

# “People Did Sometimes Stick Things in my Underwear” The Function of Laughter at the U.S. Supreme Court

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## Abstract

*Five years have passed since the New York Times covered Professor Jay Wexler’s study of laughter in the Supreme Court. Professor Wexler’s study provided a simple tabulation of laughter notations in Supreme Court oral argument transcripts and was the first of its kind to systematically examine laughter at the Supreme Court. This article expands on Professor Wexler’s topic by exploring the communicative function of laughter in Supreme Court oral arguments. Using first hand observations during nine weeks of Supreme Court oral arguments, audio files of 71 oral argument cases, and transcripts from 2006-2007 Supreme Court oral arguments, I argue that laughter plays an important social and communicative function in Supreme Court oral arguments that enables advocates and justices to negotiate the complex institutional, social, and intellectual barriers to obtain brief moments of equality within the Courtroom.*

The architecture of the Supreme Court building conveys the serious task with which the justices are charged. The Supreme Court building in all its majesty and power most closely resembles a church, and yet the diverse legal symbolism depicted through statues of Chinese, Greek, Roman, Christian, Muslim, and Jewish figures reminds visitors that the only religion worshipped here is one of Law and Justice (Maroon and Maroon 1996). The Courtroom’s velvet red curtains, aisles of wooden pews, and Italian marble columns, compounds visitors’ sense of reverence, so it may seem out of place to hear a justice offering remarks about his underwear.

**Justice Breyer:** In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear --  
(Laughter.)

**Justice Breyer:** Or not my underwear. Whatever. Whatever. I was the one who did it? I don’t know.

Indeed, Justice Breyer’s description of the teasing he received as a boy drew raucous laughter and howls at the justice’s irreverent comment, subsequently embarrassing the justice (*Safford Unified School District v. Redding*, 56: ln1-5).

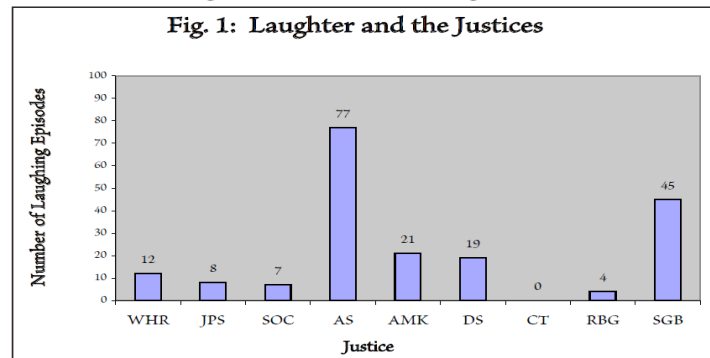
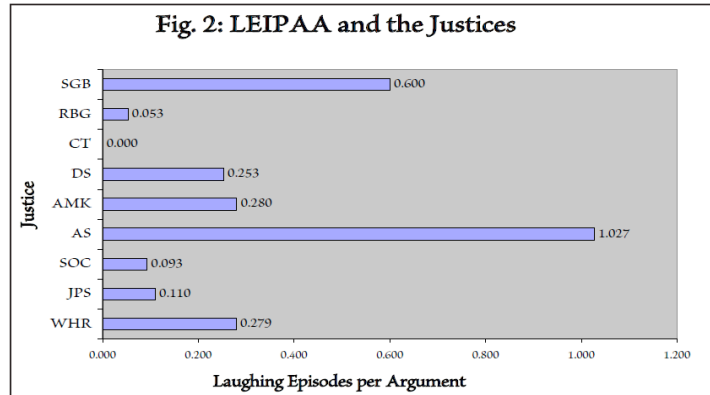
Not only does the architecture and environment of the Supreme Court convey the Court’s expectation of reverence and respect, but the Court’s own “guide for Counsel” warns advocates that “attempts at humor usually fall flat” (11). Infamously, Jay Floyd in *Roe v. Wade* began his opening argument with a failed joke that set the tone for his argument, “Mr. Chief Justice and may it please the Court. It’s an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.” Pausing for the justices’ laughter, and gaining only cold silence, Mr. Floyd struggled to gain momentum through the rest of his argument. Despite the Court’s constrictive environment and prior advocates’ failed attempts at humor, laughter in the Courtroom is a regular occurrence but it has rarely been studied, which makes laughter an intriguing dimension of the Court’s oral arguments.

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Justice Breyer's laughter generating comment prompts laughter because of its highly personal, unexpected, and indecorous nature. During oral arguments, to have a Supreme Court justice reveal their personal experience with objects in their underwear is wholly unexpected and shocking in its impact. However, other justices have had their own moments of humor, albeit without embarrassing themselves to such an extent. In Chief Justice Robert's first term on Halloween, a light bulb exploded during the oral arguments for *Central Virginia Community College v. Katz*. The gunshot-like sound frightened the Court, rattling the nerves of both the justices and the advocates. To ease the tension, Chief Justice Roberts joked "I think we're... I think it's safe. It's a trick they play on new Chief Justices all the time." His comment drew laughter and relief, but Justice Scalia's welcoming reply of "Happy Halloween," brought about even more laughter from the audience and the Court. Not to be outdone, Chief Justice Roberts replied "We're even more in the dark now than before" (37-38:ln 18-25, ln1-2). While strange occurrences bring about unexpected moments for laughter in the courtroom, Justice Kennedy has relied on the jokes of the famous blue-collar comedian Bill Engvall in oral argument. Mr. Engvall is famous for his narratives in which he recounts encounters with foolish individuals who should wear a sign warning others of their stupidity. After the end of each story he announces "here's your sign," confirming an individual's stupidity. Justice Kennedy once reused one of Mr. Engvall's signature story noting "recently I lost my luggage, and I had to go to the Lost and Found at the airline, and the lady said has my plane landed yet" (Liptak 12/31/05). We are only missing Mr. Engvall's tag line "Here's your sign," to complete the joke. Finally, newly appointed associate Justice Elena Kagan brings a humorous wit with her to the Court. In her oral arguments, before the Court as Solicitor General, she often drew laughter from the Court and attendees. In *United States v. Comstock*, General Kagan mistakenly called Justice Scalia "Mr. Chief," but with the same breath wryly corrected herself "excuse me, Justice Scalia -- I didn't mean to promote you quite so quickly." Her comments drew a round of laughter and prompted Chief Justice Roberts to respond "Thanks for thinking it was a promotion," causing Justice Scalia to continue the joking, turning to Chief Justice Roberts and sarcastically remarking "And I'm sure you didn't" (26, ln: 6-14). These comments from the justices clearly offer a lighter side to the Court's serious nature. Research on humor and laughter spans a wide variety of topics and working environments, but few studies have ever considered the role of humor and laughter at the Supreme Court. This article attempts to turn scholars' attention towards laughter and humor at the Supreme Court in the hopes that others will expand upon research generated within this study.

The only study to consider laughter in Supreme Court oral arguments was completed by Jay Wexler in 2005 and was titled "LaughTrack." The article was a simple three page study that tracked the number of "(laughter)" notations in the Court's 2004-2005 oral argument transcripts. Figures 1 and 2 represent Mr. Wexler's entire findings.



Mr. Wexler crowned Justice Scalia “the funniest justice” because he drew the most laughs and ranked the other justices in the number of laughs attributable to them. Mr. Wexler jested with readers, calling his study “scientific,” but it lacked the methodological rigor and insight normally attributable to social scientific studies (Wexler 2005). As a law professor, Wexler’s article did not follow traditional approaches to studying communication, and he employed an approach that overlooked the complexity of communication. He ignored listening to any of the argument’s audio files, and he missed an opportunity to provide scholars with an insight into what function laughter played in the courtroom.

To be fair, Wexler’s study was not designed to be a rigorous academic study, but rather was a brief article on an interesting topic, which scholars have overlooked. However, his “study” did draw significant national attention as news sources across the country ran Adam Liptak’s article on what he called a study of the “relative funniness of the justices.” Mr. Wexler’s study reached a broad audience with Senator Schumer citing Wexler’s study as he surmised that Elena Kagan may surpass Justice Scalia as the funniest justice (<http://www.holyhullabaloos.typepad.com/6/30/10>). In his blog, Mr. Wexler referred to Senator Schumer’s comments humorously noting:

“Wait? A study? On Supreme Court humor? Oh, right, he must be referencing my Nobel Prize winning monograph from 2005, Laugh Track, published in the Green Bag and discussed in a front page New York Times article on a very slow news day. That’s where I geniusly (is that a word? well it is now!) counted how many times each justice said something that got a “(laughter.)” notation in the oral argument transcript” (<http://www.holyhullabaloos.typepad.com/6/30/10>).

