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Contemporary Supreme Court Cases  
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## **Judicial Open Mic Night:**

### *The Prominence and Function of Laughter in Oral Arguments*

The Supreme Court is a place of austerity, sobriety, and intellectual chess, with oral argument as the main square for interaction. Discussions at oral argument can help determine the fate of a prisoner on death row, or the upper limit of detention for noncitizens. Yet, despite the gravity of the setting and the warning in the advocate's manual that "attempts at humor usually fall flat,"<sup>1</sup> levity can somehow find its way into the conversation in uncommon, but not overly rare, instances. In the face of the serious discussions before the bench, laughter and humor seeps in and produces a level of sincerity among the justices that is rarely seen in such a setting. Moments of humor, transcribed simply as "(laughter)," cut through the formal visage and the judicial pomp to bring character to the justices. In showing the true feelings of the justices, humor helps elucidate some truths that are not otherwise apparent. Due to the utility of laughter, advocates and those who study oral advocacy should use these moments of signposts of the true feelings of the justices percolating through the veil. Despite the fact that absurdity can often accompany laughter, even on the bench, there are moments of laughter that function as a signpost to truth, and that can assist in understanding the interpersonal dynamics on the bench.

Previous studies have looked to laughter and humor during oral arguments, but they have generally not looked to the role of laughter in divining personal relationships on the court, and have never looked to the personal relationships on *this* court. Jay Wexler's first study to examine laughter and humor simply calculated the amount of "(laughter)" annotations that were attributed to each justice.<sup>2</sup> The study, published in 2005, found that Justice Scalia drew the most "(laughter)" notations of any justice. However, Wexler's study failed to look beyond the laughter in to the meaning for the court. The only other study to examine the role of laughter on the court was conducted by Ryan Malphurs in which he examined oral arguments from the 2006-2007 docket.<sup>3</sup> Malphurs's study takes a step beyond Wexler's quantitative observations to reach the conclusion: "The aesthetic of laughter evokes a human quality in the justices, and allows them to connect with the lawyers, each other, and possibly the audience at the shared level of humanness; during these brief moments the realm of superiority diminishes as the justices briefly relinquish their control inviting everyone to laugh with them or even at them."<sup>4</sup> Wexler does a fair bit of analysis to reach this conclusion, and grounds his observations in a breakdown of the different types of laughter: laughter based on relief of stress, laughter caused by aggression, laughter showing superiority, and laughter in response to incongruity.<sup>5</sup> His framework provides a

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<sup>1</sup> Guide for Counsel in Cases to Be Argued Before the Supreme Court of the United States at 12 (Oct. 2015). Available at, [www.supremecourt.gov/casehand/guideforcounsel.pdf](http://www.supremecourt.gov/casehand/guideforcounsel.pdf).

<sup>2</sup> Jay Wexler, *Laugh Track*, THE WALL STREET JOURNAL, available at <http://online.wsj.com/public/resources/documents/Wexler.pdf>.

<sup>3</sup> Ryan Malphurs, "People Did Sometimes Stick Things in my Underwear:" The Function of Laughter at the U.S. Supreme Court, 10 COMMUNICATIONS LAW REVIEW 2 (2007).

<sup>4</sup> *Id.* at 71.

<sup>5</sup> *Id.* at 54.

nice backdrop to examples of laughter during the 2006-2007 sessions, but his argument stops short of a specific conclusion.

This paper will look at occurrences of laughter on the Supreme Court, and what those moments can elucidate about the way that the Justices interact and how they view their position on the Supreme Court. The sample size for this argument will not be quite as robust as those conducted by Wexler and Malphurs, as it only features 23 cases from the 2016-2017 docket. However, within these 23 arguments there are enough examples of laughter to lead to a somewhat coherent idea of the perpetrators, and the role, of laughter. Malphurs was correct in coming to the conclusion that laughter can assist in “facilitating communication amongst themselves, between the justices and advocates, and with the audience members as well.”<sup>6</sup> However, this communication is also noteworthy for what it evokes in these moments of heightened communication. While the Justices generally operate behind a veiled intent, moments of laughter cut through the veil to show the true feelings and observations of the justices. By looking to moments of laughter, observers can find instances where the Justices break from formalities to comment on the relationships on the court. In short, laughter is a valuable signpost for observers attempting to parse through the relationships of those on the court.

