

THE JOURNAL OF
APPELLATE PRACTICE
AND PROCESS

VOLUME 21 / NUMBER 1
Winter 2021

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THE UNIVERSITY OF ARIZONA
JAMES E. ROGERS COLLEGE OF LAW

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

VOLUME 21/NUMBER 1
WINTER 2021

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Access: Published semi-annually, *The Journal* is a free digital resource. Orders for back issues of *The Journal* should be directed to William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068, or to periodicals@wshein.com.

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

A “NEW NORMAL” FOR *THE JOURNAL*

On January 22, 2020, I received an email that would profoundly impact the course of my year. The email had originated on a library listserv, and it came to me from our director of legal writing, Susie Salmon, who had received it from our interim library director, Shaun Esposito. Normally a double forward like that would receive little attention in my inbox—but this email sparked my interest. It was a call for someone to take over editing *The Journal of Appellate Practice and Process*. Nancy Bellhouse May was retiring from the University of Arkansas at Little Rock Bowen School of Law, and the school was unsure if it could find someone to replace her and continue *The Journal*.

I emailed our director, and she and I started considering if this was something that we could take on at the University of Arizona James E. Rogers College of Law. Within a few days I had exchanged emails with Dean Theresa Beiner at Arkansas and had a phone conversation with Nancy. A few days later I was drafting a memo for our dean, Marc Miller, on acquiring *The Journal*.

If I had to find one word to describe Dean Miller, it would be innovative. He is always open to new ideas. When Susie and I met with him in mid-February to discuss *The Journal*, he was enthusiastically supportive of

acquiring it. But, as is often the case, we all agreed that we needed to think more about how we would fund *The Journal* and a full-time editor.

I started reaching out to a few friends at law firms to discuss funding. I also contacted Marsi Buckmelter at the National Institute for Trial Advocacy to see if NITA would be interested in sponsoring *The Journal*.¹ I had worked with Marsi on revising the classic advocacy text *Winning on Appeal*, and I have tremendous respect for the work that NITA does. NITA was interested—but not in the way we thought. They presented us with a truly innovative offer, where instead of funding the editor they would assist us in the editing process. It was an offer that we could not refuse, so we decided to move forward.

On March 11, Dean Miller, Susie, and I called Dean Beiner with an official offer to take over *The Journal*. That was the same day that the NBA canceled the remainder of its season due to COVID-19.² Closer to home, that same day President Robbins of the University of Arizona announced that our classes would move online.³ Almost overnight, the country came to a standstill.

As I write this foreword, it has been almost nine months since that phone call with Dean Beiner.⁴ Despite the shutdown across the country and the world, we were able to successfully transfer *The Journal* to University of Arizona Law. We are grateful for the work of Thomas Sullivan, Nancy Bellhouse May, and others at UALR in

1. We held one of these meetings via Zoom. Looking back over my email I have to laugh at the exchange that Marsi and I had in late February 2020. She asked if I had used Zoom, and I responded that we “used zoom a lot” at the law school, but then qualified my statement by saying that I wasn’t sure that I had used it on my new office computer. Looking back, I had not used Zoom “a lot,” but I have now!

2. Scott Cacciola & Sopan Deb, *N.B.A. Suspends Season After Player Tests Positive for Coronavirus*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/sports/basketball/nba-season-suspended-coronavirus.html>.

3. Dylan Smith, *University of Arizona to Cancel In-Person Classes Due to Coronavirus*, TUCSON SENTINEL (Mar. 11, 2020), http://www.tucson sentinel.com/local/report/031120_ua_coronavirus/university-arizona-cancel-in-person-classes-due-coronavirus/.

4. Although, admittedly, it seems like six years sometimes.

establishing *The Journal* and shepherding it to this point. We are honored to carry on *The Journal's* legacy.

THE ISSUE

This issue, the first published by University of Arizona Law, epitomizes the year that we have had. Half of the Issue is quite traditional. Our lead article, written by Senior Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit, presents an in-depth look at “reasonableness.” This article is followed by an article from Thomas L. Hudson⁵ on structuring appellate briefs. Finally, Luke Burton critiques the length of judicial opinions.⁶

It is at this point that the Issue pivots to the topic of COVID-19. Professors Timothy R. Johnson, Maron W. Sorenson, Maggie Cleary, and Katie Szarkowicz consider how Justice Thomas’s participation in oral arguments was impacted by the Supreme Court’s COVID-19 argument format. Next, Margaret D. McGaughey⁷ follows up on her article⁸ from Volume 20, Issue 2, with a look at how judges and lawyers view remote oral arguments. Judge Pierre H. Bergeron of the First District Court of Appeals, Ohio, also explores the topic of remote oral arguments and posits that they offer significant, lasting value to the appellate world. The issue ends with a poignant essay by Senior Judge Michael Daly Hawkins of the United States Court of Appeals for the Ninth Circuit, on how the judge–law clerk relationship has changed due to COVID-19.

5. Mr. Hudson is a partner at Osborn Maledon and a graduate of the University of Arizona Law.

6. Mr. Burton is the career law clerk to Judge Morris S. Arnold, United States Court of Appeals for the Eighth Circuit.

7. Margaret D. McGaughey is the former Appellate Chief of the United States Attorney’s Office for the District of Maine.

8. Margaret D. McGaughey, *May It Please the Court—Or Not: Appellate Judges’ Preferences & Pet Peeves About Oral Argument*, 20 J. APP. PRAC. & PROCESS 141 (2019).

The publication format of *The Journal* also reflects the “new normal.” For the first time, *The Journal* will be primarily circulated as a digital publication. It will also be offered free of charge. Digital publications are nothing new, even in the legal arena—I published an article in a digital law journal six years ago.⁹ This digital, open-access format expands the readership and reach of *The Journal*, both domestically and internationally.

Digital delivery and reading also reflect life during a global pandemic. Those of us who are working remotely may not have access to office mail or a reliable printer.¹⁰ Many important documents are reviewed electronically or mailed to personal residences. Although I was an avid online reader pre-pandemic, I have relied even more on e-books and electronic sources over these last few months as public and academic libraries have been temporarily closed.

Only time will tell how many of the profound changes that we have seen will remain when pandemic subsides, but, as several of our authors discuss, we are likely to see real, lasting change in several aspects of appellate practice.

ACKNOWLEDGEMENTS

I would be remiss to end this foreword with a few (ok, more than a few) thank yous. Many of the people who deserve thanks are mentioned on the masthead. But, I would like to mention a few that aren't there. First, thank you to Dean Beiner, Dean Miller, Wendy McCormack, Jennifer Schneider, and Don Tringali for helping facilitate *The Journal* transfer and the partnership with NITA. Second, thank you to University of Arizona Library Team, including Ellen Dubinsky and Teresa Miguel-Stearns, for helping us get *The Journal* online.

9. Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL'Y 255 (2014).

10. My husband and I bought a refurbished laser printer when the pandemic hit. It was a really good decision, as it has already gotten a lot of use!

Finally, thank you to our great student editors who have ensured that the citations in *The Journal* are in tip-top shape—Daniel Bowman, Adam McGovern, John McKelvey, Zeke Peterson, and Tyler Stine. You have also helped me with many other projects that have facilitated *The Journal* transfer, including updating our subscription list. You are the best!

We hope you enjoy this inaugural issue. Stay safe and stay healthy!

TLD

From a spare bedroom in her home in the foothills near
Tucson, Arizona

January 1, 2021

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLES

ON REASONABLENESS: THE MANY MEANINGS OF LAW'S MOST UBIQUITOUS CONCEPT

Jon O. Newman*

“The term ‘unreasonable’ is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning.”

*Sandra Day O'Connor, Associate Justice
United States Supreme Court*¹

“What is reasonableness? What are its components? There is no consensus on this matter.”

*Aharon Barak, President
Supreme Court of Israel*²

* Senior Judge, United States Court of Appeals for the Second Circuit. This article has benefitted from the questions and comments offered by students in seminars on “The Concept of Reasonableness” that I conducted at the law schools of the University of Connecticut and the University of Hawai‘i.

1. Taylor v. Williams, 529 U.S. 362, 410 (2000).

2. AHARON BARACK, PROPORTIONALITY—CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 373 (2012).

The idea of exploring the concept of reasonableness first occurred to me during my years as a District Judge. I noticed that in a wide variety of cases, when I reached the critical portion of a jury charge, I frequently told the jurors that the applicable standard was “reasonableness” or its antonym “unreasonableness.” In criminal cases, I told them that conviction required proof beyond a reasonable doubt. In antitrust cases, I told them that agreements in restraint of trade were unlawful if they were unreasonable. In civil rights cases seeking damages for police searches, I told them to apply the standard twice: the homeowner had to prove that the police officer’s search was unreasonable, but, even if it was, the officer had a qualified immunity defense if the officer had a reasonable belief that the action taken was lawful.

The more I spoke the word “reasonable,” the more I wondered why the jurors never came back and asked, “Judge, could you explain exactly what you mean by ‘reasonable’?” Fortunately, they never asked.

In many cases, appellate courts also invoke the concept of reasonableness without explaining it, but in some cases, they have tried to give meaning to “reasonableness,” the law’s most ubiquitous concept. Four different approaches can be identified, three of which employ what generously can be called an analysis, and a fourth, if it can be called an approach at all, that seems to lack any analysis. This article will consider each of these four approaches in three contexts in the hope that the resulting twelve sections will promote some understanding of what courts are not just saying, but actually doing in cases where “reasonableness” is the applicable standard.

Before discussing “reasonable” in different legal contexts, I first consider the word in ordinary, nonlegal speech and writing as illustrated by the various definitions in a leading dictionary. Some of these definitions use value-laden words without fixed meaning. One definition, for example, is “being in agreement with right thinking or right judgment”³ and “possessing good sound

3. *Reasonable*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986).

judgment.”⁴ Other definitions suggest a result just short of some outer limit—for example, “not extreme” and “not excessive.”⁵ Others suggest a result near but well within some outer limit—for example, “moderate.”⁶ That dictionary also offers “reasonable” as a synonym for “rational,” and defines “rational” as being “intelligent.”⁷ These nonlegal uses of the term, which might be termed “colloquial,” are significant in their lack of consistent meaning.

Moving from colloquial speech to court interpretations, I start by briefly identifying the four approaches that some courts take with respect to the concept of “reasonableness”: (I) viewing reasonableness as a continuum, (II) balancing or weighing interests and effects, with a balance in favor of positive interests or effects considered reasonable and a balance in favor of negative interests or effects considered unreasonable, (III) articulating a standard, factor, or factors relevant to determining reasonableness and providing some guidance as to how that standard or those factors are to be applied, and (IV) determining reasonableness without identifying any method of analysis or any standard or factor. I illustrate these four approaches by exploring each in three contexts in which they are applied.

I. REASONABLENESS AS A CONTINUUM

The first approach considers the concept as a continuum along which unreasonableness is reached at some point, although that point is not clearly marked, nor are criteria identified for determining where that point is located. This approach appears to be inherent in the following contexts: (1) a continuum of certainty implicitly guides the determination of whether guilt is proven beyond a reasonable doubt, (2) a continuum of severity

4. *Id.*

5. *Id.*

6. *Id.*

7. *Rational*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986).

implicitly guides the determination of whether a federal court sentence is unreasonable, and (3) a continuum unrelated to an identified characteristic implicitly guides the determination of whether an interval of time is reasonable.

A. *Reasonable Doubt*⁸

The most familiar context in which the concept of reasonableness can be thought of as a point along a continuum is the traditional phrase of a jury charge instructing that conviction in a criminal case requires proof “beyond a reasonable doubt.”⁹ A curious aspect of the concept in this context is the view, expressed by many courts, that trial judges should not try to explain to juries what the phrase means.¹⁰ How odd that courts are fearful of giving jurors some guidance as to what they mean by proof “beyond a reasonable doubt.”

Nevertheless, some attempts at elaboration have been made. A widely respected treatise on jury

8. This section is adapted from my article, *Taking “Beyond a Reasonable Doubt” Seriously*, 103 JUDICATURE 54 (2019).

9. Understood today as a protection for those accused of crime, the standard of proof beyond a reasonable doubt has been said to have originated in the Middle Ages as a protection for jurors in England who feared that they would be committing a mortal sin if they found guilty a defendant who was in fact innocent. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 3 (2008). Judge Richard A. Posner has challenged Whitman’s historical contention. Posner points out that the theological concern about convicting an innocent person and thereby subjecting jurors and judges to damnation for error, though prevalent in the Middle Ages, was not a significant factor centuries later when the reasonable doubt standard came into use. See Richard A. Posner, *Convictions*, NEW REPUBLIC (Feb. 27, 2008), <https://newrepublic.com/article/62036/convictions>.

10. See, e.g., *United States v. Hall*, 854 F.2d 1036, 1037–39 (7th Cir. 1988) (“[W]e have decried the use of instructions which attempt to define reasonable doubt.”); *Murphy v. Holland*, 776 F.2d 470, 478–79 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986); *United States v. Davis*, 328 F.2d 864, 867–68 (2d Cir. 1964); see also *Holland v. United States*, 348 U.S. 121, 140 (1954) (“[A]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.” (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880))). See generally Henry A. Diamond, Note, *Defining Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1718–21 (1990).

instructions provides a model charge that includes this language: a reasonable doubt is “a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life.”¹¹ The “hesitate to act” formulation probably originated in *Posey v. State*,¹² was first cited by a federal court in *Bishop v. United States*,¹³ and entered Supreme Court jurisprudence in *Holland v. United States*.¹⁴

I disapprove of this elaboration because I have learned, from asking several people, that it is subject to different interpretations. Some people think it means that if they, as potential jurors, were to think that the evidence leaves them with a doubt comparable to the doubt that would cause them to hesitate before deciding some important matter, then they should vote “not guilty.” That understanding seems to be what the instruction literally requires them to do. Other people, however, reject this literal understanding because they almost always hesitate before making important decisions, and they do not think a judge would be telling them to find nearly every defendant “not guilty.” For these people, the instruction suggests caution: if they conclude that the evidence has created a doubt comparable to the doubt that would cause them to hesitate before making an important personal decision, they should take a careful look at all the evidence and vote to find the defendant guilty only if they are then quite sure that he is guilty. In other words, for one group, reaching the point of hesitation ends the process of deliberation; for the other group, reaching that point permits the process to continue but with caution.¹⁵ However juries understand

11. Leonard B. Sand *et al.*, *Instruction 4-2 Reasonable Doubt*, MODERN FEDERAL JURY INSTRUCTIONS 4.01, (1993).

12. 93 So. 272, 273 (Ala. Ct. App. 1922).

13. 107 F.2d 297, 303 (D.C. Cir. 1939).

14. 348 U.S. 121, 140 (1954).

15. In approving the “hesitate to act” formulation, the Supreme Court criticized the trial judge’s instruction, which had defined reasonable doubt as “the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon,” *Holland*, 348 U.S. at 138 (quoting

this elaboration, the fact that this common “explanation” is ambiguous ought to cast doubt on its utility.¹⁶

Another elaboration tells juries that a reasonable doubt is “a doubt based on reason.”¹⁷ This elaboration has three defects. First, it runs counter to the idea that a juror should be entitled to vote “not guilty” based only on a gut feeling, without any particular rationale.¹⁸ Second, it can create ambiguity as to whether the juror has a doubt for which a reason can be thought of in the juror’s mind or a doubt that the juror can articulate to other jurors. Third, it might mislead a jury to look to the defendant for an explanation.¹⁹ The “based on reason” formulation has encountered some criticism, mostly in an earlier time.²⁰ In *Jackson v. Virginia*, the Supreme Court said that “[a] ‘reasonable doubt,’ *at a minimum*, is one based on ‘reason.’”²¹

Still a third approach to explaining reasonable doubt urges a numerical standard. Judge Jack B. Weinstein has suggested that burdens of proof can be expressed as percentages of probabilities, with 50 percent for “preponderance,” 70 percent for “clear and convincing,” 80 percent for “clear, unequivocal, and convincing,”²² and 95

trial judge), and said that “the charge should have been in terms of the kind of doubt that would make a person hesitate to act.” *Id.*

16. The “hesitate to act” formulation has been criticized as “risking trivialization of the constitutional standard.” *United States v. Noone*, 913 F.2d 20, 28–29 (1st Cir. 1990).

17. *See, e.g.*, *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965) (cited with approval in *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972)); *Sand et al.*, *supra* note 11 at 4-2.

18. *See Chalmers v. Mitchell*, 73 F.3d 1262, 1274 (2d Cir. 1996) (Newman, then C.J., dissenting) (“A juror is entitled simply to have a gut feeling that, after consideration of all the evidence, a reasonable doubt remains in the juror’s mind.”).

19. *See id.* at 1268.

20. *See id.*; *United States v. Fatina*, 184 F.2d 18, 23–24 (2d Cir. 1950) (Frank, J., dissenting); *Pettine v. Territory of New Mexico*, 201 F. 489, 495–97 (8th Cir. 1912); *Owens v. United States*, 130 F. 279, 283 (9th Cir. 1904).

21. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) (emphasis added).

22. *See United States v. Fatico*, 458 F. Supp. 388, 405–06 (E.D.N.Y. 1978), *aff’d without consideration of this point*, 603 F.2d 1053 (2d Cir. 1979).

percent for “beyond a reasonable doubt.”²³ Judge Weinstein wrote about percentages of “probabilities,” but the concept of probabilities, at least in a technical sense, is inappropriate. Probabilities generally have to do with the likelihood that a particular outcome will occur in the future.²⁴ For example, if a coin is flipped, the probability that it will come up heads is 50 percent, there being only two equally likely outcomes. What the probability of 50 percent really means is that if the coin is flipped 100 times, it will likely come up heads fifty times. I say “likely” because the number of times the predicted result will occur in a sequence of results depends on standard deviation analysis. The more times the coin is flipped, the more likely it will be that the percentage of times heads will come up will really be fifty.

Probability analysis, in this technical sense, is not applicable to the standard of proof beyond a reasonable doubt, unless those urging a 95 percent probability for proof beyond a reasonable doubt want a juror to find guilt only when persuaded that if 100 people were tried with the same evidence presented in the defendant’s case, at least ninety-five of those defendants would in fact be guilty.²⁵ It is unlikely that a juror told that beyond a reasonable doubt means a 95 percent probability of guilt would understand the approach just described.

The Supreme Court pointed toward the most appropriate way to think about reasonableness in the context of the standard of proof for conviction of crime in *In re Winship*,²⁶ the decision establishing the “beyond a

23. *United States v. Schipani*, 289 F. Supp. 43, 57 (E.D.N.Y. 1968), *aff’d*, 414 F.2d 1262 (2d Cir. 1969).

24. In some contexts, a probability is expressed as to a past event. For example, a doctor might say that there is a 50 percent probability that the cause of a death was a heart attack. In a sense, this is a probability applied to a past event, but it can also be viewed as the doctor saying that if, before the death, he knew the facts he then knew, he would have predicted that there is a 50 percent probability that the cause of death will be a heart attack.

25. For other possible interpretations (or misinterpretations) of what a 95 percent probability for guilt beyond a reasonable doubt might mean, see Jon O. Newman, *Quantifying the Standard of Proof Beyond a Reasonable Doubt: A Comment on Three Comments*, 5 LAW, PROBABILITY & RISK 267 (2006).

26. 397 U.S. 358 (1970).

reasonable doubt” standard as a requirement of due process of law. The Court stated, “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.’”²⁷ The Court repeated the “certitude” language of *Winship* in *Jackson v. Virginia*, modifying the language to “near certitude.”²⁸ As the Court explained in *Jackson*, “[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard [of proof beyond a reasonable doubt] symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.”²⁹ Precisely. The standard is met when the jurors have reached “a subjective state of near certitude” concerning the defendant’s guilt.

In 1987, a subcommittee of the Committee on the Operation of the Jury System of the United States Judicial Conference proposed a model jury charge that included these words: “Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt.”³⁰ Justice Ginsburg endorsed this charge language, stating, “This Model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.”³¹

If certitude (or certainty) is thought of as a continuum, “beyond a reasonable doubt” means that the probative force of the evidence of guilt has reached a point very far along a continuum of certainty. If the continuum were to be expressed in numerical terms with the scale of certainty running from zero to 100, the “near certainty” that *Winship* and *Jackson* require for proof

27. *Id.* at 364 (quoting Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAM. L. Q. No. 4, 1, 26 (1967)).

28. 443 U.S. at 315. *Jackson* incorrectly cited to Justice Harlan’s concurring opinion in *Winship*, 397 U.S. at 372, *see Jackson*, 443 U.S. at 315, when in fact the “near certitude” language appeared in Justice Brennan’s opinion for the Court, *Winship*, 397 U.S. at 364.

