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When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court

INTRODUCTION

Judicial attacks seem to be on the rise. For example, according to some sources,[1] high-profile verbal "attacks" between Supreme Court Justices occurred after the *National Federation of Independent Business v. Sebelius*[2] decision. Written attacks and counterattacks

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[1] *E.g.*, Debra Cassens Weiss, *Scalia Was 'Enraged' at Roberts' Switched Vote on the Health Law, New Book Says*, ABA JOURNAL (Sept. 17, 2012, 6:55 AM), http://www.abajournal.com/mobile/article/scalia_was_enraged_at_roberts_switched_vote_on_the_health_law_new_book_says/.

[2] No. 11-393 (U.S. June 28, 2012).

between Justice Scalia and Judge Posner, regarding Justice Scalia's defense of textualism in his new book, *Reading Law*,[3] also come to mind. The attacks discussed in this Article are not like those attacks. The attacks discussed here are not overt attacks. They are more subtle, more in the nature of a defense than an offense;[4] they are likely even subconscious and do not play out in newspapers or legal journals, but in the Justices' written opinions. Interestingly, however, as discussed in Part II, like the *Sebelius* attacks and the Scalia/Posner feud, Justice Scalia finds himself in the spotlight of these "attacks" as well.

It is human nature to attack, or at least to defend oneself, when we feel threatened.[5] We humans also know that the threat need not be physical in order to elicit a counterattack or a defensive posture. We have likely been on the receiving end of a verbal or written threat and know from the experience that we may feel like firing off an angry response that would not necessarily reflect how we might speak or write if we were not responding defensively. And because lawyers and judges are no different, they sometimes write angry responses in briefs and opinions.[6]

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3 *See* Bryan A. Garner & Richard A. Posner, *How Nuanced is Justice Scalia's Judicial Philosophy? An Exchange*, NEW REPUBLIC (Sept. 10, 2012, 12:01 AM), http://www.tnr.com/article/politics/107001/how-nuanced-justice-scalias-judicial-philosophy-exchange#. Justice Scalia and co-author Bryan Garner explain that the book is "unapologetically normative, prescribing what, in our view, courts *ought* to do with operative language." *Id.* Posner believes that the book is incoherent and that there is "a pattern of equivocation exhibited throughout their book." Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012, 12:00 PM), http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism.

4 In all honesty, this Article should be entitled, "When Justices Get Defensive." But the Authors could not resist the allure of alluding to the "When [Things] Attack" genre of real-life television. *See, e.g.*, *When Animals Attack*, IMDB, http://www.imdb.com/title/tt0293702/ (last visited Jan. 30, 2013); *When Sharks Attack*, IMDB, http://www.imdb.com/title/tt0987934/ (last visited Jan. 30, 2013); *When Vacations Attack*, IMDB, http://www.imdb.com/title/tt1794677/ (last visited Jan. 30, 2013).

5 *See Stress: Constant Stress Puts Your Health at Risk*, MAYO CLINIC (Sept. 11, 2010), http://www.mayoclinic.com/health/stress/SR00001.

6 Justice Scalia is perhaps the most famous, angry responder in contemporary American jurisprudence. *See, e.g.*, Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES (Mar. 9, 2011, 8:40 PM), http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/ (quoting language from Justice Scalia's dissent in *Michigan v. Bryant*, which included Justice Scalia's assessment that a conclusion in the majority opinion was "'so transparently false that professing to believe it demeans this institution,'" and that the majority "makes itself the obfuscator of last resort"); *see also* Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, LITIG. COMMENT. & REV., http://www.litcounsel.org/commentary/winder1109.htm (last visited Jan. 30, 2013) (discussing the rise of incivility in legal briefs and using *Peters v. Pine Meadow Ranch*

Overt, angry responses are, however, intentional. But, do lawyers and judges also react defensively in a more subtle and subconscious "attacking" manner even if a brief or an opinion lacks any obvious signs of frustration or anger? What about United States Supreme Court Justices? Does being on the losing end of an argument change the manner in which a Justice writes an opinion?

Here's another question: What do the frequent use of intensifiers,[7] long sentences, and long words have in common? If you examined legal writing texts, you might answer that these writing conventions are all characteristic of "poor" legal writing style. And, in fact, these conventions are almost universally proscribed by legal writing texts.[8]

Home Ass'n, 151 P.3d 962 (Utah 2007), as an example). In *Peters*, the Supreme Court of Utah refused to address the merits of an apparently meritorious claim because the brief of the appellant's lawyer was "replete with unfounded accusations impugning the integrity of the court . . . below." 151 P.3d at 962.

[7] In grammar, an intensifier is "a word, esp[ecially] an adjective or adverb, that intensifies the meaning of the word or phrase that it modifies, for example, *very* or *extremely*." COLLINS ENGLISH DICTIONARY 415 (2d ed. 2006). Also called an "intensive," the Oxford American Dictionary of Current English similarly describes its grammatical meaning: "expressing intensity; giving force, as *really* in *my feet are really cold*." THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 511 (1999) (emphasis in original).

[8] For proscriptions against overusing intensifiers, see, e.g., MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 234 (3d ed. 2010) ("*Clearly, obviously, of course,* and *it is evident that* have been so overused that they go beyond having no meaning to having a negative meaning" (emphasis in original)); BRADLEY G. CLARY & PAMELA LYSAGHT, SUCCESSFUL LEGAL ANALYSIS AND WRITING: THE FUNDAMENTALS 88 (2003) (directing writers to "[l]et nouns and verbs do most of your talking, not adjectives and adverbs" and to "[p]articularly avoid exaggeration through conclusory modifiers such as 'clearly,' 'plainly,' 'very,' 'obviously,' 'outrageous,' 'unconscionable,' and the like"); LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 283 (3d ed. 2011) ("Because generations of writers have overused words like 'clearly' or 'very,' these and other common intensifiers have become virtually meaningless. As a matter of fact, they have begun to develop a connotation exactly opposite their original meaning."); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 192 (2d ed. 2002) ("[C]learly; obviously. As sentence adverbs <Clearly, this is true>, these weasel words are often exaggerators. They may reassure the writer but not the reader. If something is clearly or obviously true, then demonstrate that fact to the reader without resorting to the conclusory use of these words."); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 330 (5th ed. 2005) (stating that "'[i]t is obvious' and 'clearly' supply no extra meaning" and, "[i]nstead, . . .divert the reader's attention from the message of the sentence"); MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 205 (3d ed. 2000) (instructing writers to "avoid modifiers that have little substantive meaning, such as *in this manner*, *very*, or *obviously*"); Neil Daniel, *Writing Tips*, 1 PERSP.: TEACHING LEGAL RES. & WRITING 87, 88 (1993) ("The rule for *very*, a conspicuously empty modifier, applies for other intensifiers as well. In general, writing without such words is stronger than writing with them. . . . Avoid *clearly*. The word is almost always the writer's last resort when an

On the other hand, if you had researched the use of these writing conventions in appellate briefs and appellate opinions, you might answer that these conventions are found more frequently when lawyers and judges think—or know—that they are on the losing end of an argument.[9] Or, in other words, these conventions are found more frequently when the writer feels her position is threatened.

As lawyers, we hope that such language conventions, regardless of whether they constitute "poor writing style" or "defensive language," would not ultimately affect appellate court decisions. We want to

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argument is murky."); and James W. McElhaney, *A Style Sheet for* Litigation, 1 SCRIBES J. LEGAL WRITING 63, 71 (1990) (discussing that a "recent study of courtroom language showed what good writers already know—intensifiers often have the opposite of their intended effect").

