EMORY | LAW

Emory Law Journal

Volume 73 | Issue 2

2023

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ALTERNATIVE FACTS: THE STRATEGY OF JUDICIAL RHETORIC

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ABSTRACT

Studies have established the influence of ideology on the answers justices give to legal questions; this study shows that the questions themselves are often selected, framed, and phrased in a way that promotes ideologically-driven answers. By examining a variety of linguistic techniques used to describe just the facts of constitutional criminal procedure cases—separate from the legal analysis—we show the justices are engaging in highly strategic behavior. The facts included, omitted, or emphasized vary with the ideology of the justices and are predictable not just based on voting behavior in other criminal procedure cases but in all Supreme Court cases. We undertake this analysis both qualitatively and quantitatively. For the latter, we created a novel dataset consisting of the complete text of the fact portions of every Supreme Court opinion dealing with police investigation since the beginning of the Roberts Court, 2005–2022 terms. We also created six sets of linguistic variables to test the effect of different factors on judicial framing of case facts: hedges and intensifiers; extent of abstract and specific language; positive versus negative framing; inclusion of surplus facts and omission of relevant facts; stigmatization versus personalization of individuals; and use of active versus passive voice. Lastly, we created two new measures of judicial behavior in terms of outcomes—the "pro-prosecution score" in criminal procedure cases and the "pro-conservative score" in all non-criminal procedure cases. We show that the justices make use of strategic fact manipulation to bring about outcomes in line with their pro- or anti-prosecution tendencies, as well as their pro- or anti-conservative tendencies. Yet, not all justices partake in this strategy equally: the relative moderates of the Court make little use of strategic fact manipulation, whereas the extremists on both ends of the Court make far more use of the techniques we identify. Framing a characterization as a "fact" presents an

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impression of objectivity and reliability; but if even the starting place for a Supreme Court opinion is ideologically tilted, if each side is entitled to their "alternative facts," then legal decision-making loses the promised legitimacy of being differentiable from the political process.

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INTRODUCTION

Traditionally, legal scholarship has reified the ideal of detached, impartial application of generalized law to specific facts.[1] The adversarial system allows each party to present information in the form of evidence to the courts and challenge the veracity of the other party's account.[2] This information crystallizes into the "facts" of a case—statements that are supported by evidence and theoretically refutable,[3] which will be dispassionately analyzed by a reviewing court. Although judges describe their reasoning processes as resistant to emotion and political influence,[4] judicial decision-making does not happen in a vacuum,[5] especially where cases touch on the personal experience of a jurist, are about issues with a high emotional temperature, or concern issues with a more distinct partisan valence.[6] While other research has examined the way that judges cite factual information from the submitted merits briefs (or, increasingly, from amicus briefs) and the trend of increased judicial fact-finding research outside of the litigation process,[7] there has been little critical examination of how

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[1] Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1, 4 (2018) ("[There is] a central presumption rarely questioned by the prevailing literature on judicial behavior—that logical reasoning can occur absent bias, emotion, and empathy."); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 721 (1988) ("It is of course clear that 'the fundamental aspiration of judicial decisionmaking . . . [is the] application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . ."'" (quoting Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting))).

[2] Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1257 (2012).

[3] Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 70 (2013).

[4] Bradley, *supra* note 1, at 4 ("Justice Sonia Sotomayor acknowledges that judges have emotions, but cautions that '[i]t's not the heart that compels conclusions in cases, it's the law. [. . .] Recognize those feelings and put them aside.' Chief Justice John Roberts, expressing his preference for judicial restraint, has stated that '[j]udges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.' The late Justice Antonin Scalia advised that 'good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.'" (citations omitted)); Adam Liptak, *Why Justice Breyer May Resist Calls for His Retirement*, N.Y. TIMES (May 17, 2021), https://www.nytimes.com/2021/05/17/us/justice-breyer-retirement.html (quoting Justice Breyer: "My experience of more than 30 years as a judge has shown me that, once men and women take the judicial oath, they take the oath to heart . . . . They are loyal to the rule of law, not to the political party that helped to secure their appointment").

[5] *See* Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1574 (2019).

[6] *See id.*; *see also* Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 41 (2015); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888–89 (2009).

[7] *See, e.g.*, Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 2, at 1263; Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017, 8:00 AM), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find.

judges—in particular the justices of the Supreme Court—rhetorically frame the facts of a case when authoring an opinion.[8] This Article identifies patterns in how the Roberts Court crafts descriptions of the factual circumstances at issue in constitutional criminal procedure opinions. We show that what the justices describe as the objective "facts" of the cases are in fact highly subjective, ideologically skewed, and strategically manipulated.

Prior work has empirically established that the decision-making processes of Supreme Court justices are influenced by ideology and politics.[9] However, that literature addresses how the justices develop answers to legal questions; it has not considered that the questions may also have been selected, framed, or phrased in a way that promotes an ideologically driven answer. If even the starting place for a Supreme Court opinion is ideologically tilted, if each side is entitled to their "alternative facts,"[10] then legal decision-making loses the promised legitimacy of being differentiable from the political process, raising the stakes of the counter-majoritarian difficulty.[11] Inquiring into the reliability of fact descriptions in judicial opinions is especially important in light of a recent trend in the lower courts of citing language directly from Supreme Court opinions for general factual information.[12]

We examine this question in relation to constitutional criminal procedure cases, having observed through reading the cases a high variance in how differing opinions within a case characterize the same facts at issue. It is possible that the variance in fact descriptions may be particularly salient in constitutional criminal procedure cases, both because those cases implicate prominent social

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[8] Though there has been some work on the language and rhetoric of the Court generally. *See infra* Parts I, II.

[9] *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 280 (2002) (establishing the strong predictive effect of ideology on vote outcomes); *see also* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 824 (2002) (summarizing the history of the field of empirical legal studies).

[10] This double-speak phrase was coined by then-President Donald Trump's counselor Kellyanne Conway, in defending White House press secretary Sean Spicer falsely claiming the crowds at Trump's swearing-in ceremony were "the largest audience to ever witness an inauguration, period, both in person and around the globe"; the interviewer, Chuck Todd, responded, "Alternative facts are not facts. They are falsehoods." *See* Mahita Gajanan, *Kellyanne Conway Defends White House's Falsehoods as 'Alternative Facts'*, TIME (Jan. 22, 2017), https://time.com/4642689/kellyanne-conway-sean-spicer-donald-trump-alternative-facts/.

[11] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 20 (2nd ed. 1986) (critiquing the ability of nonelected judges to invalidate legislation passed by elected politicians, which is particularly problematic if judges are politically influenced).

[12] Larsen, *Factual Precedents*, *supra* note 3, at 62.

issues[13] and because the doctrine is especially sensitive to variations in factual circumstances.[14] But those same factors make it particularly important to study how the factual descriptions provided in these cases are being manipulated.

We hypothesize that the justices are employing a variety of strategic linguistic choices when describing the facts of a case. We expect that how justices frame the purportedly neutral facts—separate from their legal analysis—displays patterns that are far from neutral. In contrast to the idealized legal thesis described above, we expect that the justices will be strategic,[15] crafting the facts of a case to fit their ideological proclivities and to promote the rhetorical persuasiveness of the conclusion they reach in the outcome of the case. Framing the description as "facts" presents an impression of objectivity and reliability,[16] but we theorize that "facts" as the justices describe them are shaped toward the strategic goal of suiting the answer that their legal analysis leads them to; that is, the questions are shaped by the preferred answer.[17]

To test this hypothesis, first, we look qualitatively at how the justices describe the police and defendants as "characters" in the factual story in a way that aligns with their ideology and makes the ultimate holding seem more palatable. We lay out the different linguistic techniques identified in other contexts and present numerous case examples where the justices use these tools

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[13] Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 993 (2001) (describing criminal law as "a traditional medium for emotion in law" because "[c]riminal law has often touched emotion, sometimes providing a safe haven for emotion within the social order, identifying which emotions act as valid defenses to crime, indulging the impulse to punish, and occasionally restraining emotional reaction to crime in the name of civility and rationality"); *see, e.g.*, Thornburg, *supra* note 5, at 1620 (recounting an empirical study where a crime was described to judges tasked with deciding whether the crime constituted forgery under a statutory definition). The same crime was described as being motivated by either a desire to pay for a child's liver transplant or alternatively by a desire to harm someone who had stolen money from the defendant, triggering a "dramatically" different response in the respective groups of respondents. Thornburg, *supra* note 5, at 1620.

[14] Kahan, *supra* note 6, at 892. This analysis could also be undertaken with other courts. However, note that it is very data-intensive work for one apex court that takes less than sixty cases a year; the same analysis for lower courts would be enormous.

[15] *See* Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 342 (2010) (summarizing the extensive literature of strategic judicial behaviour in other contexts).

[16] Larsen, *Factual Precedents*, *supra* note 3, at 71.

[17] The Supreme Court is supposed to rely on the factual determinations of its inferiors. The hierarchy of the judicial system is based on the idea that fact-finding is done at the court of first instance and by the time a case reaches the pinnacle of the hierarchy, the facts should be well cemented. As such, this inquiry challenges the nature of the Supreme Court's judicial role within that hierarchy. There is good reason for the norm that apex courts should rely on the factual determinations of lower courts. Within the criminal procedure of police practices jurisprudence specifically, Seth W. Stoughton has shown that many of the Court's factual descriptions of how police of his act, police practices, and officer motivations are made without support and are often factually inaccurate. *See* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 897 (2014).

to lay the groundwork for their preferred conclusions. Second, we look quantitatively at whether that ideological tilt is systematically predictable based on the recognized overall ideology of each justice. We show that the strategic behavior we identify doctrinally in the cases is not exceptional but rather pervasive and ideologically-driven.

We both qualitatively and quantitatively examine Roberts Court constitutional criminal procedure cases and find the justices engaging in strategic inclusion or exclusion of certain facts, emphasis or deemphasis of certain facts, and starkly different language used to portray different characters in the narrative, in line with the result of the legal analysis that each justice promotes. For example, *Florence v. Board of Chosen Freeholders* concerned the lawfulness of subjecting all suspects held in prison or jail facilities to systematic intrusive bodily touching, regardless of the nature of their alleged offense.[18] Writing for a five-justice majority, Justice Kennedy rejected the term "strip search" as imprecise, instead framing the conduct at issue as "a close visual inspection while undressed."[19] Before Justice Kennedy even oriented the case as a challenge to the jail's "visual search procedures," or described what those procedures were, his first sentences emphasized the "legitimate interest, indeed a responsibility" that correctional officials have to protect "facility personnel, other inmates, and the new detainee himself . . . ."[20] Justice Kennedy's description emphasized at multiple points that the search is jail procedure that every arrestee must go through.[21] Only after hitting these points did Justice Kennedy describe the requirement to shower with a delousing agent and be checked for scars, marks, gang tattoos, and contraband while disrobing.[22]

Justice Alito's concurrence similarly played up the theme of regulating safety in the facility while playing down the nature of the bodily intrusion. Justice Alito recounted the details of the strip searches but described them simply as the arrestees being directed "to disrobe, shower, and submit to a visual inspection" where "the arrestees may be required to manipulate their bodies."[23] Justice Alito went on:

> **Undergoing such an inspection is undoubtedly humiliating and deeply offensive to many**, *but there are reasonable grounds for strip*

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[18] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 322 (2012).
[19] *Id.* at 322, 325.
[20] *Id.* at 322.
[21] *Id.*
[22] *Id.* at 323.
[23] *Id.* at 340–41 (Alito, J., concurring).

> *searching arrestees before they are admitted to the general population of a jail*. As the Court explains, there is a serious danger that some detainees will attempt to smuggle weapons, drugs, or other contraband into the jail.[24]

It is noteworthy how summarily Justice Alito dealt with the grisly facts that cut against his argument [bolded]. He admitted the intrusion to one's body was upsetting, but did this swiftly, glossing over the specifics. He also utilized other techniques of deemphasis. After briefly acknowledging the facts unhelpful to his case, he then immediately provided a rationale for them [italicized] in more detail than the description of the multiple intrusions the complainant had to endure. This counterpoint technique is seemingly an attempt to undermine the salience of the facts that were not useful to him. In the same sentence, he framed the intrusion as "reasonable," and then in the next sentence emphasized his rationale for this conclusion with specific examples of a "serious" potential danger. These techniques provide a window into the otherwise opaque decision-making process of judicial opinion writing. By giving detail to the rationale, but glossing over the intrusion, Justice Alito showed what he valued as relevant to the argument, and what he did not.

In order to comprehensively analyze these rhetorical devices, we created a novel dataset consisting of the complete text of the fact descriptions from every Supreme Court opinion in every Supreme Court case dealing with police investigation since the beginning of the Roberts Court. This data covers the 2005–2022 terms'[25] fifty cases in total. For each case, we analyzed all factual information in the majority, concurrence, dissent, and mixed (concurring and dissenting) opinions. We also created six sets of linguistic variables to test the effect of different factors on judicial framing of case facts: hedgers and intensifiers; extent of abstract and specific language; positive versus negative framing; inclusion of surplus facts and omission of relevant facts; stigmatization versus personalization of individuals; and use of active versus passive voice.[26]

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[24] *Id*. at 341 (emphasis added).

[25] Starting with the beginning of the Roberts Court in the 2005 Term was a natural boundary, given changes that have occurred at the Court in recent decades. *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 303 (2016) (describing changes at the Court due to polarized appointments). Ending with the 2022 Term was unavoidable because, in the Court's most recent term, the October 2023 Term, for the first time in many years, there were no constitutional criminal procedure cases dealing with police investigation.

[26] We coded a seventh category, identification of the characteristics of specific parties emphasized in the case, including defendant, police, victim, and witnesses, but found these terms were rarely used. For space reasons, we excluded discussion of this category. Results are available from the authors.

These variables capture the extent to which the justices use different linguistic and rhetorical devices.[27]

We also created two new measures of judicial behavior in terms of outcomes—the "pro-prosecution score" and the "pro-conservative score." The pro-prosecution score captures the percentage of times each justice votes for the state or the prosecution in our database of constitutional criminal procedure cases. The pro-conservative score captures the percentage of times each justice votes for the conservative outcome in cases *not* otherwise in our database, i.e., in all other areas of law in the same time period. This second score tells us whether we can predict each justice's tendency to use, for example, intensifying language about police in constitutional criminal cases, based on their votes in entirely unrelated areas, such as freedom of religion cases or abortion cases.[28]

We show that the justices make use of strategic fact manipulation to bring about outcomes in line with their pro- or anti-prosecution tendencies, as well as their pro- or anti-conservative tendencies. For example, conservatives are much more likely to use hedging language when describing bad behavior by police, whereas liberals are more likely to use intensifying language for the same behavior, in line with their sympathy for the prosecution or the defense, respectively, and the associated desire to minimize or emphasize blame, respectively.[29] We find that the effects are as predicted and statistically significant across at least some aspects of all six of our sets of variables. Importantly, some of our variables are more damning than others in terms of judicial neutrality, such as adding in surplus and potentially prejudicial facts, and we show these techniques are used in highly statistically significant and impactful ways. Also, although some of the variables may seem more innocuous, such as active-passive and positive-negative, we show that there is meaningful strategic behavior in terms of using these selectively, such as using active voice when conservative justices are describing good police behavior and using passive language when describing bad police behavior, thus deemphasizing it. As such, even the seemingly less problematic legalistic techniques are actually highly strategic and constitute "judicial advocacy."[30]

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[27] *See infra* Parts I.D, II.
[28] *See infra* Part III.A.
[29] *See infra* Part IV.
[30] *See infra* text accompanying note 126.

Interestingly, we show that there is important variation among the justices that is not random. The relative moderates[31] of the Court make little use of strategic fact manipulation, whereas the extremists on both ends of the Court make far more use of the techniques we identify. A number of secondary findings are also interesting in terms of linguistics—for instance, while there is a tendency in the extant literature to think about hedging and intensifiers as oppositional, we show that, at least in the case of Supreme Court justices talking about constitutional criminal procedure facts, the two are used together in a strategic manner. We also reveal a number of secondary findings that are significant in terms of legal methodology—for instance, we show a very strong relationship between a justice being more conservative and both adding more surplus facts and omitting more relevant facts, which discredits the claim that conservative methodology provides a means of discipline and restraint on justices.

Ultimately, we find that the factual descriptions of cases are part of a justice's overall persuasive framing of a case and their opinion. This research validates what others have theorized about opinion writing.[32] It is important to consider what persuasive strategies the justices are employing in framing case facts because the factual narrative adopted by an opinion is used as the foundation to justify why a doctrinal principle or a line of cases is appropriate or inappropriate as applied to the case. This is especially true in constitutional criminal procedure cases, wherein factual differences are so critical in distinguishing cases from one another.[33]

Part I begins with a detailed case example of the techniques we describe and illustrates just how different the justices' descriptions of the same facts can be. It then provides a description of the content of our study—the cases selected and how the facts are isolated. Part II provides the theory and illustrations of the rhetorical variables used by the justices, continuing our qualitative analysis. Part

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[31] The Court has become more conservative over time, and so the moderates of the Court are only moderate compared with the rest of the Court. By 'moderates,' we mean those who sit in the middle of an ideologically conservative Court. *See, e.g.*, Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative ("In an astounding 62% of the decisions, conservatives prevailed, and more importantly, often prevailed in dramatic ways.").

[32] *See, e.g.*, Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1387–88 (1995) ("Do these judicial 'storytelling' techniques drive the outcome of the case? Probably not; more likely the opposite. Judges decide outcomes, and then tell the story in a way that makes the outcome look like a perfectly logical and necessary consequence of the law, handed to us from above, as applied to the facts, handed to us from below.").

[33] *See infra* Part I.B.

III sets out the requisite elements to conduct our quantitative analysis, describing its building blocks and introducing our two novel scores of judicial behavior and their significance. Part IV provides our quantitative analysis. We undertake a multivariate regression analysis to rigorously test whether linguistic techniques are being used strategically. We show that there are systematic ideological patterns in the way that the justices use these devices, with conservative justices using linguistic techniques in describing the facts so as to favor pro-prosecution outcomes and liberal justices the reverse, and that extremists on the Court drive the effect. The results overwhelmingly support the strategic hypothesis and dispute the traditional legal theory, showing that justices' presentation of seemingly objective facts is in fact highly skewed and self-serving. We conclude with a discussion of the significance of these findings for the judicial role and the concept of judicial objectivity.

I. THE FACTS IN QUESTION: THE CONTENT ANALYZED

This Article develops a catalog of rhetorical techniques in order to understand the strategic framing and emphasis that authoring justices employ in the construction of factual descriptions. We first delve in detail into one case example. Then we describe our case selection and why constitutional criminal procedure cases are particularly apt for this analysis. We then explain how we identify what constitutes "the facts." Throughout this Part, we employ numerous shorter case examples.

A. A Detailed Case Study

In *Florida v. Jardines*, the Court held that it was a "search" under the Fourth Amendment to use a police dog trained to detect narcotics on the porch of a person's home.[34] To reach their competing conclusions on the law, the majority and dissent were strikingly polarized in how they described the same set of events. By emphasizing or minimizing the police officer's actions and the relative ferocity of the K-9 Unit, the justices each constructed a narrative that aligned with their understanding of the story—and used that narrative to shape the reader's perception of how reliable and normal the use of drug-sniffing dogs ought to be considered.

Justice Scalia, majority:

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[34] 569 U.S. 1, 11–12 (2013).

> In 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.
>
> Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by . . . tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source.
>
> After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.
>
> On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.[35]

Justice Kagan, concurring:

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[35] *Id.* at 3–4 (internal citations omitted).