29. 443 U.S. at 315.

30. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 17–18, Instruction 21 (1987).

31. *Victor v. Nebraska*, 511 U.S. 1, 23, 27 (1994) (Ginsburg, J., concurring).

beyond a reasonable doubt would probably be reached at least above ninety, perhaps around ninety-five. I do not expect any court to include a numerical measure of certainty in a jury charge on what it means to prove guilt beyond a reasonable doubt, but a numerical measure would make clear what “near certainty” means. In the absence of a numerical measure, it would help to tell jurors that a finding of guilty requires a very high degree of certainty. Unfortunately, standard practice is not to speak of near certainty, but instead, either to offer no explanation at all or to amplify briefly with the ambiguous “hesitate to act” or the ill-advised “doubt based on reason” formulations.

Having usefully explained in *Jackson* the concept of reasonable doubt in terms of near certitude (repeated from *Winship*), the Supreme Court then substantially weakened the rigor of the concept when, later in *Jackson*, it considered the task of an appellate court adjudicating a claim that the evidence was insufficient to permit a jury to find guilt beyond a reasonable doubt.³² The most frequently cited appellate review standard from *Jackson* states, “The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”³³ By requiring only that one out of many rational juries could have found guilt beyond a reasonable doubt (and gratuitously emphasizing the point by italicizing “any”), this statement diminished the rigor of appellate review. Earlier in *Jackson*, the Court stated the appellate review standard far more appropriately: “[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”³⁴ Unfortunately, appellate courts far more

32. See *Jackson*, 443 U.S. at 319.

33. *Id.* (emphasis in original).

34. *Id.* at 318.

frequently quote the “*any* rational trier” formulation.³⁵ Instead, they should ask “whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”³⁶

The Court’s formulations of the appellate-review task also suffer from the use of the word “rational.” The Court had it right when it first said that the appellate task is “to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt.”³⁷ By stating the task to be whether a “rational trier of fact” could find guilt beyond a reasonable doubt,³⁸ the Court risked requiring only a finding by a jury that was not irrational, *i.e.*, acting without any basis in fact.

Across the Atlantic, the idea of near certainty is captured in various phrasings. English judges sometimes simply tell a jury that they may not convict unless they “are sure” of guilt.³⁹ The French Code of Criminal Procedure instructs the *Cours d’Assise* to read to a mixed panel of three judges and nine lay jurors a charge that includes the following: “The law asks [judges] only the single question, which encompasses the full measure of their duties: ‘Are you thoroughly convinced?’”⁴⁰

So what can be said about the concept of reasonableness in the context of proof beyond a reasonable doubt? First, the concept can have several meanings, some of which are undesirable. Second, the concept can also have a fairly precise and useful meaning if it is thought of as a point very far along a continuum of certainty, which could be expressed in numerical terms. Viewed this way, the concept has nothing to do with the reasonableness of

35. A Westlaw search conducted in 2018 revealed that the “*any* rational trier of fact” formulation had been used in federal appellate opinions 9,080 times and the “could reasonably support a finding of guilt” formulation had been used 92 times. See Posner, *supra* note 9, at 38.

36. *Jackson*, 443 U.S. at 318.

37. *Id.* (emphasis added).

38. *Id.* at 317, 319.

39. See, e.g., *Ferguson v. The Queen*, [1979] 1 W.L.R. 94, 98, 1 All E.R. 877 (1978).

40. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 353 (Gerald L. Kock & Richard S. Frase, trans., 1988).

the doubt in a juror's mind, and, in my view, that is a good thing. Instead of inviting jurors to consider whether any doubt they might have about the defendant's guilt is reasonable, trial judges would do well to retain in a jury charge the verbal formulation of "beyond a reasonable doubt," which is both familiar and constitutionally required, and then explain that what this instruction really means is that a finding of guilt requires a very high degree of certainty, not absolute certainty, but something close to it.

B. Unreasonable Severity of Federal Court Sentences

A second context in which reasonableness (or unreasonableness) can be thought of as a point along a continuum is federal court review of the severity of non-capital criminal sentences.

Whether the length of a sentence is reasonable or unreasonable is a relatively new issue for federal appellate courts, arising for the first time in 1987 when the appellate-review provision of the Sentencing Reform Act of 1984⁴¹ became effective.⁴² Before then, defendants challenging the length of a sentence had only the limited claim that their punishments were "cruel and unusual" in violation of the Eighth Amendment.⁴³ However, some

41. 18 U.S.C. § 3742.

42. Sentencing Reform Act of 1984 § 3742.

43. U.S. CONST. amend. VIII. Most Supreme Court decisions applying the Eighth Amendment do not assess the length of a sentence. Instead, they consider such things as the means of carrying out a punishment, *see, e.g.*, *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (allowing execution by shooting); the quality of a prisoner's treatment, *see, e.g.*, *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death."); *Trezza v. Brush*, 142 U.S. 160, 160 (1891) (solitary confinement); the age of the defendant, *see, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (life sentence without parole for defendant under 18 at time of offense violates Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (death sentence for defendant age 17 at time of crime (murder) violates Eighth Amendment); and the nature of the offense, *see, e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962) (punishment for offense of being addicted to the use of narcotic violates Eighth Amendment); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such."). Even the Court's most quoted sentence on the Eighth Amendment—

of the Supreme Court's Eighth Amendment decisions merit consideration because they use the concept of sentence "proportionality," which is somewhat analogous to sentence "reasonableness."

In the first Supreme Court case to rule a sentence in violation of the Eighth Amendment, the Court said, "it is a precept of justice that punishment for crime should be graduated and *proportioned* to offense."⁴⁴ Many years later, the Court ruled that "a sentence of death is grossly *disproportionate* and excessive punishment for the crime of rape."⁴⁵ In *Solem v. Helm*,⁴⁶ the Court invalidated as disproportionate a sentence of life imprisonment without the possibility of parole for uttering a bad check, the defendant's seventh nonviolent felony.⁴⁷ *Solem* refined the

"The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Warren, C.J.)—was written in an opinion invalidating the punishment of loss of citizenship because of its nature and consequences, not its length.

44. *Weems v. United States*, 217 U.S. 349, 367 (1910) (emphasis added). The sentence in *Weems*, imposed by a court in the Philippines under a local system called *cadena temporal* (temporary chains), was 15 years at hard labor and in irons plus lifetime civil disabilities for the offense of falsifying a public account.

45. *Coker v. Georgia*, 433 U.S. 584, 592 (1970) (emphasis added). In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court made it clear that a death sentence in one case need not be proportional to death sentences in other cases.

46. 463 U.S. 277 (1983). In *Rummel v. Estelle*, the Court had said, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S. 263, 274 (1980). In *Solem*, the Court quoted this sentence with the words "One could argue" in italics, adding that the Court in *Rummel* had "merely recognized that the argument was possible." 463 U.S. at 288 n.14.

47. In a later decision upholding a life sentence subject to parole for minor crimes under a recidivist statute, the Court made clear that the sentence in *Solem* was invalid not simply because of its length but because of the unavailability of parole. *See Ewing v. California*, 538 U.S. 11, 22 (2003) ("[I]n *Solem*, we struck down the defendant's sentence of life without parole. We specifically noted the contrast between that sentence and the sentence in *Rummel [v. Estelle]*, 445 U.S. 263 (1980), pursuant to which the defendant was eligible for parole."). Moreover, after *Solem*, even a life sentence without parole for possessing 672 grams of cocaine was upheld against an Eighth Amendment challenge because the crime was considered "far more grave than the crime at issue in *Solem*." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., with whom O'Connor and Souter, JJ., join, concurring in part).

proportionality principle to prohibit punishments that are “grossly disproportionate” to the crime,⁴⁸ a standard several Justices have endorsed.⁴⁹

Solem also endeavored to identify criteria for applying a proportionality standard: “[A] court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions,”⁵⁰ although no Supreme Court decision since *Solem* has used the last two criteria.

Throughout the emergence of a proportionality principle in the Court’s Eighth Amendment jurisprudence, there was no mention of unreasonableness as a standard for assessing the validity of sentences. That changed in 1984. The Sentencing Reform Act provided that, under the system of mandatory sentencing guidelines then in place, a court of appeals could vacate a sentence if it departed from an applicable guidelines range “to an unreasonable degree.”⁵¹

48. 463 U.S. at 288.

49. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (“Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment.”) (Kennedy, J., with whom Stevens, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., join); *Graham v. Florida*, 560 U.S. 48, 59 (2010) (“The concept of proportionality is central to the Eighth Amendment.”) (Kennedy, J., with whom Stevens, Ginsburg, Breyer, and Sotomayor, JJ., join); *Harmelin*, 501 U.S. at 1001 (The Eighth Amendment “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”) (Kennedy, J., with whom O’Connor and Souter, JJ., join, concurring in part and concurring in the judgment) (citing *Solem*, 463 U.S. at 288)); *id.* at 1009 (“[I]t would not be unreasonable to conclude that it would be both cruel and unusual . . . to impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted.”) (White, J., with whom Blackmun and Stevens, JJ., join, and with which Marshall, J., agreed, dissenting). The Court’s opinion in *Harmelin*, written by Justice Kennedy, said, “Though our decisions recognize a proportionality principle, its precise contours are unclear.” 501 U.S. at 998.

50. 463 U.S. at 292.

51. 18 U.S.C. § 3742(e)(3)(C). A sentence could also be rejected if it were imposed for an offense for which there is no applicable guideline and is “plainly unreasonable.” *Id.* § 3742(f)(2).

Then, in 2005, when the Supreme Court ruled in *United States v. Booker*⁵² that the Federal Sentencing Guidelines (“Guidelines”) were no longer mandatory, the Court announced that “[t]he courts of appeals review sentencing decisions for unreasonableness.”⁵³ Through some mysterious alchemy, the standard of unreasonableness, which the Sentencing Reform Act had established for assessing departures from mandatory Guidelines,⁵⁴ became the standard for reviewing all federal sentences under the advisory Guidelines regime.

“Reasonableness,” as a standard for reviewing federal sentences, has two components: procedural reasonableness and substantive reasonableness.⁵⁵ “Procedural reasonableness,” which might better be called “procedural correctness,” concerns such matters as whether the sentencing judge (1) identified the correct Guidelines range, either for a Guidelines sentence or as a starting point for a non-Guidelines sentence; (2) treated the Guidelines as advisory; and (3) considered the statutory sentencing factors outlined in 18 U.S.C. § 3553(a).⁵⁶ “Substantive reasonableness” concerns the length of the sentence, usually its severity when challenged by the defendant but occasionally its leniency when challenged by the prosecution.⁵⁷ My concern focuses on substantive reasonableness on review of sentences claimed to be too severe.

As with “grossly disproportionate” in Eighth Amendment jurisprudence, the Supreme Court has given little guidance as to the meaning of “unreasonableness” under both the mandatory and the advisory guidelines regimes. No decision of the Court had considered the language of subsection 3742(e)(3)(C) under the mandatory

52. 543 U.S. 220 (2005).

53. *Id.* at 224.

54. “Upon review of the record, the court of appeals shall determine whether the sentence . . . (3) is outside the applicable guideline range, and . . . (C) the sentence departs to an unreasonable degree from the applicable guidelines range.” 18 U.S.C. § 3742(e)(3)(C).

55. *See* *United States v. Crosby*, 397 F.3d 103, 113–15 (2d Cir. 2005).

56. *See* *United States v. Rattoballi*, 452 F.3d 127, 131–32 (2d Cir. 2006).

57. *See, e.g., id.* at 135–37.

Guidelines regime. Under the advisory Guidelines regime, the Court has said that “appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion,”⁵⁸ but later added in *Gall v. United States*⁵⁹ an apparent refinement by referring to “a deferential abuse-of-discretion standard.”⁶⁰ It is possible that this phrasing was intended only to describe the abuse-of-discretion standard as deferential, but subsequent language in *Gall* indicates that the Court meant a deferential *version* of the abuse-of-discretion standard. The Court noted that “[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the [Sentencing] Commission or the appeals court” and that “[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more guidelines cases than appellate courts do.”⁶¹

However, the Court has not yet encountered a case where it has considered a post-*Booker* sentence unreasonable, although it has twice reversed a Court of Appeals that had ruled a sentence unreasonable.⁶² In a separate opinion in *Rita*, Justice Scalia offered, as an example of unreasonableness, a sentence imposed for no other reason than that the sentencing judge thought the offense merited seven times the applicable guideline range.⁶³

The Supreme Court has made one observation about reasonableness in the context of sentences, but it sheds little, if any, light on what the concept means. In *Rita*,

58. *Rita v. United States*, 551 U.S. 338, 351 (2007).

59. 552 U.S. 38 (2007).

60. *Id.* at 41.

61. *Id.* at 51–52 (internal quotation marks omitted). The Second Circuit has understood the *Gall* phrasing to mean that the “unreasonableness” standard in sentencing review “is a particularly deferential form of abuse-of-discretion review.” *United States v. Cavera*, 550 F.3d 180, 188 n.5 (2008) (en banc).

62. *Kimrough v. United States*, 552 U.S. 85, 110–11 (2007) (sentence not unreasonably low), *rev’g* *United States v. Kimrough*, 174 F. App’x 988 (4th Cir. 2006); *Gall*, 552 U.S. at 56–60 (same) *rev’g* *Gall v. United States*, 446 F.3d 884 (8th Cir. 2006)).

63. *Rita*, 551 U.S. at 372 (Scalia J., with whom Thomas, J., joins, concurring in part and concurring in the judgment).

the Court ruled that a sentence within an applicable Guidelines sentencing range is entitled to a presumption of reasonableness.⁶⁴ However, the Court did not explain what effect this presumption has on appellate review, explaining only what the effect is not and why the presumption applies. The presumption “does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case.”⁶⁵ “Rather, the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.”⁶⁶ So a sentence within the applicable Guidelines range has a higher likelihood of being reasonable than one outside that range, but the task of determining whether it is reasonable remains.

The Court undertook that task in *Rita*. The defendant had argued that three circumstances made his within-Guidelines sentence unreasonable: his health, his fear of retaliation in prison because he was formerly a law enforcement officer, and his military record.⁶⁷ The Court responded that the sentencing judge had sought assurance from the Bureau of Prisons that (1) the defendant would receive appropriate treatment, (2) nothing indicated that the threat of retaliation was more significant than that faced by any former law enforcement officer, and (3) the defendant did not claim that military service should ordinarily lead to a below-Guidelines range.⁶⁸ In short, the defendant’s claimed special circumstances were not “special enough.”⁶⁹ The arguable

64. *Id.* at 347.

65. *Id.*

66. *Id.* (emphases in original).

67. *See id.* at 359–60.

68. *See id.*

69. *Id.* at 360.

inference is that very special circumstances might make a within-Guidelines sentence unreasonable.

The Courts of Appeal have struggled to give meaning to “unreasonable” in the sentencing context. One interesting effort is the Second Circuit’s opinion in *United States v. Rigas*.⁷⁰ First, the court deemed the “unreasonableness” standard in sentencing analogous to the “manifest injustice” standard used in considering a motion for a new trial in a criminal case after a jury verdict⁷¹ and the “shocks-the-conscience” standard used in considering claims of intentional torts by state actors.⁷² Second, the court considered factors common to all three standards:

The manifest-injustice, shocks-the-conscience, and substantive unreasonableness standard in appellate review share several common factors. First, they are deferential to district courts and provide relief only in the proverbial “rare case.” Second, they are highly contextual and do not permit easy repetition in successive cases. Third, they are dependent on the informed intuition of the appellate panel that applies these standards. In sum, these standards provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.⁷³

On this last sentence the opinion added a useful footnote:

To say that a sentence is “substantively unreasonable” is not to say that “no reasonable person” would have imposed such a sentence. We may generally assume that federal judges are “reasonable” people in the commonsense definition of the term. Nonetheless, even reasonable individuals can make unreasonable decisions on occasion. The Supreme Court recognizes this and has charged the Courts of

70. 583 F.3d 108 (2d Cir. 2009).

71. *Id.* at 122 (citing *United States v. Josephberg*, 562 F.3d 478, 488 (2d Cir. 2009)).

72. *Id.* (citing *O’Connor v. Pierson*, 426 F.3d 187, 203 (2d Cir. 2005)).

73. *Id.* at 123.

Appeals with reviewing the substance of sentences for reasonableness, and we cannot employ a definition of “substantive unreasonableness” that would render the required review a dead letter.⁷⁴

The Eighth Circuit in *United States v. Gall*⁷⁵ attempted to quantify sentencing unreasonableness by requiring that a sentence outside of the Guidelines range must be supported by a justification that “is proportional to the extent of the difference between the advisory range and the sentence imposed.”⁷⁶ Of course, the “difference” between an advisory range and a sentence outside the range is a number of months, and a justification for a non-Guidelines sentence has no mathematical counterpart. What the Eighth Circuit presumably meant was that the greater the difference between the advisory range and the sentence imposed, the more persuasive must be the justification for the sentence.

In *Gall v. United States*,⁷⁷ the Supreme Court rejected the Eighth Circuit’s approach and that Circuit’s ruling that a below-Guidelines sentence was unreasonable. The Court pointed out that “deviations from the Guidelines range will always appear more extreme—in percentage terms—when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years.”⁷⁸

The Eighth Circuit has also tried to explain unreasonableness by enlisting the weighing metaphor (considered in section II *infra*). In *United States v. Miner*,⁷⁹ the Court of Appeals said that a sentencing court abuses its discretion, *i.e.*, imposes an unreasonable sentence, when it “considers the appropriate factors but commits a clear error of judgment in weighing those factors.”⁸⁰ This use

74. *Id.* at 123 n.5.

75. 446 F.3d 884 (8th Cir. 2006).

76. *Id.* at 889.

77. 552 U.S. 38 (2007).

78. *Id.* at 47–48.

79. 544 F.3d 930 (8th Cir. 2008).

80. *Id.* at 932.

of the weighing metaphor, as usual, provides the illusion, rather than the substance, of analysis. In *Miner*, the Eighth Circuit also said that a district court abuses its discretion and imposes an unreasonable sentence when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors.⁸¹

Although no Supreme Court opinion has ever compared the “unreasonableness” standard applicable to review of post-*Booker* federal sentences to the “grossly disproportionate” standard applicable to review of sentences challenged under the Eighth Amendment, it seems likely that the two standards are similar. A sentence grossly disproportionate to the offense would likely be deemed unreasonable. Conceptually, a post-*Booker* sentence might be said to reach the outer limit of reasonableness before it was so grossly disproportionate as to reach the limit beyond which a sentence would be cruel and unusual, but the limits, if different, are surely not very far apart.

In the sentencing context, “unreasonable” apparently means only that in very unusual circumstances a reviewing court concludes that a sentence is way too high along a continuum of sentence severity. Appellate courts might consider enlisting the proportionality analysis that the Supreme Court developed in its Eighth Amendment jurisprudence.

C. Reasonable Time

A third context where reasonableness (or unreasonableness) can be thought of as a point along a continuum concerns an assessment of an interval of time. Courts frequently determine whether an interval of time is reasonable. Although many statutes, rules, and contracts prescribe precise intervals of time for some action to be taken, some do not. Sometimes a statute or rule requires

81. *See id.*

only that an event occur within a “reasonable time.” Examples are making a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure within a reasonable time⁸² and granting a motion for summary judgment after a nonmovant has had a reasonable time to respond.⁸³ Where a contract does not specify a time for some required action, courts usually imply a “reasonable time” requirement.⁸⁴

An objection to “reasonable time” as too vague was rejected by the Supreme Court in *Walker v. Martin*,⁸⁵ considering California’s use of the standard for invoking state court habeas corpus remedies. “Indeterminate language is typical of discretionary rules,” the Court noted, adding, “application of those rules in particular circumstances, however, can supply the requisite clarity.”⁸⁶

Determining whether a time interval is reasonable occurs in a variety of contexts. A familiar one is a continuance of a trial date.⁸⁷ Here are some examples from other contexts:

- A witness cited for civil contempt must be allowed a reasonable time to prepare for the contempt hearing.⁸⁸

82. FED. R. CIV. P. 60(c).

83. FED. R. CIV. P. 56(f).

84. *See, e.g.*, *Galvin v. U.S. Bank*, 852 F.3d 146, 164 (1st Cir. 2017) (“When a contract does not specify a time for performance, the law implies a contract term providing for performance in a reasonable period of time.”); RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981) (“When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”).

85. *See Walker v. Martin*, 562 U.S. 307, 317 (2011).