For proscriptions against using long sentences and long words, see, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 268 (6th ed. 2011) (stating that clear, concrete, and simple terms allow readers to more easily grasp ideas); CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 257–58 (2008) (stating that because "[a]fter [twenty five] words, a reader will usually stop absorbing," writers should create shorter sentences); JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 244, 246 (4th ed. 2010) (instructing writers to use active voice and avoid wordy phrases); EDWARDS, *supra*, at 274, 281, 284 (noting that paragraphs should be moderately short, unnecessary phrases should be omitted or replaced by a single word, and long sentences should be avoided); MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, LEGAL WRITING AND ANALYSIS 242 (2009) (noting that writers should write as plainly as possible, break up long sentences, and write shorter paragraphs using fewer sentences); NEUMANN, *supra*, at 224, 241–43 (stating that an effective paragraph is of readable length, is broken up into smaller sections, streamlines and breaks up unnecessary wordy phrases, and avoids passive voice); RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING 154, 156 (2d ed. 2011) (instructing writers to break sentences into two or more shorter sentences, break up paragraphs that are too large, and break material into "digestible chunks"); MARY BARNARD RAY, THE BASICS OF LEGAL WRITING 132–33 (rev. 1st ed. 2008) (stating that writers need to use shorter, simpler sentences in legal writing and include no more than one phrase before and after the subject and verb in each sentence); NANCY L. SCHULTZ & LOUIS J. SIRICO, Jr., LEGAL WRITING AND OTHER LAWYERING SKILLS 91–94, 98–99 (5th ed. 2010) (inculcating writers to use the simplest and most direct language possible, eliminate passive voice, avoid legalese, and write short sentences); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 207–08, 231, 232, 235 (5th ed. 2008) (directing writers to avoid long, complicated sentences, omit wordy, unnecessary phrases, keep language simple and straightforward, use short, concrete subjects, and write short, concise sentences); ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS 271–72, 276–77 (3d ed. 2011) (stating that writers should use the active voice, keep sentences short to avoid confusing the reader, "[s]ubstitute [s]imple [w]ords for [l]onger [w]ords," and use concrete, specific words).

[9] *See* Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—Or Is It?*, 45 IDAHO L. REV. 171 (2008) [hereinafter *Clearly, Using Intensifiers*]; Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?*, 12 J. APP. PRAC. & PROCESS 145 (2011) [hereinafter *Readability of Your Brief*].

believe that appellate court decisions will be decided on the relevant facts and law applicable to a client's case and not on a particular writing style. Many judges undoubtedly share this sentiment. As one California Court of Appeals justice stated, "That a decent writing style is appreciated by a busy jurist is self-evident. However, the suggestion that appeals are 'won' or 'lost' thereby, is a conceit I am loathe to see further encouraged."[10]

Nevertheless, abundant research has shown that writing style and readability do affect a reader's perception of the message and the messenger.[11] Even the simple convention of using intensifiers, words

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[10] Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301, 304–05 (1987) (quoting a letter from Donald N. Gates, Justice, Cal. Courts of Appeal, to Robert W. Benson, Professor, Loyola Law Sch. (June 12, 1985)).

[11] *See* RICHARD E. PETTY & JOHN T. CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES 70–72, 77–79 (1981) (discussing the effect of number of arguments, order of arguments, and message comprehensibility); Benson & Kessler, *supra* note 10, at 304 n.27 (citing ERWIN P. BETTINGHAUS & MICHAEL J. CODY, PERSUASIVE COMMUNICATION (4th ed. 1987), which discusses research into what constitutes effective persuasion)); Alice H. Eagly, *Comprehensibility of Persuasive Arguments as a Determinant of Opinion Change*, 29 J. PERSONALITY & SOC. PSYCHOL. 758 (1974); *see also* Benson & Kessler, *supra* note 10, at 302; James Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 YALE L.J. 161, 169 (1982) (book review) (characterizing Flesch's then-new *How to Write Plain English* as "good" but questioning the value of applying a Flesch-type analysis to legal writing and asking rhetorically: "Why force yourself to write at an eighth- or ninth-grade level if you are writing mainly for an audience of other lawyers?"); Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 68–71 (1994–1995) (describing a study showing that the contract and statutory provisions were better understood by law students, law school staff, and state-agency staff when the provisions were rewritten in a more readable format). *See generally* WILLIAM H. DUBAY, THE PRINCIPLES OF READABILITY 54–55 (2004), *available at* http://almacenplantillasweb.es/wp-content/uploads/2009/11/The-Principles-of-Readability.pdf; EDWARD FRY, THE LEGAL ASPECTS OF READABILITY (rev. 1998) (available with the Education Resources Information Center) (revised version of a talk given at the International Reading Association, New Orleans, in May 1989); PETER M. TIERSMA, LEGAL LANGUAGE 220–27 (1999); Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 547–58 (1984–1985).

An example of this sentiment was also stated by the court in *Johnson v. Revenue Management Corp.* when scrutinizing dunning letters sent to debtors by collection agencies: "Unsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after the sixth grade." 169 F.3d 1057, 1060 (7th Cir. 1999); *see also* HUNTER M. BRELAND & FREDERICK M. HART, DEFINING LEGAL WRITING: AN EMPIRICAL ANALYSIS OF THE LEGAL MEMORANDUM (Law Sch. Admission Council Research Report 93-06, 1994) (describing an extensive survey and regression analysis conducted to determine what constitutes good or poor legal writing); Benson & Kessler, *supra* note 10; Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 LEGAL WRITING 183 (2010) (describing a

such as "very," "clearly," and "obviously," has been shown to affect a reader's perception of the persuasiveness and credibility of a legal argument.[12] In particular, two previous studies by the Authors[13] showed that the outcome of an appeal is related to the interaction of the frequency of intensifiers used by an appellant in a brief and by the court in its opinion. One of the authors' studies also shows that using long sentences and long words is statistically correlated with dissenting Supreme Court opinions.[14]

Still, no research or study has conclusively shown that an appeal can be "won" or "lost" by implementing—or avoiding—any given writing convention. Even in light of the inconclusive evidence of whether writing style dictates the outcome of an appeal, there is evidence of a correlation between "losing arguments" and certain writing conventions.[15]

This Article proposes the Authors' novel theory of "argumentative threat," which hypothesizes that when faced with an argument that a legal writer believes—or knows—she is likely to lose, the writer will tend to write in a style that uses more intensifiers. The theory also proposes that longer sentences and longer words may be associated with a defensive style of writing. The Authors use the United States Supreme Court to illustrate their theory.

Part I of this Article reviews the scholarly research addressing legal writing style and its relationship to appellate outcomes. Part I includes a brief review of the Authors' previous two studies, one of which shows that although a statistically significant correlation exists between higher intensifier usage and a higher likelihood of losing on appeal, that relationship is probably not causal. In other words,

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survey showing that most state and federal judges prefer plain language over legalese and describing three earlier surveys that reached the same result); *cf.* TIERSMA, *supra*, at 211–30 (listing areas in which plain language is better understood than unduly technical language and discussing examples); Brady S. Coleman et al., *Grammatical and Structural Choices in Issue Framing: A Quantitative Analysis of "Questions Presented" from a Half Century of Supreme Court Briefs*, 29 AM. J. TRIAL ADVOC. 327 (2005); Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. APP. PRAC. & PROCESS 75 (2010); Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASS'N LEGAL WRITING DIRECTORS 1 (2009).

12 *Clearly, Using Intensifiers*, *supra* note 9, at 175–76 (describing two surveys showing that appellate judges thought briefs were annoying, less persuasive, and less credible if they used intensifiers in their writing).

13 *Id.*; *Readability of Your Brief*, *supra* note 9.

14 *Readability of Your Brief*, *supra* note 9, at 161–62.

