APPELLATE ORAL ARGUMENT IN THE FEDERAL COURTS OF APPEALS: A VESTIGE OF THE PAST, OR A VITAL CHECK ON INTUITIVE DECISION-MAKING?

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INTRODUCTION

It is eleven o'clock on the morning of February 4, 1824. Chief Justice John Marshall and five other Justices of the Supreme Court are seated in the Old Supreme Court Chamber in the U.S. Capitol[1] waiting for Daniel Webster, remembered as the best orator of his

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1. *Old Supreme Court Chamber*, ARCHITECT OF THE CAPITOL, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building/senate-wing/old-supreme-court-chamber? [https://perma.cc/MBB2-ESQA] (last visited Jan. 14, 2026) ("The Old Supreme Court Chamber is the first room constructed for the use of the nation's highest judiciary body and was used by the Court from 1810 until 1860.").

day,[2] to begin his argument.[3] Before the Court is *Gibbons v. Ogden*,[4] the landmark case establishing federal authority over interstate commerce.[5] After twenty hours of argument spread over six days, the case finally closed.[6]

Chief Justice Rehnquist, who wrote about the centrality of oratory to the decision-making process during this era, had the impression from reading contemporary accounts of the arguments that even after many hours spent in Court, the "judges had genuine respect, even awe, for some of the counsel who appeared before them; and the lawyers had equal respect for some of the judges."[7] He further concluded that the oral

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2. William H. Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289, 294 n.14 (1986). Chief Justice Rehnquist noted that "[a]t age 42, Daniel Webster was regarded by many as one of the most eminent members of the Bar." *Id.*; *see also id.* (quoting JULIUS J. MARKE, VIGNETTES OF LEGAL HISTORY 15 (1977) ("Daniel Webster's reputation as a great constitutional lawyer had been markedly enhanced by his triumphant victories in two landmark cases the Supreme Court had just decided—the *Dartmouth College* Case and *McCulloch v. Maryland*. Webster was being hailed as one of the foremost lawyers of the American Bar . . . .")).

3. *Id.* at 291–92. Justice Rehnquist noted that oral arguments in *Gibbons* were "heard by only six of the seven members" of the Court because the seventh Justice "did not take his seat on the Bench until . . . the day after the conclusion of oral arguments . . . ." *Id.* at 292 n.7

4. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

5. Rehnquist, *supra* note 2, at 291–92. More specifically, "[a]t issue [in *Gibbons*] was whether the federal government had the power to regulate commerce under U.S. CONST. art. I, § 8, cl. 3, which confers on Congress the power '[t]o regulate Commerce with foreign Nations, and among the several States . . . .'" *Id.* at 291 n.6 (third alteration in original). As Justice Rehnquist notes, "[k]nown in its day as the 'Steamboat Case,' *Gibbons* was a popular topic of national debate . . . ." *Id.*

6. *Id.* at 292–93.

7. *Id.* at 293 (footnote omitted). As Justice Rehnquist notes, "Justice Story described Daniel Webster's argument," highlighting:

> Of Mr. Webster's argument in the opening of this cause . . . it may be said to furnish as good a specimen of the characteristics of his mind, as any which could be named. We have here, in as favorable light as we could desire, his clearness and downright simplicity of statement, his vast comprehensiveness of topics, his fertility in illustrations drawn from practical sources; his keen analysis, and suggestion of difficulties; his power of disentangling a complicated proposition, and resolving it in elements so plain as to reach the most common minds . . . . Whoever, with a view to the real difficulties of the case and the known ability of his opponents, shall sit down to the task of perusing this argument, will find that it is equally remarkable for profoundness and sagacity,

presentations were critical to the judges' understanding of the case and the decision that followed.[8]

In the two hundred plus years since *Gibbons v. Ogden* was argued, oral argument has changed dramatically. Although today the percentage of argued cases in the federal courts of appeals varies depending on circuit norms and workloads,[9] there is no doubt that it is in steep decline.[10] In the seventies and eighties, the circuit courts granted oral argument in nearly two-thirds of cases and allowed each side an hour to argue.[11] But by 2024 oral argument was heard in only twenty-three percent of cases across all circuits (excluding the Federal Circuit),[12] which represents an almost forty-five-percentage-point drop over the past fifty years. Consequently, judges, lawyers, and scholars have engaged in a debate regarding the utility of oral argument to modern appellate justice: Is it a critical component of the process in most cases, or a vestigial formality of the past?

This Article identifies an important, and largely overlooked, benefit of oral argument to the decisional process: Preparing for and participating in argument provides a singular opportunity in the appellate process

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> for the choice and comprehensiveness of the topics, and for the delicacy and tact with which they were handled.

Id. at 293 n.11 (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 603–04 (1926)).

8. *Id.* at 294 ("[T]here cannot be the slightest doubt that the oral presentation of the case of *Gibbons v. Ogden* to the Supreme Court of the United States was of commanding significance in getting across to the judges the lawyers' views of the case.").

9. Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 368 (2011) ("[T]he size and nature of a court's docket greatly affect the case-management practices that the circuit adopts.").

10. James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. APP. PRAC. & PROCESS 89, 98 (2018).

11. David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 128 (2012).

12. U.S. CTS., *Table B-10: U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2024* [hereinafter *Table B-10*].

for deliberative thinking, which cognitive research shows can mitigate reasoning errors associated with intuitive decision-making. In their groundbreaking work on heuristics in the 1970s, Nobel Prize winning psychologist Daniel Kahneman and his colleague Amos Tversky proposed that intuitive thinking can "lead to severe and systematic errors" that result in mistaken and biased judgments.[13] Building on Kahneman and Tversky's research, professors Chris Guthrie, Jeffrey Rachlinksi, and U.S. Federal Court Magistrate Judge Andrew Wistrich conducted studies showing that judges, despite their intelligence and expertise, use intuitive thought processes to resolve complex issues, including judicial tasks.[14] In other words, "judges do not stand out as especially deliberative . . . ."[15]

According to Guthrie, Rachlinksi, and Wistrich, because judges have heavy dockets, they are more likely to resolve their "cognitive overload" by making intuitive decisions as they are "speedier and easier."[16] Because this process is subconscious, judges "may never figure out that their first instinct regarding how to decide a case was flawed."[17] But empirical studies have also shown that judges can reach a more accurate outcome by overriding their intuition with conscious deliberation.[18] Accordingly, researchers urge the judiciary to promote deliberative decision-making by increasing judges' awareness of cognitive biases and error, affording

13. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).

14. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 44–45 (2002).

15. Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863, 877 (2023).

16. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORN. L. REV. 1, 35 (2007) (citations omitted).

17. Wistrich, *supra* note 15, at 876 (citing Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX (Aug. 11, 2020, at 05:30 MST), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman).

18. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 28.

additional time for case consideration, and creating opportunities to receive feedback and consider alternative perspectives.[19]

Drawing on cognitive science, this Article contends that oral argument is central to appellate justice in the circuit courts because it uniquely combines the deliberative functions that research has shown reduce the risk of decisional error in appellate adjudication. Although Judge Wistrich briefly mentioned that oral argument might mitigate intuitive biases in an article examining the perils of the Supreme Court's shadow docket, the observation was brief and treated ambivalently, leaving the topic largely unexamined.[20] This Article intends to fill that gap by comprehensively exploring how oral argument in the circuit courts engage judges in deliberative reasoning, counteracts cognitive biases, and contributes to higher-quality decision-making.

To substantiate that claim, this Article proceeds as follows. Part I traces the evolution of oral argument from the founding era to the present and summarizes the ongoing debate over whether its decline has adversely affected judicial decision-making.[21] Part II provides an overview of jurisprudential theories of judicial decision-making and insights from cognitive science revealing that judges, like all humans, rely on intuitive thought processes when making decisions.[22] Part III explains that once judges have a foundational understanding of their susceptibility to reasoning errors, oral argument uniquely facilitates deliberative thinking and reduces the risk of such errors by providing additional time for careful consideration of the case, opportunities to receive feedback and engage alternative perspectives, and a structured environment that focuses judicial attention on the matter at hand.[23] Finally, Part IV explains

19. *See id.* at 29–43.
20. *See* Wistrich, *supra* note 15, at 935–37.
21. For further discussion, see *infra* Part I.
22. For further discussion, see *infra* Part II.
23. For further discussion, see *infra* Part III.

potential time-saving measures that courts could adopt to allow more room for additional oral arguments.[24]

If appellate courts continue to sacrifice oral argument for efficiency, they risk discarding a deliberative mechanism uniquely suited to counteract cognitive errors in judicial decision-making, which risks the quality and legitimacy of appellate justice.

I. ORAL ARGUMENT IN THE FEDERAL COURTS OF APPEALS

Since the time of the ancient philosophers, the communicative superiority of speech over writing has been predominant in Western thought.[25] Indeed, Socrates believed that "true knowledge and understanding is hampered by fixing one's thoughts into a writing, which fosters misunderstanding and cannot be questioned further because a writing 'produce[s] the same unvarying meaning, over and over again.'"[26] Yet the trajectory of oratory in the U.S. Courts of Appeals over the past two centuries has been one of steady decline. In the early American Republic, oral argument was central to judicial decision-making and took as long as needed for the judges to fully grasp the issues.[27] But as the nation grew along with the number of appeals, arguments were supplanted by written submissions.[28] Today, oral argument is often the exception rather than the rule in federal courts of appeals.

A. The Diminishing Role of Oral Argument

In addition to other institutional procedures from England that shaped the legal culture during the

24. For further discussion, see *infra* Part IV.

25. Cleveland & Wisotsky, *supra* note 11, at 122–23.

26. *Id.* at 123.

27. *See, e.g.*, William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1017 (1984) (discussing importance of oral argument in *Gibbons v. Ogden*).

28. For further discussion, see *infra* notes 39–51 and accompanying text.

colonial period and early American Republic, courts adopted the centuries old English tradition of putting speech at the heart of appellate practice.[29] Attorneys delivered lengthy oral presentations instead of briefs, and judges deliberated and delivered their opinions in open court after the attorneys concluded their arguments.[30] In fact, the Supreme Court did not require briefs of any kind until 1821, and those early submissions would be unrecognizable today.[31] The brief was to contain "the substance of all the material pleadings, facts and documents on which the parties rely, and the points of law and fact intended to be presented at the argument."[32] "The early brief was also quite short—usually no more than three or four pages in length."[33] The modern brief did not exist until 1884, when the Court first compelled lawyers to include arguments in their appellate briefs.[34] Moreover, written opinions did not replace extemporaneous opinions from the bench until the early decades of the nineteenth century.[35]

Even today in other common-law jurisdictions, including England, "speech rather than writing has been the dominant mode of communication for both lawyers and judges."[36] For instance, in England "there are few

29. Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 248–49 (2009).

30. Marshall L. Davidson, III, *Oral Argument: Transformation, Troubles, and Trends*, 5 BELMONT L. REV. 203, 204–05 (2018).

31. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 2 (1999).

32. SUP. CT. R. XXX, 19 U.S. xiii (6 Wheat.) (1821).

33. Rehnquist, *supra* note 31, at 2.

34. *Id.* at 2–3 ("Besides identifying the questions involved in the case, briefs to the Supreme Court were to state the points of law and relate these to the relevant authorities, statutes, and pages of the record. With these new requirements, the modern brief was born.").

35. Davidson, *supra* note 30, at 204 (citing ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 242 (1st ed. 1990)).

36. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1166 (2004). Ehrenberg explained that lax rules for written materials in appellate courts in England, Canada, New Zealand, and Hong Kong

briefs and no fixed time limits on oral argument. Thus, English appellate judges, who have no law clerks and who rarely write opinions, 'must learn all they are going to learn about the case while the oral argument is in progress.'"[37] The centrality of oral argument in common law countries has been "justified on the basis of its deep historical roots, cost-effectiveness, better engagement with the parties' arguments, and capacity to promote judicial accountability."[38]

But in nineteenth century America, oratory evolved from having a principal role in the decisional process to becoming a "supplement" to the written word.[39] To be sure, it was far easier to put lengthy oral argument at the center of the appellate process during the early republic because the justice system itself was much smaller. For example, during the Supreme Court's February Term in 1824—the Court's only Term that year—the Justices decided just thirty-six cases.[40] Subsequently, the Court's docket increased dramatically, due largely to the admission of additional states to the Union and later the Judiciary Act of 1875,

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highlight that these courts do not rely heavily on briefs but rather rely on oral argument. *Id.* at 1166 nn.19–20. Further, historically, some courts have not restricted the length of oral argument. *Id.* at 1166 n.20 (noting Hong Kong and New Zealand judicial systems have no time limits on oral argument).