86. *Id.*

87. *See, e.g.*, *United States v. Mark*, 460 F. App’x 103, 106–07 (3d Cir. 2012) (approving grant of continuance for 42 days and denial of continuance for 90 days); *United States v. Hoenig*, 79 F. App’x 8, 9 (5th Cir. 2003) (approving denial of continuance and holding trial 12 days after granting motion to proceed *pro se*); *Napoli v. United States*, 341 F.2d 916, 916 (5th Cir. 1965) (approving denial of continuance and holding trial 12 days after arraignment).

88. *See In re Smothers*, 322 F.3d 438, 442 (6th Cir. 2003).

- A parole revocation hearing must be held within a reasonable time after the parolee is taken into custody.⁸⁹
- Police officers must wait a reasonable time after knocking and announcing their presence before a forced entry.⁹⁰
- The remainder interest in a trust must be disclaimed within a reasonable time after learning of the transfer that created the trust to avoid gift tax liability.⁹¹
- A claim for failure to deliver goods must be made within six months after a reasonable time for delivery has elapsed.⁹²
- A contract made by a minor must be disclaimed within a reasonable time after attaining majority.⁹³

As would be expected, determining whether a particular interval of time is reasonable depends on the context in which the issue arises and the precise circumstances of the case. Some examples:

- Fifteen to twenty seconds was a reasonable time for officers to wait after knocking and announcing their presence before a forced entry where there was a risk that suspect would dispose of cocaine.⁹⁴
- Six days was not a reasonable time for defendants to obtain trial counsel.⁹⁵
- Eight days was reasonable and twenty days was not a reasonable time for a seller to deliver goods.⁹⁶

89. See *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

90. See *United States v. Banks*, 540 U.S. 31, 37–40 (2003).

91. See *United States v. Irvine*, 511 U.S. 224, 226 (1994).

92. See *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 213 (1931).

93. See *Hegler v. Faulkner*, 153 U.S. 109, 119–20 (1894) (construing a Nebraska statute).

94. See *Banks*, 540 U.S. at 37–40.

95. See *Powell v. Alabama*, 287 U.S. 45, 53–61 (1932) (the so-called “Scottsboro boys” case).

96. See *Chesapeake & O. Ry.*, 283 U.S. at 216.

- Two months after acquiring a remainder interest was a reasonable time for an heir to disclaim the interest to avoid gift tax liability.⁹⁷
- “[O]ne year or so” after attaining majority would be reasonable time for a minor to disclaim a contract.⁹⁸
- Forty-seven years was not a reasonable time for a beneficiary to disclaim a remainder interest in a trust.⁹⁹

Reasonable time for a contempt hearing depends on the nature of the contempt proceeding.¹⁰⁰ In some circumstances, a hearing on the day the contempt occurs is timely.¹⁰¹ In other cases, forty-eight hours might be sufficient.¹⁰² If the defendant intends to raise complex legal issues or if an evidentiary hearing may be required, a five-day notice of the hearing is preferable.¹⁰³

Courts typically provide little, if any, explanation as to why a particular time interval is reasonable or unreasonable. There is no claim of weighing competing considerations. The standard of review is abuse of discretion,¹⁰⁴ and the trial judge is rarely deemed to have exceeded allowable discretion. There is a continuum of time with no signposts for guidance. Determining reasonableness along a continuum of time is simply a judgment call that depends on the context.

II. THE WEIGHING METAPHOR

A second approach articulates a process of weighing various interests or effects, with a balance in favor of

97. See *Cottrell v. C.I.R.*, 628 F.2d 1127, 1129 (8th Cir. 1980).

98. See *Hegler*, 153 U.S. at 119–20.

99. See *United States v. Irvine*, 511 U.S. 224, 235 (1994).

100. See *United States v. O’Day*, 667 F.2d 430, 434 (4th Cir. 1981).

101. See *id.*

102. See *United States v. Martinez*, 686 F.2d 334, 339 (5th Cir. 2013).

103. See *United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir. 2015).

104. See, e.g., *First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992).

positive interests considered reasonable and a balance in favor of negative interests considered unreasonable. Although courts identify such interests and effects, they provide little, if any, guidance as to how they are valuing interests individually or balancing them in the aggregate. The weighing of interests and effects is the articulated process in these contexts: (1) antitrust, (2) search and seizure, and (3) use of excessive force. Before considering each context separately, I first discuss the metaphor itself.

Courts have frequently instructed juries, and appellate courts have frequently instructed trial judges, that determining whether something is reasonable (or unreasonable) requires a process of “weighing” or “balancing” interests or effects. To take a familiar example, when considering whether a restraint of trade is unreasonable in violation of the Sherman Antitrust Act,¹⁰⁵ a fact-finder is to determine “whether [the restraint’s] anti-competitive effects outweigh its pro-competitive effects.”¹⁰⁶

Appellate courts have instructed trial courts, even on questions of law, to weigh or balance relevant factors in other contexts. Examples include *Bivens v. Six Unknown Named Agents*,¹⁰⁷ “weighing of the arguments both for and against the creation of [an implied cause of action] under the Fourth Amendment”;¹⁰⁸ *Hamdi v. Rumsfeld*,¹⁰⁹ determining the process that is due by “weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater

105. 15 U.S.C. § 1 prohibits “[e]very contract . . . in restraint of trade,” but the Supreme Court long ago made it clear that the statute prohibits only an “*unreasonable*” restraint of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1911) (emphasis in original).

106. *Columbia Broad. Sys., Inc. v. ASCAP*, 620 F.2d 930, 934 (2d Cir. 1980).

107. 403 U.S. 388 (1999).

108. *Id.* at 429 (Black, J., dissenting). The Supreme Court later significantly restricted the creation of causes of action deemed implied by the Constitution. See *Bush v. Lucas*, 462 U.S. 367, 373–74 (1983).

109. 542 U.S. 507 (2004).

process”;¹¹⁰ and *Sattazahn v. Pennsylvania*,¹¹¹ deciding whether reprosecution is permissible after a mistrial by “balanc[ing] ‘the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him against the public interest in insuring that justice is meted out to offenders.’”¹¹²

The weighing metaphor is more frequently invoked than analyzed with rigor. A typically vague description of the weighing process is the following description expressed in *In re Insurance Antitrust Litigation*¹¹³ by the Ninth Circuit:

We were to “weigh” and to “balance” the various considerations—the two metaphors indicated that a court should examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved.¹¹⁴

However, the Ninth Circuit did not identify the relevant factors, much less “assign” them “relative importance” or “compare” their “relative importance.”

One shortcoming of this metaphor, occasionally pointed out, is the illusion of precision.¹¹⁵ As Judge Jerome N. Frank wrote in 1950 in *Ford Motor Co. v. Ryan*,¹¹⁶ with respect to weighing or balancing factors relevant to a change of venue decision under 28 U.S.C. § 1404(a):

“Weighing” and “balancing” are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing

110. *Id.* at 529 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

111. 537 U.S. 101 (2003).

112. *Id.* at 120–21 (Ginsburg, J., dissenting) (quoting *United States v. Scott*, 437 U.S. 82, 92 (1978)).

113. 938 F.2d 919 (9th Cir. 1991).

114. *Id.* at 932.

115. However imprecise the process of weighing, it is at least a substantial improvement over the medieval process of favoring the side that produced the greater number of consistent witnesses. See 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 302–03 (3d ed. 1922). That system had precision but no other merit.

116. 182 F.2d 329 (2d Cir. 1950).

machinery is available. Of course it is not. At best, the judge must guess, and we should accept his guess unless it is too wild.¹¹⁷

In *McEvoy v. Spencer*,¹¹⁸ a case presenting the issue of whether “the harmful effects of [an employee’s] expression to the public workspace outweigh its benefits to the speaker-employee,”¹¹⁹ I wrote:

The “weighing” metaphor conveys the appearance of precise quantification of competing interests, while tolerating in practice rather subjective qualitative consideration of the importance of the values at stake.¹²⁰

The Ninth Circuit, endeavoring to “weigh” the significance of a disability plan administrator’s conflict of interest, as instructed by the Supreme Court in *Metropolitan Life Insurance Co. v. Glenn*,¹²¹ commented in *Salomaa v. Honda Long Term Disability Plan*:¹²²

“Weighing” is a metaphor. Real weighing is done with a scale. . . . [I]t is a comforting metaphor for judicial work. . . . Nor is it easy to decide how many metaphorical grams should go on the metaphorical scale when we pretend to weigh conflicts of interest. The misleading precision of the metaphor is indeed a serious concern.¹²³

Justice Scalia once said of balancing: “It is more like judging whether a particular line is longer than a particular rock is heavy.”¹²⁴

Despite its lack of analytical rigor and the defect of creating the illusion of precision, the weighing metaphor continues to be invoked, recently in a major Supreme Court decision. Ruling against the constitutionality of a Louisiana statute requiring a doctor performing an

117. *Id.* at 331–32.

118. 124 F.3d 92 (2d Cir. 1997).

119. *Id.* at 98.

120. *Id.* at 98 n.3.

121. 554 U.S. 105, 115 (2008).

122. 642 F.3d 666 (9th Cir. 2011).

123. *Id.* at 675.

124. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

abortion to have admitting privileges at a nearby hospital,¹²⁵ the Court noted that the district court had correctly “‘weighed the asserted benefits’ of the law ‘against the burdens’ it imposed on abortion access.”¹²⁶

Since weighing is not a process of comparing factors or effects that can be quantified, what are courts expecting will be done when they require relevant factors to be “weighed?” I think courts mean that the *importance* or *significance* of relevant factors or effects is to be compared. That requires two quite different judgments, which are usually not distinguished. The first is determination of the importance or significance of each factor in the abstract. The second is determination of the extent to which the factor has importance or significance in the circumstances of a particular case.

With *related* effects, such as the pro- and anticompetitive effects that flow from the same cause—for example, a restraint of trade—and affect the same subject—for example, competition—the first determination is easy. Everyone would agree that procompetitive effects are more important for an efficient market than anticompetitive effects. The difficult determination is how much of a procompetitive and an anticompetitive effect does a restraint have, or are likely to have, in the particular circumstances in which it functions.

By “how much” I do not contemplate any measurement in precise numerical terms. The assessment of effects necessarily requires a judgment about the degree of the effect, expressed (or at least thought of) in verbal terms of approximation. Is the effect minimal, small, medium, large, or very large?¹²⁷ Once that judgment has been made, the extent of one effect must be compared to the extent of a competing effect. If the effects have different verbally described values, the comparison is easy. If

125. LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2020).

126. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020) (quoting Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016)).

127. Professor Areeda suggested “significant in magnitude” as a verbal way of expressing a very large effect. See PHILLIP AREEDA, THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES 3 (Federal Judicial Center 1981).

the values of the effects are similar, a difficult judgment must be made. In practice, courts purporting to “weigh” competing effects or interests, rarely find the value of the effects to be similar.

With *unrelated* effects, however, even the first determination, assessment in the abstract, is not easy. For example, with respect to the validity of a public employer’s restriction of an employee’s speech, a court is to “balance ‘the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’”¹²⁸ Comparing the importance or significance of such unrelated interests in the abstract requires a judgment that one interest is usually, perhaps always, more important than the other. That is often not an easy task. Assessing the importance or significance of these interests in particular circumstances is also not easy but can be done in a more nuanced way than assessing their importance in the abstract. For example, an employee’s comment could have great public significance if it concerns the reasons to prefer a candidate for President but not as much public significance if it concerns a referendum on trash removal. And workplace efficiency could have great significance if the comment is likely to create a serious disturbance on the factory floor but not much significance if it will only precipitate a heated conversation at the water cooler.

However effects or interests are assessed and then compared, the significant point is that judgments, essentially value judgments, must be made in determining the relative importance of the interests involved, both in the abstract and in the particular circumstances of a case.

Sometimes the weighing metaphor is phrased as a cost-benefit analysis. One example is the Supreme Court’s decision in *Montejo v. Louisiana*.¹²⁹ Justice Scalia wrote, “When this Court creates a prophylactic

128. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

129. 556 U.S. 778 (2009).

rule in order to protect a constitutional right, the relevant ‘reasoning’ is the weighing of the rule’s benefits against its costs.”¹³⁰ The quotation marks around “reasoning” apparently reveal his skepticism that a true process of reasoning was involved. He might also have put the marks around “weighing.” The issue in *Montejo* was whether the Court should reject the rule announced in *Michigan v. Jackson*,¹³¹ “forbidding police to initiate interrogation of a criminal defendants once he has requested counsel at an arraignment or similar proceeding.”¹³² The Court set forth the benefits and costs of the rule and concluded that the costs outweighed the benefits.¹³³ Of course, what the Court really did was express its judgment that the costs were more important than the benefits.

Courts invoking the weighing metaphor would be well advised to acknowledge, at least to themselves, if not the readers of their opinions, how subjective and non-quantitative the process is, and to identify the judgments they are making in assigning even approximate verbal measures of importance to the interests or effects they are purporting to compare. They might even avoid the pretense of “weighing” and more candidly speak of comparing the importance of relevant interests or effects.

A. *Antitrust: Unreasonable Restraint of Trade*

Of the contexts in which the weighing metaphor is enlisted to determine reasonableness, the most familiar is antitrust law. Despite the seemingly absolute language of section one of the Sherman Antitrust Act—“Every contract . . . in restraint of trade . . . is hereby declared to be illegal”¹³⁴—the Supreme Court long ago made clear in *Standard Oil Co. v. United States*¹³⁵ that

130. *Id.* at 793.

131. 475 U.S. 625, 631 (1986).

132. *Montejo*, 556 U.S. at 780–81.

133. *See id.* at 793–97.

134. 15 U.S.C. § 1.

135. 221 U.S. 1, 66 (1911).

“the rule of reason becomes the guide” in applying the statute, although, as the Court explained in *Northern Pacific Ry. Co. v. United States*,¹³⁶ “there are certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” Price-fixing is the classic example of the so-called *per se* violations that do not require inquiry under the rule of reason.¹³⁷

Apart from restraints that are *per se* unreasonable, the reasonableness of a restraint is to be determined by weighing its procompetitive effects against its anticompetitive effects.¹³⁸ The Supreme Court derived the weighing concept for antitrust claims from an early English case, *Mitchel v. Reynolds*.¹³⁹ *Mitchel* concerned a promise by the seller of a bakery that he would not compete with the purchaser of his business.¹⁴⁰ The Supreme Court noted in *Professional Engineers* that the English court had deemed this covenant not to compete reasonable because “[t]he long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—*outweighed* the temporary and limited loss of competition.”¹⁴¹

Since the weighing metaphor entered federal antitrust jurisprudence in *Professional Engineers*, it has been expressed in various similar formulations: “A restraint violates the rule of reason if the restraint’s harm to competition outweighs its procompetitive effects,”¹⁴² “[T]he factfinder must analyze the anti-competitive effects along with any pro-competitive effects to determine

136. 356 U.S. 1, 5 (1958).

137. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 216 (1940).

138. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 689 (1978).

139. 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

140. See *id.* at 347.

141. 435 U.S. at 689 (emphasis added).

142. *Tanaka v. Univ. of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001).

whether the practice is unreasonable on balance,”¹⁴³ and “A rule of reason analysis requires a determination of whether [the restraint’s] anti-competitive effects outweigh its pro-competitive effects.”¹⁴⁴ Sometimes the factors to be weighed are stated in the reverse order: “In the absence of a procompetitive justification that outweighs the likelihood of substantial anticompetitive effects” the agreement violates the Sherman Act.¹⁴⁵

The weighing of pro- and anticompetitive effects not only yields an answer for appellate courts applying law, it is also the task given to juries assessing facts. At either level of decision-making, the task is an elusive one. Although it is easy to determine that procompetitive effects are more beneficial than anticompetitive effects in the abstract, it is far more difficult to determine how much of a procompetitive effect a restraint has (or is likely to have) in the particular circumstances in which it functions versus how much anticompetitive effect it has (or is likely to have). The assessment necessarily first requires a judgment about what the effects the challenged restraint are or are likely to be. To make that judgment, Justice Brandeis advised consideration of

the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.¹⁴⁶

It is one thing to identify these factors. It is quite another to assess their importance, especially their relative importance. Only rarely does an appellate decision explain why the balance in Rule of Reason cases tips in favor of either pro- or anticompetitive effects.¹⁴⁷ In some

143. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

144. *Columbia Broad. Sys.*, 620 F.2d at 934.

145. *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1193 (9th Cir. 2010).

146. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

147. See decisions cited *infra*, notes 152–55.

cases, courts purport to apply a balancing approach to pro- and anticompetitive factors, but in reality emphasize only one set or the other. For example, in *Akanthose Capital Management, LLC v. Atlanticus Holdings Corp.*,¹⁴⁸ the Eleventh Circuit declared that “the [Sherman] Act does not curtail activity that is procompetitive.”¹⁴⁹ In *Hennessey v. NCAA*,¹⁵⁰ the Fifth Circuit, considering an NCAA bylaw limiting the number of assistant football and basketball coaches a college could employ, compared the procompetitive and anticompetitive effects in these words:

The court is . . . of the view admittedly bordering on speculation that the Bylaw will be of value in achieving the ends sought by the association and will have in time lesser, not greater, adverse effect upon assistant coaches than that already experienced.¹⁵¹

The court was candid, but there was not even an attempt to quantify, even in generalized verbal terms, the extent or importance of the pro- and anticompetitive effects thought likely to occur.

Occasionally, courts using the weighing metaphor in antitrust cases identify the relevant factors. In *Law v. NCAA*,¹⁵² the Tenth Circuit, considering a limitation on coaches’ salaries, identified and discussed three allegedly procompetitive factors before concluding that the evidence was insufficient to make a triable issue of any of them.¹⁵³ In *California Dental Ass’n v. F.T.C.*,¹⁵⁴ the Ninth Circuit, considering a dentists’ association’s limitation on advertising, identified four procompetitive effects and concluded, rather summarily, that they outweighed an alleged, but unsupported, anticompetitive effect.¹⁵⁵

148. 734 F.3d 1269 (11th Cir. 2013).

149. *Id.* at 1277.

150. 564 F.2d 1136 (5th Cir. 1977).

151. *Id.* at 1153.

152. 134 F.3d 1010 (10th Cir. 1998).

153. *See id.* at 1021–24.

154. 224 F.3d 942 (9th Cir. 2000).

155. *Id.* at 957–59.

Some have viewed with despair what passes for Rule of Reason analysis. Professor Turner has commented that The Rule of Reason approach “suffers from several problems—vagueness, unpredictability, high costs of litigation, and difficulties in obtaining facts.”¹⁵⁶ Judge Easterbrook has written, “When everything is relevant, nothing is dispositive Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.”¹⁵⁷

So a weighing of pro- and anticompetitive effects is supposed to determine whether a restraint of trade is unreasonable and therefore an antitrust violation, but in practice appellate courts say very little as to how that weighing is to be done, and trial courts submit the task to a jury with little, if any, guidance. The reasonableness of the restraint is easily determined if there are only procompetitive effects or only anticompetitive effects, but where both are present, the “weighing” process is never explained to a jury, and when appellate courts perform the task, their explanation is limited at best. For them, an unreasonable restraint seems to be one that they considered undesirable as a matter of economics. In the antitrust context, the weighing metaphor gives reasonableness and unreasonableness the illusion of meaningful analysis.

Rather than claim that anticompetitive effects have determinable values whose aggregate can be compared to the aggregate of the determinable values of procompetitive effects, courts should candidly explain *why* one or more anticompetitive effects either are or are not more harmful to competition than the procompetitive effects of the challenged restraint.

156. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 800 (1987).

157. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984).

B. Unreasonable Searches and Seizures

A second context in which the weighing metaphor is invoked to determine reasonableness is searches and seizures. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁵⁸

These words present a host of interpretation issues. Among them are whether warrants are required for all or only some searches and seizures, whether probable cause is required for searches and seizures for which warrants are not required, whether a public official is liable for damages for violating the Amendment, whether such an official has immunity from damages for actions taken with a good faith belief in lawfulness, and whether the official's employer is liable for such a violation. Professor Amar has analyzed whether the Amendment does or should provide answers to these issues.¹⁵⁹ My focus here is more limited. I propose to explore only the Amendment's use of the word "unreasonable."

Furthermore, I am not concerned with what the Amendment meant by "unreasonable" when it was adopted. Professor Davies has argued, persuasively in my view, that the drafters of the Amendment understood "searches and seizures" to be "unreasonable" when they were carried out pursuant to a general warrant.¹⁶⁰ Whether or not the Supreme Court should have moved away from this original understanding and shifted to using "unreasonable" as a general concept for evaluating the lawfulness of searches and seizures, it has been doing

158. U.S. Const. amend. IV.

159. See Akil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

160. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

so for decades, indeed, calling “reasonableness” “[t]he general touchstone” that “governs Fourth Amendment analysis.”¹⁶¹ My concern is what the term means in its modern application to all searches and seizures.