15 *Clearly, Using Intensifiers*, *supra* note 9, at 185–86; *Readability of Your Brief*, *supra* note 9, at 159–62.

although using more intensifiers might not *cause* you to lose more often on appeal, using more intensifiers may indicate that you *believe* that you are about to lose an appeal. The study also shows that judges writing dissenting ("losing") opinions will use more intensifiers than judges writing majority ("winning") opinions. The other study shows that although no statistically significant relationship exists between readability (which is measured by the length of words and sentences) and outcome, there are some interesting relationships between the readability of briefs and opinions in state supreme courts, federal courts of appeals, and the United States Supreme Court.

Part II explains the theory of argumentative threat and shows how the theory of argumentative threat is supported by previous studies by other scholars as well as by the Authors' previous studies. Part II also illustrates the theory of argumentative threat, using the United States Supreme Court as an example. The theory of argumentative threat applied to the Supreme Court posits that Supreme Court Justices write in a more defensive posture, typified by using more intensifiers and longer words and sentences, when they write a dissenting opinion. This Article concludes by summarizing the theory and suggesting areas for further research.

I
WRITING STYLES AND APPELLATE OUTCOMES: IS THE VERDICT IN?

Before addressing appellate writing styles and outcomes, it should be noted that there is good evidence showing that oral presentation styles and techniques can affect trial outcomes. For example, William O'Barr and others proposed that using intensifiers was one of several forms of "powerless language." When powerless language is used by witnesses in a courtroom, it "strongly affects how favorably the witness is perceived, and by implication suggests that these sorts of differences may play a consequential role in the legal process itself."[16] Powerless language includes using hedges, (such as "sort of," "kind of," "a little"), hesitations (such as "ah," "um," "let's see"), answering a question with rising intonation ("thirty-five?"), polite forms, ("please," "thank you") and other similar language forms.[17]

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16 WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 75 (Donald Black ed., 1982).

17 *Id.* at 63–75.

Other presentational factors may also affect trial outcomes. Recently, a study using mock jurors showed "that the presence of eyeglasses on a defendant may significantly affect verdict outcome."[18] For example, African-American defendants were less likely to be convicted of a violent crime if they wore glasses.[19] On the other hand, Caucasian defendants were more likely to be convicted of white-collar crimes if they wore glasses.[20] One study even indicated that the pitch of a voice might affect a listener's perception of the truthfulness of the speaker.[21]

While oral presentation likely affects trial outcomes, most judges suggest that in the majority of cases, oral advocacy has little effect at the appellate level. Federal appellate court judges have estimated that oral argument determines the outcome in as few as zero percent or as many as thirty-seven percent of cases.[22] Justice Thomas sees almost no value in oral argument: "I refuse to participate. I don't like it, so I don't do it."[23] Justice Scalia believes that oral argument rarely changes a judge's mind.[24] Justice Ginsburg says that she has "seen few victories snatched at oral argument" in her eighteen years on the bench, but has seen winners become losers.[25] While Chief Justice Roberts believes oral argument is "terribly, terribly important," he doesn't necessarily think it affects the outcome of appeals.[26]

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18 Michael J. Brown, *Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions*, JURY EXPERT, Mar. 2011, at 1, 3–4.

19 *Id.*

20 *Id.* at 4.

21 William Apple et al., *Effects of Pitch and Speech Rate on Personal Attributions*, 37 J. PERSONALITY & SOC. PSYCHOL. 715 (1979).

22 BUREAU NAT'L AFFAIRS, INC., *Oral Argument*, *in* FEDERAL APPELLATE PRACTICE 437, 439 (2008), *available at* http://subscript.bna.com/pic2/lsll.nsf/8e9ea8728473b3be852569f9005d302a/36659829b6a2f21085257505004ffcd9/$FILE/Oral%20Argument.pdf; Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 453 (2002) (generally concluding that almost all judges find that oral argument affects their decisions in only a small minority of cases); *see also* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986) (arguing against oral argument, including a claim that it does not usually change the outcome of an appeal).

23 *Does Oral Argument Matter*, D.C. CIRCUIT REV. (Mar. 22, 2012), http://dccircuitreview.com/2012/03/22/does-oral-argument-matter/.

24 *Id.*

25 *Id.*

26 *Id.*; *see also* Courtpoint, *Chief Justice John Roberts on the Topic of Writing*, YOUTUBE (Mar. 11, 2008), http://www.youtube.com/watch?v=ZIjBzn7rbPE (interviewing Justice Roberts by Bryan Garner, in which Justice Roberts says that the briefs are more important than the oral argument and that "I don't think anybody would dispute that").

On the other hand, almost every appellate judge recognizes that appeals are usually decided on the briefs.[27] Despite the importance of appellate briefs, there is little scholarship addressing whether appellate writing styles affect appellate outcomes. Previous studies and surveys by other scholars have suggested that judges generally value briefs that are concise and clear. In fact, a survey of 355 federal judges (forty-six percent of sitting federal judges in 1999) concluded that "[t]he overwhelming message from [the] judges is that they want briefs that are concise and clear."[28] Other studies have shown that judges appreciate plain language over legalese[29] and that good writing may enhance a lawyer's credibility.[30] But no study, to the Authors' knowledge, unequivocally finds that a given writing style can demonstrably affect an appellate outcome.

For example, in a previously published article entitled, *Clearly, Using Intensifiers is Very Bad—Or Is It?*,[31] the Authors summarized the history and status of scholarly research addressing the use of intensifiers in lawyers' briefs and courts' opinions and determined that it is inconclusive as to whether intensifiers actually "intensify" much less whether they can affect an appellate outcome.[32] Some studies have found that increased intensifier usage negatively affects the credibility, likeability, and believability of a writer,[33] while others have found no effect from a more frequent use of intensifiers, or have

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27 D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. APP. PRAC. & PROCESS 27, 36 (2000) (noting that briefs are the primary, and sometimes the only, way of communicating with the court and persuading the judges); Courtpoint, *supra* note 26.

28 Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257, 284 (2002) (noting that judges also want well-organized and well-analyzed briefs).

29 *See, e.g.*, Flammer, *supra* note 11 (describing a survey showing that most state and federal judges prefer plain language over legalese, and describing three earlier surveys that reached the same result).

30 *See* Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141, 158 (2002); David Lewis, *If You Have Seen One Circuit, Have You Seen Them All? A Comparison of the Advocacy Preferences of Three Federal Circuit Courts of Appeal*, 83 DENV. U. L. REV. 893, 917, 929 (2006); *Clearly, Using Intensifiers*, *supra* note 9, at 176; *see also* David Lewis, *What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. APP. PRAC. & PROCESS 335, 359, 371 (2005).

31 *Clearly, Using Intensifiers*, *supra* note 9.

32 See *id.* at 175–80 & nn.13–44 for an extensive description of the studies addressing intensifiers by various researchers.

33 *See id.* at 177–80 & nn.20–44.

even found a positive effect.[34] The Authors' study found a statistically significant relationship between the frequent use of intensifiers in an appellate brief and the outcome of the appeal:

> [T]he frequent use of intensifiers in appellate briefs (particularly by an appellant) is usually associated with a statistically significant increase in adverse outcomes for an "offending" party. But—and this was an unexpected result—if an appellate opinion uses a high rate of intensifiers, an appellant's brief written for that appeal that also uses a high rate of intensifiers is associated with a statistically significant increase in favorable outcomes. Additionally, when a dissenting opinion is written, judges use significantly more intensifiers in both the majority and dissenting opinions. In other words, as things become less clear, judges tend to use "clearly" and "obviously" more often.[35]

Because intensifier usage was associated with increased adverse outcomes in certain circumstances and with decreased adverse outcomes in other circumstances, the results suggested that there was not a simple causal relationship between the frequency of intensifier use and the outcome of an appeal.[36] In fact, the results raised additional questions about the meaning of the statistically significant relationship between intensifier use and the outcome of an appeal. The Authors framed these questions as follows:

> The results can be interpreted several ways. It may be that . . . overuse of intensifiers actually renders [a brief] suspect and subject to increased skepticism by appellate court judges. . . . Alternatively, it may be that the overuse of intensifiers is accompanied by violations of other writing conventions that further affect the credibility of the brief. Or, it could simply be that appellants or appellees with difficult arguments (arguments that they believe they are likely to lose) tend to lapse into an intensifier-rich mode of writing in an attempt to bolster the perceived weaknesses of an argument. . . . All of these factors may combine to produce the result. Of course, because no causal relationship is shown, it could be a yet-unidentified factor. At the very least, the study suggests the need for further research and a fruitful source of data for performing such research.[37]

In the end, the Authors hypothesized that any effect was not due to the presence of abundant intensifiers per se; rather, it seemed to be a response—and maybe an irrational response—to a losing argument:

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34 *See id.*

35 *Id.* at 171–72.

