I GET WORRIED WITH THIS . . . Constitutionality by Statistics: A Critical Analysis of Discourse, Framing, and Discursive Strategies to Navigate Uncertainties in the Argersinger Oral Arguments

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Abstract

Framing and discursive strategies influence the direction of oral arguments and, ultimately, case outcomes, and these strategies benefit dominant interests and sideline marginalized voices. This paper critically evaluates the oral arguments in the 1972 Supreme Court, *Argersinger v. Hamlin*, decision holding (for the first time) that some misdemeanor defendants were entitled to counsel. The case was argued twice (1971 and 1972) and decided under tremendous uncertainty about its effect, including (1) how many misdemeanor defendants would be affected by the ruling, (2) how lawyers might be recruited for representation, and (3) what kind of impact mandated representation might have on small, rural communities. Drawing on critical discourse analysis, this paper investigates how lexicality and framing shifted questions and arguments that constructed social realities perpetuating and reproducing dominant interests while obscuring and backgrounding non-dominant interests on the scope of the right to counsel. The analysis shows that common legal framing strategies amplified the voices and concerns of the judges, lawyers, and systemic interests while undermining defendants' interests, particularly in resolving factual uncertainties. Guidance in structuring contemporary arguments to avoid these inequities that result in the unintended marginalizing of constitutional rights is discussed.

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Introduction

Given the current climate, it is evident that the Supreme Court is the battleground for significant social conflicts, addressing new social problems, or revising 'resolved' issues in a changing society.[2] So, why revisit a case from 1972? The Supreme Court, in *Argersinger v. Hamlin*,[3] held that *some* misdemeanor defendants were entitled to counsel, but the holding was narrow. Although this case provided defendants with greater constitutional rights, it was circumspect, constricted by the uncertainties of how many misdemeanors were prosecuted, how many lawyers would be necessary to represent them, and how rural America might provide counsel. Today, uncertainty remains about the number of misdemeanor cases, prosecutions, representation, outcomes, and consequences.[4] *Argersinger* did not resolve the representation issue, and many of the problems that plagued the lower courts continue.[5] Uniquely, *Argersinger* was argued twice, providing the perfect vehicle to investigate and uncover how the perspectives of the dominant and privileged were amplified, and other interests were muted or sidelined by exposing (1) how practical and various uncertainties were lexically navigated and (2) how legal discourse and framing strategies narrowed the scope of the right to counsel.

Uncovering the power and influence of language and framing strategies that obscure facts, foreground the speech and interests of elites and background non-dominant group interests are instructive for advocates and judges. Social reality is shaped and constructed through written appellate decisions that impact future decisions and more importantly, real people with long-lasting results. This Article reveals how language is used to create mental shortcuts connecting perspective, pragmatic, relational, and intertextual framing questions and responses during argument to fill gaps in knowledge that undermine and narrow defendants' rights. The first Part reviews the background and context of the *Argersinger*

2. Eloise C. Snyder, *Uncertainty and the Supreme Court's Decisions*, 65 *Am. J. Soc.* 241, 241 (1959); Stephen G. Giles, *The Supreme Court and Legal Uncertainty*, 60 *DePaul L. Rev*. 311, 312 (2011).
3. Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972).
4. *See*, *e.g.*, Alexandra Natapoff, *Punishment Without Crime: How our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (2018); Alisa Smith & Sean Maddan, *The Lower Criminal Courts* (Alisa Smith & Sean Maddan eds., 1st ed. 2019); Alisa Smith & Sean Maddan, *Misdemeanor Courts, Due Process, and Case Outcomes*, 31 Crim. Just. Pol'y Rev. 1312 (2020); Becca Cadoof Et Al., *Misdemeanor Enforcement Trends Across Seven U.S. Jurisdictions*, 30 (2020), https://datacollaborativeforjustice.org/wp-content/uploads/2020/10/2020_20_10_Crosssite-Draft-Final.pdf [https://perma.cc/5GE4-H6CT]; Issa Kohler-Hausman, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (2018); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, *61 B.C. L. Rev.* 971, 972 (2020).
5. *Id.*; The problem of access to counsel in rural communities remains particularly fraught. *See* Alyssa M. Clark, Andrew L.B. Davies, & Karise M. Curtis, *Access to Counsel for Defendants in Lower Criminal Courts*, 43 Just. Sys. J. 85 (2022).

case. The second Part discusses the philosophical approaches to legal decisionmaking, focusing on the role of legal uncertainty. The third and fourth Parts of the paper provide an overview of critical discourse analysis as the theoretical framework along with the methodology and coding structure guiding the investigation. The fifth Part applies the analysis to answer three research questions: (1) How did advocates frame the issue; (2) How did framing strategies derail the broad appointment of counsel; and (3) How navigating uncertainty undermined non-dominant interests. The final Part offers conclusions and implications along with recommendations to amplify the interests of defendants on appeal, at oral argument, and for legal decisionmaking.

I. Background and Context

Argersinger was argued eight years after the U.S. Supreme Court decided, in *Gideon v. Wainwright*,[6] that felony defendants were entitled to counsel and, if indigent, appointed counsel. Two years later, President Lyndon B. Johnson commissioned a task force to study law enforcement and the administration of justice.[7] The task force issued comprehensive reports, with one devoted to the courts. The report's third chapter focused on the lower criminal courts and unearthed chaos and due process violations. The chapter began by highlighting that: "[n]o findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts."[8] The lower courts were not characterized by a single organizational structure. The task force observed that quick dispositions were common problems associated with high caseloads and less competent personnel.[9]

At issue in *Argersinger* was whether indigent people charged with misdemeanor offenses were entitled to appointed counsel under the Sixth and Fourteenth Amendments. At the 1971 oral argument, an inexperienced attorney admitted to the Florida Bar for only two years represented Mr. Argersinger.[10] Opposing counsel, representing the State of Florida and the Sheriff, was a long-time Assistant Attorney General (hereinafter AG), who had argued four cases[11] before the United States Supreme Court. The Court ordered a re-argument and invited the

6. Gideon v. Wainwright, 372 U.S. 335, 340 (1963).
7. *See generally* U.S. Dep't of Just., President's Comm'n on Law Enf't and Admin. of Just., *Task Force Report: the Courts* (1967), https://www.ojp.gov/ncjrs/virtual-library/abstracts/task-force-report-courts [https://perma.cc/8HAN-GF9C].
8. *Id.* at 29.
9. *Id.* at 111.
10. He was admitted to practice in Florida on November 10, 1969, and the oral argument was held on December 6, 1971 *Florida Bar Directory*, Florida Bar, https://www.floridabar.org/directories/find-mbr/profile/?num=120989.
11. *See* Schneble v. Florida, 405 U.S. 427 (1971); Waller v. Florida, 397 U.S. 387 (1969); Robinson v. Florida, 378 U.S. 153 (1963); Hoyt v. Florida, 368 U.S. 57 (1961). *Argersinger* was the last case argued by Mr. Georgieff at the Supreme Court of the United States.

Solicitor General (hereinafter SG) to submit written briefs and oral arguments on the issue. Three months later, Argersinger was represented by a more experienced defense counsel (author of Petitioner's brief) at the second argument.[12] The SG joined the AG to argue for the State of Florida (i.e., Hamlin).

There were changes to the Court between 1971 and 1972. In 1971, only seven justices participated. Justice Black retired on September 17, 1971 (and died eight days later). Justice Harlan retired on September 23, 1971, and died three months later. President Nixon nominated Rehnquist and Powell on October 22, 1971. Both were confirmed in December 1971. Powell was confirmed quickly by a Senate vote of 89–1. Rehnquist's appointment was more controversial, but he was confirmed by a vote of 68–26. Both were sworn in on January 7, 1972, and they were seated for the second *Argersinger* argument.[13]

Justice Douglas wrote for the majority in a plurality opinion that extended the right to counsel to defendants sentenced to jail. Chief Justice Burger concurred with the result and issued a separate opinion. Justice Brennan concurred and issued a separate opinion, joined by Justices Douglas and Stewart. Justice Powell authored another opinion concurring with the result, and Justice Rehnquist joined his opinion.

Each participant is an "elite." Even though defense lawyers represent those marginalized or oppressed, they are not themselves marginalized or oppressed directly (though, often, their roles conflict with dominant positions). At the time of this argument, the Justices of the Court were male and white, except Justice Marshall, the first African American to serve on the Court. The attorneys were white males.

II. Uncertainty and Supreme Court Decisionmaking

More than a century ago, Oliver Wendell Holmes and other legal pragmatists challenged the prominent historical theory that judges mechanically applied formalistic legal principles to facts to arrive at case decisions. Holmes famously said, "the life of the law has not been logic; it has been experience."[14] In his later work, *The Path of the Law*, Holmes observed that behind the language of the "logical form," decisions were

12. Zoom Interview with Bruce Rogow, Founding Professor of Law, Nova Southeastern University Law Center (Sept. 17, 2021). (on file with author).
13. Christ Schmidt, *This Day in Supreme Court History—January 7, 1972*, IIT Chicago-Kent Coll. of L.: SCOTUS Now (Jan. 7, 2018), https://blogs.kentlaw.iit.edu/iscotus/day-supreme-court-history-january-7–1872 [https://perma.cc/JE9H-R2V6].
14. Oliver W. Holmes, *The Common Law* 1 (1881). A thorough description of the history of judicial decision-making, legal formalism, realism, and pragmatism and the debates and nuances of these theories is beyond the scope of this paper. Several scholars have summarized and critiqued the long history (*see, e.g.*, Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 *Wash. U. L. Rev.* 1049 (2018); Michael J. Sullivan & Daniel J. Solove, *Radical Pragmatism*, *in The Cambridge Companion to Pragmatism* 324 (Alan Malachowski ed., 2013)).

often grounded on unarticulated and unconscious judgments.[15] He predicted that the "blackletter man" of logic would be replaced by "the man of statistics and the master of economics."[16]

Roscoe Pound likewise wrote critically of the mechanical jurisprudence model, favoring sociological jurisprudence that recognized the law as dynamic and influenced by social conditions. Pound urged a sociological movement in the law toward a pragmatic jurisprudence, "putting the human factor in the central place and relegating logic to its true position as an instrument."[17] Today, Judge Richard Posner is considered the most prolific scholar and proponent of legal pragmatism, viewing it as a method (not a philosophy) that is "forward-looking," with an "adherence to past decisions as a (qualified) necessity rather than as an ethical duty."[18] Pragmatic decisionmaking centers on the "best decision" and focuses on "future needs."[19] Social concerns are prominently considered with a pragmatic jurisprudence approach; legal institutions and judicial decisions are expected to serve individuals with a broader and more holistic view of social concerns.[20] Legal pragmatism emphasizes empirical data that serves the social practice of law and decisionmaking, centered on context and not driven by ideological perspective.[21]

