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Scorn

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I. INTRODUCTION[1]

Every year, the Supreme Court issues between one and two hundred written opinions.[2] The more than five hundred volumes of United States Reports occupy over one hundred feet of shelf space in a law library Such a body of work can legitimately be regarded as a corpus, analyzed for style, argument, and use of rhetorical strategies.[3] As with any such analysis the undertak-

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2. For example, in its 1992 term the Court issued 107 signed opinions including four shorter per curiam decisions. *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 62 U.S.L.W. 3124 (Aug. 17, 1993). In prior years, a similar number of opinions have been issued. For example, the Court issued in 1990 129 signed opinions including three per curiam opinions, *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 61 U.S.L.W 3098 (Aug. 11, 1992); in 1983, 151 signed opinions including six per curiam opinions and in 1982, 141 signed opinions including 10 per curiam opinions, *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 53 U.S.L.W. 3028 (July 24, 1984).

3. *See, e.g.*, Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (arguing that the law and its narrative content are inseparable); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) [hereinafter Ross, *Innocence*] (examining the recurrent theme of the "innocent white victim" in both academic and judicial discussions of affirmative action); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991) [hereinafter Ross, *The Rhetoric of Poverty*] (discussing ongoing themes in the Supreme Court's treatment of the constitutional claims of the impoverished); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990) [hereinafter Ross, *The Rhetorical Tapestry of Race*] (proposing that the themes of racism running throughout nineteenth century Supreme Court decisions, although once thought to be discredited, continue in the opinions of today);

ing can reward us with insights into the writer's psychology—into the way the Court sees itself as an institution, into the way it thinks of itself and of law [4]

It is said that if you want to know what a person is like, all you need to know is whom he adores, whom he venerates and tries to emulate.[5] We believe that the opposite is also true—that to understand how a person's mind works, it is helpful to know whom he scorns, at whom he laughs, and whom he regards as low and outside his circle of concern.[6]

This Article analyzes the use of scornful humor by the Supreme Court. In Part II, we describe the various types of scathing speech, including satire, parody, mockery, irony, and sarcasm, and situate the kinds courts use within this broader field. In Part III, we explain the various ways the Justices unleash humor—against litigants, against lawyers who come before them, against legal ideas, and against each other—and give examples of disparaging humor from Supreme Court opinions.

In Part IV, we set out our own version of when a powerful institution like the Court permissibly may engage in scornful discourse and when it should not. We argue that the most caus-

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Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) [hereinafter Ross, *The Richmond Narratives*] (discussing the narrative quality of judicial opinions, especially of the Supreme Court decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)); Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990) (suggesting the need for continued judicial recognition of the desirability and value of diversity espoused in *Metro Broadcasting*).

4. *E.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (analyzing various views of race); Ross, *The Rhetoric of Poverty*, *supra* note 3, at 1513-46 (reflecting on the Court's current views of poverty); *see also* Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990) (discussing generally the use of metaphor and its effects on the consideration of race).

5. *See* DICTIONARY OF QUOTATIONS 7, 680 (Bergen Evans ed., 1968) (attributing similar remarks to Ambrose Bierce and John Ruskin).

6. For a few works in this general vein, see ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) (discussing individuals stigmatized by various physical and social malformations and their image as a reflection of how others view them); IRWIN KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS (1981) (addressing the psychological impact of stigmatizing an individual); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991) (analyzing the possibility that the Law and Literature movement could have aided the thought processes of the Supreme Court Justices in nine notorious decisions).

tic types of humor are permissible only when deployed against the high and the mighty, when used to call attention to the foibles, weaknesses, pomposities, and abuses of those more powerful than oneself. A root meaning of "humor" is humus—bringing low, down to earth[7] or ground.[8] On this theory, it is never permissible to use destructive humor at the expense of someone weaker or of a lower station than oneself. This distinction also corresponds to a key function the Supreme Court is supposed to serve, namely, its countermajoritarian role.[9] In a leading theory of judicial review, the highest court is charged with policing excesses of powerful actors, like the military and other branches of government.[10] To these, the Supreme Court owes a duty of *suspicion*.

To the poor, the outcast, and to "discrete and insular minorities"[11] unable to fend for themselves in the democratic process, the Supreme Court owes respect and solicitude. The Court is their defender, the only arm of government capable of redressing injustice they suffer at the hands of the majority

Our concern is that, today, the Supreme Court has quietly brought about a stunning reversal. It is applying suspicion—cool, sometimes disrespectful treatment—to blacks, welfare recipients, prisoners, and other disempowered groups.[12] And it is treating with exaggerated respect the military, large corporations, arms of government, and other empowered actors.[13] The study of scornful discourse brings this reversal into sharp relief. If we are right, the Court today is verging close to becoming an illegitimate institution.

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7. JOSEPH T. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 441 (1984).

8. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1102 (1986).

9. *See infra* part IV.D.

10. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

11. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted) ("Nor need we enquire whether prejudice against discrete and insular minorities may be a special condition call[ing] for a correspondingly more searching judicial inquiry.").

12. *See infra* part III.B.

13. *See infra* part III.A.

II. TYPES OF SCORNFUL HUMOR

One can distinguish the use of scathing words[14] according to their character or genre, that is, the kind of words they are; as well as according to who speaks them, their audience, their target, and their intent and effect. First we discuss scornful words in their personal aspect—that is, who speaks and hears them, who or what is the target, and their intention and effect. Then we focus more closely on the words themselves, differentiating among the various types of scornful discourse in common use.

A. Scornful Speech. The Personal Aspect

A scornful or satiric speaker can have high or low prestige. When he wrote his famous satires of French society,[15] Voltaire was a well known and respected writer whose prestige and power were inferior to the wealthy whose vices he mocked, but not greatly so.[16] A newspaper columnist writing today about the excesses of government spending is an example of a writer of moderate social power writing about an institution of even greater power. When Jonathan Swift wrote his famous satire of humanity's foibles, *Gulliver's Travels*,[17] his target[18] was powerful in the aggregate, but weak individually Marie Antoinette's notorious remark about the poor illustrated a powerful individual speaking cavalierly about those of much lower station, mak-

14. Throughout this Article, we employ more or less interchangeably this term ("scathing words"), as well as the related terms "scorn" and "scornful words," "caustic humor," and so on, to designate the field of pointed wit and humor generally. Within this broad field, we draw a number of distinctions, *see infra* part II.B., insofar as these help us understand and analyze the Supreme Court's deployment of humor and sarcasm, *see infra* part III.

15. *E.g.*, VOLTAIRE, CANDIDE AND OTHER WRITINGS (Haskell M. Block ed., The Modern Library 1956) (1759). Of particular note are *Candide*, which mocks the optimism of Leibniz and Rousseau, and *Philosophical Letters*, which comments that poor taste swept over France when the French began to prefer British playwrights such as Shakespeare to natives such as Racine.

16. For further discussion of Voltaire and his work, see THEODORE BESTERMAN, VOLTAIRE (3d ed. 1976) (detailing the life and works of Voltaire); PETER GAY, VOLTAIRE'S POLITICS: THE POET AS REALIST (2d ed. 1988) (discussing Voltaire's career as a commentator and political observer).

17. JONATHAN SWIFT, GULLIVER'S TRAVELS (Martin Price ed., 1963) (1726).

18. That is, all humanity.

ing light of their predicament.[19] As we shall see, Supreme Court opinions sometimes employ humor in each of the above ways.

Humorous discourse also can be distinguished in terms of its intention or effect. Some of the classic exponents of satire employed wit with what they considered an educative purpose, that is to improve or to edify.[20] For example, Alexander Pope wrote about what he perceived as the frailties and vanities of women.[21] His purpose seems not to have been intentional unkindness, but rather to amuse and entertain while gently poking fun. Others, however, made fun at the expense of women[22] or weak social groups, such as dunces, bumpkins, or rustics.[23] On the

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19. *"Qu'ils mangent de la brioche"* or "Let them eat cake," attributed to the soon-to-be-beheaded queen on the occasion of being informed that her subjects were hungry and lacked bread. THE OXFORD DICTIONARY OF QUOTATIONS 329 (2d ed. 1953).

20. *E.g.*, EDWARD A. BLOOM & LILLIAN D. BLOOM, SATIRE'S PERSUASIVE VOICE 205 (1979) (discussing, for example, the use of political satire to cast aside precious notions about the infallibility of the monarchy); LEONARD FEINBERG, INTRODUCTION TO SATIRE 13-15, 17-18, 28-33, 58-59, 212-15, 257-59 (1967) [hereinafter FEINBERG, INTRODUCTION TO SATIRE] (claiming that satire unmasks hypocrisy and other human frailties); GILBERT HIGHET, THE ANATOMY OF SATIRE 18-19 (1962) (discussing satirists' desire to make people see the truth); *see also* LEONARD FEINBERG, THE SATIRIST: HIS TEMPERAMENT, MOTIVATION AND INFLUENCE (1963) [hereinafter FEINBERG, THE SATIRIST] (analyzing the satirist's personality and the impetus behind satire, including morality, creativity and attempts to adjust to society); LINDA HUTCHEON, A THEORY OF PARODY: THE TEACHINGS OF TWENTIETH-CENTURY ART FORMS (1985) (explaining the many functions of satire, including its attempt to edify).

21. ALEXANDER POPE, SELECTED POETRY AND PROSE (Robin Sowerby ed., 1988) (see particularly *Epistle to Miss Blount with the Works of Boiture*, at 55 (1712); *To Mrs. M.B. On Her Birthday*, at 149 (1724); *Epistle to a Lady: Of the Characters of Women*, at 158 (1735)).