36 *Id*. at 183–85.

37 *Id.* at 184–85 (footnote omitted).

> [I]t could simply be that appellants or appellees with difficult arguments (arguments that they believe they are likely to lose) tend to lapse into an intensifier-rich mode of writing in an attempt to bolster the perceived weaknesses of an argument. This last interpretation is supported by the fact that dissenting opinion writers (who are arguing a losing cause) also tend to use more intensifiers.[38]

The Authors came to a similar conclusion in a subsequent study that addressed whether a correlation exists between "readability" and success on appeal. That study was described in *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?*[39] The Authors' study found that the length of sentences and words, which constitutes "readability" based on the Flesch Reading Ease scale,[40] probably does not make much difference in appellate brief writing.[41] First, the Authors found that most briefs are written at about the same level of readability; there simply was not much difference in how lawyers wrote appellate briefs when it came to the length of sentences and words.[42] Second, the readability of most appellate briefs was well within the reading ability of the highly educated audience of appellate judges and justices.[43] Third, the relatively small differences in readability were not related to the outcome of an appeal in a statistically significant manner.[44]

The study did show, however, that the opinions of judges and justices were less readable than lawyers' briefs and that the opinions of dissenting judges or justices were the least readable of all the appellate writing analyzed.[45] Ultimately, the Authors concluded that

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38 *Id.* at 185.

39 *Readability of Your Brief*, *supra* note 9.

40 The Flesch Reading Ease scale and the Flesch-Kincaid Grade Level scale are two of many mathematic readability formulas used to determine whether one text is easier to read than another. DUBAY, *supra* note 11. The various readability formulas use differing semantic and syntactic factors to assess readability; the Flesch formulas use the number of syllables and the number of sentences in a selected 100-word sample to determine the readability of a text. *Id*. The theory is that more multi-syllabic words and longer sentences make a text more difficult to read. For a brief, but thorough and well-researched, explanation of readability formulas, their history and their use, see *Readability of Your Brief*, *supra* note 9, at 148–54 & nn.9–42.

41 *Readability of Your Brief*, *supra* note 9, at 159–62.

42 *Id.* at 160.

43 *Id.*

44 *Id.* at 156–57.

45 *Id.* at 157–58.

readability, as determined by the Flesch Reading Ease scale, was a non-issue for legal writing at the appellate level.[46]

Although readability did not appear to be related to outcome, there was a mild (but not statistically significant) difference between the readability of the courts' majority and dissenting opinions (*p*-value = 0.0772).[47] Dissenting opinions were somewhat less readable than majority opinions, but the difference was not nearly as pronounced as were the differences in intensifier rates.[48]

So, the verdict on whether writing can affect appellate court outcomes is, thus far, a "no." Nevertheless, this Article proposes that the statistically significant difference between winners and losers constitutes a subconscious, irrational response to a perceived weak, or losing, argument. This difference manifests itself in an intensifier-rich mode of writing and (possibly) writing in a less readable style (longer words and sentences) by the losers. In other words, the theory of argumentative threat proposes that frequent intensifier use and writing with longer sentences and words is "loser language"; it reflects a defensive emotional response to an expected (in the case of a lawyer)—or known (in the case of a judge)—adverse result in an appellate case. Both lawyers and judges react similarly to the effect of argumentative threat. This theory is illustrated by analyzing majority and dissenting opinions of the United States Supreme Court.

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[46] *Id.* at 159–62.

[47] The definition of *p*-value is the probability of observing a test statistic at least as extreme as the one observed, given the null hypothesis. Consequently, a small *p*-value implies that such a large observed difference in mean intensifier rates is very unlikely to be due to chance alone. This *p*-value was based on a test of the difference between two means that was proposed by Morrison in 1973. The Morrison test is a variation on the commonly-used paired *t* test, but it enables a paired comparison (i.e., dissent vs. majority) when some cases are missing a measurement on one of the variables in the pair. Because some Supreme Court cases have a majority opinion but no dissent, the Morrison test was most appropriate here. *See* Donald F. Morrison, *A Test for Equality of Means of Correlated Variates with Missing Data on One Response*, 60 BIOMETRIKA 101, 101–05 (1973).

[48] *Compare Clearly, Using Intensifiers*, *supra* note 9, at 188 (intensifier usage differences in briefs and opinions) *with Readability of Your Brief*, *supra* note 9, at158–59 (readability differences in briefs and opinions).

II
THE THEORY OF ARGUMENTATIVE THREAT[49]

Scientists and scholars have conclusively shown that humans respond physiologically and psychologically to perceived threat. This response is often called the "fight-or-flight" response.[50] The threat need not be "real" in order to elicit the "fight-or-flight" response.[51] Any perceived threat can actuate fight or flight. One manifestation of the "fight-or-flight" response may be linguistic in nature. Linguists and other language scholars have found that people who feel threatened may also speak and write in a manner that is demonstrably different from how the same people would speak or write in the absence of a threat.[52] The Authors' theory of argumentative threat applies the linguistic response to threat concept to appellate briefs and opinions. This Article argues that in their briefs and opinions, lawyers and judges seem to react linguistically to a perceived threat. This section first addresses current theories of linguistic response to threat. It then presents the Authors' study of Supreme Court opinions as an example of argumentative threat, and shows how the Supreme Court Justices' response to argumentative threat is consistent with other social psychology theories. In essence, the Justices may respond to perceived threats just like everybody else.

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[49] The term "argumentative threat" was spawned by the term "social threat," as used by Allen Liska and others in the book, SOCIAL THREAT AND SOCIAL CONTROL. The theory of social threat generally posits that attempts to control criminal conduct by a majority population increase as the percentage of a minority population increases—regardless of whether the increase in minority population is associated with an overall increase in crime. SOCIAL THREAT AND SOCIAL CONTROL *passim* (Allen E. Liska ed., 1992). Social threat theory has little application to argumentative threat theory other than both theories suggest that the reaction to a perceived threat may be irrational; the reaction does not appropriately address the perceived threat and may, in fact, be counterproductive.

[50] *Stress: Constant Stress Puts Your Health at Risk*, *supra* note 5; Julia Layton, *How Fear Works*, HOWSTUFFWORKS, http://science.howstuffworks.com/life/fear2.htm (last visited Feb. 6, 2013). A more expansive view of "fight or flight" is offered by cultural anthropologist Ernest Becker. In his book THE DENIAL OF DEATH, Becker argues "that of all things that move man, one of the principal ones is his terror of death," ERNEST BECKER, THE DENIAL OF DEATH 11 (1973), which is "all-consuming . . . when we look it full in the face," *id.* at 15. While his theory is not directly applicable to argumentative threat, they do share the common idea that we behave subconsciously in ways to protect ourselves from threats.

[51] Robert Sapolsky, *Taming Stress*, SCIENTIFIC AMERICAN, AT 87, 88 (Sept., 2003).