The Supreme Court has acknowledged that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”¹⁶² The Court has often said that whether a search or a seizure of a person is reasonable depends on an evaluation of “all the circumstances.”¹⁶³ That observation, however, provides no guidance as to what analysis is to be made of the relevant circumstances to determine reasonableness.

Professor Clancy has noted five different modes of analysis that the Court has used to determining whether a search is reasonable:

[T]he reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court’s view of what constitutes a reasonable search or seizure. The Court chooses from at least five principal models to measure reasonableness: the warrant preference model, the individualized suspicion model, the totality of the circumstances test, the balancing test, and a hybrid model that gives dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, in any situation the Court may choose whichever model it sees fit to apply.¹⁶⁴

For purposes of my inquiry, two models of what purports to be “analysis” of “reasonableness” are worth

161. *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (“The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”).

162. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

163. *See, e.g., United States v. Knights*, 534 U.S. 112, 113 (2001); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

164. Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (2004).

considering: weighing interests and developing special rules.

As the Supreme Court has said, “The test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”¹⁶⁵ In slightly different words, the Court has said that reasonableness of a search “is determined by weighing ‘the promotion of legitimate governmental interests’ against ‘the degree to which [the search] intrudes upon an individual’s privacy.’”¹⁶⁶ Thus, the weighing metaphor is now firmly part of any determination of whether a search is reasonable.

However, unlike the weighing of pro- and anticompetitive effects that determines whether restraints of trade are reasonable, the factors weighed to determine whether a search is reasonable—government need and privacy rights—bear no relation to each other. Nevertheless, they can be assessed in verbal terms, though not quantified precisely. On the government side, the need for a search can be considered along a continuum from slight to vital. The need to locate a stolen check is surely slight compared to the need to locate a gun, which is less vital than the need to locate a ticking bomb. And invasion of privacy rights can also be considered along a continuum from minor to serious. Searching a lunchbox, unlikely to have highly personal materials, is a minor invasion of privacy rights compared to searching a filing cabinet, likely to have private papers, which is a less serious invasion of privacy than searching a person’s body cavities. Wherever on these continuums one would place the public and private interests involved in a particular search, the issue on which the Supreme Court has given no guidance is how interests on these separate continuums are to be weighed against each other.

Sometimes the Supreme Court explicitly states that it has weighed (or balanced) state and privacy interests

165. *Bell*, 441 U.S. at 559; *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

166. *Maryland v. King*, 569 U.S. 435, 436 (2013) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

in determining the reasonableness of a search. In *Winston v. Lee*,¹⁶⁷ the Court ruled unreasonable a proposed operation on a suspect under a general anesthetic to remove a bullet, stating that it was applying a “balancing test.”¹⁶⁸ The intrusion on privacy interests was deemed “severe.”¹⁶⁹

*Michigan v. Summers*¹⁷⁰ provides an example of the Supreme Court explicitly identifying the factors to be weighed but then only implicitly comparing them. *Summers* involved the seizure of a person on the steps of a residence for which officers had a search warrant.¹⁷¹ Reducing the seriousness of the intrusion were the facts that the police already had a warrant authorizing the major intrusion of searching the home, homeowners were likely to want to remain on the premises while the search was being conducted, and the detention was unlikely to increase the stigma beyond that resulting from a police search itself.¹⁷² The public interests identified were preventing flight, minimizing danger to the police officers, avoiding destruction of evidence, and having the homeowner present to unlock doors and containers.¹⁷³ The Court did not explicitly state that the public interests outweighed the privacy intrusion, but upholding the temporary seizure of the occupant implied its reasonableness, and the Court described prior, somewhat similar, cases as examples where law enforcement interests “justified” a limited intrusion on privacy.¹⁷⁴ Perhaps “justified” is another way of saying “outweighed.”

In *Cupp v. Murphy*,¹⁷⁵ the police, without a warrant, scraped the fingernails of a suspect lawfully detained for questioning.¹⁷⁶ The Supreme Court noted that the

167. 470 U.S. 753 (1985).

168. *Id.* at 763.

169. *Id.* at 766.

170. 452 U.S. 692 (1981).

171. *See id.* at 693.

172. *See id.* at 701–02.

173. *See id.* at 702.

174. *See id.* at 699–701.

175. 412 U.S. 291 (1973).

176. *See id.* at 292.

intrusion of privacy was “very limited,” the state had an interest (not characterized as to degree) in avoiding the destruction of evidence, and probable cause to arrest existed, although no arrest had been made.¹⁷⁷ The last factor does not appear to be a state interest, but was nonetheless thought to be relevant to an assessment of reasonableness.

In somewhat similar fashion, in *Schmerber v. California*,¹⁷⁸ the Court upheld the taking of a blood sample from a person lawfully arrested for drunk driving.¹⁷⁹ The obvious state interest was avoiding the alcohol content of the blood diminishing in the time needed to obtain a warrant.¹⁸⁰ The privacy invasion was not characterized as to degree, although the Court noted that the quantity of blood extracted was “minimal” and that for most people the procedure, performed in a hospital, involves “virtually no risk, trauma, or pain.”¹⁸¹ The Court did not explicitly state that the state interest outweighed the privacy interest, but later characterized *Schmerber* as a case where the competing interests were “[w]eighed.”¹⁸²

Although the Fourth Amendment’s text requires probable cause for the issuance of a search warrant and for most limited searches permitted without a warrant,¹⁸³ the Supreme Court has acknowledged that the weighing process can sometimes ignore probable cause: “Where a careful balancing of government and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.”¹⁸⁴ A familiar example is the so-called *Terry* stop—briefly detaining a person on the street when a police officer can “point to specific and

177. *See id.* at 296.

178. 384 U.S. 757 (1966).

179. *See id.* at 758–59.

180. *See id.* at 770–71.

181. *Id.* at 771.

182. *Winston v. Lee*, 470 U.S. 753, 762 (1985).

183. *See, e.g., United States v. Santana*, 427 U.S. 38, 42 (1976).

184. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

articulable facts” that “*reasonably* warrant that intrusion.”¹⁸⁵ The circularity of determining that a stop is “reasonable” when it is “reasonably” warranted apparently escaped the Court’s attention. The same circularity is evident when the Court considered the reasonableness of a search incident to a *Terry* stop: “Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a *reasonable* search for weapons for the protection of the police officer.”¹⁸⁶

Perhaps implicitly recognizing that the weighing metaphor often just *reflects* a result, rather than *yields* one, the Supreme Court has formulated rules, applicable in particular types of cases, that bring some certainty to the determination of whether a search is reasonable.¹⁸⁷ “*Except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.*”¹⁸⁸ It is beyond the scope of this inquiry to canvass all the rules the Court has developed for determining the reasonable of searches, but a few examples are worth noting.

One rule is that “searches and seizures inside a home without a warrant are presumptively unreasonable.”¹⁸⁹ Another is that a search without a warrant is reasonable under exigent circumstances. Examples are hot pursuit of a fleeing felon,¹⁹⁰ anticipated destruction of evidence,¹⁹¹ and emergencies, such as an ongoing fire.¹⁹² Also, a warrantless search of a lawfully arrested person and the area within his immediate control is

185. *Terry v. Ohio*, 392, U.S. 1, 21 (1968) (emphasis added).

186. *Id.* at 27 (emphasis added).

187. To the extent that the Court has formulated these rules, it has shifted the analysis of reasonableness in the context of search and seizure away from the use of the weighing metaphor and into the approach of using one or more specific factors, discussed in III, *infra*.

188. *Camara v. Municipal Court*, 87 U.S. 523, 528–29 (1967) (emphasis added).

189. *Payton v. New York*, 445 U.S. 573, 586 (1980).

190. *See United States v. Santana*, 427 U.S. 38, 42–43 (1976).

191. *See Schmerber v. California*, 384 U.S. 757, 770–71 (1966).

192. *See Michigan v. Tyler*, 436 U.S. 499, 511 (1978).

reasonable.¹⁹³ Equally familiar is the rule that a seizure of items in plain view is reasonable if their incriminating nature is immediately apparent and the officers have lawful access to the premises.¹⁹⁴

The location of the seized item may sometimes make a search for it and its seizure reasonable; the most familiar example is the so-called “automobile exception” to the warrant requirement as long as probable cause exists to believe the vehicle contains the item.¹⁹⁵

The Supreme Court has also deemed a search reasonable simply because it occurs near an international border: “That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.”¹⁹⁶

What can be concluded about “reasonableness” in the context of searches and seizures? First, the concept is frequently invoked, which is not surprising since it appears in the text of the Fourth Amendment. Second, the weighing process is often invoked, the interests on both sides of the “scale” are sometimes identified, but the process by which the Supreme Court determines whether one set of interests outweighs the other is unexplained, being apparently a matter of a value judgment. Third, the weighing process is supplemented, and in some contexts entirely replaced, by specific rules that determine reasonableness in certain classes of cases.

C. Use of Unreasonable Force in Making Arrests

A third context in which the weighing metaphor is enlisted to determine reasonableness is assessing claims

193. See *Arizona v. Gant*, 556 U.S. 332, 335 (2009); *Chimel v. California*, 395 U.S. 752, 763 (1969).

194. See *Horton v. California*, 496 U.S. 128 (1990).

195. See *California v. Acevedo*, 500 U.S. 565, 569–70 (1991); *Carroll v. United States*, 267 U.S. 132, 149 (1925).

196. *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

that a government officer used excessive force during an arrest or an investigatory stop. The Supreme Court has ruled that such actions are “seizures” of the person within the meaning of the Fourth Amendment and as such are “properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard.”¹⁹⁷ In *Graham*, the Court rejected the contention that excessive force claims in the law enforcement context should be analyzed under the more amorphous substantive due process standard of the Fourteenth Amendment.¹⁹⁸

Instead, applying the reasonableness standard of the Fourth Amendment to the claim that excessive force had been used in the course of making an investigatory stop, the Court invoked its Fourth Amendment jurisprudence, stating that it had to “balanc[e] . . . ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”¹⁹⁹ This balancing, the

197. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

198. *See id.* In the context of harm inflicted on prisoners, the Supreme Court has ruled that claims of excessive force are to be analyzed under the Eighth Amendment’s prohibition of cruel and unusual punishments. *See Whitley v. Albers*, 475 U.S. 312, 318–26 (1986). Unlike the context of force used to initiate the law enforcement process by an arrest, “the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment,” *Graham*, 490 U.S. at 398, a proposition previously announced in *Whitley*, 475 U.S. at 320–21.

The substantive due process standard is still available for excessive force claims that do not involve either initiation of the criminal process or punishment of sentenced prisoners. Examples are force used against a pretrial detainee, *see Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002), an inmate awaiting sentencing, *see Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009), or a student, *see Golden ex rel. Balch v. Anders*, 324 F.3d 650, 652 (8th Cir. 2003).

199. *Graham*, 490 U.S. at 396 (quoting *Terry v. Ohio*, 392 U.S. 1, 8 (1968), which quoted *United States v. Place*, 462 U.S. 696, 703 (1983)). When the Court later described the government interests to be balanced in *Tennessee v. Garner*, 471 U.S. 1 (1964), it abandoned the phrase “the countervailing governmental interests at stake,” which it had used in *Graham*, 490 U.S. at 396, and used the phrase “the importance of the governmental interests alleged to justify the intrusion,” which it quoted from *United States v. Place*, 462 U.S. 696, 703 (1983). *See Garner*, 471 U.S. at 8. Focusing on the *importance* of the governmental interests was useful. *Graham* itself shed no light on how the balancing process would yield an answer to the reasonableness inquiry on the facts of that case because the Court remanded to permit the Court of Appeals to reconsider its decision without regard to the officer’s motivation. *See Graham*, 490 U.S. at 398-

Court noted, “requires careful attention to the facts and circumstances of each particular case.”²⁰⁰ The Court identified three factors in particular: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”²⁰¹ And, the Court added, “[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”²⁰² The Court also made clear that the standard is one of objective reasonableness, and the officer’s state of mind, whether evil or benign, is not relevant.²⁰³ Then, as often happens when courts try to explain a standard of reasonableness, the Court circularly explained, “The ‘reasonableness’ of the amount of force used “must be judged from the perspective of a reasonable officer.”²⁰⁴

The one case in which the Supreme Court purported to apply balancing to a claim of excessive force in a law enforcement context is *Garner v. Tennessee*.²⁰⁵ Police, endeavoring to stop an unarmed suspect feeling from a

99. That court had directed a verdict for the officers, erroneously relying in part on the fact that they had not acted with malice. *See Graham v. City of Charlotte*, 827 F.2d 945, 948–49 (4th Cir. 1987).

200. *Graham*, 490 U.S. at 396.

201. *Id.*

202. *Id.* at 396–97. The Court subsequently amplified this point, noting that “[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.” *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

203. *See Graham*, 490 U.S. at 397. Previously, in *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998), the Court had ruled that officers must have an intent to harm before a seizure (through a high-speed chase) is an unreasonable seizure.

204. *Graham*, 490 U.S. at 396.

205. 471 U.S. 1, 7–8 (1985). The Court’s recent decisions on excessive force in the context of the qualified immunity defense, did not purport to “weigh” or “balance” competing interests. *See Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *White v. Pauly*, 137 S. Ct. 548 (2018); *Mullenix v. Luna*, 577 U.S. 7 (2015). *See text at pp. 47–57, infra.*

burglary, shot and killed him.²⁰⁶ As with Fourth Amendment balancing in search cases, the Court articulated individual and government interests, but appeared to “balance” them, not by comparing their “weight” or importance but essentially by simply making value judgments.²⁰⁷

The Court began by noting that “the suspect’s fundamental interest in his own life need not be elaborated upon.”²⁰⁸ Although that individual interest was plainly very important, the Court did not indicate how important would be the interest in not suffering a serious non-fatal injury inflicted, for example, by a bullet. The governmental interest identified was “effective law enforcement,”²⁰⁹ which included the goals of reducing violence by encouraging peaceful submission of subjects who know they may be shot if they flee and making arrests to start law enforcement process.²¹⁰ The Court also identified an interest on both sides of the balance: the use of deadly force was said to “frustrate the interest of the individual, and of society, in judicial determination of guilt and punishment.”²¹¹

Having identified these interests, the Court then said only that it was “not convinced that the use of deadly force is a sufficiently productive means of accomplishing [them] to justify the killing of nonviolent suspects.”²¹² The Court relied on data showing that a majority of police departments forbid use of deadly force against nonviolent suspects.²¹³ Ultimately, the Court simply concluded that the parties favoring use of deadly force “have not persuaded us that shooting nondangerous fleeing

206. *Garner*, 471 U.S. at 3–4.

207. *Id.* at 9.

208. *Id.*

209. *Id.*

210. *See id.* at 9–10.

211. *Id.* at 9.

212. *Id.* at 10.

213. *See id.* at 10–11.

suspects is so vital as to outweigh the suspect's interest in his own life."²¹⁴

Use of force that inflicts injury in the law enforcement context thus appears to be unreasonable when the Supreme Court deems the alleged government interest not sufficiently important to justify the individual's injury.

The Courts of Appeals have had to apply the balancing process in the more typical context of police efforts to subdue a suspect being arrested, rather than to stop the suspect's flight. These cases involve a claim of police brutality. The suspect's interest remains avoiding injury. The government interest is obviously to bring the suspect into custody. How are these interests weighed?

Not surprisingly, the Courts of Appeals, although having been instructed to invoke the weighing metaphor in police brutality cases, have not really weighed or even compared the competing interests. One court understood its assignment in these words:

In order to establish that the use of force to effect an arrest was unreasonable and therefore a violation of the Fourth Amendment, plaintiffs must establish that the government interests at stake were outweighed by "the nature and quality of the intrusion on [plaintiffs'] Fourth Amendment interests." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In other words, the factfinder must determine whether, in light of the totality of the circumstances faced by the arresting officer, the amount of force used was objectively reasonable at the time.²¹⁵

The court replaced the weighing of relevant interests with a tautological inquiry into "objective[] reasonable[ness]."

In reality, it does not make sense to talk about weighing the interests of the suspect and the government. The suspect always has an interest in not being injured. The government always has an interest in

214. *Id.* at 11.

215. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 123 (2d Cir. 2004) (citation abbreviated).

bringing the suspect into custody. What should matter is the amount of force needed to accomplish that objective. Thus the issue of unreasonable or excessive force in subduing a suspect should turn on the straightforward question: whenever the suspect has suffered an injury, could some lesser amount of force have been used to bring the suspect into custody, with some allowance for the fact that the officer must decide on the spot how much force is needed to subdue the suspect? If less force would have sufficed, the force used was excessive and therefore unreasonable in violation of the Fourth Amendment.

III. REASONABLENESS ANALYSIS GUIDED BY ONE STANDARD OR ONE OR MORE FACTORS

In a third approach, courts articulate one standard, or one or more factors, that are relevant to the determination of reasonableness and provide some guidance as to how the standard or factors are to be applied. One standard has been identified to determine reasonableness with respect to (1) effective assistance of counsel, one factor has been identified to determine reasonableness with respect to (2) qualified immunity, and several factors have been identified as relevant to reasonableness in the determination of (3) personal jurisdiction over out-of-state defendants.

A. *Reasonably Effective Assistance of Counsel*

In the category of approaches where courts identify one standard, or one or more factors, to determine reasonableness, I turn first to the context of effective assistance of counsel.

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”²¹⁶ And this right means “the right to the *effective* assistance of counsel.”²¹⁷ In two ways, reasonableness is embedded in determining when counsel’s performance renders a conviction unconstitutional. The first concerns whether counsel’s performance was not constitutionally “effective.” The Supreme Court has explained that “the proper standard for attorney performance is that of *reasonably effective* assistance.”²¹⁸ The second concerns the prejudice necessary to render ineffective assistance of counsel a basis for invalidating a conviction. Except in those

216. U.S. CONST. amend. VI.

217. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

218. *Strickland*, 466 U.S. at 687 (emphasis added).

situations where prejudice is presumed,²¹⁹ the Court has explained that “[t]he defendant must show that there is a *reasonable* probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²²⁰

With respect to whether counsel’s performance was reasonably effective, the Court has provided considerable meaning to “reasonableness”: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms,”²²¹ and “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.”²²²

The Court has provided a framework for making the determination of reasonable attorney performance:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.²²³

219. Examples of presumed prejudice are “[a]ctual or constructive denial of the assistance of counsel altogether” and “various kinds of state interference with counsel’s assistance,” *Id.* at 692 (citing *United States v. Cronin*, 466 U.S. 648, 659 & n.25 (1984)), and “when counsel is burdened by an actual conflict of interest,” *id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (2003)).

220. *Strickland*, 466 U.S. at 694 (emphasis added).

221. *Id.* at 688.

222. *Id.*

223. *Id.* at 690. Illustrating a deficient performance, the Court has said, “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential

With respect to a showing of prejudice, however, the Court's explanation is not especially helpful: "A reasonable probability [that the outcome would have been different] is a probability sufficient to undermine confidence in the outcome."²²⁴

As in some other contexts, it is possible that the meaning of "reasonable" with respect to effective assistance of counsel implicitly reflects a balance of interests—in this instance, between the interest of government in the finality of convictions and the interest of a defendant in enjoying a right to counsel—but the Supreme Court has not explicitly referred to such a balance and has given no indication of implicitly "weighing" competing interests. Effective assistance of counsel is a context where a single standard—"prevailing professional norms"—helpfully provides some meaning to the reasonableness inquiry.

B. *Qualified Immunity: Reasonable Belief in Lawfulness of Action*

A second context in which courts have identified one standard or factor to determine reasonableness is qualified immunity.

The defense of qualified immunity is available to a public official sued for damages for violation of a person's constitutional rights. The defense initially turned primarily on the concept of reasonableness. In some contexts, as discussed *infra*, the defense involved the concept of reasonableness twice, arguably with two different meanings. The suit is authorized by 42 U.S.C. § 1983, which provides that a state (or local) official is liable for "the deprivation of any rights, privileges, or immunities secured by the Constitution." The words of the statute contain no special defense. Under its terms, the sole

example of unreasonable performance under *Strickland*." Hinton v. Alabama, 571 U.S. 263, 274 (2014).

224. *Id.* at 694.

issue is whether the officer denied a person a constitutional right.

