dogma a good name and its bite may become as bad as its bark." Coincidenza! *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984 (2d Cir. 1942).

13. Timothy Ferris argues that humor is a device to test the models of the world that the mind constructs by quickly changing their focus and ground. FERRIS, *supra* note 6, at 117-34. To put his analysis in my terms, Humorous's job is to keep Serious on track by reminding it that it can be wrong, that it can slip and fall and have egg on its face.

14. Occasionally, perhaps usually, this hierarchical relationship is reversed, with the reader looking for flaws rather than for truth. Here I am reminded of a scene from *The History of the World, Part 1*. The first artist ever had just completed his first cave drawing; he was very pleased with it. Then we see a very dour Sid Caesar, playing the role of the first critic ever, standing before the cave drawing

Humorous is that it is absolutely and completely egalitarian. No one is out to convince and no one stands in judgment; everyone is on the same side—there is no they, only we.

Of course, Humorous has its dark side, a side I ignored in my first draft. After reading it, my colleagues Barbara Atwood and Toni Massaro, while generally quite supportive, rightly pointed out that Humorous is not always nice. It can be used to distance oneself, to avoid intimacy and to inflict harm. These are quite valuable points; my assumption here, however, is that if folks are encouraged to include an occasional joke in their writing, the jokes will not be hurtful.

But are there non-hurtful jokes? Dog jokes may be good only because dogs don't get them. Some dog jokes poke fun (with Masters hearing "all in good fun" and their dogs, if they get them, hearing "mean-spirited"). But not all jokes poke fun. I will recount one told by the late (and great) Professor Irving Younger. I will not disclose my own dog joke, the one which inspired this essay, in the foolish hope of making myself interesting ("Come on, please, what is the joke?").

Professor Younger, lecturing on the hearsay rule, discussed a case where witnesses observed a guard dog chasing the culprit from the premises. The witnesses were unable to keep up, losing direct visual contact of the dog and culprit. Later, however, they came upon the guard dog at the base of a tree; in the tree, the defendant. At trial, the issue was whether testimony concerning the dog was a form of hearsay—the dog's out of court conduct being offered for the truth asserted that the defendant, the guy in the tree, was the very same individual she chased from the premises. As to the court's ruling, who (besides Serious) cares? What is forever itched in memory (never to flee) is Younger's argument as to why the testimony should not be admitted: "Dogs don't lie, but they have great senses of humor."

Frankly, I am reluctant to get into the matter of "bad" jokes. Intellectual honesty would compel the concession that the line between "good" and "bad" jokes is not always clear. I fear another round of deconstructionism, with my good friend Tony D'Amato arguing that, just as there are no "easy" cases, there are no "good" jokes. Good Grief!

and frowning; he suddenly throws open his animal cloth and, as the camera quickly retreats, we hear the sound of water trickling against the wall.

Finally, I do not wish to be misunderstood. I do not advocate law reviews becoming joke books. Serious and pressing matters confront us; legal scholars have contributions to make. However, we should not over-estimate our importance or that of the law:

How small, of all the ills that human hearts endure, that part that law or kings can cause or cure.¹⁵

The "Lighten Up" movement, which may be coalescing in this Symposium, is not the only movement to criticize traditional legal writing. Traditional legal writing is lineal, logical, abstract and anonymous (no "I's," no self-disclosure). "Legal Storytelling" advocates argue cogently that important facets of the human experience are overlooked in traditional law review writing; authors should share life experiences, fears, failures, triumphs and inspirations. Richard Delgado makes an eloquent plea: "Stories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else's spectacles. They challenge us to wipe off our own lenses and ask, 'Could I have been overlooking something all along?'"¹⁶

I join Delgado and add a plea for humor. Humor doesn't humanize us; it is us. It emphasizes our sameness in ways that can ultimately bring us together. A good joke is a moment of togetherness, a moment of non-judgment, a moment of humanness. Despite our "serious" differences, when we laugh together we realize our common humanity and that, when all is said and done, we are all in this together.

Serious is a jealous sibling. Serious is racism, sexism, Saturday Night Specials, AIDS, poverty and death. Serious demands our undivided attention. Humorous, the rascal,

15. Serious, taking the human form of law review editor, would, no doubt, insist upon a citation, perhaps, indeed, upon the most dreaded form of all citations (by the law review writer), the "pinpoint citation." It makes perfect sense; without a citation, the source could not be checked and perhaps the person who the law review writer didn't say said it didn't say it. Humorous, who has a hard time remembering anything and bitterly resents being challenged, is apt to fudge: "Mrs. Benson, Fifth Grade Teacher, Lemon Grove Elementary, La Mesa, California, on file with author."

16. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440 (1989). On the "Storytelling" movement generally, see the symposium in that volume of the *Michigan Law Review*.

sneaks up behind us, pops a balloon and forces us to jump back from our somber human condition and to, momentarily, together, transcend it.

Life is a veil of tears and surely we all must die . . . but, hey, have you heard the one about the dog?