Judicial decisions, particularly those involving constitutional or empirical questions, rarely "settle" claims, and often stimulate more debate and questions.[22] Scholars have devoted attention to "court-created legal uncertainty."[23] "[C]onfusion and incomprehensibility" has been considered inevitable, rooted in limitations endemic to the law, e.g., gray areas, compromises, and the principle of stare decisis, particularly in constitutional claims where "clear lines can rarely be drawn"[24] Although legal uncertainty "reduces the law's efficacy" and legitimacy, "reducing legal uncertainty inevitably entails information, law-production, and other costs."[25]

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15. Oliver W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 466 (1897).
16. *Id.* at 469.
17. Roscoe Pound, *Mechanical Jurisprudence*, 8 *Colum. L. Rev.* 605, 610 (1908).
18. *See generally* Richard Posner, *Law, Pragmatism, and Democracy* 60 (2003); *see also* Richard Posner, *Pragmatic Adjudication*, 18 *Cardozo L. Rev.* 1 (1996); Richard Posner, How Judges Think (2008).
19. Posner, *Pragmatic Adjudication*, *supra* note 18, at 5.
20. *See* Michael Sullivan, *Pragmatism and Precedent: A Response to Dworkin*, 26 *Transactions of the Charles S. Pierce Soc'y* 225, 228 (1990).
21. Brian Edgar Butler, *Legal Pragmatism*, *Internet Encyclopedia of Phil.*, https://iep.utm.edu/leglprag [https://perma.cc/S54W-HLU8].
22. Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1 *Duke L. Jnl.* 1, 2 (1986); Giles, *supra* note 2, at 315.
23. Giles, *supra* note 2, at 311; *see also* Bradley, *supra* note 22, at 2; Snyder, *supra* note 2, at 241.
24. Bradley, *supra* note 22, at 27, 43; *accord* Snyder, *supra* note 2, at 241.
25. Giles, *supra* note 2, at 311; *see also* Richard A. Posner, *Economic Analysis of Law* (4th ed. 1992).

Legal uncertainties are embedded in social conflicts. Empirical data, authoritative and expert sources, and intertextual discourse play roles in arguments and framing strategies anchored in precedent (legalism), consequences (pragmatism), and policy.[26] Even when justices agree on case outcomes, they do not always agree on the reasons, which undermine decisions impacts on other cases (as precedent) or the practical and pragmatic consequences for individuals and society.

Language is an essential feature of legal text, decisions, and arguments. Although scholars have studied language, sociolinguistics, and legal discourse for more than forty years, the primary focus of studies has been courtroom interactions.[27] How dominant and marginalized legal discourse, heuristics, and framing strategies influence appellate case decisions are often overlooked.[28] This oversight is unfortunate because court decision language is "shaped by the ways society thinks about, talks about, and understands particular issues."[29] Discourse is a social practice,[30] and discursive strategies, weaknesses in reasoning, and framing often occurs in oral argument and become reflected in legal decisions.[31] Critical discourse analysis provides a framework to investigate and uncover the discursive construction of legal decisions through language, intertextual references, and framing strategies.

III. Theoretical Framework

The systematic analysis of spoken and written legal discourse is grounded in the power/knowledge conceptualization that power and knowledge are intertwined; knowledge reproduces and shapes power, and power reproduces and shapes knowledge.[32] The power of legal discourse is that it frames not just the law and legal interpretation but also

26. *See* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 *William & Mary L. Rev.* 1671, 1677–78 (2016).
27. *See generally* John M. Conley et al., *Just Words: Law, Language, and Power* (3d ed. 2019).
28. *See* Ryan A. Malphurs, *Rhetoric and Discourse in Supreme Court Oral Arguments* (1st ed. 2013); Marlo Goldstein Hode & Rebecca J. Meisenbach, *Reproducing Whiteness Through Diversity: A Critical Discourse Analysis of the Pro-Affirmative Action Amicus Brief in the Fisher Case*, 10 *Jnl. Diversity in Higher Ed.* 162, 168–169 (2017).
29. Hode & Meisenbach, *supra* note 28, at 169.
30. Norman Fairclough & Ruth Wodak, *Critical Discourse Analysis*, in *Discourse as Social Interaction: Discourse Studies, A Multidisciplinary introduction* 258, 258 (Teun A. Van Dijk ed., 1997); Ruth Wodak, *The Discourse-Historical Approach*, in *Methods of Critical Discourse Analysis* 63, 63 (Ruth Wodak & Michael Meyer, eds., 2001) [hereinafter *Methods of Critical Discourse]*.
31. *See* Malphurs, *supra* note 28.
32. *See* Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., Pantheon Books 1997); Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley trans., Vintage Books 1978); Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980).

the facts and social reality. The study of legal power constructs reality, social practices, and meaning.[33] The study of language, power, and the law has centered on the courtroom and other micro-level interactions between individuals and the police or as part of everyday life.[34] The courtroom studies analyze interactions between attorneys and witnesses or defendants and attorney strategies, finding a relationship between language and power.[35] It is likely that the same features, discourse, and framing strategies affect appellate argument and decisions as well.[36]

Advocates and judges take facts from one context and use them in different contexts to extract that text from its source, reconstitute it, and establish new meanings.[37] Scheppele[38] asserts that legal and factual interpretations are intertwined: (1) judging "engages both in an ongoing project of meaning-making, producing a single opinion in which fact and law are woven together in one coherent whole," and (2) facts "don't have a life of their own apart from legal interpretation, nor do legal texts have a meaning outside a context of fact." On appeal, legal narratives are constructed based on and by the spoken and written word, often involving analogies, metaphors, legal fiction, and policy references.[39]

Legal authority descends from language. Justices and judges integrate facts and law to craft "legal narratives [that] reside simultaneously in the normative universes of legal and nonlegal worlds."[40] Appellate decisions, especially Supreme Court decisions, produce influential texts beyond party litigants.[41] Legal arguments and text influence claims on social issues, contexts, and realities, and the pragmatic consequences of case outcomes. Intertextual, empirical data and authoritative references assist the court in constructing social realities, particularly in cases

33. *See* Foucault, *Discipline and Punish: The Birth of the Prison, supra* note 32.
34. *See, e.g.*, Conley, et al., *supra* note 27; *Language in the Legal Process* (Janet Cotterill ed., 2002); Patricia Ewick & Susan Sibley, *The Common Place of Law* (1998); Roger W. Shuy, *Topic as the Unit of Analysis in a Criminal Case*, in *Analyzing Discourse: Text and Talk* 437, 437 (Deborah Tannen ed., 1982).
35. *See, e.g.*, Conley, et al., *supra* note 27; Susan Ehrlich & Jack Sidnell, *"I Thank That's Not an Assumption You Ought to Make": Challenging Presuppositions in Inquiry Testimony*, 35 *Lang. in Soc'y* 655 (2006); Greg Matoesian, *Intertexuality, Affect, and Ideology in Legal Discourse*, 19 *Text* 73 (1999); Roger W. Shuy, *To testify or not to testify*, *in Language and Legal Process* 3, 3 (Janet Cotterill ed., 2002); Susan U. Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (1998).
36. *See* Hode & Meisenbach, *supra* note 28 at 170–73.
37. Jennifer Andrus, *Beyond Texts in Context: Reconceptualization and the Co-Production of Texts and Contexts in the Legal Discourse, Excited Utterance Exception to Hearsay*, 22 *Discourse & Soc'y* 115 (2011); *Natural Histories of Discourse* (Michael Silverstein & Greg Urban eds., 1996).
38. Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, 30 *Representations* (Special Issue) 42, 60–61 (1990).
39. *Id.*
40. *Id.* at 65
41. Bradley, *supra* note 22 at 32–39.

involving uncertainty with cascading and real-world effects on future cases, people, and society.

Some prior research has explored (at least in part) the use of framing in legal decision-making[42] to connect facts and legal precedent that construct and trigger 'mental structures to shape the way we see the world' or social realities.[43] Legal framing most commonly employs the law, legal precedent, and trial facts.[44] The "'textualization' of social life at trial is magnified on appeal, where judges rarely see the parties to the lawsuit and have only a written record to consult for the evidence."[45] Connecting law and facts operate as discursive strategies that affect and create power and authority and influence audiences, ranging from juries and advocates to citizens and opinion-makers, including the media and Supreme Court justices.[46] By taking from one "speech event and recontextualiz[ing]" it for another,[47] the legal discourse of trials and appellate writings obscure inconsistencies, foregrounding some aspects of speech and backgrounding others.[48]

Legal discursive strategies shape societal issues and social realities, and employing critical discourse analysis seeks to uncover the lexical discursive practices, including intertextual and framing strategies that reproduce, rather than rectify, social problems and inequities and reinforce dominant power structures.[49] Law and legal discourse are particularly opaque, requiring careful and critical analysis to uncover its constitutive features of meaning-making that mask dominant and privileged values, disguise non-neutrality, and perpetuate social inequality.[50] The power of language is evident in oral arguments, which are speech acts intended to influence judicial decisionmaking and case outcomes. Here, the critical discourse analysis approach concentrates on language and the framing of legal discourse in an oral argument to uncover power disparities.

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42. *See, e.g.*, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 *Notre Dame L. Rev.* 521 (2018); Justin Wedeking, *Supreme Court Litigants and Strategic Framing* 54 *Am. J. Pol. Sci.* 617 (2010).
43. George Lakoff et al., *Don't Think of an Elephant!: Know Your Values and Frame the Debate – The Essential Guide for Progressives* (2004).
44. Andrus, *supra* note 37, at 116; Matoesian, *supra* note 35; Scheppele, *supra* note 38.
45. Scheppele, *supra* note 38, at 44.
46. Matoesian, *supra* note 35.
47. Andrus, *supra* note 37, at 116; Greg Matoesian, *Intertextual Authority in Reported Speech: Production Media in the Kennedy Smith Rape Trial*, 32 *J. Pragmatics* 879, 879 (2000).
48. Matoesian, *supra* note 47.
49. Norman Fairclough, *Discourse and Text: Linguistic and Intertextual Analysis within Discourse Analysis*, 3 *Discourse & Soc'y* 193 (1992); Norman Fairclough, *Language and Power* (2nd ed. 2000) [hereinafter Fairclough, Language and Power].
50. Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (Dissertation, 1984); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987); Teun A. van Dijk, *Principles of Critical Discourse Analysis*, 4 *Discourse & Soc'y* 249 (1993).