### *The Data*

In my study of the 23 cases on the most recent Supreme Court docket, some trends began to emerge after quantifying the laughter in a manner similar to that of Wexler. For one, all of the cases except for three had a moment of “(laughter).” The three exceptions were *Lewis v. Clarke*,<sup>7</sup> *Lee v. US*,<sup>8</sup> and *Varsity Brands v. Star Athletica*.<sup>9</sup> However, *Varsity Brands* had a clear instance of laughter that was not notated in the transcript.<sup>10</sup> I will include this moment for future statistics as it featured a clear comical quip by Justice Kagan with audible and pronounced audience laughter.<sup>11</sup> Including that moment, there was only two cases out of the sample size of 23 that did not feature a moment of laughter. In sum, the 23 cases featured 71 “(laughter)” notations that broke down into 68 separate incidences.<sup>12</sup> This averages out to 2.91 instances of laughter for every case in front of the current bench.

While the early studies of laughter found that Justice Scalia generated the most laughter, the current bench is not devoid of its own judicial comedy panel.<sup>13</sup> Seen in Table 1, the results show that laughter remains highly dependent on a few speakers. Interestingly, Justice Scalia’s counterpart, Justice Breyer, has taken over the title of judicial jester with

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<sup>6</sup> *Id.* at 51

<sup>7</sup> Oral Argument, *Lewis v. Clarke*, 581 U.S. \_\_\_\_ (2017, (15-1500)).

<sup>8</sup> Oral Argument, *Lee v. US*, case pending (2017 (16-327)).

<sup>9</sup> Oral Argument. *Star Athletica, LLC v. Varsity Brands, Inc.* 580 U.S. \_\_\_\_ (2017 (15-866)).

<sup>10</sup> In this moment, Breyer stated “The clothes on the hanger do nothing; the clothes on the woman do everything. And that is, I think, what fashion is about.” Elena Kagan responded, “That’s so romantic.” *Id.* at 56-38.

<sup>11</sup> There were other such moments that were marginally funny with hazy audio—I will not include those moments.

<sup>12</sup> This discrepancy is due to several moments in which laughter was carried over at the same event. I counted such moments as laughter instigated by the original communication.

<sup>13</sup> *Supra* note 2, at 60.

21 instances of laughter coming off of his statements. Not far behind was Justice Kagan with 16 instances. The most other notable comedic presence is the advocate, who ties Chief Justice Roberts with nine laughs. This is notable due to the express instructions to avoid laughter and the risk that attempts at humor entail.

However, looking at specific instances of laughter tend to reinforce the observation that that laughter assists in communication. By paying attention specific moments of levity on the court, advocates can find moments where they can remind themselves of the true nature of the court and also to shape how they respond to certain justices. Observers of the court can also use these moments as signposts when looking for moments in which Justices hint at their true feelings for certain issues and for other justices.

TABLE 1	
Justice	Laughter Citations
Breyer	21
Kagan	16
Roberts	9
Kennedy	4
Alito	3
Sotomayor	2
Ginsburg	1
Advocate	9

### *Laughter as a Tool for Advocates*

The main lesson to be gleaned for the advocates is to avoid all inclinations towards humor, as it exposes the advocate to unnecessary risk. A prime example of this occurred in *NLRB v SW General*, in which an advocate generated laughs by responding to a request to identify the type of person would say that a president’s preferences should override congressional intent. His drew laughter with a circular response that “somebody who then was going to be pressed and had to explain the technicalities of why the appointment was illegal.”<sup>14</sup> This answer drew laughter, likely due to the terse and circular answer he provided to the bench. However, minutes after that response, Justice Kagan got her own moment when she confronted the same advocate by saying, “the way you describe that, you sound a bit skeptical of those defenses.”<sup>15</sup> Attempting to bring levity to the court with curt, pithy replies is quite evidently a poor idea.