> Here, police officers came to Joelis Jardines' door with a super-sensitive instrument, which they deployed to detect things inside that they could not perceive unassisted. The equipment they used was animal, not mineral.[36]

Justice Alito, dissenting:

> Detective Bartelt and Franky approached the front door via the driveway and a paved path—the route that any visitor would customarily use—and Franky was on the kind of leash that any dog owner might employ. As Franky approached the door, he started to track an airborne odor. He held his head high and began "bracketing" the area (pacing back and forth) in order to determine the strongest source of the smell. Detective Bartelt knew "the minute [he] observed" this behavior that Franky had detected drugs. Upon locating the odor's strongest source, Franky sat at the base of the front door, and at this point, Detective Bartelt and Franky immediately returned to their patrol car.
>
> A critical fact that the Court omits is that, as respondent's counsel explained at oral argument, this entire process—walking down the driveway and front path to the front door, waiting for Franky to find the strongest source of the odor, and walking back to the car—took approximately a minute or two. Thus, the amount of time that Franky and the detective remained at the front porch was even less. The Court also fails to mention that, while Detective Bartelt apparently did not personally smell the odor of marijuana coming from the house, another officer who subsequently stood on the front porch, Detective Pedraja, did notice that smell and was able to identify it.
>
> The Court notes that Franky was on a 6-foot leash, but such a leash is standard equipment for ordinary dog owners.[37]

One of the clearest rhetorical differences between the justices' opinions is how they described the "drug-sniffing dog" that played a starring role in the case. The dog, in Justice Scalia's telling, was a wild and erratic, even potentially dangerous, creature.[38] Justice Kagan described the dog as "a super-sensitive instrument" which had been "deployed" by the police, describing the dog as something almost mechanical.[39] Justice Alito, by contrast, consistently referred to Franky by name.[40] Franky's agency and ability to be controlled by the

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[36] *Id.* at 12 (Kagan, J., concurring).
[37] *Id.* at 17–18, 17 n.5 (Alito, J., dissenting) (internal citations omitted).
[38] *See id.* at 3–4 (majority opinion).
[39] *See id.* at 12 (Kagan, J., concurring).
[40] *Id.* at 17–18 (Alito, J., dissenting).

detective differed between the opinions. In Justice Scalia's recitation, the detective "pulled the dog away from the door," but in Justice Alito's story "Detective Bartelt and Franky immediately returned to their patrol car."[41]

The majority and dissent told markedly different—though not technically contradictory—stories. For example, the pace of each account was contrasting. Justice Scalia began the story much earlier than Justice Alito, with the unverified tip received a month before surveillance team arrived on the scene.[42] Justice Scalia emphasized that before involving the drug-sniffing dog, Detective Pedraja spent time observing the home, that the Detective further made note of the empty driveway, the quiet home, and the closed blinds which prevented him from seeing inside the home.[43] He counterposed this serenity with the dog "energetically exploring" the area before having to be "pulled . . . away from the door."[44]

Justice Alito, in contrast, compressed the timeline, emphasizing at every opportunity how briefly Franky was on the scene. In his account, Franky and Detective Bartelt arrived and instantly encountered suspicious stimuli ("*As Franky approached the door*, he started to track an airborne odor.")[45] which they quickly interpreted before exiting the property. ("Detective Bartelt *knew 'the minute [he] observed' this behavior* that Franky had detected drugs. [. . .] Detective Bartelt and Franky *immediately* returned to *their* patrol car.").[46] Justice Alito's description of the facts strived to paint the story as unexceptional and routine. He framed Franky's leash, the route by which Franky and his handler approached the house, and even the use of drug-detection dogs as well-established and customary. In this telling, Detective Bartelt and Franky were efficient, professional, and working in sync.[47] Justice Alito even describe the patrol car as "their patrol car"[48] (though one would hope that Detective Bartelt would be behind the wheel).

Ultimately, these rhetorical differences culminate in two very dissimilar impressions about the level of police action and encroachment on the property. Each narrative primes the reader to understand this series of events as either a

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41 *Id*. at 4 (majority opinion); *id.* at 18 (Alito, J., dissenting).
42 Compare *id.* at 3–4 (majority opinion), *with id*. at 17–18 (Alito, J., dissenting).
43 *See id.* at 3–4 (majority opinion).
44 *Id.* at 4.
45 *Id.* 17–18 (Alito, J., dissenting) (emphasis added).
46 *Id.*
47 *Id.*
48 *Id.* at 18.

search or not a search. This is true even though Justice Scalia's conclusion that the use of a narcotics detection dog was an unlawful search hinged on the fact that it was an unlicensed physical intrusion of the property[49]—which presumably would be true even if Franky had been on a different leash or spent less time on the property.

Another notable feature of this case is that Justice Alito claimed that the majority left out a detail—"[a] critical fact that the Court omits is that . . . this entire process . . . took approximately a minute or two."[50] And Justice Alito disputed the majority's characterization of the officer's approach and Franky's leash, suggesting that these are details that the majority left out as well.[51] It is notable when a justice explicitly accuses another justice of omitting a "critical" fact because doing so is a direct confrontation of a colleague and a public refutation of the legitimacy of a decision.[52] The justices are (either as individuals or as part of an institution) invested in a version of institutional legitimacy that rests on the idea that the Court is impartially applying doctrine to facts.[53] Where an opinion author publicly calls out deviation from that norm, it is likely a calculated choice balanced against the potential costs.

All of this back-and-forth occurred completely outside of the legal reasoning portion of the opinion. Our research identifies patterns in the factual

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[49] *Id.* at 11–12 (majority opinion).

[50] *Id.* at 18 (Alito, J., dissenting).

[51] *Id.* at 17 ("Detective Bartelt and Franky approached the front door via the driveway and a paved path—the route that any visitor would customarily use—and Franky was on the kind of leash that any dog owner might employ.").

[52] Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 40–41 (1998) ("A judicial decision is never totally free from involvement of the judge's self-concept. At the very least, the judge has a professional interest in the soundness and effectiveness of the decision rendered."); Wald, *supra* note 32, at 1413 ("If the case is newsworthy, the dissent will inevitably be characterized as 'biting,' 'scathing,' 'powerful,' 'strong,' or 'acerbic,' resulting in a 'divided,' 'fractured,' or 'split open' court.")

[53] *See supra* note 4; Jack Knight, *Are Empiricists Asking the Right Questions about Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1543 (2009) ("[T]he offering of the opinion has an important justificatory function. Through the practice of offering an opinion, judges seek to enhance the legitimacy of the decision in particular and the judicial system in general."); Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 623 (2018) ("Work in political psychology shows that citizens have a strong negative response to Court decisions portrayed as politically motivated, compared to decisions described as following legal guidelines."); *see also* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2021 (2002); Tonja Jacobi & Matthew Sag, *Supreme Court Interruptions and Interventions: The Changing Role of the Chief Justice*, 103 B.U. L. REV. __ (forthcoming 2023) (one justice confronting another "would constitute a breach of etiquette and constitute a sign of lack of collegiality on the Court which would no doubt get significant media attention. In fact, the Court so insists on the supposed collegiality of the Justices that it sometimes defies belief.").

descriptions, suggesting that *Florida v. Jardines* is not a rhetorical outlier.[54] Prior research has focused on the use of judicial language in other contexts and noted the use of different techniques for rhetorical/persuasive effect,[55] but the language of the factual descriptions deserves specific consideration. We show that the fact descriptions in our database are not neutral accounts.[56] This is despite the justices themselves advising advocates against the type of rhetorical manipulation and expression of certainty illustrated above. For instance, Justice Scalia urged lawyers to avoid writing in a way that is too one-sided:

> You'll harm your credibility—you'll be written off as a blowhard—if you characterize the case as a lead-pipe cinch with nothing to be said for the other side. Even if you think that to be true, and even if you're right, keep it to yourself.[57]

The information that the justices include, what they do not include,[58] and how they frame the characters and their actions, all shape the reader's perception of the case—before the reader even reaches the justice's legal reasoning. Our empirical analysis shows that the ways in which the justices do this framing and shaping of perceptions is predictable based on factors such as ideology and extremism.

B. Cases Analyzed

We examined all constitutional criminal procedure cases dealing with policing investigation topics arising over a twenty-eight year period, under the

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[54] *See infra* Part IV.

[55] Both at the Supreme Court and in judicial language more generally. *See, e.g.*, Rachael K. Hinkle, Andrew D. Martin, Jonathan David Shaub & Emerson H. Tiller, *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. LEGAL ANALYSIS 407, 408 (2012).

[56] *See infra* Part IV.

[57] ANTONIN SCALIA & BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 13 (2008). *But see* Chemerinsky, *supra* note 53, at 2021 ("[T]here has been a great change in that Justices are far more willing to use a 'poison pen' and be very sarcastic. Justice Scalia is the prime example of this phenomenon. In dissenting opinions he describes the majority's approaches as 'nothing short of ludicrous' and 'beyond the absurd,' 'entirely irrational' and not 'passing the most gullible scrutiny.'"); Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers is Very Bad–Or Is It?*, 45 IDAHO L. REV. 171, 172 (2008) (describing empirical studies that suggest advocates that overuse intensifiers may be correlated with more adverse outcomes and that justices are more likely to use intensifiers when a case generates a dissent; and quoting Justice Roberts: "We get hundreds and hundreds of briefs, and they're all the same . . . . Somebody says, 'My client clearly deserves to win, the cases *clearly* do this, the language *clearly* reads this,' blah blah blah. And you pick up the other side and, lo and behold, they think they *clearly* deserve to win").

[58] *See, e.g.*, Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L.J. 379, 381–83 (2017) (discussing *Iqbal v. Ashcroft* and what information was and was not included about the factual background of U.S. government's detention program, and Mr. Iqbal's specific case).

Roberts Court (2005–2022 Terms, inclusive).[59] We compiled a comprehensive list of these cases drawn from Washington University Law's Supreme Court Database[60] which classifies cases into issue areas.[61] The criminal procedure issue area included both police investigation and post-indictment prosecution. We focused on policing cases because we examined how the justices rhetorically present, or potentially manipulate, the circumstances that become the fact patterns for litigation, not how the litigations are pursued. Accordingly, we used only the following subset of the sixty topics covering criminal procedure more broadly:[62]

10010	involuntary confession
10050	search and seizure (other than as pertains to vehicles or Crime Control Act
10060	search and seizure, vehicles
10070	search and seizure, Crime Control Act
10090	self-incrimination (other than as pertains to Miranda or immunity from prosecution)
10100	Miranda warnings
10110	self-incrimination, immunity from prosecution
10150	line-up

These cases are excellent vehicles for undertaking this inquiry for numerous reasons. First, other scholars have noted that the rhetoric of Supreme Court writings has generally been understudied.[63] The literature that does examine

[59] This includes twenty-six terms but extends over a twenty-seven-year period since Terms begin in October of one year and are completed in June of the following year.

[60] *2022 Supreme Court Database*, WASH. U. L., http://scdb.wustl.edu/ (last visited Apr. 27, 2023).

[61] The database assigns a code to each case denoting the general topic that the case falls under, as well as the more specific issue within that topic. For example, cases involving search and seizure and vehicles are assigned the code 10060. *2022 Supreme Court Database Online Code Book, Version 2022 Release 01, "Issue"*, WASH. U. L., http://scdb.wustl.edu/documentation.php?var=issue#norms (last visited Apr. 27, 2023).

[62] Examples of topics within the criminal procedure issue area that were excluded as concerning prosecution rather than investigation are: 10110 self-incrimination, immunity from prosecution; 10120 right to counsel (cf. indigents appointment of counsel or inadequate representation); 10130 cruel and unusual punishment, death penalty (cf. extra-legal jury influence, death penalty); 10140 cruel and unusual punishment, non-death penalty (cf. liability, civil rights acts); 10150 line-up; 10170 double jeopardy. *See 2022 Supreme Court Database*, *supra* note 60. Note: admissibility into evidence of identification obtained after accused was taken into custody, or after indictment or information.

[63] Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 856–57 (2014) ("[T]he actual language of opinions has been little examined. Citations are clearly significant to the law, but they can often be readily manipulated. Ultimately, it is the language of the Court that is used as a precedent for future decisions . . . . This language may be quoted directly as the key to resolving a future decision.

Supreme Court rhetoric is more general in its scope and descriptive aims.[64] Likewise, empirical review of cases about the Court's criminal legal docket focuses on other metrics, such as the voting patterns of particular justices and the number of opinions authored.[65] By focusing solely on the fact descriptions in pretrial criminal procedure cases, our inquiry is distinct, narrow, and novel.

Second, criminal law and procedure is particularly fertile ground for charged language.[66] There are two related reasons for this—the political valence and emotional valence of cases involving the criminal legal system and questions of the legitimacy of policing tactics. In contrast to other types of cases, the individual reaction that a person has to questions of public safety, policing, and surveillance are more directly linked to moral judgments embedded in criminal legal rules.[67] Citizens make sense of criminal law through an evaluative inquiry which relies on our emotional reaction to moral questions to appraise the importance or appropriateness of actions.[68] This is borne out in the way that

Legal researchers, by contrast, closely scrutinize details of judicial opinions. However, their analyses typically dwell on intricate details of particular cases, with little generalization of the meaning of opinion language. Nor do these legal studies use more rigorous, statistical methods in order to find true associations. In general, the content of opinions has been 'woefully understudied.'"); *see also* Chemerinsky, *supra* note 53, at 2008 (emphasizing the importance of critically engaging with the rhetoric of Supreme Court opinions) "The Supreme Court's opinions are rhetoric in that they are reasoned arguments intended to persuade. I believe that we can gain new insights about the Court and constitutional law by looking at the opinions from a rhetorical perspective." Chemerinsky, *supra* note 53, at 2008.

[64] Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 88, 93 (1998) (analyzing the linguistic features of federal jurisdiction decisions as compared to decisions on the merits of a dispute but mostly focusing on the holding paragraphs, the parts of the text that "crystallize [the Court's] reasoning" rather than the fact patterns involved); Cross & Pennebaker, *supra* note 63, at 879 (using language software to analyze word count, word type, and inclusion of emotionally charged words in different opinion types and among the different Justices). Cross and Pennebaker's article drew only "preliminary conclusions" about the Justices' rhetorical style from a descriptive analysis of Roberts Court opinions through 2010 that contained at least 100 words. Cross & Pennebaker, *supra* note 63, at 872, 893. For example, while Alito and Roberts were found to often vote in the same way, "Alito is far more angry and negative in his words, while Chief Justice Roberts is more upbeat." *Id*. at 893.

[65] Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2014-2015 United States Supreme Court Term*, 61 S.D. L. REV. 242, 276 (2016) (describing decision outcomes, voting coalition patterns, opinion distribution, and ideas of cohesiveness amongst the Justices for criminal cases from the 2014–2015 term); Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2015-2016 United States Supreme Court Term*, 53 WILLAMETTE L. REV. 185, 196 (2017) (same, but for the 2015–2016 term).

[66] Little, *Negotiating the Tangle of Law and Emotion*, *supra* note 13, at 993.

[67] *Id*. (describing criminal law as "a traditional medium for emotion in law" because it "has often touched emotion, sometimes providing a safe haven for emotion within the social order, identifying which emotions act as valid defenses to crime, indulging the impulse to punish, and occasionally restraining emotional reaction to crime in the name of civility and rationality").

[68] Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 278 (1996) (arguing for a more robust understanding of how decisions about criminality are affected

justices describe the factual sequences at issue in a case before them. The facts in criminal legal opinions are written under the shadow of fact patterns that incite our most intense emotional reactions to legal problems.[69] Critically examining the way that the "story" of a criminal procedure case was told allows us to see where the justices are expending their persuasive energy.

Third, this focus on criminal procedure cases is especially timely. Issues of policing and the legitimacy of the criminal legal system moved to the forefront of political salience following the nationwide protests over the murder of George Floyd by a Minneapolis police officer.[70] Other work has pointed out that high-profile events have a recurring pattern in generating public interest in the criminal legal system.[71] The 2020 election cycle was dominated by a few central themes, among them racial inequality in law enforcement.[72] Some of these themes were on display at Justice Amy Coney Barrett's confirmation hearing a few weeks before the election,[73] which captured the volume and political salience of criminal procedure doctrine and its role in enabling disparate policing.[74]

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by emotional influences, without which we will continue to be at the inconsistent mercy of emotional value judgments).

[69] *See* Little, *Negotiating the Tangle of Law and Emotion*, *supra* note 13, at 993; *see also* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 64 (2011) (describing the Court's attempt to acknowledge the complexity of a death penalty decision, recognizing the strong reaction that one might have to the facts of the case and stating that "[i]n *Kennedy v. Louisiana*, for example, the Court's tone conveyed genuine ambivalence as it justified its conclusion that the Eighth Amendment forecloses execution of a man convicted of raping a child").

[70] Tony Mauro, *Nationwide Protests May Resound in Supreme Court First Amendment Case*, NAT'L L.J. (June 9, 2020), https://www.law.com/nationallawjournal/2020/06/09/nationwide-protests-may-resound-in-supreme-court-first-amendment-case/.

[71] McCall, *Criminal Justice and the 2014-2015 United States Supreme Court Term*, *supra* note 65, at 243–44 (referencing events in 2014 and 2015 including mass shootings, marijuana legalization trends, and the uprisings in Ferguson, Missouri after police officer Darren Wilson shot and killed Michael Brown).

[72] Claudia Deane & John Gramlich, *2020 Election Reveals Two Broad Voting Coalitions Fundamentally at Odds*, PEW RSCH. CTR. (Nov. 6, 2020), https://www.pewresearch.org/fact-tank/2020/11/06/2020-election-reveals-two-broad-voting-coalitions-fundamentally-at-odds/.

[73] Samantha Raphelson, *Barrett On George Floyd: Obvious That 'Racism Persists In Our Country*', NPR (Oct. 13, 2020), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923266984/barrett-on-george-floyd-obvious-that-racism-persists-in-our-country; Rebecca Shabad, *Highlights of Amy Coney Barrett's Questioning at Supreme Court Confirmation Hearing: Barrett Says George Floyd's Death Was 'Personal,' But She Could Not Make a Broad Statement About Racism*, NBC NEWS (Oct. 13, 2020), https://www.nbcnews.com/politics/supreme-court/blog/live-updates-amy-coney-barrett-faces-questions-supreme-court-confirmation-n1243016.

[74] Andrew Chung & Lawrence Hurley, *Analysis: U.S. Supreme Court Nominee Barrett Often Rules for Police in Excessive Force Cases*, REUTERS (Oct. 25, 2020), https://www.reuters.com/article/us-usa-court-barrett-police-analysis/analysis-u-s-supreme-court-nominee-barrett-often-rules-for-police-in-excessive-force-cases-idUSKBN27A0C1; Raphaelson, *supra* note 73; Chiraag Bains, *Amy Coney Barrett Could Bring Down*

A close review of the language that the Roberts Court has used in policing cases is a useful prism to examine how the lives and experiences of citizens are filtered through the appellate process and subsequently turned into precedential decisions. Criminal procedure rules have been shown to affect not only individuals but the broader communities in which they live, and communities of color are particularly adversely affected.[75] The rulings in constitutional criminal procedure cases potentially touch the lives of citizens more closely than other types of cases[76] and are oftentimes based on a reasonableness analysis or a close review of the particular factual situation. In that regard, the manner in which the facts of these cases are described has broad implications for how the public understands the decision, its rationale, and its political legitimacy.

It is, however, worth noting that what we are about to describe also occurs outside of the constitutional criminal procedure contexts. For instance, in 2022, in *Kennedy v. Bremerton School District*, the Supreme Court addressed whether a football coach at a state school could be prevented from engaging in public prayer prior to games without violating the free exercise clause of the First Amendment.[77] The majority, in finding for the coach, described him as "offer[ing] his prayers quietly while his students were otherwise occupied."[78] However, Justice Sotomayor, writing in dissent, challenged not only the majority's legal reasoning and conclusion, but also its portrayal of the facts, stating that "[t]o the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts."[79] Then, after repeatedly describing the Court as "ignor[ing]" various facts, she wrote, "[t]oday's decision

Decades of Anti-Discrimination Law, SLATE (Oct. 26, 2020), https://slate.com/news-and-politics/2020/10/barrett-supreme-court-race-discriminatory-laws.html ("During her confirmation hearing, Judge Amy Coney Barrett was asked if she agreed with the late Justice Antonin Scalia that the Voting Rights Act was a 'racial entitlement.' Barrett, who has said, 'His judicial philosophy is mine too,' declined to answer."); *Transcript: Into Amy Coney Barrett's Record on Race*, MSNBC (Oct. 22, 2020), https://www.msnbc.com/podcast/transcript-amy-coney-barrett-s-record-race-n1244302.

[75] Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 956 (2014) (showing that permitting warrantless searches of parolees is felt not only by parolees themselves, but also by those with whom they are living, as increasing the parolee per capita rate by 1% increases stops per capita of a ZIP code more than tenfold).

[76] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018) (acknowledging that government ability to access a person's cell phone would have implications for anyone encountering police or anticipating encountering police); *see also Findings*, STAN. OPEN POLICING PROJECT, https://openpolicing.stanford.edu/findings/ (last visited Aug. 3, 2023) (finding that "[p]olice pull over more than 50,000 drivers on a typical day, more than 20 million motorists every year" and calling such stops "the most common police interaction").

[77] Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2415 (2022).

[78] *Id.*

[79] *Id.* at 2434 (Sotomayor, J., dissenting).

goes beyond merely misreading the record."[80] She began her alternative description of the factual record with the sarcastic phrase, "[a]s the majority tells it," then wrote, "[t]he record before us, however, tells a different story."[81] She then provided five pages of detailed facts, including three photographs of crowds of students engaged in prayer with the coach, contradicting the majority's characterization of the coach as engaging in quiet and private prayer.[82] Justice Sotomayor's use of photographic evidence disputing the majority's description of the facts made headlines for its unusual frankness and spectacular nature.[83] Yet, our analysis shows that clashes of the factual record occur quite regularly.

C. Text Selected

Our empirical analysis of the facts of criminal procedure opinions utilized a novel database comprised of the full texts of the factual parts of each written opinion in each case—including majority, dissent, concurring, and mixed (concurring and dissenting) opinions—dealing with police investigation from the 2005–2022 terms. We identified the "facts" of a case as described by the authoring justice, which are typically identifiable by their narrative characteristics. The facts are ordinarily described early in the text of an opinion and usually involve a description of some series of events, the setting, and characters involved.[84] Factual information tends to immediately follow a short statement of the issue before the Court (which occasionally has some factual material in the phrasing of the question, but usually does not). Generally, there

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[80] *Id*.

[81] *Id*. at 2435.