Nevertheless, the Supreme Court long ago ruled that public officers had two kinds of defenses—absolute or qualified immunity—depending on the type of office they hold. In 1871, the Court ruled in *Bradley v. Fisher*²²⁵ that judges had absolute immunity, relying on the practice “in all countries where there is any well-ordered system of jurisprudence” and “the settled doctrine of the English courts for many centuries.”²²⁶ *Bradley* rejected dictum in *Randall v. Brigham*,²²⁷ which had suggested that a judge might be liable for actions taken maliciously.²²⁸ Absolute immunity was later accorded to legislators in *Tenney v. Brandhove*,²²⁹ and to prosecutors in *Imbler v. Pachtman*.²³⁰

For officials not deemed entitled to absolute immunity, such as police officers, the Supreme Court read into section 1983 the defense of qualified immunity.²³¹ The Court first used the phrase “qualified immunity” in *Scheuer v. Rhodes*²³² in 1974, a rather late development considering that section 1983 was enacted in 1871.²³³ *Scheuer* was a suit seeking damages from a governor and other state officials for the 1970 shooting deaths at Kent

225. 80 U.S. 335 (13 Wall.) (1871) (W.H. & O.H. Morrison 1872). I include the publisher and date of publication of all cases in the nominative reports because of stylistic variations among the versions of different publishers. See generally Jon O. Newman, *Citators Beware: Stylistic Variations in Different Publishers' Versions of Early Supreme Court Opinions*, 26 J. SUP. CT. HIST., No. 1 (July 2001).

226. *Bradley*, 80 U.S. at 347.

227. 74 U.S. (7 Wall.) 523, 526 (1868) (W.H. & O. H. Morrison 1870).

228. See *Bradley*, 80 U.S. at 351.

229. 341 U.S. 367, 377–79 (1951).

230. 424 U.S. 409, 421–28 (1976). To whatever extent *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896), could be read to extend absolute immunity to heads of federal executive departments, that arguable implication was rejected in *Butz v. Economou*, 438 U.S. 478, 492–94 (1978).

231. *Scheuer v. Rhodes*, 416 U.S. 232, 247.

232. *Id.* at 248.

233. See Act of April 20, 1871, c. 22, §§ 1, 2, 17 Stat. 13. I should point out that only in 1961 did the Supreme Court first rule that public officers were not insulated from liability under section 1983 just because state law rendered their actions unlawful. See *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

State University.²³⁴ Interestingly, the Court articulated the defense, not to give the defendants protection, but to make sure they were *not* insulated from liability by the absolute immunity available to judges and legislators.²³⁵ Section 1983 “would be drained of meaning were we to hold that the acts of a governor or other high executive officer have the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the United States.”²³⁶

The Supreme Court’s first decision providing police officers with the defense that it had called “qualified immunity” in *Scheuer* was *Pierson v. Ray*.²³⁷ The Court relied on the availability of the defense at common law in actions for false arrest, together with the statement in *Monroe v. Pape*²³⁸ that section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”²³⁹ Although *Monroe* had drawn from the common law a basis to *impose* liability on a public official, *Pierson* drew from the common law a *defense* to liability. In *Pierson*, the Court, following the common law, said that the defense to a section 1983 claim would be available where a police officer had probable cause for an arrest and acted in good faith.²⁴⁰

Pierson was the first case to introduce into the qualified immunity defense the concept of the officer’s *reasonable* belief in the lawfulness of his action.²⁴¹ The Court ruled that an officer should be “excus[ed] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its

234. *Scheuer*, 416 U.S. at 234.

235. *See id.* at 248.

236. *Id.* (internal quotation marks omitted).

237. 386 U.S. 547, 557 (1967).

238. 365 U.S. 167 (1961).

239. *Id.* at 187.

240. 386 U.S. at 557.

241. *See id.* at 555.

face or as applied.”²⁴² Later, in *Malley v. Briggs*,²⁴³ the Court said that the officer’s belief that his actions were lawful would be reasonable if “officers of reasonable competence could disagree” on the legality of the action at issue in its particular factual context.²⁴⁴ *Pierson* also introduced into the defense the officer’s good faith. The Court accorded qualified immunity “if the jury found that the officers reasonably believed in good faith that the arrest was constitutional.”²⁴⁵ The Court again made good faith an element of the qualified immunity defense in *Wood v. Strickland*.²⁴⁶

When the Court endeavored to describe the content of a qualified immunity defense, it provided a refinement to what it had said in *Pierson*. In that case the Court had said that the police officers were entitled to immunity if they reasonably believed the statute they were enforcing was constitutional.²⁴⁷ In *Scheuer*, the Court generalized this thought beyond the context of a reasonable belief concerning the constitutional validity of the applicable *statute* to a reasonable belief in the constitutional validity of the officers’ *action*.²⁴⁸

Where a police officer is sued for an alleged violation of the right not to be subjected to an unreasonable search or seizure, making the qualified immunity defense turn on an objectively reasonable belief in the lawfulness of the challenged action creates a doctrine of apparent circularity. The apparent circularity arises from the fact that reasonableness is a component of both the lawfulness of the challenged action and the defense to the claim of unlawful action. An arrest is unlawful if the officer lacked probable cause, *i.e.*, an objectively reasonable officer would not believe that the suspect had committed a crime. But, even without such a belief, the officer has a

242. *Id.*

243. 475 U.S. 335 (1986).

244. *Id.* at 341.

245. 386 U.S. at 557.

246. 420 U.S. 308, 318 (1975).

247. 386 U.S. at 557.

248. 416 U.S. at 247–48.

qualified immunity defense if he reasonably believed his action was lawful. It is not readily apparent how an officer can have an objectively reasonable belief that an arrest is lawful where an objectively reasonable officer would not believe that probable cause existed.

Shortly after *Pierson* introduced the concept of reasonableness as the principal component of the qualified immunity defense, Judge Lumbard endeavored to dispel the apparent circularity of the defense as applied to claims of unlawful arrests or searches.²⁴⁹ The case concerned claims against federal officers for allegedly unlawful actions.²⁵⁰ Although these claims were based directly on provisions of the Constitution (so-called *Bivens* claims), the Second Circuit ruled that the qualified immunity defense, available to state officers, would be available to federal officers.²⁵¹

Concurring in that ruling, Judge Lumbard wrote that “there are two standards to be considered” in applying the qualified immunity defense to conduct alleged to constitute an unlawful arrest or search:

The first is what constitutes reasonableness for purposes of defining probable cause under the fourth amendment for the protection of citizens against governmental overreaching. The other standard is the less stringent reasonable man standard of the tort action against government agents. This second and lesser standard is appropriate because, in many cases, federal officers cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves. It would be contrary to the public interest if federal officers were held to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently the law ought to, and does, protect government agents if they act in good faith and with a

249. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972) (Lumbard, J., concurring), *on remand from the Supreme Court*, 403 U.S. 388 (1971).

250. See *id.* at 1342.

251. See *id.* at 1347.

reasonable belief in the validity of the arrest and search.²⁵²

I have argued elsewhere that “it is unrealistic to suppose that . . . juries . . . will possibly grasp the distinction” between the two standards Judge Lumbard identified.²⁵³ After presiding at the trial of a large number of police misconduct cases as a district judge, I concluded that jurors, hearing two standards of reasonableness, would focus only on the officer’s good faith, a concept they can readily understand, in deciding whether to uphold the defense of qualified immunity.²⁵⁴ Indeed, a study of responses to a questionnaire I authorized to be sent to jurors who had served in a number of police misconduct cases revealed that they had little, if any, understanding of the qualified immunity defense at all.²⁵⁵ I have found no decision explicitly considering Judge Lumbard’s second reasonableness inquiry as to whether, under “a less stringent standard” of tort law, the officer was objectively reasonable in thinking that his actions were lawful.

The 1975 decision in *Wood v. Strickland*, although continuing a reference to an officer’s reasonable belief in good faith that the action taken was lawful, added what would become an increasingly important, and ultimately critical, element of the qualified immunity defense by stating that an officer would have qualified immunity for unlawful action unless the right allegedly violated has been “clearly established” prior to his action: “A compensatory award will be appropriate only if the [official] has acted . . . with such disregard of the [plaintiff’s] *clearly established* constitutional rights that his action cannot reasonably be characterized as being in good faith.”²⁵⁶

252. *Id.* at 1348–49.

253. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Action*, 87 YALE L.J. 447, 461 (1978).

254. *See id.*

255. *See generally* Note, *Suing the Police in Federal Court*, 88 YALE L. J. 781 (1979).

256. *Wood v. Strickland*, 420 U.S. 308, 322 ((1975) emphasis added).

Later, in *Harlow v. Fitzgerald*,²⁵⁷ the Court appeared to diminish, if not eliminate, the significance of the accused official's subjective good faith, which it had introduced in *Pierson*.²⁵⁸ Fearing that "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery" that would be "disruptive of effective government,"²⁵⁹ the Court ruled instead, echoing *Wood*, that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."²⁶⁰ Thus, the prior reference in *Wood* to "clearly established" rights became in *Harlow* the key determinant of whether the defense of qualified immunity was available.

Harlow not only emphasized the importance of the concept of clearly established rights for the qualified immunity defense but also began a progression of decisions broadening the defense by making more rigorous the tests for determining whether the right claimed to have been violated was clearly established. The progression developed along two dimensions: *who* had to be aware that the right was clearly established and *how similar* the facts of a case had to be to those in previously decided cases.

With respect to *who* had the requisite awareness, *Harlow* in 1982 referred to clearly established rights of which *a* reasonable person would have known.²⁶¹ In *Anderson v. Creighton*²⁶² in 1987, the Court also referred to "*a* reasonable officer"²⁶³ and seems to have made the

257. 457 U.S. 800 (1982).

258. 386 U.S. at 557.

259. *Harlow*, 457 U.S. at 817.

260. *Id.* at 818.

261. *Id.* (emphasis added).

262. 483 U.S. 635, 641 (1987) (emphasis added).

263. *Id.* at 641 (emphasis added). The year before, the Court had said the question was "whether a reasonably well-trained officer in petitioner's position *would* have known that his affidavit failed to establish probable cause." *Malley v. Biggs*, 475 U.S. 335, 345 (1986) (emphasis added). Although Justice Scalia's opinion in *Anderson* cited *Malley* at page 344–45 for the "could have" formulation,

quality immunity defense somewhat easier to establish by saying that the question was “whether a reasonable officer *could have* believed [the officer’s] warrantless search comported with the Fourth Amendment.”²⁶⁴ *Anderson* also made clear that the test of whether a reasonable person would have believed his action was lawful, *i.e.*, did not violate a clearly established right of which a reasonable person was aware, was an objective one: “Anderson’s subjective beliefs about the search are irrelevant.”²⁶⁵

Then, in 2011 in *Ashcroft v. al-Kidd*,²⁶⁶ the Court made the defense even easier for police officers to establish by stating, “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.”²⁶⁷ Similarly, in 2014 in *Plumhoff v. Rickard*,²⁶⁸ the Court referred to the understanding of “*any* reasonable official in the defendant’s shoes.”²⁶⁹

With respect to how similar the facts of the case have to be compared to those of a previous case, the Court has explained that determining whether the right allegedly violated has been clearly established depends on what the Court has called the “level of generality” at which the

Anderson, 483 U.S. at 638–39, those words appear only in the separate opinion of Justice Powell, *Malley*, 475 U.S. at 350 (Powell, J., with whom Rehnquist, J., joins, concurring in part and dissenting in part).

264. *Anderson*, 483 U.S. at 641 (emphasis added). Although *Anderson* seems to have made the qualified immunity defense slightly easier to establish by changing the words “would have known,” used in *Harlow*, 437 U.S. at 818, to the words “could have believed,” used in *Anderson*, 483 U.S. at 637, the Court later reverted to the words “would have understood” in *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), and *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). It is not clear whether changing from “would” to “could” and back to “would” was deliberate.

265. *Anderson*, 483 U.S. at 637.

266. 563 U.S. 731 (2011) (emphasis added) (brackets in original) (internal quotation marks omitted). In *al-Kidd*, the Court also said that “existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* at 741.

267. *Id.*

268. 572 U.S. 765 (2014).

269. *Id.* at 779 (emphasis added).

right is described,²⁷⁰ a phrase first used in the context of the qualified immunity defense in *Anderson*.²⁷¹ Applying the phrase, the Court said in *al-Kidd*, “The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.”²⁷²

As to how “particular” the conduct had to be compared to previous cases, in *Anderson*, the Court first disclaimed precluding the qualified immunity defense “unless the very action in question has previously been held unlawful.”²⁷³ And in *Hope v. Pelzer*,²⁷⁴ the Court, reversing a Court of Appeals that had rejected a qualified immunity defense, again made it clear that it was not precluding the defense “unless the very action in question has previously been held unlawful.”²⁷⁵ Similarly, the Court later said in *al-Kidd*, “We do not require a case directly on point.”²⁷⁶ However, in an indication of what was to come, the Court added, “At the time of *al-Kidd*’s arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional.”²⁷⁷

Then, in *Mullenix v. Luna*,²⁷⁸ the Court said that “the correct inquiry” was “whether it was clearly established that the Fourth Amendment prohibited the officer’s conduct in the ‘situation [she] confronted.’”²⁷⁹

270. The Supreme Court first used the phrase “level of generality” in 1961 to distinguish abstract advocacy of revolution from more narrowly described advocacy of violent overthrow of government for purposes of a Smith Act violation, 18 U.S.C. § 2385. See *United States v. Scales*, 367 U.S. 203, 237 (1961). The phrase was next used to distinguish among market conditions for purposes of an antitrust violation. See *Illinois Brick v. Illinois*, 431 U.S. 720, 745 (1977).

271. 483 U.S. at 639.

272. 563 U.S. 731, 742 (2011).

273. 483 U.S. at 640.

274. 536 U.S. 730 (2002).

275. *Id.* at 738.

276. 563 U.S. at 741.

277. *Id.*

278. 577 U.S. 7 (2015).

279. *Id.* at 13 (quoting *Brosseau v. Haugen*, 534 U.S. 194, 199 (2004)).

Even more exacting, in *District of Columbia v. Wesby*,²⁸⁰ the Court said, “The ‘clearly established’ standard also requires that the legal principle clearly prohibit the officer’s conduct in *the particular circumstances* before him.”²⁸¹ Although having said in *al-Kidd* that the Court was not requiring “a case directly on point,”²⁸² the Court reversed a grant of qualified immunity in *White v. Pauly*,²⁸³ because the Court of Appeals “failed to identify *a case* where an officer acting under similar circumstances as [the defendant officer] was held to have violated the Fourth Amendment.”²⁸⁴ And in *Kisela v. Hughes*,²⁸⁵ the Court said, “[P]olice officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”²⁸⁶

The Court’s altering of the “clearly established” standard from not requiring “a case directly on point” in *al-Kidd*²⁸⁷ to requiring precedent that “squarely governs the specific facts at issue” in *Kisela*,²⁸⁸ elicited a dissent specifically critical of this progression:

The majority’s decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases [relied on by the Court of Appeals] are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the “clearly established” standard.²⁸⁹

The Court’s expansion of the qualified immunity defense is best captured by the Court’s repeated statement

280. 138 S. Ct. 577 (2018).

281. *Id.* at 590 (emphasis added).

282. 563 U.S. at 741.

283. 137 S. Ct. 548 (2018).

284. *Id.* at 552 (emphasis added). The Court has noted how often it has reversed a grant of qualified immunity by a Court of Appeals. See *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases).

285. 138 S. Ct. 1148 (2018).

286. *Id.* at 1153 (quoting *Mullenix*, 577 U.S. at 13).

287. 563 U.S. at 741.

288. 138 S. Ct. at 1153.

289. *Id.* at 1161 (Sotomayor, J., with whom Ginsburg, J., joins, dissenting).

that the “immunity protects all but the plainly incompetent or those who knowingly violate the law.”²⁹⁰

Reasonableness in the context of a qualified immunity defense now turns out to be primarily, if not entirely, concerned with a single factor: whether the law concerning the unlawfulness of an officer’s conduct was clearly established. As stated in *Kisela*, “Reasonableness is judged against the backdrop of the law at the time of the conduct.”²⁹¹ Although the objective reasonableness of a defendant’s belief in the lawfulness of the challenged action is sometimes said to be relevant, that factor rarely receives explicit analysis.²⁹²

C. Personal Jurisdiction: Unreasonable Burden

290. *Id.* at 1152; *Wesby*, 138 S. Ct. at 589 (same); *White*, 137 S. Ct. at 551 (same); *Mullenix*, 577 U.S. at 13 (same); *Sheehan*, 135 S. Ct. at 1774 (same). In the one case, the Court invoked the “plainly incompetent” standard: “[T]he question is whether, in light of precedent existing at the time, [the defendant officer] was ‘plainly incompetent’ in entering [the plaintiff’s] yard to pursue the fleeing [suspect].” *Stanton v. Sims*, 571 U.S. 3, 5 (2013). The Court concluded that he was not. *Id.* at 11.

291. 138 S. Ct. at 1152 (quoting *Brosseau*, 543 U.S. at 198). Determining reasonableness for purposes of qualified immunity could involve a weighing or balancing process, and the Court has occasionally invoked the weighing or balancing metaphor in this context. “Requiring the alleged violation of law to be ‘clearly established’ ‘balances . . . the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.’” *Wood v. Moss*, 572 U.S. 744, 758 (2014) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)); “This ‘clearly established’ standard protects the balance between vindication of constitutional rights and government officials’ effective performance of their duties by ensuring that officials can ‘reasonably . . . anticipate when their conduct may give rise to liability for damages.’” *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson*, 483 U.S. at 639) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).”

292. More than forty years ago, I advocated abolition of the qualified immunity defense, believing that a person injured by a police officer’s constitutional violation should be compensated, preferably by the officer’s city or state employer (as with all over torts committed in the course of a public officer’s employment), simply because of the violation, regardless of whether the officer believed the conduct was lawful or whether the unlawfulness of the conduct had been clearly established. See Newman, *supra*, note 253, at 458–62. Abolishing the defense was recently supported by the U.S. House of Representatives. See H.R. 7120, 116th Cong., 2d Sess. (2020).

to Defend in Out-of-State Forum

A context in which courts determine reasonableness by identifying several relevant factors is assertion of personal jurisdiction over an out-of-state defendant.

The antecedent of this multi-factor context is the Supreme Court's decision in *Pennoyer v. Neff*,²⁹³ interpreting the Due Process Clause of the Fourteenth Amendment to limit a state's assertion of jurisdiction over a nonresident.²⁹⁴ *Pennoyer* established only that service of process was required.²⁹⁵ Then, in *Green v. Chicago, B & Q R Co.*,²⁹⁶ the Court moved beyond *Pennoyer* and began to determine what contacts of a defendant with the forum state sufficed to satisfy the constitutional due process requirement. Solicitation of orders was not enough.²⁹⁷ Much later, in *International Shoe Co. v. State of Washington*,²⁹⁸ the Court refined the Due Process Clause requirement to mean that, to be subject to the judicial process of a state, a defendant must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁹⁹ Further explicating "the demands of due process,"³⁰⁰ the Court said, "Those demands may be met by such contacts of the [defendant] corporation with the state of the forum as to make it *reasonable*, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."³⁰¹ Thus was "reasonable[ness]" introduced into due process limits on assertion

293. 95 U.S. 714 (1877).

294. *See id.* at 733–34.

295. *See id.* at 733–34.

296. 205 U.S. 530 (1907).

297. *See id.* at 533–34.

298. 326 U.S. 310 (1945).

299. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 465 (1941)). "Fair play" as a standard for due process in the context of asserting jurisdiction over an out-of-state defendant was first enunciated in *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

300. *International Shoe*, 326 U.S. at 317.

301. *Id.* (emphasis added).

of personal jurisdiction, along with the context of “our federal system of government.”

Continuing its elucidation of due process limits, the Court said,

[I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and *unreasonable* a burden on the corporation to comport with due process.³⁰²

Then, detailing the defendant’s activities within the forum state, the Court concluded:

It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it *reasonable* and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant-]appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an *unreasonable* or undue procedure.³⁰³

Although *International Shoe* is usually cited for enunciating a requirement of “minimum contacts” with the forum state,³⁰⁴ it is also significant for using “reasonableness” as the standard for determining when those contacts suffice to satisfy due process requirements.

Most significantly, in *World-Wide Volkswagen Corp. v. Woodson*,³⁰⁵ the Court provided content to the concept of reasonableness in the context of personal jurisdiction:

302. *Id.* (emphasis added) (citations omitted).

303. *Id.* at 320. (emphases added).

304. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

305. 444 U.S. 286 (1980).