Generally, critical discourse analysis (CDA) focuses on "the role of discourse in the (re)production and challenge of dominance" and discursive strategies that maintain inequality.[51] CDA concentrates on uncovering the language, rhetoric, or meanings that conceal "everyday" power relations that perpetuate, "reflect, or construct social problems."[52] The law reproduces dominance and marginalization "through 'natural' and quite 'acceptable'" legal discourse.[53] To uncover the everyday dominance that is (re)produced in social interactions, communications, and discourse requires concentrated analysis of "discursive strategies that legitimate control, or otherwise 'naturalize' the social order," and perpetuate "inequality."[54]

Discursive power is evident in who has a voice, or whose story is told. The stories foster unconscious and widely accepted evaluative beliefs and ideologies that are routine and normative. Shared legal discourse is evidenced in "arguments, metaphor, lexical choice, and rhetorical models" common and preferred among lawyers and justices.[55] CDA uncovers how the taken-for-granted discourse structures mental models and manipulates beliefs.[56] The dominant discourse—common among groups, institutions, and genres (like the law)—is reflected in everyday lexical activity. Metaphors, labeling, and storytelling (all methods common to legal discourse) are potent examples for creating mental models and (re) producing ideologies.[57] Examples of discourse structures and strategies include euphemistic syntax or lexicon (downplaying seriousness or mitigating importance), metaphor (use of illegitimate comparisons), and storytelling (indexing social identities and power structures).[58]

Legal text and talk privileges elites and institutionalized power by defining the concepts of legitimacy, equality, and justice through discourse. Law and facts are culturally situated and socially constructed by verbal performance and influenced by emotion and authority.[59] Mental shortcuts (i.e., cognitive biases, heuristics, or commitments) influence the decision-making process, particularly at times of uncertainty,[60] including legal and judicial decisions. Legal scholarship has focused on how the

51. van Dijk, *supra* note 50, at 249; *Methods of Critical Discourse Analysis*, *supra* note 30.
52. Meriel Bloor & Thomas Bloor, *The Practice of Critical Discourse Analysis: An Introduction*, 12 (2007); van Dijk, *supra* note 50, at 250.
53. van Dijk, *supra* note 50, at 254.
54. *Id.*, *citing* Norman Fairclough, *Critical and Descriptive Goals in Discourse Analysis*, 9 *J. Pragmatics* 739 (1985).
55. *Id.* at 258.
56. Teun A. van Dijk, *Critical Discourse Analysis*, *in The Handbook of Critical Discourse* 466 (Deborah Tannen et al. eds., 2nd ed. 2015).
57. *Id.* at 474–75.
58. *Id.*
59. Matoesian, *supra* note 35.
60. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974).

affect heuristic[61] impacts judicial decisionmaking by examining judges' responses to survey questions and hypothetical scenarios.[62] The current research expands this focus to uncover other heuristics shaping legal arguments and decisions.

IV. Methodology

Prior research investigates fast and unreflective judgments, characteristic of trial but not appellate decisionmaking. Moreover, the "affect heuristic" provides a narrow lens for understanding constitutional decisions, failing to encompass the range of emotions and other framing strategies that influence judicial decisionmaking.[63] The current study builds on prior research and investigates how discourse and framing strategies in a real (not hypothetical) case reproduced the status quo and power disparities. Appellate decisions emerge from slow and deliberate processes, reviewing written briefs and precedent, often challenging positions at oral argument. Oral argument can change the direction of a decision,[64] and plenty of articles and books provide guidance and tips on how to conduct oral arguments.[65] The advice covers public speaking techniques, organizational strategies, and tips for oral argument.[66] None critically investigate how discursive and framing strategies reproduce institutionalized biases toward the status quo to the disadvantage of nondominant groups, including criminal defendants.

A. *Data*

Oral arguments are public events; they are audio recorded and publicly available. Rarely, however, do oral arguments draw large crowds, and beyond academics, few listen to the recorded arguments. Oral arguments

61. The affect heuristic "is an instance of substitution, in which the answer to an easy question (What do I feel about it?) serves as an answer to a harder question (What do I think about it?)." Daniel Kahneman, *Thinking, Fast and Slow* 139 (2011).

62. *See e.g.*, Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 *Cornell L. Rev. 1* (2007); Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 *Court Rev: The J. Am. Judges Ass'n* 114 (2013); Malphurs, *supra* note 28; Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 *Ann. Rev. Law & Soc. Sci.* 203 (2017); Andrew J. Wistrich, Jeffery J. Rachlinski, & Chris Guthrie, *Heart versus Head: Do Judges Follow the Law or Follow their Feelings?*, 93 *Tex. L. Rev. 855* (2015).

63. Terry A. Maroney, *Why Choose? A Response to Rachlinkski, Wistrich, and Guthrie*, 93 *Tex. L. Rev.* 317 at 318 (2015).

64. *See* Brooke J. Bowman et al., *Oral Argument: The Essential Guide* 1 (2018).

65. *See, e.g.*, Bowman et al. (2018); Bryan A. Garner & Antonin Scalia, *Making Your Case: The Art of Persuading Judges* (2008); Bryan A. Garner, The Winning Oral Argument: Enduring Principles with Supporting Comments from the Literature (2009); Sylvia Walbolt, *Twenty Tips from a Battered and Bruised Oral-Advocate Veteran*, 37 *Litigation* 54 (2011); Robert L. Stern, *Tips for Appellate Advocates*, 15 *Litigation* 40 (1989).

66. *Id.*

are instrumental in the appellate decisionmaking. They are conversations between advocates and the judiciary that provides the only opportunity for appellate judges to ask questions directly to advocates, gather factual and legal information, and test theories and consequences of the potential decisions.[67] Oral argument reveals the discursive and framing strategies that most likely influence the case outcome.[68] Although today, justices and advocates might be influenced by potential news coverage with media and blogs (like SCOTUS.blog) reporting on the oral arguments, widening the scope of the attendant audience. In the 1970s, the media did not write about the *Argersinger* case. In researching newspaper articles on newspapers.com—the largest online newspaper, archiving over 300 million pages of historical newspapers from over 11,000 newspapers around the United States, including the New York Times and the Wall Street Journal, no articles were published about *Argersinger* at the time *certiorari* was granted or when the case was argued. A few articles were published after the case was decided.[69]

The transcripts of the *Argersinger* case provide the bounded corpus of the text and talk under study here. The recordings and transcripts are available on oyez.com.[70] The first step in the analysis was to upload the audio files to Temi.com and compare the oyez.com texts and the Temi.com transcriptions. The Oyez transcriptions were good but not perfectly transcribed. Since the Oyez transcription identified speakers, the Temi-generated transcripts were edited and updated for accuracy, and the speakers (noted in oyez.com) were added. Segments of the audio recordings remained inaudible due to low or overlapping voices, and there are a few instances where the speakers are unknown. To investigate the large body of text, the arguments were uploaded to Atlas.ti qualitative management software for coding and analysis.

B. *Analytical Approach*

Building on and expanding prior research, the current study employs Fairclough's[71] three-stage system of critical discourse analysis to reveal relationships between text, interactions, and contexts and van

67. Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* 21–28 (2004).
68. *Id.*
69. *See e.g.*, Fred P. Graham, *High Court Bars Any Jail Sentence Without Counsel: Extends Its 6th Amendment Ruling on Felonies to Apply to Petty Cases*, *N.Y. Times*, June 13, 1972, at A1 [https://perma.cc/258T-6XEK]; Allan J. Mayer, *What Price Justice? States Face a Choice: Make Punishment Mild or Bolster Legal Aid; Ruling Guaranteeing Counsel for Many Minor Offenders Facing Jail to be Costly*, Wall St. J., June 26, 1972, at 1 [https://perma.cc/L669-V2DU]; Ed Kohn, *Decisions Cause Problems*, *Delta Democrat-Times*, Feb. 17, 1974, at 3 [https://perma.cc/E9V8-DHY9].
70. *Argersinger v. Hamlin*, Oyez, https://www.oyez.org/cases/1971/70–5015 (last visited Apr 9, 2023) [https://perma.cc/Y3HM-SDZQ].
71. Fairclough, Language and Power, *supra* note 49, at 26.

Dijk's model[72] of controlling, justifying, and framing discourse strategies. Fairclough's three stages focus on describing (text analysis), interpreting (processing analysis), and explaining (social analysis).[73] Van Dijk's[74] analytic approach augments Fairclough's stages to uncover the discursive strategies that control talk, downplay inequality, and rely on shared, mental shortcuts in describing, interpreting, and explaining the text and how those structures perpetuate dominance, privilege, and the status quo. Coding and analytical stages are iterative, and they involve multistep processes that center on the arguments and sections as a whole rather than line-by-line or overly segmented analyses.[75]

Before the first, descriptive cycle of open coding, both oral arguments (1971 and 1972) were read and reviewed several times. The overview revealed, with few limited exceptions, that Mr. Argersinger—the person—was not mentioned. He was briefly mentioned in the introductory remarks by both defense attorneys, framing the issue of his being sentenced, without the benefit of counsel, to 90 days in jail. A handful of interactions concentrated on clarifying Argersinger's sentence. For example, Justice Powell asked specifically how the labeling of crimes affected whether an individual was provided counsel in Florida. Under the new Florida rule, Argersinger was not entitled to counsel by the difference of one day. Under the Florida holding, defendants charged with offenses punishable by more than six months—Argersinger's charges carried up to six months—were entitled to counsel. In another instance, Justice White asked what relief was being sought for Mr. Argersinger. Like the oral arguments, the court's opinion refers to Mr. Argersinger only at its beginning to provide context on the case history, charges, and sentence.

Argersinger's identity, offense, and the facts of his particular case were merely the vehicle to decide the ultimate issue. It is unlikely that the justices' like or dislike (under an affect heuristic model) had any impact on the trajectory of the arguments or the case outcome.[76] Since, each participant (the justices and advocates) is an elite, the semantics or structure of discourse, including pauses, hesitations, or interruptions, that might reflect dominance or power relations among speakers is not examined.[77] Instead, drawing on interdisciplinary studies of Supreme Court

72. van Dijk, *supra* note 50, at 268–69.
73. Fairclough, Language and Power, *supra* note 49, at 26.
74. van Dijk, *supra* note 50.
75. Wendy Patterson, *Narratives of Events: Labovian Narrative Analysis and Its Limitations*, in Doing Narrative Research 27 (Molly Andrews, Corinne Squire, & Maria Tamboukou, eds., 2013); Catherine Kohler Riessman, *Narrative Methods for the Human Sciences* 3–17 (2008).
76. *Cf.* Kahneman, *supra* note 61; Guthrie et al., *supra* note 62; Wistrich, et al., *supra* note 62.
77. Recent and interesting research, however, has focused on interruptions during oral argument by gender of advocates and Justices, ideology, and seniority. See Tonja Jacobi & Dylan Schweers, *Justice Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Argument*s, 103 *Va. L. Rev*. 1379

decisionmaking and the critical discourse analysis approach, the current study investigates through concentrated analyses of the transcribed texts the use of words, metaphors, labels, emotion, euphemisms, and stories that frame, situate and construct social realities.