37. Davidson, *supra* note 30, at 204 (footnote omitted) (quoting Delmar Karlen, *Civil Appeals: English and American Approaches Compared*, 21 WM. & MARY L. REV. 121, 133 (1979)); *see also id.* ("Under England's oral argument tradition, both then and now, most information appellate judges consider, including the facts, law, and arguments of the parties, are presented to the judges in open court, after which the decision is typically announced from the bench, without a written opinion.").

38. Terry Skolnik, *Hot Bench: A Theory of Appellate Adjudication*, 61 B.C. L. REV. 1271, 1275 (2020).

39. Kravitz, *supra* note 29, at 253–54 (quoting Ehrenberg, *supra* note 36, at 1183); *id.* at 252 (noting that the "primacy" of the brief over oral argument became apparent when the Court promulgated a "new rule" that "cautioned counsel that attorneys would be prohibited from referring to any book or case that was not referenced in the points and authorities" (citing David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. SUP. CT. HIST. 1, 12–13 (2005))); Ehrenberg, *supra* note 36, at 1181.

40. Rehnquist, *supra* note 27, at 1018.

which significantly expanded federal jurisdiction.[41] Consequently, starting in 1849 the Court limited each attorney's oral presentation to two hours,[42] although exceptions were made for significant matters.[43] By the end of the century, each side—rather than each individual attorney—was allotted two hours total.[44] The Supreme Court's constraints on oratory continued into the twentieth century; in 1911, each side was limited to ninety minutes, which was then reduced to an hour.[45] In 1970, the Court restricted each side to thirty minutes, which has been the standard ever since.[46] Indeed, Chief

41. *See* Judiciary Act of 1875, ch. 137, sec. 1, 18 Stat. 470, 470 (1875). The Judiciary Act of 1875 expanded jurisdiction and the right of removal. *Landmark Legislation: Jurisdiction and Removal Act*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-jurisdiction-and-removal-act [https://perma.cc/SK25-85LM] (last visited Jan. 15, 2026). Specifically, the Act granted federal courts general jurisdiction over any federal question cases where the amount in controversy exceeded $500 and allowed for either party to remove a case to a circuit court if party members were residents of different states or if the matter involved a question of federal law. *Id.*

42. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 10 (1986).

43. *See, e.g.*, Rehnquist, *supra* note 31, at 3 ("In *Ex parte Milligan*, for example, argued in 1866, the oral arguments continued for six days. But emphasis, at least in the ordinary case, was gradually shifting from oral argument to the brief." (footnote omitted)); SUP. CT. R. 53, 48 U.S. (7 How.) iv (1849) (stating that granting leave of court would allow counsel to speak for more than two hours).

44. Kravitz, *supra* note 29, at 252–53.

45. Davidson, *supra* note 30, at 206.

46. Nancy S. Marder, *The Supreme Court's Transparency: Myth or Reality?*, 32 GA. ST. U. L. REV. 849, 860 & n.39 (2016) (quoting ROBERT SHNAYERSON, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES 45 (1986) ("Only by limiting each side to thirty minutes can the Court squeeze in twelve one-hour arguments per week and still have time for writing opinions. These oral argument sessions occur three days a week (Monday, Tuesday, and Wednesday) during fourteen weeks interspersed from October through April . . . .")). Moreover, limiting the time for oral argument also changed its dynamic. Davidson, *supra* note 30, at 207. As one judge explained, "the expectation was cast upon lawyers that they would be prepared to address questions from the bench instead of delivering lengthy speeches, and judges began asking questions with increasing frequency. Thus, '[m]ore written submissions, and less air time, naturally affected oral argument's character.'" *Id.* (alteration in original) (quoting Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROCESS 271, 278 (2016)). *But see* Wistrich, *supra* note 15, at 935 (noting that the Court's "recent post-pandemic arguments have run longer" than thirty minutes).

Justice Rehnquist noted that in a case decided in 1981 which, in his view, involved questions equally important to those posed in *Gibbons v. Ogden*, "the time for oral argument was reduced from twenty hours to two."[47]

Oral argument also declined in the federal courts of appeals over the twentieth century. This trend has had significant implications for appellate justice because "the decline in frequency of oral argument" has coincided with "the decline in reversal rates in both civil and criminal cases."[48] The explosion of litigation beginning in the 1960s and 1970s[49] and concurrent "considerations of efficiency" led to "the universal adoption of case-screening methods that shunt aside the majority of cases to a summary or non-argument calendar."[50]

Although "[s]creening programs vary somewhat from circuit to circuit,"[51] non-argued cases are typically subjected to decisional shortcuts such as, "dispositions on motion, . . . disposition without opinion, and unpublished opinions . . . ."[52] Cleveland and Wisotsky explained that "[t]his separate decisional track involves 'a significantly lesser degree of personal attention by judges' by placing 'primary reliance for the operation of the screening process on a centrally-organized, parajudicially-

47. Rehnquist, *supra* note 2, at 293.

48. Cleveland & Wisotsky, *supra* note 11, at 121. Cleveland and Wisotsky cite data from 1994 "showing a decline of one half in the overall federal appellate reversal rate from 1982 to 1993, from 19.9 percent to 10.3 percent, with a significant decline in every category of appeal." *Id.* The authors further note that "[b]y 2011, the reversal rate had fallen further, to 8.9 percent overall and 5.8 percent in criminal cases." *Id.* (citing ADMIN. OFF. OF THE U.S. CTS., 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 89 (2012)).

49. *See* Wistrich, *supra* note 15, at 937; Symposium, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 n.2 (2005); *Court of Appeals Caseloads, 1892–2016*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/court-appeals-caseloads-1892-2016 [https://perma.cc/7TNJ-CHSS] (last visited Jan. 25, 2026) ("From [the 1960s] to the mid-2000s, the rate of increase grew more rapidly.").

50. Cleveland & Wisotsky, *supra* note 11, at 120.

51. *Id.* at 120 n.6 (citing John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 865–66 (1991)).

52. *Id.* at 139 (quoting Martineau, *supra* note 42, at 13)).

supervised group of staff attorneys.'"[53] Screening procedures have not only reduced the number of oral arguments, but also the amount of time allotted for argument when it is granted.[54]

Indeed, the percentage of argued cases in the circuit courts "[b]etween 1989 and 2011" plummeted from forty-six percent to about thirty-six percent.[55] By 2024, oral argument was only granted in approximately twenty-three percent of cases across all circuits (excluding the Federal Circuit).[56] Between September 2023 and September 2024, the circuits with the lowest rate of oral argument were the Third Circuit, at about twelve percent, and the Fourth, Sixth, and Eleventh Circuits at about thirteen percent each.[57] On the higher end of the spectrum was the D.C. Circuit, which heard argument in just under half its cases during the same time period, followed by the Second Circuit, which heard arguments in about forty percent of cases, and the First and Seventh Circuits, which heard argument in just over a third of cases.[58] Further, when the circuit courts do hear

53. *Id.* at 120 (footnote omitted) (quoting Oakley, *supra* note 51, at 860).

54. *See id.* at 128; *see also* Ehrenberg, *supra* note 36, at 1183–85; Kravitz, *supra* note 29, at 254–55; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORN. L. REV. 273, 279 (1996).

55. *In Defense of Oral Argument in the Federal Circuit Courts of Appeals*, THE MADDEN L. GRP., PLLC (Mar. 11, 2020), https://themaddenlawgroup.com/in-defense-of-oral-argument-in-the-federal-circuit-courts-of-appeals/ [https://perma.cc/X75H-SAMZ].

56. Table B-10, *supra* note 12; *see also* U.S. CTS., *Table S-1: U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearing or Submission on Briefs During the Twelve-Month Period Ending September 30, 1997* [hereinafter Table S-1], https://www.uscourts.gov/sites/default/files/statistics_import_dir/s01sep97.pdf?utm (last visited June 4, 2026). In 1997, the Federal Judiciary began tracking how often oral argument was being granted in the U.S. Courts of Appeals. *See Table S*-1. In 1997, the average percentage of cases terminated on the merits after oral arguments across all circuits (excluding the Federal Circuit) was 40.1%. *Id.*

57. *Id.*; *see also* Pierre H. Bergeron, *COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. APP. PRAC. & PROCESS 193, 196 (2021) (stating that "oral argument at the Sixth Circuit, much like most of its sister circuits, is essentially a rarity").

58. *Table B-10*, *supra* note 12. Judge Bergeron noted that state courts have likewise seen a drop in the number of oral arguments. Bergeron, *supra* note 57,

argument, the parties now have an average of just fifteen minutes per side to make their case,[59] though some circuit courts advocates are limited to ten or even five minutes.[60]

Although Federal Rule of Appellate Procedure 34 was promulgated in the 1960s to promote oral argument,[61] in reality, it is a "vague and subjective standard" that has made oral argument "a rare and fleeting occurrence" in the circuit courts.[62] That rule provides:

> Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.[63]

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at 196–97 n.8 (quoting J. Mark White, *"Request for Oral Argument Denied:" the Death of Oral Argument in Alabama's Appellate Courts*, 69 ALA. LAW. 123, 123 (2008) ("During the last six years, an average of 2,100 cases were filed each term in the Supreme Court of Alabama. However, during this same period, the average number of oral arguments were only 25 each year. During this entire six-year period, the Alabama Court of Civil Appeals granted oral argument in only 12 cases, and there were two consecutive years where no oral argument was held. Over the last seven years, the Alabama Court of Criminal Appeals has averaged only 22 oral arguments annually.")).

59. *See* Davidson, *supra* note 30, at 211. Judge Bergeron observed that "[s]ome [circuit] courts restrict certain arguments to five or ten minutes." Bergeron, *supra* note 57, at 193 (citing PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 194 (2020), http://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf [https://perma.cc/XWR4-N7NW] ("Since the court generally hears six appeals each day, it screens appeals in advance to determine how much time should be sufficient in each case, and limits the time in many to 10 to 20 minutes per side."); SECOND CIRCUIT CIVIL APPEALS: ORAL ARGUMENT, DISPOSITION, AND REHEARING, PRACTICAL LAW PRACTICE NOTE 9-519-4890 ("The Second Circuit typically allots between 5 and 15 minutes per side. Time allocations vary depending on the judge presiding over a given calendar and on each case's particulars.")).

60. Bergeron, *supra* note 57, at 193.

61. Cleveland & Wisotsky, *supra* note 11, at 129–30.

62. *Id.* at 130.

63. FED. R. APP. P. 34(a)(2)(A)–(C).

As scholars David R. Cleveland and Steven Wisotsky observed, the "exceptions listed in parts A, B, and C are so broad that they effectively swallow the rule," with the result that the presumption favoring oral argument has transformed into "a default of no argument."[64] Specifically, they explained that Part A is reasonable because "[n]o oral argument is needed in a case that is frivolous on its face."[65] Part B, which permits the denial of argument "'when the dispositive issue or issues have been authoritatively decided,' is merely a type of frivolous appeal."[66] Part C, however, is a "catch-all provision" that "grants the court the authority to deny oral argument whenever its members think oral argument is unnecessary . . . ."[67] As such, it "is not a standard at all."[68]

Moreover, the local rules of the courts of appeals do not provide clarification or add parameters because they either neglect to include a standard for oral argument, or reiterate or reference Rule 34.[69] The low rates of oral argument in the federal courts of appeals, however, suggest that Rule 34 is widely understood as permissive rather than mandatory.[70]

B. Whether Oral Argument Contributes to the Decisional Process

While most judges, lawyers, and scholars agree that briefs are the most important part of the appellate process, they are divided on whether the drastic decline of oral argument is negatively affecting appellate justice. Critics argue that oral argument should be eliminated or

64. Cleveland & Wisotsky, *supra* note 11, at 131.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (quoting THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURT OF APPEALS 109 (1994)).

69. *Id.* at 131–32.

70. *See* Martin & Freeman, *supra* note 10, at 99.

reserved for only the most complex appeals,[71] while proponents contend that it should be the rule rather than the exception.[72]

1. The Costs and Benefits of Oral Argument

Critics claim that the significant curtailment of oral argument in the federal courts of appeals has freed up judicial resources while having minimal effect on judicial decision-making.[73] They contend that argument is hard to justify given overcrowded dockets, its perceived adverse impact on judicial efficiency, and the burdens it imposes on litigants.[74] It should be noted, however, that some scholars question whether the concern about growing docket pressures is outdated, as the number of filed cases has decreased from its peak in 2005.[75]

Regardless, preparing for and participating in oral argument requires additional time, which delays case resolution and contributes to backlogs.[76] The hours judges spend on the bench hearing argument is just the beginning; for each argued case, the prepared judge (or their law clerks) must read the record and the briefs submitted by the parties, conduct independent legal

71. *See* Leonard M. Ring, *The Pros of Oral Argument*, 16 FORUM 451, 459 (1980).