[82] *Id*. at 2435–40. Another well-known example of a Justice taking creative liberty with the factual record involved Justice Cardozo allegedly massaging the facts in an important tort case, to justify a landmark ruling against the privity limitation on recovery. *See* James A. Henderson, Jr., MacPherson v. Buick Motor Company*: Simplifying the Facts While Reshaping the Law*, *in* TORT STORIES 51 (Robert L. Rabin & Stephen D. Sugarman, eds., 2003).

[83] Commentators noted that Sotomayor was "using whatever tool was available to her to really underline just how egregious the manipulation of the facts was in that case." Joan E. Greve, *What the Liberal Justices' Scorching Dissent Reveals About the US Supreme Court*, GUARDIAN (July 11, 2022), https://www.theguardian.com/law/2022/jul/11/us-supreme-court-liberal-justices-dissenting-opinions (quoting Lindsay Langholz, director of policy and program at the progressive group American Constitution Society); Rebecca Cohen & Oma Seddiq, *Justice Gorsuch Called a High-School Football Coach's On-Field Prayer 'Quiet' and 'Personal' as the Supreme Court Sided with Religious Rights. Sotomayor Said that Description 'Misconstrues the Facts.'*, BUS. INSIDER (June 27, 2022), https://www.businessinsider.com/sotomayor-supreme-court-decision-backing-coach-prayer-misconstrues-facts-2022-6 (describing Justice Sotomayor's critique of the majority's portrayal of the facts and noting that she even included photographs).

[84] A notable exception to this is *City of Los Angeles v. Patel*, 576 U.S. 409, 413 (2015). Because this case was a facial challenge to the law, there was not the same narrative series of events that were present in the other opinions. *Id.* at 415. There is some general scene-setting, and Justice Scalia's dissent provides a few sentences describing general background information. *Id*. at 428 (Scalia, J., dissenting).

is a clear shift between where the "story" of the facts ends, and the legal analysis of the opinion begins. This structure is most strictly adhered to by majority opinions; some concurrences and dissents dive straight into analysis or rebuttal of the majority's reasoning prior to including factual information.

The end of the facts is typically easy to identify as it is usually immediately followed by a description of the procedural history of the case, which is not included in our analysis. Procedural history most commonly includes information about the trial and the lower appellate court's ruling. But the content and order can vary. For instance, in *Kansas v. Glover*,[85] Justice Kagan's concurrence stated:

> That fact . . . provides a "reason[] to infer" that such a person will drive without a license—at least often enough to warrant an investigatory stop. And there is nothing else here to call that inference into question. *That is because the parties' unusually austere stipulation confined the case to the facts stated above*—**i.e., that Mehrer stopped Glover's truck because he knew that Kansas had revoked Glover's license.**[86]

In this example, the italicized phrase is clearly procedural, but the bolded phrase is factual description. In circumstances such as this, we included only the part of the sentence relating to the facts. Likewise, we included footnotes only if they contained factual material. Hypothetical statements were not coded as facts. Descriptions of the fact patterns of previous cases were not coded as facts. If there were sentences in other parts of the opinion that were factual and not analytical, we captured those as well.[87]

Including something as "factual" rather than "analytical" involved some subjective judgment—yet, we believe that our characterization was more rigorous than the Court's own infamous categorization of pornography, which in Justice Stewart's words "may be indefinable . . . [b]ut I know it when I see it."[88] For almost all of the cases, capturing the narrative information at the beginning of the opinion, between the statement of the issue and the procedural

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[85] 140 S. Ct. 1183 (2020).

[86] *Id.* at 1192 (Kagan, J., concurring) (emphasis added) (citations omitted).

[87] All coding was initially conducted by one coder (who has linguistic training) and then reviewed for accuracy by the other (who has empirical training) to flag entries that did not appear to squarely fit criteria. Notably, there were few queries of the initial coding, 153 of thousands of entries. Once an entry was flagged as a query, both coders re-reviewed the entry and discussed. Of these, 65 were incorporated as edits/changes; the majority did not result in changes.

[88] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing the constitutional task of defining obscenity as "the task of trying to define what may be indefinable" and admitting that "perhaps I could never succeed in intelligibly doing so. But I know it when I see it").

history, was routine and therefore consistent across the data. However, where a justice weaved narrative information into their legal analysis, the line between the two could get fuzzy. We only coded a sentence as facts if it described a series of events, a setting, or some other narrative component in a way that does not require a legal determination. If a justice purely applied rules or precedent to advance a point, that was not coded as facts. If a justice described purely narrative information about the characters and the setting that make up the fact pattern, those *were* facts. But at times the two are combined, and so we included any *part* of a sentence that contained narrative information, even where some legal analysis or discussion of precedent occurred within the same sentence.

Our data included a subset of cases where one or more opinions involved a specific fact description relating to the circumstances of the litigation, as described above, but also contained a detailed and lengthy discussion about some "background" facts relevant to the analysis of the case—illustrated immediately below. In these cases, we split the opinion into two categories: the primary factual opinion and the secondary background factual opinion. The "specific" text deals with the particular defendant named in the case and the details of their arrest. The "background" text is where the writing justice describes information that would be generally applicable to a set of cases.[89] Typically, this secondary opinion involves a very detailed description of a type of technology and how it is used. The cases where we analyzed additional background factual descriptions are: *Mitchell v. Wisconsin*, *Florida v. Jardines*, *Carpenter v. United States*, *Safford Unified School District v. Redding*, *Missouri v. McNeely*, *Los Angeles v. Patel*, *Maryland v. King*, *Birchfield v. North Dakota*, *Riley v. California*, *Florence v. Burlington*, *Utah v. Strieff*, and *Navarette v. California*. There are two significant factors setting the background portion of the opinions apart from the specific portion of the opinions.

First, the secondary descriptions are fact-based, but less tied to the individual circumstances facing the party before the Court. To return to our earlier example, in *Florida v. Jardines*, Justice Alito came to the defense of not just Franky, but all drug-sniffing dogs by including information about the historical use of their "keen sense of smell" to achieve law enforcement goals:

> Dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption

[89] For example, the two cases that discussed cell phone technology (*Riley* and *Carpenter*) both contained background information about cell phones, how they worked, and their prevalence in modern life. Riley v. California, 573 U.S. 373, 385, 388–90, 393–97 (2014); Carpenter v. United States, 138 S. Ct. 2206, 2217–20 (2017).

> of the Fourth Amendment; and their acute sense of smell has been used in law enforcement for centuries . . . . Dogs' keen sense of smell has been used in law enforcement for centuries. The antiquity of this practice is evidenced by a Scottish law from 1318 that made it a crime to "disturb a tracking dog or the men coming with it for pursuing thieves or seizing malefactors . . . . If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.[90]

This information was not specifically about Franky's sense of smell, nor was it about the marijuana plants that Franky led the police officer to find. But it was a description of factual matters. Of note for our strategic hypothesis, it was also not particularly relevant to the doctrinal question. Justice Alito seemingly included this information to bolster the credibility of police use of drug detection dogs as a general matter—which is what set it apart from the more specific narrative at issue in the case.

The second reason for differentiating between the portions of these opinions is that, when combined with the traditional factual description, the amount of text that constitutes the factual opinion in cases with background factual sections is much lengthier than most of the other cases, to the point where failing to identify these opinions as different could lead to spurious results, driven by the outliers that these cases constitute. Accordingly, we controlled for the two categories of opinions. This division also allowed us to develop some interesting testable hypotheses, as impressionistically, from our reading of the cases there appears to be some stylistic and perhaps strategic differences in the way that these secondary factual opinions are written. These opinions tended to be particularly emphatic and often full of hyperbole, high emotional content, and seemingly of high valence to the authoring justice. This sort of background information was most frequent and most striking in the Court's handling of cases that sit at the intersection of technology and police action. For example, Chief Justice Roberts wrote a forceful description of the function of cellphones in *Carpenter v. United States*:

> Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation,

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[90] Florida v. Jardines, 569 U.S. 1, 16–17, 23 (2013) (Alito, J., dissenting) (internal citations omitted).

> without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data.[91]

These details were very different in nature to the description of Mr. Carpenter's crimes—six counts of robbery and six counts of carrying a firearm during a federal crime of violence for his involvement in leading a criminal conspiracy in nine armed robberies in Michigan and Ohio.[92] As such, we were interested in whether the justices authoring such "background opinions" tend to use, for instance, more hedging and intensifiers in these types of opinions.

II. THEORY: THE STRATEGIC POTENTIAL OF RHETORICAL DEVICES

Our central hypothesis is that the justices strategically use rhetoric to shape how the facts portions of opinions in criminal procedure cases are perceived, to buttress the legal conclusion a given justice is proposing. We call this the strategic theory. In this Part, we identify six key variables which constitute an array of rhetorical techniques that justices can utilize to further their strategic goals. They are: specific circumstances, hedges and intensifiers, positive and negative framing, passive and active voice, surplus facts and minimized facts, and use of stigmatizing versus person-centered terms for individuals. We describe in detail each of these variables and how we expect each technique to be used strategically, using case examples to illustrate how they are exploited to shape the reader's impression of the merits of a given side of an argument.

A. Hedges and Intensifiers

Hedges and Intensifiers broadly refer to language that shifts emphasis towards a concept (intensifiers) or diffuses emphasis or certainty (hedges). Hedges are words or phrases that qualify an assertion—such as relatively, reasonably, approximately, etc. Intensifiers are words or phrases that pull emphasis to a particular assertion—such as very, highly, clearly, etc. Intensifiers and hedges can make a sentence sound more forceful or less sweeping, respectively. Language indicating certainty is ostensibly controversial in legal

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91 *Carpenter*, 138 S. Ct. at 2220 (internal citations omitted).

92 *Id.* at 2212.

writing,[93] but in reality, it is common. When they are surveyed for their preferences directly, judges report that they find such language unconvincing or even annoying.[94] Nevertheless, advocates "are taught to eschew doubt," to project certainty and to ruthlessly quash seeds of potential counterargument before they can take root.[95] Research has explored the theoretical reasons why strong language is so common in persuasive writing in legal briefs and court opinions.[96] Psychological research suggests that unequivocal language is not likely to change the position of someone who disagrees with the argument, but is nonetheless valuable in signaling to others uniformity and/or intensity of disagreement.[97]

The typical construction of hedges and intensifiers implies that they would be opposites of each other.[98] Instead, our impression, which we tested, is that hedges and intensifiers often work *together*, and are used in combination in Supreme Court opinions to persuasively construct the topography of the fact pattern by creating emphasis. The following examples demonstrate the interplay of hedges and intensifiers.

> When the police arrived to execute the warrant, they announced their presence, but waited only a short time—**perhaps "three to five seconds,"**—before . . . ."[99]

Here, while the word "perhaps" indicates a lack of certainty, the phrase "perhaps three to five seconds," set off by dashes, has the effect of emphasizing just how short of a time period the police waited before executing the warrant—that is, it acts as an intensifier. Similarly:

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[93] *See* Sinnar, *supra* note 58, at 385–86. Scalia has advised to avoid being "written off as a blowhard" by overusing terms of certainty, and Garner has suggested that such terms as "clearly" and "very" reassure the writer but do little for the reader. SCALIA & GARNER, *supra* note 57, at 13; BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE 926 (3d ed. 2001). Garner has also referred to such phrases as "weasel words." GARNER, supra, at 926. *But see* King v. Burwell, 576 U.S. 473, 499 (2015) ("This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it.").

[94] Long, *supra* note 57, at 175–76 (describing previous research on judicial preferences).

[95] Kahan, *supra* note 69, at 60.

[96] *See* James A. Macleod, *Reporting Certainty*, 2019 BYU L. REV. 473, 480 (2019).

[97] *See* Kahan *supra* note 69, at 60–62.

[98] Hinkle, *supra* note 55, 420–21 (describing intensifying language as more precise and narrow and hedging language as more vague and diffuse, and explaining why different contexts would call for strategically using each).

[99] Hudson v. Michigan, 547 U.S. 586, 588 (2006) (emphasis added).

> **Virtually any** activity on the phone generates CSLI, **including** incoming calls, texts, or e-mails ***and countless*** other data connections that a phone ***automatically*** makes when checking for news, weather, or social media updates. **Apart from disconnecting the phone** from the network, ***there is no way to avoid*** leaving behind a trail of location data.[100]

In the first sentence in the above excerpt from *Carpenter*, Chief Justice Roberts started with a hedge ("Virtually any activity")[101] which inexactly but broadly draws the boundary of what activity generates CSLI. But he then emphasized just how broad that category is, and how little one has to do to trigger that effect ("countless other" and "automatically").[102]

In the second sentence, Chief Justice Roberts again included both a hedge and an intensifier within the same sentence but achieves something slightly different. The first phrase ("Apart from disconnecting")[103] acts as a hedge by taking out the exception to the second phrase. This both subtracts the scope of the second phrase ("there is no way to avoid leaving behind a trail of location data")[104] but also emphasizes that generating this data is a binary choice which is not really a choice at all—either forgo the use of a cell phone or leave a trail of digital breadcrumbs without ever meaning to do so.

Hedges and intensifiers are common throughout the factual descriptions that we analyze. Their use in concert with each other suggests that there is a deliberate persuasive shaping of the facts presented in the opinions. Each concept is explained in further detail below.

1. Hedging

A linguistic "hedge" is a word or phrase that qualifies the degree of truth of a given statement.[105] Hedges create vagueness.[106] While they add descriptive context to the thing they are describing, they do so while being inexact. For example, the phrases "approximately half" and "almost all" do not describe a

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100 Carpenter v. United States, 138 S. Ct. 2206, 2220 (2017) (emphasis added).
101 *See id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 George Lakoff, *Hedges: A Study in Meaning Criteria and the Logic of Fuzzy Concepts*, 2 J. PHIL. LOGIC 458, 471 (1973).
106 *Id.*

precise measure of quantity, but they allow the reader to understand the general concepts of volume being conveyed.

Previous research on hedges has found that authors often use hedges to dilute the force of a more direct statement, particularly in writings they anticipate being closely scrutinized.[107] For example, the use of the word "often" in the previous sentence functions as a way of emphasizing the idea that there is some frequency to the phenomenon but is not specific about *exactly* how frequent. The word "often" could refer a wide range of possible frequencies, just as the phrase "approximately half" could potentially[108] refer to any value between 40% and 60%. There are a number of reasons[109] why an author may use hedging in their writing, including smoothing over a lack of more specific information, expressing deference, de-emphasizing the importance of something, and defending the statement against an accusation of inaccuracy.[110] By qualifying a statement and cutting back a more sweeping statement, a hedge can minimize the risk that the statement could be characterized as incorrect. This should make a certain intuitive sense to lawyers. Applying legal rules to messy, real-world contexts does not separate conduct neatly into clear-cut categories.[111]

While linguistic hedges have been studied in other legal contexts,[112] analyzing hedging in fact pattern construction provides a completely different set of insights than analyzing the use of hedging in legal reasoning. Our review excluded all of the explicitly legal reasoning-based text. This means we did not capture any of the hedges that were used to describe legal standards, such as "reasonable expectation of privacy."[113] We considered the fact descriptions separately to examine if the persuasive framing of an opinion begins before one even reaches the "reasoning" part of the opinion. If the fact descriptions shape the path that the legal reasoning takes, then the fact descriptions are a part of that reasoning that deserve attention. Additionally, constitutional criminal procedure fact patterns touch on some of the most emotionally intense political issues.[114]

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107 Hinkle, *supra* note 55, at 418–21.

108 Another hedge.

109 Another hedge.

110 Hinkle, *supra* note 55, at 416.

111 Thus, the joke about law students who answer every yes/no question with: "it depends."

112 *See* Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, *supra* note 65, at 103; Holly Vass, *Lexical Verb Hedging in Legal Discourse; The Case of Law Journal Articles and Supreme Court Majority and Dissenting Opinions*, 48 ENG. FOR SPECIFIC PURPOSES 17 (2017).

113 *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (articulating the "reasonable expectation of privacy" standard).

114 *Supra* notes 13, 14 and accompanying text.

The framing of these emotionally salient fact patterns, then, has an especially important role in shaping legal reasoning.

We identified hedges by reviewing each sentence and coding the phrases that cut back the scope or application of a fact.[115] We observed that hedges tend to be used in the descriptions of fact patterns either where there is some factual ambiguity—for example, as to a period of time—or to cede some less-than-favorable aspect of the facts prior to using an intensifier to emphasize a favorable one. The latter is a category of strategic behavior fitting our hypothesis, with justices deploying selective emphasis in factual descriptions. Hedges tend to either precede and, therefore, modify a phrase and/or be in the form of adverbs. This happens frequently, as these examples illustrate:

> "*Roughly 30 minutes* into the search, Grubbs was provided with a copy of the warrant . . . ."[116]

This is an example of a hedge that is denoting factual ambiguity. "Roughly" indicates an inexactness to the described period of time before the defendant was given a copy of the warrant. Such uncertainty is explicit in the following example, but the hedge is doing more than simply describing how well the facts are known:

> "The officer is *unlikely to know precisely when* the suspect consumed alcohol or how much; all he knows is that critical evidence is being steadily lost."[117]

The hedging language here indicates that there is no clarity on how often a police officer will know details about a drunk driving suspect. The first part of the sentence cedes that an officer will often not have clear information about whether or not someone is actually driving under the influence. The second half of the sentence following the semicolon, however, is an intensifier. This phrase emphasizes what the officer *does* know, and so suggests that that information may be enough to justify an exigency exception to the Fourth Amendment.

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[115] We did not code hedges where they appeared in quotes attributed to the record of proceedings below or from other Supreme Court opinions.

[116] United States v. Grubbs, 547 U.S. 90, 93 (2006) (emphasis added).

[117] Missouri v. McNeely, 569 U.S. 141, 170 (2013) (emphasis added).

2. Intensifiers

Just as hedges create a "fuzzy" boundary around the truth of a statement, intensifiers function like a spotlight.[118] Intensifiers are not as well-defined by existing literature as hedges, but their effect is to emphasize a concept by communicating definitiveness or specificity.[119]

One way to think of intensifiers is to consider what a sentence would sound like if it was read out loud. In oral speech, someone making an argument or telling a story does not relate a list of facts in monotone. A speaker uses tone, gestures, and variating volume, among other techniques, to convey meaning. A written text does this too but relies on different mechanisms. Persuasive writing functions by urging a reader to adopt the author's viewpoint or value-judgment. There are many ways to demonstrate emphasis in a written text. A writer can use different typefaces or punctuation to highlight importance or convey a tone that otherwise would be hard to perceive from the page. A writer also can use adverbs, repetition, or introduce bits of information in a different order or alongside other fragments of context to frame a narrative event in a way that is most persuasive.

Use of intensifiers to convey concrete certainty may vary with the intent of an authoring justice in drafting the opinion. For example, one study found that language asserting certainty, such as "obviously" and "well-established," occurs more often in dissenting opinions throughout the courts of appeals.[120] It also found that where there was a dissenting opinion written in a case, there was a significant increase in the use of intensifiers in both the majority and the dissent.[121] This is true for judges on lower federal appellate courts and state appellate courts as well as the Supreme Court.[122] One theory for why this occurs

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[118] *See* Hinkle, *supra* note 55, at 415.

[119] *See id.* at 425.

[120] *See* Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 948 (2013).

[121] *Id.* at 949–50. *See also* Kahan, *supra* note 69, at 60–61 ("Because people sense that the position they take on a charged issue (say, climate change) influences how others who share their group commitments evaluate them, they are more likely not only to conform to the position that dominates within their group but also to keep silent if they disagree or merely harbor doubts about it. Their tendency to suppress their dissenting views prevents others, in their group and outside of it, from observing evidence that the opinion in the group is less uniform or less intensely supportive of the position in question. As a result, those inside the group and out form an exaggerated assessment of how single-minded and adamant the group's members truly are — increasing identity-protective pressure all around.").

[122] Long & Christensen, *supra* note 120, at 939.

is that opinion writers are reacting defensively to the fact that there is a written disagreement with their position.[123]

Other research has suggested that there are normative reasons why a legal writer might avoid a suggestion of doubt. Unequivocal language is attractive to someone drafting a legal argument because such language avoids "frankly acknowledging the vulnerability of [the] reasoning to counterarguments" which an authoring opinion writer may fear will "invite the suspicion that [judges] are deciding on the basis of some personal value or interest."[124] Professor Dan Kahan suggests that this is actually a weakness of judicial opinions "couched in completely unequivocal language"—the opinions are less focused on persuading the other side or someone on the fence and feel more like a reassuring signal to the audience that already agrees with the author and the difference in opinion between the two groups (or decisions) is magnified by such signaling.[125] This can come at the cost of the ability to build consensus or compromise, especially when the language at issue is contained in the public pronouncements of a collective decision making body.[126] At a time of increasing polarization on the Supreme Court,[127] we may expect such linguistic techniques to become more common.

We identified as intensifiers any phrases or words that "play up" some aspect of the context for persuasive effect and signpost importance throughout a description of a story. Those emphasized pieces of information become the landmarks that the reader uses to orient themselves as they follow the path of the author's reasoning. We identified a number of forms of language that constitute identifiers:

- Parenthetical statements that pull emphasis to a particular fact. For example:

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123 *Id.* at 947–48.

124 Kahan, *supra* note 121, at 60.

125 Timothy P. O'Neill, *Law and "The Argumentative Theory"*, 90 OR. L. REV. 837, 848 (2012) (discussing Kahan's arguments regarding exaggerated certitude in judicial opinion writing).