1. First-level coding

During the open-coding phase, "a word or short phrase" that summarized the "basic topic of a passage of qualitative data" was captured.[78] Early in the 1971 argument, controlling or censoring language, downplaying or mitigating differences in power, and metaphors and other mental shortcuts framed the direction of the arguments.[79] Language, phrases, words, citations, data references, and legal claims were identified and coded broadly. During this early stage, sixteen broad topics were identified.[80] The identified topics reflected concepts from the critical discourse tradition, including euphemistic expressions, over-wording, and framing strategies that incorporated metaphors, labeling, and stories, legalistic references (i.e., legal rules and materials), and pragmatic arguments (i.e., the potential effects of the decision).[81] Instances of overlapping codes and more than one discursive tactic emerged.

2. Second-level coding

Through a series of reflection and examination, the original codes were refined, yielding subcodes and themes that further highlighted discursive patterns and framing strategies.[82] Four framing strategies—relational, perspective, legalistic, and pragmatic—materialized that either elevated or marginalized positions. *Relational framing* employed language that compared parties, outcomes, and the potential consequences of the case decision. Examples of relational framing included using counter-arguments or euphemistic language that downplayed the issue's significance and lexical phrasing that elevated dominant interests. Anecdotes, examples, and stories, often using us/them, indigent/wealthy, rural/urban, or felony/misdemeanor grounded the comparisons. *Perspective framing* expressed views, attributions, and arguments from particular

(2017).

78. Johnny Saldaña, *The Coding Manual for Qualitative Researchers* 102 (3rd ed. 2015).
79. van Dijk, *supra* note 50, at 265.
80. (1) Constitutional Argument/Interpretation, (2) Counter-Arguments, (3) Defense Position/Perspective, (4) Expert: Organization/Association Reference, (5) Expert: Statistical Evidence, (6) External Actor Reference, (7) Florida Rule/Law, (8) Framing: Euphemism/Lexical Phrase/Hyperbole, (9) Framing: Example/Story, (10) Framing: Indigent/Wealthy or Us/Them comparisons, (11) Framing: Metaphor, (12) Framing: Rural/Urban, (13) Framing: Misdemeanor/Felony Labeling, (14) Other State/Federal Precedent, (15) Precedent, and (16) State/Prosecutor Perspective.
81. Fairclough, Language and Power, *supra* note 49, at 110–11; Fischman & Jacobi, *supra* note 26; Posner, How Judges Think, *supra* note 18.
82. Fairclough, Language and Power, *supra* note 49; Saldaña, *supra* note 78.

viewpoints.[83] The competing viewpoints included lexical dichotomies from the defense or state/prosecutor positionality or perspectives, references to external actors, or metaphors. *Legalistic framing* formed arguments on legal texts, actors, other authorities, and intertextuality. These were evidenced by references to federal and state precedents and constitutional, statutory, or rule provisions and laws. Finally, *pragmatic framing* relied on expected (or feared) results, expert opinions, organizational recommendations, and empirical (often statistical) findings.

3. Final coding step

The final interpretive explanatory cycle of coding scrutinized framing strategies for controlling talk and text through the foregrounding and backgrounding stories, perspectives, and voices (in other words, whose stories are told); justifying or denying inequality in terms of policy preferences; and employing shared discourse through rhetoric, style, metaphors, labeling, euphemism, and storytelling that recasts uncertainty, power, and dominance to perpetuate the status quo and marginalize the legal interests of non-dominant viewpoints.[84] The following research questions guided and structured the interpretive explanatory inquiry discussed in the next Part:

(A) How did the advocates frame the issue?

(B) How did framing strategies derail the broad appointment of counsel?

(C) How did navigating uncertainty undermine non-dominant interests?

V. Discussion[85]

The 1971 argument relied heavily on framing labels that distinguished felonies and misdemeanors and, more granularly, misdemeanor types with an inordinate focus on statistical and expert references about the extent of the misdemeanor "problem" and the need for counsel. In contrast, in the 1972 argument, the Solicitor General agreed that misdemeanor defendants should have access to counsel, but he urged that that right should be limited to incarceration-only cases. In 1971 and 1972, advocates and justices stressed pragmatic rather than legalistic strategies.

Pragmatic uncertainty about the potential effects of requiring counsel foregrounded concerns over the defendants' constitutional

83. Methods of Critical Discourse, *supra* note 51; Martin Reisigl, *The Discourse-Historical Approach*, in The Routledge Handbook of Critical Discourse Studies 44, 52 (John Flowerdew & John E. Richardson eds., 2017); Wodak, *The Discourse-Historical Approach*, *supra* note 30, at 63.

84. *See generally* Norman Fairclough, *Critical Discourse Analysis* (1st ed. 1995); *see generally* Norman Fairclough, *Language and Power* (2nd ed. 2001); van Dijk *supra* note 50.

85. For ease of reading, the excerpts from the oral arguments were modified to remove pauses and repeated or redundant wording, and minor grammatical errors were fixed.

interests in fairness and due process. The negative consequences of the lack of legal representation were pushed to the background. Even, external amicus briefs from national associations and organizations that advanced the need for counsel, muted the consequences for defendants and elevated systemic concerns. Despite the documented miscarriages of justice and chaos of the misdemeanor system in the President's Commission report,[86] the stories and examples focused on system concerns (like lawyers slowing down processing cases or lack of lawyers in rural communities) and framed the oral arguments to highlight uncertainties about requiring appointed counsel and the impact on trial judges, lawyers, and the legal system. Uncertainty on how many misdemeanors were prosecuted annually, how many lawyers would be needed, and the ability of the system to provide counsel drove the framing and discursive strategies fueling the stories and the lexical, hyperbolic, and euphemistic language that permeated the advocates' and justices' interactions in both oral arguments.

A. *How Did the Advocates Frame the Issue?*

Introductory statements are typically uninterrupted by justices, allowing the advocates to provide their theory and roadmap for their argument. In 1971, defense and prosecution attorneys launched descriptive and fact-heavy introductions. The defense began a broad assertion that was narrowed substantially by the end of the argument that any person charged with a crime was entitled to counsel: ". . . it is our contention that a person charged with any crime should be given the right to counsel, even in the situation where he is indigent."[87] In the final moments of his argument, defense counsel retracted and narrowed his proposition, urging that only those facing the "practical possibility" of jail should be counseled. Succinctly and memorably, he concluded simply: "no attorney, no jail."[88]

The prosecutor's introductory remarks in 1971 meandered, framing the issue of crime typology as complex and employing pejorative language to characterize the broadening of the right to counsel and euphemistically downplaying imprisonment, calling it "confinement."[89] The 1971 prosecutor's opening remarks foreground the dominant perspective by relying on lexicality minimizing the benefits of the right to counsel. To illustrate, he suggested that it was a "fitting occasion" that this case involved Florida laws, building on *Gideon*, the case holding defendants charged with felonies were entitled to counsel. Using the metaphor that "Florida opened the door for *Gideon* itself" falsely suggested that the State offered defendants those rights rather than Florida litigating

86. President's Commission, *supra* note 7, at 139–51.
87. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 00:22 (Dec. 6, 1971) (transcript on file with author).
88. *Id.* at 15:19, 41:41.
89. *Id.* at 24:22.

against them, as the state was arguing against extending those rights in *Argersinger*. The lexical language framed the issue in the negative by asking "whether *Gideon* should be extended downward" constructing a pejorative mental image of moving "from a higher to a lower place" or "from a higher to a lower condition."[90] Linguistically employing "downward" marginalizes misdemeanor defendants and cases as less important, and this is echoed by his "hope" that the case outcome "won't be the same as it was in *Gideon*." His metaphors and language downplayed the inequities of failing to provide counsel for people without the means to hire an attorney and the effects of imprisonment.

By comparison, in 1972, the introductory arguments were targeted and narrowed. The SG submitted an amicus brief, supporting counsel for incarcerated misdemeanants; a position that defense counsel adopted at the outset of the second argument. In his introductory remarks, defense counsel contextualized and humanized the issue, but narrowed the interest to incarceration-only defendants:

> . . . . Three dissenters in the Florida Supreme Court would have held that the right to counsel extends to any offense in which a man may lose his liberty. Our position is essentially that. Our position is that wherever the actual threats of incarceration exists, a man must be advised of his right to counsel, and counsel must be appointed for him if he cannot afford counsel, unless the defendant knowingly and intelligently waives that, right . . . [Interrupted by CJ Burger].[91]

In 1972, the Chief Justice interrupted defense counsel's introductory remarks to interject a relational question on the pragmatic limits of the potential policy. CJ Burger asked: "Suppose the judge, at the outset under a rule, such as you suggest, concluded in his own mind that he was not going to impose any sentence, even though it was permitted. And then went ahead with the trial that would be alright under your theory, would it?"[92] The question controlled the legal talk, refocusing defense counsel's argument away from the defendants' concerns and toward the trial judges' perspectives.

The SG's introductory remarks were longer and uninterrupted for eight minutes. Unlike the 1971 prosecutor, the SG did not employ the euphemistic "confinement" when referencing the loss of liberty but rather "imprisonment." His pragmatic framing of the legalistic need for counsel and metaphorical line drawing "forced" him to conclude that counsel was a necessity, but only for a narrow group of defendants accused of misdemeanor offenses:

> . . . I cannot find any basis, any logical ground to stand on for saying that the right to counsel exists for imprisonment of six months or more, but does not apply for imprisonment for less than six months. I

90. *Downward*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/downward [https://perma.cc/5S8G-2DFH].

91. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 00:27 (Feb. 28, 1972) (transcript on file with author).

92. *Id.* at 1:38.

> recognize that lines have to be drawn in the law like the age of majority and that like cases close to the line on each side will not be very different from each other. However, with respect to imprisonment, I find it hard to draw the line anyplace. Five months imprisonment seems to me to be substantial. I do not find much help when the time is reduced to 10 days or five days. There seems to me to be a difference in kind between imprisonment of any duration and merely monetary sanctions or other sanctions, which may be imposed by judicial decisions. These other sanctions may be a serious burden, but they do not equ- involve depriving a person of his liberty, and that is something fundamental in our society. And thus I have found myself forced to the conclusion that there should be a due process, right to counsel, and that this right should be applicable before any term of imprisonment can be imposed.[93]

The S.G. recognized a common ground that detention for any amount of time was a serious burden regardless of wealth. Counsel for the rich and poor was necessary when liberty was at stake.