72. *See id.*

73. *See* Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMMC'N & RHETORIC 45, 78–80 (2017).

74. *See* Davidson, *supra* note 30, at 210–11 ("As explained by one appellate judge, the 'cost of oral arguments in terms of judicial and lawyer time, money, and decisional delay usually outweighs the benefits.'") (quoting Barry G. Silverman, *Sua Sponte: A Judge's Comments*, 42 LITIG. 31, 33 (2016)); *see also Table B-10*, *supra* note 12 (recording 25,338 appeals filed in 2024 alone).

75. Stefanie A. Lindquist & Kirk Randazzo, *The Vanishing Appeal?*, 86 U. PITT. L. REV. 477, 481 (2024).

76. *See, e.g.*, People v. Pena, 83 P.3d 506, 509 (Cal. 2004) (noting that oral argument delays filing an opinion up to five months). Moreover, "active federal appellate judges handle over 300 cases per year . . . ." Rory Little, *The Justices Have the Easiest Job in the Judiciary*, SCOTUSBLOG (Aug. 21, 2025), https://www.scotusblog.com/2025/08/the-justices-have-the-easiest-job-in-the-judiciary [https://perma.cc/D3KL-QPPB].

research, and determine questions to ask counsel.[77] On top of that, judges may need to account for potential travel time.[78] Furthermore, "[o]ral argument panels generally hear five cases per day for four days during each of the seven sittings" that occur per term.[79] Consequently, both the judge and staff have little time to accomplish anything else on days designated for oral arguments.[80] Regarding the delay in disposition time, one study found that "unpublished cases without oral arguments are almost twice as fast as published, orally argued cases."[81] The researchers noted, however, that "while these methods significantly reduce case-processing times, they could have negative costs in terms of the quality of decisions."[82]

Besides the efficiency cost to the judicial system, judges are cognizant that oral argument also imposes a financial burden on litigants.[83] The cost of travel to attend oral argument adds to already substantial legal fees.[84] Even some appellate practitioners acknowledge

77. *See* Patricia M. Wald, Commentary, *Some Real-Life Observations About Judging*, 26 IND. L. REV. 173, 177 (1992).

78. *See* Ross Todd, *Oral Arguments Fall Out of Favor in 2nd Circuit, Other Appeals Courts*, LAW.COM (May 31, 2018, at 09:00 ET), https://www.law.com/newyorklawjournal/2018/05/31/quiet-time-oral-arguments-disappear-in-federal-appeals-courts-389-32497 [https://perma.cc/7LP4-WTEY].

79. LAURAL HOOPER, DEAN MILETICH & ANGELA LEVY, FED. JUD. CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 115 (2d ed. 2011).

80. Martineau, *supra* note 42, at 21.

81. John Szmer, Robert K. Christensen & Ashlyn Kuersten, *The Efficiency of Federal Appellate Decisions: An Examination of Published and Unpublished Opinions*, 33 JUST. SYS. J. 318, 330 (2012).

82. *Id.* (citation omitted).

83. Bergeron, *supra* note 57, at 198. Judge Bergeron notes that because of the expense, "courts often think they are doing parties, but perhaps not lawyers, a favor by dispensing with argument." *Id.* (citation omitted). Although sympathetic to this concern, he questioned whether judges or lawyers and their clients should decide if "oral argument—or even pursuing an appeal, for that matter—is worth the cost." *Id.* at 199.

84. Margaret D. McGaughey, *May It Please the Court—Or Not: Appellate Judges' Preferences and Pet Peeves About Oral Argument*, 20 J. APP. PRAC. & PROCESS 141, 143 (2019); *see also* Jay Tidmarsh, *The Future of Oral Argument*, 48 LOY. U. CHI. L.J. 475, 482 (2016) ("The fees and travel expenses for a single oral argument might cost the parties thousands of dollars.").

that, in routine cases, oral argument may not justify the time and expense to their clients.[85]

Yet even the most emphatic detractors do not believe that oral argument should be eliminated in all circumstances. For example, Professor Robert J. Martineau—an early critic of argument in the 1980s—distinguished between courts of last resort, which primarily exercise discretionary jurisdiction, and intermediate courts, where appeals are taken as of right.[86] He argued that the presumptively high stakes and complexity of the relatively few cases granted full review in courts of last resort justify the costs of oral argument, even if, in his view, there is minimal likelihood that it will affect the outcome or improve decision-making.[87] Conversely, he believed that because the non-discretionary appeals filed in intermediate courts of appeals are often frivolous or routine, they are generally unworthy of full adjudication.[88] Even when the briefs are poorly written or lack clarity, he doubted that oral argument would assist the court's understanding of the case because each sides' presentation is typically limited to just fifteen to twenty minutes.[89]

But Judge Bright—who had a decades-long tenure on the Eighth Circuit and was a vocal proponent of oral argument—rejected Martineau's contention that oral argument should be reserved for courts of last resort. He countered that "important" cases are usually first

85. Davidson, *supra* note 30, at 211.

86. *See* Martineau, *supra* note 42, at 5 n.15.

87. *Id.* at 12–13, 32–33. To be sure, providing full merits review in the approximately 62 cases in which the United States Supreme Court granted certiorari during the 2024 Term is far more feasible than, for example, doing so in the 1,606 non-discretionary appeals filed in the Third Circuit during the same period. *See Table B-10*, *supra* note 12; *see also Supreme Court Cases, October Term 2024-2025*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases%2C_October_term_2024-2025 [https://perma.cc/24P7-LWKF] (last visited Jan. 27, 2026).

88. *See* Martineau, *supra* note 42, at 1–2 & n.4.

89. *See id.* at 14.

decided by the circuit courts and "many . . . are never heard by the Supreme Court."[90]

Still, the most ardent proponents of oral argument would not propose returning to the days of *Gibbons*. Chief Justice Marshall, while supporting lengthy oral argument, "also spoke of arguments so stultifying that the 'acme of judicial distinction' was the 'ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says.'"[91] That said, many judges, lawyers, and scholars believe that today, the pendulum has swung too far in the opposite direction. In their view, oral argument should be granted more liberally because, among other benefits, it has an important institutional function, as interaction with the public promotes transparency, accountability, and legitimacy, which in turn increases public trust in the judicial system.[92] Losing litigants may be disappointed by the outcome, but they are more likely to accept the legitimacy of the

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90. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 (1986). The commentary to the Supreme Court's Code of Conduct states that "[t]he Court receives approximately 5,000 to 6,000 petitions for writs of certiorari each year. Roughly 97 percent of this number may be and are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review." SUP. CT. OF THE U.S., STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT 11 (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/TLU6-CJMQ].

91. Kravitz, *supra* note 29, at 250–51.

92. *See* Cleveland & Wisotsky, *supra* note 11, at 138. Alexander Hamilton in Federalist No. 78 first expressed the idea that the courts' authority rests not on coercive power but on the acceptance and compliance of both the political branches and the public, a foundation for the legitimacy of the judicial system:

> The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously,* 93 CHI.-KENT L. REV. 505, 506 (2018) (tracing Justice Frankfurter's view that "the Court must carefully nourish public confidence" to Hamilton's argument in Federalist 78).

court's decision when they have had their day in court.[93] Additionally, face-to-face interaction makes the appellate process visible and provides assurance that the judges are deciding their case,[94] "an assurance that is increasingly important in a staff-driven, bureaucratic, decision-factory system."[95] Oral argument also teaches lawyers how appellate judges decide cases, allowing them to enhance the quality of their advocacy in the future.[96] Finally, as discussed below, oral argument may have a significant impact on the quality of judicial opinions.

2. The Effect of Oral Argument on Case Outcomes and the Quality of Judicial Decision-making

Detractors maintain that the cost of argument to judges and litigants, both in time and money, is unwarranted especially because oral argument is unlikely to change a judge's mind about the case.[97] In fact, Professor Christine Venter claims, based on prior studies of arguments at the Supreme Court[98] and her

93. *See* CTR. FOR CT. INNOVATION, TO BE FAIR: CONVERSATIONS ABOUT PROCEDURAL JUSTICE 192 (Emily LaGrotta ed., 2017), https://www.innovatingjustice.org/wp-content/uploads/2017/03/To_Be_Fair.pdf [https://perma.cc/PT5Y-PKKU].

94. Cleveland & Wisotsky, *supra* note 11, at 139.

95. *Id.*

96. Martin & Freeman, *supra* note 10, at 100.

97. *See* Barry G. Silverman, *A Judge Comments*, 42 LITIG. 2, 2, 4 (2016) (explaining oral argument's cost and time outweigh benefits). Researchers have theorized that oral argument is unlikely to change the minds of Supreme Court Justices because pre-existing ideology, namely, "values, emotions, attitude, and political leanings" play a substantial role in their decisions. Venter, *supra* note 73, at 52. "Although political ideology influences the choices of lower court judges, it evidently does so to a relatively modest degree." Wistrich, *supra* note 15, at 893 (footnote omitted). Further, the Supreme Court differs institutionally from the circuit courts. *See* Venter, *supra* note 73, at 52. Supreme Court nominees undergo a highly politicized confirmation process, and the Court frequently hears cases involving divisive political issues. *See id.* at 51–52. In contrast, the circuit courts tend to hear fewer "politically charged" cases, suggesting that oral argument may play a different role at that level. *See id.* at 52.

98. Venter, *supra* note 73, at 47–52, 55–60. Researchers have studied Supreme Court oral arguments to determine whether the quality and quantity

own examination of the Seventh Circuit,[99] that "judges may consciously or subconsciously" use oral argument to elicit information that confirms their own preexisting biases about the appropriate disposition.[100] Moreover, they may retain their biases even when counsel's answer provides contrary information, "a form of 'belief perseverance.'"[101]

Although it is true that exchanges with counsel at oral argument usually solidify a judge's view of the appropriate outcome after reading the briefs, "instances abound where oral argument causes a judge to re-evaluate his or her initial impression or, sometimes, change his or her view of the case altogether."[102] Put simply, judges have acknowledged that oral argument can affect outcomes. Indeed, the American Academy of Appellate Lawyers (AAAL) conducted a study which

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of questions asked by the Justices have any correlation to the outcome of the case. *Id.* at 57 & nn. 77–78 (citing Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433 (2010); Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 259–60 (2009)). Venter explains that studies have shown that a high frequency of questioning and skeptical or hostile questioning is a usual indicator that a side will lose. *Id.* at 48 & n.16 (citing Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 271–72 (2004)). As such, when outcomes align with statistical data, it may be assumed that the Justices "approach[ed] oral argument with a particular inclination regarding the outcome." *Id.* at 49.

99. *See id.* at 71–74. Venter analyzed the questions asked at oral argument in the Seventh Circuit to determine whether the results would mirror similar studies of the Supreme Court. *Id.* at 48–49, 71. Her study showed that in the Seventh Circuit, question frequency was heavily correlated with case outcome. *Id.* at 71 ("For example, Judge Posner asked the losing side an average of 11.3 questions with only 3.4 to the winning side . . . ."). Also, hostility in questioning was heavily correlated with case outcome. *Id.* at 72 ("On average, the three study judges each asked three or four hostile questions per argument to the losing side and none to the winning side."). Further, Venter states that "[i]n all of the cases where [she] saw evidence of confirmation bias, the side ask[ing] questions that suggested confirmation bias lost the appeal." *Id.* Venter notes these results suggest that judges may go into oral arguments with a preexisting bias or conclusion that they seek to confirm. *Id.*

100. *Id.* at 62.

101. *Id.* at 60.

102. Davidson, *supra* note 30, at 207.

found that argument alters the outcome "in approximately 10 to 20 percent of argued cases."[103] Although some would argue that these statistics support critics of oral argument, litigants, particularly criminal defendants, may view a ten- to twenty-percent chance of changing a judge's vote as worthwhile odds.