126 *See id.* at 847.

127 *See* Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1162–63 (2019) (showing that since 1995, during which greater political polarization occurred in Congress and throughout the nation, Supreme Court judicial behavior has evinced significantly more polarized behavior, including judicial advocacy on behalf of the side the justice ultimately supports in subsequent judicial votes); Devins & Baum, *supra* note 25, at 303 (arguing that in recent decades, party and ideology are more closely linked at the Supreme Court, key manifestations of political polarization).

> which Haner suspected **(correctly)**.[128]

- Adverbs used to characterize facts as especially strong, or beyond dispute, such as "especially" or "clearly." For example:

> Both phones are based on technology **nearly inconceivable** just a few decades ago.[129]

- A phrase preceding a sentence or set off by commas that emphasizes some element—usually time or the basis for a police officer's decision. For example:

> The officer impounded Riley's car, **pursuant to department policy**, and another officer conducted an inventory search.[130]

And:

> Officer Rhodes, **who did not have a warrant**, exited his car and walked toward the house.[131]

- Italics that are used for stylistic emphasis (not case names). For example:

> The FBI CODIS database includes DNA from *unsolved* crimes.[132]

Overall, there are many subtle (and not so subtle)[133] ways that justices draw emphasis to a particular part of a sentence or a particular factual characterization. Justice Scalia's dissenting opinion in *Maryland v. King* is one standout example for his use of intensifiers.[134] The following text has several of the different types of intensifiers that we identify:

> **Surely, then—*surely*—**the State of Maryland got cracking on those grave risks **immediately**, by rushing to identify King with his DNA as soon as possible.
>
> **Nothing could be further from the truth.** Maryland officials **did not even begin** the process of testing King's DNA that day. Or, **actually**, the next day. Or the day after that. And that was for a simple reason: Maryland law forbids them to do so . . . . And King's first appearance in court was not until three days after his arrest. **(I suspect, though,**

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128 Devenpeck v. Alford, 543 U.S. 146, 149 (2004) (emphasis added).
129 Riley v. California, 573 U.S. 373, 385 (2014) (emphasis added).
130 *Id.* at 378 (emphasis added).
131 Collins v. Virginia, 138 S. Ct. 1663, 1668 (2017) (emphasis added).
132 Maryland v. King, 569 U.S. 435, 473 n.2 (2013) (Scalia, J., dissenting) (original emphasis).
133 This is an example of an intensifier.
134 Another example of an intensifier.

> that they did not wait three days to ask his name or take his fingerprints.)[. . .]**It gets worse.** King's DNA sample was not received by the Maryland State Police's Forensic Sciences Division until April 23, 2009—two weeks after his arrest. It sat in that office**, ripening in a storage area**, until the custodians got around to mailing it to a lab for testing on June 25, 2009—two months after it was received, and nearly *three* since King's arrest.[135]

Justice Scalia heavily leaned on rhetoric to paint the majority's reasoning as reliant on unreasonable facts. The indignation leaps off the page. Each place where he emphasized the amount of time that the DNA testing took, he primed the reader to understand the state's actions as repeated, unacceptable failures. The intensifiers act as a guide, shepherding the reader through the information and signposting that there are delays and problems with the database that contradict the majority's straightforward description, priming the reader to agree with his dissenting analysis.

B. Specific Circumstances

Almost every case has an initial "scene setting" sentence that describes, with varying levels of generality, the year in which the events took place.[136] A higher level of specificity—describing the exact highway, for example, rather than just the state or county that the events occurred within—can provide context for scrutinized police action. We expect this to be used strategically as an authoring justice frames the story, as the story will shift if a reader understands the events to be framed through the officer's perception, rather than through the defendant's perception (or as some neutral, omniscient witness seeing the events unfold).

For example, in *Heien v. North Carolina*,[137] Chief Justice Roberts wrote for the majority:

> On the morning of April 29, 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department sat in his patrol car near Dobson, North Carolina, observing northbound traffic on Interstate 77.[138]

Here, Chief Justice Roberts set a scene in which the police officer was not a nameless unknown but rather an individual with whom we may identify and

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135 *King*, 569 U.S. at 471–72 (bolding added).

136 This variable also captures when the specific statute or code that a defendant was charged with violating is mentioned.

137 574 U.S. 54 (2014).

138 *Id.* at 57.

sympathize. It comes as little surprise that here Chief Justice Roberts ruled in the officer's favor, finding his error to have been reasonable.[139]

Justices tend to include the year and geographic location of a factual description very early in the text. Often, these sentences introduce (as in the above example) a state actor and describe what they observed or reacted to that initiated the series of events to come. Placing state actors in the position of *reacting* to information implicitly provides the reason for the next action that the police take, making the police action seem inherently more reasonable. For instance, Justice Scalia wrote for a majority finding in favor of the state by beginning so:

> In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son.[140]

In fact, the legal issue in this case did not concern the sexual abuse of his son but rather whether the fact of his incarceration prevented a break in custodial interrogation for purposes of Miranda analysis.[141] In this case, Justice Scalia announced a rule cutting back on the rights of defendants.[142] In another case where he dissented in favor of the defendant, Justice Scalia objected to the majority opinion's introduction of very similar factual—and equally likely to be inflammatory and thus prompt the reader to disfavor the defendant—information, as irrelevant.[143]

C. Framing

By putting issues either in a positive or negative light, a writer can emphasize or de-emphasize information that push the reader's understanding of the facts to be in line with the author's preferred position.[144] When utilized by justices

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139 *Id.* at 68.

140 Maryland v. Shatzer, 559 U.S. 98, 100 (2009).

141 *Id.* at 101.

142 *Id.* at 117 (holding that a break in *Miranda* custody lasting more than two weeks does not mandate suppression of former statements).

143 *See* Maryland v. King, 569 U.S. 435, 470–71 (Scalia, J., dissenting).

144 This effect is well-known enough that standard advice when criticizing someone is to use "I" language, such as "I think things need to change" rather than "You need to change" to help avoid defensiveness and a "hostility spiral." *See, e.g.*, Shane L. Rogers, Jill Howieson & Casey Neame, *I Understand You Feel That Way, but I Feel This Way: The Benefits of I-Language and Communicating Perspective During Conflict*, PEER J. 3, 9 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5961625/ (showing that I-language reduced perceptions of hostility).

describing facts of criminal procedure cases, this can drive the reader toward sympathy for either the state or the defendant.

We coded two different components of framing: both whether the content is positive or negative, and the direction of that affect, i.e. to whom it was directed. Together, this resulted in a four-way coding scheme: whether a sentence was framing either the defendant or the police in either a positive or negative way ("Positive Defendant," "Negative Defendant," "Positive Police," or "Negative Police").

In terms of what counts as "positive" or "negative," most obviously, if a justice writes disparagingly about a party or uses rhetoric to shine a complimentary light on someone, those would be captured by this variable. However, this variable also captures phrases that appear emotionally neutral but are supporting some relevant characterization of the facts that is important to the doctrinal issue.

For example, sentences that do not appear explicitly complimentary to police often contain rhetorical information that supports the police action as reasonable or justified—the effect of this rhetoric is to shore up the credibility or rationality of the police. In the following case, the opinion walked through the series of events, explaining the ostensible rationale for the police action at every step:

> In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway.
>
> Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana.
>
> At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered.
>
> Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their vehicles.
>
> Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment. Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door "as loud as [they] could" and announced, "'This is the police'" or "'Police, police, police.'" Cobb said that "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t sounded as [though] things were being moved inside the apartment." These

> noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.[145]

These sentences are not explicitly praising the police officers themselves, but the way that the facts are arranged provides a justification for each police action. In the first sentence, the initial phrase "in response to the radio alert" ensures that the reader understands that the officers are reacting to information that they understand to be reliable and urgent. The way that the rest of the sentence is ordered suggests that their actions were hurried as a proportionate response to the urgency.

The second sentence proceeds in a similar way, placing the police at a particular spot and describing what they hear and smell at that exact moment. What they see is absent from the sentence. The reader is left to infer that they did not see anything useful, but that the "very strong" suggestion from the other two senses is enough to let them know that they are proximate to criminal activity.

From the first sentence, the action that police took is framed as "in response to" some stimuli or event that police are merely reacting to. The officers acted on the radio alert initially, but then encountered the sound of a door closing and the "very strong" smell of marijuana. The opinion then described what the officers *did not* know, because they were away from the radio and ostensibly did not see which door the person they were chasing went through. The officers chose the door on the left because they were lured by the smell of marijuana "emanating" from the door. When the officers knocked on the door, the sounds of scrambling inside were what prompted them to forcibly enter the apartment. Every action is described by first describing the purported rationale, implicitly conveying the legitimacy of the response. The reader is shepherded through a factual narrative shaped by the impression that each step the officers took was guided by an independent decision responsive to the circumstances, bolstering the idea that each action was a reasonable and measured response.

The cases that wrestle with fact-specific issues like warrantless searches are frequently told this way, entirely from the police perspective. This is true even though the phrasing is in the third-person. It is common to read a fact section that lays out what the police are seeing, hearing, and what the police narrative asserts that an officer believed to be going on. It is rare to read an opinion that explains only the defendant's beliefs and motivations. This makes some sense,

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[145] Kentucky v. King, 563 U.S. 452, 456 (2011) (alteration in original) (adjusted spacing).

given that the inquiry often centers on what information the police had when they acted, but query whether the reverse would be true in criminal cases, addressing a defendant's potential misbehavior.

Other examples of police framing are coded positive because they note the police officer's compliance with professional standards or constitutional requirements. For example:

> Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights.[146]

This sentence bolsters the claim that the police were acting professionally and that, at least in one part of the narrative, the defendant was provided with constitutional protections.

Similarly, language that casts doubt on police motivation or the justification for police action is coded negative. For example:

> With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.[147]

J. D. B. was a child, as Justice Sotomayor pointed out earlier in the opinion.[148] The exact language she used was that he was a "13-year-old, seventh-grade student."[149] It is not entirely necessary to provide both J. D. B.'s age *and* what year he was in school, but with that additional tidbit of context, Justice Sotomayor underscored what being a 13-year-old *means.* If a reader does not remember what they were like at 13, they likely have some excruciating memory of being a middle schooler or have experience with children that age that they are close with. That information paired with the sentences in the above excerpt all lay out a series of unreasonable actions and choices made by the police. Justice Sotomayor listed each failure made by police with respect to the questioning.[150] Not only were there four adults in the room, not only was it a

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146 Maryland v. Shatzer, 559 U.S. 98, 101 (2009).
147 J. D. B. v. North Carolina, 564 U.S. 261, 266 (2011).
148 *Id.* at 265.
149 *Id.*
150 *See id.* at 266.

long period of time, not only was J. D. B. not allowed to leave, nor allowed to speak to an adult he trusted, but he also was never read his Miranda warnings.[151]

Where there is a description of a defendant acting badly or in a way that suggests bad character, that phrase is coded negative. For instance, this is the first sentence of Justice Kennedy's majority opinion in *Maryland v. King*, a case addressing the use of DNA swabs of arrestees:

> In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's DNA.
>
> In 2009 Alonzo King was arrested in Wicomico County, Maryland, and charged with first- and second-degree assault for menacing a group of people with a shotgun.[152]

In this example, the 2009 arrest was completely unrelated to the legal question at issue. Justice Scalia's dissenting opinion described the same arrest this way: "King was arrested on April 10, 2009, on charges unrelated to the case before us."[153] Both justices were introducing us to a character. They chose to emphasize a particular action or characteristic of that person to encourage the reader to make certain inferences about the character.

Sometimes framing is developed by pairing pieces of information together. For example, the question in *Howes v. Fields* was whether or not the situation presented is a custodial interview for purposes of the *Miranda* requirements.[154] Justice Alito's majority opinion held that Mr. Fields was not in custody, and therefore did not have his *Miranda* rights violated.[155] In his description of the facts of the encounter between the deputies and Mr. Fields, Justice Alito's sentences paired an initial piece of information that was presumably harmful to the contention he was trying to make with a second more helpful factual circumstance that had the rhetorical effect of neutralizing the initial "bad fact."[156]

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151 *Id.*
152 *King*, 569 U.S. at 439–40.
153 *Id.* at 470 (Scalia, J., dissenting).
154 *See* Howes v. Fields, 565 U.S. 499, 504–05 (2012).
155 *Id.* at 514.
156 *See id.* at 503.

> The two interviewing deputies were armed during the interview, *but Fields remained free of handcuffs and other restraints*. . . . According to Fields' testimony at a suppression hearing, he said several times during the interview that he no longer wanted to talk to the deputies, *but he did not ask to go back to his cell prior to the end of the interview*.[157]

The first half of the first sentence provides information that could potentially undermine Justice Alito's conclusion ("The two interviewing deputies were armed during the interview").[158] Justice Alito acknowledged this circumstance by mentioning it, but then the sentence immediately pairs that information with new information that was friendlier to his conclusion—that Mr. Fields was not in restraints. By pairing the two together, the second phrase calls into question the importance of the first. The order and phrasing of the two pieces of information further suggests that the lack of handcuffs might even be the more significant fact. Justice Alito positioned the second piece of information as a successful rebuttal to the first, without ever explicitly saying so.

Justice Alito used the same framing combination in the second sentence. He admitted that Mr. Fields vocalized his desire to leave but by immediately adding "he did not ask" to leave, the opinion treated this latter information as conclusory, as if the entire question is adequately answered by describing this as Mr. Fields' failure, even though that is not the law on custody. As with the same sentence construction in the first sentence, in the second sentence, the second piece of information rhetorically overwhelms the first.[159]

D. Surplus Facts and Minimized Facts

One essential aspect of framing a factual narrative is what facts are even included, and which are not. The choice of what information is described as a relevant fact is important especially for the Supreme Court because it is the body that lower courts follow in determining what kind of facts should be outcome-

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[157] *Id.* (emphasis added).

[158] *Id.*

[159] We observed this strategy used consistently across the justices, from both the liberal and conservative blocs. *Compare* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 340–41 (2012) (Alito, J., concurring), *with* Fernandez v. California, 571 U.S. 292, 311 (2014) (Ginsburg, J., dissenting) ("After Walter Fernandez, while physically present at his home, rebuffed the officers' request to come in, the police removed him from the premises and then arrested him, albeit with cause to believe he had assaulted his cohabitant, Roxanne Rojas."). Here Justice Ginsburg explained that Fernandez had been removed from his home before the time of the search but pairing that information with a concession that the police had cause to believe he had assaulted someone. *See Fernandez*, 566 U.S. at 311.

determinative when deciding legal questions. A reader of an opinion can only interpret the information *included* in the opinion. That means that the omission of relevant information can heavily shape a description yet be beyond the notice of most readers encountering an opinion. Similarly, including information that is *not* relevant can have an outsized influence on a reader's perception of the narrative and what facts should matter to the legal analysis, as often the reason certain facts are included when not legally relevant is because they are emotionally charged, and thus are often prejudicial or otherwise sway a reader's emotions.

As others have noted, opinions have become longer and contain more contentious language.[160] And the types of citations and facts contained in an opinion have changed, with modern opinions incorporating a wider array of sources beyond case law.[161] As the justices increasingly challenge the motivations for opinions that they disagree with, a case's factual framing may provide additional insights into the ideological distance between members of the Court.[162] This variable allows us to quantify the disagreement over what facts do and should matter among members of the Court.

Including facts outside the relevant scope of the legal issue implicitly suggests to the reader that a fact is or should be understood as important enough to include. That the mere inclusion of a factual detail suggests its importance is not an unfamiliar concept—it is the underpinning of much of evidence jurisprudence.[163] Much pretrial energy is spent on shaping the narrative presented to the jury for consideration, and what information the jury should be allowed to hear.[164] The exclusion of otherwise admissible evidence due to the potential problem of prejudicial effect, for instance, is a recognition that inclusion of certain facts that reflect badly on the defendant can so shape the narrative as to sway a decision-maker's fair judgment.[165]

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160 *See* Chemerinsky, *supra* note 53, at 2021.

161 *See* Larsen, *Confronting Supreme Court Fact-Finding*, *supra* note 2, at 1262–63.

162 *See* Joan Biskupic, *Supreme Court Enters a New Era of Personal Accusation and Finger-Pointing*, CNN (May 21, 2021), https://www.cnn.com/2021/05/21/politics/supreme-court-finger-pointing-kavanaugh-kagan-gorsuch/index.html.

163 *See* 28 U.S.C. § 403; Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1276–77.

164 Colbert, *supra* note 163, at 1276–77 ("Most commentators agree that a court's cautionary instructions are usually ineffective after a jury has heard inadmissable, irrelevant, or inflammatory evidence. The motion in limine reduces the likelihood that a jury will be irrevocably prejudiced by hearing such evidence.").

165 28 U.S.C. § 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice . . . .").

Though the Supreme Court certainly has a much more limited review of factual allegations than a trial court, the justices are not immune from the strategic impulse to include or omit information that best serves their ultimate argument. For example, when recounting the majority opinion in *Ashcroft v. Iqbal*, Professor Shirin Sinnar pointed out that the opinion made no reference to Mr. Iqbal "as a former cable repairman who had lived a decade in Long Island—a fact readily available from earlier media coverage of the case."[166] Instead, "[t]he majority opinion opened with a bare statement of Iqbal's nationality and religion and his relationship to the September 11 investigation."[167] The opinion opened: "Javaid Iqbal . . . is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials."[168] Sinnar continued, "[a]lthough accurate and legally relevant, these opening lines also present Iqbal, from the outset, as essentially a foreigner and possible terrorist suspect."[169] As Sinnar explained, a reader who did not have an independent knowledge of the facts would be more likely to draw inferences from the factual description that would bolster the majority's argument that the allegations in Mr. Iqbal's complaint were implausible.[170] The lack of a factual rebuttal on this point in the dissenting opinions compounded this problem.[171]

Coding this variable relies on an understanding of the detail of the doctrine being developed in the case and whether an issue is relevant to the doctrinal question. We identified: (1) "Minimized Facts," which are factual elements that are relevant but that have been, potentially strategically, omitted so as to create a particular impression, for example of a less blameworthy defendant; and (2) "Surplus Facts," which are factual elements included when not relevant. For instance, for their prejudicial effect against an arguably morally blameworthy defendant where the defendant's blame is not a legally relevant issue, as is often the case in constitutional criminal procedure cases, which are typically concerned with police misconduct.

For example, Justice Kennedy included surplus facts in his dissenting opinion in *Carpenter v. United States* about the "nature of cell-site records" in order to argue that they should be treated as business records and not as a Fourth

166 Sinnar, *supra* note 58, at 385.

167 *Id.*

168 *Id.* (quoting Ashcrof v. Iqbal, 556 U.S. 662, 666 (2009)).

169 *Id.*

170 *See id.* at 385–86.

171 *See id.* at 390–91; *Ashcroft*, 556 U.S. at 688 (Souter, J., dissenting); *Ashcroft*, 556 U.S. at 699 (Breyer, J., dissenting).

Amendment search.[172] The information that he included, however, relied on the imprecise nature of the records to imply that the government should be entitled to access them:

> That means a 60–degree sector covers between approximately one-eighth and two square miles (and a 120–degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.[173]

This information might make the use of data by law enforcement seem more reasonable. However, it does not address whether a cell phone user would have a legitimate expectation of privacy in their location data,[174] or constitute a trespass.[175] The imprecision of the records might be theoretically comforting, but that does not address a doctrinal question.

When a justice omits factual information that is arguably relevant to the decision, this is often explicitly identified as such by a concurring or dissenting opinion. Take, for example, Justice Scalia's blistering dissent in *Navarette v. California*, wherein he took issue with multiple factual omissions in Justice Thomas's majority opinion's description of the facts.[176] The majority held that a police officer, having received information about an anonymous tip that a car had allegedly run another driver off the road, had reasonable suspicion to stop the car even though the police were unable to corroborate the factual premise of the tip.[177] Justice Thomas based part of his reasoning on the idea that even an uncorroborated tip can contain sufficient evidence of a potentially intoxicated driver that police were justified in stopping the vehicle.[178] Justice Scalia's response to this argument included the following: (1) "All that has been said up to now assumes that the anonymous caller made, at least in effect, an accusation of drunken driving. But in fact she did not[,]" and (2) "But the pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes

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172 *See* Carpenter v. United States, 138 S. Ct. 2206, 2224–25 (2018) (Kennedy, J., dissenting).
173 *Id.* at 2225.
174 *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
175 *See* United States v. Jones, 565 U.S. 400, 409 (2012).
176 Navarette v. California, 572 U.S. 393, 411 (2013) (Scalia, J., dissenting).
177 *See id.* at 403 (majority opinion).
178 *See id.* at 398–99.

that the truck was being followed (five minutes is a *long* time), Lorenzo's driving was irreproachable."[179]

This example underscores why we are interested in this variable. By specifically (and emphatically) describing these factual omissions, Justice Scalia argued that the logic of the majority opinion was based on a less-than-full accounting of the facts and implied that it was therefore less reliable. Justice Thomas's opinion did not account for these omissions, which further supports the idea that, although he would certainly be aware of these facts, he strategically chose to omit them.

