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# Constructing Legal Meaning in the Supreme Court Oral Arguments: Cultural Codes and Border Disputes

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Constructing Legal Meaning in the Supreme Court Oral Arguments: Cultural Codes and  
Border Disputes

by

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A thesis submitted in partial fulfillment  
of the requirements for the degree of  
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## ABSTRACT

Culture plays a part in the construction of legal understandings in the Supreme Court contrary to much legal scholarship. The oral argument of the Supreme Court is a unique way for Justices to gather information beyond the formalized briefs and prior written opinions. In the oral argument the Supreme Court Justices utilize cultural codes as tools to probe, shape, negotiate and challenge the legal meanings and boundaries of the case before them. Using the oral argument transcript in a 2010 Supreme Court case on the issue of whether California has the right to censor the sale of violent video games to minors, this study attempts to understand the sociological processes behind constructing law. Findings show cultural codes being used by the Justices, in this legal context of an oral argument, to address the border disputes and help to establish the specific legal parameters of a case.

## INTRODUCTION

The role of the Supreme Court is to review and decide the constitutionality of legal issues decided in the lower courts. A key part of this process is the oral argument where the Justices attempt to establish the meanings and legal parameters of the issues they need to decide. The Justices use their questioning of the lawyers to tease out their arguments, test out their own ideas and use cultural codes and legal precedents to make sense of the issues of a case. These oral arguments provide an interesting space for Justices to directly interact with the law through discourse with the lawyers. Particularly interesting for sociological study, is how cultural codes are used to understand the law and its meaning in the oral arguments of the Supreme Court.

In order to assess the process, techniques and attributes of this discourse, it is important to have working definitions for the concepts involved. For the purposes of this study, cultural codes are complex inter-related systems of meaning, about how the world works, how the world should work, and the expected rights and responsibilities of people in the world (as discussed in Cerulo 1998, Loseke 2007, Swidler 1986, Zerubavel 1997, and Bruner 1991). The “cultural toolkit” contains the available ideas, norms, values and traditions which practical actors can use to make sense of themselves and others in given social contexts (Swidler 1986). Cultural tools are the socially circulating meanings and symbols available to specific actors in specific situations that provide the standpoint for the actors and the specific constructs of thought available to them (as discussed in

Swidler 1986, Zerubavel 1997, Amsterdam & Bruner 2000 and Johnson 2004). For the purposes of this study law is understood as the process or system of meaning by which social order (normative actions) are maintained and formalized (as discussed in Leubsdorf 2001, Johnson 2004, and Amsterdam & Bruner 2000). Using these concepts, I will review the oral argument in a 2010 Supreme Court case on the issue of whether California has the right to censor the sale of violent video games to minors in order to understand the sociological processes of constructing law through the discourse of oral arguments.

I will address two questions about the oral argument (1) How do the Justices use the cultural codes available to them to obtain and shape information beyond the written briefs submitted by the lawyers and friends of the court? and (2) How do the Justices integrate cultural codes into the formal legal setting? Exploring these questions will allow me to address characteristics that shape the issues as well as illustrate how the Justices utilize cultural codes as tools to assess and construct the parameters of the law. Before I can assess the oral argument as a meaningful space where the issues are shaped and understood through interaction, I will present the case to be reviewed, discussing how scholars understand oral arguments and offer a theoretical sociological background of cultural codes.

## CASE

The case under review for this study is *Brown, Governor of California, et al v. Entertainment Merchants Association et al*. The oral argument was held on November 2, 2010. The Video Software Dealers Association initially filed the lawsuit in August 2007 in the U.S. District Court for the Northern District of California. The lawsuit challenged a

California law enacted in 2005 restricting the sale or rental of violent video games to minors. The District Court held that the law was unconstitutional and violated the first amendment guarantee of free speech. The court also ruled that the wording of the definition of a “violent video game” and the labeling provisions of the law were both too vague to be upheld.

Next, the case went to the United States Court of Appeals, Ninth Circuit in 2008. Having lost its case in the lower court, California shifted the focus of its claims to that of states’ rights to protect minors. However, in the Court of Appeals the Judge held that violent video games were not “obscene” under the First Amendment, that the law was not precise enough in definition to warrant State intervention, and there was not a compelling interest to prevent harm to minors caused by violent video games.

This shift in focus was also found in the final questions presented to the Supreme Court in 2009, which centered on states’ rights and the constitutionality of the law rather than the initial concerns relating to the law’s wording and labeling provisions. The final questions as presented to the Justices were (1) Does the First Amendment bar a state from restricting the sale of violent video games to minors? (2) To overcome the first amendment protection of the game makers, does the state need to demonstrate a direct causal link between violent video games and physical and/or psychological harm to minors before the state can prohibit the sale of these games to minors? By accepting this case for review, the Supreme Court was tasked with resolving the conflict between the right of free speech found in the First Amendment and the state’s rights and responsibility to protect minors from harm. The majority opinion of the Supreme Court struck down the law on the basis that it violated the First Amendment protection of video games as free

speech and that it failed to pass the strict scrutiny test which required a compelling government interest to intervene.

Legal briefs are written arguments presented to the court claiming why one particular side's claim or story has more merit. Legal briefs often frame the initial policy and legal boundaries to be discussed for the cases heard by the court (Wahlbeck 1998). The legal briefs contain citations to legal precedent and the lawyer's arguments applying that legal precedent. Prior to the oral argument, outside interested parties submitted approximately thirty amicus briefs, which are commonly known as friend of the court briefs, trying to influence the outcome.