In fact, most times that an advocate generated laughter, it was due to overbearing humility. In one instance, after Justice Breyer accused the advocate of being too young to know the Office of Price Administration. The advocate drew a chuckle when he responded, “I think—I think so, Justice Breyer.”<sup>16</sup> In another instance, an advocate drew laughter after responding to a question of his sides brief’s argument by leading with, “I think that what we said. . . .”<sup>17</sup> These two examples are one of many that demonstrate the trend that overt humility is a valuable method to bring the advocate into the conversation in a playful manner without challenging the role and authority of the Justices. If the aim is to lighten up the conversation, humble responses are a much more potent weapon than quick wit.

<sup>14</sup> Oral Argument at 43:43, *National Labor Relations Board v. SW General, Inc.*, 580 U.S. \_\_\_\_ (2017 (15-1251)).

<sup>15</sup> *Id.* at 51:24.

<sup>16</sup> Oral Argument at 5:10, *Expressions Hair Design v. Schneiderman*, 581 U.S. \_\_\_\_ (2017 (15-1391)).

<sup>17</sup> Oral Argument at 32:52, *Bethune-Hill v. The Virginia State Board of Elections*, 580 U.S. \_\_\_\_ (2017 (15-680)).

In another trend, lawyers with weak cases should prepare for an onslaught of jokes coming their way. There were two cases that each had lopsided decisions that featured a rush of laughter towards the end of the case. In one, *Andrew F v. Douglas County*, there were four instances of laughter during the respondent's argument and at one point there were three instances of laughter in a three-minute span.<sup>18</sup> That case was decided for petitioner 8-0. In another case, *Nelson v. Colorado*, there were eight instances of laughter in a 15-minute span during the respondent's argument.<sup>19</sup> This span featured one moment when Justice Breyer drew laughter by saying: "I grant you have a tough side of this argument. It doesn't seem very fair."<sup>20</sup> That case was decided 7-1, with only Justice Thomas dissenting. This is not to say that every lopsided case will feature an open mic event. However, advocates who are on the receiving end of a barrage of jokes should not get their hopes up for a ruling in their favor.

### ***Laughter as a Gateway to the Genuine***

Another lesson gleaned from moments of laughter goes beyond the advocates, to any person hoping to gain insight into the justices from oral argument. Laughter tends to expose the party telling the joke, or the party on the receiving end. At its most potent, laughter can help cut through the artificial into the genuine, as Mark Twain once said, "against the assault of laughter, nothing can stand."<sup>21</sup> In this instance, the intent of the Justices to hide their stances succumbs to laughter.

In a rather harmless example, Justice Breyer's sense of humor introduces any listener to a humble and ranting judge. Justice Breyer may come off as the most genuine of the Justices with his manner of self-deprecating humor as he often uses himself as his own punching bag. For example Justice Breyer stated, "I wrote the *Zadvydas* [opinion]. I think it said 6 months. I'm often wrong in what I think I said."<sup>22</sup> In another instance, Justice Breyer looks to the sentencing guidelines, only to find that "when I say those words, I'm confused,"<sup>23</sup> and in a separate case he ends a statement with "well I guess I can figure it out later."<sup>24</sup> In short, these examples make Breyer's personality quite clear to the audience. While there is not much beyond exposing Justice Breyer's ability to laugh at himself, other Justices are more inclined to reveal more significant truths in comedic moments.

For example, Justice Kagan seems to demonstrate her true feelings towards argument and her disposition towards other justices in moments that are often accompanied by laughter. After one of the several mix-ups in which the advocate confused Justice Kagan with Justice Sotomayor, she told the advocate, "she (Justice Sotomayor) was the one helping you...I was the one who wasn't."<sup>25</sup> While most Justices would be reluctant to show their hand and the hand of a colleague, a moment of Seinfeldian name confusion brings Justice Kagan to lower her guard.

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<sup>18</sup> Oral Argument from 55:30-58:10, *Andrew F. v Douglas County*, 580 U.S. \_\_\_\_ (2017 (15-827)).

<sup>19</sup> Oral Argument from 41:00-55:50, *Nelson v. Colorado*, 581 U.S. \_\_\_\_ (2017 (15-1256)).