Minimized Facts also capture instances where a justice describes a fact, but intentionally downplays some aspect of it or its importance. For example, Justice Sotomayor's dissent in *Berghuis v. Thompkins* described, very differently, the statements from the defendant who confessed to a crime than the majority did.[180] In this case, the majority described the exchange between the defendant and the police is as follows:

> [Detective] asked [Defendant], "Do you believe in God?" [Defendant] made eye contact with [Detective] and said "Yes," as his eyes "well[ed] up with tears." [Detective] asked, "Do you pray to God?" [Defendant] said "Yes." [Detective] asked, "Do you pray to God to forgive you for shooting that boy down?" [Defendant] answered "Yes" and looked away.[181]

The defendant's positive answer to the final question was a highly incriminating confession to the crime, and the majority described the defendant's responses to police questions as inculpatory statements.[182] In stark contrast, Justice Sotomayor grouped all of the answers together as if they were equivalent, and described them simply as "one-word answers" in response to "questions about God."[183] The justices here disagreed not just on how to characterize the statements made by defendant, but what the relevant content of the questions was that needs to be emphasized. Justice Sotomayor's description downplayed the effective confession that the defendant made with the one-word answers by characterizing them as answers to a different question. By failing to mention that one of the answers was a clear confession, however concise, she

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179 *Id.* at 409, 411 (Scalia, J., dissenting).
180 *See* Berghuis v. Thompkins, 560 U.S. 370, 391, 393–94 (2010) (Sotomayor, J., dissenting).
181 *Id.* at 376 (majority opinion).
182 *Id.*
183 *Id.* at 394 (Sotomayor, J., dissenting).

gave the impression that the nature of the questioning was all that was relevant, and that there was little to see in the answers.

In both of the above examples, whether information is completely omitted or merely minimized, the justices demonstrate the strategic framing that can quietly yet dramatically structure the fact descriptions, and in doing so, massively shape the impression of the reader one way or another.

E. Stigmatizing vs. Person-Centered Terms

Parties are largely described in the facts by their name, their position as a police officer (and sometimes even their rank or specific job), or by their status as a defendant or petitioner/respondent.[184] As a result of the relatively narrow set of circumstances that the case facts describe, the words used to refer to each person construct the entire impression that a reader has.[185] These person-specific descriptions can also constitute rhetorical strategies that the justices use to shape the reader's impressions of the relative blameworthiness of each party.

Many commentators and participants in the legal system—from advocates for reform to government decisionmakers—have called for changes in the way that media and public officials refer to those charged with or convicted of a crime.[186] For example, under President Obama, the Department of Justice avoided terms like "felons" and "convicts" to refer to people, in reaction to advocacy that characterized these terms as stigmatizing.[187] Researchers have pointed to the way that stigmatizing language affects judgments of a person, which can prejudice a decisionmaker who is introduced to a person with terms that tap into existing biases.[188] The stigma of a criminal conviction is, in theory,

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[184] *See, e.g.*, *id.* at 374 (majority opinion).

[185] *See, e.g.*, Sinnar, *supra* note 58, *passim*.

[186] *See* Tom Jackman, *Pennsylvania Dept. of Corrections to Discard Terms 'Offender,' 'Felon' in Describing Ex-Prisoners*, WASH. POST (May 25, 2016, 5:00 AM), https://www.washingtonpost.com/news/true-crime/wp/2016/05/25/pennsylvania-dept-of-corrections-to-discard-terms-offender-felon-in-describing-ex-prisoners/; Tom Jackman, *Guest Post: Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry*, WASH. POST (May 4, 2016, 5:00 AM), https://www.washingtonpost.com/news/true-crime/wp/2016/05/04/guest-post-justice-dept-to-alter-its-terminology-for-released-convicts-to-ease-reentry/.

[187] Alexandra Cox, *The Language of Incarceration*, 1 INCARCERATION 1, 4 (2020).

[188] One example is when medical professionals make decisions about patients from the information contained within their medical record. Anna P. Goddu et al., *Do Words Matter? Stigmatizing Language and the Transmission of Bias in the Medical Record*, 33 J. GEN. INTERNAL MED. 685, 685 (2018) ("Exposure to the stigmatizing language note was associated with more negative attitudes towards the patient (20.6 stigmatizing vs. 25.6 neutral, $p < 0.001$). Furthermore, reading the stigmatizing language note was associated with less aggressive management of the patient's pain (5.56 stigmatizing vs. 6.22 neutral, $p = 0.003$).").

one of the lines that separates criminal convictions from civil penalties.[189] But those labels are irrelevant to the questions and factual scenarios before the Court in general in constitutional criminal procedure cases, which are ordinarily concerned with police malfeasance or wrongdoing. However, that assessment of police behavior can be shaped by the moral blameworthiness of the defendant, even though it is doctrinally irrelevant.

While there is debate about which terms are best in each circumstance,[190] advocates have generally pointed out that many other fields have adopted "person first" language, and argued that such reform is overdue for news outlets and professionals who write about the criminal legal system.[191] Similar changes have been made in other contexts, such as the Associated Press Stylebook's rejection of certain terms to refer to undocumented persons.[192] This focus in language is not solely the concern of progressive reform advocates; President Trump's Department of Justice altered the language on parts of its website in ways that signaled ideological departures in approach from the previous administration.[193]

This is not a concept unique to constitutional criminal procedure cases. The rules of evidence regulate information about prior criminal conduct precisely because of the potential that jurors will make unfair judgments about a defendant

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189 *See* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 143 (2011).

190 Blaire Hickman, *Inmate. Prisoner. Other. Discussed., What to Call Incarcerated People: Your Feedback*, MARSHALL PROJECT (Apr. 3, 2015), https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed.

191 *See* Cox, *supra* note 187, at 3; *see also* Morgan Godvin & Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That's Changing.*, POYNTER (Dec. 15, 2020), https://www.poynter.org/reporting-editing/2020/the-words-journalists-use-often-reduce-humans-to-the-crimes-they-commit-but-thats-changing/.

192 Paul Colford, *'Illegal Immigrant' No More: The AP Stylebook Today Is Making Some Changes in How We Describe People Living in a Country Illegally*, AP (Apr. 2, 2013), https://blog.ap.org/announcements/illegal-immigrant-no-more ("Except in direct quotes essential to the story, use illegal only to refer to an action, not a person: illegal immigration, but not illegal immigrant. Acceptable variations include living in or entering a country illegally or without legal permission. Except in direct quotations, do not use the terms illegal alien, an illegal, illegals or undocumented.").

193 Jon Campbell, *Takedown of DOJ Juvenile Justice Office Webpages About Still-Active Initiatives Highlights Its Shift Towards a More Punitive Approach*, SUNLIGHT FOUND. (Oct. 4, 2018, 5:00 AM), https://sunlightfoundation.com/2018/10/04/ojjdp-website-changes-reflect-punitive-direction-of-office/ ("[T]he drift in policy at OJJDP has been reflected in language shifts on the OJJDP site. On the site's 'About' page, for example, the term 'justice-involved youth,' widely used to describe young people in the criminal justice system, has been replaced with the term 'offenders,' which advocates regard as stigmatizing. Similarly, the office's 'Vision Statement' on the 'Vision and Mission' page used to declare that it 'envisions a nation where our children are healthy, educated, and free from crime and violence.' The newest version has excised the phrase 'healthy and educated.'").

in a subsequent criminal trial. For example, Federal Rule of Evidence 404(b) bars the use of past crimes to show conformity with those past actions.[194] Propensity evidence is inadmissible primarily to minimize bias and advance "fairness, especially toward criminal defendants, to prevent undue prosecution for the previous acts of the parties."[195] While in criminal procedure policing cases the question is not guilt or innocence, the doctrine often relies on questions of reasonableness for the course of action that an actor chose to take. Where information about the defendant is often sparse, what information the Court includes is particularly influential in shaping the reader's perception of the interaction between the defendant and police. Playing up a defendant's charge or status as a person convicted of a crime in a factual description is a rhetorical tool that the justices can use to make their point.

Stigmatization includes not only obviously stigmatizing language that criminal legal reform advocates typically express concern about words like "convict" or "drug addict."[196] We coded any reference to the actual name of the person in an opinion as "person" and coded any reference to a party that did not use their name as "stigma." This meant that "police officer" was coded as stigma. We did this because some justices emphasize a party's identity as a police officer to emphasize some fact in favor of the defendant, while other opinions used the term neutrally, while still others may emphasize an officer's official capacity to accord deference to their choices. While we recognize that this may be overinclusive, as most people would not consider that calling someone a generic police officer constitutes stigma, this removed all discretion and purely captured the difference between identifying an individual by name and identifying a person by their category, rather than attempting to subjectively code whether the category in question is positive or negative, which could reflect our own biases.

Personalization or objectification of individuals also shapes sympathy. This variable captures how the justices refer to the parties, particularly whether they

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194 28 U.S.C. § 404(b)(1) ("*Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

195 Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 5–6 (2016).

196 *See* Megan Denver, Justin T. Pickett & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 671 (2017) ("[T]he use of crime-first language (i.e., 'convicted criminals') causes a significant increase in the public's estimates of the likelihood that individuals with violent convictions will commit new crimes in the future . . . .").

use the party's name or instead rely on the status of the party as a police officer or defendant in a criminal case. Our expectation is that judges who are deciding in favor of the state are more likely to use stigmatizing terms in reference to the defendant, and personalized terms for state actors, and the reverse for pro-defendant justices. It is easier to rule against a person when they have been depersonalized.

F. Passive Voice and Active Voice

Passive voice constructs a sentence with a "be" verb—was, were, been—using the past-tense of the verb to remove the actor performing the verb as the subject of the sentence: mistakes *were* made; the brief *was* filed.[197] Passive voice, in this way, obscures the actor.[198] Other researchers have called passive voice "the most common obfuscatory device" in the grammar of legal reasoning.[199] Passive voice is understood by linguists as comparable to "interpersonal strategies such as 'averting the eyes [or] turning one's back" because it can "hide the identity of those responsible for the actions or processes described."[200]

In the examples mentioned, a reader might wonder: Mistakes were made . . . by whom? The brief was filed . . . by whom? Normally, the answer is obvious from context, but the removal of the actor from the sentence leaves a different impression to the clarity of active voice. In passive voice, the subject is the recipient of the action—they are being *acted upon*.[201] Active voice, by comparison, clearly denotes the actor as the subject of the sentence that is performing the verb:[202] Alex filed the brief; the clerk made a mistake.

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[197] *See* Beth McCormack, *Quick Proofreading Tips for Busy Attorneys*, 39 VT. BAR J. 30, 30 (2014); *see also The Last Word: The Aggressive Passive*, PROB. & PROP. 64, 64 (2014) ("When a passive-voice verb is used, the subject is the recipient of the verb's action—the verb is always a form of to be joined with the verb's past participle . . . .").

[198] *See* Gerald Lebovits, *Drafting New York Civil-Litigation Documents: Part XLVI — Best Practices for Persuasive Writing*, 87 N.Y. ST. BAR J. 64, 59 (2015); *see also* Michael G. Walsh, *The Grammatical Lawyer: Tips on Converting Legalese Into Plain Language (Part 2)*, 62 PRAC. LAW. 7, 8 (2016).

[199] *See* Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, *supra* note 64, at 81.

[200] *Id.* at 97.

[201] *See, e.g.*, K.K. DuVivier, *Problems with the Passive Voice*, 24 COLO. LAW. 545, 545 (1995) ("In standard English construction, the actor is in the subject position of a sentence; the action is in the verb; and the result is in the object position. Described in another way, the subject 'is doing the action described by the verb.' . . . In contrast to the active, the passive voice shifts the result into the subject location. The verb consists of a form of the verb 'to be' (e.g., be, is, are, was, were) along with the participle of the action verb. In the passive, the subject 'is having the action of the verb done to it.'").

[202] *Id.*

The choice between using active voice or passive voice in a sentence can alter the meaning almost entirely. This can result in humorously misleading sentences. For instance, saying "the kangaroo carried her baby in her pouch" makes clear that the kangaroo is carrying a joey; whereas saying "the baby was carried by the kangaroo in her pouch" creates the possibility that a small human infant is being carried around by a kangaroo. Use of the passive voice can have more serious implications, implicitly assigning responsibility or lack thereof. For instance, saying "the police officer gave instructions," gives agency to the police officer, suggesting that the police officer chose his or her own words; whereas saying "instructions were given by the police officer" suggests a lack of responsibility on the part of the police officer for the content of the instructions.

This is particularly relevant in the context of criminal procedure cases, which are concerned with the blameworthiness of police action—using the passive voice is one way to minimize that blame. In news media, for example, a common phrase that has come under recent scrutiny is "Officer-Involved Shootings."[203] The phrase is often used in police department press releases and then repeated by newspapers or television reports of the event.[204] A typical use of the phrase describes an event where a police officer discharges a gun and strikes someone, but describing the action as "an officer-involved" event makes it ambiguous what happened and who did what to whom, pulling agency and thus responsibility for any wrongdoing away from the officer as an actor.[205] That is typical of situations where there is not only blame to distribute, but also reluctance to accept or place that blame.[206]

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[203] *See* Michael Conklin, *"Officer-Involved Shootings": How the Exonerative Tense of Media Accounts Distorts Reality*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 53, 54 (2020); Radley Balko, *The Curious Grammar of Police Shootings*, WASH. POST (July 14, 2014, 1:04 PM), https://www.washingtonpost.com/news/the-watch/wp/2014/07/14/the-curious-grammar-of-police-shootings/.

[204] Jonathan Moreno-Medina, Aurelie Ouss, Patrick Bayer & Bocar A. Ba, *Officer-Involved: The Media Language of Police Killings* 1, 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30209, 2022) (finding higher levels of obfuscatory language in headlines about killings by police than in other homicides); *see also* Conklin, *supra* note 203, at 55–56; Jerry Iannelli, *Why the Media Won't Stop Using 'Officer-Involved Shootings'*, THE APPEAL (Oct. 12, 2021), https://theappeal.org/officer-involved-shooting-media-bias/ ("Police departments know all this and use it to their advantage—their PR departments notoriously remove critical reporters from their email lists and slow-walk requests from contentious journalists. Departments overwhelmingly send out news alerts to reporters via email, so removal from the hallowed police Listserv means a reporter is at a significant speed disadvantage when it comes to breaking news against their competitors.").

[205] *See* Paul J. Hirschfield & Daniella Simon, *Legitimating Police Violence: Newspaper Narratives of Deadly Force*, 14 THEORETICAL CRIMINOLOGY 155, 163 (2010).

[206] Balko, *supra* note 203 ("Use of the passive voice in an admission of wrongdoing has become so common that the political consultant William Schneider suggested a few years ago that it be referred to as the 'past exonerative' tense."). The classic example is "mistakes were made." *Id.*

The factual descriptions in criminal procedure cases are generally chronological recitations of the actions taken by the respective parties. Those actions underlie the entire litigation. We expect that examining how each actor is associated with the verb of the sentence describing an action will capture any disparity in the relative agency attributed to defendants and police. We anticipate finding more construction of questionable police action through passive tense by those justices finding in favor of the state. We expect to see the same tendency, but in reverse, for liberal justices: more use of passive tense when describing wrongdoing by offenders, since liberal justices tend to be pro-defendant.[207] That is, we expect each ideological group to minimize the wrongdoing by the party that they are more sympathetic toward, by employing greater use of passive voice when describing their wrongdoing, and greater use of active voice when describing wrongs done to them.

As with our positive-negative variable, we coded both use of active and passive voice, combined with whose actions are being described, creating a four-way variable again. In the following examples, even though the police are not described in the sentence, they are the ones we are supposed to infer took the actions.

> Authorities questioned respondent when they learned that he had been in the convenience store . . . .[208]

Here, Justice Scalia used active voice to describe the scenario. It is clear to a reader, from this snippet of text alone, that authorities performed the verb, questioning the respondent. In contrast:

> Finally, Savana *was told* to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills *were found*.[209]

At the other end of the spectrum, the sentences above do not make clear that Savana, a thirteen-year-old schoolgirl, was instructed *by* school officials to expose parts of her body *to* public school officials.[210] Instead of attributing agency to the state actors by directly linking the state actor with the verb—such as by saying, "the school official(s) *told* Savana to pull her bra out"—this

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[207] *See infra* Table 1.

[208] White v. Woodall, 572 U.S. 415, 418 (2014).

[209] Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 369 (2009) (emphasis added).

[210] *See id.* The sequence of events was initiated by the assistant principal and was carried out by an administrative assistant and the school nurse. *Id.* at 368–69. These characters are coded as "police" actors as they are functioning as state actors by carrying out a Fourth Amendment search of a public school student.

sentence characterizes the action as simply being done by an impersonal, unnamed force in the room. It is far more exonerative to describe this as merely being "done" to Savana, rather than attributing that action to a specific person.

It is not a coincidence that the justices described the facts in these contrasting ways in these two cases. These textual differences are impactful, differently assigning responsibility for actions. Using the active or the passive voice is a choice available to the justices, according to how they want the narrative to be read. The reader is given a very limited universe of details about the case facts, and the choice between active versus passive construction can markedly shape how the reader understands the relative position of the defendant and the police and their roles in the events described. Accordingly, the authoring justice has power to use active or passive voice in describing actions by police or defendants—especially where the action is either legally questionable or generally objectionable for some other reason, as in the example above—according to whether the justice wants to clearly assign blame or skirt it, respectively. We expect to find active voice is used more frequently by the liberal justices when critiquing police action, and more frequently by the conservative justices when prompting condemnation of defendants, and vice versa for passive voice.

III. METHODS, MEASUREMENT, AND DESCRIPTIVE INFORMATION

In this Part, we briefly lay out the methods we use in our empirical analysis, and we also present some basic descriptive data.

A. Key Independent Variables: Ideology and Pro-prosecution Scores

Examining strategic judicial behavior is typically assessed in terms of whether the justices' behavior is predictable based on broad groupings of liberal and conservative ideology. Judicial ideology is "an overarching framework of beliefs, with sufficient consistency among constituent belief elements that knowledge of an individual's ideology allows for prediction of his or her views on related topics."[211] However, there are two constraints on the use of a liberal-conservative measure of ideology as applied to our inquiry. First, these two ideologically dichotomous camps are broad, and necessarily involve grouping extreme conservatives such as Justice Thomas with more moderate

[211] Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 804 (2009).

conservatives such as the Chief.[212] Second, criminal procedure may be exceptional, cutting across the typical ideological boundaries, such that the overarching framework of beliefs referred to above may not in fact predict views on criminal procedure cases in particular. Within our database, we have salient examples of conservative justices voting in favor of defendants[213] and liberal justices voting in favor of the prosecution.[214] To deal with both of these concerns, we created two new measures of ideology, both novel, continuous variables that measure different aspects of judicial ideology.

Addressing the second issue first, we created a measure that is a "pro-prosecution score," which specifically assesses the tendency of each justice to vote for the state or the prosecution in our database of constitutional criminal procedure cases. This score represents the percentage of times each justice has voted in favor of the prosecution in our data. To address the first issue, we created a measure that is a "pro-conservative score." This variable captures the tendency of each justice to vote for the conservative outcome in cases *not* in our database—looking at their votes in all other areas of the law in the same time period. This second score tells us whether we can in fact predict each justice's tendency to use, for example, intensifying language about police in constitutional criminal cases, based on their votes in abortion cases, First Amendment cases, etc.[215]

We find that for every single relationship studied here, for all our linguistic variables, we observe identical patterns for pro-prosecution and for pro-

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[212] In our study, Justice Thomas has a pro-prosecution score of 83% and a pro-conservative score of 62%, putting him in second and first place, respectively. Using Martin-Quinn scores of judicial ideology, discussed *infra* at note 215, Justice Thomas's ideology score in the 2021 term (the most recent available) is 3.05, more than one (1.23) standard deviations (2.35) to the right of the center of the Court (0.16). In contrast, in our study Chief Justice Roberts's pro-prosecution score is 73% and his pro-conservative score is 55%, putting him in equal third and fourth place, respectively. His Martin-Quinn score in the 2021 term is 0.71, less than a quarter (0.23) of a standard deviation to the right of center. *Id.*

[213] For example, Justice Scalia not only voted in favor of the defendant in *Maryland v. King*, he also authored a particularly scathing dissent critiquing majority as massively encroaching on constitutional rights. *See, e.g.*, Maryland v. King, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting).

[214] For example, Justice Breyer dissented in *Arizona v. Gant*, voting in favor of the state and arguing against narrowing the search incident to arrest exception to the warrant or probable cause requirement. *See* Arizona v. Gant, 556 U.S. 332, 354–55 (2009) (Breyer, J., dissenting).