I chose this case because it was the first Supreme Court case related to the First Amendment issues associated with the video game industry. As such, it offers an interesting look into how the Justices utilize cultural codes to define the issues that surround legal questions concerning this new medium of entertainment. The video game industry has not received much attention in the legal process and this case provides a way to examine the role of cultural codes and expectations about video games and how that plays out in the formal legal process of the Supreme Court.

In recent years, the video game industry has been going through a transformation with touch-enabled devices and motion-based inputs becoming a large part of gameplay. These two new ways of gaming, which both allow players to more directly interact with games, has rekindled the concerns about the potential impact of violent video games on minors. Many violent video games utilizing these interactive systems of control were presented to the Justices to justify the law restricting the sale of violent video games to minors. An example of this interactive control scheme in gameplay is using the controller

to simulate violent actions. For example, in some games a slicing motion with a controller translates to the gamer's character slicing another character within the game. In the past there have been many claims made concerning the negative impact of violence in video games such as Mortal Kombat. However, these concerns have not resulted in the establishment of legal precedent to regulate the distribution of violent video games. What sets this case apart from earlier legal precedent related to violence in other forms of media, is that the consumers are not merely observing the media but are actively simulating the violent actions in video games.

I also chose this case because the questions presented and the oral arguments are examples of meaning construction and negotiation in a high-level institutional context. The scene involves eleven people, nine Justices and two lawyers, arguing over the intent and meaning of the law for the purpose of constructing institutional understandings. This negotiation and construction is played out in the context of the oral argument. By observing this process it is possible to observe how these precedents and legal meanings are constructed, challenged, renegotiated and modified through the use of cultural codes throughout the interaction. The Justices will interpret new legal boundaries for the video game medium through the lens of established legal precedent used to regulate other forms of entertainment.

In dealing with a new technology and social media, this analysis will be a unique space to observe how legal standards and assumptions are constructed during the process of the Supreme Court oral argument. This insight allows for a sociological vantage on the social construction of reality in a context with very concrete consequences. The oral argument transcript reflects the fifty-six minute conversation between eleven people

attempting to define and construct an understanding of the argument or legal precedent. Part of the purpose of the Supreme Court oral arguments, as argued by Johnson (2004), is to construct and shape opinions beyond the singular viewpoints and stories presented to the Justices through the thousands of pages of briefs presented prior to the hearing. During the oral argument, the lawyers are trying to construct their stories in such a way that they convince the Justices to accept their viewpoints while the Justices are trying to pin down the arguments to their essence as well as challenging the lawyers to come up with their best arguments.

I think it is pertinent to mention my relevant positionality to the context of the case. I am a Californian who played video games as both a minor and as an adult. This experience allowed me to be more literate with certain concepts raised in the Supreme Court oral argument. My background as a Californian gamer helped to make sense of the conversations about players' experiences of interactive video games and the specific stories of the video games. However, this knowledge did little to inform my understanding of the legal processes and issues that surrounded the claims that were made by the lawyers. Therefore, my positionality allowed me to understand the video game centered claims and hypotheticals throughout the oral argument, but I had to learn how the law was being used to make sense of these experiences.

#### THE SUPREME COURT AS CONTEXT

In the United States, the Supreme Court is the final arbiter of the law. Its role is to rule on constitutional questions in civil and criminal cases and resolve conflicts in decisions of the lower courts. Through the process of hearing and ruling on cases, the Justices establish or reinforce legal precedents that help define the legal and moral order

of our society. The oral argument is an important part of this process as it allows the Justices to find, challenge and clarify information that is important for their understanding the law in question (Johnson 2004).

Nine Justices sit in a semi-circle facing but above the singular podium that the lawyers use to address the issues raised by the Justices who frequently interrupt them to direct the argument to the issues they are concerned about. In addition, the hearing is open to the public and journalists who sit just outside of the podium area. This setting provides for a sociological analysis of the specific discourse and topics presented as a form of information gathering used by the Justices. Contrary to this, many legal scholars dismiss the oral argument as a worthwhile place of study (Smith 1993, Rohde and Spaeth 1976). Many contemporary legal scholarly studies often ignore Supreme Court oral arguments and treat them as antiquated formalities rather than as an integral part of the process (O'Brien 2000, Smith 1993, Carp and Stidham 1996, Segal and Spaeth 2002).

Many legal scholars argue that the oral argument is not important to the legal process because the pertinent information and argument can be found in the briefs. Their major critique is that an hour of debate about the legal and policy merits of a case will not change a justice's expected vote (Segal and Spaeth 2002, Abraham 1993, Smith 1993).

An important distinction between the purposes of research by legal scholars and my research is that while they focus on the impact of oral argument on the outcome of the cases, I am concerned with how the Justices talk about and navigate a conversation on the topic given the written information already presented to them. As such, the importance of oral arguments can be found in how Justices use the oral argument as a space to gather and shape information through specific discourse and dialogue centered on cultural codes

and legal precedents. The oral argument provides opportunities to have cultural codes and stories presented to them in an oral format that may not be as apparent in formal legal writing.