Both defense counsels framed their arguments similarly, noting the relational inequity of people with means and wealth having attorneys but the poor proceeding without counsel. By raising this inequitable reality, defense counsels exposed the weaknesses in constitutional protections, only benefiting those with the means to hire counsel. However, the Chief Justice derailed the argument by interrupting both introductory remarks and directing the legal talk toward the dominant interests of the functioning of the legal system instead of due process, fairness, or equity.

In 1971 and 1972, the state prosecutor and several justices characterized imprisonment as "confinement," euphemistically downplaying lost liberty and its cascading effects. Even defense counsel re-focused their arguments on trial judges' decision-making and the infrequency of "confinement" as a punishment rather than highlighting the impact of arrests and prosecutions on marginalized defendants and constitutional implications. Consistent with advocacy techniques that frame the law more narrowly to allay justices' concerns about sweeping constitutional changes, defense counsel responded to CJ Burger's (1972) concern about the lawyers necessary to enforce a newly proposed rule by downplaying the need for counsel:

> So I think there really is some practical recognition made every day in every court in the country, that some offenses, although they carry the possibility because of the ordinance says 15 days, there is no real actual possibility of incarceration.[94]

The offense labels are essential to court efficiency but irrelevant to arrested, prosecuted, and punished defendants who lose their liberty and suffer many other harmful consequences from misdemeanor arrests. Characterizing misdemeanors as minor violations, labeling them as lower-level offenses, and constructing the narrative that incarceration is rare

93. *Id.* at 31:06.
94. *Id.* at 5:29.

reinforce the dominant discourse that controls and defines a social reality which downplays inequities and perpetuates power differentials.

The juxtaposition in lexicality about the infrequency of defendants needing counsel emerged early in the introductory marks and carried throughout the advocacy. Despite the gravity of the President's Commission report[95] sounding the alarm about the miscarriages of justice in the lower criminal courts, defense and prosecuting attorneys downplayed its scope—arguing that few defendants would take advantage of counsel, while proposing alternatives that included weakened versions of counsel to meet their needs.[96] The overriding focal concern was the perceived burden on the legal system rather than the need for counsel to protect against due process violations and unconstitutional injustices. By concentrating on 'dominant discourse' and labeling of (1) what constituted misdemeanors, (2) what the imposed penalties were, and (3) trial judges' sentencing authority, the Justices and advocates dehumanized and objectified the "people" subjected to the arrests, prosecutions, and punishments. There was little discussion of the inequity of a criminal legal system where only the wealthy had access to counsel.

B. *How Did Framing Strategies Derail the Broad Appointment of Counsel in All Criminal Cases?*

The Justices' and advocates' interactions were influenced by their respective perspectives (court, lawyers, defendants, or society). In 1971, the justices and defense counsel (n=80) interacted more than the Justices and the prosecutor (n=13); in 1972, it was the reverse. The prosecutors (the SG, n=27, and the AG, n=43) fielded more questions than the defense (n=54). Occasionally, interactions were interrupted (either by counsel or a Justice, speaking over one another). Some interactions reflected serial questioning focused on clarifying perspectives, arguments, or factual assertions. In 1971, five (of the seven) justices interacted with defense counsel (Burger, Brennan, Stewart, Blackmun, and Marshall), and only three interacted with the prosecutor (Stewart, Burger, and Brennan).[97] In 1972, five of nine justices interacted with defense counsel (Burger, White, Stewart, Marshall, and Rehnquist), and six of nine interacted with the prosecutors (Marshall, Stewart, Burger, Douglas, White, and Rehnquist).[98]

Justices' interactions with counsel varied. In 1971, Justice Stewart interacted most often with defense counsel (n=37), followed by Brennan

95. President's Commission, *supra* note 7, at 29–30.

96. Audiotape: Oral Argument of Argersinger v. Hamlin, *supra* note 91, at 9:56; *id.* at 50:11.

97. Justices Black and Harlan had retired, leaving seven justices on the Court for the first oral argument. Justices White and Douglas may not have interacted with either advocate at this argument, unless one or both were the unknown justices, who could not be identified in the audio recording.

98. Additionally, an unknown Justice asked a question of the prosecution. Justices Brennan, Blackmun, and Powell did not interact with either defense counsel or the prosecutors.

(n=20), Marshall and Burger (n=7 each), Blackmun (n=6), and an unidentified Justice (n=3). Justice Stewart engaged most often with the prosecutors (n=6), followed by an unidentified justice—which might be more than one person (n=4), Burger (n=2), and Brennan (n=1). In 1972, Chief Justice Burger interacted most often with defense counsel (n=26), followed by Justice White (n=21), then followed by far fewer interactions among the remaining justices and defense counsel: Justice Stewart (n=5), Marshall (n=1), and Rehnquist (n=1). Justice Stewart was again most active with the prosecutors (n=21), followed closely by Marshall (n=20), then Burger (n=15), Douglas (n=5), White (n=4), and Rehnquist (n=4).[99]

Interactions and question types varied by the advocate. Interactions with the Justices were categorized into three question types: Initial, clarifying, and commentary. Initial questions posed new or slightly new topics, like Justice Brennan's question to defense counsel about traffic offenses: "How about traffic offenses? Do you have any of them that carry between six and 12 months?"[100] A clarifying point referred to previous questions or answers seeking clarification on the point, perspective or position, like "not in the jail" by Justice Stewart[101] responding to the immediately preceding discussions on labeling to distinguish treatment of felons and misdemeanants. Finally, commentary did not seek to elicit answers from the advocates. Justice Stewart's "Oh, I see"[102] in response to the prosecutor explaining the distinctions between municipal and county offenses, particularly in Miami's metro division.

In 1971, clarifying-type questions were most commonly posed to defense counsel (n=33), followed by initial questions (n=25) and then commentary (n=21). Commentaries by justices were most common during the prosecutor presentation (n=6), followed by clarifying questions (n=4) and initial questions (n=3).[103] Again, in 1972, defense counsel fielded more clarifying questions (n=35) followed by initial questions (n=10) with few commentaries (n=9). The SG fielded mostly clarifying questions (n=12), followed by commentary (n=8) and initial questions (n=7). In 1972, the AG, the only lawyer who argued twice, again fielded the most comments by the justices (n=24), followed by clarifying questions (n-=11) and initial questions (n=8).

1. Critical Framing that Refocused on Dominant Interests.

In 1971, the justices primarily focused on gathering factual information and defining and clarifying crime labels, particularly in Florida. Rarely were other states' structures discussed. The framing of social reality and the facts underlying the issue were shared across the interactions. The questions narrowly concentrated on understanding Florida's

99. One unknown Justice interacted with the prosecutor.
100. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 03:36 (Dec. 6, 1971) (transcript on file with author).
101. *Id.* at 02:53.
102. *Id.* at 26:03.
103. One of the questions/comments was inaudible and was not included.

criminal laws and offense labels, context, and court processes. The thrust of the questions was directed to how Florida distinguished felonies and misdemeanors and what types of cases subjected people to incarceration. Often, the system-related facts signified intertextual relationships that maintained the status quo. For example, the exchange between defense counsel and Justice Brennan's[104] clarifying question presents a good illustration of weaving facts and law to focus on systemic labels and concerns rather than the defendants' quality of life, the consequences of misdemeanor convictions, or even the benefits of counsel:

> Justice Brennan: So now you understand this recent decision is meaning in all those instances [in Florida], counsel would have to be provided.
> Defense Counsel: Yes sir. And I think that the question of the difference between the terminologies has probably been laid to rest with this court's decision of Waller.
> Justice Brennan: Has there been any effort to provide the figures as to what this will mean in terms of the number of [counsel] assignments that will have to be made?
> Defense Counsel: That, of course, is only speculation on our part . . . .

Few judicial questions inquired about defendants, due process, the concern of the marginalized, or even the defense perspective or position. In one instance, while discussing the right to counsel whenever imprisonment is possible, Justice Stewart asked whether judges had to advise of the right to counsel for parking violations. He admonished the defense counsel for advancing a legal position, rather than responding to his fact-based question: "No, I'm just wondering. I'm asking you about a fact, not about what you think the law ought to be."[105]

In 1972, many of the fact-driven questions were couched in terms of statistical data. The exchange between defense counsel (Rogow) and Justice White shows how statistical facts centered the arguments:

> Defense Counsel: . . . I can really speak only in terms of some practical experience in in Dade County, about 400,000 people are faced with traffic offenses and cases tried in the Metro Court, but only about 5,000 of those people ever actually faced incarceration. So, in that situation–
> Justice White: 5000 people in jail?
> Defense Counsel: Well, those incarcerated, yes, sir. Incarcerated. [106]

Focusing on raw numbers, instead of people's individual stories or comparative inequities, further de-humanized the arguments, steering them away from marginalized concerns.

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104. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 03:56–04:23 (Dec. 6, 1971) (transcript on file with author).
105. *Id.* at 07:23.
106. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 15:49–16:14 (Feb. 28, 1972) (transcript on file with author).

Euphemism and hyperbole, relational comparatives, and metaphors were more common in the 1972 argument with 223 examples than in 1971 with only 86 examples.[107] This shift was likely due to the change in the S.G.'s position that some misdemeanants should be entitled to counsel. Where the 1971 argument focused on definitions, the 1972 argument narrowed the conversation and focused on how the right to counsel should be applied, which opened the discussion to more creative legal argument.

In analyzing the oral argument language, several interpretive explanatory framing strategies emerged, falling into four categories. Perspective framing (n=23), highlighting respective positions on policy issues, Pragmatic framing (n=8), encompassing uses of statistical and authoritative organizational and informational data and references, Relational framing (n=8), involving examples, anecdotes, and stories, and Legalistic framing (n=9), employing intertextual, constitutional, and precedential arguments.