22. JUVENAL, *Satire VI*, *in* JUVENAL'S SATIRES (William Gifford trans., 1802, rev. & ann. John Warrington, Everyman's Library 1954) (creating a series of derogatory portraits of women). Juvenal lived c. 50 A.D. to 130 A.D.

23. JUVENAL, *Satire I*, *supra* note 22 (pointing out the gluttony of the wealthy and the foolhardiness of the poor who depend on them); WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM (Houghton Mifflin 1969) (1598) (creating the fools Aguecheek and Belch for the audience to ridicule); PHILLIP WYLIE, A GENERATION OF VIPERS 194-217 (1955) (containing a scathing denunciation of "momism"); *see also infra* notes 194-211 and accompanying text (discussing in greater detail the past and present targets of the satirist). *But see* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 49-50 (pointing out that the fool or "schlemiel" sometimes sees the truth the rest of us miss).

whole, however, most of the classic writers reserved their arrows for society's favored few [24]

Finally, scornful discourse can be aimed at an audience consisting of the target group, someone else, or both. If aimed at the target group, the impact is apt to be sharper and more immediate. Accordingly, the satirist often moderates his or her remarks, writing with a little more restraint or delicacy than usual.[25] But if the target is a large group or humanity in general, feelings are less exposed and the writing is apt to have a more no-holds-barred quality [26]

B. Scornful Speech. Types and Genres

According to most theorists, humor always has a social dimension wherein a speaker and an audience mutually acknowledge certain beliefs or norms of behavior.[27] Much of it is also tacitly aggressive, using words to rearrange the distance between speaker and target, reiterating or calling into question the social hierarchy [28]

This Article is concerned with humor that is expressly or impliedly political, and particularly that which has a more or less vituperative—as opposed to an innocent, playful, or mirthful—quality [29] Within the general field of scornful speech we

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24. *See, e.g.*, BLOOM & BLOOM, *supra* note 20, at 205 (discussing satire aimed at the monarchy); FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 29-32 (observing that most satirists criticize named individuals or ideas and institutions); *id.* at 212-15 (describing the technique of "unmasking" the object of satire); *see also infra* part IV (arguing on general grounds that this latter is the most defensible use of humor and satire).

25. *See* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 29-31.

26. *See id.* at 32-34.

27. *E.g.*, *id.* at 11-13; *see also* WAYNE BOOTH, A RHETORIC OF IRONY 47-86 (1974); D.C. MUECKE, THE COMPASS OF IRONY (1969).

28. *E.g.*, FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 6, 30, 206-09, 220-21 (describing detachment, alienation, distancing, and the creation of the feeling of superiority in the *genre*); SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS 200 (James Strachey ed. & trans., W.W. Norton & Co. 1960) (1905).

29. We do not mean "political" in any pejorative sense. A court or other speaker could employ caustic humor—destructive wit—quite appropriately, as for example when calling to account a refractory governmental agency that has been guilty of a long course of misconduct. *See* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 86-90.

deal with satire and its cousins, parody, caricature, and irony.[30] Each genre employs ridicule, sarcasm, and mockery to achieve its effect.[31] No generally agreed upon typology classifies these relatives; the categories overlap to a considerable extent.[32]

Satire has a long history. Many cultures used satiric utterances to drive away evil spirits.[33] The Greeks had no word for satire per se,[34] but Aristophanes' comedies ridiculed the Athenian literary elite mercilessly and today are considered early exemplars of the genre.[35] Juvenal, the most famous Roman satirist, also aimed his quill at the upper class.[36] According to one classicist, "the 'smart set' of Domitian's Rome[] was sufficiently corrupt to furnish innumerable targets for his barbed shafts."[37] Though some medieval bawdy plays made fun of both kings and clergy, satiric discourse did not flourish in the Middle Ages.[38] Satire requires a tension between assent to and rejection of previously accepted social norms, something that was missing during much of this period. But by the seventeenth century, French society was so rife with religious and social hypocrisy that Moliere was able to mock those who piously feigned humility while privately scheming for worldly wealth and position.[39] Satire reached its apogee in eighteenth century England when Jonathan Swift composed his biting diatribes exposing the venality of the British ruling class.[40] Though polit-

30. On similarities and differences among these forms of humor or ironic discourse, see generally FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 93; HUTCHEON, *supra* note 20; LINDA HUTCHEON, IRONIES BINARIES (forthcoming 1994).

31. On these tools of the ironist's trade, see BOOTH, *supra* note 27, at 28-31; FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 93, 112; HUTCHEON, *supra* note 20, at 5, 6, 20, 24-26, 40-42, 50-68.

32. *E.g.*, FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 186. For various overviews and typologies, see HUTCHEON, *supra* note 30, at 47-58.

33. ARISTOTLE, IV THE POETICS 1448f-1449a (Steven Halliwell trans., 1986) (claiming the function of satire was to drive out evil spirits, improve fertility, etc.).

34. *The Art of Literature: Satire*, 23 ENCY. BRITANNICA 173 (1993).

35. *See* ARISTOPHANES, THE FROGS (B.B. Rogers trans., 1909).

36. *See* H.J. Rose, *Introduction* to JUVENAL, *supra* note 22, at vi.

37. *Id.* at viii.

38. *See* HIGHET, *supra* note 20, at 44 (asserting that little satire was written during this period).

39. *See, e.g.*, JEAN BAPTIST POQUELIN DE MOLIÈRE, TARTUFFE act 1, sc. 5 (Richard Wilbur trans., 1965) (1669). Voltaire, a century later, continued this tradition. *See* VOLTAIRE, *supra* note 15.

40. *See, e.g.*, SWIFT, *supra* note 17 (satirizing English people, representing man-

ical humor in the nineteenth century was more restrained, the tradition was carried on by Mark Twain who wrote about the foibles of the European aristocracy during the Middle Ages,[41] and more currently by such writers and commentators as H.L. Mencken,[42] Sinclair Lewis,[43] and Russell Baker.[44]

Although the genre has a lengthy lineage, the word itself is not easily defined. "Satire" derives from the Latin *satura*, meaning a poetic medley characterized by a mocking spirit or tone.[45] Satire is a deliberately distorted image of a person, institution, or society written to entertain.[46] It can take the form of beast

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kind in general, and Whigs in particular); JONATHAN SWIFT, A MODEST PROPOSAL (1729) (proposing to alleviate poverty by eating infants of beggars); JONATHAN SWIFT, TALE OF A TUB (1704) (ridiculing the many extreme corruptions in religion and learning).

41. MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT (Modern Library 1949) (1889).

42. *See, e.g.*, H.L. MENCKEN, NOTES ON DEMOCRACY (1926) (suggesting that democracy is the most charming form of government because it is based on propositions which are palpably not true).

43. *See, e.g.*, SINCLAIR LEWIS, BABBITT (1922) (satirizing complacent mediocrity). Other political satirists of note include Oscar Wilde, *see, e.g.*, OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST (1899) (satirizing birth, love, marriage, death and respectability—everything people consider important), and G.B. Shaw, *see, e.g.*, QUINTESSENCE OF G.B.S. THE WIT AND WISDOM OF BERNARD SHAW (Stephen Winsten ed., 1949) (collection of excerpts from Shaw's works).

44. *See, e.g.*, RUSSELL BAKER, THERE'S A COUNTRY IN MY CELLAR (1990) (chronicling American life at the breakdown point).

45. *The Art of Literature: Satire*, 23 ENCY. BRITANNICA 173 (1993); *see also* QUINTILIAN, INSTITUTE ORATORIA 8.6.54 (H.E. Butler trans., 1920-22) (describing the early origins of the term). On satire as a medley of devices, including grotesquerie, sentiment, parody, demasking, see FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 80-81, 89.

46. Professor Feinberg describes it as "a playfully critical distortion of the familiar," FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 19, whose essential quality is entertainment, despite being "permeated with disapprobation, complaint, expose, denunciation, rebuke, [and] condemnation," *id.* at 59. For an analysis of a related form, allegory, see *id.* at 201-05. Other scholars have defined satire in various ways, but humor coupled with criticism are the most frequently mentioned elements. For example, Gilbert Highet describes satire as evoking a particular emotion which is a

> blend of amusement and contempt. In some satirists, the amusement far outweighs the contempt. In others it almost disappears: It changes into a sour sneer, or a grim smile, or a wry awareness that life cannot all be called reasonable or noble. But, whether it is uttered in a hearty laugh, or in that characteristic involuntary expression of scorn, the still-born laugh, a single wordless exhalation coupled with a backward gesture of

fables, imaginary voyages, character sketches, anecdotes, proverbs, homilies, and the like.[47] The writer marshals social themes and narratives to expose the incongruity between what is said and what is done.[48] As will be seen, courts employ satire in a remarkable number of these senses.[49] When they do so, they are apt to use the subtler tools of the satirist's art, including irony, mockery, ridicule, and belittlement, rather than the more heavy-handed tools of invective, burlesque, derision, raillery, and so on.[50]

Closely related to satire are parody and caricature.[51] In parody, the author imitates a person or a work in an exaggerated way so as to make him or it appear ridiculous. Often, the more

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the head—it is inseparable from satire.

HIGHET, *supra* note 20, at 21.