The oral argument is a unique way for Justices to gather information in cases beyond the formalized briefs and prior written opinions (Wasby et al. 1976, Johnson 2004). While there are many scholars who have explored other aspects of the Supreme Court's process (such as: Caldeira, Wright, and Zorn 1999, Johnson 2004, Segal and Spaeth 2002, and Epstein and Kobylka 1992) few have looked at the oral argument. By arguing that Justices use oral arguments to raise issues not explicitly discussed in the briefs, the oral argument takes on a particular sociologically important role in the legal process (Johnson 2004). Utilizing Johnson (2004), Amsterdam and Bruner (2000) and Zerubavel (1997), I argue that the methods and forms of the questions presented by the Justices in the oral argument showcase the use of categories, cultural codes and legal precedents.

Amsterdam and Bruner (2000) provide an important link between sociological concerns and the legal process. In their book *Minding the Law*, Amsterdam and Bruner (2000) claim that, "If law is to work for the people in a society, it must be (and be seen to be) an extension or reflection of their culture" (2). Expanding on this claim that links the social realm to the legal realm they discuss how the legal process is dependent on the taken-for-granted process of categorization. A few examples from the oral argument of taken-for-granted categorizations in the legal process is brought into focus when Justice Ginsberg states, "So it's 18, and California doesn't make any distinctions between 17-year-olds and 4-year-olds?" (Oral Argument Transcript [hereafter referenced as "OA"]:

10). Additionally, Justice Scalia approaches the category of minor when he questions “Artistic for whom? For a 5-year-old? What a 5-year-old would appreciate as a great art, is that going to be the test?” (OA: 58) and most explicitly when Mr. Morazzini states. “[...] the jury would be instructed to consider minors as a whole” (OA: 10). These examples show how in order for legal understandings to be established there needs to be a baseline understanding of what constitutes the categories of people, actions or things to be referenced in legal outcomes.

Combining Johnson’s (2004) hypothesis that oral arguments are information-gathering tools for the Justices and Amsterdam and Bruner’s (2000) discussion of the role of categorization in the legal process, one can see that oral arguments are important spaces for sociological study as they inform meanings and boundaries in the legal institutional setting. Categorization is necessary to make sense of the world (legal and social) and to communicate with one another about it (Amsterdam & Bruner 2000, Zerubavel 1997). Categories make the meanings and boundaries associated with legal issues and cultural expectations easier to discuss especially in a complex setting like the Supreme Court.

#### CULTURAL CODES AS CONTEXT

Classification is an important aspect of culture. Cultural codes are socially circulating systems of ideas that classify and organize objects into groups or categories for ease of understanding them in everyday circumstances when limited information is available (Zerubavel 1997, Amsterdam and Bruner 2000). By using categories, practical actors are able to communicate, construct meaning and thereby maintain social order. Classifying and categorizing are social acts that people perform in a particular social

context (Zerubavel 1997, Cerulo 1998 and Polletta et al. 2011). In other words, there are multiple interpretations of the social context and meaning systems in any given situation due to multiple conflicting systems of meaning coexisting in modern society. These theories on social cognition are located within a constructionist perspective. The social dimension associated with categorization becomes more evident when considering how the distinctions we make often change (Zerubavel 1997). By understanding categorization from a constructionist perspective, we can see how categories are tools, which help to differentiate and establish our social realities. For example, minors are constructed as a category throughout the oral argument and identified as a group of innocents who deserve protection.

This process of differentiation and categorization is best described by Zerubavel (1997) as ‘border disputes’, which are instances when the boundaries of meaning are disputed, discussed and re-established in order to put the objects of the meaning construction into the specific cultural normative structure in which the discussion takes place (Zerubavel 1997). The particulars of the oral argument provide examples of these border disputes often found in debates, structuring institutions and everyday interactions. Border disputes represent the practical attempts to compartmentalize and delineate meaning into specific regions or islands of understanding (Zerubavel 1997). Categorizations and border disputes showcase the way that people organize realities in an attempt to make the complex more understandable and to avoid issues of conflicting meanings in interactions. Some people understand these categories or cultural codes as a repertoire or tools available to use to solve different kinds of problems (Swidler 1986, Johnson 2004 and Amsterdam and Bruner 2000). A few concrete examples of cultural

codes as a means to solving different kinds of problems by categorization found in my analysis are the ways minors are constructed as innocent, how violence is constructed as degrees of negative entertainment and the way that video games are constructed as being primarily produced for minors.

By positing culture as a 'toolkit' from which actors select different means to construct their action, Swidler (1986) addresses how diverse groups behave differently in similar situations, as there are a variety of tools (in this case cultural codes or categories) available for any given situation. Justices use cultural codes or categories as tools to shape the information they receive during the oral argument.

Johnson (2004) discusses the Justices as actors who must take into account multiple expectations of 'proper' action in the context of the court and the issues surrounding the case. Combining this assertion with how Amsterdam and Bruner (2000) view categorization's role in the construction of law, it is possible to better understand the cultural codes the Justices use to probe, construct and renegotiate legal meaning and boundaries. More specifically, by probing, constructing and renegotiating meanings through their questions and assertions in the oral argument, the Justices are making sense of all the pieces of the story to construct their reasoning for their eventual decisions. Ultimately, these tools are embedded in the context of the court proceedings, which in turn are embedded in ongoing social life, which are used to construct the meanings necessary to address the practical tasks of the Supreme Court in determining the constitutionality of the law. As such, it is important to understand how these cultural codes are formed, how they relate to the culture in which they are found and how the context impacts their use. Examples of how to ask questions about cultural codes and

categorizations are found in Cerulo's (1998) work *Deciphering Violence*. This work also provides an insight into the code of violence and its reception, which is directly related to the stories of the oral argument analyzed in this paper.