Many framing strategies overlapped, making thematic categorization complex. Uncertainty, however, dominated the 1972 argument, shaping and directing the issue while amplifying the dominant and systemic concerns about the cost and availability of counsel.

a. Perspective Framing Questions

Position or policy questions were most common in 1971 (n=13) and 1972 (n=11) and many included intertextual examples (n=7 and n=9, respectively). Perspective-framing and hypothetical questions were directed most often to defense counsel in 1971. The questions challenged the defense position on the limits of appointed counsel, the types of cases requiring counsel, and the ability to waive counsel—all systemic concerns and tangentially related to how many cases and how many lawyers would be necessary for the representation. Illustrative of these questions, Justice Blackmun succinctly asked defense counsel,[108] "No matter how intelligent a person is. He cannot waive counsel?" And a short while later, Justice Blackmun asked "Next week, will you be back here with a fine case?"[109] The former concerned trial judges' ability to assess a counsel waiver. The latter, the breadth of impact and potential future of even more appointed roles for counsel. A more direct concern about the role of the trial judge is captured by Justice Stewart, who expanded on Justice Marshall's hypothetical and asked defense counsel about the process and potential appeals:

> Well, or maybe he'll go to prison. But in my brother, Marshall's hypothetical case where you had an offense where never in the particular jurisdiction had anybody been sentenced to prison for the commission of this offense. And so, at the outset of the trial, it could be fairly confidently assumed that this defendant was not going to prison. Then it developed during the course of that trial that for

107. Van Dijk (1993), *supra* note 50.
108. *Id.* at 14:45.
109. *Id.* at 41:40.

> one reason or another, this was a singularly egregious example of this particular violation. And, for good and sufficient reasons after the defendant was convicted, he was sentenced to prison. And for the first time in the history of that jurisdiction, then would it be your position that the convicted defendant could then appeal, and have a new trial, this time with a lawyer?[110]

Perspective framing and hypothetical and relational questions continued to permeate the 1972 arguments. Again, the limits or breadth of the right centered the argument, not the actual need for counsel. The questions Justice White asked defense counsel on applying the rule are instructive: "It depends on when you judge that actual threat [of incarceration]. Correct?"[111] And, later,[112] "What about pleas of guilty, same rule?" The prosecutor also fielded questions about who would benefit, but those focused on the sentencing. Justice Burger asked the SG: "And then on line drawings, Mr. Solicitor General, that means one day or one hour, as well as six months or a day."[113] Justice Marshall, on the other hand, challenged the SG's perspective on the usefulness of lawyers even in actual imprisonment cases. He asked the SG about the quality of representation: "What are you going to compare that with [competence of non-lawyer advocates]? No lawyer?"[114] This line of questioning captured system concerns and downplayed the need for "real" lawyers in misdemeanor cases. Justice Marshall continued by asking the prosecutor about non-lawyer representation: "So, wouldn't a law school student be better than no lawyer?"[115]

b. Pragmatic Framing Questions

Questions about statistical information and authoritative organization opinions (e.g., ABA rules and positions) were posed to defense counsel in 1971 and to both advocates in 1972. Justice Marshall, in 1971, succinctly framed his concern about statistical and pragmatic uncertainties about the decision's impact on the legal system, the uncertainties surrounding the estimated number of misdemeanor cases, the ability of towns and communities to provide counsel, and the reliability of the sources of statistical data: "I get worried with this legality by statistics or constitutionality by statistics."[116] Justice Marshall was not alone in his concern. Across the 1971 and 1972 arguments, the pragmatic concerns and uncertainties about statistical data centered on the legal system, not due process (e.g., the number of individuals proceeding without counsel, or even the number of defendants pleading guilty when innocent). Justice Brennan's inquiry of defense counsel in 1972 illustrates the concern for the number of lawyers necessary: "Has there been any effort to

110. *Id.* at 21:58.
111. *Id.* at 09:13.
112. *Id.* at 14:43.
113. *Id.* at 31:37.
114. *Id.* at 55:19.
115. *Id.* at 55:38.
116. *Id.* at 19:18.

provide the figures as to what this will mean in terms of the number of assignments that will have to be made?"[117] In response to another inquiry posed by Justice Burger, defense counsel dismissed the need for counsel in the case of incarcerated misdemeanor defendants based on the limited statistical data from New York: " . . . we have to look to the practicality of it. Actually, we're only talking about 40 people, 40 people out of 1 million 800,000."[118] Justice Burger asked further about the source of the New York data, and defense counsel responded, "Well, that's what the actual figures show." Poor criminally charged defendants' perspectives were muted. The data on the lack of due process, court chaos, and manifest injustices of only the rich taking advantage of counsel were ignored. It was the "extra burden" on the legal system that mattered:

> Justice White: But do you think—does anyone have any statistics at all on what kind of an extra burden this would be on the legal system or on the attorneys of the country? How many, under six months cases, actually result in jail sentences?[119]

The importance of representation by actual and trained counsel was diminished by the SG suggesting that the growing number of law students and new lawyers could relieve the burden for the courts. The SG even proposed social workers and ministers as able to assist in representing misdemeanor defendants. The justices did not concern themselves with providing competent counsel, as illustrated by Justice Stewart's question to the SG: "How many states, Mr. Solicitor General, if you know, or about how many, now permit appearance in court on behalf of indigents by law students or people who are not yet admitted to the Bar?"[120]

c. Relational Framing Questions

Questions relying on examples, anecdotes, and stories were scattered throughout and overlapped with other question types. Still, these were nearly exclusively directed to defense counsel in 1971 and 1972, and the questions constructed a false social reality of the cunning misdemeanor defendant who games the legal system. In 1972, Justice Burger posed a poignant hypothetical question that assumed that a highly sophisticated misdemeanor defendant could take advantage of a trial judge:

> Let's assume he's a little more sophisticated than some defendants and he answers the judge's suggestion by saying no, thank you, your honor. I've tried my case as well as I think it can be tried by anyone, and the case is closed and it's your decision. Except he makes the point, you can't send me into any confinement and I will not accept a new trial.[121]

The Chief Justice's question shifts the focus of power from the judiciary to the indigent defendants, suggesting the dominant interests of the

117. *Id.* at 04:10.
118. *Id.* at 05:35.
119. *Id.* at 15:25.
120. *Id.* at 42:53.
121. *Id.* at 03:11.

judiciary might paradoxically be undermined by hypothetical cunning indigent defendants.

d. Legalistic Framing Questions

Intertextual references, constitutional questions, and clarifying precedent were fairly common approaches. In 1971, however, precedent and history were rarely discussed. The right-to-counsel history was avoided by the advocates. The justices did not ask questions on the originalist perspective of the right to counsel, the framers' intent, or, even, the history of counsel in misdemeanor or petty offense cases. Even in 1972, legalistic references concentrated on recent (e.g., Gideon), not historical, precedents. The questions and advocacy focused on the pragmatics of appointing counsel, likely because the Justices agreed that individuals should, at a minimum, not be incarcerated without a meaningful right to counsel.

The justices employed legalistic framing in positioning their questions more often in 1972 than in 1971. The questions were fixated on academic and comparative principles about juries, federal mandates, and the burdens on the legal system. Justice Potter pointed to precedent denying defendants jury trials unless they faced more than six months imprisonment.[122] Justice Burger framed further concerns about the burden on the courts for retrials if counsel were denied and the defendant incarcerated.[123] Equal protection was only mentioned by the Court when Justice Stewart raised a concern for the wealthy: "I suppose, equal protection would require that the judge inform a non-indigent defendant, the same way. Would it not?"[124] Justice Marshall raised the few questions framed from an oppressed perspective by asking the prosecutor, in 1972, about liberty and waiving a prosecutor (which was a humorous but pointed commentary): "Is there anything in the constitution, in your mind, that limits the word liberty? It says liberty."[125] This exchange emerged following a discussion about drawing lines in terms of liberty, and the prosecutor admitted that the constitution did not qualify liberty, and he further conceded that "liberty if it is curtailed is curtailed."[126]

Shortly after that, Justice White stated that "no one suggests you can't waive a lawyer," and the prosecutor responded by observing that all constitutional rights could be waived.[127] It is at this point that Justice Marshall observed that: "You can't waive a prosecutor though, can you?"[128] The prosecutor noted that no, defendants could not waive a prosecutor. The intent is unclear, but the commentary exposed the disparate

122. *Id.* at 01:11:27.
123. *Id.* at 04:12.
124. *Id.* at 01:15:44.
125. *Id.* at 58:29.
126. *Id.* at 58:39. .
127. *Id.* at 00:59:48–01:00:05.
128. *Id.* at 01:00:04.

power arrangement; defendants can waive counsel, but they do not have the power to waive being prosecuted by a lawyer.

2. Intertextual Framing

Intertextual framing effectively narrowed the scope of the right to counsel. Several queries combined framing strategies. The intertextual references controlled the direction of the argument and amplified the dominant discourse that narrowed the decision to provide counsel only to those who were imprisoned. For example, Justice Warren posed a combined-framing question to defense counsel in 1971 that drew on perspective, pragmatic, and relational framing and pivoted his original argument to the narrower proposition:

> Well then, you'd have to come around to the test that has been suggested as one possibility in various reports. That counsel is required only if generally or usually a prison sentence is imposed. Is that the test you advocate?"[129]

Similarly, in 1972, Justice Burger posed two questions to defense counsel that used relational and pragmatic framing techniques to raise systemic concerns in rural and small towns:

> Your observations certainly have relevance to metropolitan centers. What about isolated, rural areas that are either not covered by any legal aid and defender system at all, or one that's on a regional basis where the legal aid office may be a hundred miles away from the particular small-town court?[130]

Justice Rehnquist piggybacked on that systemic concern, combining relational framing, positionality, and pragmatic concerns with a personal story, and asked defense counsel about the burdens on lawyers and courts in rural communities:

> Mr. Rogow, let me ask you, along the line [of] the Chief Justice's question. The situation in my home state of Arizona, where Coconino County, which has an area of 20,000 square miles and has one county seat where the superior court sits, but justice courts that are spread out over an area that is larger than that of many of the states where ordinarily there simply are not lawyers in residence. [W]ouldn't [an] application of your rule [ ] virtually require the abolition of justice court jurisdiction in an area of that size?[131]

Perspective, relational, pragmatic, and legalistic framing incorporated euphemistic, hyperbolic, and lexical phrases and metaphors on discussions about uncertainties, particularly statistical uncertainties, benefiting the dominant perspectives. Seventy-one utterances, in 1972, concerning statistical uncertainty were observed compared to only 18 in 1971. In 1972, uncertainty and euphemistic, hyperbolic, and lexical phrases were connected 136 times, far more frequently than in 1971, with

129. *Id.* at 17:28.
130. *Id.* at 21:27.
131. *Id.* at 23:53.

only 34 coded utterances. Metaphors were employed more often in 1972 with 52 utterances compared to only 10 in 1971. How the advocates navigated uncertainty by linking lexical phrases and power disparities (i.e., the backgrounding or foregrounding of interests) and portending the pragmatic difficulties that undermined the right to counsel are discussed in the next Parts.

C. *How Navigating Uncertainty Undermined the Interests of the Indigent and Accused*

Uncertainty was coded when advocates or justices referred to unclear or unresolved factual matters, used hedge words (like I think), or employed vague, ambiguous lexical phrases. The factual uncertainties are discussed in detail below, and the latter two types are discussed next.