Implicit in this emphasis on reasonableness is the understanding that [1] the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including [2] the forum State's interest in adjudicating the dispute; [3] the plaintiff's interest in obtaining convenient and effective relief . . . ; [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies.³⁰⁶

The second factor was cited to *McGee v. International Life Ins. Co.*;³⁰⁷ the third and fifth factors were cited to *Kulko v. California Superior Court*.³⁰⁸ However, the Court gave no indication of how the five factors were to be evaluated individually, much less in combination, because the Court concluded that the record showed "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."³⁰⁹

Seven years later, in *Asahi Metal Industry Co. v. Superior Court*,³¹⁰ the Court undertook to apply the five factors identified in *World-Wide Volkswagen*. Starting with the burden on the defendant, the Court characterized it as "severe."³¹¹ The defendant had to "traverse the distance" between its corporate headquarters in Japan to California and "submit its dispute . . . to a foreign nation's judicial system."³¹² Turning to the second and third factors, the Court characterized the interests of the plaintiff and the forum (California) as "slight."³¹³ The only claim left in the litigation was that of an indemnitee

306. *Id.* at 292 (citations omitted) (bracketed numbers added).

307. 355 U.S. 220, 223 (1957).

308. 436 U.S. 84, 92, 93 (1978). *Kulko* had also produced another reference to "reasonableness," the Court seeing "no basis on which it can be said that appellant could reasonably have anticipated being" sued in a California court. 436 U.S. at 97-98.

309. *World-Wide Volkswagen*, 444 U.S. at 295.

310. 480 U.S. 102 (1987).

311. *Id.* at 114.

312. *Id.*

313. *Id.*

from Taiwan, and the transaction on which its claim was based took place in Taiwan.³¹⁴ California's interest was deemed diminished by the fact that the plaintiff was not a California resident, the state's alleged safety concern was not implicated by an indemnification claim, and it was not even clear that California law would apply.³¹⁵

With respect to the fourth and fifth factors, the Court said:

World-Wide Volkswagen also admonished courts to take into consideration the interests of the several States, in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.³¹⁶

This paragraph provides little guidance as to how courts are to evaluate the fourth and fifth factors—"the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and "the shared interest of the several States in furthering fundamental substantive social policies." The analysis is hardly advanced by the advice that these interests "will be best served by a careful inquiry into the

314. *See id.*

315. *See id.* at 115.

316. *Id.* (internal quotation marks omitted).

reasonableness of the assertion of jurisdiction in the particular case.”³¹⁷ Beyond this tautological way of determining whether the assertion of jurisdiction is reasonable, the Court could only re-invoke the first three factors by advising courts to be unwilling “to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State” and then to exercise “[g]reat care and reserve” “when extending our notions of personal jurisdiction into the international field.”³¹⁸

Nevertheless, personal jurisdiction remains one of the few fields in which the Supreme Court has at least identified factors that bear on whether the disputed action—assertion of jurisdiction over an out-of-state defendant—is reasonable. The first three of the identified five factors are obviously relevant and not difficult to assess. It is far from clear what the Court means by the fourth and fifth factors, and its “application” of them in *Asahi* reveals its own inability to say anything helpful about them. Finally, it is worth noting that, as with many multi-factor standards in the law, the Court has said nothing about how the five factors are to be assessed in the aggregate, especially in the close cases where the factors tilt in opposite directions. Substantial room for clarification remains.

IV. REASONABLENESS WITHOUT GUIDANCE

In a fourth approach, reasonableness appears to be determined without identification of any method of analysis or identification of even a single relevant factor. Examples of this approach are (1) tort law, where unreasonableness of conduct is primarily left for determination by a jury without identification of any relevant factors, (2) habeas corpus, where federal courts determine whether a state court made an unreasonable application of

317. *Id.* (emphasis added).

318. *Id.*

constitutional requirements, and (3) *Chevron* deference,³¹⁹ where federal courts determine whether an administrative agency made a reasonable construction of an ambiguous statute.

A. *The Reasonable Person of Tort Law*

One example of this fourth approach is tort law, where the issue of reasonableness is primarily left to the jury without guidance, other than general advice to determine what is reasonable under all the circumstances.

Liability for causing injury through negligence is generally said to arise when a defendant who owes a duty of care to a plaintiff fails to act as a reasonable person would have acted under the circumstances of the case.³²⁰ However, Justice Holmes observed that “most juries approach their task by asking how a reasonable person *should* behave rather than how an average or ordinary person would behave.”³²¹

Despite Holmes’s observation, juries are regularly instructed to decide what a reasonable person *would* have done, *i.e.*, what degree of care he or she would have observed to avoid liability.³²² How is that to be determined? In *Conway v. O’Brien*,³²³ Judge Learned Hand answered that question in these words:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced

319. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

320. See RESTATEMENT (SECOND) OF TORTS § 283 (1965) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”); RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 3 (2010) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”).

321. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW*, 123–24 (1881) (emphasis added).

322. See, e.g., NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 2:10 (“Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.”).

323. 111 F.2d 611 (2d Cir. 1940).

against the interest which he must sacrifice to avoid the risk.³²⁴

Seven years later, Judge Hand put these factors into a formula in *United States v. Carroll Towing Co.*,³²⁵ which considered the liability of the owner of a barge that had broken loose from its moorings.³²⁶ Judge Hand famously wrote:

[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.³²⁷

In *Conway*, Judge Hand had acknowledged that the three factors he had identified “are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically.”³²⁸ “For this reason,” he continued:

a solution always involves some preference, or choice between . . .^[329] incommensurables, and it is co[n]signed to a jury because their decision is

324. *Id.* at 612. Without commenting on Judge Hand's formulation, the Supreme Court reversed his decision, believing the applicable Vermont law required submission of the case to a jury. *See Conway v. O'Brien*, 312 U.S. 492 (1941).

325. 159 F.2d 169 (2d Cir. 1947).

326. *See id.* at 170.

327. *Id.* at 173. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 3 (2010) (“Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”).

328. 111 F.2d 112 (2d Cir. 1940).

329. This ellipsis replaces “a,” which appears to be a typographical error, like the omission of “n” in “consigned.”

thought most likely to accord with commonly accepted standards, real or fancied.³³⁰

Echoing and developing Judge Hand's point, Judge Posner has written:

Ordinarily . . . the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytics than operational significance For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula; and so long as their judgment is reasonable, the trial judge has no right to set it aside, let alone substitute his own judgment.³³¹

From these observations, we gain some general understanding of what "reasonable" means in the standard of "reasonable care," against which the conduct of tort law's "reasonable person" is measured. "Reasonable care" is the care the jurors determine would (or should) have been exercised in the circumstances of the case, applying their collective sense of what society has a right to expect. Of course, as with all jury determinations in civil cases, courts retain power to police the outer limits of a range of permissible jury decisions. A court may not simply impose its sense of whether reasonable care has been observed but may reject a finding of liability or non-liability when the court is satisfied that the jury has simply gone too far in either direction. Within these outer limits, however, no explicit factors guide the determination of what a reasonable person would (or should) have done under the circumstances.

*B. Habeas Corpus: Unreasonable State Court
Application of Federal Law*

A second context in which the determination of reasonableness appears to be made without identification of

330. *Conway*, 111 F.2d at 112.

331. *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7th Cir. 1987).

a method of analysis or even a single relevant factor is habeas corpus, where federal courts determine whether a state court conviction rests on an unreasonable application of federal law, essentially constitutional law.

In 1996, Congress limited the circumstances under which a federal court could use the writ of habeas corpus to vacate a state court conviction because a constitutional right of a defendant had been violated.³³² One of those circumstances, codified at amended 28 U.S.C. § 2254(d)(1), is where a state court has made “an unreasonable application” of “clearly established Federal law, as determined by the Supreme Court of the United States.”³³³ The other two circumstances are where a state court decision was “contrary to” such clearly established Federal law,³³⁴ or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”³³⁵

My concern is only with the “unreasonable application” formulation of subsection 2254(d)(1).³³⁶ That

332. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214, 1219 (1996).

333. The amendment to section 2254(d)(1) was section 104 of the Anti-Terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 1219 (1996).

334. 28 U.S.C. § 2254(d)(1).

335. 28 U.S.C. § 2254(d)(2).

336. With respect to the “contrary to” established law formulation of section 2254(d)(1), the Supreme Court, in *Williams v. Taylor*, 529 U.S. 362 (2000), approved the Fourth Circuit’s interpretation:

[T]he Fourth Circuit held in *Green [v. French]*, 143 F.3d 865 (4th Cir. 1999) that a state-court decision can be contrary to this Court’s clearly established precedent in two ways. First, a state-court decision is contrary to this Court’s precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court’s precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours. See 143 F.3d, at 869–870.

The word “contrary” is commonly understood to mean “diametrically different,” “opposite in character,” or “mutually opposed.” Webster’s Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court’s decision must be substantially different from the relevant precedent of this Court. The Fourth Circuit’s interpretation of the “contrary to” clause accurately reflects this textual meaning. A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that

formulation made two changes in the authority of a federal court. First, a federal habeas court's authority to rule that a state court had violated constitutional protections as determined by federal courts in general was replaced by a more limited authority to rule that a state court had violated only those constitutional protections identified by the Supreme Court.³³⁷ Second, a federal habeas court's authority to vacate a state court conviction whenever a state court had violated a defendant's constitutional rights was replaced with authority to vacate a conviction only if the state court had made an *unreasonable application* of constitutional law. The state court might have violated the defendant's constitutional rights, but the federal habeas court could not vacate the conviction as long as the state court had made a reasonable, even if incorrect, application of constitutional law.

The more understandable component of the new formulation is the requirement that what the state court unreasonably applied is "clearly established Federal law, as determined by the Supreme Court of the United States."³³⁸ Far more problematic is the meaning of "unreasonably applied." The Supreme Court endeavored to interpret this phrase in *Williams v. Taylor*,³³⁹ the Court's initial encounter with amended subsection 2254(d)(1).

contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Williams, 529 U.S. at 405 (O'Connor, J., concurring but writing for the Court on the proper interpretation of section 2254(d)(1)).

The Supreme Court has not yet had occasion to interpret the "based on an unreasonable determination of the facts" formulation of section 2254(d)(2).

337. Amended subsection 2254(d)(1) speaks of an unreasonable application of "federal law," not just constitutional law, thereby creating the possibility that the writ could issue if a conviction violated some federal statutory right recognized by the Supreme Court. Such cases will arise so infrequently that the following discussion will consider only violations of constitutional law.

338. 28 U.S.C. § 2254(d)(1). Of course, even determining whether law has been "clearly established" poses its own problems, as the discussion of qualified immunity reveals. See text at pp. 47–57, *supra*.

339. 529 U.S. 362 (2000).

In *Williams*, a state court defendant sought habeas corpus relief to challenge his death sentence on the ground that his lawyer had been ineffective, in violation of the Sixth Amendment guarantee of a right to counsel, at the penalty phase of the state court proceedings.³⁴⁰ The Supreme Court agreed that the Virginia Supreme Court decision's denying relief had been contrary to and an unreasonable application of federal law as previously determined by the Supreme Court in *Strickland v. Washington*.³⁴¹ The Supreme Court issued two opinions, one by Justice Stevens and one by Justice O'Connor.³⁴² A portion of each opinion interpreted subsection 2254(d)(1).³⁴³ Since the portion of Justice O'Connor's opinion that interpreted subsection 2254(b)(1) garnered five votes compared to the four votes that supported Justice Stevens's interpretation, her opinion represents the Court's position interpreting subsection 2254(d)(1).³⁴⁴

340. See *id.* at 363.

341. See *id.* at 362.

342. See *id.* at 362, 367.

343. See *id.* at 364–65, 373–74.

344. To understand the 5–4 vote in favor of Justice O'Connor's interpretation, I must resort to what I have elsewhere called “nose-count jurisprudence.” See *In re Application of Herald Co.*, 734 F.2d 93, 98 n.3 (2d Cir. 1984).

Justice Stevens's opinion comprises five parts. Part I sets forth the facts of Williams's offense, the facts concerning his claim of ineffective assistance of counsel, and the procedural steps of his state court direct review and his federal court collateral review. Part II provides his interpretation of subsection 2254(d)(1). Part III explains that the right to effective assistance of counsel in a criminal trial had been clearly established as federal constitutional law by the Supreme Court in the phrases “contrary to” established federal law and “an unreasonable application” of federal law. Part IV explains why the decision of the Virginia Supreme Court upholding Williams's death sentence incorrectly applied the *Strickland* standard for determining whether a lawyer's ineffective representation prejudiced a defendant. Part V concludes that Williams is entitled to habeas corpus relief and that the decision of the Virginia Supreme Court must be reversed.

Justice O'Connor's opinion comprises three parts. Part I canvasses the state of habeas corpus law prior to the 1996 amendment of section 2254. Part II provides her interpretation of subsection 2254(d)(1). Part III agreed with Justice Stevens that the Virginia Supreme Court's decision upholding Williams's death sentence incorrectly applied the *Strickland* standard for determining whether a lawyer's ineffective representation prejudiced a defendant.

Justices Souter, Ginsburg, and Breyer joined all five parts of Justice Stevens's opinion. See *Williams*, 529 U.S. at 367 n.*. Justices O'Connor and

From that opinion we learn two things about the meaning of “unreasonable application,” but gain no precise understanding of the phrase. First, Justice O’Connor makes clear that the two phrases of subsection 2254(d)(1), “contrary to” established federal law and “an unreasonable application” of federal law, set forth different tests for habeas corpus relief, and both are more restrictive than prior law.³⁴⁵ This view contrasted with Justice Stevens’s contention that the two phrases mean virtually the same thing and that neither phrase limits the circumstances under which federal courts could grant habeas corpus relief.³⁴⁶ Second, and more significant, Justice O’Connor explained that an unreasonable application of federal law involves something beyond a decision that is erroneous or incorrect:

Under § 2254(d)(1)’s “unreasonable application” clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.³⁴⁷

In *Lockyer v. Andrade*,³⁴⁸ the Court further explained that even clear error in a state law decision does not render that decision unreasonable for purposes of subsection 2254(d)(1):

Kennedy joined Parts I, III, and IV of Justice Stevens’s opinion. *See id.* Justice Kennedy joined all three parts of Justice O’Connor’s opinion. *See id.* at 399 n.*. Chief Justice Rehnquist and Justice Thomas joined Part II of Justice O’Connor’s opinion. *See id.* Justice Scalia joined Part II of Justice O’Connor’s opinion, except for her footnote *, 529 U.S. at 408, which discussed the legislative history of section 2544(d)(1), *see* 529 U.S. at 399 n.* Chief Justice Rehnquist wrote a separate opinion, which Justices Scalia and Thomas joined, concurring in part and dissenting in part. *See id.* at 418. Their partial dissent concluded that the Virginia Supreme Court had correctly applied *Strickland*.

Thus, on the crucial issue of interpreting subsection 2254(d)(1), five Justices (Chief Justice Rehnquist and Justices Scalia, O’Connor, Kennedy, and Thomas) endorsed Justice O’Connor’s interpretation, and four Justices (Stevens, Souter, Ginsburg, and Breyer) endorsed Justice Stevens’s interpretation.

345. *See Williams*, 529 U.S. at 402–05.

346. *See id.* at 375–90.

347. *Id.* at 411.

348. 538 U.S. 63 (2003).

[T]he Ninth Circuit defined “objectively unreasonable” to mean “clear error.” These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.³⁴⁹

“[C]onflating error (even clear error) with unreasonableness” is improper because “[t]he gloss of clear error fails to give proper deference to state courts.”³⁵⁰ In *Schriro v. Landrigan*,³⁵¹ the Court called the standard of “unreasonable” in this context “a substantially higher threshold” than mere error.³⁵²

A narrowing of the standard for determining whether state courts have erred on issues of constitutional law that started (before subsection 2254(d)(1)) with determining whether a state court’s interpretation of the Constitution was correct, then (after subsection 2254(d)(1)) changed to determining whether the determination was “error,”³⁵³ then progressed to “clear error,”³⁵⁴ and continued on to “unreasonable,”³⁵⁵ seems alien to a traditional view of the judicial role. When appellate courts review trial court decisions or when the Supreme Court reviews appellate court decisions, the reviewing court usually determines whether the decision under review was correct, *i.e.*, free from error. Of course, the identification of error does not automatically result in reversal; the error may not have caused prejudice or otherwise been serious enough to warrant setting aside the decision being appealed. But until subsection 2254(d)(1), federal courts had not been obliged to apply a standard of state court mistake more wrong than “error,” much less more wrong than “clear error.” Apparently coming close, which used to count only for hand grenades and horseshoes,

349. *Id.* at 75.

350. *Id.*

351. 550 U.S. 465 (2007).

352. *Id.* at 473.

353. *Lockyear*, 538 U.S. at 75.

354. *Id.*

355. *Schriro*, 550 U.S. at 473.

now counts for constitutional law, at least when a state court interpretation of the Constitution, challenged in a federal court habeas corpus proceeding, is close to correct.

The idea that a legal remedy was unavailable as long as there had been at least a reasonable, though not a correct, understanding of a constitutional right had previously entered federal jurisprudence via the doctrine of qualified immunity. In *Pierson v. Ray*,³⁵⁶ the Supreme Court ruled that the defense of qualified immunity insulated a government official, for example, a police officer, when sued for damages under 42 U.S.C. § 1983, for violating a person's constitutional right as long as the official reasonably believed that he was not violating a constitutional right, even though he really had done so. The Court relied on the common law protection from damages liability for a police officer who reasonably believed that a suspect had committed a crime, even though the suspect had not done so.³⁵⁷ But qualified immunity, as previously discussed,³⁵⁸ precludes liability to pay damages, whereas the "unreasonable application of constitutional law" formulation in subsection 2254(d)(1) can leave a defendant convicted of a crime even though the conviction was obtained in violation of the constitution.³⁵⁹

The "unreasonable application" formulation in subsection 2254(d)(1) derives from the Supreme Court's decision in *Teague v. Lane*.³⁶⁰ The Supreme Court there held that, with limited exceptions, a "new rule," *i.e.*, a new interpretation of the Constitution that benefits a

356. 386 U.S. 547, 554–58 (1967).

357. *See id.* at 555 (citing RESTATEMENT (SECOND) TORTS § 121 (1965); 1 HARPER & JAMES, THE LAW OF TORTS § 3.18, at 277–78 (1956)).

358. *See* text at pp. 47–57, *supra*.

359. If a state court conviction is obtained in violation of a constitutional right, it remains theoretically possible for the Supreme Court to vacate the conviction upon direct review, but the Court exercises its discretion to grant a petition for a writ of certiorari to review a state court conviction so infrequently that federal district and appellate court review on collateral attack via a petition for a writ of habeas corpus, now subject to the "unreasonable application" formulation, is almost always the only realistic opportunity to challenge a state court conviction on constitutional grounds.

360. 489 U.S. 288 (1989).

defendant, announced after a conviction become final, may not be applied retroactively by a federal habeas court.³⁶¹ One year after *Teague*, the Supreme Court explained in *Butler v. McKellar*³⁶² that “[t]he ‘new rule’ principle therefore validates reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.”³⁶³ The Court has repeated this explanation several times.³⁶⁴ Building on the notion of an unreasonable interpretation of law in the context of retroactivity, Congress, in subsection 2254(d)(1), made all state court decisions affirming convictions immune from habeas corpus relief unless those decisions were “unreasonable applications” of established federal law.³⁶⁵

How are federal habeas courts to determine when a state court decision is not merely erroneous but also an unreasonable application of federal law? In *Williams*, Justice O’Connor said very little. Initially, she identified two circumstances where an unreasonable application can occur:

First, a state-court decision involves an unreasonable application of this Court’s precedent if the state court identifies the correct governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case. Second, a state-court decision also involves an unreasonable application of this Court’s precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.³⁶⁶

361. *Id.* at 307.

362. 494 U.S. 407 (1990).

363. *Id.* at 414.

364. *See, e.g.*, *Caspari v. Bohlen*, 510 U.S. 383, 393–96 (1994); *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Wright v. West*, 505 U.S. 277, 291 n.8 (1992); *Stringer v. Black*, 503 U.S. 222, 227 (1992).

365. 28 U.S.C. § 2254(d)(1).

366. *Williams*, 529 U.S. at 407 (O’Connor, J., concurring).

But since the word “unreasonably” is used to describe both of these circumstances, their identification sheds very little light on what “unreasonably” means in this context, as Justice O’Connor recognized when she wrote, “There remains the task of defining exactly what qualifies as an ‘unreasonable application’ of law under § 2254(d)(1).”³⁶⁷

Then, acknowledging that “[t]he term ‘unreasonable’ is no doubt difficult to define,”³⁶⁸ she offered the comforting assurance that “it is a common term in the legal world, and, accordingly, federal judges are familiar with its meaning.”³⁶⁹

From her opinion we learn that an “unreasonable application” is not limited, as the Fourth Circuit had thought, to a circumstance where “the state court has applied federal law ‘in a manner that reasonable jurists would all agree is unreasonable.’”³⁷⁰ That test, she explained, “would transform the inquiry into a subjective one,”³⁷¹ whereas “a federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.”³⁷² The Supreme Court subsequently repeated the phrase “objectively unreasonable” in the context of subsection 2254(d)(1).³⁷³

What we do not learn from Justice O’Connor’s opinion is what would make a state court’s view of established federal law objectively unreasonable or how an “unreasonable” application differs from an “incorrect” one.