Cerulo (1998) distinguishes the cultural code available to make sense of different types of violence as: deviant violence, normal violence and ambiguous violence (6). She presents the cultural code as necessary for the audience observing or experiencing violence to make sense of the particular violent themes. Many of these attributes of evaluating violence can be seen in the oral argument as part of the border dispute regarding what the law means by violence. As such, her work attempts to understand the construction and reception of violent accounts, which relate to the way that the Justices in this case attempt to distinguish between types of violence.

As also discussed by Zerubavel (1997), Cerulo (1998) argues that the individual assessment of events is variable due to vastly different meanings attributed to similar acts. She addresses the process of referencing events back to cultural stocks of knowledge by putting forth a two-step process; "Individuals first apprehend and process the sequences that organize facts and images; individuals then interpret these sequences in a culturally specific way enabling them to classify and evaluate the information at hand" (Cerulo 1998: 35). This assertion is important as the Supreme Court Justices have a very particular stock of knowledge in legal rules and precedents in addition to their culturally specific stocks of knowledge. As such, the linkage between cultural codes as categories and the legal boundaries of categories as meaningful tools to gather and shape information is established. (Johnson 2004, Zerubavel 1997, Cerulo 1998).

In brief, the theoretical background of my project includes: (1) the importance of the oral argument as a meaningful space for information gathering and negotiation by the Justices (Johnson 2004); (2) the role of categorization in the legal process (Amsterdam and Bruner 2000); and (3) the importance of cultural codes as tools to categorize objects, events and people in the complex social world (Zerubavel 1997, Swidler 1986).

#### DATA & METHODOLOGY

The data are the oral argument transcripts of the Supreme Court case *Brown, Governor of California et al. v. Entertainment Merchants Association, et al.* This case questions whether or not the right to deny minors access to violent video games is unconstitutional in reference to a California law enacted in 2007. The sixty-one page transcript contains verbatim reports of the fifty-six minute interaction between the nine Supreme Court Justices and the two lawyers who are a part of the formal proceedings of the oral argument for this case. The oral argument takes place in the high vaulted courtroom in the Supreme Court Building where the Justices sit in a semi-circle of desks that are focused on a podium. During the oral argument the lawyers address the Justices one at a time from the podium. The positioning reflects the formalized power of the Justices. During the oral argument the Justices repeatedly interrupt the lawyers with questions.

Over the course of the oral argument the Justices prod and question the lawyers for information they can use to assess and delineate the parameters of the law presented in the case. Therefore, I analyzed this transcript as if it were a story. I then asked a series of questions: What is the scene of the story? What is the plot? Who are the characters? What are the relationships between the characters? What are the morals? I specifically

followed Loseke's (2011) methodology for assessing the characteristics of stories told on public stages.

First, I established the *social context* of the data. I identified the major characters and initial plot in the transcript of the Supreme Court oral argument. In addition, I examined the case's trajectory through the court system and reviewed the briefs in order to grasp the *social context* of the data. I also analyzed the literature surrounding the Supreme Court oral arguments in order to understand the who, what and how of this specific legal process. This provided the social context of the data for this study, which is reviewed briefly in the 'case' section.

Second, I followed the steps of Loseke's (2011) methodology by categorizing explicit descriptions of the characters. The primary characters in this story are the child, the parent, the state and the video game industry. I coded within the oral argument transcript to address these questions of how they are constructed: What kind of persons are they? What is their relationship to each other? Where do they fit in the story? What are 'proper' relationships or expectations of these characters in the context of this plot? as well as how are they represented as a category? This provided the underlying attributes of the characters and plots, which are periodically referenced throughout this work to better situate the focus of this work on the process of working through border disputes. After coding and reviewing these explicit descriptions of the characters I moved onto the next step of assessing the plot and moral of the story.

Third, I located thematic examples in the form of the border disputes around the plot of the oral argument. This step of my methodology accounts for how the data is analyzed in this paper. For the purposes of this analysis I focused on two major plot

points of: whether or not video games are a problem, and if so, whose responsibility is it to protect or monitor kids' access to them. I coded within the oral argument taking into account the character descriptions determined in the second step to see how these characters and plots interact along tensions of the plot and the purpose of the oral argument itself. Additionally the intersection of these plots and characters can be understood as border disputes that occur throughout the oral argument.

## ANALYSIS

The oral argument is organized as a conversation between two competing stories from the opposing lawyers. The oppositional nature of the oral argument is structurally created, as there are two lawyers who are each arguing for their client's interests. Mr. Morazzini, the lawyer for California's interests, put forward the story that the law that permits States to restrict minors' ability to purchase violent video games, thereby helping parents protect the well-being of children when they cannot be present, should be upheld by the Supreme Court (OA: 3) (hereafter referenced as "State Responsibility Story"). Meanwhile, Mr. Smith, the lawyer for the Entertainment Merchants Association's interests, put forward the story that this law impinges on First Amendment standards due to the ill-defined nature of violence that could be used in the future to limit expressive works beyond video games. Mr. Smith also argued that the law impinges on parents' rights, responsibilities and expectations to exercise their own authority over what their children, see, hear and play (OA: 26)(hereafter referenced as "Parental Rights Story").