Although not a formal academic “study,” and certainly not treated by Wexler himself with the typical academic seriousness, Wexler’s research had a wide ranging impact and opened up for further investigation the topic of laughter at the Supreme Court.

In addition to his first study, Wexler followed up with two other studies by focusing on the changes from the 2004-2005 to the 2006-2007 court term (Wexler 2007), but he offered no further insight other than, once again, counting the number of “laughter” notations attributable to justices. Wexler’s studies foreground an interesting issue surrounding the Court, but his work provides little more than counting laughter notations, and identifying the “funniest justice.” This paper is an attempt to expand on Wexler’s topic of studying laughter before the Supreme Court by questioning the function of laughter in the Supreme Court’s oral arguments.

This paper’s findings suggest that laughter plays an important communicative function in oral argument which enables lawyers and justices to negotiate the complex barriers that constrain their interactions. However, before establishing this position, I trace the development of research on laughter and humor, consider a pragmatic theoretical context to understanding laughter in Supreme Court oral arguments, analyze the frequency of laughter at the Court, evaluate the aggressive or congenial tone of Courtroom laughter, and trace the direction of laughter (i.e. do the justices laugh at each other, the advocates, or at the absurdity of a an argument?). These four areas of interaction (context, frequency, tone, and direction) assist in understanding laughter’s function in Supreme Court oral arguments. Further elaboration of these concepts may be helpful in grasping their significance.

Understanding laughter through various theoretical contexts reveals laughter’s complexities and multipurpose function, but also provides a lens through which we can gain further insight into the interaction.<sup>2</sup> The frequency in which advocates and justices use laughter reveals its significance by quantifying its common occurrence. Learning the aggressive or congenial tone in which justices and lawyers use laughter, as well as the direction of laughter further informs whether or not it is used as a form of control or resistance within the Courtroom. Because the Courtroom is a site of significant debate and argument, we would expect the justices’ laughter to challenge the position of advocates or each other, functioning as control and resistance. However, after considering the four areas of interaction, readers will recognize that the justices do not use laughter to reinforce control or resistance within the Courtroom; instead the justices’ laughter diminishes formal control and power barriers, facilitating communication amongst themselves, between the justices and advocates, and with the audience members as well. Situating this research as a laughter study among larger discussions of laughter and humor studies will provide readers with a context for the concepts that will later be built upon.<sup>3</sup>

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<sup>2</sup> For purposes I will later explain, I adopt the superiority theory of laughter to evaluate instances of laughter in the Courtroom.

<sup>3</sup> Disclaimer: For some reason, studies on laughter or humor prompt readers to expect authors to adopt a humorous tone or style. No other area of scholarly writing holds the same expectation. Critics of Melville are not expected to channel his ghost in their writings. So for those readers expecting humor in this article, turn back now. This article most assuredly follows E.B. white’s description: “Analyzing humor is like dissecting a frog. Few people are interested and the frog dies of it.” While I am fairly confident you will survive this analysis, the scholarly droning will continue in typical lifeless academic form.

## **Laughter and Not Humor?**

This study emphasizes the study of laughter during Supreme Court oral arguments. Laughter and humor are closely intertwined concepts with distinct functions. Laughter may result from humor but it also occurs without humor (laughing gas, tickling, relief, nervousness, joy, play, contests, and unintentional humor). Humor may provoke laughter, or it could simply provoke a smile, or internal amusement. During Supreme Court oral arguments, labeling a justice's or advocate's statement "humorous," as a result of the audience's laughter ignores the potential for a serious comment to be misunderstood. In some situations, advocates or justices will offer a serious statement that provokes laughter. Justice Breyer's underwear comment was delivered without any intent toward humor; his immediate embarrassment and attempt to move past the comment was evidence of his blunder and invited further laughter. And yet, the audience, advocates, and the justices howled with laughter from his statement. Categorizing an utterance as an attempt at humor also claims an understanding of the speaker's cognitive intention, always an uncertain and dangerous assumption to make. Additionally, if a speaker's attempt at humor fails to generate laughter can his utterance be considered "humorous." Mr. Floyd's comment during his opening remarks in *Roe v. Wade* were clearly an attempt at humor, but not a single person laughed. Is this humor? And should humor be judged on its ability to provoke laughter?

To avoid the difficulties associated with determining the humorous nature of a statement, I emphasize the study of laughter because it proves an easier and more verifiable means to identify statements for a few reasons. First, the Court's transcripts identify occurrences of laughter in the Courtroom with laughter tags, noting "[laughter]" after a statement drawing laughter. Following Justice Scalia's "Happy Halloween" comment a "[laughter]" tag follows. To find some instances of laughter, one only needs to locate these laughter tags in the transcripts. However, the Court's transcripts are not completely accurate in their attribution of laughter tags to justices and misses a large number of statements that prompt laughter. Listening to audio files of the Court's oral arguments reveals instances overlooked in the Court's transcripts, and allows researchers to hear laughter within the Courtroom. While laughter tags assist in locating statements that provoked laughter in the Courtroom, but they reveal very little else. Finding a laughter tag after Justice Scalia states "That's nice," uncovers little about the function of the statement within the greater argument. We do not know whether this statement was delivered with sarcasm, sincerity, or a joking tone, nor is it entirely clear what may have prompted the laughter. Understanding these elements requires listening to the audio files of the oral arguments. And often where the transcript contains a laughter tag, other moments of laughter occur either before or after the utterance. When tracking instances of laughter, I include those unidentified moments of laughter that I stumbled upon with those already identified in the Court's transcripts. Second, where significant debate could surround the interpretation of a "humorous" or "serious" statement, little debate would surround the presence of "laughter." So where a study of "humor" in Supreme Court oral arguments invites significant and unresolvable challenges, evaluating laughter offers a more agreeable approach because it can easily be verified. Finally, my observations focus upon the effect or impact of laughter. Most readers would agree that generally the impact of humor is laughter, but I focus upon the impact of the resulting laughter upon the communication environment of oral arguments. So for these reasons, this study

emphasizes the role of laughter rather than humor. The delineation between humor and laughter is important in the analysis of laughter's function during Supreme Court oral arguments, not only to prevent interpretive challenges, but also because, historically, studies of laughter have fallen under the larger canopy of humor theory and readers should not confuse a study on laughter with a study of humor.<sup>4</sup>

### **Perspectives on Laughter: Superiority, Incongruity, and Relief**

Scholars have created a historical tension among areas of laughter and humor studies as they attempt to explain the effect of laughter, its social purpose, and an actor's underlying motivations. In their attempt to explain laughter and humor, three perspectives have dominated their discussions and resulted in the theories of Superiority, Incongruity, and Relief. Among the three theories of laughter, Psychology, Sociology, and Philosophy primarily contribute to theorizing about laughter's purpose. Of these fields and theories, philosophy's study of laughter as an expression of human superiority is the oldest approach to theorizing about laughter's purpose.

#### *Laughter Theories*

Philosophers have largely used laughter to comment on humor types, and to theorize about humans' inherent motivations in using humor to provoke laughter. Aristotle spoke in the *Poetics* of how humans laugh at what is ugly but painless, and this understanding of humor helps set the stage for understanding humor as a contest between humans, or what has become known as the "superiority theory" or superiority principle (Monroe 1951). During Aristotle's and Plato's time (5<sup>th</sup>-4<sup>th</sup> century B.C), humor "was considered to be an effective means of correcting or controlling excessive, ridiculous, or otherwise unacceptable behavior" (McGhee 1979, p. 5).<sup>5</sup> Although Aristotle did not spend much time considering laughter, Thomas Hobbes more fully developed laughter as a means of expressing superiority. Given his cynical view of humans, there is little surprise that Thomas Hobbes is primarily credited with development of the superiority principle. In Hobbes' view, humans are caught in a perpetual struggle, and laughter occurs when we are winning in our struggle because it results from "a sudden glory arising from some conception of eminency in ourselves by comparison with the infirmity of others" (Hobbes, 2005, p. 38). The superiority principle aligns well with the environment of Supreme Court oral arguments. Here justices correct and control the advocates' arguments and similarly challenge each other, often reflecting a Hobbesian struggle.