[52] *See infra* Part II.A. and accompanying notes.

A. Linguistic Responses to Perceived Threats

One way humans react defensively is through changes in their use of language. Some of these changes are subtle and may not even be consciously implemented. For example, social psychologists Jeroen Vaes and Robert A. Wicklund found that this defensive reaction may affect how people speak: "[A] general relevant threat can motivate people in a linguistic multiculture to conform more rigidly to their own language, and hence accentuate their own linguistic singularity."[53] In Norway, there are two official languages; one is used primarily by the rural population (Nynorsk) and the other by the urban population (Bokmål).[54] Vaes and Wicklund's experiment involved an experimenter posing as a foreigner in Norway seeking help in editing a postcard to his or her Norwegian cousin.[55] The postcard was a response to a fax from the uncle.[56] The participants, who were all urban Norwegians (Bokmål speakers), received one of two faxes.[57] The first contained a positive comment about Norwegian educational and ecological policies.[58] The second contained a negative comment about the same policies and stated that the Swedish policy was better.[59] The postcard mixed Nynorsk and Bokmål.[60] As predicted, the participants changed the Nynorsk to Bokmål more than twice as often when responding to the negative fax.[61] Vaes and Wicklund conclude that the experiment showed "a general cultural threat produce[d] a defensive, narrowing reaction" that caused the participants to emphasize their own language rather than the other Norwegian language.[62]

The phenomenon described by Vaes and Wicklund is generally referred to as "linguistic intergroup bias." Other studies addressing linguistic intergroup bias have similarly suggested that language changes in response to a perceived threat, in particular, a perceived threat to a person's social identity. Generally, these studies show that

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53 Jeroen Vaes & Robert A. Wicklund, *General Threat Leading to Defensive Reactions: A Field Experiment on Linguistic Features*, 41 BRIT. J. SOC. PSYCHOL. 271, 271 (2002).

54 *Id.* at 273–74.

55 *Id.* at 274–75.

56 *Id.* at 275.

57 *Id.*

58 *Id.*

59 *Id*.

60 *Id.* at 275.

61 *Id.* at 276–77.

62 *Id.* at 277.

> individuals tend to utilize broad, abstract, and intangible concepts whenever they describe positive acts committed by members of their social identity and negative acts committed by members of a rival collective. In contrast, they refer to specific, tangible details whenever they describe negative acts committed by members of their social identity and positive acts committed by members of a rival collective.[63]

The idea is that those who agree with us are generally good, and therefore we use general terms indicating that their good acts pervade the entire group and are the norm. Conversely, a bad act is described with specificity so as to limit its application to the specific situation.

Studies addressing linguistic intergroup bias have shown that when a group-threatening statement has been made by hunters against environmentalists, or by environmentalists against hunters, the "linguistic differentiation in favor of one's own group was much greater when an in-group-threatening message had been delivered."[64] So, a hunter may be described by another hunter as "hurting somebody," while an environmentalist would be described by a hunter as being "aggressive."[65] In simpler terms, language is limited to a specific incident for the in-group, but is generalized for the out-group. Interestingly, the hunters "showed a more pronounced [linguistic intergroup bias] than environmentalists."[66] Other linguistic intergroup bias studies have found the same effect between northern and southern Italians.[67] Another study that hits closer to home for academics found that university professors are also subject to linguistic intergroup bias. Professors wrote "nicer" replies to "accidentally" misdirected emails when they believed the sender was from the professor's own university.[68]

B. Justices' Responses to Perceived Threats

Lawyers and judges also react defensively when the lawyers believe they are likely to lose a case, or, when the judges are writing a

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63 *Linquistic Biases*, PSYCHLOPEDIA (Jan. 2, 2011), http://www.psych-it.com.au/Psychlopedia/article.asp?id=407.

64 Anne Maass et al., *Linguistic Intergroup Bias: Evidence for In-Group-Protective Motivation*, 71 J. PERSONALITY & SOC. PSYCHOL. 512, 516 (1996).

65 *Id.* at 512.

66 *Id.* at 516.

67 *Id.* at 523.

68 Jeroen Vaes et al., *On the Behavioral Consequences of Infrahumanization: The Implicit Role of Uniquely Human Emotions in Intergroup Relations*, 85 J. PERSONALITY & SOC. PSYCHOL. 1016, 1020 (2003).

dissent (and know that they are losing). The Authors hypothesize that this defensive reaction, at least in part, takes the form of increasing the use of intensifiers and (maybe to a lesser degree) by using longer words and sentences. For judges, this increased use of intensifiers could be a form of linguistic intergroup bias in the sense that a dissenting judge, alienated from the majority, seeks to show that the dissenting argument is "obviously," "clearly," and "wholly" superior to the opinion of what is now the dissenter's out-group, the majority. The increased use of intensifiers and the use of long sentences and words could be a subconscious attempt at showing the "strength" of the dissenter's argument—even though the dissenter consciously knows that using more intensifiers is negatively perceived by judges and legal readers in general.

While the Authors found this defensive increase in intensifier use at all levels of appellate practice among lawyers and judges,[69] the United States Supreme Court Justices provide a particularly interesting example of the defensive response that occurs when a Justice is in the minority and writes a dissenting opinion. The Justices all write "worse," in some sense, when writing a dissenting opinion.

As part of their previous studies, the Authors analyzed 266 cases from the United States Supreme Court, in which the Court issued at least one opinion.[70] After considering all briefs associated with these cases, and eliminating any opinions that were too short to yield reliable quantitative text assessment, a total of 526 opinions were analyzed.[71] The same intensifiers used in the Authors' intensifier article analysis ("very," "obviously," "clearly," "patently," "absolutely," "really," "plainly," "undoubtedly," "certainly," "totally," "simply," and "wholly") were again used and every effort was made to exclude the selected intensifiers when they were not used as intensifiers. For example, intensifiers used as legal terms of art, such as "clearly erroneous," were not used.

The Authors used a test of statistical significance to evaluate the difference between intensifier use in the Court's majority and

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[69] *Clearly, Using Intensifiers*, *supra* note 9, at 181–84.

[70] The cases analyzed were from February 21, 2006 to June 9, 2009. The 266 Supreme Court opinions included the opinions written from the time Justice Alito first participated in an opinion of the Court on February 21, 2006, through the opinion of the Court issued on June 28, 2007.

[71] The database includes only cases in which the Court issued an opinion. Opinions or briefs less than 500 words in length were not included for analysis.

dissenting opinions. The Authors also analyzed the readability of the same 266 cases using the Flesch-Kincaid Grade Level formula.[72]

The statistical test showed that the Justices write "worse," by using more intensifiers, when writing a dissenting opinion (p-value = 0.000004).[73] Such a small p-value is strong evidence of a real difference in intensifier rates.[74] In fact, if there is actually no difference in intensifier rates between majority opinions and dissents, there would be evidence of a difference this strong in only four studies in a million. Figure 1 graphically depicts the change in writing style for each of the nine Justices writing opinions during the studies' time period.