[215] As a check, when discussing individual justices ideological scores, we also report a commonly used exogenous score of liberal-conservative ideology, the Martin-Quinn scores. Martin-Quinn scores are the dominant measure of judicial ideology. Justices are categorized as conservative or liberal according to whether they are above or below zero, respectively, where zero represents the approximate historical average of the Court over time. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 146 (2002). Updated data is available at mqscores.lsa.umich.edu/measures.php (last visited Oct. 27, 2023).

conservative. Accordingly, we do not replicate any of the graphs for pro-conservative tendencies.[216] Before turning to our results, it is worth first pausing to emphasize the significance of this finding: while focus on particular salient cases may make it seem that certain justices break their usual ideological mold when it comes to constitutional criminal procedure cases, as some have argued particularly of Justice Scalia[217] and Justice Breyer,[218] this interpretation appears to be a result of salience bias. We find that voting pro-prosecution in criminal procedure cases and voting conservative in all other cases has a correlation of 0.81, an extremely high relationship. As such, when looked at in aggregate, over more than a decade, those salient cases can be put in perspective. Indeed, this first result shows that it is possible to predict patterns of criminal procedure voting without even looking at criminal procedure cases, based on all other Supreme Court cases across the entire spectrum of issues that the Court faces.

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[216] All graphs are available from the authors.

[217] *See, e.g.*, Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005) (analyzing *Crawford v. Washington* and *Blakely v. Washington* as case studies of Justice Scalia's "libertarian, pro-defendant streak"); Joanmarie Ilaria Davoli, *Justice Scalia for the Defense?*, 40 U. BALT. L. REV. 687, 689 (2001) (analyzing cases where Justice Scalia ruled for the defense and arguing that the impact of his decisions has "been to the benefit of criminal defendants").

[218] *See, e.g.*, Jordan S. Rubin, *Breyer Doesn't Leave Clear 'Liberal' Criminal Law Legacy*, BL (Jan. 26, 2022, 1:55 PM), https://news.bloomberglaw.com/us-law-week/breyer-doesnt-leave-clear-liberal-criminal-law-legacy (quoting multiple criminal procedure scholars as opining that Breyer is far less consistent in voting for criminal defendants than for other underdogs, particularly compared to other liberal justices such as Justice Ginsburg).

Table 1: Pro-Prosecution & Pro-Conservative Scores, by Justice

	Pro-prosecution	Pro-conservative	Difference (P-p – P-c)
Alito	84	60	24
Thomas	83	62	21
Kennedy	73	52	21
Roberts	73	55	18
Scalia	73	59	14
Souter	50	34	16
Breyer	50	38	12
Gorsuch	50	50	0
Kavanaugh	50	57	-7
Stevens	42	30	12
Ginsburg	34	34	0
Barrett	33	59	-27
Kagan	29	34	-5
Sotomayor	21	33	-12

Table 1 shows the pro-prosecution score for each justice, their pro-conservative scores, and the difference between them (pro-prosecution minus pro-conservative). The table is ordered from most-pro-prosecution—Justice Alito at 84%—to least pro-prosecution—Justice Sotomayor at 21%. The only real surprise is Justice Barrett, with a pro-prosecution score of 33%, which puts her in the liberal camp on this dimension. But of course, we have the least data on Justice Barrett, who has not yet even authored an opinion in the area, so we do not want to make too much of her surprising score. Justice Breyer does sit above some of the moderate conservative justices on being pro-prosecution, but for all the attention paid to Justice Scalia, he sits in the center of the conservative justices on both scores.[219] The main difference between the two scores is the

[219] The ordering of the justices in terms of being pro-conservative is not radically different. If we had ordered the justices by the difference between the scores, the significant change would not be the position of Justice Scalia, despite the attention he gets. Rather, he would simply sit one rung lower, under the moderate conservative Justice Souter. The big difference would be that Justice Kavanaugh would move down to second bottom and Justice Barrett would be last, showing the biggest divergence between her pro-prosecution and pro-conservative tendencies. Note however that these two justices are the two newest in our data (Justice Jackson joined the Court in the 2023 term, outside our data set), and so we have the least information on her. This result also belies expectations, for of the three Trump appointees, it was Justice Gorsuch who was expected to be, like Justice Scalia, the exception, not Justice Kavanaugh. *See, e.g.*, Andrew Cohen, *Neil Gorsuch: Scalia Without the Scowl*, MARSHALL PROJECT, (Jan. 31, 2017, 8:02 PM), https://www.themarshallproject.org/2017/01/31/neil-gorsuch-scalia-without-the-scowl ("On criminal law it is hard to identify much ideological space between Gorsuch and Scalia. . . . [L]ike Scalia (and unlike, say, Justice Samuel Alito), Gorsuch will side with criminal defendants, if he believes their arrests violated Fourth Amendment protections against unreasonable search or seizure.").

range: pro-prosecution ranges between 21–84 whereas pro-conservative ranges only between 30–62. The top three conservatives are each more than 20% more conservative in criminal procedure cases than all other cases, whereas Justice Sotomayor is 12% more liberal in criminal procedure cases than all other cases, even though she is very liberal overall.[220] Criminal procedure cases, then, appear to polarize the justices more than other cases, with more extremism than in other cases, in aggregate.

This is an important finding because we consistently find in our analysis in Part IV that the extremists on the Court are the most frequent manipulators of the strategic linguistic techniques we study here. When looking at variation among the justices, we observe the same names heading up the scales of who is exploiting the linguistic technique studied here. Our analysis shows that the effects are not idiosyncratic, driven by particular personalities, but rather are predictable based on systematic patterns.

B. Opinion Length and Units of Analysis

In our regressions, the unit of analysis is frequency of use of a given linguistic technique per 1,000 words per opinion. Analyzing the data in this way enables us to both control for length effectively and interpret the coefficients directly as how many more or less instances of each dependent linguistic variable we can expect to occur per 1,000 words.

To check the relationship between opinion length, measured in word count, and each of our control variables, Table 2 presents a simple regression that is largely descriptive. Table 2 regresses opinion length by type of opinion, to see where the justices are directing the most energy in terms of describing the facts. It shows that the average word count of our opinions is 539 but the standard deviation is 532, indicating that there is significant variation between types of opinions. Thus, it is important to examine the variation in opinion length between types of opinions, as that could have significant impact on the tendency of any type of linguistic technique used.

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[220] Justice Sotomayor's pro-prosecution score is 21% and her pro-conservative score is 33%, putting her in bottom place on each measure. Consistent with this, her Martin-Quinn score for the 2021 Term is -4.14, approximately 1.83 standard deviations (2.35) from the average for the Court (0.16). *See* mqscores.lsa.umich.edu/measures.php (last visited Oct. 27, 2023). For an approximately normal data distribution, 68% of observations appear within one standard deviation of the mean and 95% of observations appear within two standard deviations of the mean. *Id.* As such, being 1.83 standard deviations renders Justice Sotomayor strongly liberal.

Table 2: Word Count in Facts, by Type of Opinion

	Wordcount
Background	**638.75****
Majority	**569.12****
Pro-prosecution	-1.61
Background	**669.43****
Concur	-10.91
Mixed	346.05
Dissent	180.18
Pro-prosecution	**288.09****

Observations were dropped if word count was zero

Table 2 shows that, unsurprisingly, majority opinions describe the facts in much more detail than any of the other secondary opinions—almost 600 words more per opinion.[221] What is striking in Table 2 is the fact that the background opinions—those descriptions of facts that are more general characterizations of the world, rather than descriptions of the specific facts at issue raised by the case—count for even more additional words per opinion, over 600. Remember that background opinions are written in addition to, not as a substitute for, general factual descriptions.[222] That means that a majority opinion that includes a background facts section is more than twice as long on average. As such, controlling for background factual descriptions is important; it also suggests that background factual descriptions may also be where we see a disproportionate amount of strategic behavior.

C. Control Variables: Types of Opinions and Measuring Votes vs. Tendencies

To rigorously test the relationships we hypothesize, we used multivariate regression, so that we can control for other variables that could affect the

[221] This is important interpretive information—our regression analysis is in terms of every additional 1,000 words, and the average majority opinion is around 600 words longer than other opinions, so in order to translate each variable into average for opinion, we multiply by 0.57. An easier way to see the effect of each of our variables is to examine the graphs provided after the discussion of each regression result.

[222] *See supra* Part I.C.

relationship between being pro-prosecution and our linguistic variables. Particularly, we controlled for (1) whether the opinion is a primary or secondary background opinion; and (2) whether the opinion is a majority, concurring, dissent, or mixed (concurring and dissenting) opinion. In all of the regression tables, coefficients that are statistically significant to at least the $p<0.05$ level are bolded and asterisked, with additional asterisks indicating highly statistically significant results, to at least the $p<0.01$ level.[223]

To anyone with experience in reading the facts portions of case opinions—both in constitutional criminal procedure and more generally—it is clear that majority opinions are different to other opinions, be they dissenting opinions, concurring opinions, or mixed opinions. Some non-majority opinions do not describe the facts at all, simply relying on descriptions provided in the majority opinion. Even when non-majority opinions do describe the facts, overall, majority opinions typically contain significantly longer fact descriptions—as detailed above. Given this, it is important to distinguish between different types of opinions laying out the facts of the case. We did this in two ways.

Our first method was to use being a majority opinion as a control variable.[224] The majority opinion coefficients associated with each type of linguistic variable can be simply and directly interpreted. For instance, if the majority control variable is positive and significant in looking at use of intensification, that shows that use of intensification language is significantly higher in majority opinions than in all other opinions. These results are laid out in Table 3 below. Our second method was to look at all other types of opinions in contrast to how majority opinions use each linguistic variable.[225] These results show how each non-majority opinion compares to the majority opinion in the same case. These results are laid out in Table 4 below.

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[223] Highly statistically significant means the p-value is less than 0.01, that is, we can be confident that the chances of this relationship showing as a result of random error is less than 1%. The standard benchmark for statistical significance is a p-value of less than 0.05, that is, there is less than a 5% chance of random error creating the result. We use these two terms throughout the following analysis. For a more detailed discussion of what makes such findings reliable, see Tonja Jacobi, *The Role of Theory in Empirical Legal Studies*, 1 COMPAR. CONST. STUD. __ (forthcoming 2023) (manuscript available from the author).

[224] We utilize a simple dichotomous variable indicating yes/no as to whether the opinion is a majority opinion.

[225] We utilize a categorical variable with four categories, with majority opinion as our baseline variable, to see how all other opinions compare to majority opinions.

Our final control variable was whether the opinion includes an additional background opinion section.[226] These only arise in majority opinions in our database.

As well as presenting our regression results, which establish whether strategic use of the variables is statistically significant, we also use graphs to illustrate the manner and extent that each of the linguistic techniques we described are being used by the justices. This allows the reader to see for themselves whether the relationships are substantially significant as well as statistically significant. We examine the use of each of our variables in two ways: by looking at variation between each justice on the Roberts Court; and looking at broader trends across the Court, discerning patterns of behavior based on justices' tendencies to vote in favor of the prosecution or defense. To examine variation among the justices, we use each justice as the unit of analysis. Since some justices in our sample write more opinions than others—ranging from a high of 26 for Justice Alito to a low of 3 for Justice Gorsuch (excluding Justice Barrett, for reasons discussed immediately below)—all of the graphs are normalized by the number of opinions that each justice has written, so that we can compare like with like. As of the end of the 2022 Term, Justice Barrett has not authored any criminal procedure opinions. Accordingly, she appears in the database in terms of votes in the cases and pro-prosecution and pro-conservative scores discussed above, but in the justice graphs, she appears as an empty box. Other justices who have not used the specific linguistic technique analyzed in any of their factual opinions appear in the same way.

In the regressions, our key independent variable is a yes-no pro-prosecution *vote*, i.e. the probability of a given justice voting for the prosecution over the defense in any case. In the graphs, we look at each justice individually and their overall percentage *tendency* to vote pro-prosecution versus pro-defense. Thus, the regressions examine individual votes in individual cases, whereas the graphs look at overall patterns across cases. The regressions give the rigorously tested, specific extent to which each of our existing variables are associated with pro-prosecution tendencies; the graphs provide the big picture.

It is apparent from examining the graphs that a quadratic relationship emerges between being pro-prosecution and use of many of our linguistic variables. That is, the strategic effect is particularly high in the two extremes of the Court, and low in the middle of the Court. In our regression analysis, we use

[226] We utilize a simple dichotomous variable indicating yes/no as to whether the opinion also has a background section.

a logistic model that predicts strategic behavior in each case. This is not a quadratic function, but that is appropriate because, as a reminder, the regression predicts individual votes, whereas the graphs predict tendencies of the justices. The regressions then are capturing not anything *innate* to the justice, for example, being a conservative versus a liberal justice, or idiosyncrasies of a given justice, such as Justice Gorsuch's tendency to say, "to be sure." Rather, we are capturing how each justice *behaves* when they are voting pro-prosecution or not. So, for instance, if Justice Scalia voted pro-prosecution in one case and pro-defense in another, we expect him to have used strategically pro-police rhetoric in the former case and strategically pro-defendant rhetoric in the latter. Both are consistent with the strategic hypothesis. If the strategic hypothesis is correct, the regressions will show a relationship between being pro-prosecution and a given variable—a positive one if it is pro-police and a negative one if it is pro-defense. The graphs illustrate how this manifests among the justices. The fact that the relationship is regularly quadratic shows that extremist justices use strategic rhetoric considerably more than justices clustered closer to the median. In the conclusion, we discuss why we interpret this as further evidence of strategic behavior and the Court.

IV. THE FACTS ABOUT THE FACTS: HOW THE JUSTICES SHAPE THE FACTS TO FIT THE LAW

We now test our strategic theory. Having isolated the relevant text for each opinion, as described in Part II, we scrutinized the text of each individual phrase of each sentence for the presence of for each of our linguistic variables described in Part III. We report the use of each technique by the justices, and describe the patterns that emerge in their use, including variation among the justices and association with ideological judicial camps.

The multivariate regression analysis shows the extent to which each of our linguistic variables are associated with, central to the strategic hypothesis, the justices' tendency to vote pro-prosecution, as well as how those linguistic variables are associated with different types of opinion—majority, concurring, dissenting, and mixed—as well as our background fact additional opinions. The full set of regression results for all of our variables are presented in Tables 3 and 4. Table 3 shows the results for majority opinions (i.e., controlling for majority opinion), Table 4 shows the results for the secondary opinions compared to majority opinions (using majority opinions as a baseline).

The key variable of interest in each table is column 1, the vote pro-prosecution column: this tells us the extent to which more pro-prosecution justices are more likely to use hedging language, intensification language, etc. The other columns tell us how often each technique is used in the different types of opinions, be it regular opinions versus background opinions or in each category of opinions. These columns are less central to the analysis, as they do not relate directly to the strategic thesis, but they do tell us, for example, whether particular categories of opinions use significantly more hedging and intensification language, etc. In Table 3, the results can be read intuitively: each cell tells us how much more background or majority opinions are associated with greater use of each linguistic technique. But in Table 4 it is important to keep in mind that the vote pro-prosecution coefficient in each row is a summary of the extent to which pro-prosecution justices use this kind of language in *all* of the non-majority opinions; the coefficient listed for each category of opinion does not tell us about pro-prosecution tendencies, it tells us how much each type of opinion is associated with use of the linguistic variables, *compared to majority opinions*.

Table 3: Use of Linguistic Variables, for Majority Opinions

		(1) Vote pro-prosecution	(2) Background	(3) Majority
A	Hedging	**3.56****	**7.85****	2.00
B	Intensification	4.27	**11.78****	**7.42****
C	Hedging-defendant	1.26	-0.47	0.99
D	Hedging-police	**2.29***	**8.32****	1.01
E	Intense-defendant	0.71	-0.54	**3.09****
F	Intense-police	3.62	**12.33****	4.24
G	Specific Circumstances	2.09	-3.54	**5.49****
H	Frame: police-negative	-3.21	**6.32***	**4.23***
I	Frame: police-positive	**10.18****	**9.07****	2.50
J	Frame: defendant-negative	**4.48****	-1.86	**4.21****
K	Frame: defendant-positive	-0.07	0.09	0.61
L	Surplus facts	**2.24***	-0.35	1.19
M	Minimized facts	-0.09	-0.51	**1.30***
N	Stigmatize	**5.26****	-3.40	**3.58***
O	Stigmatize: defendant	**1.31****	-0.81	0.61
P	Personalize: police	**2.31****	-1.91	**1.69***
Q	Passive: defendant	**2.67****	-1.70	1.23
R	Active: police	**10.66****	**-9.80***	**16.27****

* = $p<0.05$, ** = $p<0.01$.

Table 4: Use of Linguistic Variables, for Concurring, Dissenting, and Mixed Opinions

		(1) Vote pro-prosecution	(2) Background	(3) Concurring	(4) Dissenting	(5) Mixed
A	Hedging	**3.74****	**6.60****	**11.51****	0.86	**7.78****
B	Intensification	**5.28****	**7.99***	**20.95****	**9.27****	**11.81***
C	Hedging-defendant	**1.56****	-0.93	**5.86****	0.20	0.49
D	Hedging-police	**2.18***	**7.53****	**5.64****	0.66	**7.29****
E	Intense-defendant	**1.93***	-1.12	**6.55****	1.35	1.72
F	Intense-police	3.35	**9.11****	**14.40****	**7.92****	**10.09***
G	Specific Circumstances	**4.77****	-2.84	-0.86	1.65	-1.63
H	Frame: police-negative	**-3.68****	2.81	**14.09****	**9.22****	**8.49***
I	Frame: police-positive	**10.98****	**8.30****	**8.48***	0.83	3.99
J	Frame: defendant-negative	**7.20****	-1.14	1.24	-0.56	-2.28
K	Frame: defendant-positive	-0.45	-0.81	**3.12****	**2.20****	**2.86***
L	Surplus facts	**3.16****	0.08	-0.96	-0.52	-0.96
M	Minimized facts	0.58	-0.57	**2.38***	0.16	-0.19
N	Stigmatize	**5.39****	**-5.62***	**10.08****	**5.64****	**7.86***
O	Stigmatize: defendant	**1.35****	-1.25	**2.29***	**1.17***	-0.35
P	Personalize: police	**2.96****	**-2.12**	-0.46	**1.88***	-0.60
Q	Passive: defendant	**2.88****	-2.08	2.01	0.53	**6.98****
R	Active: police	**17.45****	**-11.58***	10.46	**11.13****	2.33

* = $p<0.05$, ** = $p<0.01$.

In each of the sections that follow we discuss the results for each variable in turn. Lettered labels are provided for each row, for ease of discussion. We refer to, for example, variable A, column 1 in Table 3, as 3A1.

A. Hedges and Intensifiers

More pro-prosecution justices are highly statistically significantly more likely to use hedging language ($p<0.01$). This is the case for both majority opinions (3A1) and non-majority opinions (4A1). In particular, hedging in relation to describing police behavior (3D1 & 4D1) is more common and especially associated with pro-prosecution judging for all types of opinions. This makes sense on the strategic thesis, as most constitutional criminal procedure cases are concerned with police misbehavior. The more pro-prosecution a justice is, the greater the rhetorical advantage there typically is to hedge in relation to describing police conduct, as hedging in this context minimizes police malfeasance. And as predicted, pro-prosecution justices are significantly more likely to use hedging in these circumstances.

Intense language is not associated with being pro-prosecution for majority opinions (3B1), but it is strongly associated with being pro-prosecution in non-majority opinions (4B1). Further, in non-majority opinions, intense language is not used by pro-prosecution justices more in relation to police (4D1), but it is used more by pro-prosecution justices in relation to defendants (4C1). This also conforms with the strategic hypothesis and is what we expected, as it is the flipside to what we just discussed in terms of use of hedging language—just as pro-prosecution justices use more hedging language in describing police behavior, making less clear their culpability, those same justices use more intense language for defendants, at least in non-majority opinions.

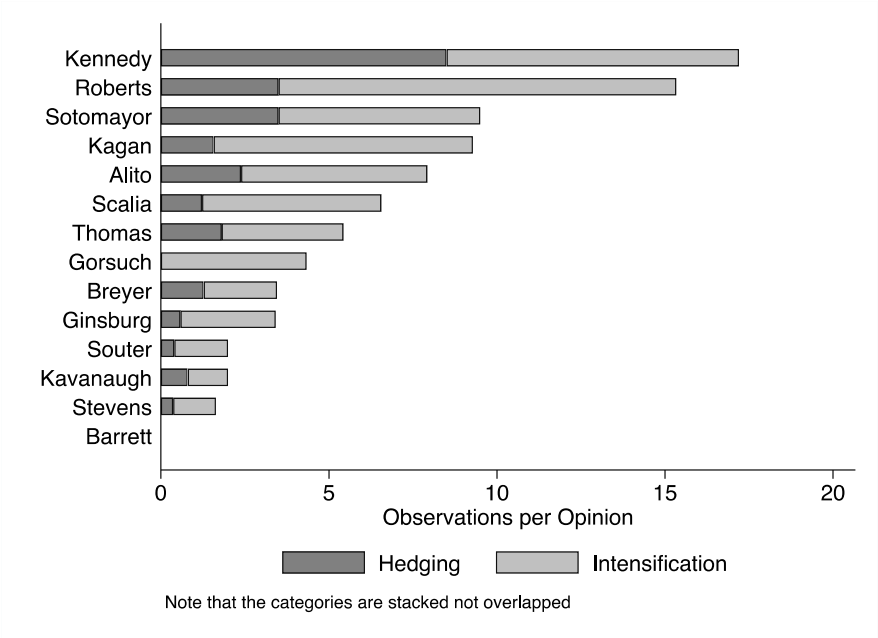
Further, as predicted but not shown in the table for reasons of concision,[227] these two techniques are not used in opposition to one another but in combination: overall, hedging and intensification is significantly associated with being pro-prosecution for majority opinions, with a coefficient of 5.57 ($p=0.04$) and even more so when looking at other opinions, with a coefficient of 9.04 ($p=0.00$). And the correlation between the two variables is also highly statistically significant, at 0.62 ($p=0.00$), indicating that the two techniques are regularly used in combination.