As practical actors, the two lawyers construct two distinct and clashing sides of the issues hoping to convince the Justices of the moral correctness of their story. The business of the lawyers is to construct their story to be understood as more important and

more believable than the story of their rival (Leubsdorf 2001). The two lawyers attempt to frame their story as most important and relevant throughout the oral argument by answering the Justices questions, proddings and hypotheticals. While the world is complex, messy and full of shades of grey, the context and purposes of the Supreme Court demands distinct and clashing stories. Through the interaction of the oral argument it can be seen how the limits, boundaries and points of contentions are managed by the lawyers to best fulfill the purpose of the Supreme Court case, specifically to address the constitutionality of the State's right to limit access of violent video games to minors.

The Supreme Court Justices use border disputes to negotiate which story has the most legal merit. The Supreme Court Justices are raising and attempting to resolve these border disputes through the context of these two stories. These border disputes surround the construction of the characters, the plots and the morals that serve to distinguish these two stories. There are many border disputes, and therefore points of contention, in the oral argument but only a few adequately reflect the specific tensions between these two stories. The major points of contention in the oral argument that address the parameters of the stories presented are: **(1)** parents need help parenting from the state versus parents as the only necessary authority figure; **(2)** minors as enacting and learning violence from video games versus minors consuming and constructing entertainment in violent video games; **(3)** deviant violence in video games is a problem versus violence as an normative attribute of entertainment. These three border disputes respectively deal primarily, but not exclusively, with the characters, the plots and the morals of the two competing stories. Additionally, these are each concerned with the underlying cultural codes of the rights

and responsibility of parents, the innocence of children, and the moral meanings of violence.

*State's Intervention vs. Parental Authority*

A major contention in this case is what role parents should and can play in the lives of their children. The distinctive constructions of the role of parents differ depending on which of the two stories is being supported. This border dispute is based around the questions of whether or not parents are responsible and available enough to oversee their children in terms of what they are allowed to view and which video games they are allowed to play. The border dispute raises the issue, does the State need to intervene to protect children whose parents are failing to oversee their children or do parental rights and responsibilities to care for the moral development of their children take precedent over state concerns. As such, the parent, as a category, becomes the mediator of the State's intentions and ability to protect children, as the parents are the expected primary caretakers of minors.

The State Responsibility Story argues that parents need help because they are not always available to protect their children. Beyond their lack of availability this story also questions the competency of contemporary parents to fulfill their expected roles as caretakers, according to cultural codes of ideal parents.

The State Responsibility Story and the law presented for scrutiny in this oral argument make the claim that the law is meant to assist parents in protecting their children by placing restraints on retailers. After Mr. Morazzini maintains that the law is attempting to ensure that the parent is involved in the purchasing decision, Justice Scalia attempts to clarify this goal, "...a law to help parents; is that right?" (OA: 22) Justice

Breyer further supports Mr. Morazzini's assertion by stating, "They [parents] need additional help because many parents are not home when their children come home from school " (OA: 29). The border dispute of the State's role in family matters are explored further by Justice Sotomayor, "[...] there's proof that some parents, as well-intended as they may or may not be, have not been able to supervise that [purchase of game]." (OA: 49) The Justices here are contending whether or not parents are capable of supervising their children given their other expected responsibilities and roles. While the Justices and lawyers construct the role of the parent as an authority figure, they question whether or not this is just an ideal. This parental ideal is questioned due to the presumed conflicting roles, availability, and responsibilities of modern parenting. The Justices and lawyers question the practical actors of parenthood by arguing that often they lack the knowledge, involvement and availability to practice their legal and cultural authority as parents.

The Parental Rights Story on the other hand portrays the parents in the oral argument as the authority figures who have the right to raise their children as they see fit without interference from the government. An example of the legal precedents supporting parents as authority figures is succinctly expressed by Mr. Morazzini in his argument on behalf of the state, "...under Ginsberg, they're [parents] entitled to direct the development and the upbringing of their children in the manner they see fit" (OA: 22). This assertion coming from the proponent of the State Responsibility Story is telling as it affirms the construction of the parent as arbiter of the child's actions yet brings into focus the border dispute of to what degree parents have authority before the state must intervene to protect the minor from harm. In other words, at what point do the concerns for the child's safety supersede the rights of the parents. Mr. Smith supports the role of

parents as having decision-making power over the content in the household by mentioning that, “Families have different judgments that they make about their children at different ages and with different content and different family values...” (OA: 36) The expected role of parents as authority figures is even affirmed within the video game systems’ hardware themselves through the parental control software.

The claim of parental authority in the context of video games consumption can be understood similarly to how other mediums manage such issues through internal ratings boards. The information of the ratings system also provides tools for parents to maintain their empowered authority over their children, according to Mr. Smith (OA). Justice Scalia presents a hypothetical of the parent’s expected role as the authority figure, “—if the parents of the minor want the kid to watch this violent stuff, they like gore, they may even like violent kids...So long as the parent buys the thing, it’s perfectly okay.” (OA: 22) By presenting this hypothetical Justice Scalia is testing the boundaries of parental authority. This sentiment brings up the issue of parental controls and the expectations of parents’ oversight of their children. Mr. Smith addresses this construction of parents by discussing the ratings board and the assumption that the “game is being played in the home on the family television...” (OA: 30). Therefore the Parental Rights Story focuses on the expected role of parents as an authority figure for children in our society to manage their own children rather than rely on state intervention.

