

The Devil's Advocate

Our experience has been that the humor of judges during working hours exceeds only that of undertakers and is just as deadly. To be sober as a judge implies more than abstinence or refusing a hair of the dog that bit you. If there be wit, it too must be dry.

But there are exceptions. Repressed judicial humor may be uncurbed in animal trespass cases and a most decorous jurist may unleash repartee with his *ratio decidendi*. Such was true in the classic opinion in *Kopplin v. Quade* [130 N.W. 511 (Wis.1911)], where the court made a romance out of the "misalliance" of the defendant's scrub bull and the plaintiff's prize heifer.

The wise cracks by the animal crackers in *Kopplin v. Quade* are well known to generations of law students who suffer from a steady diet of judicial stoicism. Considering the law's dedication to *stare decisis* and the venerable tradition or protocol that permits a lapse from self-restraint in exceptional circumstances, the Devil's Advocate was somewhat taken aback when he read Judge Lang's straight-faced and straight-laced opinion in *People v. Goodfriend* (New York Law Journal, p. 7, March 6, 1981). The exception was there to prove the rule but Judge Lang abstained.

We pondered over this. First, Goodfriend is a most unlikely name for the accused in a rape/sodomy case. The name itself spells out the nature of the defense. Dickens could have done no better. Nonetheless, Judge Lang passed up the opportunity. He said nothing about the name.

The issue presented was even more titillating, as was its denouement. In his effort to prove consent, Goodfriend sought to produce an alibi witness, not his good friend but man's best friend. The prosecutrix had a dog who had been present during the entire incident. The dog in question, said Goodfriend, was a German shepherd, a breed well known for its "protective aggression." It had remained passive.

Not so, claimed the prosecutrix, her dog was of a mixed breed (the product of a misalliance?), and if you will pardon the expression, he was a pussycat. The most marked characteristic of her Lassie was lassitude. The only attack he knew came from his fleas, and as a watch dog this Popeye preferred watching. His bark was not worse than his bite because he did neither.

Judge Lang, understandably, was troubled by this direct conflict in the evidence and could not let sleeping dogs lie. Like Sherlock Holmes' dog that didn't bark, the dog was the clue. Accordingly, Judge Lang used a familiar ploy. He ordered an examination and evaluation of the dog by

an expert animal behaviorist (with a sound pedigree) to determine breed, gender, age, and weight, and if he had had guard or attack training. Further, the expert was ordered to evaluate "dangerousness," i.e., "aggressive response to certain (unnamed) stimuli."

The judge, moreover, rejected defense counsel's sly suggestion that the actual incident be reenacted, saying that such a test would be "too fraught with logical variables to be subject to testimony" and also would be too speculative. For the same reason, if defendant was present at the test, "no testimony may be given as to the dog's reaction or lack of reaction to him." The report was to be submitted to the court, no doubt on dog-eared paper.

Considering his dilemma, did the judge end up making the tail wag the dog? Did the animal behaviorist bite off more than he could chew? Why exclude the dog's reaction to Goodfriend?

These and other questions remain to trouble us, but the great puzzle is Judge Lang's self-restraint. On the law, he may come off as clean as a hound's tooth, but surely behind those black robes there lurks a frustrated humorist. The case at least was worthy of doggerel. But we may be out on a limb, or barking up the wrong tree. Discretion may be the better part of valor.

This was a rape case. More than one judge has learned to his sorrow that like ethnic jokes one-liners about rape are verboten. In such cases to be a Falstaff is an affront to the distaff. Judge Lang forsook traditional levity because he didn't want to get into anybody's dog house. At least that's the hunch of the Devil's Advocate.

HENRY H. FOSTER, ESQUIRE