47. *See, e.g.*, LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (Univ. of Cal. Press 1982) (1865); MIGUEL DE CERVANTES, DON QUIXOTE DE LA MANCHA (Macmillan 1957) (1605); SWIFT, *supra* note 40; *see also* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 46-55 (discussing, among others, Capek's, Ambrose Bierce's, and James Thurber's contribution to these styles); HIGHET, *supra* note 20, at 39.

48. FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 15-17.

49. *See, e.g.*, THE JUDICIAL HUMORIST 52-75 (W.L. Prosser ed., 1985) (describing cases of bumbling attorneys or judges); *id.* at 139-43 (depicting bullying lawyers who got their comeuppance); *id.* at 258-73 (depicting bumbling bureaucrats). In satirizing the cases before them, courts also have resorted to animal fables, *see infra* notes 166-67 and accompanying text, and the tried and true method of reductio ad absurdum, *see infra* notes 105-107, 124-26 and accompanying text; *see also* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 112-16. For grotesque examples of satire, see Commentary, *He-Manifesto of Post-Mortem Legal Feminism (From the Desk of Mary Doe)*, 105 HARV. L. REVUE 13 (1992) (withdrawn, copy on file with author) (parodying scholarship and brutal death of slain law professor, Mary Joe Frug), and a response, Susan Conwell & Andrea Brenneke, *Senseless & Insensitive*, THE RECORDER, Apr. 25, 1992 (criticizing lampoon of the murdered professor as tasteless and mean spirited).

50. For examples of a few opinions and trial proceedings which descended to these levels, see *infra* notes 76-87, 95-101, 104-05, 127-45, 156-57 and accompanying text; *see also* JUDICIAL HUMORIST, *supra* note 49, at 130, 139-43, 243-45. *But see id.* at vii (disapproving of this practice); James D. Gordon III, *Introduction: Humor in Legal Education and Scholarship*, 1992 B.Y.U. L. REV. 313, 318 (urging that humor be used carefully).

51. *See* BOOTH, *supra* note 27, at 91-134; FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 116-17, 184-92. *See generally* HUTCHEON, *supra* note 20. In parody the writer "takes an existing work which was created with a serious purpose He then makes the work, or the form, look ridiculous, by infusing it with incongruous ideas, or exaggerating its aesthetic devices; or by putting the ideas into an inappropriate form." HIGHET, *supra* note 20, at 13.

familiar the subject, the more successful the parody.[52] An early Classical Greek poet used parody to mimic and mock Homeric epics by describing a battle between frogs and mice in grandiose language.[53] In recent times, Victor Borge imitates Liberace, Jay Leno or Dana Carvey parodies a U.S. President, and a battery commercial mimics other products. Caricature likewise relies on exaggeration. It takes a troublesome quality of a person and focuses on that feature alone, distorting through oversimplification to produce a desired effect.[54] Dickens' character, Pecksniff, and Hogarth's drawings are classic examples.[55]

Ridicule raises laughter against a person or thing by making him or it the object of jest or sport.[56] Sarcasm intensifies the tone of ridicule, making the gibe or taunt more caustic or biting.[57] Mockery jeers and scoffs. It makes a counterfeit representation of something, mimicking and distorting with ridicule, derision, and belittlement.[58]

Irony, according to Northrup Frye, is "the great engine of comedy and satire."[59] It can be verbal or situational.[60] Thomas

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52. On the use of familiar themes in parody, see FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 184-85.

53. A mock-heroic Greek poem of early but uncertain date and authorship, the *Batrachomyomachia*, translated as the Battle of the Frogs and Mice, is a savage satire of Homer's *Iliad*. *See* THE READER'S ENCYCLOPEDIA 84 (William R. Benet ed., 1965).

54. On caricature generally, *see* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 116-19; JOHN FELSTINER, THE LIES OF ART: MAX BEERBOHM'S PARODY AND CARICATURE (1972); HUTCHEON, *supra* note 20, at 38-40 (describing specifically burlesque and parody).

55. CHARLES DICKENS, MARTIN CHUZZLEWIT (1844) (illustrating the self-propagating nature of selfishness). On Hogarth and his drawing, see HOGARTH AND ENGLISH CARICATURE (Francis D. Klingender ed., 1944).

56. On ridicule, see FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 207-10 (dealing with derision and cartoons); HUTCHEON, *supra* note 20, at 5-6, 24-26, 50-68.

57. On sarcasm generally, see FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 180 (labeling sarcasm a form of "overobvious" verbal irony). On invective, see HIGHET, *supra* note 20, at 155.

58. On mocking and mimicry, see, for instance, FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 184-92 (discussing a specific type of mimicry—parody); *id.* at 108-12 (discussing invective and denunciation); DAVID WORCESTER, THE ART OF SATIRE 19 (1940) (differentiating "gross" from "satiric" invective).

59. NORTHRUP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 223 (1957); *see also* BOOTH, *supra* note 27, at ix-x.

60. On verbal irony, see FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at

Hardy employed the latter category in his novels dealing with the role of fate in human lives.[61] Primarily a storyteller's device, situational irony seldom finds its way into judicial opinions, because it requires a degree of elaboration. Verbal irony, however, often does appear.[62] It is a figure of speech in which the intended meaning is other than that which is expressed.[63] It can take the form of mock seriousness, or showering attention on minutiae while ignoring what is important.[64] Voltaire's two generals, each of whom thanked God for their great victory, are a classic example of a third form, insincere praise.[65] The statement seems to depict the generals as pious, but in the next instant, the reader realizes they are vain, self-deluding fools.

With these distinctions in mind, it is time to turn our attention to the use of these figures in the American judicial system.

III. IRONY AND SATIRE IN THE SUPREME COURT

Courts use humor and sarcasm fairly often, in ways not all of which are wrong by any means. Humor can brighten a dry and technical opinion, relieve a discussion that otherwise would be dull and lifeless.[66] As we have seen, humor can also have an educative function. Many of the world's great writers employed wit and satire to change the behavior of their readers. They used it to point out flaws and foibles of human nature generally, or to

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178-83. On situational or dramatic irony, see *id.* at 157-75.

61. *See, e.g.*, THOMAS HARDY, THE MAYOR OF CASTERBRIDGE (Heritage Press 1964) (1886); THOMAS HARDY, THE RETURN OF THE NATIVE (Macmillan 1975) (1878); THOMAS HARDY, TESS OF THE D'URBERVILLES (Macmillan 1974) (1891). For a more recent tour de force, see Joseph Heller's brilliant CATCH-22 (1962).

62. *See, e.g., infra* notes 100-01, 131-32, 156-57 and accompanying text.

63. *See* BOOTH, *supra* note 27, at ix; FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 178-83; MUECKE, *supra* note 27, at 42-52; *see also* HUTCHEON, *supra* note 20 (distinguishing various continua for understanding irony: mild to provocative; rhetorical to assaultive; playful to irresponsible, etc.).

64. On these approaches to irony, see BOOTH, *supra* note 27 at 1-3; FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20.

65. VOLTAIRE, *supra* note 15, at 143; *see* BOOTH, *supra* note 27, at 10-11. On the techniques of feigned or insincere praise, see FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 178-79.

66. *See* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 442 (1963); Adalberto Jordan, Note, *Imagery, Humor and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 700-02, 709-21 (1987).

chide official figures they saw as abusing their authority or getting caught up in their own self-importance.[67]

The Supreme Court also has a supervisory and educative function.[68] When it deploys humor to admonish an overstepping governmental figure, unresponsive bureaucrat, or tedious, long-winded attorney, no one could object. But at other times, the Court's use of humor and sarcasm goes beyond entertainment or edification. This Section discusses examples of these more troublesome uses. We employ the rough classification system developed in Part II, distinguishing judicial texts in terms of their target and the type of sarcasm deployed. As will be shown, the two dimensions are not unrelated: the Court tends to differentiate, employing one type of humor for one type of target, and another type for another. Part IV then offers our own thoughts on the legitimate role of humor in Supreme Court discourse.

A. *When the Target Is an Institution or Person of High Social Standing*

The Supreme Court directs humor or sarcasm at institutions or persons of high prestige much less often than it does at ones of lower prestige, and when it does, so its language is apt to be relatively restrained: it uses a scalpel, not a sledge hammer. For example, the Supreme Court recently upheld a challenge to the FBI's policy regarding the exemption from disclosure, pursuant to the Freedom of Information Act, of Bureau records compiled in the course of a criminal investigation.[69] The Bureau had insisted that virtually all documents it obtained in the course of a criminal investigation were confidential, despite a federal statute that required them to establish that each requested docu-

67. On the edifying function of humor and satire, see *supra* note 20 and accompanying text; *infra* notes 195-98 and accompanying text.

68. It has a supervisory relationship to the lower federal courts, of course, as well as to state courts on matters dealing with the interpretation of the U.S. Constitution. Beyond that, law is said to have a teaching function in general. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Our Government is the potent, the omnipresent teacher To declare that in the administration of the criminal law the end justifies the means would bring terrible retribution.").