Albert Rapp's *Wit and Origins of Humor* subscribes to a similar Hobbesian view of human nature, as he notes that laughter is the result of "the roar of triumph in an ancient jungle duel" (Rapp 1951, p. 21). Rapp expands the superiority principle to include laughter towards those we love and towards ourselves. Laughter directed at a loved one "takes the form of a mild amusement at a weakness or predicament" (Rapp 1951, p. 66). Laughing at oneself results from "a picture of yourself in a certain predicament" outside of and separate from the laughing self (Rapp 1951, p. 68). Philosophers espousing a certain view of laughter relied on a cynical view of human nature to establish

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<sup>4</sup> The tension is similar to that found between communication and psychology research. Communication studies often focus on the audible ebb and flow of dialogue or visual symbolism and the social impact of this communication. Conversely, psychology emphasizes the internal cognitive motivations that prompt communication. In comparison Laughter serves as communication and humor serves as the psychological motivation. Communication would be more concerned with the effects of laughter and psychology would be more interested in explaining the reason an actor used humor.

<sup>5</sup> Also see Morreall, 1983.

their understanding. In spite of laughter being linked to such a dim view of humans, the superiority theory has been a long standing approach to understanding laughter (Bain 1888, Carus 1898, Stanley 1898, Beerbohm 1921, Bergson 1911 1921, Carpenter 1922, Dunlap 1925, Ludovici 1932, Lealock 1935, Lealock 1937, Rapp 1947, Rapp 1949, Feinberg 1978). Given the Supreme Court's adversarial nature, the superiority principle appears a valid perspective to adopt in understanding oral arguments. However, the superiority principle cannot account for Chief Justice Roberts joking about the light bulb exploding. Under the superiority principle we should expect him to laugh or joke about the frazzled nerves of the others around him.<sup>6</sup>

As an alternative consideration to the superiority theory of laughter, philosophers and theorists began considering that humans' laughter resulted from incongruous occurrences which disrupt the worldly pattern we have established for ourselves. Aristotle mentions the ability of orators to surprise their audience with the unexpected in the *Rhetoric*, but he ignores further development of this theory. Kant takes up Aristotle's understanding of incongruity and applies it to laughter noting that "in everything that is to excite a lively convulsive laugh" there must be "something absurd" (Kant 1892, p. 223). Kant's understanding of laughter by way of incongruity resulted from the frustration of understanding. Schopenhauer augments Kant's development of the incongruity principle by noting that "a mismatch between conceptual understanding and perception" results in laughter (Morreall 1983, p. 18). For Kant and Schopenhauer, laughter is the result of incongruity but for two very different reasons.

Kant theorizes that a tension between an absurdity eluding understanding results in laughter, and Schopenhauer views laughter as the result of the unexpected. Incongruity plays a substantial role in provoking laughter and it does seem likely that laughter most commonly results from an abrupt transition in what we expect to occur. Laughter deriving from General Kagan's mis-step, when calling Justice Scalia "Mr. Chief," and her subsequent correction exemplify an abrupt transition from the norm. However, neither Kant nor Schopenhauer articulate a comprehensive theory of laughter, and other scholars have attempted to explain incongruity more broadly (Spencer 1860, Lipps 1898, Bergson 1911, Carpenter 1922, Morreall 1983). But eventually, the laughter from incongruity that Schopenhauer and Kant identified depends on what emotion arises out of the unexpected situation (Billig 2005, p.72). Clearly there is a difference between a pleasant surprise and a painfully sad one, or a rich person suffering a misfortune versus a poor one. Incongruity can also augment the effect of other types of laughter, such as superiority. For example we laugh more vigorously at the haughty wealthy person splashed with mud than we do at the humble poor person enduring the same misfortune, because we enjoy the internal triumph over the wealthy's misfortune while pitying the poor's (Billig 2005). At the Court, moments of incongruity are rare and this perspective fails to thoroughly apply to the justices' interactions during oral arguments.

The final laughter theory to consider for its historical contribution is laughter as relief. Relief theory, as its name implies, suggests that laughter results from the expression and release of feelings caused by stress. These feelings could be caused by social anxiety, fear, or nervousness, among others. Relief theory developed primarily out

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<sup>6</sup> The advocates and justices reacted strongly to the light bulb exploding, requiring Chief Justice Roberts to reassure the advocate to help her regain composure. Even when listening to the moment on audio file, heavy breathing and nervousness can be heard.

of a scholarly debate between noted British thinkers Herbert Spencer and Alexander Bain. Both scholars agreed that the physical response of laughter resulted in the diminishment of bodily tension. However, of greater influence, Bain and Spencer's belief in laughter's ability to dispense energy proved appealing to another prominent thinker of the time, Sigmund Freud. Freud modified initial conceptions of Bain and Spencer's relief theory to shift from the release of bodily energy to that of excess psychic energy (Freud 1960). Freud theorized that the mind saved energy and would release it as laughter. He proposed that a clown tripping expends energy, in turn, causing us to recognize incongruity, and thereby release our own excess psychic energy. Other theorists have attempted to draw on relief theory but they all run aground when considering laughter without tension, or humor without laughter (Lipps 1898, Penjon 1893, Dewey 1894, Bergson 1911, Bliss 1915, Patrick 1916, and Rapp 1947). The premise of relief theory, laughter as release, is certainly applicable to the Court. The audience, advocates, and justices' laughter following the light bulb explosion could be explained by the nervous energy resulting from the jolting noise. Additionally, the justices and advocates could experience a significant level of stress during their arguments, advocates regularly share their tales of nervousness. But while the Court may be a site of significant stress for advocates, the justices do not appear to endure a similar level of stress in fact some appear eager and excited to begin the argument. Because neither the audience nor the justices seem to endure the same stressors as the advocates, relief theory does not offer an ideal position from which to analyze the Court's oral arguments.

The three primary historical theories of laughter reviewed here—superiority, incongruity, and relief—are not the only theories concerning laughter. Authors have detailed lengthy developments in the history of humor and the study of laughter (Sully 1902, Gregory 1924, Diserens 1926, Kimmins 1928, Piddington 1933, Monro 1951, Keith-Spiegel 1972, Haig 1988, Mulkay 1988, Bud and Cady 1992, Billig 2005); however, the three previous theories are the most commonly discussed perspectives, and they are also the most useful when considering the role of laughter in the Supreme Court. Each perspective offers distinctly different views of the purpose of laughter; however, the superiority principle clearly offers a more compelling frame through which we may consider the justices' and advocates' interactions.<sup>7</sup>

#### *Fields of Laughter*

While theoretical considerations about laughter are diverse, psychology and sociology are some of the few fields of study where a substantial amount of concentrated scholarship exists. Psychology has long been engaged in the study of laughter because laughter is a direct response related to what and how people think. Freud's early writings in *Jokes and their relation to the Unconscious* (1905) helped to direct psychology towards considering why humans laugh. In psychology, laughter has been known to elevate moods, release stress, alleviate depression, and relieve pain. Given the mental and physical benefits of laughter and humor, psychologists have directed substantial attention to its study (Goldstein and McGhee 1976, McGhee 1979, O'Connell 1987, Porterfield 1987, Durant and Miller 1988, Haig 1988, Simon 1990, Martin and Lefcourt 1983, Kuiper and Martin 1993, Danzer et al. 1990, Nezu et al. 1988, Richman 1995, Lefcourt 2001). While psychology considers how the individual mind creates and

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<sup>7</sup> I will spend more time discussing the superiority's applicability to the Supreme Court in my discussion of this study's method and theoretical perspective.



responds to laughter, sociology examines the role of laughter within society. Because laughter is pervasive across cultures, though different in each context, sociologists and anthropologists have long sought to capture and preserve the humor of various cultures as a means of better understanding and learning about cultures (Geertz 1971, Abrahams 1964, Morgan 2002, Boland and Hoffman 1986, Bradney 1957, Chapman and Foot 1976, Collinson 1988, Davis 1988, Dundes and Hauschild 1988, Holdaway 1988, Linstead 1985, McGhee 1976, Mulkay 1988, Powell 1988, Powell and Paton 1988, Sykes 1966). The sociological studies of humor prove helpful in understanding how laughter functions in the Supreme Court, because sociologists tend to emphasize how laughter serves to control individuals within societies, corresponding well with the governing nature of the Supreme Court.

While psychological and sociological research dominates laughter studies, Communication research plays an important role in filling a significant gap between sociological and psychological studies. Owen Lynch divides the field of humor study between sociology and psychology because “humor is a message sent by an individual or group with psychological motivations,” but in order to understand humor the individual or group receiving the message must “take into account the social context and functional role of humor within that context” (Lynch, 2002 p.430). Lynch is right to identify that psychology emphasizes the individual motivations and sociologists foreground the social context of the message, but he argues that as a field Communication studies can enhance and expand upon previous research.