[227] Full results available from the authors.

Both hedging and intensification language are also highly significantly correlated with background opinions—when justices write exceptionally long opinions describing background facts, they are more likely to use both intense and hedging language, and especially intense language, particularly in relation to the police. Given that these opinions generally describe the state of the world and why a particular doctrinal shift is necessary, it is not surprising that, even when describing the facts, these opinions involve particularly intense language as a persuasive endeavor. Hedging and intensification are both also particularly seen in concurring opinions (4A3 and 4B3), directed at all parties (4C3–4F3). Note that the coefficients for concurring opinions are particularly high for use of hedging and intense language, even though concurring opinions are much shorter, showing that this type of language makes up the particularly high proportion of concurring opinions.

To examine individual justice's use of hedging and intense language, and the same for other linguistic techniques, we use bar charts that show the frequency of each justice's tendency to use each variable studied here. The x-axis is simply the number of observations per opinion—in Figure 1, this is the number of hedges and intensifiers used on average per opinion—with each justice appearing on the y-axis. Note that the categories are stacked, not overlapped, meaning that the end of the bar represents the total when more than one category is displayed. Figure 1 represents both hedging and intensification, with the total of each bar representing the cumulative use of both techniques. For instance, in first place is Justice Kennedy, with 17.3 total observations on average per opinion, 8.5 of which are hedges and 8.7 are intensifiers.

Figure 1: Hedging and Intensification, by Justice



We observe considerable variation in the use of both hedging and intensifiers among the justices—the top justices on the scale, Justice Kennedy, Chief Justice Roberts, and Justice Sotomayor, used hedging and intensifiers 5–10 times as often (17, 15 and 10, respectively, on average) as do the justices down the bottom of the scale, Justice Stevens and Justice Souter (2 or less each per typical opinion). Yet, despite this remarkable degree of variation among the justices, we see two very consistent patterns emerge. First, as discussed, there is a tendency in the literature to think about hedging and intensifiers as oppositional. But from Figure 1, that does not appear to be true, at least in the case of Supreme Court justices talking about constitutional criminal procedure facts. As discussed, the correlation between the two variables is 0.62, which is both highly statistically significant ($p<0.01$) and substantially a strong and meaningful positive association. We see this manifest in Figure 1 in that the same justices who tend to use one linguistic technique also tend to use the other; that is, the biggest hedgers are also the biggest intensifiers, and vice versa. This first pattern reinforces our impression from reading the cases that both hedging and intensifying are a form of rhetorical emphasizing.

Second, every justice uses intensification far more than hedging. The only justice who achieved parity was Justice Kennedy, who uses intensifiers a lot but hedges a lot also.[228] Every other justice had a large majority of their bar comprised of intensification rather than hedges.[229] This fits with our expectations based on the literature: Professor Rachel K. Hinkle and her co-researchers found that lower court judges use hedging language when they are politically out of alignment with higher court judges; the study's authors interpret this as the judges' attempts to avoid being overruled by making their language flexible enough to evade direct findings of erroneousness.[230] Supreme Court justices, of course, have no higher judges sitting over them,[231] and so have no need to curtail their language for fear of retribution, and hence can use the more confidence-driven version of the rhetorical emphasis, intensification rather than hedging. Thus, Figure 1 provides important insight into how the justices see their role within the judicial hierarchy and how they use rhetorical techniques in line with that self-perception.

If we simply read the regression tables, we may have the impression that use of hedging and intensifiers as strategic rhetorical devices is exclusively the domain of the conservative justices. But that is not correct. When we look at the distribution among the Justices, based on our pro-prosecution measure of Supreme Court justices, we see the use of hedges and intensifiers is not defined purely by ideology but rather by extremism.

Figure 2 displays the use of hedging and intensification as a product of the level to which each justice is pro-prosecution, broken down by who each action

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[228] It is worth noting that Justice Kennedy is someone who is described as favoring "flowery language" by both admirers and critics. *See, e.g.*, Nancy L. Combs, *Justice Kennedy's Controversial Judicial Philosophy, Described by a Former Clerk*, VOX (July 2, 2018, 12:14 PM), https://www.vox.com/first-person/2018/6/30/17520572/kennedy-retirement-supreme-court-clerk-remembers-reflections (describing Justice Kennedy as displaying "optimism in all of his most important opinions – and indeed in the soaring (some say overly flowery) language of those opinions"); Ian Millhiser, *Justice Kennedy Deserves This Nasty, Unflinching Sendoff*, THINK PROGRESS (June 27, 2018, 2:01 PM), https://archive.thinkprogress.org/kennedy-was-a-bad-justice-76e464024d78/ ("[Kennedy's] writing ranged from needlessly flowery to completely incoherent."). The emphatic embellishments that we identify Kennedy as particularly prone to use are a good measure of what commentators may be more impressionistically discussing.

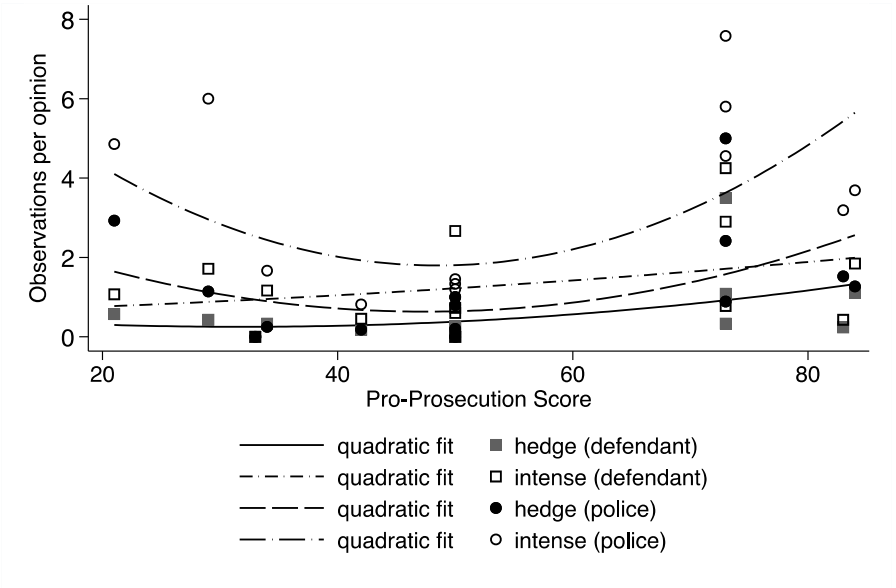
[229] After Justice Kennedy, who uses an equal rate of intensifiers and hedgers, the percentage of intensifiers range from 63% for Justice Kagan and Justice Breyer, to 100% for Justice Gorsuch and 81% for Justice Scalia and Justice Kagan.

[230] Hinkle et al., *supra* note 55, at 431, 436–38.

[231] *But see* Tonja Jacobi & Matthew Sag, *The Supreme Court Needs 15 Justices*, BL (May 4, 2021, 4:01 AM), https://news.bloomberglaw.com/us-law-week/the-supreme-court-needs-15-justices?context=search&index=0 (proposing that if justices sat on panels that could be reviewed en banc by a vote of the justices, this would have advantages including mitigating polarization).

is directed toward, defendants or police. This and later graphs, which order the justices by our pro-prosecution measure, have the justices arrayed on the x-axis, ordered by their pro-prosecution scores, and frequency of use of our linguistic variables on the y-axis—here, use of hedges and intensifiers. Each justice still appears individually in the graph, but now each is simply represented as a circle, square, and triangle; the point of these graphs is to focus on overall patterns between the tendency to vote more or less pro-prosecution and our linguistic variables of interest.

Figure 2: Hedging and Intensification, by Pro-Prosecution & by Subject—Police/Defendant



Whereas in Figure 1 we observed the similarities among the justices in use of hedging and intense language, in Figure 2 we see an important point of diversion among the justices: use of both linguistic techniques is more common for extreme justices, both pro-prosecution and pro-defendant justices. Figure 2 shows that the tendency to use hedges and intensifiers is higher among both the extreme left and the extreme right of the Court and lower among moderates of the Court. This is a consistent trend throughout our results. This result is mimicked when comparing liberal and conservative justices.

This effect is particularly marked for intense language than for hedging, but the overall pattern is the same. The relationship is not linear but rather quadratic: of the 14 justices in our data set, the 6 moderately pro-prosecution justices[232] barely register as using hedging at all; use intense emphasis 1 or 2 times per opinion; and, in combination, use the techniques on average 2.8 times per opinion each. In contrast, the two least pro-prosecution justices (on the left) use these techniques 9.6 times per opinion, more than 3 as often as the moderate justices, and the 5 most pro-prosecution justices (on the right) use both these techniques 10.5 times per opinion, almost 4 times as often as the moderate justices.

When we break down the use of hedging and intensifiers by who each technique is directed toward, police or defendant, when characterizing the police, both hedging (dashed curve) and intensifiers (long dash with dots curve) again display a quadratic relationship, with the outliers overrepresented and the moderates underrepresented. In contrast, when characterizing defendants, the curves are almost straight lines, with slight upward slopes, indicating use more by more pro-prosecution justices. As discussed, it is unsurprising that the most common use is intense language regarding the police in criminal procedure cases, but the pattern is clearly ideologically differentiated, as we predicted: the average use of intensifiers toward police by Chief Justice Roberts, the top justice in this category, is 7.6 instances per opinion, whereas his use of hedging toward defendant's is 1.1 on average per opinion. At the other end, Justice Stevens uses less than 1 instance of each technique per opinion.

We believe that this pattern emerges not because extremist justices are more dramatically expressive. Rather, we predicted that the greater use of these intense expressions about police by pro-prosecution justices will be mostly positive—an attempt to combat the effect of blame inherent in the nature of the cases—and that the greater use by pro-defendant justices will be mostly negative—to achieve the opposite effect. And that is what we have seen in our first set of results.

B. Specific Circumstances

When examining the use of linguistic variables in majority opinions, in Table 3, we find that majority opinions involve significantly more specificity than all other opinions (3G3), but that specificity is not associated with the pro-

[232] All averages among the justices exclude Justice Barrett, who has not authored an opinion.

prosecution score (3G1). However, Table 4 shows that a higher pro-prosecution score is highly correlated with specificity for non-majority opinions (4G1), and this effect is highly statistically significant. This confirms our expectation that the two examples we examined in Part II are representative of a pattern: pro-prosecution justices are meaningfully exploiting this rhetorical technique to downplay police misbehavior by giving significantly more detail to justify police errors and malfeasance—but only in non-majority opinions. Thus, we see partial confirmation of the strategic theory as applied to specific circumstances.

C. Framing

The results in terms of framing are extremely interesting and strongly supportive of the strategic hypothesis. Negative framing of police behavior is significantly and negatively associated with being pro-prosecution for non-majority opinions (4H1). That is, the more pro-prosecution a justice is, the lower the chance of using negative framing words regarding police behavior—or misbehavior. When it comes to positive framing for police, this is very highly correlated with being pro-prosecution, for all opinions (3I1 and 4I1). On the flipside, when it comes to describing defendant behavior, pro-prosecution justices use statistically more negative framing, across all opinions (3J1 and 4J1). These effects are all highly significant and substantially large. Yet, as expected, being pro-prosecution shows no such effect for positive descriptions of defendant behavior (3L1 and 4L1). Each of these results is as predicted by the strategic hypothesis: pro-prosecution justices work hard to put police misbehavior in its best possible light and defendant behavior in its worst possible light. Even when the justices are only describing the facts, they are already introducing rhetorical flourishes that set the reader up to see the facts in light of the overall doctrinal position of the given justice.

This effect is further confirmed in the correlations: framing police negatively and defendants positively is statistically significantly correlated, at 0.39; likewise, framing defendants negatively and police positively is statistically significantly correlated, at 0.60. This shows that our framing results do not come about because some justices tend to write positively and some tend to write negatively: rather, the same justices are reversing each technique, depending on who they are describing, police versus defendants, and doing so strategically, positively framing the police and negatively framing defendants, or vice versa, according to how pro-prosecution the justice is. These results are worth breaking down in greater detail, graphically.

Figure 3: Positive Framing, by Justice

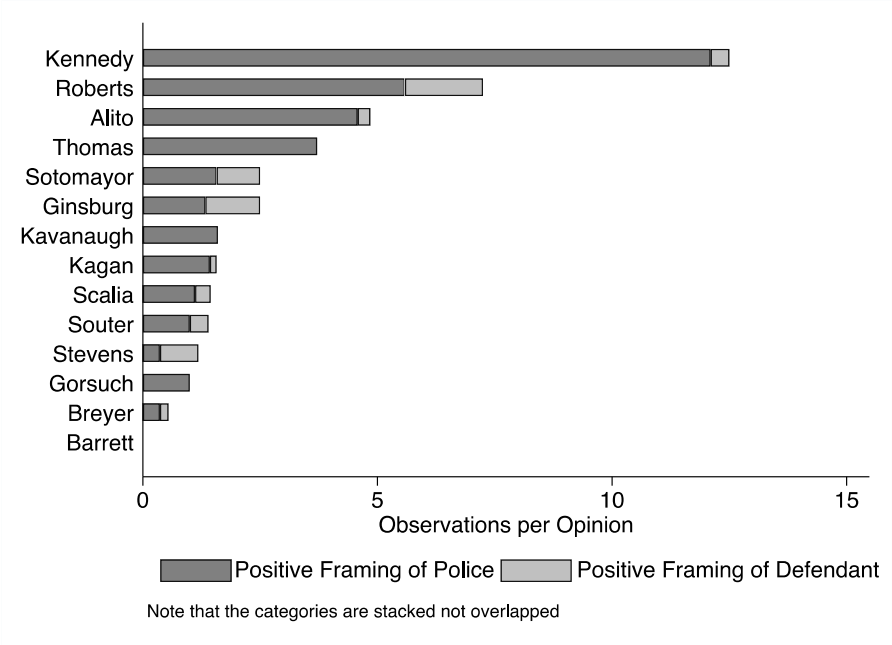
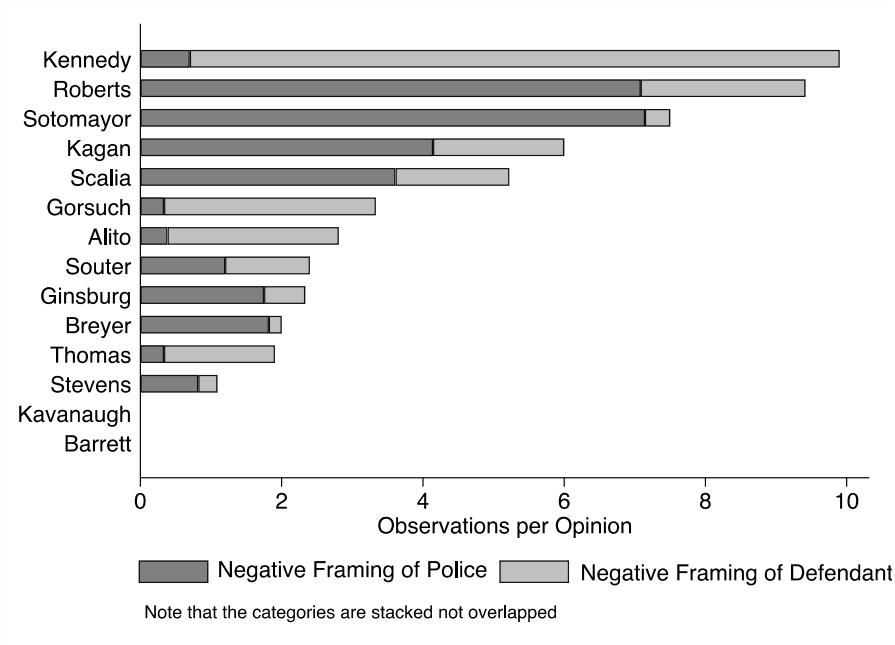


Figure 3 shows the extent to which each justice uses positive framing, broken down by who they direct such positive framing toward. The results shown are interesting and, we believe, quite surprising. Constitutional criminal procedure is concerned with misbehavior by the police, yet strikingly, Justice Ginsburg was the only one of our 14 justices to direct more positive comments to defendant than police, and her numbers are low: 1.3 compared to 1.2 positive comments per opinion, on average, respectively. For every other justice, the majority of the positive framing is concerned with police conduct, as a proportion of total positive framing directed at the two sides combined.

Despite this rather surprising consistency, as we predicted, the inconsistencies between the justices follow the justices' pro-prosecution tendencies. Justice Kennedy praised the police more than thirty times as often as he praised defendants. Justice Alito praised the police more than fifteen times as often. And for Justice Thomas, the difference is infinite, for he only used positive terms to describe police (an average of 3.7 observations per opinion). At the other end of the spectrum, the ratio for Justice Sotomayor was just 1.8 times as

often. Accordingly, positive framing strongly comports with our hypothesis that justices strategically use language describing facts, which are meant to be neutral, to favor the side that they tend to be ideologically aligned with.

Figure 4: Negative Framing, by Justice



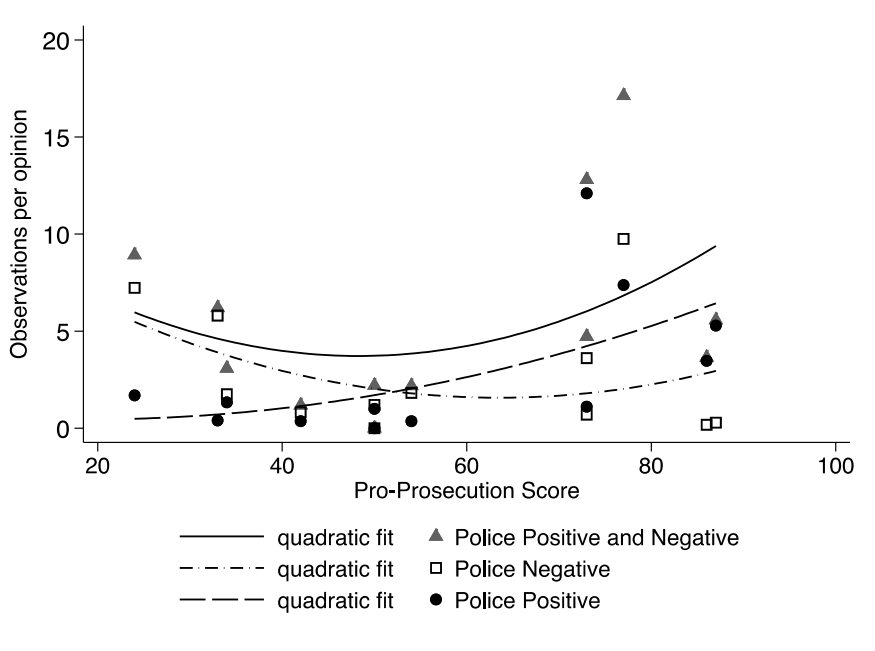
When we turn from positive framing to negative framing, the ideologically disordered ranking in Figure 4 does not mean that use of positive and negative framing does not follow the strategic theory that the justices use rhetorical devices to achieve their ideological goals. The overall ranking of the justices tells us only how often each justice uses positive or negative framing. What is telling is who the positive and negative frames are directed at, the proportion between police and defendant, which can be predicted once again by each justice's pro-prosecution score. The order in which the justices frame most negatively in terms of defendant compared to police is once again dominated by three conservative, pro-prosecution justices: Justice Kennedy at more than 13:1, Justice Alito at 6:1, and Justice Thomas at more than 5:1. On the flipside, the liberal justices negatively frame police more than they negatively frame defendant: Justice Sotomayor at 18:1, Justice Kagan at 2:1, Justice Ginsburg at 3:1, and Justice Stevens at 3:1. The only two justices who are not predictable

based on pro-prosecution scores are Chief Justice Roberts and Justice Scalia, who framed police negatively more often than they framed defendants, 3 and 2.2 times as often, respectively. But it is worth remembering that these are cases concerned with police misconduct, and so these results show that only two of 14 justices are not predictably partisan.

While many of our results thus far have shown that conservative justices disproportionately behave strategically, we also see that Justice Sotomayor appears high on the scale of many of these strategic behavior variables relative to the other liberal justices. Justice Sotomayor is described as the most ideological and outspoken of the liberal justices,[233] suggesting that our variables are effectively capturing what commentators are impressionistically noticing: that these rhetorical devices are used by some justices more than others, those typically described as outspoken in some form or another. Put another way, it is the extremists who most engage in linguistic strategy. The next two figures, like Figure 2, further establish this effect.