Both the defense and prosecutor, in 1971, used hedge words, like "I think" often. Defense counsel uttered "I think" fourteen times[132] and an additional eleven[133] times in rebuttal. The prosecutor used "I think" ten times,[134] more often than a seasoned orator should, but far less than defense counsel. The prevalence of "I think" might[135] reflect the wide-ranging uncertainties about appointing counsel to represent misdemeanor defendants. The prosecutor exploited and tactically advantaged the uncertainties to argue for maintaining the status quo and avoiding the practical difficulties of requiring counsel. Defense counsel, in 1971, did not capitalize on or advantage uncertainties. Instead, he admitted to confusion and contradicted himself, undermining the strength of his argument. Illustrative of the differing approaches to uncertainty, in 1971, the prosecutor linked emotional language with everyday discursive strategies to paint a mental model that some citizens deserved rights, and others deserved fewer. This was evidenced by the language of "drawing of the line" for when counsel should be appointed, and his use of "down at the basement" and "a never-ending battle"[136] referring to expanding the right to counsel to minor offenses. He also employed the discursive strategy of us-versus-them language, distinguishing those who should and should not benefit from counsel and the uncertainties of having too few lawyers to represent misdemeanor defendants:

> Now I don't stand ready, willing or able to tell you that an individual ought to like it for one day. I'm sure none of them do, but if we're going to live in a world with people who serve it, and if there are

132. *Id.* at 4:02; *id.* at 5:24; *id.* at 8:47 (twice); *id.* at 10:02 (five times); *id.* at 13:04; *id.* at 17:51; *id.* at 19:26; *id.* at 21:39; *id.* at 22:52.
133. *Id.* at 38:49 (three times); *id.* at 41:41 (3 times); *id.* at 43:19 (twice); *id.* at 43:41; *id.* at 43:52; *id.* at 44:09.
134. *Id.* at 24:22 (twice); *id.* at 26:44 (twice); *id.* at 31:59; *id.* at 34:32 (twice); *id.* at 37:00 (three times).
135. I recognized that I am using a hedge word in describing their use of hedge words; the irony has not escaped me.
136. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 34:32 (Dec. 6, 1971) (transcript on file with author).

> going to be enough of them to go around, then I think an intelligent break has made at the six-month petty offense situation.[137]

The 1971 prosecutor went so far as to advance a fictional argument.[138] He claimed that the Florida legislature was considering a new law to eliminate victimless crimes, removing the need for counsel in many crimes. Even though he used the word "if" repeatedly to assert this claim (If the legislature acts . . .), these references undermined the need for counsel by suggesting that it was unnecessary for the Court to constitutionally require counsel based on the legislative change. In concluding, he urged the Court to maintain the status quo on this ground, narrowing the argument to Florida instead of nationally and without qualifying the potential change in the law: "And in the last analysis, since Florida *is not going to be imposing these awesome burdens* at any time after January one, I think the action of the Supreme Court of Florida should be affirmed."[139]

Defense counsel countered by humanizing those in need of counsel by describing "the prospect of imprisonment for however short, a time will seldom be viewed by the accused as a trivial or petty matter and may well result in quite serious effect to the defendant."[140] Yet, he pointed to the arbitrariness of uncertain line drawing, by adopting the prosecutor's us-versus-them language, using "we" to refer to the lawyers and Justices, and "them" referring to the "man that's sitting in jail":

> I find it very difficult to understand how we can pick anything less than one day. How can we arbitrarily say one day, 30 days, or 60 days to the man that's sitting in jail that decision is completely arbitrary, I also would offer that there's no logical reason for picking 60 days or 90 days or six months.[141]

Factual uncertainty emerged around three themes: 1. How to define the actual threat of imprisonment; 2. How to address the lack of attorneys in rural communities; and 3. How to measure the extent of misdemeanor prosecutions and the need for counsel. Some of the uncertainty was perpetuated by counsel's arguments and advocacy. The lack of information plagued both arguments, but the attorneys, in 1972, (particularly Mr. Rogow and the SG) more deftly navigated the uncertainties by practically acknowledging contrary evidence or perspectives and using fewer hedge words. Relational framing strategies through examples and stories were far more prevalent in 1972 (n=132) than in 1971 (n=26). The

137. *Id.* at 37:00.
138. No documents support the assertation that broad revisions were under consideration, and co-counsel (Bruce Rogow) confirmed that he did not recall the legislature considering such a bill, and at the time, he was actively advocating in Florida's misdemeanor courts, and challenging its vagrancy statutes, so he would have been aware of such a challenge. Private correspondence with Bruce Rogow (Nov. 7, 2021) (on file with the author).
139. Audiotape: Oral Argument of Argersinger v. Hamlin, *supra* note 136.
140. *Id.* at 10:02.
141. *Id.* at 38:49.

pragmatical framing turned on stories and statistical concerns about how trial judges might implement the new rule, particularly in rural or remote areas. Without concrete solutions, the examples, stories, and statistics raised the specter of more significant uncertainties.

1. How to define the actual threat of imprisonment?

In a series of questions, Justice White raised concerns about when and how trial judges might determine the 'actual threat' of incarceration. The defense counsel acknowledged the difficulty of predicting imprisonment before hearing the facts. He pointed to prejudgment in criminal contempt cases and when judges decide that defendants are entitled to jury trials (when they are likely to be sentenced to more than six months in jail). [142] Defense counsel continued by emphasizing the narrowness and practicality of the proposed rule by comparing it to his preferred approach of counsel for all defendants, "the rule we advance, and the rule that is supported by the solicitor general takes into consideration the practical aspects of what goes on every day and the low visibility of the criminal justice system."[143]

By referring to misdemeanors as "low visibility" and everyday—pedestrian in a way—he suggested that these courts' activities are not widely publicized. The unspoken inference highlights how critical lawyers are to ensuring due process in these busy but shielded courts. Defense counsel employed the same mental image and metaphor of practical, everyday courts to downplay the concerns raised about requiring counsel: "the people that have refused to extend the right to counsel have raised a spect[er] of counsel for sidewalk spitters and jaywalkers, and they have exaggerated the need for counsel because they do not take into consideration the practical day-to-day situations in these courts."[144]

The SG also relied on real-world examples to address systemic concerns rather than the multitude of benefits when defendants are represented by counsel. He pointed to the District of Columbia, where counsel had been required for some time for "petty offenses" and it had "not proved to be unbearable" for the system.[145] He noted that although the "manpower situation is sketchy," the examples that are available are "encouraging." [146] The SG explained that "nearly half of the states" provide counsel for many of the misdemeanor offenses, and he observed less time was necessary to try misdemeanor cases and counsel would likely be waived more often compared to felonies.[147]

142. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 09:16 (Feb. 28, 1972) (transcript on file with author).
143. *Id.* at 09:16.
144. *Id.* at 23:31.
145. *Id.* at 36:09.
146. *Id.* at 35:12.
147. *Id.* at 36:09.

2. How to address the lack of attorneys in rural communities?

Several justices raised concerns about the uncertainty of providing counsel in rural communities. Their concern did not focus on the lack of due process, the common practice of police officers acting as prosecutors, or the number of non-lawyer judges,[148] but rather on costs in time and money on communities in providing counsel. Defense counsel attempted to balance both interests—advancing the need for counsel and downplaying the burden on the legal system, particularly on small town, non-lawyer courts:

> Not necessarily, it might require that the penalty imposed by the justice court would have to be less than incarceration, but it would not necessarily do away with the jurisdiction of the justice court in any way. Of course, I am not aware of how many people actually face incarceration in those cases, there may be relatively few. They may try minor offenses, which do not actually carry the threat of incarceration.[149]

Defense counsel also underscored the practical lack of immediacy of the rule, relying on legalistic framing and refocusing the argument that defendants' rights trump the cost of providing representation and slowing down the courts . . . However, he then returned quickly to allay concerns about an overwhelmed judiciary:

> Yes, there is a problem, your honor, there's no doubt. This is not going to be something that will just be taken overnight implemented without any discomfort at all to the states. But recently in Mayor versus City of Chicago, this court has held that when a fundamental right is involved, the expense is not something to be considered in terms of guaranteeing that fundamental, right. We're not saying there will be no expense here. We're not saying there will be no changes. There obviously will be. We were saying it was changed to nowhere near as great as some people would have us believe . . . .[150]

The SG dispelled the concerns by recommending that defendants could be represented by non-lawyers:

> Usually [law students] have much more time available than practicing lawyers and they work on their cases with great energy and enthusiasm. It might also be the other persons could serve as counsel in certain types of cases involving relatively small sentences. These might include clergymen, social workers, probation, officers, and other persons of that type . . . . In such cases, it seems to me that the real need might be met by the appearance on behalf of the defendant of a minister or a parent or a probation officer or some other local citizen. Often what is needed in cases of this sort is not legal

148. Allan Ashman & David L. Lee, *Non-Lawyer Judges: The Long Road North*, 53 *Chi.-Kent L. Rev.* 565, 567 (1977): Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 604 (1956); Caleb Foote, *Comments on Preventive Detention*, *23 Jntl. Legal Ed.* 48 (1970).

149. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 24:27 (Feb. 28, 1972) (transcript on file with author).

150. *Id.* at 25:17.

> expertise, but simply an assurance that there is not overreaching of some sort. I would hope that this Court's decision might leave some flexibility. So, the cases in remote areas involving relatively minor penalties might be handled with some sort of appropriate representation other than that, a fully qualified legal counsel. This seems to me to be adequately consistent with the due process concept in cases where the requirement of counsel is clearly stretched close to its limit . . . .[151]

The SG navigated uncertainty by providing a solution that maintained the status quo and alleviated the fears of the dominant groups (the legal system and judiciary) at the expense of defendants (the less powerful), who had been deprived of due process.

The AG, who continued to argue against extending the counsel rule, responded with "a parade of horribles"—as characterized by Justice Stewart. The AG alleged that once counsel was required for this group of defendants, the rule would be extended in the future for nearly all defendants, even those who had property taken under the due process clause. The added financial costs and time necessary for due process, he urged would crash the legal system. The parade of horribles and concerns for the judiciary were hypotheticals. Telling is what went unsaid or the omission/silence on the disturbing, real findings by the Presidential Commission,[152], that "[t]he inescapable conclusion is that the conditions of inequity, indignity, and ineffectiveness previously deplored [in the lower court] continue to be widespread."[153] The justices were more concerned with hypotheticals regarding uncertainties than the actual data illustrating the awful reality defendants faced daily.

3. How to measure the extent of misdemeanor prosecutions and the need for counsel?

There was limited information about the number of misdemeanor prosecutions, how many individuals might require counsel under a new rule, and the availability of attorneys to fulfill a constitutional mandate. In the first argument, the AG approached that uncertainty to his advantage, and the defense counsel did not. References to statistics, experts, and external actors muddled defendants' voices., the examples and stories cited foregrounded dominant discourse.