Lynch proposes that rhetorical studies could examine how the individual uses laughter, but do so through the persuasiveness of the text, instead of psychological motivations. Scholars may emphasize the persuasive value of laughter within speeches and texts to evaluate a speaker’s intention and an audience’s response. Previous rhetorical studies in communication have evaluated the role of humor in public speeches, with a particular consideration for understanding and trying to measure the persuasiveness (Dahlberg 1945, Meyer 1990, Volpe 1977), or lack thereof in various speeches (Levasseur and Dean 1996, Gruner 1978). The most comprehensive research on the persuasiveness of laughter was completed by Charles Gruner (1978) who traced the results of 16 different studies which tried to measure the persuasiveness between a humorous speech and a dull one, finding no real difference in persuasiveness between the two types of speeches.

Other areas of communication may also consider laughter in society by emphasizing how groups use laughter in their discourse. Scholars considering laughter have traditionally examined it as an expression of resistance or control (Geertz 1971, Abrahams 1964, Morgan 2002, Boland and Hoffman 1986, Bradney 1957, Chapman and Foot 1976, Collinson 1988, Davis 1988, Dundes and Hauschild 1988, Holdaway 1988, Linstead 1985, McGhee 1976, Mulkay 1988, Powell 1988, Powell and Paton 1988, Sykes 1966); however, communication studies have complicated the traditional resistance and control dialectic by considering the variety of discursive purposes humor may serve in people’s daily lives (Goodschilds 1957, Odonnell-Tujillo and Adams 1983, Vinton 1989, Civikly 1986, Graham et al. 1992, Smith and Powell 1988, du Pre 1998, Lynch 2002, Lynch 2007, Westwood and Rhodes 2007). These researchers emphasize the complex role laughter plays in our lives; they note that laughter helps us negotiate the unfamiliar (i.e. groups, and social settings). It is communication studies’ understanding of

language and laughter's various discursive functions that proves so valuable to understanding laughter in the Supreme Court.

### **Oral Argument**

During oral argument, the complex interactions between justices and lawyers set the stage for laughter to play a role in negotiating the relationships between the actors. Oral argument before the Supreme Court is without a doubt one of the single most difficult oratorical tasks. Advocates attempt to draw out the essence of a case in thirty minutes, while being regularly interrupted by justices who question and challenge the very assumptions the case relies upon, often interrupting lawyer's responses and redirecting topics before lawyers can begin to respond to previous points. Most experienced advocates spend between 100-200 hours in preparation for a single case, and argue at least three moot courts before they finally step into the courtroom. On top of the intellectual and oratorical expectations, the institutional pressure of the Court is substantial, as is the audience listening to the argument and their laughter at the justices' quips, which may be directed at the advocate. The occurrence of laughter in such a high stress environment is a fascinating dimension of communicative interaction between humans. However, scholars disagree about the importance of oral arguments which subsequently calls into question the importance of laughter during such a futile act.

Although Wexler offers the only findings on laughter at the Supreme Court, numerous studies examine the Supreme Court, particularly in regards to oral argument. Traditional studies of the Supreme Court question the value of oral arguments, believing that "oral arguments [do not] play a significant role in the decision making of the U.S. Supreme Court" (McGuire 2005, pp.107-109). Political scientists largely dominate this skeptical view point, ignoring the discursive interactional dimension of oral argument (Rhode and Spaeth 1976, Segal and Cover 1989, Segal and Spaeth 1993, Segal and Spaeth 2002). Other researchers, dissenting from long standing skepticism, emphasize the dynamic interactional nature of oral arguments and suggest that oral arguments play a crucial role in judicial decision making, but acknowledge the influence of oral arguments is difficult to determine given other variables' potential influence on the justices (Cohen 1978, Schubert et al. 1992, McGuire 1995, Songer and Lindquist 1996, Epstein et al. 2001, Johnson 2001, Johnson 2004, Johnson et al. 2006, Collins 2007, Wrightsman 2008). A former advocate before the Court, Rodney Smolla, has suggested that the Court uses oral argument to wrestle with the crucial issues that can be found in the final opinion. And conversely, studying the oral arguments for a case can reveal further insight into the Court's final opinion (Russomanno 2008).

Only a few studies concerning oral argument have suggested that oral arguments are crucial for justices and lawyers because they provide a unique opportunity for the distribution of information. Wasby et al. (1976) identify the practical nature of oral arguments for both lawyers and justices. During oral argument, lawyers foreground the essence of a case, while justices may "communicate with his colleagues," concerning their standing in the case, "obtain information and clarification of points" from lawyers, and advance arguments in which they may be vested (Wasby et al 1976, p. 422). Dickens and Schwartz (1971) convey the mental and rhetorical obstacles lawyers face, noting that the Court "impose[s] additional constraints rendering inappropriate or ineffectual many rhetorical

techniques commonly used in public speaking,” and yet the lawyer’s “oral effectiveness will be largely determined by his . . . rhetorical strategy” within the constraining environment (pp. 41-2). My own research on courtroom communication and juror deliberations suggest that the flow and development of communication impacts jurors understanding of a case and subsequent judgment (Trask and Malphurs 2009, Malphurs 2010 TJE). Additional research at the Court suggests that oral arguments can have a significant cognitive impact on the justices’ consideration of a case (Malphurs 2010 JALWD). Since an individual’s communication influences both their own cognition and the cognition of others, the justices’ communication in oral arguments plays a significant role in the evaluation of a case. A justice actively challenging one advocate prevents that advocate from advancing their arguments as they fend off the justice’s attack. An active justice may prevent other justices from asking questions and waste valuable time in oral argument. This active justice may also cognitively hinder their own personal ability to fairly consider both parties in the case. If more than one justice strongly challenges an advocate, then the consequences can be even greater with multiple justices entrenching themselves in a position and preventing the rest of the Court from having their questions answered by counsel. The divergent views regarding the influence of Supreme Court oral arguments within the scholarly realm result from opposing methods in the study of oral arguments. Not surprisingly, one’s theoretical perspective and methodological approach colors one’s evaluation of information.

### **Methodological Approach and Theoretical Perspective**

Political scientists and psychologists have traditionally conducted quantitative macro longitudinal studies that overlook interactional discourse, language’s persuasive nature, or individual judicial behavior. In the past, researchers employed longitudinal methods because they sought generalizable and replicable findings that adhere to scientific norms and that allow researchers to make broad “scientific” generalizations about judicial behavior. Conversely, this study approaches the topic of oral arguments from a distinctly different scholarly perspective.

#### *Method*

Although not entirely separate from scientific concerns, I approach the study of Supreme Court oral arguments from an interpretivist’s position, focusing more closely on understanding the justices’ and advocates’ situational and individual behavior through personal observations or by listening to the Court’s communication and relying on my prior experience at the Court. Additionally, in evaluating oral arguments, prior scholars have rarely attended them, preferring to analyze the interplay of oral arguments at a distance and subsequently overlooking the complex environment that cannot be captured within a transcript or audio file, such as hand gestures, body language, eye-contact, smiles, frowns, nods, and shrugs.

To gain a more comprehensive understanding of oral argument, I have observed in person nearly 60 oral arguments, worked with Supreme Court advocate David Frederick on my research, observed moot courts at Georgetown’s Supreme Court Institute and the National Association of Attorney Generals, interviewed top D.C. advocates such as Maureen Mahoney, Miguel Estrada, and a number of former clerks, and held a brief conversation with Justice Breyer on the topic of oral arguments. This interpretive positioning provides insight into the

communication process of oral arguments separate from the post-positivist approach adopted by prior scholars in political science and psychology.

A significant dimension of understanding about the process of oral arguments would be lost without the experience of witnessing the communication process of oral argument firsthand.

Attending oral arguments brought to life the struggles and difficulties both lawyers and justices face when communicating and arguing positions. The audience's laughter was dramatic and often returned visitors from their daydreams to the Court's argument. Laughter also visibly diminished tension between justices and lawyers, commonly relieving heated moments. A brief joke or pun could easily displace building tension, and the justices' stern appearance would relax in their laughter. First hand observations were crucial to understanding the role of laughter in the Supreme Court by providing a contextual understanding of oral arguments and insight into the justices' and advocates' patterns of behavior and reactions to laughter.

