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No Laughing Matter

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Tonja Jacobi & Matthew Sag, _Taking Laughter Seriously at the Supreme Court_, 72 **Vand. L. Review** 1423 (2019).

Few would mistake One First Street for a comedy club. Sure, it may be hard to get a ticket sometimes, but at least there's no two-drink minimum once you get in. Am I right? Is this thing on?

But seriously, folks. For years now, some Supreme Court aficionados have taken a particular interest in oral argument humor. Jay Wexler's @SCOTUSHUMOR Twitter account keeps regular stats on how often each Justice triggers [LAUGHTER] in an argument transcript. (He was on this beat before Twitter existed, in fact.) Wexler's laughter rankings garnered a full Adam Liptak article in the New York Times, and Justice Breyer referred to them in a speech last Fall.

This all may seem like something on the lighter side of the Court-watching world, but it's not immune from rigorous quantitative analysis. And that is exactly what Tonja Jacobi and Matthew Sag bring to bear in their fascinating article. They created a database of every argument transcript over a 63-year period, identifying more than 9000 incidents of laughter. They devised a method to account for the delay between a laughter-inducing event and the point at which "the laughter reaches the threshold of disruption that causes the court reporter to make a note of it." (Comedy is all about timing, after all.) They deployed several approaches to the denominator problem, measuring laughter rates on a per-argument basis and as a function of each "speech event" and even the number of words spoken. And they cleansed the data of those instances where "laughter" lurks in less jovial words like "manslaughter."

As an initial matter, Jacobi and Sag's article provides a terrific highlight reel of moments that have elicited giggles and guffaws from the gallery: the Court's epic twelve-laugh set in _FCC v. Fox Television_; the time an advocate confused Justice Kagan for Justice Scalia; Chief Justice Roberts ad libbing "I knew we should have paid that bill" when the lights went out; Justice Ginsburg dropping the mic after a deep-cut reference to "Bong hits for Jesus"; Justices Scalia and Breyer clashing in the carbohydrate culture wars over the merits of "sliced bread"; Justice Kennedy riffing on Einstein and the space-time continuum; and for you procedure enthusiasts out there, Justice Sotomayor openly lobbying that she _not_ be assigned the opinion in _Perry v. MSPB_ (a case about the jurisdictional boundary between federal district courts and the Federal Circuit in challenges to Merit Systems Protection Board decisions).

Ultimately, however, Jacobi and Sag argue that there is a decided dark side to the SCOTUS laugh track. Based on an admittedly "impressionistic" review of more than one thousand laughter events from 2010 to 2017, they conclude that "humor at the Supreme Court is not an equalizing force." Instead, Justices use humor to highlight their superiority over the advocates before them. Not all laughs fit this profile. Jacobi and Sag recognize examples of "laughter reflecting incongruity," prompted by "both absurdities and the surprising lack of fit between experience and expectation." They also see instances where laughter acts as a "release valve." There is even occasional "inferiority humor" involving "silliness or self-deprecation"—especially from Justices Breyer and Kagan. But Jacobi and Sag posit that, by and large, laughter "does not tend to indicate lighthearted, good-natured jesting." Rather, "the Justices use it as a rhetorical weapon against their inferiors, as a form of advocacy against counsel arguing a side they will likely oppose, or to indicate that an advocate is inexperienced or doing badly." As the saying goes, comedy is tragedy that happens to someone else.

Jacobi and Sag's deeper statistical analysis reveals a number of interesting dynamics. First is a dramatic increase in laughter-inducing incidents over time: by any measure, laughter occurred much more frequently in the Rehnquist and

Roberts Courts than in the Warren and Burger Courts. The authors consider a number of possible explanations for the increase. One was Justice Scalia joining the Court in 1986. As noted below, he places at the top of the laughter rankings by most measures. Another potential trigger that occurred at roughly the same time was the professionalization and concentration of the Supreme Court bar, which might have generated the sort of "exclusive club" among Justices and advocates that would be conducive to convivial banter. Jacobi and Sag also consider a more recent tipping point—1995, which they mark as the beginning of our current period of intense political polarization.

Looking at variations among cases, the authors show that the bigger the case the bigger the laughs, with more than double the frequency of Justice-inspired laughter in "legally salient" cases. And Jacobi and Sag provide a wealth of data on the individual Justices. Measured by laughter incidents per oral argument, Justice Scalia gets the gold medal, Justice Breyer the silver, and Chief Justice Roberts the bronze. Justice Frankfurter is the only Warren Court era Justice in the Top-10. (You can check Figure 2 of the article to see how your favorite Justices stack up.)

Jacobi and Sag then present data supporting their view that humor is a "weapon of advocacy." The Justices are more likely to elicit laughter when the advocates they do not ultimately support are at the podium (the "agree/disagree" differential). And they are more likely to elicit laughter during the arguments of lawyers who ultimately lose the case (the "win/lose" differential), which could indicate that the Justices are getting laughs at the expense of weaker advocates. Finally, the authors explore the connection between the Justices' use of humor and the advocate's experience arguing before the Court. The Justices get more laughs when a SCOTUS novice is at the podium, which may reflect barbs directed at inexperienced advocates. Indeed, novice advocates endure much larger agree/disagree and win/lose differentials than their more experienced counterparts.

The insights lead Jacobi and Sag to question the notion that the Justice who gets the most laughs is truly the "Funniest Justice." Humor is "a blood sport at the Court," rather than "an empathetic attempt to equalize a hierarchical system." Justice Scalia in particular exemplified this aspect of the Court's practice; the authors note—as other scholars have—his "sarcasm and snark" and argue that he "put the punch in punchline." According to the data, however, Justice Scalia is not alone. With some exceptions, "the overall humor of the Court is pretty mean."

The Justices start their next gig on October 5. Although they'll be here all week (and the following week, for that matter), it remains to be seen whether the October arguments—or those beyond—will generate any laughter data for scholars like Jacobi and Sag to collect and analyze. Last spring's March and April sittings were postponed due to the COVID-19 pandemic, prompting the Court to hold remote oral arguments by teleconference in May. (The remote arguments did feature some amusing moments, but there was no gallery whose real-time reaction could be captured on a transcript.) Whatever broader lessons we should draw from the Justices' use of humor during oral argument, we all hope for safe enough conditions that they can try their new material in front of a live studio audience. And we could certainly use a little laughter.

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