The first mention of statistics was not by an advocate, but by Justice Brennan, who asked: "Has there been any effort to provide figures as to what this will mean in terms of the number of assignments that will have to be made?"[154] Defense counsel's response relying on the 1969 New York report reflected the uncertainty about the numbers. He admitted that it was "speculation," but he directed the court to the New York sta-

151. *Id.* at 51:09.
152. President's Commission, *supra* note 7.
153. *Id.* at 29.
154. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 4:10 (Dec. 6, 1971) (transcript on file with author).

tistics that demonstrated only 40 of 1.8 million convicted misdemeanor defendants were incarcerated.[155]

Rather than reflecting alarm that defendants might be incarcerated for spitting on the sidewalk, parking tickets, or jaywalking, defense counsel redirected the argument to the more dominant concern about overburdening the system, "I would ask [the prosecutor] to offer to us some statistics where someone did go to prison for that." Later, defense counsel affirmatively asserted the "statistics just don't bear out" that those charged with spitting on the sidewalk go to prison. The arguments spotlight courts being overwhelmed by minor cases rather than the hair-raising and alarming concern about incarcerating individuals for trivial peccadillos.

The statistical texts and reports were recontextualized by the prosecutor, who asserted that based on the New York data, counsel was unnecessary:

> Well, if you do, and if we use the statistics that they've given us on the New York report of the [1,800,000] with only 40 processed to the degree where they were put in confinement. If anything, ever sounded like de minimis to me, that certainly does. Now, if it is the awesome prospect that they tell us that it is, how come so few ever wound up in jail as a result of it.[156]

Minimizing inequities and the necessity of counsel framed the arguments around the dominant perspective and goals. References to pragmatic frames of direct statistical (n=12), expert (n=5), and external actor (n=8) references were limited but pivotal in advancing the dominant direction of advocacy and discourse.

Chief Justice Burger pointed to the "various reports" that supported counsel as the minimum standard when defendants were subjected to incarceration, and defense counsel agreed that their position was aligned with the ABA. [157] Defense counsel also referred to the President's Commission's report, [158] but his assertions were conclusory and did not cite the reasons for their findings and recommendation, further muting the defendants' perspective. Rather, defense counsel emphasized the elites that put the report together, such as his reference to President Nixon's latest on legal reform.

In the 1972 argument, statistical uncertainty loomed, and it remained a pivotal feature. Relational framing with examples and stories permeated the questions and advocacy, ignoring the consequences of all of this uncertainty for the accused. Once again, defense counsel assuaged Justices concerns about overburdening the judiciary and lawyers or reducing trial judges' sentencing discretion (dominant discourse

155. *Id.* at 04:23.
156. *Id.* at 31:59.
157. *Id.* at 17:51.
158. President's Commission, *supra* note 7.

claims) by downplaying the significance of the rule, noting that counsel would be rare

Time and again, the Justices pointed to the uncertainty of the statistics and the potential burdens on the legal system to detract from the constitutional issue:

> Justice White: But do you think, does anyone have any statistics at all on what kind of an extra burden this would be on the legal system or on the attorneys of the country? How many, under six months cases, actually result in a jail sentences?[159]
> Defense Counsel: The figures on that are not reliable and really do not exist. The only statistics that I have [interrupted by Justice White].[160]
> Justice White: What would it be a million, hundred thousand, or 10,000, or what? [161]

To moderate concerns about the uncertain statistical estimates, defense counsel relied on examples that demonstrated the rarity of the need by focusing on his experience in Dade County (Miami), Florida. He referenced that 400,000 people were prosecuted, "but only 5,000 of those people ever actually faced incarceration." [162] Immediately, Justice White was alarmed by the figure of 5,000 people. After a series of clarifying questions, it was shown that this figure included crimes where counsel was already required.

Justice White attempted to extrapolate the national need for additional lawyers based on Dade County statistical estimates. Defense counsel advised that 5,000 people went to jail the previous year in Dade County.[163] Justice White hypothesized then that if half or even 25 percent of those individuals were indigent then between 1,250–2500 people would be entitled to appointed counsel without a valid waiver.[164] In reassuring Justice White, defense counsel estimated that lawyers could handle more of these cases quickly, focusing on system efficiency:

> Defense Counsel: . . . . the statistics also show that a public defender who can handle 150 felonies a year can handle a thousand of these cases a year because these cases are not as complex. These cases— First of all, there'll be no jury trial in these cases, either. The case will proceed much more rapidly. So, if we're talking about a public defender, being able to handle a thousand cases, and we're talking about 2,500 cases, we're talking only about two and a half public defenders.[165]

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159. Audiotape: Oral Argument of Argersinger v. Hamlin, 407 U.S. 25 (1972), held by the U.S. Supreme Court, at 15:25 (Feb. 28, 1972) (transcript on file with author).
160. *Id.* at 15:49.
161. *Id.* at 15:46.
162. *Id.* at 15:49.
163. *Id.* at 17:06.
164. *Id.* at 17:20.
165. *Id.* at 17:38. It is unclear what statistics supported the argument that public defenders could handle a workload of 1,000 cases a year. Current ABA standards recommend only 400 misdemeanors per attorney per year. *See Sufficient Time to Ensure*

The frequent requests for statistical evidence fixated on the operation of the legal system and the burden of requiring counsel for misdemeanor defendants. The number of jailed defendants, the lack of lawyers in rural areas, and the burdening of lawyers and judiciary were the recurrent themes. Defense counsel admitted that there was a lack of data, but pointed to the infrequency of appointed counsel and how the twelve states that already provided counsel did so without much disruption.

In addressing concerns regarding the lack of lawyers, he asserted that the cost of providing lawyers would not be "insuperable," [166] and he estimated that "young lawyers [were] starting their practice in unprecedented numbers" and the number of lawyers would "double in the next 12 or 13 years."[167] The SG asserted, without statistical evidence, that these young lawyers could fill the gap in representation and ease the burden on the legal system. The Justices did not interrupt, challenge or question the assertions. In his conclusion, the SG urged the Court to allow non-lawyers to represent misdemeanor defendants.

Implications and Conclusion

The framing of opening remarks, questions, and responses advanced dominant discourse, while discursive strategies minimized the defendants' voice and perspectives. The effect narrowed the issue to the detriment of marginalized interests, amplifying dominant concerns. The initial framing by defense counsel in 1971 that "[a] person charged with any crime should be given the right to counsel, even in the situation where he is indigent" was derailed by Justices' questions mainly concerning definitions and labels for misdemeanors and felonies. This forced the defense to start off from a narrower position in 1972, linking counsel to incarceration: "Our suggestion to boil it down in its simplest form is no attorney, no jail."[168] Thus, the broad right to counsel was already off the table when starting arguments in 1972.

Language and framing strategies controlled the dialogue, amplifying the dominant concerns of the legal system while downplaying the necessity of counsel for indigent defendants. The statistical uncertainties drove the dominant narrative to uphold the status quo, muting the defendants' realities. The oral arguments employed narratives, language, metaphors, euphemisms, labeling, and stories that were collapsed into four framing strategies (perspective, relational, legalistic, and pragmatic) that functioned to background defendants' voices and perspectives. Some

Quality Representation – ABA Principle 4, Sixth Amendment Center, https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/sufficient-time-to-ensure-quality-representation-aba-principle-4/#:~:text=This%20means%20that%20the%20appointed,attorneys%20owe%20to%20their%20clients [https://perma.cc/3BRL-NYVX].

166. *Id.* at 39:30.
167. *Id.* at 40:42.
168. *Id.* at 41:41.

of the most critical data, reflected in the President's Commission report, was ignored.[169] Justices controlled the advocacy through their questions, unduly concentrating on burdening lawyers and the courts. During the 1971 and 1972 arguments, advocates articulated perspectives far more often about the legal system (n=31) than concerns about indigent defendants' constitutional rights to counsel and the fundamental fairness of a system where the wealthy are represented by lawyers but not the poor (n=15). The uncertainty served to benefit dominant interests.

This concentrated analysis of the *Argersinger* oral arguments demonstrates that language and framing strategies are powerful tools that, when used improperly or not taken advantage of, minimize the interests of the marginalized in cases involving constitutional questions and individual rights. Employing critical discourse analysis to evaluate this case closely revealed that the framing strategies reinforced and reproduced social realities that discounted the necessity of counsel for the poor. The justices' questions emphasized hypothesized chaos, so advocates' responses fell into the trap of discussing uncertainties that might hamstring the legal system. Focusing on the legal system recasts crucial facts to construct social realities that favored narrowing the ruling and disadvantaging indigent defendants.[170]

This study shows that language and framing strategies employed during oral arguments promoted mental shortcuts to fill gaps in knowledge to the defendants' detriment. Defense advocates should rely on empirical evidence, identify uncertainties that might undermine non-dominant interests, and ensure those concerns are not derailed. Rather than system concerns, pragmatic outcomes for these groups should become prominent. Pragmatic arguments, strategies, and outcomes should promote the "best decisions" with a focus on the "future needs" of the least powerful in society and not myopically focus on dominant and systemic interests, i.e., those with the power who construct knowledge and social reality.[171] To improve constitutional decision-making, uncertainties should be resolved by creating a national database on misdemeanor cases, uncovering taken-for-granted and dominant assumptions, stories, and anecdotes, and evaluating common framing strategies and discursive and lexical approaches that undermine marginalized voices.

Preparing arguments that empower marginalized interests is essential to successfully preserve and expand constitutional rights for non-dominant groups. Research should focus on how language can influence outcomes and produce decisions that accurately reflect the diverse social reality in America and amplify marginalized interests, particularly in constitutional rights claims. Appellate decisions, especially cases decided by the Supreme Court, construct false realities that impact real people with long-lasting results.

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169. President's Commission, *supra* note 7.
170. *See* Scheppele, *supra* note 38.
171. Richard Posner, *Law, Pragmatism, and Democracy* 60 (2003).

The *Argersinger* decision expanded access to the right to counsel, but many concerns about the misdemeanor legal system in 1972, remain today.[172] The dire conditions observed in the 1967 report remain, especially as "quality of life policing" increases, misdemeanants still lack counsel, non-lawyers sit on the judiciary, and police act as prosecutors. Society and criminal defendants are left with the long-term cascading effects of these framing and discursive strategies, including due process violations, uncounseled pretrial detentions and pleas, and economic instability from misdemeanor convictions.[173] Future scholarly research should critically examine legal discourse in appellate court proceedings, party and amicus briefs, and the Justices' conference notes. Every stage of the legal decision-making process should be subjected to concentrated analysis to uncover the framing and discursive strategies that marginalize the interests of the non-dominant groups in society, especially those decisions that have a long-lasting negative impact.

172. *See generally* Natapoff, *supra* note 4; Kohler-Hausmann, *supra* note 4; Smith & Maddan, *supra* note 4; Cadoof, et al., *supra* note 4; Mayson & Stevenson, *supra* note 4.

173. *See generally* Natapoff, *supra* note 4; Kohler-Hausmann, *supra* note 4; Smith & Maddan, *supra* note 4.