In addition to my time researching oral arguments, I located laughter tags in the Court's transcripts and listened to these moments in audio files located on Oyez.org. Oyez.org is an organization which has taken on the task of posting online the Supreme Court's transcripts, audio files, and the justices' opinions where the public can search through and even listen to the oral arguments. After identifying laughter tags in the 51 out of 71 cases argued before the Supreme Court from 2006-2007, I then listened to sections of the oral arguments where the laughter tags were located to better understand the role laughter played in each specific instance. Typed transcripts lack any indication of intonation, and this is a crucial element for interpreting the purpose of a statement and understanding the function of the subsequent laughter. On the typed page, Justice Scalia's statement "that's just wonderful," is difficult to understand, and even more so when laughter follows. Is he congratulating, making light of, or sarcastically challenging an advocate's argument? When listening to the audio file, the sarcasm in his voice makes apparent his attack on the advocate's argument. Listening to each instance of laughter recorded in the transcripts was crucial for understanding laughter's role.

While listening to oral arguments, it was common to find "laughter" situations which were not recorded in the Court's, thus it seems likely that in the other 20 cases without laughter tags notations laughter occurred and was not recorded; nonetheless, the 51 documented cases with more than 130 instances of laughter provided enough data to create a clear picture of how laughter was generally used in the Supreme Court for this term, and demonstrates its relative common occurrence within the Courtroom. I categorized instances in which laughter suggested aggressive or congenial tones to determine how the Court may use laughter as a form of control and resistance.<sup>8</sup> Related to issues of control and resistance was the direction of laughter in the courtroom. I classified statements from justices that generated laughter based upon whether laughter was directed at the advocate personally, the lawyer's arguments, the justice themselves, the other justices, or a third party.<sup>9</sup> A real social difference exists between

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<sup>8</sup> I did not find any instances of "neutral" laughter, and the idea seems in conflict with the act of laughing. When humans laugh we laugh at something, and laughter in our society is never neutral.

<sup>9</sup>Laughter and humor is multilayered and can move in multiple directions at once. A joke can cause laughter at a lawyer's argument, but be framed in such a way as to make fun of a justice as well. In these instances I categorized the statement under what I believed to be the primary purpose of the comment.

laughter directed at an advocate's mistake, a justice's folly, or a humorous hypothetical that everyone can laugh at. I also categorized statements from advocates that generated laughter at the Court, a particular justice, the lawyer themselves, or a third party.<sup>10</sup> The direction of laughter coupled with tone provides a means of understanding the types of laughter generating statements that justices and advocates use, as well as the level of control and resistance exerted by the statement. A critical comment directed at a lawyer's argument is less personally aggressive than if the justice ridicules the lawyer personally. Tracking the tone and direction of laughter provides a simple means of categorizing laughter in the Courtroom.

This paper's findings include both analysis and description of the use of laughter in the Supreme Court. While some scholars may dismiss descriptive portions of this paper as unnecessary, it is important to remember that this type of description has never before taken place in a study on the Supreme Court, because the majority of Supreme Court studies are not concerned with the role of language. Including a description of the Court's various uses of laughter provides a unique opportunity to catalogue previously overlooked interactions. Descriptions of laughter situations also serve to illuminate the congenial nature in which justices and lawyers use laughter during oral arguments.

#### *Theory*

The previously discussed theories of laughter: superiority, incongruity, and relief theory, all provided underlying explanations of laughter's purpose. While these theories of laughter rely on fundamental views of human behavior, their real value lies in the contextual situations each theory foregrounds. The superiority theory functions well in situations in which humans challenge each other. The incongruity theory helps articulate moments of surprise or uncommon behavior which fails to fit our previous understandings of patterned behavior. And finally, relief theory lends itself to articulating and explaining why laughter results from stressful scenarios. Each theory provides a various dimension to considering laughter's multivocal and multifunctional purpose (Holmes 1982, Tracy and Coupland 1990). Thus a good natured statement from Justice Scalia, directed at a lawyer he favors, could be understood to tease the lawyer, causing the lawyer relief, as well as joke with Justice Breyer by suggesting the superiority of Justice Scalia's position. One must take into account the audience for each instance of laughter, and certainly when one comment from a justice is seemingly directed at the counsel, but relates to an "inside joke" between justices. A deep and complex interplay often results from the justices' use of laughter, and multiple theories can enter into one laughter situation.

The usefulness in the previous three theories or perspectives lies in their ability to articulate layers of interaction with varying degrees of emphasis in different situations. However, in attempting to understand laughter in the Supreme Court, the superiority principle provides the most reasonable perspective for understanding and evaluating instances of laughter in the Courtroom. The ultimate environment for intellectual and oratorical sparring, Supreme Court oral argument presents a challenging site for a verbal contest between advocates and justices. Even the ritual's name "oral argument" emphasizes that argument, conflict, and disagreement are central to the activity, inevitably framing the interaction. However, simply because the superiority principle best

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<sup>10</sup> Lawyers did not direct laughter towards their opposition.

encapsulates the interactional context of the Supreme Court, does not mean that instances of relief or incongruity do not occur, but rather that instances of relief or incongruity exist within the overarching superiority principle, further informing our understanding about justices' and advocates' negotiation of this challenging environment.

Furthermore, laughter in the superiority theory can function within a spectrum in which the laughter of justices or lawyers may range from aggressive and hostile to congenial and good natured. A justices' good natured play on words, which critiques a lawyer's argument, can be understood as challenging through a use of incongruity. The justice's playful manner softens the criticism's blow, and invites the lawyer to participate with the group, rather than ostracizing or ridiculing them. But at its essence, the Supreme Court focuses upon the rule of law mediating relations between humans and serves as the final voice, adopting a superior position that controls lower courts and the everyday life of Americans.

### **Superior Control and Resistance in Oral Argument**

Almost all human challenges have rules, and a number of interactional rules (institutional, social, and intellectual) govern communication within the Supreme Court. These rules and boundaries serve to control and resist human behavior, providing further support for using the superiority principle to understand laughter's function in oral argument.

On the first level, institutional, the Supreme Court operates as the highest court in our country and is provided powers to influence the power of the other two branches. Conversely the Supreme Court has two other branches that enforce their rulings. Institutionally, the governmental powers provide the Supreme Court with significant influence. This powerful influence certainly determines the reverence and respect with which lawyers approach oral argument. For many lawyers, arguing before the Supreme Court represents the World Series of the legal world, and the legal community holds in high regards those advocates who regularly appear before the Court. The institutional power of the Supreme Court lends an authority and respect for all those who hold business before the Court.

Along with the exterior institutional rules of our government, the Supreme Court also has self-constructed institutional rules for advocates, both informal and formal, that govern their interactions with justices. Although I will not list all of the rules for advocates, some essential rules are stated in the "Guide for Counsel" the Supreme Court provides lawyers. The guide articulates that advocates are not to begin until recognized by the Chief Justice, and each justice should be addressed with their title and last name, warning that "it is better to use 'Your Honor' rather than mistakenly address the Justice by another Justice's name" (p. 5). Advocates should "never interrupt a Justice who is addressing you . . . if you are speaking and a Justice interrupts you, cease talking immediately and listen" (10). And the last point pertinent to this paper, the justices recommend avoiding the use of humor since "attempts at humor usually fall flat" (11). These institutional rules place the Supreme Court justices in a superior and controlling position in oral arguments, allowing them to determine if the advocate gets to speak, for how long, and on what topic. The Court even controls what advocate may appear before them since arguing advocates must be approved by the justices to gain admission to the Supreme Court Bar. The Court's rules are not overly

restrictive; however rules applying to advocates, do not similarly apply to justices. The justices may openly laugh at, interrupt, ignore, or talk loudly with each other while advocates must maintain their composure and remain focused on the argument. A discrepancy between the advocate's behavior and the justices is clear, foregrounding the tension between control and resistance within oral arguments, and further supporting the primacy of the superiority principle. Within the institutional setting, the justices have a substantial amount of control, but another interactional level, the social setting, also accords the justices with a significant level of influence.

Socially, both justices and lawyers operate within implicit rules that govern human interaction within our society. Justices on the Court are typically older members of our society who have earned significant accomplishments in their lifetime and occupy a high position of esteem that accords them a particular level of social respect. Our social rules inform how advocates must interact with justices. Aside from institutional rules, younger lawyers should not ridicule an elderly justice, nor should they attempt aggressive physical action within the Court. A justice aggressively ridiculing an advocate or another justice would not be violating any institutional rules, but he or she could be the cause of a socially awkward moment, because such a heightened disrespect for other humans is often socially uncomfortable and outside the reverential behavior normally conducted in the Courtroom. These socially implicit rules influence the conduct of advocates and justices along with innumerable other rules that socially control how humans must behave in our society.