Moreover, judges differ widely in their views on the utility of oral argument in the decisional process. For example, "[w]hen asked about the importance of oral argument Justice [Robert H.] Jackson stated that 'the justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations,' and added that 'it always is of the highest, and often of controlling, importance.'"[104] Likewise, Judge Myron H. Bright and his colleague Judge Richard S. Arnold conducted a study in the 1980s which found that oral argument changed their assessment "in a substantial number of cases."[105] Although Judge Pierre Bergeron, an appellate judge in Ohio, noted research that has found oral argument "almost never" changes judges' minds, he also noted that in his own experience, oral argument can "definitely change minds" and "enrich our understanding of cases."[106] Yet the late Chief Judge Ruggero Aldisert of the Third Circuit estimated that argument changed his assessment of the outcome just ten percent of the time,[107]

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103. Martin & Freeman, *supra* note 10, at 100 (summarizing research results); *see also* Martineau, *supra* note 42, at 22–23. Professor Martineau asserts that "[t]he different percentages are a product of the [] judges' own experiences; essentially, the matter comes down to one of expectation and approach." Martineau, *supra* note 42, at 23.

104. Cleveland & Wisotsky, *supra* note 11, at 140 (quoting A GOOD QUARREL: AMERICA'S TOP LEGAL REPORTERS SHARE STORIES FROM INSIDE THE SUPREME COURT 4–5 (Timothy R. Johnson & Jerry Goldman eds., U. Mich. Press 2009)).

105. Bright, *supra* note 90, at 39–40.

106. *Id.* at 214–15.

107. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 294 (Nat'l Inst. for Trial Advoc. ed., 1996). Judge Aldisert also remarked that "[w]hen I change my mind at oral argument, more often than not it is because the performance at argument did not meet the promise of the brief. My mind was changed because the argument did not properly defend the brief. The case was not won at oral argument; it was lost." *Id.*

and Judge Easterbrook similarly estimated the number to be between five to ten percent of cases.[108]

But perhaps more importantly, "[e]ven if oral argument does not result in a changed vote, it can certainly make for a more informed and focused opinion."[109] As one judge explained, the "spontaneity in the face-to-face conversation at a good oral argument that cannot be achieved in the [briefs] . . . has a way of unlocking more insight about the issues . . . than volumes of briefs."[110] Chief Justice John Roberts "noted the apparent long and deep consensus among U.S. Supreme Court Justices, who otherwise notoriously disagree on all manner of issues, on the importance of oral argument to their decisionmaking process."[111] Chief Justice Rehnquist likewise asserted that argument "affected his analysis in a 'significant minority of cases.'"[112] Federal courts of appeals judges have also recognized the centrality of argument to their opinions; for example, Judge Bright cited a study showing that of two hundred appellate judges, "eighty percent . . . said that oral arguments are very important to the resolution of cases."[113]

When describing how oral argument benefits their thinking, judges have noted that it often provides the only opportunity in the appellate process for communication between "bench and bar" and among the

108. Venter, *supra* note 73, at 55.

109. Davidson, *supra* note 30, at 207–08.

110. *Id.* at 209.

111. Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194, 1214 (2014) (citing John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 70 (2005)).

112. *Id.* at 1213 (quoting WILLIAM H. REHNQUIST, THE SUPREME COURT 243 (2001)).

113. Bright, *supra* note 90, at 39 (citing MARVELL, *supra* note 31, at 75 & n.7); *see also id.* at 38 ("The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result."); Kravitz, *supra* note 29, at 267 (describing how "speech is dynamic in a way that writing can never be"); Rehnquist, *supra* note 27, at 300 (oral argument serves an important "collegial function" because "[i]t is one of only two occasions on which the judges get together to consider the case"); Martineau, *supra* note 42, at 11–20 (detailing how oral argument serves the interests of appellate courts, appellate judges, counsel, and litigants).

judges themselves.[114] Indeed, "oral argument is the first time that individual justices are exposed to their colleagues' views about a case" and is thus a critical opportunity for "coalition-building."[115] As such, "questions . . . directed to counsel may be intended for a judicial colleague, to sway that colleague . . . or at least to alert him to the need to face certain issues."[116] Judges have noted that signaling through questioning at oral argument provides insight into their colleagues' views,[117] which in turn influences their own thinking, even in cases they initially believed were straightforward.[118] As Justice Scalia explained, "[i]t isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking."[119] The American Academy of Appellate Lawyers also observed that "in traditional internal court operations, the conference immediately following the oral argument presents the best opportunity for one judge to correct another's misunderstanding."[120]

Questioning also allows judges to receive important information from counsel that may be missing from the briefs.[121] Judges can seek clarification on the briefs and

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114. Stephen L. Wasby, *Oral Argument in the Ninth Circuit: The View from Bench and Bar*, 11 GOLDEN GATE U.L. REV. 21, 38 (1981).

115. Skolnik, *supra* note 38, at 1313.

116. Wasby, *supra* note 114, at 40.

117. *Id.*

118. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 132–33 (1994); *see also* Bergeron, *supra* note 57, at 215. Judge Bergeron stated that oral argument was helpful in so-called "simple cases" if just to confirm that the matter was indeed as clear-cut as it seemed. Bergeron, *supra* note 57, at 215; *see also* Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 142 (2003) (suggesting that oral argument can be viewed "as the preliminary conference for deciding the case").

119. Hatchett & Telfer, *supra* note 118, at 142 (quoting Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, 15 LITIG. 33, 33 (1989) (citing THIS HONORABLE COURT (WETA television broadcast, aired Apr.–May 1988)).

120. Martin & Freeman, *supra* note 10, at 100.

121. Cleveland & Wisotsky, *supra* note 11, at 125.

record, which judges have claimed is important regardless of whether the briefs are "poor" or "well done."[122] In fact, "[n]inety percent of the lawyers surveyed by the Federal Judicial Center agreed that 'by asking questions of counsel, the judges are better able to avoid erroneous interpretations of the facts or issues in the case.'"[123] Judge Bergeron explained that he and his colleagues could reach "vastly different" conclusions about an appeal after reading the same materials and therefore would have benefited from counsel's assistance at oral argument.[124] Oral argument also allows judges to extract concessions because attorneys are far less likely to make "extreme arguments" when "in a face-to-face conversation with a knowledgeable and prepared judge" than they are in their briefs.[125] Further, in-person exchange enables judges to pose hypothetical questions that explore a ruling's potential effects on future cases and to force attorneys to confront their opponent's strongest arguments.[126]

Additionally, counsel benefits from oral presentations because they can adjust their tactics if they perceive that the judges are not amenable to certain arguments, an opportunity that can significantly influence judicial thinking and, in turn, the direction of the law.[127]

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122. Wasby, *supra* note 114, at 42.

123. *Id.* at 41 (quoting THOMAS F. DRURY, LEONARD F. GOODMAN & WILLIAM B. STEVENSON, FED. JUD. CTR., ATTORNEY ATTITUDES TOWARD LIMITATION OF ORAL ARGUMENT AND WRITTEN OPINION IN THREE U.S. COURTS OF APPEALS 38 (1974)).

124. Bergeron, *supra* note 57, at 214–15. Judge Bergeron described how, as a practicing attorney, he learned via the court's unfavorable opinion that it had "a complete misunderstanding" of the facts and his arguments, which he believed he could have clarified if oral argument had been granted. *Id.* Studies have shown that "[trial] judges draw[] different inferences based on the same underlying facts." Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1608 (2019). Likewise, "appellate decisions with a dissent may reveal that judges on the panel have chosen different inferences, and hence different facts." *Id.* at 1581–82 (citations omitted).

125. Kravitz, *supra* note 29, at 265.

126. *See id.* at 264.

127. Bergeron, *supra* note 57, at 215.

In fact, the Supreme Court's opinions suggest that oral argument provides new information that is both significant and influential. For example, Frederick Liu theorized that if oral argument affects a Justice's decision or provides helpful information, the opinion will reflect that influence.[128] To that end, he "examined every citation of the transcript of oral argument" between the beginning of the 1994 Term and the conclusion of the 2007 Term, and found that during this period, "there were 787 citations of the transcript."[129] Although a similar study has yet to be conducted in the circuit courts, it is reasonable to presume that intermediate courts of appeals likewise obtain new and important information during oral argument.

Against this backdrop, judges and other stakeholders might conclude that decisions about the rate of oral argument should be left to each circuit's procedures and institutional preferences, and that wholesale reform of existing screening practices is unwarranted. But as discussed below, insights from cognitive science provide a forceful justification for reinvigorating oral argument as a safeguard against reasoning errors.

II. COGNITIVE SCIENCE AND JUDICIAL DECISION-MAKING

How do judges make their decisions? Historically, two fundamental jurisprudential theories, legal formalism and legal realism, have attempted to answer this question.[130] The formalists posit that "the judicial

128. Frederick Liu, *Citing the Transcript of Oral Argument: Which Justices Do It and Why*, 118 YALE L.J. POCKET PART 32, 32–33 (2008).

129. *Id.* at 33.

130. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 2. There are other theories of judicial decision-making that "have long argued that judges do not merely find facts or apply legal principles in a completely accurate and unbiased fashion." Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORN. L. REV. 777, 779 (2001). For example, "proponents of critical legal studies have complained that judges favor the existing power structure; critical race and feminist scholars have argued that race and gender

system is a 'giant syllogism machine,' and the judge acts like a 'highly skilled mechanic.'"[131] Conversely, the realists claim that judges use their intuition to reach a decision which they justify with deliberative reasoning based on legal and factual support.[132]

But researchers who put the two theories to the test concluded—drawing on cognitive science research on human decision-making and their own empirical studies of judges—that the two theories are not mutually exclusive.[133] Rather, they learned that in general, judges rely heavily on their intuition "but sometimes override their intuition with deliberation."[134] This discovery is concerning because although intuition can be correct, and even a sign of expertise, studies have shown that intuitive judicial decisions are frequently wrong. Thus, to avoid the risk of reasoning errors in opinions resulting from unchecked intuition, researchers recommend that the justice system increase opportunities for judicial deliberation.[135]

A. Legal Formalism and Realism

Legal formalism, which was most influential in the late nineteenth and early twentieth centuries, asserted that judges can and should be neutral actors who apply legal rules mechanistically and without regard to personal preferences or societal consequences.[136] Christopher Columbus Langdell, a nineteenth century

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heavily influence judicial decisions; and law-and-economic scholars have asserted that judges make self-serving decisions designed to advance their political fortunes." *Id.* at 779–80 (footnotes omitted).

131. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 2 (quoting Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992)).

132. Timothy Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 5, 6 (1998).

133. *See* Guthrie, Rachlinski & Wistrich, *supra* note 16, at 3.

134. *Id.*

135. *See id.* at 5.

136. *See* Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSPS. 191, 193–94 (2009) (describing "mechanical legal formalism").

legal formalist and foundational figure in legal education, encapsulated this theory when he asserted that law is a science and decisions can be made through logical reasoning based on objective legal rules.[137]

Despite the maxim that "we are all realists now,"[138] formalism is entrenched in current beliefs about decision-making as the rules for judicial conduct instruct judges to remain neutral and avoid extra-legal considerations when deciding cases. For example, the United States Code states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[139] Rule 2.2 of the American Bar Association's Model Code of Judicial Conduct states that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[140] Canon 3 of the Supreme Court Justices' Code of Conduct, which was promulgated in 2023, provides that "[a] justice should perform the duties of office fairly, impartially, and diligently."[141]

Likewise, Chief Justice Roberts minimized the role of judicial discretion when he asserted during his confirmation hearings that "[j]udges are like umpires. Umpires don't make the rules, they apply them. . . . They make sure everybody plays by the rules, but it is a limited role."[142] Erwin Chemerinsky observed that

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137. *See* C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (Little, Brown, & Co. 1871).

138. *See, e.g.*, Michael S. Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (emphasis omitted) ("[I]t is often said—indeed *so* often said that it has become a cliché to call it a 'cliché'—that we are *all* realists now." (footnote omitted)).

139. 28 U.S.C. § 455(a).

140. MODEL CODE OF JUD. CONDUCT r. 2.2 (A.B.A. 2020).

141. SUP. CT. OF THE U.S., *supra* note 90, at 1.

142. *Chief Justice Roberts Statement—Nomination Process*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/nomination-process/chief-justice-roberts-statement-nomination-process [https://perma.cc/987V-8RTH] (last visited Jan. 22, 2026). *But see* RICHARD POSNER, HOW JUDGES THINK 78 (Harvard Univ. Press 2010) ("[No] knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the

formalism is a compelling theory because it removes human identity (and therefore responsibility) for decisions and replaces it with an immutable law:

> [I]f judges just applied the law in a formalistic way, then results would be a product not of the human beings in the robes, but of the laws themselves. The identity of the judges would have little effect, so long as the individuals on the bench had the intelligence and honesty to faithfully carry out their duties.[143]

Legal realism, which reached its apex in the 1920s and 1930s as a critical response to formalism, is most associated with jurists such as Oliver Wendell Holmes and Jerome Frank, and Professor Karl Llewellyn.[144] Realists asserted that instead of making decisions based on legal rules, judges often reach their conclusions through "intuition" or "hunches," which are frequently based on "inarticulate *and unconscious* judgment."[145] Hunches are then rationalized with legal reasoning.[146] In other words, "decision first, evidence second."[147] As Frank remarked, "if judicial decisions are 'based on judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever

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Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.").

143. Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 698 (2014) (quoting Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1071 (2006)).

144. *See* RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 174 (Oxford Univ. Press 6th ed. 2021) (describing Holmes, Frank, and Llewellyn as "leading exponents of American realism").

145. Craig E. Jones, *The Troubling New Science of Legal Persuasion: Heuristics and Biases in Judicial Decision Making*, 41 ADVOCS. Q. 49, 95 (2013) (quoting Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897)).

146. *Id.* (stating that if judges relied on hunches or intuition, then such reliance is concealed "by the traditional manner of writing briefs and judicial opinions") (quoting JEROME FRANK, LAW AND THE MODERN MIND 111 n. 2 (1930)).

147. *Id.* at 96.

produces judges' hunches makes the law.'"[148] What then are the hunch producers?

Realists have different theories on the "hunch producers," but typically cite the "influence of social, political, and economic beliefs, variously described as 'society' or 'life,' or [as Holmes famously proclaimed] 'not logic but experience.'"[149] Justice Charles Evans Hughes supposedly even said that "ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."[150] Indeed, many judges have since acknowledged anecdotally that "intuition and hunches play a prominent role in their decision making."[151]

Notably, scholars have criticized the legal formalism and realism dichotomies as deficient jurisprudential philosophies of decision-making. For example, Pierre Schlag explained that neither formalism nor realism "is adequate to describe the ways in which lawyers, judges, or legal academics reason, interpret, or elaborate law."[152] Conversely, some scholars claim that the theories are dialectic. For example, Brian Z. Tamanaha rejected "the formalist-realist divide that has prevailed for well over a century" in favor of what he termed "balanced

148. Guthrie, Rachlinski & Wistrich, *supra* note 130, at 781 (emphasis omitted) (quoting FRANK, *supra* note 20, at 104).

149. Jones, *supra* note 145, at 98 (quoting GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 27 (1995); O. W. HOLMES, JR., THE COMMON LAW 1 (Little, Brown, & Co. 1881)).

150. *Id.* at 96 (quoting WILLIAM O. DOUGLAS, THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 8 (1980)); *see also* James E. Bond, *The Court Years, 1939–1975: The Autobiography of William O. Douglas*, 1982 DET. C. L. REV. 203, 203 (1982) (noting Justice Douglas "feigned shock" when Justice Hughes gave him this advice, as he "had thought of the law in the terms of Moses" (quoting DOUGLAS, *supra* note 1, at 8)).

151. Wistrich, *supra* note 15, at 878 & n.86 (citing Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORN. L. REV. 274, 285 (1929) (asserting that a judge "decides by feeling, and not by judgment; by 'hunching' and not by ratiocination"); Milton Heumann et al., *Going with Your Gut: "Hunches" and "Hunching" in Judicial Decision-Making*, 55 CRIM. L. BULL. 1, 5–11 (2019) (reporting the results of interviews with nineteen judges, many of whom conceded that they rely on intuition and hunches in making rulings)).

152. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 213 (2009).

realism."[153] In sum, his theory recognized that "judges sometimes make choices" and can be "influenced by their political and moral views and their personal biases," but also "that judges abide by and apply the law." [154]

As discussed below, Tamanaha's view aligns with researchers who have theorized based on empirical studies of cognition that hunches, or intuition, play a role in judicial decision-making. Although intuitive processes can be extraordinarily good, and even a "hallmark of expertise,"[155] excessive reliance on unchecked intuition can lead to cognitive errors. With respect to judicial tasks in particular, researchers have concluded that deliberative reasoning is more likely than intuitive judgment to result in just outcomes.[156]

B. Reliance on Intuitive Processes

Although psychologists have developed multiple dual-system models of cognition, they all recognize intuitive processes ("System 1") and deliberative processes ("System 2").[157] Intuitive thinking occurs quickly and without deliberate analysis; it is unconscious, automatic, spontaneous, fast, and emotion-laden.[158] System 1 uses various heuristics, or cognitive shortcuts, to make "both important and inconsequential decisions under uncertainty, often under time pressure with limited information and cognitive resources."[159] Heuristics are not value-laden, meaning they "are neither good nor bad," but can rather be viewed "as tools in the mind's adaptive toolbox."[160] Conversely, deliberative, or System 2 processes, require conscious

153. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 6 (Princeton Univ. Press 2010).

154. *Id.*

155. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 30.

156. *See id.* at 31.

157. *Id.* at 7.

158. *See id.*

159. Shabnam Mousavi & Gerd Gigerenzer, *Heuristics are Tools for Uncertainty*, 34 HOMO OECONOMICUS 361, 367 (2017).

160. *Id.* (emphasis omitted).

work; associated with "'controlled processing,' they are 'deliberate, rule-governed, effortful, and slow.'"[161] Because intuition is fast, quick, and easy, it can overtake deliberation during the decision-making process.[162]

But simply because intuition is more primitive does not mean it should be disregarded; to the contrary, "many neuroscientists believe that unconscious thoughts comprise 95% of brain activity."[163] Moreover, use of stored knowledge to make intuitive decisions can be an indication of expertise.[164] For example, research has shown that experts like chess grandmasters rely on stored knowledge to make successful intuitive decisions:

> [T]he expert relies not so much on an intrinsically stronger power of analysis as on a store of structured knowledge. When confronted with a difficult position, a weaker player may calculate for half an hour, often looking many moves ahead, yet miss the right continuation, whereas a grandmaster sees the move immediately, without consciously analyzing anything at all.[165]

Researchers caution, however, that humans should not over-rely on their intuition in situations where their judgment could benefit from deliberation. In their groundbreaking work on heuristics in the 1970s, Nobel Prize winning psychologist Daniel Kahneman[166] and his

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161. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 7–8 (footnotes omitted) (quoting Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 436 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002)).

162. *Id.* at 9.

163. Jones, *supra* note 145, at 58 (citing LEONARD MLODINOW, SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR 34–35 (2012)).

164. *See* Guthrie, Rachlinski & Wistrich, *supra* note 16, at 30.

165. *Id.* (quoting Philip E. Ross, *The Expert Mind*, 295 SCI. AM. 64, 67 (2006)).

166. Press Release, The Nobel Prize, Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002 (Oct. 9, 2002), https://www.nobelprize.org/prizes/economic-sciences/2002/press-release [https://perma.cc/6NNS-KVGS]. Kahneman won the Nobel Prize in Economics in 2002 "for having

late colleague Amos Tversky proposed that intuitive thinking can "lead to severe and systematic errors" that result in mistaken and biased judgments.[167] Put differently, "[j]ust as certain patterns of visual stimuli can fool people's eyesight, leading them to see things that are not really there, certain fact patterns can fool people's judgment, leading them to believe things that are not really true."[168] While researchers have found that it is possible to override the "heuristic default" with deliberation, because "doing so takes cognitive energy, a scarce resource," intuitive decisions often remain unchanged.[169] Subconscious decisions that remain unchecked by deliberation are then rationalized by the conscious mind:[170] "These explanations may have little to do with the real reason behind the decision, but to the decision-maker they are the gospel truth."[171]

Building on Kahneman and Tversky's research, professors Chris Guthrie, Jeffrey Rachlinski, and U.S. Federal Court Magistrate Judge Andrew Wistrich conducted a series of studies involving trial judges to determine whether the realist or formalist conception of decision-making were correct; in other words, do trial judges rely on intuitive thinking like other humans, or are they "exceptionally deliberative"?[172] Their work was

integrated insights from psychological research into economic science, especially concerning human judgment and decision-making under uncertainty." *Id.*

167. Tversky & Kahneman, *supra* note 13, at 1124 (explaining that "people assess the probability of an uncertain event or the value of an uncertain quantity" by relying on heuristics, "which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors").

168. Negowetti, *supra* note 143, at 694–95 (quoting Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCH. BULL. 117, 121 (1994)).

169. Jones, *supra* note 145, at 60.

170. *Id.*

171. *Id.*

172. Wistrich, *supra* note 15, at 876; *see also* Negowetti, *supra* note 143, at 693 n.1. Negowetti observed the dearth of scholarship regarding judicial decision-making as compared with juries: "[t]here is much literature regarding juries, biases, and group dynamics; however, '[i]n the day-to-day operation of the legal system, judges are much more important than juries.'" *Id.* (second alteration in

novel because prior research on judicial decision-making had mostly focused on the "political 'attitudes' or ideology" of "appellate judges, particularly Supreme Court justices."[173] Further, Guthrie, Rachlinski, and Wistrich's studies focused on "judicial accuracy," and not "judicial activism."[174] To test judicial vulnerability to cognitive errors, the researchers gave the judges Shane Frederick's "Cognitive Reflection Test" (CRT), which is designed to measure the ability to suppress an incorrect intuitive response and to successfully override it with deliberation.[175] The test consists of just three questions:

- A bat and ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? ___ cents.
- If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? ___minutes.
- In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long will it take for the patch to cover half of the lake?[176]

These questions prompt an incorrect and immediate intuitive response of ten cents, one hundred minutes, and twenty-four days.[177] With some deliberation, however, it is apparent that the correct responses are five cents, five minutes, and forty-seven days.[178] But "the judges [the authors] tested performed like other groups

original) (quoting Guthrie, Rachlinski & Wistrich, *supra* note 130, at 781). "Judges decide roughly as many cases at trial as juries do, they determine the outcome of roughly seven times as many cases as juries by ruling on dispositive motions, and they often play an active role in settling cases." *Id.* "Even cases ultimately resolved by juries are regulated by judges." *Id.*

173. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 3–4 (footnotes omitted).

174. *Id.* at 5 (emphasis omitted).

175. *Id.* at 10 (citing Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 35 (2005)) (describing the CRT as measuring "the ability or disposition to resist reporting the response that first comes to mind" (quoting Frederick, *supra*, at 35)).

176. *Id.* (citing Frederick, *supra* note 175, at 27 fig.1).

177. *Id.* at 10–11.

178. *Id.*

of well-educated adults."[179] Put simply, this test revealed that "judges do not stand out as especially deliberative."[180] Although the CRT is a powerful predictor of cognitive errors in many areas,[181] Guthrie, Rachlinski, and Wistrich conducted additional studies which specifically showed that judges use their intuition to make decisions based on simulated judicial tasks, such as "awarding damages, assessing liability based on statistical evidence, and predicting outcomes on appeal."[182]

Particularly, they found that judges rely on numerical "anchors" or an initial numerical reference point, notwithstanding receiving later information that should have diminished its influence.[183] Guthrie, Rachlinski, and Wistrich's studies revealed that demands made in a prehearing settlement conference and a motion to dismiss anchored the judges' determination of the appropriate damages award.[184] For example, the defendant's motion to dismiss asserted that plaintiff's damages did not meet the jurisdictional minimum of $75,000.[185] Despite having the same case background information, the judges who ruled on the motion—and were therefore exposed to the $75,000 anchor—on average awarded plaintiff about thirty percent less in damages than the judges who did not rule on the motion and were thus not exposed to the anchor.[186] According to Guthrie, Rachlinski, and Wistrich, these studies showed that "the anchor triggered intuitive, automatic processing that the judges

179. *Id.* at 29.

180. Wistrich, *supra* note 15, at 877.

181. *See id.* at 878–79 (citing Maggie E. Toplak, Richard F. West & Keith E. Stanovich, *The Cognitive Reflection Test as a Predictor of Performance on Heuristics-and-Biases Tasks*, 39 MEMORY COGNITION 1275 (2011)).

182. Negowetti, *supra* note 143, at 715 (citing Guthrie, Rachlinski & Wistrich, *supra* note 16, at 27).

183. *See* Guthrie, Rachlinski & Wistrich, *supra* note 16, at 19.

184. *Id.* at 20–21.

185. *Id.* at 21.