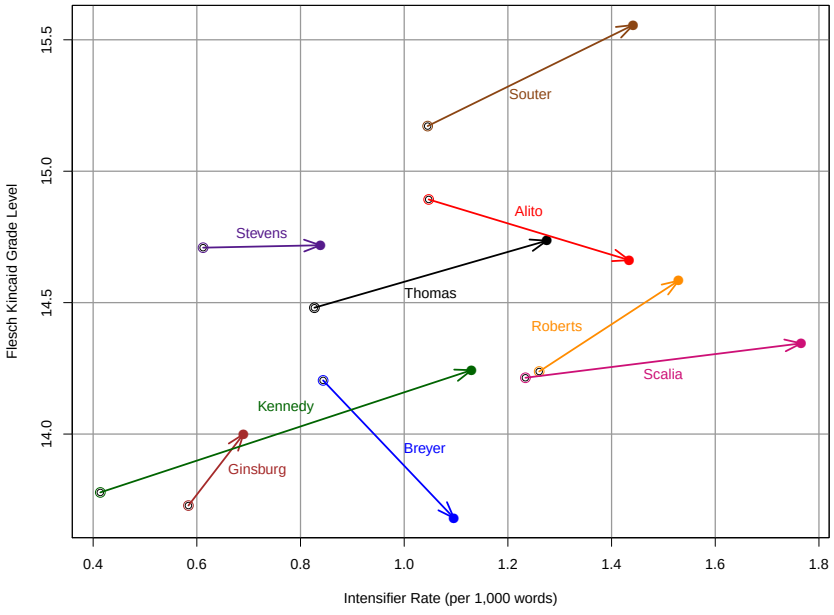

Figure 1. Comparison of majority opinions (open circles) with dissents (solid circles) in terms of intensifier rates and Flesch Kincaid Grade Level.

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[72] *See* DUBAY, *supra* note 11, at 22–23; *supra* note 40 and accompanying text.

[73] This p-value was based on a test of the difference between two means that is a variation on the standard t test which enables the paired comparisons (i.e., dissent vs. majority) when observations are missing on one of the measures in some cases. Because not all majority opinions are accompanied by dissents, this test was most appropriate here. *See* Morrison, *supra* note 47, at 101–05.

[74] As stated *supra* note 47, a small p-value implies that such a large observed difference in mean intensifier rates is very unlikely to be due to chance alone. The Authors conclude that the mean intensifier rate for dissenting opinions is significantly different from the mean intensifier rate for majority opinions.

As shown in Figure 1, all nine Justices use more intensifiers when writing a dissenting opinion. Seven of the nine Justices write in a less readable style when writing a dissenting opinion.[75] While the difference in means between majority and dissenting opinions is large (0.82 intensifiers per 1,000 words for majority opinions vs. 1.19 for dissents, *p*-value = 0.000004), the corresponding difference in mean Flesch Readability scores (30.53 for majority vs. 29.50 for dissents, *p*-value = 0.0772) is not statistically significant.

Even with large differences in mean intensifier rates from majority to dissenting opinions, it is also important to note that rates within each type of opinion still exhibit a reasonable degree of variability. This is depicted by the boxplots[76] shown in Figure 2 where it is shown that even the most intensifier-prone Justices have also written intensifier-free opinions. Similarly, even the most intensifier-averse Justice (Justice Ginsburg) has written individual opinions that are in the top fifteen percent of intensifier-laden majority opinions and the top twenty-five percent of intensifier-laden dissents.

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[75] The estimated Flesch Kincaid Grade Level is meant to roughly correspond to the level of difficulty, so that a grade level of 12.0 indicates the expected reading level of a person in twelfth grade and a grade level of 15.0 indicates the expected reading level of a third-year college student. Higher values of the Kincaid Grade Level are associated with texts containing longer words and longer sentences.

[76] A boxplot illustrates the distribution of an observed variable. The lower and upper ends of the box denote the twenty-fifth and seventy-fifth percentiles of the variable's distribution, with the line in the middle of the box denoting the median (i.e., the middle observation). The whiskers extending from the lower and upper ends of the box denote the observations in the lowest and highest quartiles of the data; the circles appearing beyond the ends of the whiskers denote unusually large or small values (which are typically referred to in statistical analysis as "outliers").

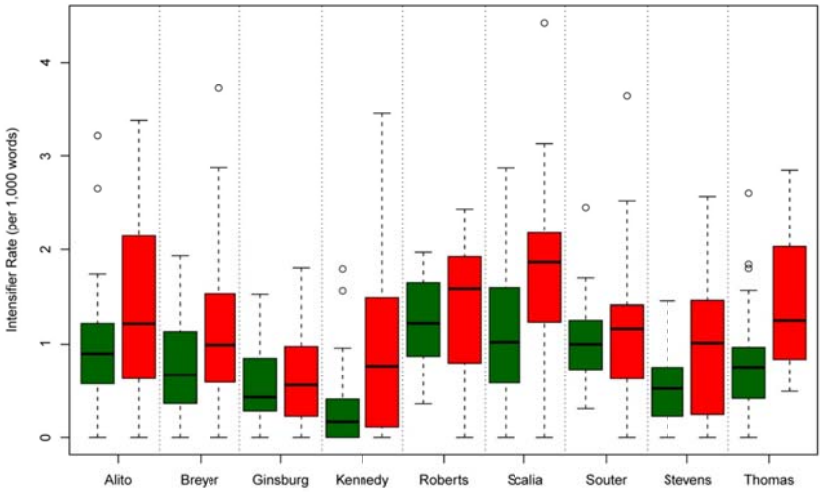

Figure 2. Distribution of majority (green) and dissenting (red) opinion intensifier rates for each Justice.

According to the argumentative threat theory, the Justices use intensifier-rich language and longer words and sentences as a reaction to their losing status. Alienated from the majority, a Justice subconsciously (and irrationally) resorts to the universally panned intensifier in an attempt to bolster the losing argument. Intensifiers are used in an attempt to prove superiority in the losing effort.

It is interesting to note that Justice Kennedy, often the "swing vote" on the Court, appears to be the Justice most affected by argumentative threat. His majority opinions are, intensifier-wise, the "best" written opinions, but he dramatically increases his intensifier usage and moderately decreases his readability when writing a dissent; he shows the greatest response to threat when writing a dissenting opinion—more than doubling his use of intensifiers when writing a dissenting opinion. This tendency is contrary to his claim that he does not like adverbs. According to Justice Kennedy, "adverbs are a cop-out. . . . [I]f you don't use them, it forces you to think through the conclusion of your sentence."[77] Due to argumentative

[77] Bryan A. Garner, Interview, *Justice Anthony M. Kennedy*, 13 SCRIBES J. LEGAL WRITING 79, 92–93 (2010).

threat, it appears to be difficult for him to follow his own advice when writing a dissent.

In order to better compare the Justice's intensifier rates, the Authors considered two additional measures. The first is an aggregate measure of intensifier usage that the Authors denote the Standardized Intensifier Rate (SIR). The SIR is necessary because some Justices write for the majority more often than others. For example, during the Authors' study period, Justice Kennedy wrote more than seven times as many words for majority opinions as for dissents. At the other end of the spectrum, Justice Souter's total dissenting opinion word count is only forty percent larger than his majority opinion word count. Consequently, comparing average intensifier rates for all briefs is not a reasonable approach for evaluating relative tendency toward intensifier usage. The database of Supreme Court opinions considered here comprises text from a mix of majority opinions (59% of the database's words), concurrences (8%), and dissents (33%). To equitably compare a majority-heavy writer like Justice Kennedy with a dissent-heavy writer like Justice Souter, the SIR was created, which weights each Justice's intensifier rates for majority, concurring, and dissenting opinions using the 59%-8%-33% split found in the database. Thus, the SIR is the simplest measure for overall intensifier usage.

The second measure used to compare Justices' intensifier rate is the "Threat-Related Intensifier Rate Increase" (TIRI)—or the "Jekyll-Hyde" index. The TIRI is the increase in intensifier rate that a Justice exhibits when changing from a majority opinion to a dissent. An illustration of each Justice's SIR and TIRI is shown in Figure 3. After Justice Kennedy's most dramatic response to argumentative threat, Justice Scalia claims second place among Justices most affected by argumentative threat, and Justice Thomas narrowly edges out former Justice Souter for third place. Chief Justice Roberts and Justice Scalia use many more intensifiers relative to the other Justices, but Justice Scalia leaves all the Justices behind with the volume of his intensifiers in both majority and dissenting opinions. Justice Scalia's majority intensifier rate is higher than four of the Justices' dissenting rates and his TIRI rate is the second highest among all Justices. Therefore, Justice Scalia appears to be particularly subject to the subconscious effects of argumentative threat.