Lastly, advocates and justices must engage at the intellectual level which calls for certain rules of discourse to create understanding. Intellectually, the justices epitomize the pinnacle of sophisticated thinking in legal studies, and they occupy an intellectually superior position to advocates. Furthermore, approaches to argumentation must follow both historical and current understandings and reflect the justices' personal understandings of a case. If an argument strays too far from the intellectual norms, then the advocate will be disregarded and potentially dismissed. Advocates must compete within the intellectual realm of the justices because it is the justices who decide the validity of the advocate's case. If an advocate were to argue that *Roe v. Wade* was not established precedent, then he or she would be outside the intellectual realm and subject to dismissal of their argument.

Institutionally, socially, and intellectually, these three levels are important to highlight because they identify the ways in which justices maintain a position superior to lawyers. In all three identified levels of communication, the justices maintain a superior position. The prominence of judicial power in these levels should help further establish the superiority theory of laughter as the dominant context in which laughter and all communication in the Courtroom should be understood, but it also should foreground the various barriers that impede communication between justices and lawyers. Laughter within the Supreme Court takes place in a communicative environment with significant levels influencing and mediating communication between humans. The justices are capable of controlling laughter in the courtroom because they hold a substantial amount of influence on multiple levels, but how do justices and lawyers use laughter within the superiority context?<sup>11</sup>

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<sup>11</sup> I have intentionally ignored the audience as a further level of communication as performance for two reasons. First in my observation of oral argument I did not find the justices or the lawyers to pay the audience much attention during oral argument. Justices rarely looked in the direction of the audience when I was present. Second I do not believe the justices behave

## Supremely Superior Laughter

As previously stated, justices' "laughter" tags appeared in the transcripts of 51 out of 71 oral arguments, or in about 72% of the cases during the 2006-2007 court term. More instances of laughter were probably not captured in the other 20 transcripts, but likely occurred. The justices were responsible for at least 131 moments of laughter, both captured in transcript "laughter" tags, as well as instances I noted independently when listening to audio files. Justice Scalia led the justices with 60 statements that generated laughter, Justice Breyer came in a far second with 35 statements, Chief Justice Roberts had 12, Justice Souter 9, Justice Kennedy 7, Justice Stevens 4, Justice Ginsburg 4, Justice Alito 2, and Justice Thomas 0. Sixteen advocates were responsible for a total of 21 instances of laughter, with Mr. Dreeben leading the pack by drawing laughter 3 times. The disparity between justices and advocates in the frequency of laughter is obvious. More is at stake if an advocate's statement either fails to draw laughter or offends a justice than if a justice offends an advocate or does not draw laughter from an attempt at humor. Advocates are also more likely to be mentally involved in the articulation of their case than justices, providing justices with more opportunities to respond with levity and create laughter. Advocates may also largely be enduring a particularly stressful moment during oral argument and are choosing not to relieve their nervousness in the form of laughter or may not have an opportunity. Finally, justices lead in moments of laughter because there are numerically more of them, and nine minds are considering a lawyer's argument, opening up greater opportunities for laughter.

Out of the 131 moments in which justices used laughter, surprisingly only three instances occurred in which justices used laughter in an act of aggression<sup>12</sup>; all three instances occurred in *Morse v. Frederick* which involved a principal forcing a student who was standing off school property to take down his banner stating "Bong Hits 4 Jesus." The student sued the principal for monetary damages related to the principal's violation of his First Amendment rights. The lower court awarded the student monetary damages and the principal appealed to the Supreme Court. In this case, justices heavily questioned the student's advocate, Mr. Mertz, and laughed at him in a number of instances; however, Justices Scalia and Kennedy were particularly aggressive in their remarks. In this example, Justice Kennedy offers a hypothetical that frames the argument in an absurd light, prompting laughter and provoking Justice Scalia:

**Justice Kennedy:** So under your view, if the principal sees something wrong in the crowd across the street, had to come up and say now, how many of you here are truants . . . I can't discipline you because you're a truant, you can go ahead and throw the bottle (laughter) (52:22-25).

**Mr. Mertz:** No I don't think she needs to do that in the heat of the moment. But later on once she's discovered the true facts, then at that point I think she loses a basis for punishing him as a student if he was not there as a student.

**Justice Scalia:** Because you're both a truant and a disrupter, you get off. (laughter.)

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or perform for the audience. Even in the transcripts I listened to, communication was limited to the justices and lawyers. This is not to say that justices and lawyers never perform for the audience, but rather that it is not a frequent enough occurrence to warrant attention. It is more likely that the justices are performing for each other.

<sup>12</sup> By "aggression" or an "aggressive remarks," I mean statements in which a justice uses a disdainful tone, disrespectfully ridiculing the advocate. In these instances, a justice's laughter is clearly dismissive of an advocate. Usually, the justices are very respectful and engage in good natured joking, they become aggressive when they recognize the weaknesses of an argument that an advocate refuses to admit.



**Justice Scalia:** Had you been just a disrupter, tough luck. (laughter.) (52-53:22-13).

The castigating tone of Justices Kennedy and Scalia and robust laughter from the Court and audience lacks poignancy on the printed page, but the justices' dismissive attitude is apparent.

In this case, nearly all the justices took on disapproving tones, and Justices Scalia and Kennedy's humor falls in line with the disapproving tone found within most of the argument. It is amazing that given their substantially more powerful positions and ability to fully control interactions in oral arguments the justices only laughed aggressively at an advocate three times in the entire court term, and those three instances could have been much more severe because the justices only critiqued the argument, and not the lawyer himself. This interesting finding does not imply that justices did not act aggressively in other ways, but simply that their laughter was more respectful and good natured than aggressive and hostile. While the justices aggressively ridiculed one advocate, not a single advocate aggressively ridiculed the justices, again most likely due to the danger involved in making light of a Supreme Court Justice. Through the superiority principle we would have expected to find justices more aggressively exerting their superiority and control over advocates or each other. Learning in what direction justices and advocates directed laughter offers further information as to the function of laughter in oral arguments.

The direction of laughter reveals levels of respect and disrespect justices offer toward advocates and each other. Because laughter can function as a form of control and resistance, and within the superiority principle it serves to elevate humans above one another, then understanding what direction laughter follows can reveal what type of control or superiority justices or advocates exerted. The following table displays the number of statements causing laughter to be directed at the advocate, the advocate's argument, the justice themselves, other justices, and third parties (Congress, lower courts, etc. . . .)

	Advocate	Adv. Argument	Self	Other Justices	Third Party	Total
Roberts	-	4	1	2	5	12
Kennedy	2	5	-	-	-	7
Alito	-	1	1	-	-	2
Stevens	2	1	1	-	-	4
Souter	2	3	-	2	2	9
Ginsburg	-	1	1	-	-	2
Scalia	10	20	9	11	10	60
Thomas	-	-	-	-	-	0
Breyer	6	7	9	3	8	35
Total	22	42	22	18	25	131

Justices directed their laughter in a number of different directions. For justices, advocates provided the most material for laughter from their own arguments. However, justices equally positioned themselves as the object of laughter as often as they poked fun of the advocate, and almost as often as they teased other justices. Justice Scalia's direction of laughter reveals that his frequent comments draw laughter from a diverse range. Justice Breyer made light of himself the same number of instances as Justice Scalia, but proportionately more often. Considering the direction of laughter in the Courtroom, the justices do not appear to use laughter to posture superiority or exert control over an advocate's argument. Instead, the justices direct their laughter across a broad spectrum of topics, challenging any notions of superiority or control. Examples of typical laughter situations follow.

### **Justice teasing advocate for mistake**

In this instance the advocate confuses Justice Souter for Justice Ginsburg, and instead of reacting harshly, Justice Souter defuses the tension by telling the advocate "You're very flattering."

MS. MANNING: No Justice Ginsburg, there has been no waiver –

JUSTICE SOUTER: I'm Justice Souter.

MS. MANNING: I'm sorry. Justice Souter, sorry. Justice Souter -

JUSTICE SOUTER: You're very flattering.

(Laughter.)

MS. MANNING: Sorry. Justice Souter, sorry, Justice Souter. (*Dayton v. Hanson* 26: 16-24).

This has been a common problem for Justice Souter. During my weeks of observations, advocates wrongly called Justice Souter "Justice Ginsburg," in three other cases, drawing a substantial amount of laughter from the audience. In each instance he responded graciously, using laughter to gently correct the lawyers.

### **Justice making fun of Self**

In this example Justice Breyer is having a difficult time creating a hypothetical and he seemingly uses laughter to reduce the tension and embarrassment of his inability to speedily provide a hypothetical.