186. *Id.*

were unable to override" when making their decision, even though the anchor was irrelevant to the claim.[187]

Next, Guthrie, Rachlinski, and Wistrich found that judges are vulnerable to the representativeness heuristic,[188] whereby individuals tend to "undervalue statistical information, which can lead to [] decision errors."[189] Most notably, they may disregard the prevalence of a category, "a phenomenon known as 'base-rate' neglect."[190] In one study, the judges were given case facts that resembled a prototypical negligence case. Although they were provided statistics showing "that the actual probability that the defendant [in that case] was negligent is only 8.3%," forty percent of judges nevertheless gave the intuitive response that the accident was caused by negligence because the facts looked like a typical negligence case.[191]

Finally, Guthrie, Rachlinski, and Wistrich explained "hindsight bias," or the "tendency to overestimate the predictability of past events" stemming from the intuitive belief that the actual outcome was "inevitable."[192] Judges are vulnerable to this heuristic when they "evaluate events after the fact," thus making hindsight bias particularly relevant to appellate judges.[193] To test their vulnerability, Guthrie, Rachlinski, and Wistrich gave judges "a hypothetical fact pattern based on an actual case, labeled 'Likely Outcome of Appeal'":

> In 1991, a state prisoner filed a *pro se* Section 1983 action in Federal District Court against the Director of the Department of Criminal Justice in his state, asserting, among other things, that the prison had

187. *Id.*

188. *Id.* at 22.

189. *Id.*

190. *Id.*

191. *Id.* at 23–24. Guthrie and colleagues noted, however, that the judges performed admirably well compared to other professionals who were given similar problems. For example, "[f]ewer than 20% of doctors facing a nearly identical problem in a medical context chose the correct answer." *Id.* at 24.

192. *Id.*

193. *Id.*

> provided him with negligent medical treatment in violation of Section 1983. The district court dismissed his complaint on the ground that the provision of negligent medical care does not violate Section 1983. The district court further found that the plaintiff knew his claims were not actionable because he had made similar claims several years earlier in a case that had been dismissed by the court. Thus, the district court sanctioned the plaintiff pursuant to Rule 11, ordering him to obtain the permission of the Chief Judge in the district before filing any more claims. The plaintiff appealed the district court's decision.[194]

The researchers then randomly gave each judge one of three outcomes of the appeal: in the first outcome, the appellate court affirmed the district court's decision to impose Rule 11 sanctions; in the second outcome the appellate court "ruled that the district court had abused its discretion under Rule 11 and remanded the case for imposition of a less onerous Rule 11 sanction against the plaintiff;" and in the third outcome the appellate court "found that the district court had abused its discretion and vacated the Rule 11 sanction against the plaintiff."[195] When the judges were asked which of the three outcomes was most likely to have occurred, the judges identified the outcome they were given, revealing that "[t]he judges' responses were influenced by learning the outcome on appeal."[196] As such, Guthrie, Rachlinski, and Wistrich concluded that hindsight bias "clearly influenced the judges' ex post assessments of the ex ante likelihood of various possible outcomes. The intuitive notion that the past was predictable prevailed."[197]

While trial judges were the subjects of Guthrie, Rachlinski, and Wistrich's studies, Judge Wistrich later concluded that appellate judges are "also likely to rely too heavily on intuition . . . . if only because overreliance on intuition is an inherent feature of human cognition

194. *Id.* at 24–25 (footnotes omitted).
195. *Id.* at 25.
196. *Id.*
197. *Id.* at 26.

that influences nearly everyone."[198] In particular, he claimed that the United States Supreme Court Justices use intuitive processes when resolving cases on the shadow and merits dockets.[199] For example, they are vulnerable to heuristics like "framing," which "occurs when identical options are treated differently merely because of superficial differences in how the options are described."[200] For instance, "people prefer economically identical outcomes described as gains rather than as losses, and meat described as 90 percent lean to the same meat described as 10 percent fat."[201]

He also claimed that the Court's use of originalism or textualism could—regardless of their merits as judicial philosophies—be an example of the substitution heuristic, or "the act of replacing a difficult question that requires judgment, a complex balancing of attributes, or time-consuming analysis, with a different question that can be answered quickly and easily."[202] While substitution can be an effective problem-solving strategy, there is a risk of over-reliance in inappropriate situations.[203] For example, when determining whether to grant review, the Justices appear to substitute the number of amicus curiae briefs filed, "the identity of a party—whether the petitioner is the plaintiff or the defendant—and even whether a former law clerk is involved in a certiorari petition" for "the more difficult assessment of whether the case is actually 'cert-worthy.'"[204] The fact that the Court "follows the Solicitor General's recommendation about three-fourths of the

198. Wistrich, *supra* note 15, at 879.

199. *Id.* at 879–80. Judge Wistrich asserted that on the shadow docket, "the merits docket norms of full briefing, oral argument, and reasoned opinions are replaced by skeletal briefing on the merits, no oral argument, and unsigned orders containing little or no explanation," which can lead to reasoning errors. *Id.* at 865.

200. *Id.* at 879–80 & n.101 (citing DANIEL KAHNEMAN, THINKING, FAST AND SLOW 88 (2011)).

201. *Id.* at 880 n.101 (citing KAHNEMAN, *supra* note 200, at 88).

202. *Id.* at 881 (citing KAHNEMAN, *supra* note 200, at 97–99).

203. *Id.*

204. *Id.* at 881–82 (footnotes omitted) (citing KAHNEMAN, *supra* note 200, at 97–99).

time" is an even stronger indication of reliance on the substitution heuristic.[205] While some of these cues may be probative, others risk leading to reasoning errors.[206]

According to Judge Wistrich, the Court's reliance on the "negative effect fallacy," or "the erroneous proposition that it is more difficult to prove a negative proposition than a positive one," has "infected subsequent decisions of the Supreme Court and lower courts in a variety of domains, partly because it enables courts to sidestep challenging analysis of empirical evidence in favor of easier and more intuitive value judgments."[207] Judges are also vulnerable to the "availability heuristic," which is "the process of judging frequency by the ease with which instances come to mind."[208] For example, to avoid newly prominent plane crashes after the terrorist attacks of September 11, 2001, "travel-related deaths increased as more people chose driving—a riskier form of travel than flying."[209]

Moreover, the affect heuristic, "or the way people feel about something," can lead individuals "to make instinctive judgments based on emotional reactions without thoroughly evaluating evidence and options."[210] As Daniel Kahneman has explained, "[t]he affect heuristic is an instance of substitution in which the

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205. *Id.* at 882.

206. *Id.* at 882.

207. *Id.* (citing Ryan D. Enos, Anthony Fowler & Christopher Havasy, *The Negative Effect Fallacy: A Case Study of Incorrect Statistical Reasoning by Federal Courts*, 14 J. EMPIRICAL LEGAL STUD. 618, 625, 639 (2017)).

208. *Id.* at 888 (quoting KAHNEMAN, *supra* note 200, at 129).

209. *Id.* at 889. Judge Wistrich surmised that the Justices might be particularly susceptible to the availability heuristic because they make decisions on a case-by-case basis and rely heavily on facts. *Id.* at 890. While facts are helpful for contextualization, facts may also distort decision-making into "[c]ase-based rulemaking." *Id.* (quoting Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L. J. 765, 779 (2004)) (citing RICHARD A. POSNER, LAW, PRAGMATICISM, AND DEMOCRACY 80 (2003); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 141 (Little, Brown & Co. 1960); Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934 (2006) ("Adjudication thus builds law from the ground up, one dispute at a time.")).

210. *Id.* at 897 (citing Paul Slovic et al., *The Affect Heuristic*, 177 EUR. J. OPERATIONAL RSCH. 1333, 1346 (2007)).

answer to an easy question (How do I feel about it?) serves as an answer to a much harder question (What do I think about it?)."[211] Judge Wistrich observed that the affect heuristic influences the Justices' behavior at oral argument and their written opinions.[212] For instance, a study "analyzed over three thousand cases" and found that the Justices' expression of anger during oral argument "correlate[s] with their votes. Another study found that the Justices' votes and overall decisions could be predicted using emotional responses measured by pitch differences in the Justices' speech during oral argument."[213] Further, when affirming the denial of a habeas corpus petition, a Justice will sometimes emphasize the heinousness of the offense or "express sympathy for a party."[214] This practice suggests "that the Justices recognize that their audiences, including their colleagues, are likely susceptible to the impact of affect."[215]

Judges are also prone to biases, or systematic errors that arise from use of heuristics.[216] For example, confirmation bias is a process of "selectively gathering or giving undue weight to evidence that supports one's position and 'neglecting to gather or discounting evidence that would tell against it.'"[217] Even when confronted with disconfirming evidence, individuals tend to give greater weight to "information that supports their belief," and disregard or "explain away" contrary information.[218] Studies conducted by Judge Wistrich and

211. *Id.* (quoting KAHNEMAN, *supra* note 200, at 139.

212. *See id.* at 897–900.

213. *Id.* at 899 (footnote omitted) (citing Bryce J. Dietrich, Ryan Enos, & Maya Sen, *Emotional Arousal Predicts Voting on the U.S. Supreme Court*, 27 POL. ANALYSIS 237, 240 (2019)).

214. *Id.* at 899–900.

215. *Id.* at 900.

216. *See* Guthrie, Rachlinski & Wistrich, *supra* note 130, at 779.

217. Venter, *supra* note 73, at 60 (quoting Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998)).

218. *Id.* (citing Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 PSYCH. REV. 674, 677 (1989)).

his co-researchers "suggest[ed] that the confirmation bias could distort judges' decision making" when performing judicial tasks.[219] Further, as discussed earlier, Christine Venter contended that judges "consciously or subconsciously" use oral argument to elicit information that confirms their own preexisting biases about the appropriate disposition.[220] Moreover, they may persist in their biases even when counsel's answer provides contrary information.[221]

Additionally, in a seminal study, researcher Jerry Kang and colleagues learned that judges have the same implicit biases as the general population after giving them the Implicit Association Test (IAT).[222] Implicit bias is defined as "implicit stereotypes that are formed by one's life experiences and that lurk beneath the surface of the conscious."[223] Reactions to these implicit biases are "automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly in the relevant tests, that people have no time to deliberate."[224]

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219. Wistrich, *supra* note 15, at 886 (citing Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 598–601 (2013)).

220. For further discussion, see *supra* notes 98–102.

221. *See* Venter, *supra* note 73, at 60. Venter describes how "belief perseverance," or "the tendency to cling to one's initial beliefs even after receiving new information that contradicts or disconfirms the basis of that belief," may work alongside confirmation bias to influence the effect of oral argument on judicial decision-making. *Id.* at 59–60 (quoting Craig A. Anderson, *Belief Perseverance*, *in* 1 ENCYC. SOC. PSYCH. 109, 109 (Roy F. Baumeister & Kathleen D. Vohs eds., 2007)); *see generally id.* at 60–68.

222. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1146–48 (2012).

223. Negowetti, *supra* note 143, at 706.

224. *Id.* (citing Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006)); *see e.g.*, Kang et al., *supra* note 222, at 1146–48. To measure implicit biases, researchers have used the Implicit Association Test (IAT), which "is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures." *Id.* at 1130. For instance, to measure "an implicit stereotype associating African Americans with weapons," the participant would presumably respond more quickly when the paired categories align with their automatic associations, such as a White face and harmless object. *Id.* Conversely, the participant would respond more slowly when presented with images that conflict with those associations, such as a White face and a weapon. *Id.* "Jeff Rachlinski and his coauthors . . . [gave] the race attitude

Again, appellate judges are not immune; for example, "Professor Maya Sen examined all published and unpublished federal appellate decisions from 2000 to 2012 and discovered that, even while controlling for possible proxies for judicial qualifications, Black federal district court judges were about 10 percent more likely to be reversed on appeal than their White counterparts."[225] Implicit bias is not limited to immutable characteristics, however, as research has also shown that "federal and state appellate judges are more likely to reverse plaintiffs' trial victories than defendants' trial victories, and are also more likely to overturn jury verdicts than bench trials."[226]

In summary, research has shown that all humans, including judges, are vulnerable to cognitive errors arising from intuitive processes, including systematic biases that can distort judgment.[227] Judges are unique, however, because their errors "can compromise the quality of justice that the courts deliver."[228] Although it is impossible to completely avoid problematic heuristics, Guthrie, Rachlinksi, and Wistrich's research also demonstrated that judges can reach a more accurate outcome by overriding their intuition with conscious

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IAT to judges from three different judicial districts." *Id.* at 1146. "Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks." *Id.* (citing Jeffrey J. Rachlinski et. al, *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1210 (2009)). Subsequently, "Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level." *Id.* at 1147. Although the results were mixed, "this study provides some suggestive evidence that implicit attitudes may be influencing judges' behavior." *Id.* at 1148.