69. Department of Justice v. Landano, 113 S. Ct. 2014 (1993).

ment reasonably could be expected to disclose the identity of, or information from, a confidential source.[70] Despite the agency's clear violation, the Court's language was relatively mild. The Court merely noted that its holding was an attempt to remain consistent with its obligation to construe the Act's exemptions as narrowly as Congress intended.[71]

Sixteen years earlier, the Court considered a challenge to federal action under the Endangered Species Act of 1973.[72] The Court determined that the government had continued to appropriate and spend public funds for a certain project even after congressional committees were apprised of the impact upon the survival of the snail darter, in contravention of a section of the Act which required federal departments and agencies to cooperate with the Secretary of the Interior in furtherance of the purposes of the Act.[73] Indeed, it evidently thought the breach flagrant enough to warrant comment, observing that the plain language of the Act and the legislative history showed the value of endangered species as "incalculable" and that the balance had been struck in favor of affording endangered species the highest priority.[74]

The degree of restraint employed reminds one of that found in the more famous case of *Brown v. Board of Education*.[75] In 1954, the Supreme Court finally declared that separate but equal schools violated the Equal Protection Clause of the United States Constitution.[76] The case was of historical importance. The Court conceivably might have taken that occasion to sharply chastise the many school boards across the nation that had been

70. *Id.* at 2017-18.

71. *Id.* at 2024. Contrast this degree of restraint with the sharper language the Court employed in dealing with a California agency that it believed was overzealous in protecting public access to beaches. Nollan v. California Coastal Comm'n, 483 U.S. 825, 838 (1987) ("Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.").

72. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

73. *Id.* at 193.

74. *Id.* at 187, 194.

75. 347 U.S. 483 (1954) ("*Brown I*").

76. *Id.* at 495.

operating separate schools on the basis of color. Unfortunately, yet predictably, it did not do so. It described Topeka's action as generating a feeling of inferiority[77] and its policy of segregation as, at most, inherently unequal.[78] In a later ruling, the Court permitted local authorities to proceed to dismantle separate systems with "all deliberate speed"[79] and enjoined them to "make a prompt and reasonable start toward full compliance"[80] with the Court's prior ruling and, with equal delicacy and restraint, to "fashion[] and effectuat[e] the decrees guided by equitable principles."[81]

These examples are only suggestive, and it is possible to find opinions in which the Court rebukes a governmental figure somewhat more harshly.[82] On the whole, however, our review indicates that the Court keeps its sharpest weapons sheathed when dealing with figures of high prestige, even when it clearly finds they have transgressed. In recent times, particularly, it has reserved its unkindest language for parties who are weak and of a lower station.

B. When the Target Is an Institution or Person of Relatively Low Standing

As we mentioned earlier, the Supreme Court, and other courts as well, deploy humor and satire more frequently in connection with disempowered litigants. Moreover, when the Court attacks these parties, its language is apt to have a sharper, more acerbic quality than when it directs its wit upward. Oddly, the Court seems to take little note of certain early cases in which its own caustic language became notorious.

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77. *Id.* at 494.
78. *Id.* at 495.
79. 349 U.S. 294, 301 (1955) ("*Brown II*").
80. *Id.* at 300.
81. *Id.*
82. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 704 (1974) (holding that to permit the President to determine in each case the existence of his own privilege to withhold information "would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government").

Two of those early cases are *Buck v. Bell*[83] and *Plessy v. Ferguson*.[84] In *Buck v. Bell*, Justice Holmes upheld an order providing for the sterilization of Carrie Lee Buck, a young, sexually active woman asserted to have been mentally retarded and herself the mother of a child also said to be retarded.[85] With little consideration of the mother's interest or of less restrictive alternatives, Holmes acquiesced.[86] The opinion is curt and full of facile analogies.[87] Holmes rejects a plausible equal protection argument as one of last resort,[88] and concludes with the dismissive pronouncement, "Three generations of imbeciles are enough."[89]

A few decades earlier, Justice Brown wrote the opinion of the Court in *Plessy v. Ferguson*, upholding separate but equal treatment of American blacks.[90] A state provision had required that black railroad passengers ride only in cars for blacks, a practice the plaintiffs challenged as a violation of equal protection.[91] Justice Brown found that the rule did not violate constitutional equality, because the blacks' car was equal to that of whites.[92] The plaintiffs of course maintained that the very separation of passengers by race degraded them, thus violating the Fourteenth Amendment. Brown dismissed this argument, holding that the law could not, and should not, attempt to redress social inequality.[93] Further, if the blacks found the railroad's separate treatment offensive it was "solely because the colored race chooses to put that construction upon it."[94]

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83. 274 U.S. 200 (1927).
84. 163 U.S. 537 (1896).
85. *Buck*, 274 U.S. at 205. *But see* STEPHEN J. GOULD, THE MISMEASURE OF MAN 335-36 (1981) (pointing out that her child may have been normal and the case collusive); MICHAEL SHAPIRO & ROY SPECE, BIOETHICS AND LAW 404-05 (1981); *id.* at 102 (Supp. 1991).
86. *Buck*, 274 U.S. at 207-08.
87. *Id.* at 207 (comparing sterilization to vaccination during times of epidemic).
88. *Id.* at 208.
89. *Id.* at 207.
90. 163 U.S. 537 (1896).
91. *Id.* at 538-40.
92. *Id.* at 543.
93. *Id.* at 551.
94. *Id.*

These lines are, of course, now notorious. Yet that notoriety has stopped neither today's Court nor the individual Justices from issuing opinions as sarcastic and high-handed as the early ones. For example, in *United States v. Sioux Nation of Indians*,[95] the Sioux tribe sued the government for the fair value of lands in the Black Hills region of South Dakota which the government promised them in the Fort Laramie Treaty of 1868, but which later were taken by the United States.[96] The majority opinion presented a detailed history of the issue on the way to holding that the Sioux were indeed entitled to compensation.[97] Justice Rehnquist objected to much of the Court's historical presentation and offered his own, drawn, he maintained, from historians "not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees."[98]

This jab at the other members of the Court and the historians upon whom they relied did not content Rehnquist. He went on to quote from Samuel Eliot Morison's description of the Sioux, in order to describe the plaintiffs as barbaric:

> The plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens; and in warfare, once they had learned the use of the rifle, [were] much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.[99]

Even if true, the historic description Rehnquist adduces had little to do with the claim the Sioux nation was maintaining against the government. It could only serve as backdrop for his claim that "the Indians did not lack their share of villainy ei-

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95. 448 U.S. 371 (1980).
96. *Id.* at 374-84.
97. *Id.* at 374-84, 424.
98. *Id.* at 435 (Rehnquist, J., dissenting).
99. *Id.* at 436-37 (quoting SAMUEL MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 539-40 (1965)).

ther,"[100] one that at best only tangentially advanced resolution of the issue before the Court. Justice Rehnquist scorned the Indians, pure and simple, thinking his readers would do so as well—just as Holmes did in *Buck v. Bell*. He misjudged his audience. He failed to persuade a majority of his fellow Justices. And, among Indians and Indian lawyers, at least, his opinion acquired instant infamy

In the short time he has been on the bench, Justice Antonin Scalia has distinguished himself for his quick tongue and acerbic wit. In two cases having to do with environmental standing, he appears to have crossed the line between lively language and impermissibly caustic speech. Until ruling in these two cases, the Court had recognized a fairly generous basis for standing—environmental harm.[101] But in *Lujan v. National Wildlife Federation*[102] the Court severely restricted the previously liberal "personal stake" requirements of individuals seeking environmental standing. In *National Wildlife Federation*, Scalia held that

> Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade [103]

His "circular promenade" comment might strike most readers as gratuitous, but it is positively restrained in comparison to his approach in another environmental standing case, *Lujan v. Defenders of Wildlife*.[104] *Defenders* centered around the standing

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100. *Id.* at 435.

101. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (finding that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society" and can support a claim of injury-in-fact if the party seeking review is among those injured). *See generally* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

102. 497 U.S. 871 (1990).

103. *Id.* at 889.

104. 112 S. Ct. 2130 (1992).

of an environmental group to bring suit under federal regulations governing the extraterritorial application of the Endangered Species Act.[105] Members of an environmental organization had submitted affidavits stating that they had used the precise lands in question, but Justice Scalia, writing for the Court, held that "the affiants' profession of an 'inten[t]' to return is simply not enough."[106] He ridiculed even the terms in which the plaintiffs framed their suit, including an "inelegantly styled 'ecosystem nexus,' [and] other theories alas, the 'animal nexus' approach and the 'vocational nexus' approach."[107] A dissent by Justice Blackmun turned the ridicule on Scalia, pointing out that "a Federal Torts Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a 'description of concrete plans' for her nightly schedule of attempted activities."[108]

C. *When the Target Is an Idea or Legal Argument the Judge Thinks Ridiculous*

Justice Scalia's derision in *Defenders of Wildlife* extends beyond the plaintiff personally, illustrating a third category of cases in which the Court deploys humor against an entire legal idea or argument. In *Defenders*, Scalia made plain that he thought the idea of expansive standing in environmental litigation bordered on the ridiculous.[109] Prison and law reform cases often provoke the same reaction. For several centuries, prisoners and others have employed the historic writ of habeas corpus to challenge the conditions under which they were confined or their confinement itself.[110] Recently, conservative judges have begun

105. *Id.* at 2135.

106. *Id.* at 2138.

107. *Id.* at 2139. To contrast the harsh words used here with the much more subdued language employed in an earlier case brought under the same statute where the offending party was an arm of government, see *supra* notes 72-74 and accompanying text.

108. *Id.* at 2154 (Blackmun, J., dissenting). *See infra* part III.E. (discussing other Justices as targets).

109. *See supra* notes 97-100 and accompanying text.