When Justice O’Connor applies her interpretation of an “unreasonable application” of federal law to the Virginia Supreme Court’s ruling that the ineffectiveness of

367. *See id.* at 409.

368. *Id.* at 410.

369. *Id.*

370. *Id.* at 409 (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

371. *Id.* at 410.

372. *Id.* at 409.

373. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2004); *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003).

Williams's counsel had not caused sufficient prejudice to establish a constitutional violation under *Strickland*, she simply described the prejudice without any explanation of why the state court's view of insufficient prejudice was more egregious than mere error.³⁷⁴ I set forth her entire analysis is set forth in a footnote.³⁷⁵

374. A curious aspect of *Williams* is that although Justice O'Connor's interpretation of subsection 2254(d)(1) prevailed by a 5–4 vote, her opinion does not state whether she was applying her view of that subsection. It is unlikely that she was applying Justice Stevens's view.

375. From *Williams*:

I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland*, its application was unreasonable. As the Court correctly recounts, Williams' trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation evidence. For example, speaking only of that evidence concerning Williams' "nightmarish childhood," the mitigation evidence that trial counsel failed to present to the jury showed that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life. More generally, the Virginia Circuit Court found that Williams' trial counsel failed to present evidence showing that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; . . . that he was borderline mentally retarded;" and that "[his] conduct had been good in certain structured settings in his life (such as when he was incarcerated)." In addition, the Circuit Court noted the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities." Based on its consideration of all of this evidence, the same trial judge that originally found Williams' death sentence "justified and warranted," concluded that trial counsel's deficient performance prejudiced Williams, and accordingly recommended that Williams be granted a new sentencing hearing. The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. *See* 254 Va., at 26, 487 S.E.2d, at 200 ("At most, this evidence would have shown that numerous people, mostly relatives, thought that [Williams] was nonviolent and could cope very well in a structured environment"). For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 415–16 (most internal citations omitted).

In *Yarborough v. Alvarado*,³⁷⁶ the Court, considering whether a state court had reasonably determined that a suspect was not in custody for purposes of requiring *Miranda* warnings, restricted the meaning of “unreasonable application” in two ways. First, the Court introduced the construct of “fairminded jurists,” stating that the state court had reasonably applied constitutional law because “it can be said that fairminded jurists could disagree over whether [the suspect] was in custody.”³⁷⁷ Considering whether “fairminded jurists” could disagree about the constitutional issue seems to harken back to the Fourth Circuit’s view that Justice O’Connor rejected in *Williams*. The Fourth Circuit, she noted, had said that an unreasonable application is a circumstance where “the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable.”³⁷⁸ So the Fourth Circuit would have let the state court decision stand unless all reasonable jurists would think it unreasonable, and the Supreme Court would let it stand as long as fairminded jurists could disagree as to whether it was unreasonable. Disagreement among fairminded jurists that the state court decision was reasonable leaves the state court decision standing under either test.

The second restriction introduced by *Yarborough* was that the meaning of “unreasonable application” varies depending on the legal rule at issue:

[T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must be emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in

376. 541 U.S. 652 (2004).

377. *Id.* at 664.

378. *Williams*, 529 U.S. at 409.

reaching outcomes in case-by-case determinations.³⁷⁹

The Supreme Court stated that because “the custody test is general,” the state court’s application of federal law need only “fit[] within the matrix of [the Supreme] Court’s prior decisions.”³⁸⁰ Apparently that “matrix” covers a wide swath.

The Court applied this sliding scale approach in *Knowles v. Mirzayance*:³⁸¹ “[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied the standard.”³⁸²

In 2011, the Court narrowed the “disagreement-among-fairminded-jurists” standard to require more deference to a state court decision challenged as an unreasonable application of constitutional law. In *Harrington v. Richter*,³⁸³ the Supreme Court initially described the task of a habeas court in these words:

[A] habeas court must determine what arguments or theories supported or, as here, could have supported, the state court’s decision; and then it must ask *whether it is possible* fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.³⁸⁴

A few sentences later the Court said:

As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*.³⁸⁵

379. *Yarborough*, 541 U.S. at 664.

380. *Id.* at 665.

381. 556 U.S. 111 (2009).

382. *Id.* at 123.

383. 562 U.S. 86 (2011).

384. *Id.* at 102 (emphasis added).

385. *Id.* at 103 (emphasis added).

Thus, in *Alvarado*, a state court's application of constitutional law was reasonable if it can be said that fair-minded jurists *could* disagree that such law was violated, then in *Harrington* if it is *possible* that such jurists could disagree that such law was violated, and then, later in the *Harrington* opinion, unless there was an error *beyond any possibility* for fair-minded jurists' disagreement.

Since *Harrington*, Courts of Appeals have endeavored to use the "fair-minded jurists" standard but have quoted each of these three wording variations. The Sixth Circuit said in *Blackston v. Rapelje*³⁸⁶ that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision."³⁸⁷ The Eleventh Circuit said in *Tanzi v. Secretary, Florida Dept. of Corrections*³⁸⁸ that the habeas court asks "whether it is possible fair-minded jurists could disagree" with argument against the validity of a state court decision.³⁸⁹ The Ninth Circuit said in *Sessions v. Grounds*³⁹⁰ that "We may only grant habeas relief where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents."³⁹¹

Other than the slightly varied wordings of the "fair-minded jurists" standard, the Supreme Court has provided no further guidance on how a federal habeas court is to determine whether a state court's application of federal law was unreasonable.³⁹² In several decisions where

386. 769 F.3d 411 (6th Cir. 2014).

387. *Id.* at 424 (internal quotation marks omitted).

388. 772 F.3d 644 (11th Cir. 2014).

389. *Id.* at 652 (internal quotation marks omitted).

390. 768 F.3d 882 (9th Cir. 2014).

391. *Id.* at 901–02 (Murguia, J., dissenting) (internal quotation marks omitted).

392. I must admit that my own attempt to interpret "unreasonably applied," in a decision just four months after *Williams*, was far from enlightening. In *Francis S. v. Stone*, 221 F.3d 100 (2d Cir. 2000), acknowledging that the state court decision must be more incorrect than merely erroneous, I wrote, "The increment [of incorrectness beyond error] need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Id.* at 111.

the Court has ruled that a state court's application of constitutional law was unreasonable, it has simply set forth the relevant facts and then asserted the conclusion of unreasonable application, without explanation.³⁹³ At issue when the Court has most frequently ruled that a state court unreasonably applied constitutional law has been a claim of constitutionally ineffective assistance of counsel.³⁹⁴

It is arguable that the meaning of "unreasonable" in the context of federal habeas court consideration of state court convictions reflects a weighing of interests, similar to the process in the antitrust context previously considered.³⁹⁵ It could be said that the interest of state courts in the finality of their criminal judgments is being weighed against the interest of a defendant in the observance of his constitutional rights. However, no decision of the Supreme Court expounding on the phrase "unreasonable application" of "clearly established Federal law" has invoked the weighing metaphor. A weighing of interests may well have motivated the Court as it narrowed the meaning of "unreasonable" and broadened deference to state court decisions, but the Court has not explicitly weighed interests in this context.

By adopting a standard of unreasonableness that exists only if no fairminded jurist could agree that a state court's decision was consistent with settled constitutional law, the Supreme Court has chosen to give a restrictive interpretation to a fairly generalized statutory limitation on the authority of a federal habeas court. Once the Supreme Court recognized that Congress did not want a federal habeas court to vacate a state court conviction just because the federal court considered the state court to have committed a prejudicial error, the Court could have stayed with the statutory phrase "unreasonable application" and simply obliged the judge of

393. See, e.g., *Porter v. McCollum*, 558 U.S. 30, 42 (2009); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

394. See, e.g., *Porter*, 558 U.S. at 42; *Rompilla v. Beard*, 545 U.S. 374, 389, 390 (2005); *Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 399.

395. See text at pp. 47–57, *supra*.

the habeas court (and appellate judges reviewing the decision of that judge) to determine whether they considered the state court to have made an unreasonable application of constitutional law. Of course, that would have left the usual ambiguity as to the meaning of “unreasonable.”

Instead, the Court first framed the standard in terms of what fairminded jurists (presumably, jurists as fairminded as the habeas judge or those reviewing the decision of that judge) would think of the state court’s decision and then precluded habeas relief as long as fairminded jurists would agree that the state court had not unreasonably applied constitutional law, even escalating the limitation to preclude relief unless there was no possibility that fair minded jurists would agree that the state court had unreasonably applied constitutional law. The result is clearly a highly restrictive standard, but with little, if any, guidance for determining when the standard has been met.

*C. Chevron Deference: Agency's Reasonable
Construction of Federal Statute*

A third context in which the determination of reasonableness appears to be made without the identification of any method of analysis or even a single relevant factor is *Chevron* deference.

In *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*,³⁹⁶ the Supreme Court considered the deference due an administrative agency's construction of a federal statute that is either ambiguous or silent on the relevant issue.³⁹⁷ Deference is due when the agency has made "a reasonable construction" of the relevant statutory language.³⁹⁸

As happens in other contexts, the Court's attempt to explain what would make an agency's construction "reasonable" could not avoid the word "reasonable." For example, the Court said that where the agency's construction "involved reconciling conflicting policies,"³⁹⁹ the agency's decision would not be disturbed if it "represents a reasonable accommodation of conflicting policies committed to the agency's care by the statute."⁴⁰⁰ Ultimately the Court concluded in *Chevron* that it did not have to decide whether the agency's construction was reasonable because "[w]hen a challenge to an agency's construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."⁴⁰¹

In a recent reference to *Chevron* in *Michigan v. EPA*,⁴⁰² the Court still could not avoid tautological guidance. "*Chevron* directs courts to accept an agency's

396. 467 U.S. 837 (1984).

397. *Id.* at 843.

398. *Id.* at 840.

399. *Id.* at 844.

400. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)).

401. *Id.* at 866.

402. 576 U.S. 743 (2015).

reasonable resolution of an ambiguity in a statute that the agency administers. . . . [H]owever, ‘agencies must operate within the bounds of reasonable interpretation.’⁴⁰³ Interpreting the statutory requirement to regulate power plants only where “appropriate and necessary,”⁴⁰⁴ the Court said that the phrase “[r]ead naturally . . . requires at least some attention to cost.”⁴⁰⁵ The agency’s failure to consider cost was apparently unreasonable because compliance with the regulation imposed costs.

Chevron deference is more likely to be given where an agency has maintained a consistent interpretation,⁴⁰⁶ although a new interpretation may be given deference if the agency supplies reasons for the change.⁴⁰⁷ In *Mellouli v. Lynch*,⁴⁰⁸ the Court deemed an interpretation by the Board of Immigration Appeals not entitled to *Chevron* deference because it “makes scant sense.”⁴⁰⁹ The agency had considered possession of a sock containing narcotics but not the narcotic itself to warrant removal. Another recent example where *Chevron* deference was not warranted is *Perez v. Mortgage Bankers Ass’n*,⁴¹⁰ where the Court stated that deference does not apply when the agency’s interpretation is “plainly erroneous” or “does not reflect the agency’s fair and considered judgment.”⁴¹¹ In *Whitman v. United States*,⁴¹² Justice Scalia said that *Chevron* deference is not warranted to an

403. *Id.* at 751 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014)).

404. 42 U.S.C. § 7412(n)(1)(A).

405. *Michigan*, 576 U.S. at 752.

406. *See, e.g.*, *United States v. Graham Mortg. Corp.*, 740 F.2d 414 (6th Cir. 1984).

407. *See, e.g.*, *Nat. Fed’n of Fed. Emps., Local 1309 v. Dep’t of Interior*, 526 U.S. 86 (1999).

408. 135 S. Ct. 1980 (2015).

409. *Id.* at 1982.

410. 575 U.S. 92 (2015).

411. *Id.* at 104 n.4 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

412. 135 S. Ct. 352 (2014).

agency's interpretation of a statute "to which criminal prohibitions are attached."⁴¹³

A leading treatise has identified the following words courts have used when they accord *Chevron* deference to an agency's interpretation of a statute: "complies with the actual language of the regulation," "reasonable," "rational," "plainly consistent" with the relevant regulation, "does not conflict with the statute's plain meaning," "supported by substantial, competent evidence," "cogent," and "consistent with and reasonable necessary to implement" a statute.⁴¹⁴ The same treatise has identified the following words courts use when *Chevron* deference is denied: "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."⁴¹⁵

The Court stated in *United States v. Mead Corp.*⁴¹⁶ that one requirement for *Chevron* deference, unrelated to the meaning of the word "reasonable," is that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁴¹⁷ Consistent with that requirement, the Court said in *Christensen v. Harris County*,⁴¹⁸ that *Chevron* deference is not accorded to an interpretation contained in "an opinion letter . . . policy statements, agency manuals, and enforcement guidelines."⁴¹⁹ Such informal interpretations are not given *Chevron* deference but only the less deferential *Skidmore*⁴²⁰ deference, which the Supreme Court has explained means "respect, but only to the extent that those interpretations have the power to persuade."⁴²¹

413. *Id.* at 353 (statement of Scalia, J., dissenting from denial of writ of certiorari).

414. 2B SUTHERLAND STATUTORY CONSTRUCTION § 49:4 (7th ed. database updated 2015) (footnotes omitted).

415. *Id.* (footnotes omitted).

416. 533 U.S. 218 (2001).

417. *Id.* at 226–27.

418. 529 U.S. 576 (2000).

419. *Id.* at 587.

420. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

421. *Christensen*, 529 U.S. at 577.

It is difficult to know how the Supreme Court or other federal courts determine whether an agency's interpretation of an ambiguous statute is "reasonable." No weighing process appears to be involved. It would probably be too cynical to suggest that the courts are just accepting agency interpretations with which they agree and rejecting those they disfavor, but in some cases that almost seems to be what is happening. Clearly there is no one meaning of "reasonable" in the context of *Chevron* deference. Perhaps this is simply a context where there is a narrow range of acceptable agency interpretations, on either side of the disputed issue, that courts are willing to uphold, but they are ready to assert the power to reject others that, for stated, or more often unstated, reasons, they deem beyond an amorphous notion of "reasonable."

V. CONCLUSION

What might courts do to give the concept of reasonableness more meaning than it usually receives? First, courts should recognize that the concept has different meanings in different contexts. Second, they should try to elucidate the meaning of "reasonable" with as much guidance as the context warrants. For example, when courts explain to a jury that guilt requires proof beyond a reasonable doubt, they should point out that this standard means that the jurors must be convinced of guilt to a very high degree of certainty. Third, in some contexts, courts should recognize in their opinions, and, when appropriate, explain to a jury, that the term implies a weighing of different interests, identify those interests, and candidly acknowledge that the weighing process is not the precise one that is achieved with weights on a balance scale. Instead, "weighing" means a comparison of the importance of competing interests and the exercise of judgment, based on all the relevant facts, as to which interests have been shown to be more important. Fourth, in some contexts, courts should recognize in their opinions, and, where appropriate, explain to a jury, that the

word “reasonable” is used in its everyday colloquial sense to mean that either of two or more outcomes are within legal bounds, and that the outcome to be reached is the one that would seem fair to a cross-section of the public.

However courts elucidate the concept of reasonableness, it will remain imprecise in most contexts. Perhaps that is the ultimate virtue of law’s most ubiquitous term: providing needed flexibility in the resolution of disputes while sometimes creating the illusion and occasionally the reality of analysis.

STRUCTURING APPELLATE BRIEFS

Thomas L. Hudson*

Much has been written about legal writing, and some of it is even helpful.¹ But even the good stuff often focuses on style or other similar aspects of legal writing such as “avoid legalese.” One, of course, must master all of this, but another critical aspect of what differentiates good legal writing from bad is organization, otherwise known as structure. Indeed, even if each sentence reads well, and even if the document ultimately makes the necessary points in a civil and credible manner without unnecessary duplication, when the structure is off, it is like looking at a sculpture with the limbs unintentionally out of place—jarring, to say the least.

In appellate briefs, perhaps due to their length, structure becomes particularly important. A well-structured brief will stand out, and a poorly organized brief may cause the reader to gloss through it or put it down.² But what makes a brief well organized? At the highest level, of course, the governing rules often require a particular structure. Most appellate courts re-

* Partner, Osborn Maledon. The author has practiced appellate law for over twenty-five years and has helped hundreds of lawyers write better appellate briefs. He is a fellow in the American Academy of Appellate Lawyers, a past chair of the State Bar Appellate Practice Section, served as a Ninth Circuit Appellate Lawyer Representative, and was named the 2015 Phoenix Appellate Practice “Lawyer of the Year” by Best Lawyers®. Thanks to the many helpful comments I received from various lawyers and judges, and especially Mark Harrison and the Honorable Randall H. Warner for their particularly helpful and extensive comments.

1. See generally RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005); Diane S. Sykes, *From the Bench: Advice to Appellate Litigators*, 39 *LITIG.* 4 (2013).

2. JOAN M. ROCKLIN ET AL., *AN ADVOCATE PERSUADES* 110, 187–216 (2016) (emphasizing the importance of proper structure and describing key techniques for structuring persuasive appellate briefs).

quire a jurisdictional statement, issue statement, statement of the case, statement of the facts, argument, and conclusion.³ But within each of these sections, there is another layer of shape and structure to which the best appellate lawyers pay attention. In fact, if you pay attention to this structure, you will see that many of the best appellate briefs often implement the same high-level structure within the required overarching organizational elements.

With some planning and editing, you too can do this (if you are not already doing so). Before getting to the details, however, a few caveats. First, the scope of this article is primarily limited to structure, so it will not touch on many other important aspects of brief writing such as issue selection, themes, and framing.⁴ Second, the examples below use terms like “Appellant” and “Appellee” because it makes the examples easier to follow. In your own briefs, you should avoid those labels.⁵ Third, and for similar reasons, nothing below should be taken as advice about drafting the table of contents. With that, let’s get going.

I. THE INTRODUCTION

Absent some important overriding concern, the opening, answering, and reply briefs should begin with an introduction, overview, or summary. In the opening and answering briefs (reply briefs are discussed below), the introduction provides the first opportunity to help the reader begin to understand—big picture—what the case is about, why it is interesting, and why you should win. Unless you are litigating a highly publicized case like *Bush v. Gore*,⁶ a good introduction should assume no prior knowledge about the case. In no more than a

3. *E.g.*, ARIZ. R. CIV. APP. P. 13 (content of briefs).

4. These topics are discussed ably elsewhere. *See, e.g.*, BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2d ed. 2013).

5. ARIZ. R. CIV. APP. P. 13(e).

6. 531 U.S. 98 (2000).

page or two, it should begin framing the case and provide a high-level overview, with details to come later.

When drafting the introduction, think about what you would tell a stranger about your case if you had thirty seconds to do so. What does the 10,000-foot view of the case look like? What is the first thing you want the reader to know about your case? Often, a “This is a case about” phrase works well.

For example, in one of the now infamous marriage equality cases, the appellees (represented by Ted Olson, David Boies, and other very talented lawyers)⁷ began their brief with such a phrase: “This case is about marriage, ‘the most important relation in life,’ and equality, the most essential principle of the American dream, from the Declaration of Independence, to the Gettysburg Address, to the Fourteenth Amendment.”⁸

Of course, not all cases lend themselves to such lofty themes. Moreover, you do not want to overdo it. So, if it’s an abuse of discretion issue about case management, do not claim it’s about the client’s fundamental right to due process. But with that in mind, recognize that cases often boil down to a high-level issue that can be framed in a moderately interesting and persuasive manner. The goal is to think hard about the entry point of the case and start there.

In terms of process, many drafters find it helpful to start by jotting down some initial thoughts about what the introduction should include, and then write the rest of the brief (before finishing the introduction). They then return to the introduction after the rest of the brief is fairly polished.

Although this technique may seem counterintuitive, it works. To draft the best introduction, you must have a deep and abstract understanding of the case’s

7. Including Theodore Boutros, Jr., Christopher Dusseault, Theane Evangelis Kapur, Sarah Piepmeier, Enrique Monagas, Matthew McGill, Amir Tayrani, Jeremy Goldman, and Theodore Uno.

8. Brief for Appellees at 1, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696) (citation omitted), <http://afer.org/wp-content/uploads/2010/10/Brief.pdf>.

battleground points and themes. You will gain this deep perspective only after going through the rest of the drafting process. Thus, although you may initially draft the introduction whenever you like, revisit and redraft the introduction after drafting the rest of the brief. At that point, after understanding the brief as a whole, you will be in the best position to write the best introduction possible.