225. Wistrich, *supra* note 15, at 906 (citing Maya Sen, *Is Justice Really Blind? Race and Reversal in U.S. Courts*, 44 J. LEGAL STUD. S187, S220 (2015)).

226. *Id.* at 906 n.286 (explaining that "[f]ederal appellate judges reverse 32.5 percent of plaintiffs' trial victories but only 12 percent of defendant victories, whereas state appellate judges reverse 41.1 percent of the former and only 21.5 percent of the latter") (citing Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUD. 100, 110 tbl.1 (2015))).

227. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 3–4.

228. Guthrie, Rachlinski & Wistrich, *supra* note 130, at 821.

deliberation.[229] The researchers termed this model "realistic formalism" because it recognized both the role of intuition or the "judicial hunch" and "the importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition."[230]

Consequently, Guthrie, Rachlinksi, and Wistrich urged the justice system to promote opportunities for judicial deliberation whenever possible.[231] In particular, they recommended increasing judges' awareness of cognitive biases and error, affording additional time for case consideration, and creating opportunities to receive feedback and consider alternative perspectives.[232]

III. APPELLATE ORAL ARGUMENT REDUCES THE RISK OF REASONING ERRORS STEMMING FROM UNCHECKED INTUITION

Oral argument should be heard in most cases because it is the only stage of the appellate process that collectively encompasses key mechanisms shown to facilitate deliberative thinking, such as additional time to engage deeply with the case, feedback from colleagues and counsel, exposure to alternative perspectives, and focused attention with minimal distractions; as such, oral argument minimizes the risk that judicial decisions will stem from unexamined intuition or heuristics.

A. Awareness and Openness

It would be understandable if judges, who are highly intelligent, educated, and experienced, objected to the suggestion that cognitive illusions influence their decisions.[233] Impartiality is integral to the job description, and judges strive to decide cases on the facts

229. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 28.
230. *Id.* at 3.
231. *See id.* at 29–33.
232. *See id.* at 29–43.
233. *See* Negowetti, *supra* note 143, at 695.

and law alone. But as Justice Anthony M. Kennedy said, "bias is easy to attribute to others and difficult to discern in oneself."[234] Indeed, researchers have confirmed that "[p]eople are nearly-incorrigible 'cognitive optimists,'" who assume that the product of their intuition is reliable and does not require re-evaluation.[235] In fact, one survey found that "97 percent of judges (thirty-five out of thirty-six) believed that they were at the top of the quartile in 'avoid[ing] racial prejudice in decisionmaking' relative to other judges attending the same conference,"[236] results that are both mathematically impossible and inconsistent with the research.

Even so, Judge Wistrich agreed that judges are unlikely to "adequately grasp the danger" of cognitive illusions.[237] This knowledge gap is not benign because "thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases."[238] For that reason, Kang and his coauthors recommended that judges "remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe."[239] Or put simply, the first step in minimizing the risk of cognitive illusions is to "recognize that there is a problem," or in this context, that "psychological reality may not meet legal idealism."[240]

To that end, Kang and his coauthors cited studies showing that "learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity."[241] Similarly, Guthrie, Rachlinski,

234. Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV 78, 81 (2021) (quoting *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016)).

235. Wistrich, *supra* note 15, at 876 (quoting Dan Sperber, Francesco Cara & Vittorio Girotto, *Relevance Theory Explains the Selection Task*, 57 COGNITION 31, 90 (1995)).

236. Kang et al., *supra* note 222, at 1172 (alteration in original) (footnote omitted) (quoting Rachlinski et al., *supra* note 86, at 1225).

237. *See* Wistrich, *supra* note 15, at 939–40.

238. Kang et al., *supra* note 222, at 1173.

239. *Id.*

240. Jones, *supra* note 145, at 114 (quoting Callia Piperides et al., *Group Report: What is the Role of Heuristics in Litigation?*, *in* HEURISTICS AND THE LAW 371 (Gerd Gigerenzer & Christoph Engel eds., 2006)).

241. Kang et al., *supra* note 222, at 1174.

and Wistrich asserted that training may increase the likelihood that individuals will make rational rather than "heuristic-based" decisions, and that judges can learn to interrupt their intuition with deliberation.[242] Judge Wistrich later suggested that educating judges about "cognitive psychology and behavioral economics" in particular could convince them that it is important to "slow down, challenge their intuitive reactions, search for and seriously entertain alternative viewpoints, and seek relevant empirical data and statistics."[243] In his view, such programs could, at the very least, warn judges about their vulnerabilities and the dangers of prioritizing speed and efficiency over deliberation.[244]

Once judges recognize their susceptibility to cognitive illusions and the importance of interrupting intuition with deliberation, they should consider the important role oral argument can play in that process. But Judge Bergeron "suspect[s] that [today] many judges simply do not find oral argument as helpful as in generations past."[245] But Christine Venter, who has argued that judges engage in confirmation bias at oral argument, acknowledged sociological studies suggesting that a judge's mindset about the importance of oral argument can affect the judge's susceptibility to persuasion:

> The fact that judges seem to believe that oral argument can be significant may itself affect their behavior, in that they may treat it as significant and act accordingly. This phenomenon has been studied by sociologists, and is known as the "Thomas

242. *See* Guthrie, Rachlinski & Wistrich, *supra* note 16, at 31, 42.

243. Wistrich, *supra* note 15, at 939 (citing Guthrie, Rachlinski & Wistrich, *supra* note 16, at 38–40; Avani Mehta Sood, *Applying Empirical Psychology to Inform Courtroom Adjudication—Potential Contributions and Challenges*, 130 HARV. L. REV. F. 301, 315 (2017)); *see also* Sood, *supra*, at 315 ("The law is replete with potentially erroneous assumptions about how the human mind works, many of which have been around for centuries and continue to operate unchecked in the legal system.").

244. Wistrich, *supra* note 15, at 939–40.

245. Bergeron, *supra* note 57, at 197 (citing Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, SUP. CT. HIST. SOC'Y Y.B. 22, 28–29 (1985)).

> Theorem." The theorem suggests that what lay people term "self-fulfilling prophecies" may have some foundation in science. As noted sociologists W.I. Thomas and Dorothy Swaine Thomas put it, "[I]f men define situations as real, they are real in their consequences." Thus, if judges believe that they can be persuaded by oral argument, they may be more likely to take it seriously and ostensibly may be open to changing their minds about a case as a result of oral argument.[246]

In addition to counteracting confirmation bias, awareness and mindset could offset the affect heuristic, discussed in Part II, by helping judges recognize when they may be substituting the easier question of how they feel about an issue for substantive analysis, either at oral argument or when writing the opinion.[247] Therefore, educating judges about cognitive errors and persuading them that oral argument could change their minds or alter their rationale are crucial first steps in making oral argument an effective tool for deliberation.

B. Additional Time and Focused Attention

Conventional wisdom holds that the substantial increase in the number of appeals has placed demands on appellate judges to use decisional shortcuts, such as limiting or eliminating oral arguments, to quickly move cases off their overloaded dockets.[248] Unsurprisingly, researchers have found that "cognitive overload" due to limited time and other job constraints leads to intuitive decisions because they are "speedier and easier."[249] Put simply, "time pressures are correlated with less accurate

246. Venter, *supra* note 73, at 55 (alteration in original) (footnotes omitted) (quoting Robert K. Merton, *The Thomas Theorem and the Matthew Effect*, 74 SOC. FORCES 379, 379–80 (1995)).

247. *See* Wistrich, *supra* note 15, at 897.

248. *See* Bright, *supra* note 90, at 45; Gino L. DiVito, *Surviving the Death of Oral Argument*, 99 ILL. BAR J. 1, 3 (2011) (advocating for procedural change in cases without oral argument to prevent rushed decisions).

249. Guthrie, Racklinski & Wistrich, *supra* note 16, at 35 (citing Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1, 8 (2000)).

decisions."[250] Thus, to reduce the risk of decisional errors, researchers recommend giving judges more time to deliberate.[251] "Or, as Shakespeare teaches: 'Wisely and slow. They stumble that run fast.'"[252]

Oral argument is a critical component of deliberation because preparing for in-person exchange with colleagues and counsel requires judges to "slow down" and expend additional cognitive effort when analyzing a case.[253] Judges themselves have acknowledged that oral argument reduces the risk of decisional errors. For example, Judge Bright noted that oral argument is key because without it, docket overload might lead judges to neglect essential elements of a case in "a hurried reading and analysis of the briefs."[254] Judge DiVito, a state appellate judge, said that "the temptation to concur [in the authoring judge's opinion] without reading the briefs was great,"[255] a concern shared by the AAAL.[256] Other scholars and judges have highlighted the challenges of capturing a judge's attention in non-argued cases, which, as discussed earlier, are increasingly delegated to staff attorneys.[257] Former Ninth Circuit Judge Alex Kozinski described the resulting temptation to over-rely on staff recommendations—and the

250. Kang, *supra* note 234, at 84.

251. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 35–36.

252. Wistrich, *supra* note 15, at 934 (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 3, l. 101 (1597) (Friar Laurence)). Judge Wistrich pointed to the Supreme Court's decision in *Bush v. Gore* as an example of the dangers of quick decision-making. *Id.* (citing *Bush v. Gore*, 531 U.S. 98 (2000)). By acting too quickly in that case, Judge Wistrich noted that the Supreme Court swept aside precedents and limited future use of the ruling. *Id.* (citing *Gore*, 531 U.S. at 109); *see also* DiVito, *supra* note 248, at 3.

253. Wistrich, *supra* note 15, at 936.

254. Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68, 69 (1984).

255. DiVito, *supra* note 248, at 3.

256. *See* Martin & Freeman, *supra* note 10, at 101. The AAAL warns that current procedures for non-argued cases may be harmful to deliberative and collaborative processes, especially when technology is involved. *Id.*

257. Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 615 (2020). For further discussion, see *supra* note 97 and accompanying text.

concomitant effects on appellate decision-making—as follows:

> [T]he circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening"—oral, because the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition. *After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.*[258]

Indeed, concerns about securing the judges' attention are amplified in this current age of technology, as "the time preparing for argument and engaging with advocates without the distraction of computers or phones causes judges to focus in ways that they otherwise wouldn't."[259] Accordingly, Judge DiVito argued that if oral argument were eliminated, it should be replaced with an alternative mechanism that ensures judges remain fully engaged.[260]

For example, his appellate court required that argued and non-argued cases receive the same treatment.[261] Judges considered both types of cases simultaneously, and each panel member received the briefs and clerk's memorandum.[262] Even though this

258. Copus, *supra* note 257, at 615 n.35 (emphasis added) (quoting Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFS., Jan.–Feb. 2005, https://perma.cc/NS45-FQM3).

259. Todd, *supra* note 78 (quoting Alan Morrison, Lerner Family Associate Dean for Public Interest and Public Service Law at The George Washington University Law School).

260. DiVito, *supra* note 248, at 3.

261. *Id.* at 2.

262. *Id.*

method is preferable to no deliberation,[263] oral argument still provides unique benefits to the decisional process for the reasons discussed below.

C. Exposure to Feedback and Divergent Perspectives

"Feedback is essential for learning."[264] Thus, to reduce the risk of cognitive errors in judicial decisions, researchers recommend that judges receive some form of performance feedback.[265] Feedback to judges is most effective when it is provided by a "respected authority," such as "colleagues" or "supervisors," addresses the judge's "decision-making process" rather than the result, and is provided before the judge makes a decision.[266] Researchers have recommended various methods for providing trial judges with feedback, including peer-review processes[267] or "[m]ore frequent conferences with judicial colleagues."[268]

Relatedly, judges can also combat cognitive errors by considering decisions "from multiple perspectives."[269] As discussed, cognitive science supports the legal realists' supposition that a judge's personal characteristics and experiences can influence intuitive decisions, or "hunches," which in turn can lead to cognitive illusions of judgment.[270] Put simply, "[c]ognitive science teaches us that one's own experience is the unconscious starting point for decisionmaking."[271] To limit automatic

263. Courts may be disinclined to adopt this procedure. Judge DeVito explained that when his court was reconstituted, his new colleagues "soundly rejected" his recommendation that non-argued cases be treated the same as argued cases. *Id.* at 3. Consequently, there was no discussion of non-argued cases. *Id.*

264. Wistrich, *supra* note 15, at 936 (citations omitted).

265. *See* Guthrie, Rachlinski & Wistrich, *supra* note 16, at 39.

266. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 68 (2013).

