A Rule Against Fun

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Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, __ **Hous. L. Rev.** __ (forthcoming, 2021), available at SSRN.

In recent months, federal judicial opinions have criticized "schlocky Star Wars sequels" or called circuit case law "a hot mess." They have fondly recalled "[w]hen painter-turned-inventor Samuel Morse sent the first telegraph message" or sarcastically used expressions like "presto!" or "voila." And they have sustained decades-long criminal sentences by writing: "tl;dr . . . . we affirm the whole kit and caboodle." In different ways, these opinions are having a bit of fun. And what could be wrong with that?

Quite a lot, argues Nina Varsava in a bracing and timely paper on judicial rhetoric. The piece takes aim at opinions that are literary, witty, or entertaining—precisely the traits that, she argues, are often held in high regard. Part of Varsava's argument overlaps with familiar debates about legal narrative and storytelling, but she goes in unexpected directions.

Varsava argues that the judicial role demands at least three things of court opinions: candor, impartiality, and respectfulness. Varsava excludes not just entertainment but persuasiveness from this list. A judge's goal should be to provide a sound legal basis for the decision at hand, regardless of whether that justification proves attractive to its readers. Too often, the desire to persuade proves a temptation, yielding appeals to fashion or prejudice. Lawyers in robes should not write briefs.

The essay also considers various benefits and "ethical costs." The benefits of fun, Varsava suggests, largely lie with the jurists who engage in it. Judges aspire to write engaging opinions to draw attention to themselves, enhancing their reputations and careers. Fawning commentators encourage this strategy. The costs, by contrast, are more systemic. Colorful rhetoric consumes the reader's time, obscures legally important points, and lends itself to oversimple or offensive stereotypes.

An important theme is that what is good for one audience might be bad for another. What persuades experts might turn off lay readers. And what delights the media could offend the parties. The risk of demeaning criminal defendants looms especially large. "There's no rule against fun" in judicial opinions, Justice Kagan once remarked. "But perhaps there should be," Varsava responds, if fun too often comes at someone's expense.

What would a rule against fun look like? At one point, Varsava backs up her call for "an even-keeled and restrained institutional style" by discussing stern rules, such as "no jokes." At other moments, however, she is more cautious, asking only "to draw attention to the ethical stakes of the stylistic choices that judges make." Possible reforms thus range from encouraging judicial care to requiring that all opinions be *per curiam*.

I find the essay most persuasive in showing that judges' pursuit of fun carries serious risks that are too often overlooked. That message can acknowledge the systemic benefits of fun. Lawyers and students appreciate breaks from insipid prose, and some judges share unique, valuable voices. Further, part of the problem goes to quality. Nothing succeeds quite like success and nothing falls flat quite like a judge who is trying too hard.

The most auspicious reforms have more to do with legal culture than formal rules. Judges supply opinions to meet demand. We readers thus generate bad rhetoric by dolling out praise for cheap tricks and barbs. If we were more careful with our compliments, perhaps judges would be more responsible, too.

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