JUSTICE BREYER: So you're saying that if the Government has the most amazing, let's -- I'm trying to think of something more amazing than what I just thought of.

(Laughter.) (*Hein v. Freedom*, 17: 18-21).

### **Justice teasing advocate personally**

Justice Stevens provides a compliment to a long winded articulate explanation delivered by the advocate. His good-natured humor served as a significant compliment to the lawyer.

JUSTICE STEVENS: Ms. Forsman, can I ask you a personal question? Were you a moot court finalist?

(Laughter.)

MS. FORSMAN: I was not.

JUSTICE STEVENS: I attend a moot court at Notre Dame in about your year and it was an awfully good moot court.

MS. FORSMAN: Thank you, Your Honor. (*Whorton v. Bockting* 45:9-16)

### **Justice teasing advocate by making fun of his argument**

Justice Kennedy has inquired how to resolve a problem in the case, and the advocate begins to wander in his response. Justice Kennedy humorously interrupts the advocate before he can finish his statement.

MR. MANCINO: Well, I believe you can come up with all sorts of scenarios. What I think is the thing -

JUSTICE KENNEDY: That's why we're wondering how to write the opinion.  
(Laughter.) (*Bowles v. Russell* 12:1-6).

### **Justice making fun of 3<sup>rd</sup> party**

Justice Scalia provides a humorous hypothetical referring to the abstract concept of an “opposing counsel.”

JUSTICE SCALIA: Suppose you have problems at home. I don't know, you have an illness at home. And you ask counsel for the other side, you know, I know it's a 14-day limit, but would you give me 20 days? Right? And opposing counsel being as friendly as they are nowadays - (Some laughter.) (*Bowles v. Russell* 10-11: 22-03).

### **Justice critiquing other justices**

When Justice Ginsburg points out the obvious to Justice Breyer, her statement draws laughter, but her serious tone suggests sincerity that this is likely an example of unintentional humor.

Justice Breyer: . . . We have all these law professors who like statistics. Now they like law in economics and everything. So why don't they go out there and count, and then we'd actually know, instead of sitting here and trying to figure out something I know nothing about. I've never been involved in a lot of burglaries. I don't know how the burglaries operate. I suspect some people are hurt, but rather than my suspicion why don't we find out what the facts are?

JUSTICE GINSBURG: We're not going to be able to do that in time to decide this case. (untranscribed laughter). (*James v. US* 13:2-3).

### **Justice teasing other Justice**

Interestingly, Justice Scalia teased Justice Breyer more often than any other justice, and this proved true during my weeks of observation as well. Although it is unclear whether the statements were designed to needle Justice Breyer or just provide a friendly nudge, these two justices spar regularly evoking laughter, and occasionally tension. In this example, Justice Scalia's needling serves as a rejection of Justice Breyer's suggestion to involve academics in their case that occurred in the previous example.

JUSTICE SCALIA: It would also keep the professors from other mischief. (Laughter.) (*James v. US* 13: 6-8).

### **Advocating Laughter**

Advocates took part in the laughter as well, generating their fair share of levity. Interestingly, advocates derived humor most frequently by making fun of the justices or the Court as a whole. Their personal mistakes also attracted a fair amount of laughter. The following table tracks laughter derived from an advocate's statement that was directed at the Court as a whole, individual justices, a justice's argument, third parties, or at themselves.

	Court	Justices	Justice's Argument	Third party	Self	Total
Advocates	2	8	4	2	5	21

It is surprising to learn that over half of advocates' statements which generated laughter resulted from them making fun of a justice or making fun of a justice's argument, both equally risky maneuvers, but typical of experienced advocates who have presented enough cases to achieve a familiarity with the justices. Often times, justices would joke with an advocate first, seemingly inviting the advocate to participate, and the lawyer would then typically reply with a laughter generating comment. The Court's willingness to allow and invite laughter from advocates presents a sense of equality within the superiority principle. Rigid institutional rules and roles begin to

dissolve as the justices and advocates engage in good-natured laughter. The following examples demonstrate how advocates joke with justices.

### **Advocate teasing the Court and justices teasing advocate**

In this dynamic example, Former Solicitor General Paul Clements jokes with the Court concerning the muddled nature of their precedents in this case. Justice Alito sets the General up for a humorous response and Justice Scalia jokes with General Clements. This moment is one of the few back and forth moments from the 2006-2007 cases. It also provides an interesting situation in which the justices respectfully refer to the Solicitor General by his title. The institutional, social, and intellectual barriers stand in contrast to the previous examples.

JUSTICE ALITO: General Clement, are you -are arguing that these lines that you're drawing make a lot of sense in an abstract sense? Or are you just arguing that this is the best that can be done that this is the best that can be done within the body of precedent that the Court has handed down in this area?

GENERAL CLEMENT: The latter, Justice Alito.

(Laughter.)

GENERAL CLEMENT: And I appreciate -- I appreciate the question.

JUSTICE SCALIA: Why didn't you say so?

(Laughter.)

JUSTICE SCALIA: I -- I've been trying to make sense out of what you're saying.

(Laughter.)

GENERAL CLEMENT: Well, and I've been trying to make sense out of this Court's precedents.

(Laughter.)

GENERAL CLEMENT: And the best that I can do -- the best that I can do, when I put together *Flast* – (*Hein v. Freedom* 20:4-23)

### **Advocate teasing Justice**

Mr. Miller receives a humorous response from Justice Scalia, when he was responding to a previous question by Justice Stevens. This is an example of a fairly dangerous joke, but Justice Scalia responds well to it. Justice Stevens interrupts Mr. Miller and ponders whether the term “strong” can be quantified. Mr. Miller jokes with Justice Stevens, prompting Justice Scalia to joke back, and causing Mr. Miller to needle Justice Scalia’s general distaste for plaintiffs:

MR. MILLER: The notion of strong inference starting with the Second Circuit doctrine, as used in many other circuits, was actually a much lower standard than what we are recommending. . . .

JUSTICE STEVENS: Mr. Miller, going back just to the word strong, forgetting the particularization from it, do you think you can categorize the strength in percentage terms? They have to be more than 50 percent? More than probable cause?

We're talking all abstractly here and I find it easier to think when I think about numbers.

MR. MILLER: . . . I haven't seen a judicial opinion that says at the 33 and one-third percentage of probability, I've got to give it to the jury, because that jury might file for my -

JUSTICE SCALIA: I think it's 66 and two-thirds. I think that is -

(Laughter.)

MR. MILLER: Is that because you never met a plaintiff you really liked?

(Laughter.) (*Tellabs v. Makor* 42-44:23-03).

### **Advocate teasing justice by making fun of Justice’s argument**

The following example from the previously mentioned *Morse v. Frederick* case, provides an instance in which a lawyer jokes good naturedly with a justice’s argument. In this instance, Justice Breyer has just finished one of his long-

winded hypotheticals in which he consistently refers to a 15-foot banner as an example of the sign held by the student in the case.

MR. MERTZ: My response, Your Honor, is that, first of all, a 14-foot banner.

JUSTICE BREYER: That's an excellent response, I think.

(Laughter.) (*Morse v. Frederick* 37:13-17).

### **Advocate directing laughter at self**

In this instance, Justice Breyer is concerned that the "see also" in the counsel's brief is a bad omen, but when he asks what the words are referencing, the advocate cannot remember.

JUSTICE BREYER: -- it may have been, but you say "See Also," which is a sign to me there's something wrong with that case.

(Laughter.) . . .

JUSTICE BREYER: Why did you say "See Also"?

MR. TRIBE: I don't remember. (untranscribed laughter) (*Wilkie v. Robbins* 45:8-11, 45-46:25-01)

### **Laughing at justices for relief**

This is a clever example of an advocate diffusing a tense back and forth argument between Justices Breyer and Scalia where the advocate cannot get a word in. The advocate's remarks allow him to reclaim the argument from the two justices and proceed with his argument.

JUSTICE BREYER: Well then, in other words, the Constitution of the United States prevents the courts themselves from trying to assure that sentences who are -- that individuals who are in similar positions, commit similar crimes, will be treated in similar ways. That to me is possible, but of course I've been in dissent in these cases. But it seems to me -

JUSTICE SCALIA: So long as the jury determines the facts that make them similar.

JUSTICE BREYER: We're back-

JUSTICE SCALIA: The problem here is what makes them similar

JUSTICE BREYER: We're back

MR. DREEBEN: I understand this dialogue. And what we have-

(Laughter) (*Rita v. US* 41:1-16).