110. On the writ generally, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 28.1-28.7 (2d ed. 1992).

cutting back on the writ's scope by imposing procedural hurdles in the way of prisoners attempting to employ it. Judge Richard Posner, for example, has complained that prison writ-writers file so many requests because they have too much free time on their hands.[111] They would be far better off if they spent the time rehabilitating themselves and thinking about their sins.[112] Recently, the Supreme Court echoed this view in a pair of decisions. In *Gomez v. United States District Court*,[113] a prisoner on death row filed a writ challenging, on Eighth Amendment grounds, California's use of lethal gas in executions. The Court dismissed in a per curiam opinion, explaining that

> [e]quity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.[114]

In dissent, Justices Stevens and Blackmun described in length the horrors of death by cyanide gas.[115] They also made the obvious point that if execution by gas is unconstitutional, then delay in bringing the claim, even if unjustified, can hardly endow the state with authority to violate the Constitution.[116]

Justice O'Connor showed the frustration of a law-and-order judge confronting constitutional niceties in *Duckworth v. Eagan*.[117] In *Duckworth*, a prisoner who confessed to a stabbing brought a habeas corpus claim in federal court based on the

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111. Merritt v. Faulkner, 823 F.2d 1150, 1157 (7th Cir.) (Posner, J., concurring) ("Inmates love turning the tables on the prison's staff by hauling it into court. They like the occasional vacation from prison to testify in court."), *cert. denied*, 464 U.S. 986 (1987); *see also* McKeever v. Israel, 689 F.2d 1315, 1323 (7th Cir. 1982) (Posner, J., dissenting) ("I merely record in passing my amazement" at prisoners' suits.); Free v. United States, 879 F.2d 1535, 1536 (7th Cir. 1989).

112. *McKeever*, 689 F.2d at 1323 (Posner, J., dissenting) ("[I]nstead of reflecting on the wrongs they have done to society our convicts prosecute an endless series of mostly imaginary grievances against society.").

113. 112 S. Ct. 1652 (1992).

114. *Id.* at 1653.

115. *Id.* at 1654 (Stevens and Blackmun, JJ., dissenting).

116. *Id.* at 1656.

117. 492 U.S. 195 (1989).

argument that he was given insufficient warning before confessing.[118] Chief Justice Rehnquist's opinion for the Court blandly rejected the claim, but Justice O'Connor, concurring, felt compelled to do more:

> Eighteen state and federal judges have now given plenary consideration to respondent's *Miranda* claims. None of these judges has intimated any doubt as to respondent's guilt or the voluntariness and probative value of his confession. After seven years of litigation, the initial determination has been found to be the correct one. In my view, the federal courts' exercise of habeas jurisdiction in this case has served no one [119]

It is, of course, a new doctrine of appellate review that would predicate the value of that review solely on its reaching a different determination from that of the trial court. In dissent, Justice Marshall commented on Justice O'Connor's non sequitur and "profound distaste for *Miranda*," asking "[h]ow else to explain the remarkable statement that '*no* significant federal values are at stake' when *Miranda* claims are raised in federal habeas corpus proceedings?"[120]

In addition to the criminal justice area, the Supreme Court frequently employs scorn in two additional categories: law reform cases, and claims brought by plaintiffs who are nontraditional in some way *Bowers v. Hardwick*[121] is a prime illustration of the latter. *Bowers* is replete with cool references to the plaintiff, a gay man.[122] But the way in which the Court framed the issue before it reveals its contempt for the plaintiff's claim.

Writing for the Court, Justice White framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy "[123] Blackmun's dissent takes exception to that characterization, urging that the issue at

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118. *Id.* at 199.
119. *Id.* at 207 (O'Connor, J., concurring).
120. *Id.* at 224 (Marshall, J., dissenting).
121. 478 U.S. 186 (1986).
122. *See, e.g., id.* at 188 ("[h]e asserted that he was a practicing homosexual"); *id.* at 191 ("respondent would have us announce a fundamental right to engage in homosexual sodomy"); *id.* at 196 ("[e]ven respondent makes no such claim").
123. *Id.* at 190.

stake is much more fundamental: "the right to be let alone."[124] Commentators have argued that even this way of framing the issue does not go far enough, and that the reasoning that enabled the Court to adopt its version will not bear scrutiny.[125] One of these framing devices is the Court's use of history. Chief Justice Burger, in concurrence, goes to considerable lengths to rail against homosexuality itself, presenting a historical exposition of Judeo-Christian moral and ethical standards, pointing out that sodomy was a capital crime under Roman law, and concluding with an inflammatory quotation from Blackstone.[126] In light of all that he asserted, "[T]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would cast aside millennia of moral teaching."[127] The framing of the issue as one of a right to sodomy is what leads to the language condemning that practice, but it is contempt for the plaintiff's homosexuality that first must have led to such a characterization and hence to the opportunity for the Court to present its moral findings as it did.

Law reform cases, and ones brought on behalf of the poor, often display a similar attitude on the Court's part. For example, in *Wyman v. James*,[128] the Supreme Court upheld a New York law requiring home visitation as a prerequisite for receiving AFDC benefits.[129] Proving that even liberals can be guilty of scorn, Justice Blackmun wrote:

> [W]hat Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informa-

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124. *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

125. For a sample of critical commentary, see Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986).

126. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring) ("Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape ") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

127. *Id.* at 197.

128. 400 U.S. 309 (1971).

129. *Id.* at 326.

> tional terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind.[130]

"The home visit," he continued, "is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding."[131] In dissent, Justice Douglas pointed out: "If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different?"[132] Justice Marshall added, "I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor. Perhaps the majority has explained why a commercial warehouse deserves more protection than does this poor woman's home. I am not convinced."[133]

D When the Target Is an Attorney, or an Attorney in Addition to a Client or an Idea

Recently amended Rule 11 of the Federal Rules of Civil Procedure has provided an outlet for a fourth type of judicial derision, namely that directed against the attorney foolish enough to bring an "unwarranted" lawsuit. Rule 11 instructs a court to impose sanctions when it finds that a signed "pleading, motion, or other paper" is unfounded or frivolous.[134] As many feared,

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130. *Id.* at 321-22.
131. *Id.* at 323.
132. *Id.* at 332 (Douglas, J., dissenting).
133. *Id.* at 347 (Marshall, J., dissenting).
134. Rule 11 provides that:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is signed in violation of this rule, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction

FED. R. CIV. P 11 (amended 1993).

the rule seems to have been used disproportionately to punish attorneys and clients who brought civil rights suits or ones who sought to vindicate unpopular or new interests.[135] To the judge hearing the case, such a suit easily can appear farfetched, ill motivated, and a waste of everyone's time.

Because of the rule's relatively brief history, few Supreme Court cases have interpreted it; most of the case law is found at the district or circuit court level. For example, in *Szabo Food Service, Inc. v. Canteen Corp.*,[136] a minority firm sued over Cook County's failure to comply with its own minority set-aside program. Following the plaintiff's voluntary dismissal and refiling in state court, the district court found that Rule 11 sanctions were inappropriate.[137] On appeal, a panel of the Seventh Circuit agreed that the complaint warranted sanctions and remanded the case to the lower court to fix an amount. "If one citizen of Illinois files a suit based on state law against another citizen of Illinois," Judge Easterbrook wrote, "a federal court lacks jurisdiction so too if a plaintiff files a specious civil rights suit, for an absurd complaint does not even invoke federal question jurisdiction."[138] Moreover, he reasoned, "[i]f the complaint is indeed too silly to create subject matter jurisdiction, attorneys' fees should be an ordinary incident of the award of costs."[139]

The plaintiff, however, had to endure more than being labeled silly, absurd, and the drafter of a specious complaint. Easterbrook went on to ridicule one of his arguments as follows:

> You can get only so far with the comparison to a suit never filed, however Suppose the plaintiff files a suit, seeks a TRO, in the midst of the hearing asks to approach the bench, emits a Bronx cheer, punches the judge in the nose, and as the judge reaches for a handkerchief to stanch the bleeding tenders a dismissal under Rule 41(a)(1)(i). In reply to the inevitable citation for contempt of court, the plaintiff could not say· "I wasn't there in the eye (nose?) of the law; nothing

135. Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331 (1988).
136. 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).
137. *Id.* at 1076.
138. *Id.* at 1077-78.
139. *Id.* at 1078.

> happened for which I am responsible; for 'it is as if the suit had never been brought.' "[140]

After a few more pages detailing plaintiff's derelictions, the opinion concluded with: "Szabo-Digby's theory of due process is wacky, sanctionably so."[141]

Other judges have imposed penalties on plaintiffs who have lost civil rights cases, using such terms as "fantasies,"[142] "shocking,"[143] "absurd,"[144] and "unsubstantiated, self-serving, contradictory, and inconsistent"[145] to explain their decision. As we noted earlier, judges reserve some of their choicest scorn for suits brought by prisoners. The Fifth Circuit described one such suit as "patently meritless,"[146] "frivolous,"[147] and calculated to "try even the most patient members of this court."[148] It said it "[would] not dignify by discussion the merits of the case,"[149] directed that the plaintiff "file no further action in any court in this circuit until the sanction levied by the district court is satisfied,"[150] and warned "that such continued abusive conduct will trigger increasingly severe sanctions, including the ultimate denial of access to the judicial system absent specific prior court approval."[151]

In a final illustration, the same circuit considered a case brought by a pro se plaintiff who complained of several things including dirty prison cell ventilation, a conspiracy by the warden to turn the inmates into homosexuals, and overpricing of

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140. *Id.*
141. *Id.* at 1080.
142. Harris v. Marsh, 679 F Supp. 1204, 1224 (E.D.N.C. 1987) ("Some of the factual allegations can most charitably be termed 'fantasies.' "), *aff'd in part, rev'd in part and remanded sub nom.* Blue v. United States Dep't of the Army, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).
143. *Harris*, 679 F Supp. at 1226 (The "cavalier attitude" of the plaintiff "was and remains shocking.").
144. *Id.* at 1225.
145. *Id.* at 1267.
146. Jackson v. Carpenter, 921 F.2d 68, 69 (5th Cir. 1991).
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

paper and rulers at the commissary [152] The trial court had dismissed the case and fined the plaintiff $150. The Fifth Circuit affirmed, concluding that "[the prisoner's] issues utterly lack merit, and we refuse to dignify them by further discussion."[153] It therefore ordered that he not be allowed to file any additional appeals until he paid the $150 sanction levied by the district court.[154]

Recently proposed amendments to Rule 11 may reduce the amount of litigation brought under it by providing that offending parties compensate the court, not their adversary, and by making sanctions discretionary rather than mandatory [155] But while the rule was in effect it provided a revealing mirror into the way judges think about racial discrimination, prisoner, civil rights, and other similar suits.