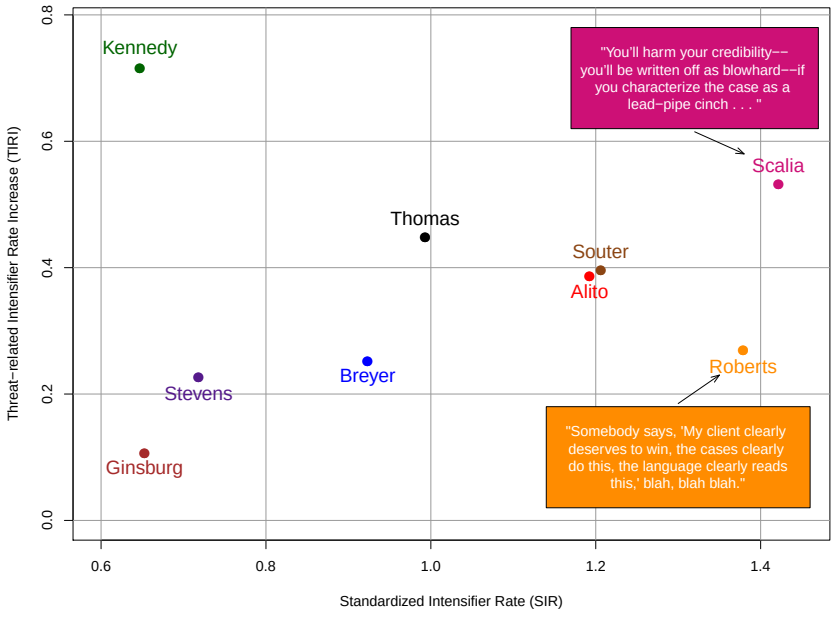

Figure 3. Standardized Intensifier Rate versus Threat-related Intensifier Rate Increase for each of the Supreme Court Justices.

Figure 3 also shows that Chief Justice Roberts's heavier use of intensifiers relative to the rest of the Court seems to ignore his own advice on avoiding the use of intensifiers in Supreme Court cases. Addressing students and faculty at Northwestern University School of Law, the Chief Justice commented on the use of intensifiers in legal briefs submitted to the Supreme Court:

> "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."
>
> How about a little recognition that it's a tough job?
>
> . . .
>
> "I mean, if it was an easy case, we wouldn't have it."[78]

[78] Robert Barnes, *Chief Justice Counsels Humility*, WASH. POST (Feb. 6, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/02/05/AR2007020501297.html (second, third, and fourth emphasis added) (quoting Chief Justice John G. Roberts Jr.).

Similarly, Figure 3 shows that Justice Scalia's use of intensifiers seems to contradict advice he offered to legal writers: "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."[79]

Chief Justice Roberts's and Justice Scalia's heavier use of intensifiers violates the advice of almost every legal writing scholar, the advice of the Justices themselves, and it renders their dissenting opinions less clear and less credible. However, according to the theory of argumentative threat, the Justices' defensive posture is to be expected as a normal response to a perceived threat. Nevertheless, at least two researchers theorize that this type of language renders the Justices' opinions more clear (and, therefore, perhaps more credible). The authors of *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*[80] agree with other researchers, and the Authors, that Justice "Scalia employs 'distinctly different rhetorical styles depending on whether he is in the majority or dissent,'" and that when he is in the dissent he "'becomes strident and contentious.'"[81] But the authors then claim that "all [J]ustices write clearer dissents than majority opinions."[82]

The Authors' research shows the opposite: the Justices use "clearly" more often as things become less clear (as evidenced by the existence of a dissent). And, the reason for the difference is, in part, because the Authors (and most other legal writing scholars) claim that using more intensifiers adds nothing to an argument, or can even have a negative effect on the argument. Therefore, if anything, adding an intensifier would render an argument less clear. The authors of *Justices and Legal Clarity*, on the other hand, theorize that "words like *always*, *absolutely*, and *clearly*, . . . measure [the degree of] how confident one is about something."[83] Generally, higher levels of certainty correspond with expressing or portraying issues less

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79 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 13 (2008).

80 Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 LAW & SOC'Y REV. 1027 (2011).

81 *Id.* at 1033 (quoting Edward L. Rubin, *Question Regarding* D.C. v. Heller*: As a Justice, Antonin Scalia Is (A) Great, (B) Acceptable, (C) Injudicious*, 54 WAYNE L. REV. 1105, 1130 (2008)).

82 *Id.* at 1027.

83 *Id.* at 1056.

complex.[84] If more intensifiers make an argument more clear, it is not surprising that the authors of *Justices and Legal Clarity* would conclude that Justice Scalia is the most clear opinion writer and Justice Ginsburg is the least.[85] The Authors' research, on the other hand, implies the opposite. Justice Ginsburg writes more readable opinions, uses less intensifiers, and is therefore the more clear and credible writer. It is notable that, unlike Justice Scalia, Justice Ginsburg is rather consistent in her writing style across majority and dissenting opinions—she feels almost no argumentative threat.[86] The Authors are on the same page as the *Justices and Legal Clarity* authors, however, in our mutual agreement that longer words lead to less clear opinions.[87]

In addition to being consistent with theories of linguistic intergroup bias, the Justices' TIRI may also be consistent with other similar social psychology theories, which address differences between "conservatives" and "liberals." As a group, the conservative Justices use substantially more intensifiers than the liberals and also seem to feel more threatened when writing for the dissent than do the liberals. It is impossible to say whether this tendency is a phenomenon unique to these nine individuals or whether it is due to differences in conservative versus liberal approaches to legal reasoning. But the phenomenon may be due to the general tendency of conservatives to react differently to a perceived threat than liberals. Or it may be that the liberals (more often in the minority during the study period) have had—to their chagrin—more practice in writing measured dissents.

The results, with respect to the liberal and conservative groups of Justices, seem to be consistent with the theories of Social Dominance Orientation and Right Wing Authoritarianism. Both theories posit that conservatives tend to accept or embrace a more authoritarian position in response to threat.[88] The increased use of intensifiers could also be

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[84] *Id.*

[85] *Id.* at 1043.

[86] *Id.* at 1043–45; *supra* Figures 1, 2.

[87] Owens & Wedeking, *supra* note 80, at 1056.

[88] *See, e.g.*, Bob Altemeyer, *The Other "Authoritarian Personality,"* 30 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 47 (1998); Richard M. Doty et al., *Threat and Authoritarianism in the United States, 1978–1987*, 61 J. PERSONALITY & SOC. PSYCHOL. 629 (1991); John Duckitt & Kirstin Fisher, *The Impact of Social Threat on Worldview and Ideological Attitudes*, 24 POL. PSYCHOL. 199 (2003); Miriam Matthews et al., *A Longitudinal Test of the Model of Political Conservatism as Motivated Social Cognition*, 30 POL. PSYCHOL. 921 (2009); Stephen M. Sales, *Threat as a Factor in Authoritarianism: An Analysis of Archival Data*, 28 J. PERSONALITY & SOC. PSYCHOL. 44 (1973). *But see*

understood as an increased use of authority in response to threat. The linguistic intergroup bias study on hunters and environmentalists discussed above noted a "more pronounced" linguistic intergroup bias among the hunters.[89] This interpretation of the study, however, assumes that hunters tend to be more conservative than environmentalists.