<sup>20</sup> *Id.* at 44:40.

<sup>21</sup> Mark Twain, *The Chronicle of Young Satan, Mysterious Stranger Manuscripts* (1908).

<sup>22</sup> Oral Argument at 27:23, *Jennings v Rodriguez*, 581 U.S. \_\_\_\_ (2017 (15-1204)).

<sup>23</sup> Oral Argument at 37:30, *Buck v Davis*, 580 U.S. \_\_\_\_ (2017(15-8049)).

<sup>24</sup> Oral Argument at 53:08, *Lynch v Morales-Santana*, case pending, (2017 (15-1191)).

<sup>25</sup> Oral Argument at 6:43, *Dean v US*, 581 U.S. \_\_\_\_ (2017 (15-9260)).

However, there are other moments in which laughter accompanies the Justices as they expose a piece of their judicial identities. For example, in a moment in the ideologically split case of *Hernandez v. Mesa* (over the constitutionality of a civil suit following an ICE agent’s bullet into Mexico), Justice Kagan lowers her guard about her feelings towards a colleague. In this instance, Justice Alito asks the advocate to muse on Mexico’s reception to a hypothetical judicial opinion. Interrupting the advocate’s response, Justice Kagan gets a laugh after stating: “I’m sure it wouldn’t have to be written that way.”<sup>26</sup> As opposed to other instances of laughter in which laughter eases a Justice into lowering their guard, this type of moment likely drew laughter as a result of the very clear expression of personal feelings. While Justice Kagan did not say, “that question is specious at best,” she may as well have. In another instances, Justice Alito draws laughter in a similar manner. In *Dean v US*, Justice Alito warns an advocate, “You don’t want to say that because –(Laughter)—nobody but me would agree with you.”<sup>27</sup> Similar to Justice Kagan’s signaling of her true position during moments of laughter, Justice Alito signals his awareness of his lone position as the only speaking member of the bench on the ideological far right. Although these two instances do not represent instances of Justices showing their feelings as a result of laughter, the fact that laughter accompanies such moments underscores the common presence of humor in genuine moments.

### **Conclusion**

Overall, it is difficult to draw broad conclusions from quantitative measures of laughter on the court. However, what the examples show is that moments of laughter accompany moments of genuine intention. In some instances the laughter instigates that moment of exposure (such as Justice Kagan’s remark, “she’s the one helping you”), while in others the moment of personal exposure causes the laughter (such as Kagan shooting down Alito’s suggested rule in *Hernandez*). In either case, an instance of laughter should prompt the listener and should especially prompt the advocate to pay attention. For in these moments, laughter can help remind the observer that these judges are not judicial decision-making automatons—they are people carrying prior opinions into their professional lives.

Additionally, laughter functions as a gateway for people to feel more comfortable expressing their true intentions, or to show their true feelings. This is not insignificant when the Supreme Court is hearing oral argument. For example if Justice Kagan prompts laughter at a petitioner’s argument, the other side might feel comfortable that Justice Kagan does not require convincing. Rather than catering to Justice Kagan, that advocate might find that her time was better spend in response to questions from Justice Kennedy or Justice Roberts. Essentially, if an advocate picks up on laughter of the sort that signals a Justice’s opinion, that advocate might attempt to pivot back to a line of questioning more likely to engage a justice who could still potentially be convinced. In short, advocates should not have their eyes gloss over during moments of laughter, as these are the moments where judges are exposing themselves as much as can be expected.

While laughter appears innocuous in a social setting and even in most instances during oral argument, laughter has a tendency to bring about something true and personal in a setting of highly veiled professional conduct. Whether you are an advocate, or a merely an oral argument observer hoping to glean some personal character from the interactions, laughter provides a

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<sup>26</sup> Oral Argument at 54:22, *Hernandez v Mesa*, case pending, (2017 (15-118)).

<sup>27</sup> *Supra* note 25 at 42:50.

gateway to some genuine observation on behalf of the justices. These moments have the potential to serve as a signpost for some previously unspoken observations by the Justices, about themselves and about the setting. For this reason, we should not laugh of laughter, as it can be signal of something real.