#### *Affecting Moral Development vs. New Entertainment*

Major plot developments of both stories surround the perceived affect of these violent video games on minors’ moral development. Specifically, this border dispute deals with the major plot point of whether or not violent video games are teaching

children to interact or emulate the violence and therefore determines if there is a problem requiring State intervention to protect minors.

The State Responsibility Story claims that minors are enacting and learning violence from these video games, which negatively impacts their moral development as responsible members of society. In the oral argument, the story of enacting and learning violence is expressly presented by Chief Justice Roberts' contention that "the child is doing the killing. The child is doing the maiming" (OA: 27). Throughout the oral argument this proscriptive language is used to support the claim of the State Responsibility Story that due to acting out the violence the minors' moral development is affected. In order to convince the Justices that there is a need to monitor the sale of violent video games, Mr. Morazzini cites experts' findings and claims that, "...video games are not only exemplary teachers of pro-social activities, but also exemplary teachers of aggression..." (OA: 6). Justice Scalia offers an example of how violent video games can be constructed as different from more traditional forms of entertainment due to their interactive nature,

It is totally different from—it's one thing to read a description of—as one of these—one of these video games is promoted as saying, 'What's black and white and red all over? Perhaps the answer could include disposing of your enemies in a meat grinder.' Now, reading that is one thing. Seeing it as graphically portrayed and doing it is still a third thing. (OA: 37)

This example shows the moral evaluations associated with this border dispute, which stem from socially circulating cultural codes surrounding violence and how we protect our children from this behavior. These examples also showcase the concern for the new ways to play, touch screens and embodied inputs, as a problematic shift in how video games are experienced by minors.

The Parental Rights Story claims that players have more interaction with the formation and experience of the games rather than merely passively emulating the violence. Mr. Smith, the proponent of the Parental Rights Story, asserts that minors creatively interact with and actively participate in video games, thus providing a positive benefit for minors:

The child is helping to make the plot, determine what happens in the events that appear on the screen, just as an actor helps to portray what happens in a play. You're acting out certain elements of the play, and you're contributing to the events that occur and adding a creative element of your own. That's what makes them different and in many ways wonderful (OA: 41).

Mr. Smith makes this defense to promote the positive expressive attributes of video game playing as informing other skills besides violent action. Thereby constructing narrative, plot and artistic representations of violence in video games as a meaningful expressive aspect of the contemporary video games.

Mr. Smith also references expert knowledge to assert that, "[...] the effects of these games are not one whit different from watching cartoons on television or reading violent passages in the Bible or looking at a picture of a gun" (OA: 36). The Justices make this claim throughout the oral argument as well, which shows the specific ambiguities surrounding the cultural understanding of what the purpose or benefits of video games are as a new more interactive form of entertainment in contrast to more traditional forms of entertainment with similar levels of violence. While most of the claims surrounding this portrayal of the effect of these violent video games on minors come from the lawyer supporting the Parental Rights Story, there are intermittent comments from the Justices throughout the oral argument concerning the ambiguity of the differences between violence in video games and violence in other forms of

entertainment. These plot assertions are examples of deviant violence as a problem versus violence as an artistic attribute of entertainment mediums.

### *Deviant Violence vs. Normal Violence*

The understanding of what constitutes deviant violence is paramount to this Supreme Court case and is the border dispute where the morals of both stories are constructed and negotiated. The Justices negotiate what differences are meant between normative and deviant violence according to the law in question by constructing the boundaries of what are acceptable and inappropriate levels of violence in video games. The tension of how to construct a legal understanding of violence in video games is best exemplified by Justice Scalia's series of questions, "What's a deviant—a deviant, violent video game? As opposed to what? A normal violent video game?"; "There are established norms of violence?"; "I mean, some of the Grimms' fairy tales are quite grim, to tell you the truth." (OA: 4). The distinctions between what constitutes deviant and normative levels of violence in video games reflect the evaluative moral claims of both stories.

The State Responsibility Story claims that violence in video games can be deviant and constitutes a problem that needs to be managed by the government. This claim is affirmed by Mr. Morazzini's statement that, "...the interactive nature of violent—of violent video games where the minor or the young adult is the aggressor, is the—is the individual acting out this—this obscene level of violence, if you will, is especially harmful to minors" (OA: 6). The description of the interactive violence as obscene is an important value judgment of how violence and minor involvement in video gameplay is constructed by the State Responsibility Story (Cerulo 1998).

When the definition of violence according to California’s law is described as vague, Mr. Morazzini states that, “We can build a consensus as to what level of violence is in fact patently offensive for minors, is deviant for minors, just as the case law has developed over time with sexual depictions” (OA: 15). However, Justice Breyer’s examples showcase how common sense creates moral tensions of the constructed layers of deviance, “I’ve tried to take as bad a one as I could think of, gratuitous torture of children. Okay? Now, you can’t buy a naked woman, but you can go and buy that, you say to the 13-year-old.” (OA: 32) Justice Roberts gives a story to exemplify these common sense assumptions:

Graphic violence. There is a difference. We do not have a tradition in this country of telling children they should watch people actively hitting schoolgirls over the head with a shovel so they’ll beg with mercy, being merciless and decapitating them, shooting people in the leg so they fall down—I’m reading from the district court description—pour gasoline over them, set them on fire, and urinate on them. We do not have a tradition in this country. We protect children from that. We don’t actively expose them to that. (OA: 33)

This demonstrates how the moral evaluations of violence are inextricably tied to questions about what it does to minors’ innocence. Statements like these and those referenced above highlight how the Justices navigate and negotiate the border disputes in the context of the oral argument explicitly through cultural codes, hypotheticals and historical precedents as tools to interpret the constructions of minors, video games and violence.