E. When the Target Is Another Court, Another Justice, or the Supreme Court of Another Era

Supreme Court opinion-writers sometimes vent their spleens at lower courts, at each other, or at a predecessor Court. Four civil rights decisions from the modern era illustrate scorn and sarcasm directed by one member or wing of the Court at another. In three, the Court found for a minority plaintiff, while conservative justices in dissent blasted their more liberal colleagues. In a fourth, in which the Court chose not to play its countermajoritarian role, liberal justices in dissent excoriated the majority

In *Metro Broadcasting Inc. v. FCC*,[156] the Court held that the Federal Communication Commission could employ racial preferences in granting licenses in order to redress long-standing imbalances in the radio broadcast industry [157] In dissent, Justice O'Connor derided the FCC as a know-it-all agency, stating "[t]he FCC has concluded that the American broadcasting public

152. Vinson v. Texas Bd. of Corrections, 901 F.2d 474 (5th Cir. 1990).
153. *Id.* at 475.
154. *Id.*
155. *See* Stephanie B. Goldberg, *On and On: Will the New Amendments Cut Rule 11 Litigation Down to Size?*, A.B.A. J., Sept. 1992, at 80-82.
156. 497 U.S. 547 (1990).
157. *Id.* at 600.

receives the incorrect mix of ideas."[158] Of course, the FCC did not maintain that it knew *what* ideas the public should receive, but rather that minority broadcasters (and their ideas) were being excluded, a much different proposition. Justice Kennedy went even further, equating the Court's treatment with the infamous separate but equal doctrine of *Plessy v. Ferguson*,[159] and evoking the horrors of that era by quoting passages from a South African government publication about apartheid.[160]

A similar attempt at redressing past injuries was the subject of a suit brought by a male worker denied a promotion in favor of what he believed was a less qualified female worker in *Johnson v. Transportation Agency* [161] The Court held that the use of sex as a factor in considering promotions was justified by past discrimination and current underrepresentation.[162] Justice Scalia, in dissent, declared that "[t]he Court today completes the process of converting [Title VII] from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*."[163] He further argued that the Court in bowing to the pressure of organized special interests—presumably the women's transportation workers advocacy group—had run roughshod over the unprotected and disenfranchised.[164] But just who are these disenfranchised? The plaintiff in *Johnson* was a man in a predominantly male field. The defendant transportation agency employed no female road dispatchers and all but a few of its female employees worked in traditional clerical jobs.[165] This did not stop Scalia, however, who sympathized with male plaintiffs such as Johnson, stating:

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158. *Id.* at 616 (O'Connor, J., dissenting).

159. 163 U.S. 537 (1896).

160. *Id.* at 631-38 (Kennedy, J., dissenting).

> The following statement would fit well among those offered to uphold the Commission's racial preference policy: "The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development."

Id. (quoting SOUTH AFRICA AND THE RULES OF LAW 37 (1968)).

161. 480 U.S. 616 (1987).

162. *Id.* at 640-42.

163. *Id.* at 658 (Scalia, J., dissenting).

164. *Id.* at 677.

165. *Id.* at 618, 620-23.

"The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."[166]

Justice Rehnquist provides a third example not only of scorn and derision, but of an astonishingly patronizing tone. *FCC v. League of Women Voters*[167] presented a challenge to an FCC regulation which prohibited government-funded public broadcasting stations from editorializing. The Court struck down the regulation, which made Rehnquist unhappy His "Little Red Riding Hood" response is as follows:

> All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the Government appears as the "Big Bad Wolf," and appellee Pacifica [co-respondent with the League of Women Voters] as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood to take to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions.[168]

The Court abandoned its countermajoritarian role in *City of Richmond v. J.A. Croson Co.*[169] This departure gave the liberal Justices in dissent an opportunity to exercise *their* skill at scorn and derision. Because it was directed upward at a portion of the Court upholding the power of the majority, this could be considered a rare example of "benign" scorn. In *Croson*, the Court addressed the constitutionality of a "minority business utilization plan" adopted by the city of Richmond, Virginia.[170] The plan required construction contractors dealing with the city to subcontract at least thirty percent of the dollar amount of each

166. *Id.* at 677.
167. 468 U.S. 364 (1984).
168. *Id.* at 402-03 (Rehnquist, J., dissenting).
169. 488 U.S. 469 (1989).
170. *Id.* at 477.

contract to one or more minority-owned businesses.[171] The Richmond City Council considered this percentage reasonable in a city roughly fifty percent black.[172] The majority disagreed, holding that the thirty percent quota rested "upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[173] This is a mischaracterization: "lockstep proportion" would be 50%; moreover, if one wanted to quarrel over numbers, the starting point would need to be the actual minority representation among recipients of prime construction contracts in Richmond of 0.67%.[174]

The factual distortions and second guessing of the decisions of the Richmond City Council, which was five-ninths black, were based on the majority's view that the Council's action was "simple racial politics."[175] The dissent disagreed. Given Richmond's history, "to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility"[176] Moreover, Justice Marshall wrote: "The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence."[177]

As we have shown, members of the Court can use blunt language with each other, and even harsher language with attorneys and parties appearing before them. Occasionally the Court has an opportunity to employ similar words when discussing its own previous actions, or those of a lower court.

For example, the Supreme Court in *Shaffer v. Heitner*[178] reversed a hundred-year-old rule concerning personal jurisdiction.

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171. *Id.*
172. *Id.* at 478-80.
173. *Id.* at 507.
174. *See id.* at 479-80.
175. *Id.* at 493.
176. *Id.* at 541 (Marshall, J., dissenting).
177. *Id.* at 555.
178. 433 U.S. 186 (1977).

In *Pennoyer v. Neff*,[179] the Court had articulated the territorial view of personal jurisdiction, under which a plaintiff needed to serve the defendant personally within the state, or else find property there belonging to the defendant and bring it before the court.[180] In *Shaffer* and a second case,[181] the Supreme Court abandoned this approach in favor of one based on minimum contacts and fairness.[182] Its treatment of *Pennoyer* was relatively gentle and restrained. In neither opinion did the Court mention that it was overruling a century-old classic. The Court discussed how the old rule had become riddled with exceptions and weakened by modern commercial realities to the point where it no longer served its original purpose.[183] The tone was moderate and respectful, assuring the venerable rule and its distinguished author (Justice Field) a decent burial.

The Court is not always so gentle with lower courts whose rulings and decisions it finds errant. For example, the Court recently reversed a Mississippi Supreme Court ruling respecting the Fifth Amendment rights of an accused and his request for the assistance of counsel. In *Minnick v. Mississippi*,[184] the Court chided the state court for its failure to uphold the rule that an interrogation must cease upon the accused's request for counsel and his stated wish to communicate with the authorities only through one.[185] Such a mistake could not be allowed to stand because of the clear and unequivocal guidelines stated in the Court's earlier decisions.[186] The Supreme Court also admonished the state court not to detract from the "affirmation of individual responsibility that is a principle of the criminal justice system," and in the future to avoid both waiver of rights and admissions of guilt that are contaminated by the coercive pressures of custody [187]

179. 95 U.S. 714 (1877).
180. *Id.* at 731.
181. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
182. *Shaffer*, 433 U.S. at 211, 215-16.
183. *Id.* at 196-206; *International Shoe*, 326 U.S. at 316-20.
184. 498 U.S. 146 (1990).
185. *Id.* at 151-53.
186. *Id.* at 150-52.
187. *Id.* at 155.

In summary, it appears that the Supreme Court reserves its sharpest language for plaintiffs, particularly ones who file suits with which the Court feels little empathy Here, the sarcasm is apt to be heavy and blunt, falling into the categories of invective or derision as we have defined them. When the target is broader or more abstract, such as an entire legal theory or group of plaintiffs, the verbal attack is apt to be more refined, if no less scathing. Perhaps because judges respect legal reasoning, the adversary is treated to greater attention and deference. We have fewer "Little Red Riding Hood" tales, but more deftness, detail, and wit. The level of writing at times approaches that of true satire, with metaphors marshaled, comparisons made, literary allusions deployed. When the target is another court, the level of asperity is apt to fall somewhere in between—more gentle and solicitous than that aimed at a seriously offending attorney, but not so mild as that directed against its own ruling or precedent. The degree of sharpness ranges between what we have described as caricature and irony By contrast, we found no case of the Supreme Court, in recent history at least, treating in any seriously satirical way the action of a federal agency, the military, an upper-level law enforcement figure, or a large, multinational corporation. The Court reserves its most withering language for law reform cases or ones brought on behalf of groups like prisoners, gays, environmentalists, and blacks, that it sees as falling outside its circle of concern.[188]

IV THE JUDICIAL FUNCTION: A THEORY OF THE APPROPRIATE ROLE OF SATIRE AND HUMOR

As we mentioned in the Introduction, our theory of humor and satire is relatively straightforward.[189] Reduced to its essentials we believe that satire should be reserved for targets of higher status and power than the speaker, never lower. Now it is time for us to explain and defend our thesis in greater detail. We first argue for our up-down distinction in general, bringing to bear

188. *See* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992); David O. Stewart, *Advantage Government: Is It Easier for the Government to Win in the Supreme Court?*, A.B.A. J., July 1992, at 46.