### **Advocate making fun of 3<sup>rd</sup> party**

In this instance, the advocate jokes with the Court about a lower court's previous decision in his case.

MR. STEWART: That is an anomaly. The Court has said on occasion that because it lacks appellate jurisdiction it has no power to do anything with the case except to vacate the order. And I think that's a court that I'm not going to try to explain.

(Laughter.) (*Bowles v. Russell* 46:7-12).

## **Seriously Discussing Laughter**

From information gathered from the 2006-2007 oral arguments before the Supreme Court, laughter during oral arguments appears to be a means of negotiating the institutional, social, and intellectual barriers separating the justices from advocates, and in turn organizing the communication within oral arguments. Justices could have easily been aggressive and hostile with their laughter generating statements. It is surprising to learn that they used aggressive laughter in a very limited manner, and deferred instead to a more good natured form of joking with advocates. It is also surprising that justices allowed advocates to joke about them personally and make light of their arguments as well. Advocates endured good-naturedly the justices' laughter as well, but of real importance within

the superiority principle, the justices' superior position enabled them to prevent laughter in the Courtroom; instead, they invited advocates to participate in the laughter or joking and even served as objects of laughter. Within the context of the superiority principle, justices and advocates appeared to use laughter to diminish the levels of superiority that separated them.

During one of my visits to the Court I observed a humorous interaction that occurred before oral arguments and thus would not appear on court transcripts. Each Monday morning, before oral arguments, the Court will hear nominations by appointed Supreme Court Bar members for attorneys that should be nominated to the Court's Bar. After the nominating attorney announces the names of appointed individuals, he or she must state "I am satisfied they meet the necessary qualifications." During this time, the dean of a nearby law school approached the podium with obvious nervousness. He quickly read the names of those he was nominating, and then promptly sat down, failing to realize he had not attested to their necessary qualifications. Instead of rebuking or chastising the lawyer, Chief Justice Roberts smiled and asked the man good naturedly, "And how do you find their qualifications?" The dean, suddenly realizing his error quickly jumped up and read the perfunctory clause amid a roar of laughter. This proved a key instance in which the Chief Justice used humor good naturedly to correct the lawyer's mistake and laughter joined audience members. Aside from correcting errors, good-natured jokes helped to alleviate tension, and also served to break down some of the formal barriers stultifying interaction. The justices voluntarily minimized their superior position by inviting the laughter of justices and lawyers or using good-natured joking to reduce the institutional, social, and intellectual separations between justices and advocates.

The use of laughter to negotiate power discrepancies is not original, but this paper's findings stand in opposition to the bulk of sociological studies which suggest that humor works as both control and resistance (Boland and Hoffman 1986, Bradney 1957, Chapman and Foot 1976, Collinson 1988, 1992, 1994; Coser 1959, 1960; Davis 1988, Dundes and Hauschild 1988, Holdaway 1988, Linstead 1985, McGhee 1976, Mulkay 1988, Powell 1988, Powell and Paton 1988, Sykes 1966). Laughter in the Supreme Court serves to diminish and lessen the formal control and power barriers. Humor and laughter were able to accomplish this task because "humor officially does not count, persons are induced to risk sending messages that would be unacceptable if stated seriously" or delivered in a serious tone (Pizzini, 1991, p. 481). More than any other factor, mutual respect and politeness epitomized the use of laughter by justices and lawyers. Mutual respect and politeness are unusual descriptors to characterize the purpose of laughter within the superiority paradigm adopted for this study; however, these behaviors relieve the tension of the multiple superiority barriers. Justices primarily, and advocates to some degree, resist the superiority barriers by displaying mutual respect, and politeness through good natured laughter.

Although this paper was not concerned with the psychological motivations as to why justices use humor, Brown and Levinson (1987) have provided a discursive path to examine the role of laughter in politeness by suggesting that actors work to save face and the face of others through politeness strategies. They propose that laughter in positive politeness can respond to the listener's positive face needs by amusing others, "contributing to the development of social cohesion . . . Shared [laughter] emphasizes common ground and shared norms" (Holmes 2000 p. 167, Blau 1955, Holdaway 1988, O' Quinn and Arnoff 1981). Good natured laughter provides a means of

social bonding in the Supreme Court's oral arguments, an unusual place and setting for bonding to occur. It may seem strange to those unfamiliar with the Court, but justices spend the greatest amount of time together each week at oral arguments, more than at any other Court related activity. Laughter may provide a healthy response they may all enjoy, and take part in, separate from the politics or legal philosophies. All of the justices can appreciate a good pun, or humorous hypothetical. Furthermore shared ground with lawyers once again diminishes the superiority barriers that divide lawyers and justices.

Brown and Levinson note that humor can be used through self-deprecating laughter that preserves the speaker's positive face. Justices Breyer and Scalia are masters of turning a potentially embarrassing situation into positive laughter; some lawyers also skillfully turned their follies into boons. In addition to Brown and Levinson's view of self-deprecation, self-deprecating humor allows all participants to laugh at the person inviting laughter. In this situation, all people can enjoy the aesthetic of laughter together, once again breaking down barriers and achieving equal footing, if only momentarily. According to Brown and Levinson, speakers may also use humor to preserve the face of those they are criticizing. This provides new insight into the 67 laughter statements concerning advocates or their arguments in the 2006-2007 term. Justices may have been using laughter to mitigate the force of their critique. Laughter designed to lessen the force of a criticism typically occurs between equals, in which one coworker is attempting to save the face of another, and does not usually occur in hierarchical situations (Holmes 2000). 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.

## **Conclusion**

Building on Professor's Wexler's first study of the topic, this paper provides new tallies of the justices' laughter generative moments by listening to audio files and supplies new information on moments of laughter created by lawyers and the frequency of laughter in cases; but most importantly, this paper finds that laughter plays an important communicative role by breaking down various barriers that impede communication and generating equality among participants. Surprisingly, in an environment where extreme human contests take place, studying laughter's function in oral arguments revealed the justices' willingness to reduce their power and control by diminishing significant institutional, social and intellectual barriers, and allowing others to laugh at and make light of them.<sup>13</sup> Instead of reinforcing or upholding their superior positions through laughter, as the superiority principle

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<sup>13</sup> The aesthetic of laughter and politeness theory's concern with one's social face should not distract from the serious endeavor required in oral argument. Laughter does not make oral arguments a cuddly time for bonding between advocates and justices. Oral argument is a site of ritualistic communication replete with tension and occasional anger; laughter serves as a brief but powerful moment in the tempest of oral argument. While "laughter" notations only appear in 51 cases, it is likely that it occurs even more frequently, occurring each day I was present for oral arguments, though not always within oral argument. Laughter would often occur in the time before oral argument, during the Supreme Court Bar nominations. The Court's ability to laugh with those future and present members of the bar further emphasize the Court's congenial nature.

suggests, the justices appear to treat advocates and each other as equals. Laughter's ability to equalize members of differing hierarchical positions is testament to its power.

Laughter makes a substantial difference in oral arguments and this paper has attempted to show how laughter enables justices and lawyers to negotiate the institutional, social, and intellectual barriers that impede human communication. To an outside observer, laughter seems an inappropriate means of communication where those cases that reach the Supreme Court are thought to be the most serious and complex cases, requiring extreme concentration. Before justices enter the courtroom, first time visitors are often puzzled to hear laughter behind the red curtains. One guest seated next to me stated to her companion that "they sound like they're having too much fun. I thought this was supposed to be more serious. This is the Supreme Court." She, like many people, viewed laughter in the Supreme Court as an inappropriate expression that suggested a poor level of consideration for cases. But laughter may be facilitating the judicial process by reducing barriers between justices and lawyers, creating a more effective and egalitarian environment for communication, and playing an essential role in their oral arguments. Mark Twain noted that "[laughter] is the great thing, the saving thing. The minute it crops up, all our irritations and resentments slip away and a sunny spirit takes their place." While laughter will not serve as a panacea for Justice Scalia's grouchiness or spur Justice Thomas into loquaciousness, it exerts a powerful moment of temporary unity.

It is difficult to capture the difference laughter makes in an oral argument, particularly during an argument that lacks any drama to keep the audience or justices engaged. A significant change occurs in the room when a justice or lawyer makes a statement that draws laughter. The tension or boredom that has surrounded the case disappears for a while, the audience shakes the sand off their heavy eye lids, and the presenting lawyer becomes more relaxed and composed. During that moment of laughter, every human shares the same insight, engages in the same action, and everyone in the courtroom seems nearly equal. And yes, even Justice Thomas shares in the laughter.

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