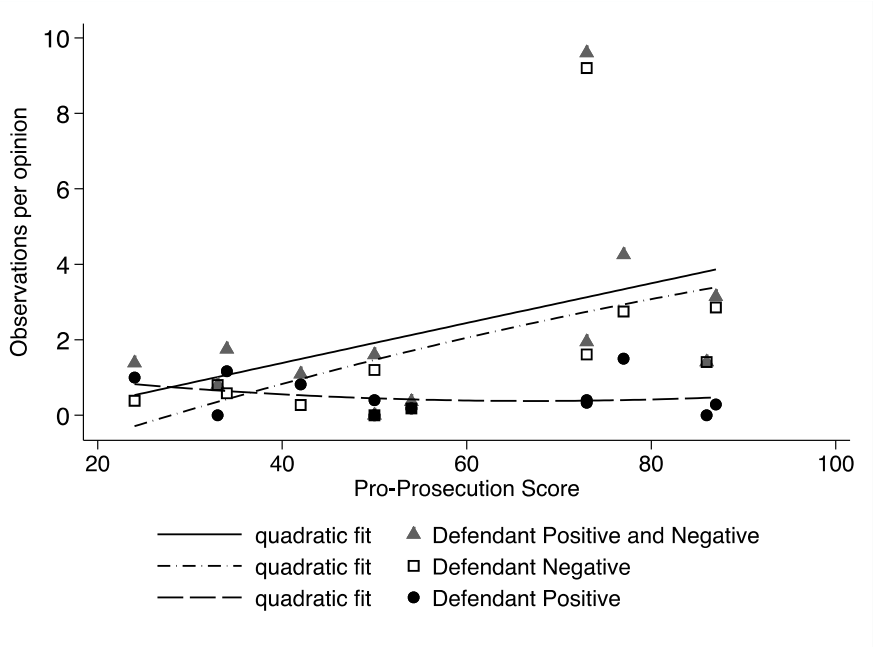
[233] *See, e.g.*, Richard Wolf, *'The People's Justice': After decade on Supreme Court, Sonia Sotomayor Is Most Outspoken on Bench and Off*, USA TODAY (Aug. 8, 2019, 3:10 AM), https://www.usatoday.com/story/news/politics/2019/08/08/justice-sonia-sotomayor-supreme-court-liberal-hispanic-decade-bench/1882245001/ (describing Justice Sotomayor as the most liberal justice, issuing the most frequent and forceful dissents, and the most outspoken justice, on and off the bench); David Fontana, *Justice Sotomayor Is Showing Her Liberal Peers on SCOTUS How to Be a Potent Minority Voice*, VOX (July 7, 2018, 10:01 AM), https://www.vox.com/the-big-idea/2018/7/6/17538362/sotomayor-kennedy-retirement-liberal-wing-dissent-travel-ban-rbg ("Relative to her liberal colleagues, Sotomayor is more confrontational and less cooperative.").

Figure 5: Positive and Negative Framing of Police, by Pro-Prosecution



In Figure 5, we see the justices' tendency to use positive language about the police (dashed curve) increases quite consistently with being more pro-prosecution; the tendency to use negative language about police (dashed and dotted curve) is the opposite, higher for less pro-prosecution justices. It is worth remembering that this figure is based only on the justices' description of the facts, not their legal analysis. Pro-prosecution justices use more positive discussion of police even in criminal procedure cases which are about police misbehavior, as the strategic model predicts. The least pro-prosecution justices display the reverse pattern, with more negative characterizations of police rather than positive descriptions.

Figure 6: Positive and Negative Framing of Defendant, by Pro-Prosecution



When we turn to framing of defendants, in Figure 6, we see the opposite relationship: pro-prosecution justices are more likely to emphasize negative facts about the defendant. But for once the relationship is not quadratic, with extreme liberal, pro-defendant justices showing little difference in how they frame defendant, positively versus negatively. This effect, instead, is being driven solely by the conservative/pro-prosecution justices.

Importantly, providing strong evidence of the strategic hypothesis, it is the same justices who are saying positive things about the police who are emphasizing negative things about the defendant. Our results illustrate that both negative framing and positive framing strongly support our hypothesis of strategic descriptions of the facts by the justices.

D. Surplus Facts and Minimized Facts

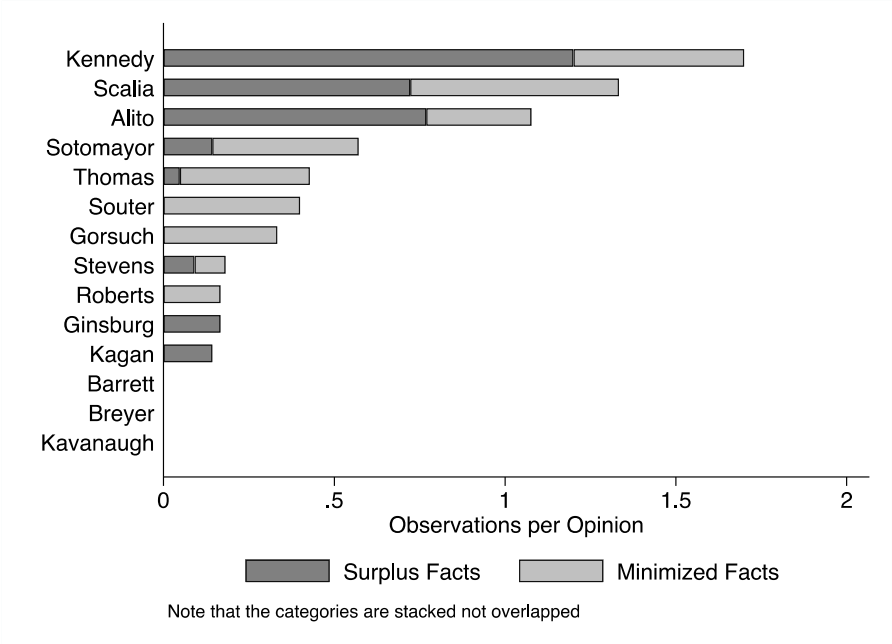
Pro-prosecution justices are significantly more likely to introduce additional, not strictly relevant facts into their narratives, in all types of opinions (3L1 and 4L1). Majority opinions and concurring opinions are significantly more likely

to skip inconvenient facts in their narratives, but there is no statistically significant relationship between minimized facts and being pro-prosecution (3M1 and 4M1)—although this may be driven by the small sample size. Importantly, use of surplus facts and minimized facts is significantly correlated, at 0.22 ($p<0.00$), suggesting that the same authors use both techniques.

This constitutes another strong indication of strategic manipulation of the facts by the justices. Professors Jacobi and Sag described strategic behavior by the justices at oral argument as techniques that "help your friends and harm your foes"—that is, behavior that appears to be in aid of the side that the justice ultimately supports or to the detriment of the side that the justice ultimately opposes.[234] Omitting relevant evidence (what we label minimized facts) or adding irrelevant evidence (surplus facts), particularly adding irrelevant or omitting relevant evidence that has high emotional valence so as to lead to a particular conclusion, fits this definition perfectly. Our reading of the cases is that typically, surplus facts fit this description: the arguably relevant facts that were included by justices were not random, they appeared to be highly emotive and included to color the feelings of the reader for or against a particular party and so distract from the legal issue. Likewise, omitted facts were typically distasteful to the outcome that the justice favored and conveniently left out.

[234] Jacobi & Sag, *supra* note 127, at 1163–64 (2019) ("[J]ustices do not pursue these activities in a neutral fashion: rather, they systematically direct their challenging comments to their 'foes' and their leading questions to their 'friends.' They step in to protect the advocate whom they ultimately support from tough challenges from their colleagues, or directly answer or rebut those tough questions and comments themselves.").

Figure 7: Surplus Facts & Minimized Facts



Theoretically, then, according to the legal model of judging, Figure 7 should be an empty graph, with all of the justices sitting at zero, neither omitting relevant facts nor including irrelevant facts. And yet that is not what we observe. Justice Kennedy engaged in this highly strategic behavior 1.7 times per opinion that he writes, Justice Scalia more than 1.3 times per opinion of his many criminal procedure opinions—despite having written books on appropriate legal reasoning and writing.[235] And also appearing near the top, with more than 1.1 occurrences per opinion, is Justice Alito, another repeat offender on a number of these variables.

The numbers alone are quite striking: those three conservative justices either add in surplus facts or omit relevant facts more than once in every opinion, and in Justice Kennedy's case, almost twice per opinion. But also of interest is that while there is variation in the proportion of surplus facts to minimized facts among the justices who seldom engage in this technique—from Justice Souter

[235] *See, e.g.*, GARNER & SCALIA, Making Your Case, *supra* note 57; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

down in Figure 7—in contrast, of the four justices discussed who engage in this more often, and particularly the three big conservative offenders, they all use *both* techniques a substantial number of times. This further emphasizes the strategic nature of this technique: this variable is not measuring a tendency of a particular justice to wax lyrical, as would be the case if Justices Kagan and Ginsburg, who only are observed adding facts occasionally, topped the overall chart; nor is it the case of these justices tending to be overly concise, leaving out too much, as would be the case if Chief Justice Roberts, Justice Gorsuch, or Justice Souter were near the top of the scale. Rather, Justices Kennedy, Scalia and Alito add where convenient and subtract where convenient, according to what suits their purposes.

Importantly, note that all three of the justices who head up this category are conservative justices; they and others claim that conservative judicial methodology constrains the discretion of justices.[236] But Figure 7 strongly suggests that this claim to conservative judicial methodological objectivity is illusory, if it is the conservative justices who are most likely to simply add in irrelevant but emotive facts or leave out inconvenient facts from their supposedly neutral descriptions. This is not to imply that the inclusion of prejudicial facts or exclusion of inconvenient facts is purely a conservative tendency: among the liberal justices, the highest ranked justice on this scale is again Justice Sotomayor, the only liberal justice to score more than .6 per opinion, once again showing the effect of extremism. But it is important to note that the claim of neutrality in conservative methodology is belied by these results.

E. Stigmatizing vs. Person-Centered Terms

In order to assess how much a justice treats the various characters who appear before them with more or less respect and the extent to which they treat the different parties fairly or not, we next consider our stigmatize-personalize variable. Respect is indicated by each justices' tendency to personalize some individuals when discussing them—for instance, by referring to them by name; disrespect is captured by their tendency to stigmatize them—for instance, by referring to them as "the inmate" or "the officer."

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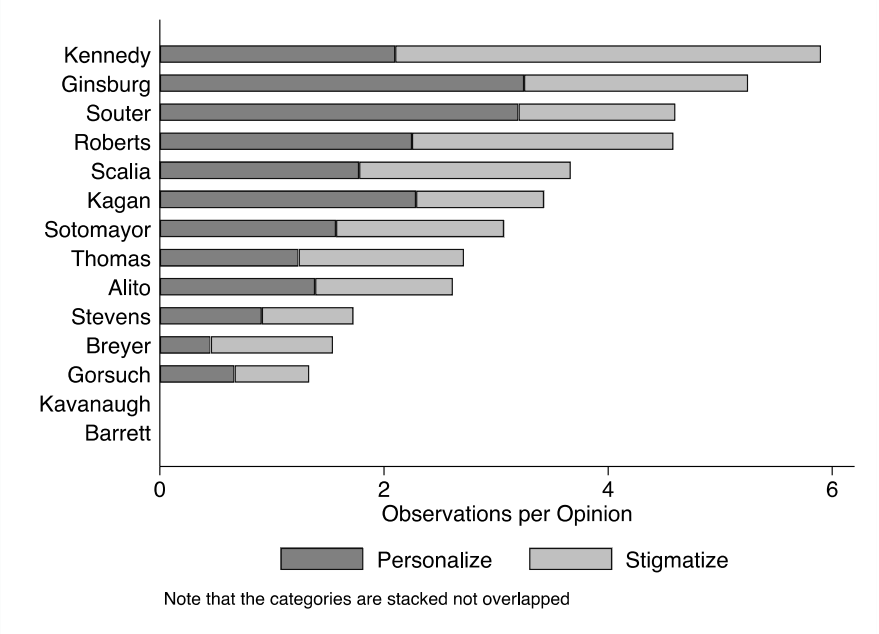
[236] *See, e.g.*, SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, *supra* note 235; SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 235. *But see* RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION ix (2018) (countering Justice Scalia's claim that conservative judicial methodology is uniquely legitimate and arguing that making this claim harms judicial legitimacy).

Stigmatization and personalization are used in exactly the way the strategic hypothesis predicts. Pro-prosecution justices are highly significantly more likely to stigmatize in general, in all categories of opinions (3N1 and 4N1). All types of opinions utilize stigmatization (3N3 and 4N3–5), except for background opinions (3N2 and 4N2), the latter of which is unsurprising given the nature of those opinions—describing broad societal changes rather than focusing on the facts in the case. Furthermore, and as predicted once again, pro-prosecution justices are particularly likely to stigmatize defendants (3O1 and 4O1), at a highly statistically significant level in all opinions. Stigmatization of defendants is particularly common in concurring and dissenting opinions (4O3–4). Likewise, pro-prosecution justices are more likely to personalize police, in all opinions (3P1 and 4P1). Personalizing the police is particularly common in majority opinions and dissenting opinions (3P3 and 4P4). Once again, these opposing techniques are significantly correlated: defendant stigmatization is significantly correlated with personalization of police, at 0.59 (p=0.00).

Figure 8: Stigmatize and Personalize by Justice



In Figure 8, once again the ranking of the justices is less important, as this only tells us the number of times that they refer to an individual, in one way or

another, and the fact that Justices Kennedy and Ginsburg did so the most tells us little. What is revealing are the proportions displayed in each justice's bar, between whether they personalize and stigmatize, and here we see a familiar pattern to previously, though with one variation. Once again Justice Kennedy stands out, with a substantial majority (64%) of his references to individuals being terms that stigmatize rather than personalize. He used stigmatizing language almost four times per opinion. Joining Justice Kennedy, the other justices who stigmatized regularly and more often than they personalized are two more of the top of the pro-prosecution ranking: Justice Thomas and Justice Scalia. The remainder of the justices either used very little of this language or, more typically, personalized more often than they stigmatized. This is important, because use of terms that denote stigma is contrary to the notion of blind justice.

F. Passive Voice and Active Voice

Our final set of linguistic techniques, use of passive versus active language, also follow the predictions of the strategic model, with striking results. By way of background, all of the justices favor active voice in general, registering at about 80% active. The only exception is once again Justice Kennedy, who was unusually passive at only 66% active. This may be another reason why Justice Kennedy's writing is critiqued by many.[237] And yet, when the justices choose to use passive voice, it is very revealing of their strategies.

Pro-prosecution justices are highly significantly more likely to use passive language in regard to defendants (3Q1 and 4Q1) and active language in relation to police (3R1 and 4R1). The latter pair of coefficients are particularly high, indicating that actively describing police behavior, with all of the positive connotations of the agency discussed above, is a particularly popular linguistic technique. The reverse effect does not arise: pro-prosecution justices are *not* more likely to use active language in regard to defendants for majority opinions (the coefficient is 2.61, p=0.07, not significant) though they are in other opinions

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[237] *See supra* note 228 and accompanying text. Justice Kennedy is not only critiqued for flowery writing but for bad writing. *See, e.g.*, Paul Horwitz, *A Hallmark of an Opinion: Justice Kennedy's Writing Style and How Much—or Little—It Matters*, PRAWFS BLAWG (June 29, 2015, 3:08 PM), https://prawfsblawg.blogs.com/prawfsblawg/2015/06/a-hallmark-of-an-opinion-justice-kennedys-writing-style-and-how-much-it-matters.html ("Kennedy's writing is often worst precisely in those cases where it clearly matters most to him."); Michael C. Dorf, *Justice Kennedy's Writing Style and First Amendment Jurisprudence*, DORF ON L. (Oct. 5, 2018), http://www.dorfonlaw.org/2018/10/justice-kennedy-and-first-amendment-and.html ("Justice Kennedy's prose style has been the frequent object of criticism, some of it extremely harsh, as when Justice Scalia in his dissent in *Obergefell v. Hodges* wrote that if he ever joined an opinion with the line with which Kennedy's majority opinion begins he (Scalia) 'would hide [his] head in a bag.'").

(the coefficient is 7.04, p=0.00).[238] Similarly, pro-prosecution justices are *not* more likely to use passive language in regard to police in majority opinions (the coefficient is 0.72, p=0.24, not significant), though they are for other opinions (the coefficient is 1.87, p=0.04). Together, these results show that, as predicted, when a justice wants to show police in the best possible light, they would describe them as actively doing their jobs, and this is associated with being pro-prosecution. Defendants, on the other hand, at least in majority opinions, are more likely to be described passively.

CONCLUSION

Our qualitative and quantitative analysis provides strong support for our hypothesis that the facts presented in criminal procedure cases are not described neutrally. The vast majority of the specific linguistic variables we examine are predictable based on a justice's pro-prosecution or pro-defense tendencies. In particular, pro-prosecution justices use more hedging language in describing police behavior, camouflaging police culpability in constitutional violations; those same justices use more intense language for defendants in non-majority opinions. Likewise, pro-prosecution justices use many more specifics when describing police conduct in non-majority opinions, though not in majority opinions. Thus, our first two measures provide support for the strategic hypothesis, but more clearly in non-majority opinions than majority opinions. Our other four linguistic measures are exactly as the strategic hypothesis predicts, across almost all categories.

Pro-prosecution justices use far less negative framing about police behavior and far more positive framing about police behavior, even though these cases typically concern police misbehavior. This applies for all types of opinions. When it comes to describing defendant behavior, those same pro-prosecution justices use more negative framing but no more positive framing. The effects for framing are statistically significant and also substantially remarkable: pro-prosecution justices praise police dozens of times more per opinion than defendants when laying out the supposedly neutral facts of cases. Pro-prosecution justices also tend significantly to stigmatize, especially defendants, and are much more likely to personalize police, in all types of opinions. Pro-prosecution justices also tilt the scales by describing police as actively doing their jobs, consistently using active language in describing police, while using passive language to describe defendants. And finally, and perhaps most

[238] These regressions are not shown for reasons of concision, but full results are available from the authors.

controversially, pro-prosecution justices introduce doctrinally irrelevant facts into their narratives significantly often, in all types of opinions. And while there is no statistically significant relationship for minimized facts and being pro-prosecution, there is a strong correlation between adding surplus facts and leaving out inconvenient facts. The biggest culprits in this category are conservative justices, undermining the claim of neutrality in conservative methodology. Altogether, these results show that even when the justices are only describing the facts, they are already introducing their ideological preferences into those descriptions and tilting the narrative to support the pro-prosecution or pro-defense tendencies of the given justice.

Pro-prosecution justices work hard to put police misbehavior in its best possible light and defendant behavior in its worst possible light. Pro-defendant justices do the opposite. But justices in the middle make far less use of any of these techniques. The fact that these techniques are primarily used by extremists on both ends of the ideological spectrum, far more than the moderate and median justices, is, we posit, further evidence of strategic behavior at the Court. A branch of political science called positive political theory has accurately predicted different strategic behaviors by different justices distributed on a multijudge panel, such as the Supreme Court.[239] This literature suggests that the farther a case outcome is from a given justice's ideal outcome preference, the more unhappy the justice will be with the proposed outcome and the more they will engage in strategic behavior.[240] Our novel contribution is to show that as a result, these justices are essentially spinning the facts in their opinions. The supposedly neutral parts of Supreme Court opinions, the parts of opinions that lay out what occurred in a given case, are actually being infected by a justice's view of what that the outcome *should* be. Furthermore, disagreeing justices present alternative facts to one another.

Recent scholarship has shown that since the body politic became more polarized, the Supreme Court has also changed.[241] In particular, the justices have been shown to be behaving more like advocates at Supreme Court oral argument, making more comments than asking questions, using up the time of the

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[239] *See, e.g.*, Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411, 412 (2009) (predicting different case outcomes depending on different norms of the Court regarding inclusion of extremist judges in case coalitions); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 6 (2009) (testing Jacobi's coalition-formation theory and finding evidence of the strategic theory of case coalition formation).

[240] Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, *supra* note 239, at 415.

[241] *See* Devins & Baum, *supra* note 25, at 301–02.

advocates they ultimately vote against, and directing comments to the advocates they vote against, only asking questions of the advocates they ultimately support.[242] But oral argument is defined by limited time and the dynamic atmosphere in which justices compete to have their say.[243] In contrast, when writing opinions, justices have the time and space to reflect, and to act in a more "judicial" way—to fulfill the traditional legal model of neutrality and objectivity. Yet, our study shows that even when writing opinions, and even when we look only at the descriptions of the facts of those opinions, the justices are engaging in advocacy. They are using linguistic techniques to further their strategic goals, even in saying what the events of the case are. These behaviors are predictable, both in terms of ideological predilections and in terms of each justice's relative position on the Court, with extremists driving most of these results. This suggests that the justices see their role not as objective, neutral decisionmakers, even when writing for the ages and shaping the law of the land, but rather as advocates for preferred outcomes. This presents a serious challenge to our understanding of the modern Supreme Court.

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242 Jacobi & Sag, *supra* note 127.

243 *See generally* Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1381–82, 1395 (2017). Note however that one study has shown that in Australian High Court oral argument, where time is effectively unlimited, measured in days, not minutes, many of the same effects arise, raising doubt about whether these effects are a result of time pressure. Tonja Jacobi, Zoë Robinson & Patrick Leslie, *Comparative Exceptionalism? Strategy and Ideology in the High Court of Australia*, 70 AM. J. COMPAR. L. (forthcoming 2024) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3913448).