189. *See supra* notes 7-8 and accompanying text.

considerations of etymology, intuition, past practice, and the social psychology of humor. Then we apply our insight to the special situation of courts.

A. Etymology: The Root Meaning of Humor

A root of "humor" is *humus*—that is, ground or earth.[190] Although humor and ridicule can of course be directed at the lowly and the weak,[191] it appears that a principal function in all ages has been that of calling to account the high and the mighty—bringing them down to earth. Early Greek playwrights and satirists such as Aristophanes made fun of the foibles and vices of the gods, the ruling class, and sometimes mankind in general.[192] Early Roman emperors employed accompanists to march or stand with them during victory parades and other state occasions. This servant's role was to whisper periodically, "thou art but a man."[193] Early European royalty employed court jesters to mock and make light of their own mannerisms and excesses.[194] Although the early meaning of humor, of

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190. *See supra* note 8 and accompanying text (defining term).

191. *See, e.g., infra* notes 186-93 and accompanying text. For examples from court opinions, see *supra* part III.

192. *See, e.g.*, ARISTOPHANES, *supra* note 35. Aristophanes' other plays also made fun at the expense of rulers, charlatans, frauds, pompous philosophers, and the Athenian ruling class. *See* ARISTOPHANES, THE ACHARNIANS (Douglass Parker, trans.), *in* FOUR COMEDIES (William Arrowsmith ed., 1969) (spoofing Euripides in a satire of militarism, war, and politics); ARISTOPHANES, THE CLOUDS (William Arrowsmith, trans.), *in* THREE COMEDIES (William Arrowsmith ed., 1969) (satirizing the teachings of the Sophists); ARISTOPHANES, LYSISTRATA (Douglass Parker, trans.), *in* FOUR COMEDIES, *supra* (playing on the theme of the battle of the sexes); *see also* PERSIUS, SATIRE IV, *in* JUVENAL'S SATIRES, *supra* note 22, at 200 (criticizing statesmen who failed to examine their true place in the world).

193. CLASSICAL AND FOREIGN QUOTATIONS 326 (W. Francis H. King ed. & trans., 3d ed. 2d prtg. 1965) (1889). The same entry goes on to note that the Russian Tsars at the time of their coronation were presented (along with their scepters, presumably) specimens of marble from which to select for their tombs. *Id.*

194. *See* DR. JOHN DORAN, THE HISTORY OF COURT FOOLS (1858) (describing the court jesters of England, France, Spain, Germany, and Italy); ENID WELSFORD, THE FOOL. HIS SOCIAL AND LITERARY HISTORY (1935) (discussing the role of the court jester in the medieval, Renaissance, and Tudor eras); *see also* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 188-89; HIGHET, *supra* note 20, at 77, 94-96 (relating pranks, hoaxes, jokes and parodies aimed at queens, the Royal Navy, and other such high groups). Recall also Anatole France's famous remark spoofing unfair laws: "The law, in its majestic equality, forbids all men to sleep under

course, is not decisive, it nevertheless gives some indication of what humor's central function might be today Considerations of historical practice, current intuition, and structural justice enable us to add to our basic insight that humor generally should be reserved for use against the strong.

B. Past Practice

Again, while not decisive, past practice argues for our general thesis. Throughout history, the best humorists and satirists have aimed their arrows either at the ruling class, or at some group that in the aggregate could be described as empowered.[195] Thus, as we showed earlier, Molière mocked the vanities and absurdities of his nation's aristocracy, or, sometimes, those of the nouveaux riches.[196] Voltaire reserved his best barbs for social climbers.[197] Jonathan Swift wrote his slyest, most savage denunciations of heartless bureaucrats and rulers.[198] Today's newspaper satirists concern themselves with abuses of power, and so on.[199]

It is possible to find exceptions, to be sure: a famous author tells a dunce tale at the expense of an industrial worker who loses a finger by accident, is recompensed, and decides to lose another;[200] women were a common object of humor in the Classical period;[201] snobs of all ages would sometimes enjoy a laugh at the expense of the naive or unsophisticated.[202] Sinclair Lew-

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bridges " DICTIONARY OF QUOTATIONS 363 (Bergen Evans ed., 1968).

195. *See supra* notes 15-17 and accompanying text; *see also* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 254 ("By the nineteenth century in France when the press became especially vehement, the custom had grown of saying, 'It's Voltaire's fault.' ").

196. *See supra* note 32 and accompanying text.

197. *See supra* note 10 and accompanying text.

198. *See supra* notes 12-13, 33 and accompanying text.

199. *See supra* notes 11, 37 and accompanying text.

200. FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 168-69.

201. *See supra* notes 16-17 and accompanying text; HIGHET, *supra* note 20, at 39 (describing an iambic poem by Semonides of Amorgos dating from seventh century B.C. "surveying the different types of wives" and praising only one); *see also* JUVENAL, *Satire VI*, *supra* note 22.

202. *See supra* notes 16-17 and accompanying text (illustrating bumpkin jokes); *see also* ROBERT C. ELLIOTT, THE POWER OF SATIRE: MAGIC, RITUAL, ART 85 (1960) (describing the ridicule of immigrants and ethnic groups); FEINBERG, INTRODUCTION TO

is,[203] H.L. Mencken,[204] and Aldous Huxley[205] made fun of the middle class; Orwell of the "proletarians."[206] And, in our time, one sees an upsurge of misguided humor aimed at minorities and immigrants.[207] Yet, "[i]t is no longer considered proper to laugh at the crippled and the insane, as it was in Shakespeare's day ..."[208] We tend to find such humor mean-spirited, "sheer invective."[209] It lacks the detachment, indirection, subtlety, or social reformist quality of the better forms of parody, irony, and satire. When satirists tirelessly "[a]ttack[ed] ... individuals in public life and in institutions ... [the] awe of greatness vanished ... And whereas there had once been discussions ... [of] the divine right of kings, these were succeeded by candid admission that monarchs were as susceptible to error as any of their subjects."[210] In our time, Jay Leno, the newly-appointed host of NBC's *Tonight Show*, explained that he favors "topical humor, hammering political figures," rather than "four-letter words ... and testosterone-laced ranting against women, gays and various ethnic groups."[211] He joins such comics as Will Rogers, Bob Hope, Gary Trudeau, and Johnny Carson in carefully aiming humor upward.

SATIRE, *supra* note 20, at 215-18.

203. *See* LEWIS, *supra* note 43 (depicting the typical middle-class American as complacently mediocre).

204. *See* MENCKEN, *supra* note 42, at 54-57.

205. *See* ALDOUS HUXLEY, BRAVE NEW WORLD (1932) (satirizing the hedonism, consumerism, and social conformity in the modern western world); *see also* FEINBERG, THE SATIRIST, *supra* note 20, at 50.

206. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 203, 210-11 (1949).

207. For a discussion of this brand of humor, see ELLIOTT, *supra* note 202, at 85; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 133-38 (1982); *see also* JUDICIAL HUMORIST, *supra* note 49, at 243-45; William L. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257 (1948) (commenting on a joke made at the expense of an Indian).

208. FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 210.

209. *Id.* at 108 (suggesting that invective may not be properly called satire because it is over-literal: "its effectiveness depends on the assumption that it means just what it says"); *see also* HIGHET, *supra* note 20, at 155 (contrasting invective and lampoon with comedy and other fare).

210. BLOOM & BLOOM, *supra* note 20, at 205.

211. Mike Duffy, *Leno's Famous Face Granted Real Seal of Big Star Approval*, DENVER POST, May 17, 1992, at 8D.

That the best humorists followed a certain practice does not of course prove that they wrote as they did out of moral principle, much less that such a principle is true. Some of the great satirists may have spared the weak and the poor simply out of sporting justice—out of a sense that such a victim could not reply in kind—or out of snobbery, the sense that they were an unworthy target. Yet, on the few occasions when the great practitioners spoke of what they were doing, they often described their writing in the same way: the satirist's province and highest calling is to act as social critic, dissecting the habits, pointing out the foibles, and puncturing the pomposities of society's elites.[212]

C. *Intuition*

Both the etymology of the term and the dominant tendency of their greatest practitioners argue that humor and satire should never be aimed at the lowly. This stance is in accord with intuition as well. In a dozen areas of life, ranging from playground protocol to international politics, we believe that it is wrong to bully a weaker adversary, that one should always "pick on someone your own size." The Bible, for example, admonishes that we should look after the poor, the lame, and our weaker brothers.[213] The Declaration of Independence justifies the colonies' break with England, in part, on a series of abuses and tyrannies the older country perpetrated on its fledgling outpost.[214] A hun-

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212. *See e.g.*, FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 16 (on Jules Feiffer); GARRY B. TRUDEAU, DOWNTOWN DOONESBURY (1986); William Grimes, *Edward Sorel, Enlightenment Cartoonist*, INT'L HERALD TRIB., May 15-16, 1993, at 18 (depicting cartoonist as an old-fashioned satirist, in line with Swift and Voltaire, who targets "pomposity, hypocrisy, vanity, and human folly" and describes the "noble calling" of the cartoonist "to defend the powerless and attack injustice"); *supra* notes 10-13, 32-37, 178-84, 194-97 and accompanying text. Francis Bacon took a similar view. *See On Discourse, in* ESSAYS 152 (1908); *see also* FEINBERG, INTRODUCTION TO SATIRE, *supra* note 20, at 13, 24, 28-33 (unmasking pretense and other corrective functions).