Apart from argumentative threat, a Justice's view of the role of a dissent could also influence the number of intensifiers used. Justice Ginsburg views the role of a dissent as a chance to speak "when important matters are at stake."[90] On the other hand, for Justice Scalia, the most important reason for dissenting is that it "renders the profession of a judge . . . more enjoyable."[91] Justice Scalia further noted,

> To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important *and no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.[92]

While both Justice Ginsburg and Justice Scalia believe that a dissent should be reserved for important matters, Justice Scalia seems to relish the opportunity to "stick it to the majority" when addressing important matters. This may, in part, account for his higher use of intensifiers when dissenting.

The Justices' reactions to argumentative threat are also consistent with the Justices' opinions in two recent—and significant—Supreme Court cases: *Citizens United*[93] and *National Federation of Independent Business v. Sebelius*[94] (Obamacare). In both opinions, the majority and dissent opinion writers stay close to their overall trends. The graph in Figure 4 illustrates how the intensifier rates

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Kimberly Rios Morrison & Oscar Ybarra, *Symbolic Threat and Social Dominance Among Liberals and Conservatives: SDO Reflects Conformity to Political Values*, 39 EUR. J. SOC. PSYCHOL. 1039, 1050–51 (2009) (suggesting that "the seemingly egalitarian responses that highly identified, hierarchy-attenuating group members demonstrate under threat may be, in a sense, group-serving biases in disguise").

89 Anne Maass et al., *supra* note 64, at 516.

90 Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 7 (2010).

91 Antonin Scalia, *Dissents*, ORG. AM. HISTORIANS MAG. HIST., Fall 1998, at 18, 22.

92 *Id.* at 22–23.

93 Citizens United v. FEC, 130 S. Ct. 876 (2010).

94 Nat'l Fed'n of Indep. Bus. v. Sebelius, No. 11-393 (U.S. June 28, 2012).

associated with these two recent cases compare with the Justices' mean intensifier rates. Note that the Intensifier Rate (IR) of Justice Roberts's majority opinion in Obamacare (IR=1.10) was slightly less than his average IR for majority opinions (mean IR=1.26).

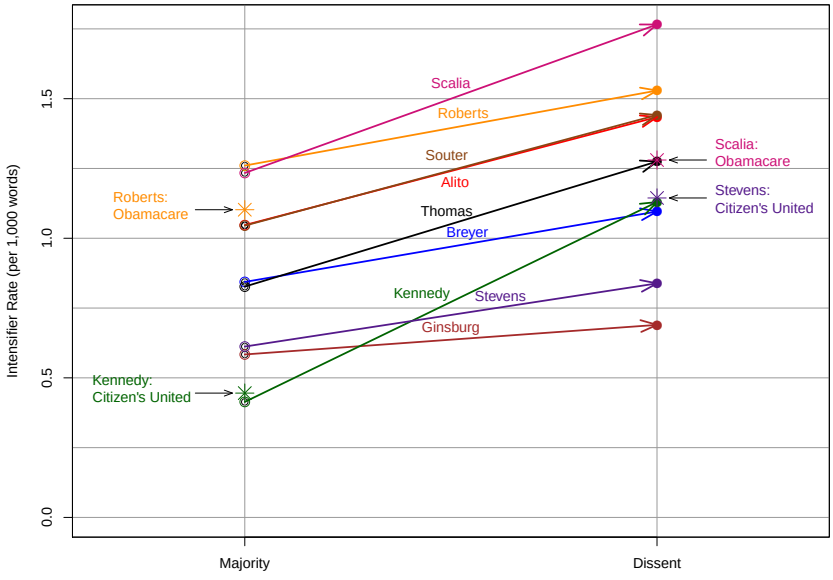

Figure 4. Intensifier rates for the Obamacare and Citizens United opinions (asterisks) in the context of the Justices' mean intensifier rates. Mean majority opinion IRs (open circles) and mean dissenting opinion IRs (solid circles) are plotted for each of the Justices.

This result suggests that even if Justice Roberts started out writing a dissenting opinion, as suggested by CBS news correspondent Jan Crawford,[95] he wrote a non-defensive majority opinion in the end. The IR in the Obamacare joint dissent is also consistent with the dissenting Justices' mean IRs for the entire study period, falling in between the mean IRs of the four Justices (Justices Scalia, Alito, Thomas, and Kennedy). Or, perhaps, as one unidentified source has suggested, the dissenting Justices used most of Chief Justice Roberts's pre-switch dissenting opinion for the first three-fourths of

[95] Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

the joint dissent.[96] Jan Crawford's sources, which claim that the dissenters "divided up parts of the opinion, with Kennedy and Scalia doing the bulk of the writing,"[97] appears to be the most likely scenario based on the dissenting opinion's IR.

Justice Kennedy's *Citizens United* majority opinion tracks his average IR almost perfectly, while Justice Stevens appears more defensive than his average IR for dissents. These findings are consistent with the well-known fact that Justice Stevens was (and remains) particularly bitter about the Court's decision in *Citizens United*.[98] He even took the unusual step of reading parts of his dissent on the day the opinion was announced.[99]

The statistically significant propensity for a Justice to increase his usage of intensifiers when on the losing end of the argument is illustrated in Figures 1, 2, and 4. Figure 3 shows that although each Justice has his or her own mean rate of intensifier usage, both Justices with relatively low standardized intensifier rates (e.g., Justice Kennedy) and Justices with relatively high standardized intensifier rates (e.g., Justice Scalia) are capable of dramatic increases in intensifier usage when experiencing argumentative threat. Although this Article focuses on Supreme Court Justices' use of intensifiers, the Authors believe that the theory of argumentative threat applies equally to lawyers who think they may be writing a losing brief. However, it should be noted that lawyers may have an additional rationale, apart from an emotional defensive response to a perceived losing argument, for writing differently in a losing brief. Lawyers writing a brief in an appeal that they think they may lose may also be writing in an intensifier-rich and less readable manner to impress their client and show the client that they are being strident and intellectual in an effort to win the case. Even so, this possible rationale would still constitute a defensive response to threat.

CONCLUSION

Legal readers do not like intensifiers, long sentences, and long words. Nevertheless, when the legal reader becomes the legal writer

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96 Paul Campos, *Roberts Wrote Both Obamacare Opinions*, SALON.COM (July 3, 2012, 6:13 PM), http://www.salon.com/2012/07/03/roberts_wrote_both_obamacare_opinions/.

97 Crawford, *supra* note 95.

98 *See* Mike Sacks, *Citizens United Attacks from Justice Stevens Continue*, HUFFINGTON POST (May 31, 2012, 2:44 PM), http://www.huffingtonpost.com/2012/05/30/citizens-united-justice-stevens_n_1557721.html.

99 *Id.*

and feels threatened with losing an appeal, or being on the dissenting side of a judicial opinion, the threatened legal writer will subconsciously resort to using more intensifiers, and maybe longer words and longer sentences, in an irrational attempt to "attack" the winning side, or to defend the losing argument. This response is explained by the Authors' theory of argumentative threat, and the study presented in this Article supports that theory; alienated from the majority, a Supreme Court Justice subconsciously (and irrationally) resorts to the universally censured intensifier in an attempt to bolster the losing argument. The theory of argumentative threat is consistent with social psychology theories suggesting that language use changes in response to a perceived threat.

More research needs to be done to further explore the impact of argumentative threat on legal writing. For example, research is needed to ascertain whether judges can actually sense the losing nature of a brief by its increased use of intensifiers. Nevertheless, it is fair to conclude that winners and losers do write differently in appellate briefs and opinions depending on the perceived threat to the writer's legal argument. As a practical matter, it may be constructive to consider these differences when writing appellate (and by extrapolation trial) briefs and opinions. It may also be helpful to track personal intensifier usage patterns in both winning and losing briefs, or majority and dissenting opinions, to examine the extent to which a brief or an opinion reveals any subconscious reaction to argumentative threat.