By arguing that there are levels or degrees of deviance associated with violence, the border dispute of what violence is becomes a moral issue. The Justices present these definitions of violence as problematic for the legal understanding of this law. Mr. Smith

claims that violence in video games would need to be classified, “Violence would require you to draw a much different line between acceptable protected violence and unacceptable unprotected violence for minors...” (OA: 46) The best representation of this contention and the layers involved is when Justice Sotomayor says, “[...a study] says that the effect of violence is the same for a Bugs Bunny episode as it is for a violent video. So can the legislature now, because it has that study, say we can outlaw Bugs Bunny?” (OA: 7). These examples show the complex layers and implications of constructing such moral evaluations of what are normative levels of violence for minors’ entertainment, in the legal context of the Supreme Court.

The Parental Rights Story claims that violence in video games are an understandable part of the video game industry, although the meanings and limits of this understandability are being probed during this interaction. Mr. Smith and Justice Scalia remind the Court that the video game industry is made up of businesses whose customer base is not made up of just minors and additionally that without a clear legal definition of what would be considered for censor under the law these businesses would take unknown monetary risks (OA: 13,55). Beyond the monetary issues, Mr. Smith argues that the video game businesses are concerned with the law’s impact on their ability to provide for the demands of their customers to support the technical gameplay with a narrative or artistic component (OA: 39). In the oral argument the degrees of violence in video games are often compared to the artistic portrayals of violence in other forms of entertainment. Thereby the meanings and limits of these portrayals of normative and deviant violence are being defined in these conversations by the artistic foundations of other expressive mediums that are considered entertainment. For example, Justice Sotomayor posits the

question of whether rap music should be controlled as well given the violent nature of the lyrics under the purview of this law. Justice Sotomayor thereby confronts the tensions of applying moral evaluations of what constitutes normative violence in video games by comparing it with other forms of expressive entertainment (OA: 9).

Justice Scalia further explores the boundaries and the impact of moral evaluations of normative versus deviant representations of entertainment by posing a question about the purview of the law in question, “If it has a plot, it has artistic value? Is that going to be the test for artistic value?” (OA: 57) Justice Sotomayor brings these tensions of what is appropriate and what is not appropriate to the forefront by stating, “To me, it’s not entertainment, but that’s not the point. To some, it may well be.” (OA: 7) By evaluating the relevance of the constructed definitions of the law, in terms of what constitutes deviant violence, the actors often refer back to precedents or legal thoughts on similar issues from the past.

Border disputes and the cultural codes are put into the contexts of precedents and cultural historical reflections because the scene of the Supreme Court, as formal institution, demands that established legal standards and history be the foundation of the stories in the oral argument. For example, Mr. Smith argues, “...violence has been a feature of works that we create for children and encouraged them to watch throughout the history of this country” (OA: 32). Additionally, Justice Scalia presents a historical challenge when he states, “I want to know what James Madison thought about violence. Was there any indication that anybody thought, when the First Amendment was adopted, that there—there was an exception to it for---for speech regarding violence?” (OA: 17) This reveals the depth of the discussion of what constitutes deviant violence in video

games and exemplifies the complexities of these two stories' constructions of plot and morals in the legal formal setting of the Supreme Court oral argument.

These major border disputes found throughout the oral argument between the claims of the State Responsibility Story and the claims of the Parental Rights Story highlights the points of contention and the associated assumptions. By reviewing these disputes it becomes apparent that there is a process and reasoning behind the flow of the oral argument. However, it is important to note here that these disputes presented are not mutually exclusive, and in fact often overlap in the oral argument. Additionally, the characters, plots and morals of these stories make up the intertwined foundation or tools by which the Justices search to gather and shape information for their decisions. The oral argument is the first and only time that the specific legal border disputes raised by the legal briefs are argued, discussed, challenged, modified, shaped, negotiated and constructed through interaction. The process of meaning-making in the Supreme Court oral argument is an attempt to construct meaning from the stories presented in the numerous one-sided briefs through the fifty-six minute interaction between the Justices and lawyers.

## CONCLUSION

The specific case under review in this study was *Brown, Governor of California et al. v. Entertainment Merchants Association, et al.* that challenged the constitutionality of the California law concerning whether or not the State has the rights and responsibility to censor access to violent video games for minors. The law is based on the assumed role of the State to maintain child protection when parents are unable to. The child protective issues that arise from the sale of violent video games present legal border

disputes for the Justices to resolve. This case was focused on negotiating the appropriate legal boundaries permitted to maintain the protection of minors' innocence. The challenges to the law were focused on whether or not state interference impinges on the first amendment and whether or not violent video games cause sufficient harm to minors to warrant state intervention. The majority Opinion of the Court was that video games are artistic expression and in order for this law to be considered constitutional there needs to be further strict scrutiny of what constitutes deviant and detrimental violence. As such, the Court found that video games fall under protection of the First Amendment as expressive artistic works that preclude state intervention. This case represents a topic that has received little to no legal attention and therefore provides a unique look at how cultural codes are relied on in conjunction with related legal precedent to make sense of the stories presented by the lawyers.