213. *Deuteronomy* 15:7; *Proverbs* 14:21, 17:5, 22:22; *Acts* 20:35; 1 *John* 3:17.

214.

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

dred myths, novels, sagas, and songs celebrate defenders who champion the causes of weaker persons or groups.

Humor is a powerful social tool. Social psychologists and others who have studied it believe it frequently is employed to marshal social consensus against an outsider of some sort. In humor one laughs, bares one's teeth, looks at and invites others to laugh with one, often at the expense of another.[215] It can lend itself as easily to bullying as to the redress of injuries. In our view, only the latter use is the appropriate one. Consideration of the judiciary's function argues that this is even more true when humor is deployed by courts.

D. Judicial Review

Consideration of the nature and function of judicial review reinforces our conclusion that courts should refrain from using sarcasm and mockery at the expense of the weak. By the same token, wit and satire are perfectly appropriate when a court finds that a powerful actor has abused power or behaved as though it is above the law

A leading theory of judicial review holds that courts, particularly the Supreme Court, are charged with exercising a countermajoritarian function.[216] In our system of politics, the judiciary is the only branch of government capable of intervening to protect a "discrete and insular minority" from discrimination at the hands of the majority[217] At the same time, the Supreme Court may often prove the only institution capable of redressing excesses and abuses by other branches of government, the military-industrial complex, multinational corporations, and other powerful actors.[218] For this reason judges have

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> The history of the present King of Great Britain is a history of repeated injuries and usurpations To prove this, let facts be submitted to a candid world

THE DECLARATION OF INDEPENDENCE para. 1, 5 (U.S. 1776).

215. *See supra* notes 21-33 and accompanying text.

216. *See, e.g.*, BICKEL, *supra* note 10; ELY, *supra* note 10; LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1451-74 (2d ed. 1988).

217. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also supra* note 216.

218. *E.g.*, United States v. Nixon, 418 U.S. 683 (1974) (holding that the President

lifetime tenure, are not easily removed from office, and are kept distant from the pressures of political life.[219] Courts owe a duty of *suspicion* toward the mighty, at the same time that they owe a duty of solicitude to the weak.[220] The rude remark, brusque dismissal, and sarcastic or mocking treatment will rarely be in order. The theories of humor and of the judicial function thus coincide: sarcasm and invective should be reserved for the high and powerful, never the lowly

Humor distances.[221] It emphasizes the separation between the one who employs it, and the one who is its butt. It invites the reader or listener to join with the speaker in laughter at the folly or plight of another. This is true virtually across the board—parody, irony, sarcasm and caricature all share this feature to a greater or lesser extent. Indeed, as we have seen, theorists believe that this distancing is one of humor's constitutive features.[222] Yet this quality renders humor and satire troublesome when deployed by a court, especially against the lowly Racial minorities, mental patients, the poor, prisoners and others are already lowly They come before the court in an effort to improve their situation, to correct some injustice they have suffered. Humor threatens to lower them even further, place them even further outside society's concern. It tends to weaken empathy, already in short supply [223]

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of the United States was subject to a subpoena duces tecum issued by a federal court at the request of a Special Prosecutor in the Watergate investigation); New York Times Co. v. United States, 403 U.S. 713 (1971) (the "Pentagon Papers" case ruling that the government failed to justify prior restraint of publication of classified study).

219. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 131 (2d ed. 1990).

220. *See* Richard Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988) (endorsing a structure of suspicion, checks and balances in the legal system, to critically analyze and challenge the rhetoric of dominant parties).

221. *See supra* notes 21-23 and accompanying text.

222. *Id.*

223. *See* Delgado & Stefancic, *supra* note 6; Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) (citing the history of racial caricatures in America which demeaned targeted minorities).

The opposite genre, *tragedy*, will often prove a more fitting model for courts considering what language to apply in such cases. Tragedy emphasizes the commonalities in human experience, humanizes by reminding us of our common fate.[224] Courts, of course, cannot compose a work of great tragic literature every time they write an opinion rationalizing their treatment of a prisoner or welfare recipient. But they can restrain their instinct to laugh, to make fun at the expense of those less fortunate than they They can aim for a tone that is sober and respectful, reserving their barbs, their wit, their flourishes for more worthy targets—for empowered actors who have distanced themselves from the rest of us, have violated the public trust, and deserve to be brought low They can deploy humor, tragedy, respect and iconoclasm appropriately, selecting their tone and language with a view to the features of the situation facing them. They can keep their countermajoritarian role constantly in their consciousness, reminding themselves, if necessary, of the way history has treated their most serious lapses.[225]

V WHAT CAN BE DONE? REDRESSING MISGUIDED HUMOR

What can be done if a court repeatedly employs humor and ridicule in the wrong way, i.e., against weak and defenseless targets? Lower courts, of course, can be chastised and reversed by higher ones. Judges who transgress egregiously, for example by employing racist or sexist terms and belittlement, can be disciplined or removed.[226]

Sometimes, however, these avenues will be unavailable. Then, what options remain? One approach is simply to *name* what the court is doing,[227] calling it, for example, "misguided and belit-

224. GEORGE STEINER, THE DEATH OF TRAGEDY (paperback 1980); RAYMOND WILLIAMS, MODERN TRAGEDY (1966).

225. *See supra* notes 76-87 and accompanying text.

226. *See, e.g., In re* Rome, 542 P.2d 676 (Kan. 1973) (holding that a magistrate court judge abused his discretion by writing an opinion in verse which scorned and ridiculed a woman convicted of prostitution); Katherine Schweit, *Judge Reprimanded for Sexist Comments*, CHICAGO DAILY L. BULL., July 31, 1987, at 1; Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HAST. L.J. 175 (1989) (pointing out the damaging effects of judicial humor).

227. For a discussion of the naming of an evil or problem as a necessary step

tling humor evidencing an unjudicial attitude and lack of respect." Sometimes, merely calling attention to a problem will cause those who are creating it to change their behavior. It may also bring out hitherto unknown allies who also had been troubled by what the court had been doing.[228] It may cause a court with supervisory power over the first one to take notice and act. One may also counterdeploy the powerful counternarrative of the bully.[229] In our society one is not supposed to take advantage of those weaker than oneself. This axiom is especially true when applied to courts, particularly higher ones, who are charged with giving litigants respectful attention. No one wants to hear the line "have you no shame?" (or similar ones) applied to oneself.

A third strategy is simply to remind the violator what the historical fate of similar actors often has been. Holmes' remark about three generations of imbeciles is now notorious and mars an otherwise illustrious career.[230] Recall also Marie Antoinette's famous remark,[231] Reagan's observation about redwood trees,[232] and Justice Brown's comment about the injury of being forced to ride in a segregated railroad car.[233] Pointing out that history has not been kind to those who treat others cavalierly can sometimes cause one's adversary to reconsider a course of conduct. This may be particularly so with judges; it is akin to being reversed.

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toward recognizing and remedying it, see Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989).

228. Delgado & Stefancic, *supra* note 227.

229. *See* Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994).

230. *See supra* notes 76-87 and accompanying text; Delgado & Stefancic, *supra* note 6, at 1948-50.

231. *See supra* note 14 and accompanying text.

232. William A. Snell, *Environmental Politics*, L.A. TIMES, Nov. 20, 1990, at B6 (letter to the Editor) (ridiculing Reagan's statement that "when you've seen one redwood, you've seen them all!").

233. *See supra* notes 83-87 and accompanying text.

VI. CONCLUSION

It is not easy to control what will strike us as ridiculous and unworthy of belief. We all have an internal canon—a group of ingrained ideas that seem to us self-evidently true, sensible, and just—indeed, that we use in evaluating new ideas to see whether they are true, sensible, and just. Ones that deviate too drastically from those we believe are apt to appear wrong and extreme.

But merely because we have a tendency to scoff at that which is new or different, it does not follow that we should. If our research teaches anything, it is that consciousness changes, so that the day's commonplace occurrences and ideas—separate railroad cars for blacks and whites are constitutionally permissible, three generations of "imbeciles" are enough—in time may look quite different.

How can judges and others protect themselves against history's judgment? We have proposed a simple, easily recalled rule: satire, sarcasm, scorn, and similar tools only should be deployed upward, at actors and institutions more empowered than oneself. The sharp tools of scorn and irony rarely, if ever, should be used against the weak and lowly This rule acquires added force in the case of judges, because of the judiciary's special role as countermajoritarian protector of minorities in our system of politics. We showed that the Supreme Court today has been breaching this rule with increased frequency, treating powerful actors with exaggerated respect and deference and affording curt, sometimes scornful treatment to society's out-groups. This trend is troublesome on a number of levels. It can tarnish the reputations of otherwise eminent justices, long after they leave the bench. It can injure particular litigants, demoralizing them and causing them to lose faith in the judicial system. And, if continued, it portends serious damage to the legitimacy of the Court as an institution.