267. Guthrie, Rachlinski & Wistrich, *supra* note 16, at 39.

268. Jones, *supra* note 145, at 120 (encouraging deliberation and collaboration between judges, but also noting the danger of "group think").

269. Guthrie, Rachlinski & Wistrich, *supra* note 130, at 822.

270. *See* Negowetti, *supra* note 143, at 716–22.

271. *Id.* at 723.

processes that may lead to bias, researchers recommend that judges engage in "perspective-taking," or putting oneself "in the shoes" of another.[272]

As an institutional matter, oral argument may be the only stage of the appellate process that reliably provides circuit court judges with real-time feedback from colleagues and counsel and that provides opportunities for perspective-taking. Appellate judges have described their professional lives as "monastic" and observed that oral argument provides one of the rare opportunities to interact with colleagues and counsel in person, particularly in circuits that cover a wide geographic area.[273] As discussed in Part I, judges have also confirmed that oral argument is their first and perhaps only opportunity to communicate with their colleagues about the appeal because they "rarely have extended discussions in private."[274] Thus, questions ostensibly directed to counsel are intended to signal their assessment of the salient issues, the relative persuasiveness of arguments, policy concerns, and the appropriate outcome.[275] In turn, judges have noted that hearing their colleagues' perspectives through questioning often influences their thinking, even in cases they initially considered to be straightforward.[276]

Counsel's responses to questions also provide important feedback about the judges' conclusions that the briefs, which "'produce[s] the same unvarying

272. *Id.* at 729.

273. Wald, *supra* note 77, at 177.

274. *Id.* (referring to panels of judges upon which Judge Wald sat, she noted that "[they] test each other's mettle and make debaters' points in public because [the judges] rarely have extended discussions in private").

275. Timothy R. Johnson, Ryan C. Black & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331, 335 (2009).

276. *See* COFFIN, *supra* note 118, at 132–33; *see also* Bergeron, *supra* note 57, at 215. Judge Bergeron likewise stated that oral argument was helpful in so-called "simple cases" if just to confirm that the matter was indeed as clear-cut as it seemed. Bergeron, *supra* note 57, at 215; *see also* Hatchett & Telfer, *supra* note 118, at 142 (suggesting that oral argument can be viewed "as the preliminary conference for deciding the case").

meaning, over and over again,'"[277] cannot. In the process of persuading judges, lawyers can "'stimulat[e] [the] minds [of judges] into active thought processes.'" They can also "'challenge the judges' concept of a case' or 'make the judges re-examine their positions.'"[278]

Further, in-person interaction with counsel (and sometimes the litigants) provides judges with a critical perspective on the real-world consequences of their decision and its effect on individual lives.[279] Chief Justice Rehnquist underscored the importance of bringing humanity to oral argument when he stated, "the more flesh and blood you can insert into it, as opposed to a dry recitation of principles of law or decided cases, the more interesting and effective that argument can be."[280] Judge Bright likewise explained that in-person exchange can bring a case to life in a way that a brief cannot.[281] Although he agreed that judges should not base their decisions on emotion, he also underscored the importance of not insulating judges from "realities that may be better communicated in face-to-face confrontations."[282] "Oral argument allows appellate judges to avoid becoming mere processors of paper, removed from human interaction with those their decisions will touch."[283]

Although circuit courts use various methods to decide non-argued cases, most are decided without in-person collaborative review,[284] which deprives judges of

277. Cleveland & Wisotsky, *supra* note 11, at 123 (quoting Plato, *Phaedrus*, *in* SELECTED DIALOGUES OF PLATO 191 (Benjamin Jowett trans., Modern Library 2000)).

278. Wasby, *supra* note 114, at 51.

279. *See* Davidson, *supra* note 30, at 209.

280. Cleveland & Wisotsky, *supra* note 11, at 124 (quoting Rehnquist, *supra* note 28, at 1024).

281. *See* Bright, *supra* note 90, at 36–37.

282. *Id.* at 37 (citation omitted).

283. Davidson, *supra* note 30, at 210.

284. *See* JOE CECIL & DONNA STIENSTRA, FED. JUD. CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 38–39 (1985). The Federal Judicial Center reported that in at least six circuits (the First, Fourth, Fifth, Eighth, Ninth, and Eleventh) non-argued cases are decided remotely via phone calls and memoranda. *Id.* Further, Judge Bright

feedback and perspective-taking. Conversely, in traditional appellate procedure, "[o]ral argument is heard in virtually all cases" and is "followed by a thorough discussion among the judges in a face-to-face conference,"[285] which "presents the best opportunity for one judge to correct another's misunderstanding."[286] While it is true that today judges frequently discuss cases with their law clerks, "the group dynamic is significantly different not only because of the fewer number of people involved [in decision making] but also because of the disparate power relationship between a judge and a law clerk."[287] Indeed, traditionally, "[t]he judge use[d] a law clerk as a research tool and sounding board, but clerks ha[d] no significant role in drafting the opinion . . . ."[288] While in some circuits staff attorneys draft the memorandum opinion and then defend the opinion before the judicial panel,[289] the AAAL has asserted that staff attorneys are an inadequate substitute for appellate lawyers,[290] who are experts on the matter. It should be noted, however, that in some appellate courts, staff attorneys "develop specialized

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claimed that in the Eighth Circuit, argued cases are decided collaboratively but non-argued cases are essentially the product of an assigned lead judge:

> Unlike a case which has received oral argument, for example, no collegial conference between the judges accompanies the disposition of the nonargument case. Moreover, nonargument cases are pre-assigned to the lead judge. In contrast, no assignment is made in argument cases until the conference has discussed each crucial issue and has cast the vote to affirm or reverse. In nonargument cases, consequently, the resulting opinion is essentially the product of one judge and that judge's staff.

Bright, *supra* note 90, at 43; *see also* Martin & Freeman, *supra* note 10, at 101 (explaining that, for non-argued cases, some courts assign a lead judge to draft the opinion and panel discussions occur only if one of the other panel judges seeks it); Bergeron, *supra* note 57, at 216 (stating that without the post-argument conference, "we might resolve [the] case by a few terse emails").

285. Richman & Reynolds, *supra* note 54, at 278.

286. Martin & Freeman, *supra* note 10, at 100.

287. C.J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 SUFFOLK J. TRIAL & APP. ADVOC. 203, 225–26 n.112 (2020).

288. Richman & Reynolds, *supra* note 54, at 278.

289. Martin & Freeman, *supra* note 10, at 101.

290. *Id.*

knowledge in intricate bodies of law" such as substantive motions and writs.[291]

Therefore, because oral argument is typically the only opportunity for judges to obtain valuable feedback and to learn alternative perspectives in real time before deciding the case, it helps reduce the risk of reasoning errors in the opinion stemming from unchecked intuition.

IV. ALTERNATIVE MECHANISMS FOR RELIEVING DOCKET PRESSURES

If courts increase the number of argued cases to enhance deliberation, how should judges contend with the presumed caseload crisis? First, as noted earlier, some scholars have questioned whether the concern about growing caseloads is outdated, noting that they have decreased from their peak in 2005.[292] Judge Bergeron specifically questioned the contention that docket demands preclude more "frequent oral argument."[293] Further, Chief Judge Gilbert S. Merritt of the United States Court of Appeals for the Sixth Circuit asserted that in truth, oral argument saves time because "[i]t is much easier to separate the wheat from the chaff after oral argument than before."[294] In "easy" cases, oral argument "can save hours of . . . time scouring the record" and briefs, and in "hard cases," oral argument

291. ROGER A. HANSON, CAROL R. FLANGO & RANDALL M. HANSEN, THE WORK OF APPELLATE COURT LEGAL STAFF 49 (Nat'l Ctr. for State Cts. 2000). The United States Court of Appeals for the Second Circuit also clarifies that "[l]ike our chambers law clerks, our staff attorneys handle a wide range of civil, criminal and agency cases, but they may also become experts in federal appellate procedure, habeas corpus, immigration or civil rights law." Robert A. Katzmann, *A Message from the Chief Judge*, U.S. CT. OF APPEALS FOR THE SECOND CIR.: STAFF ATT'Y'S OFF., https://coop.ca2.uscourts.gov/staff_attorneys/staff_attorneys_office.html?utm [https://perma.cc/NX98-HBE4] (last visited Apr. 28, 2026).

292. For further discussion, see *supra* note 76 and accompanying text.

293. Bergeron, *supra* note 57, at 197.

294. Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1387 (1990).

can be "extended informally" until the panel is satisfied that it understands the issues.[295]

Others have observed that the time required to prepare is an asset, as justice requires expending the same cognitive effort on both argued and non-argued cases.[296] Judge Bergeron stated, "I do not see the harm that comes from some more focused effort on particular cases. After all, if the case is open and shut, a judge is unlikely to burn the midnight oil preparing for it."[297]

The judicial system could also opt to implement other time-saving measures that are inferior to traditional in-person arguments, but preferable to eliminating it altogether.[298] For example, Judge Bergeron suggested that Zoom presentations would minimize the time and cost of oral argument for judges and litigants, "particularly in courts with a broad geographic reach."[299] Indeed, some circuits already permit remote arguments; for example, "the Sixth Circuit's local rule permits a teleconference argument to be ordered by the court. Similarly, the Third Circuit's local rule expressly provides for the possibility of a video-conference argument at the request of a party."[300] Judge Arnold of the Ninth Circuit suggested that in appropriate cases, courts could reduce the time for argument from, for example, twenty to ten minutes.[301] He claimed that an experiment imposing time constraints in his court made oral argument more effective because the lawyers came prepared with more incisive statements and answers to questions.[302]

Additionally, commentators predict that like other legal professionals, appellate judges are increasingly likely to employ generative artificial intelligence as a tool

295. *Id.* at 1387–88.
296. *See* DiVito, *supra* note 248, at 3.
297. Bergeron, *supra* note 57, at 197.
298. *See* Guthrie, Rachlinski & Wistrich, *supra* note 16, at 35.
299. Bergeron, *supra* note 57, at 196.
300. Cleveland & Wisotsky, *supra* note 11, at 135–36.
301. Bright & Arnold, *supra* note 254, at 70.
302. *Id.*

to enhance productivity and efficiency.[303] Many judges "think AI creates opportunities for improving access to the courts, access to justice and the quality of judicial decisions" if done with appropriate safeguards.[304] Judge Rodriguez of the United States District Court for the Western District of Texas has written that his experimentation with generative AI revealed it "can be a helpful tool for improving judicial efficiency," including by quickly locating facts in the record and parties' arguments, and assisting judges with preparation for hearings.[305] Indeed, another study of federal judges "found that more than 60 percent . . . reported using at least one AI tool in their judicial work," though "only 22.4% of judges reported using AI tools on a weekly or daily basis."[306] Thus, the emergence of AI may, somewhat ironically, create greater room for traditional appellate procedures such as oral argument.

CONCLUSION

Because of docket pressures, oral argument in the federal courts of appeals is steadily declining, raising concerns about the impact on appellate justice. This Article demonstrates that, because even judges are not inherently more deliberative than other people, the decline of oral argument increases the risk of reasoning errors arising from intuitive thinking. Oral argument

303. *See* John G. Browning, *The Dawn of the "AI Judge"? Generative Artificial Intelligence and its Impact on Appellate Courts*, 25 J. APP. PRAC. & PROCESS 341, 373–74 (2025). Browning argues that "[g]enerative AI can and should be used by appellate judges, as long as it is used in an ethical and responsible manner. Used in this way, generative AI can support human decision-making—but never replace it." *Id.* at 389.

304. Shanice Harris, *Federal Judges Report Broad Adoption of AI Tools*, NORTHWESTERN NOW (Mar. 30, 2026), https://news.northwestern.edu/stories/2026/03/northwestern-study-finds-a-significant-number-of-federal-judges-are-already-using-ai-tools/ [https://perma.cc/N58Y-6EUC].

305. Xavier Rodriguez, *Judging AI: How U.S. Judges Can Harness Generative AI Without Compromising Justice*, 109 JUDICATURE 10, 17 (2025), https://judicature.duke.edu/wp-content/uploads/sites/3/2026/01/RODRIGUEZ-Vol-109-No-2.pdf [https://perma.cc/LK2R-GS85].

306. Harris, *supra* note 304.

and the post-argument judicial conference uniquely promote deliberative thinking by providing additional time for focused attention on the case, live feedback, and exposure to alternative perspectives. While unlimited oral argument is both unnecessary and impossible, revitalizing this practice is essential to improving the quality of judicial reasoning and maintaining the legitimacy of the appellate courts.