The Justices and lawyers use cultural codes for understanding the parameters of the law yet they must formulate their opinions using formal legal language. The Supreme Court oral argument is a space for shaping and gathering cultural information to assist in the formation of their opinions. However, it is also argued that the role of the Supreme Court oral argument is to assist in maintaining and negotiating the status quo of contemporary legal moral boundaries in our society. This study focused on the role of the Supreme Court as a space for shaping and gathering cultural information that analyzes the Justices as meaningful actors in the construction and renegotiation of law and constitutionality (Johnson 2004). The Court's legal opinion has real consequences in the legal realm, in cultural understandings of moral reality and in the everyday experiences of the affected parties. The oral argument provides the space where Justices have the

opportunity to question, assess and shape the legal and moral boundaries used in legal precedents. As the Justices arbitrate the legal moral boundaries through the oral argument interaction (Johnson 2004), it is important to discuss and evaluate how cultural assumptions fit into the legal process and the formal legal language.

As evidenced by the analysis and review of three major border disputes of the oral argument in this case, we see how two competing stories are constructed, managed and shaped through the interactions of the Justices and the lawyers. The border disputes dealt respectively with the constructions of the characters, the plots and the morals of the two clashing stories of the lawyers.

First, the characters were discussed in reference to their role in the law by examining the border dispute of whether or not parents are responsible or available enough to oversee their children. The State Responsibility Story argued that parents need the State intervention to protect their children due to the shifting responsibilities of the contemporary parent. The Justices question and cite expert knowledge on the topic of parents' ability to be the authority figure. On the other hand the Parental Rights Story argued that parents are the authority figures who have the right to raise their children without State intervention. The Justices and lawyers cite precedent and to play with the parameters of acceptable parenting in order to establish how the expected role of parents as authority figure is an important aspect to consider for the case presented.

Second, the plots of the oral argument, whether or not violent video games teach violence were discussed. Particularly the construction of violence in video games as impacting the innocence or moral development of minors was the concern of the State Responsibility Story. This concern was echoed by the Justices' references to the

interactive nature of the games as teaching children how to emulate violent action rather than how it is passively consumed in other forms of entertainment. The Parental Rights Story argues that the interactive experience of these games do not make them starkly different from other forms of artistic expression in entertainment. The Justices and lawyers reference other expressive works as once being deviant and problematic in addition to citing violence in other forms of entertainment having a similar affect.

Finally, the concepts of deviant and normative violence were analyzed as moralistic claims in the oral argument with the concern for the impact of violent video games on the innocence of minors. The Justices and lawyers often make links between hypothetical situations and understandings of obscenity to establish a baseline of what constitutes deviant violence. These comments were explored by contrasting statements about the normative use of violence as an expressive or artistic means for the players to interact with the games and garner entertainment from these video games. Beyond the moral evaluations, this discussion illuminates the underlying concerns of the interaction of protecting the innocence of minors.

By observing how cultural codes and related legal precedents are used to make sense of these stories we can see how this research could be used to review how border disputes in other cases are constructed and used by the Justices. Applying this sociological lens to Supreme Court oral arguments allows us to analyze it as a social process in which cultural codes and border disputes are used to make sense of the law and thereby provide a basis to study how the legal moral boundaries of our society are constructed and maintained in this legal setting. In other words, the legal moral boundaries of our society are also put on display as evidenced by the specific cultural

codes preferred in the stories as well as the border disputes that arise in the oral argument. By calling upon specific cultural codes in the oral argument process the Justices are choosing which morals will prevail and direct the conversation in the oral argument.

According to Amsterdam and Bruner (2000), the legal process is inextricably tied to the cultural understandings of a society. By categorizing the characters in a case, it becomes easier to discuss the meanings and boundaries of the law in question. Legal briefs often set the initial legal boundaries and categories to be discussed, shaped and contended in the Supreme Court oral argument. The interaction between the Justices and the lawyers at the oral argument provide the opportunity for the Justices to compare and analyze the issues framed by the one-sided briefs (Johnson 2004). They use the oral argument to flesh out and contrast these stories in interaction with those who wrote them. The Supreme Court Justices are utilizing cultural codes as tools to probe, shape, negotiate and challenge the legal meanings and boundaries of the case before them. Specifically, this research provides a sociological lens to view Supreme Court oral argument transcripts in reference to the legal narratives, cultural codes and border disputes found in this penultimate process of the highest judicial institution.

My research is concerned with understanding the processes behind the oral argument that pits clashing stories against one another through border disputes, which the Justices are tasked with navigating to reach a decision. The method and forms of the questions posed by the Justices in the oral argument rely on the use of categories, cultural codes and legal precedents. This paper analyzed how cultural codes intersect with the law in the specific legal context of a Supreme Court oral argument. By examining cultural

codes and border disputes in a Supreme Court oral argument, the impact of social assumptions and categorizations on the legal process can be studied.

While these border disputes are more representations of clashing stories than binary opposites, the way that the process of the oral argument is structured, with opposing positions, provides for a distinct and unique interaction for sociological study. The oral argument provides a unique and fluid interaction for sociologists to explore the social construction of the legal and moral order of our society. The social and legal constructs developed in this study of the legal process will be relevant in evaluating the meanings of future laws and Supreme Court oral arguments. The meanings and boundaries developed in this specific case through the social interaction and the briefs will shape the legal boundaries and laws in future cases involving video games. Equally, this case and its constructions will influence the evolving cultural codes and expectations surrounding video games.

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