II. THE PROCEDURAL AND FACTUAL BACKGROUND SECTIONS (AKA STATEMENT OF THE CASE AND FACTS)

Both the opening and answering briefs should also include sections that explain the case's relevant procedural history and background facts. Subject to the governing rules, this information often may be combined. But sometimes it is better to start with the statement of the case if, for example, the procedural posture plays an important role on appeal.⁹

A few things to keep in mind: First, tell your story as persuasively as possible. After reading the fact section, the reader should want you to win. Do not, however, omit any bad facts to achieve this result.¹⁰ Many others have made this point, so no need to dwell on it. Just make sure the judges and law clerks hear everything bad about your case from you first. Your credibility depends on it.¹¹

Second, do not feel the need to include every detail in either the procedural history or fact section. For starters, exclude irrelevant detail. For example, if it does not matter that X Corp. is a "Delaware Corpora-

9. The FRAP Advisory Committee separated the statement of the case and the statement of the facts in 1998, then reintegrated them in 2013. *Compare* FED. R. APP. P. 28(a) advisory committee's note to 1998 amend. ("[T]he separation will be helpful to the judges."), *with* FED. R. APP. P. 28(a) advisory committee's note to 2013 amend. ("Experience has shown that [the separation] has generated confusion and redundancy."), https://www.law.cornell.edu/rules/frap/rule_28.

10. Ethics rules prohibit lawyers from misstating the law or facts. MODEL RULES OF PRO'FL CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

11. *Id.*

tion,” don’t waste the reader’s time with that detail. The same holds true with dates that do not matter.

Moreover, you also need not include every relevant detail in these sections. Unfortunately, some writing instructors teach that every detail used in the argument section must have first appeared in the facts/procedural history sections.¹² This is bad advice. In the real world, brief readers typically read the background sections once and they will not remember every detail. They will then read the argument sections multiple times (often in parallel with the corresponding argument sections from the other briefs). In these sections, the precise details often matter, and it is much easier for readers to process details in the argument section. Within the argument section, the details will now be in context and the reader should already understand the big picture. So, although the statement of facts must include the relevant background (at least at a high level), don’t get bogged down with the nitty gritty until it matters.

In certain unusual cases, you might even consider including a separate subsection in the relevant argument section with the additional details. If, for example, the appeal involves a complicated procedural history where those details really matter (*e.g.*, a *Daubert* hearing and ruling where the proffered expert’s testimony matters),¹³ you could provide a high-level overview of what happened in the procedural history section, and provide the rest of the nitty gritty in the argument section. In such a case, the procedural history could describe the *Daubert* challenge and ruling at a high level, *e.g.*, “The trial court held a *Daubert* hearing on Defendant’s motion, and precluded Plaintiff’s expert from testifying.” The body of the argument section could then include a subheading called something like “Additional procedural history relevant to the district court’s ruling

12. *E.g.*, CHRISTINE COUGHLIN ET AL., A LAWYER WRITES 249 (3d ed. 2018).

13. “A *Daubert* hearing is a trial judge’s evaluation to ensure that an expert’s testimony is reliable and relevant.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (interpreting FRE 702 to require “[p]ertinent evidence based on scientifically valid principles”).

on the *Daubert* motion.” That subsection would include the relevant details (*e.g.*, the details of the expert’s testimony perhaps with selected quotes, etc.). Those details would likely be glossed over and/or forgotten by the reader if set forth in the statement of the case. Including them closer to the section where they matter will make it easier to follow the argument.

III. THE ARGUMENT SECTIONS (OPENING AND ANSWERING BRIEFS)

Your job in your first brief (opening or answering) is to convince the appellate court that you *should* win (*i.e.*, that you have justice on your side), and that the law requires you to win. (Stated differently, convince the court it should rule in your favor and give it the legal tools necessary to do so.) Toward that end, both the opening and answering briefs must tell the reader what the case is about, what law governs the case, and why your client wins under the relevant law. It must, of course, also explain how the lower court got it wrong (or not).

In some cases, the opening brief should also deal with the points you expect your opponent will make in response. To make this determination, consider the moves of the argument and think about how it will play out. Are you better off raising and anticipating this in your first brief (knowing your opponent will provide a response)? Or will it be better for your opponent to first develop the argument in the answering brief, with your response in the reply (thereby leaving no opportunity for your opponent to respond in writing)?

*A. In Both the Opening and Answering Briefs,
Generally Make Your Positive Case First and Then Deal
with the Arguments Against Your Side*

1. The Opening Brief

As noted above, part of the opening brief's job is to convince the appellate court that the lower court erred. As the appellant, you are, after all, asking the appellate court to review one or more of the lower court's rulings. In light of that, many lawyers believe they must *first* argue that the lower court got it wrong. They accordingly begin the opening brief argument section by providing a detailed explanation of the many ways in which the trial court went awry.

In nearly all cases, this organizational strategy is a mistake. Think about it. In most cases, if the trial court errs it does so by either getting the law wrong or misapplying the law to the facts. Logically, then, to comprehend how and why the trial court erred—particularly in complex cases—one must first grasp the relevant legal principles, and then understand how they apply to the facts in your case. Accordingly, start by convincing the court that your position is legally correct, and after doing so then discuss why the trial court got it wrong.¹⁴

This means that for each issue or sub-issue, you should start the opening brief argument section with the legal principles relevant to the issue. Here, help the reader understand the law necessary to decide the case. After establishing the relevant legal principles, the brief should then explain how these legal principles apply to the facts of the case. If you are the appellant and you have decided to pursue an appeal, the conclusion must be that your client prevails under the relevant law and facts. In other words, make the positive case for why you should win *first*.

14. See RICHARD K. NEUMANN ET AL., LEGAL REASONING AND LEGAL WRITING 317–18, 424–29 (8th ed. 2017).

After you have made your positive case, then demonstrate how and why the lower court erred. Here, think about your battleground points, and ideally keep them on the *de novo* side of the standard of review ledger. Note too that by the time you get to this point, much of the work may already be done. If, for example, the error lies in misapplying the correct state's law, you can draw on your prior positive case to tee up the rebuttal: "Instead of applying the Kansas rule as required by the governing choice of law rules, the district court looked to Missouri law. It did so because it mistakenly believed"

Within your analysis of the lower court's ruling, these later sections should also generally deal with any arguments your opponent made that the lower court accepted. In some cases, you can blame your opponent for the lower court's error, *e.g.*, "Although Kansas law applies, the Railroad convinced the district court to apply Missouri law. This was error for three reasons. First, as discussed above,"

If merited, you may also address other arguments your opponent made that the lower court rejected or did not reach if it makes sense for the appellate court to first learn about those arguments from you. These arguments could be captured under a subheading with something like "The district court correctly rejected and did not rely on the Company's other reasons for applying Missouri law."

2. *Opening Brief Example*

Below is an example of this organizational structure modeled on a case where the central issue involved prejudgment interest on an arbitration award reduced to judgment in federal court. For purposes of the example, assume the following:

- The law is clear that *after* a court confirms an arbitration award (*i.e.*, reduces it to judgment), the federal post-judgment interest rate applies.

- The law is clear that a court may not award any additional “prejudgment” interest that predates the issuance of the arbitration award (doing so is considered an improper “modification” of the award).
- The law is unclear about whether a district court may award “prejudgment” interest from the date of the issuance of the award until its confirmation in federal court, and, if so, whether the federal rate or state rate applies in a diversity action.

With those assumptions and background, consider this example showing the use of the recommended structure in an opening brief for the first issue (whether a district court may award prejudgment interest that runs from the issuance of the arbitration award until its confirmation in federal court).

ARGUMENT

- I. Appellant Smith is, as a matter of law, entitled to prejudgment interest on the arbitration awards.
 - A. Because this is a diversity action, prejudgment interest is determined by State law.

This section would lay out the law concerning the applicable law in diversity actions and establish that state law determines whether a party may recover prejudgment interest, and if so the applicable rate.
 - B. State law entitled Appellant Smith to post-award, prejudgment interest at the higher State rate.

This section would apply the relevant state law to the case and argue that it entitles the appellant to prejudgment interest at the higher state rate.

- C. All relevant policy considerations confirm that Appellant Smith is entitled to post-award/prejudgment interest at the higher State rate.

This section would discuss the underling policy rationale behind the relevant legal rules and show why those considerations confirm the result requested in this case is the correct one. This section would end the positive case.

- D. The district court's ruling denying Appellant Smith prejudgment interest cannot be squared with the pertinent statutes or case law.

This section would begin the negative case by explaining how and why the district court went wrong.

- E. Appellee Jones's remaining arguments made below for the lower federal rate do not withstand scrutiny.

This section would end the negative case by rebutting the arguments the appellee will likely make or that may concern the appellate court.

- F. Conclusion.

Whether labeled as a separate section or not, the argument section on this issue would end by concluding that the appellate court should reverse the district court's ruling and remand with instructions to amend the judgment to include the requested interest.

- II. [Second issue on appeal would use the same structure.]

A few observations. First, the brief begins with Section A by discussing the relevant legal rules and what they require. Section B then discusses how those legal rules (now established) apply to the facts in this case, *i.e.*, how the court should analyze the issue. Section C helps convince the appellate court that the appellant *should win* by discussing how the result requested in this case fits the underlying rationale for the legal rules (*e.g.*, interest should compensate the prevailing party for delay). After making that positive case, the brief then turns in Section D to analyzing the district court's ruling and is able to do so in the context of the correct legal principles having already being established. Next, Section E anticipates some of the opponent's arguments. Section F then concludes the discussion of the first issue (thereby putting the rebuttal in the middle).

A few caveats. First, although starting with the positive case generally works best, that does not necessarily dictate how to frame the issue's major heading. Roman numeral I in the argument section could be something like "The trial court erred by dismissing the breach of contract claim." Each case is different, and there are many ways to implement this basic structure. The key is to be deliberate about helping the reader to understand what the law requires and why you should win before digging into the trial court's error.

Second, although the argument section should generally follow this structure, that does not mean the reader should not have some understanding of why you think the district court erred before getting to the argument section. Both the introduction and the statement of facts/case present opportunities to begin planting some of these background seeds. But the meaty details of how and why the trial court erred should come in the argument section, after the reader understands what the result should have been.

3. *The Answering Brief's Argument Section*

The answering brief must defend the lower court's ruling and fend off the criticism in the opening brief.

But like the opening brief, you should generally structure the answering brief by developing your positive case first. So again, *after* laying out the relevant legal principles and why they require that you win, turn to debunking your opponent's arguments.

4. *Answering Brief Example*

Consider the following example from a case that involved pension legislation that altered the formula for calculating increases to pension benefits for certain elected officials. The primary issue involved whether the new legislation (referred to below as “the New Pension Legislation”) violated the pension impairment clause of a state constitution. The case turned on the meaning of “benefit” in the pension clause, and whether the New Pension Legislation “diminished or impaired” that “benefit” under the constitution.

ARGUMENT

- I. The superior court correctly held that the New Pension Legislation violates the Pension Impairment Clause because it “diminished or impaired” a “benefit.”
 - A. The superior court correctly construed the term “benefit” in the Pension Impairment Clause.
 1. The Pension Impairment Clause’s plain language shows that the pension payments impacted by the New Pension Legislation qualify as a “benefit.”
 2. The State’s definition of “benefit” ignores common sense and is unsupported by any authority.

- B. The superior court correctly construed the phrase “diminished or impaired.”
1. The New Pension Legislation diminished or impaired Pensioners’ right to permanent base benefit increases under existing law.
 2. The State’s interpretation of “diminished or impaired” violates the rule that constitutional provisions must be interpreted in accordance with their plain meaning.
- C. Decisions from other jurisdictions confirm that the New Pension Legislation is unconstitutional.

Note that at the highest level, this brief is quite clearly defending the trial court, emphasizing that the “superior court” reached the “correct” result. In other cases, the answering brief may simply use headings that match the legal issues; the brief need not literally include a heading saying the lower court reached the correct result. The important point is to demonstrate what the law requires, and in some manner make clear the brief is defending the trial court. (But keep in mind that an appellate court may generally affirm so long as the trial court reached the correct result for any reason.¹⁵ Consequently, convincing the appellate court to affirm may require establishing alternative bases to affirm.)

15. *See, e.g.*, *United States v. Doe*, 136 F.3d 631, 633, 636 n.11 (9th Cir. 1998)

B. Deciding How Much of the Positive Case to Make in the Main Brief Before Turning to Rebuttal Points

When setting out to make the positive case first, choices must often be made about how much of the positive case to make before turning to the critique of either the trial court or your opponent. Generally, this should be done on an issue-by-issue basis, as in the examples above and as illustrated below:

Issue 1

Positive case (why you win)	Negative case (critique of lower court and/or opponent)
Governing legal principles	
Fact and application	
Conclusion—our side wins under governing law and facts	
	The lower court nevertheless reasoned . . .
	But this rationale fails for two reasons.
	First, . . .
	Second, . . .
	Appellee also contended . . .
Conclusion as to first issue	

In some cases, much of the disagreement occurs within the context of either factual or legal sub-issues. For example, in the prior answering brief example, the answering brief establishes the positive case first on each of the key battleground sub-issues (the meaning of both “benefit” and “diminished or impaired”), and then

deals with the opening brief's points on those issues immediately thereafter, as illustrated below:

*Issue 1—Lower court correctly held that
pension legislation violates the
Pension Impairment Clause*

Positive case (why you win)	Negative case (critique)
Pension payments qualify as a “benefit”	State’s definition of “benefit” is wrong
Pension legislation “diminished” or “impaired” a benefit	State’s interpretation of “diminished” or “impaired” is wrong
Other reasons your side wins	
Conclusion as to entire issue	

This brief could have made the positive case first with respect to each of the sub-issues, and then dealt with the opening brief. To decide which organizational structure will work best, put yourself in the likely position of your audience. For example, if you are the appellant, assume the reader is familiar with the lower court decision (or at least knows what you said about the lower court decision in your prior sections). If you are the appellee, assume the reader has read the opening brief. With these assumptions, then ask whether the reader will want to know not only your reasons for your position on the sub-issue, but also why you think the lower

court and/or your opponent is wrong on the sub-issue before moving on.

If you believe a reader may need the sub-issue addressed completely before psychologically being in a position to hear the rest of your argument, then clear the weeds on the sub-issue. If not, you can consider dealing with the negative portion of the sub-issue after completing your positive case. You can also try drafting it both ways to see which version makes the most sense. The question is always what order of presentation will make the most sense and be the easiest to follow and understand by a reader likely to be in the position of your expected audience.

IV. THE REPLY BRIEF

Even after mastering the best practices for opening and answering briefs, many lawyers struggle with reply briefs. Some resort to basically rehashing everything in the opening brief. Some naturally jump straight to taking on point-by-point everything said in the answering brief. The better strategy, in effect, combines these two strategies but does so in a more persuasive manner by using the “reorient and refute” technique.

A. The Reorient-and-Refute Approach to Reply Briefs

The reorient-and-refute approach to reply briefs involves bringing the reader back to the main point or points established in the opening brief, identifying the point or points the answering brief explicitly or implicitly concedes, and then critiquing the remaining points of disagreement so that no doubt remains that your side should win. A well-written reply brief allows one to review only the reply brief and have a good understanding of the case and the dialectic. The reader should have no doubt about what issues the court must resolve to decide the case.

To implement this approach, make sure you reread the opening and answering briefs, understand the key

premises and battleground points, and then identify (1) the concessions (explicit or otherwise) in the answering brief, and (2) the disagreement points that remain and their nature (*e.g.*, legal, factual, superficial, fundamental, etc.). Take notes about these points as you reread the briefs. You may want to review the matching argument sections of both briefs' side by side to ensure you thoroughly understand the nature of the remaining disagreements.

B. The Reply Brief Introduction (or Summary)

Having identified the relevant concessions and battleground points, the reply brief introduction should lay these out at a high level. Often, you can summarize the main points established in the opening brief, *e.g.*, "As demonstrated in the opening brief, state law dictates the applicable prejudgment interest rate, and in this case that means New York law governs." In other words, bring the reader back to your opening brief (the reorient part of "reorient and refute"). Depending on the nature of how the debate has so far unfolded, the introduction should then identify the concession points and the high-level nature of the remaining disagreement with the details to follow.

For example (and recognizing that each case is different), the reply brief could begin with something like the following:

The opening brief demonstrated that the trial court denied Company's motion for judgment as a matter of law on the basis of a legal theory that has been rejected by the California Supreme Court. Recognizing as much, the answering brief does not dispute that *Smith v. Jones* controls this case, and instead contends that facts unique to this case make it different. Not so. As explained further below,

There are, of course, many other ways to reorient and refute without literally specifying what the opening brief said. One alternative is to instead call out the

ways in which the answering brief failed to engage the opening brief:

Although the answering brief goes on for sixty pages, it fails to address the arguments in the opening brief. With respect to Appellee's six-figure windfall under the slander of title statute, Appellee fails to refute that (1) the statute requires scienter on the part of the client (not the attorney), (2) the client here did not have the requisite scienter, and (3) Appellee violated its statutory duty to notify Appellant of its basis for claiming slander of title (which would have avoided everything that occurred afterwards).

The key point is to help the reader at the outset of the reply understand what battle points remain.

C. The Reply Brief Body

The remainder of the reply brief should then turn to the rebuttal points in accordance with the reorient-and-refute approach. For each major point, consider whether it would be helpful to provide an overview of the dialectic. For example, using the prior example where the first sub-issue involves whether a slander of title statute requires client (rather than attorney) scienter, the subsection on that issue could begin with something like this:

The opening brief demonstrated that the controlling law requires a party seeking sanctions under the slander of title statute to prove that the client (not her attorney) had the requisite scienter. The answering brief disputes this foundational rule, but in doing so relies on older cases that pre-date the precedent that controls this case.

After laying out this history of the debate, the remainder of this section would then flesh out the details. By doing so, one could read just the reply and understand the nature of the parties' disagreements and the structure of the dialectic—the touchstone that should guide your drafting of the reply brief.

V. CONCLUSION

Although it is unlikely your conclusion will make or break your case, it is still an essential piece of a brief.¹⁶ Take advantage of it. In addition to making clear your requested relief, consider driving home a final take-away point or two in one or perhaps two paragraphs.

With that, I conclude with this story. One of my law school professors would regularly have his small section write anonymous essays and then have the students identify the best two essays in the group. To my surprise (but not my professor's), there was almost always broad consensus about which essays were the best written. Although individuals' writing skills vary widely, people generally recognize good writing when they see it, and they also know what bad writing looks like. This is particularly true of structure. People know it when they see it, but often struggle to implement it. Using the tips in this article, you can write briefs that will be recognized for their good structure.

16. ARIZ. R. CIV. APP. P. 13(a)(9) (An appellant's opening brief must contain "[a] short 'conclusion' stating the precise relief sought."); *see also* CAROLE C. BERRY & RAYMOND MICHAEL RIPPLE, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* 121 (5th ed. 2016) (acknowledging the "wide range of opinion as to what the Conclusion should contain" while advising always to check court rules for guidelines and to "gently remind the court of the essence of the arguments").

LESS IS MORE: ONE LAW CLERK'S CASE AGAINST LENGTHY JUDICIAL OPINIONS

Luke Burton*

French polymath Blaise Pascal is reputed to have apologized once for writing a letter he thought was too long, explaining to the letter's recipient that he did not have time to write a shorter one. We chuckle at Pascal's apology because it highlights our tendency to think that the length of a writing correlates to the amount of time and effort expended to create it. We thus tend to presume that longer writings are better writings. Judging by the length of today's judicial opinions, it appears that some judges and their law clerks likewise treat quantity as a proxy for quality. A forty-page opinion, it seems, must be better considered than a seven-page opinion, right? Contrary to what I suppose to be the conventional wisdom, I suggest the answer is no, all things being equal. My hope here is to convince you to reach the same conclusion.

I begin with an observation: judicial opinions are getting longer. I've noticed it when I research case law and when I review proposed opinions. Perhaps you've noticed it too. I decline here to support my observation with authority; I take it as given. I'm sure a simple Google search could provide the interested reader authority for this observation. But if you doubt it, I hope you will at least concede that judicial opinions as a whole, whether growing or shrinking, are generally longer than they should be.

* Career Law Clerk to the Honorable Morris S. Arnold of the United States Court of Appeals for the Eighth Circuit. All opinions expressed in this essay are my own and not those of the judge or the court for whom I work.

There are probably several reasons for this growth. Word-processing programs make it easy to write and move words without much cost. Online research databases make it easy to find springs of legal authorities and commentaries that encourage discussion. Many judges, especially in the federal system, employ droves of law clerks who help write opinions. Many of these law clerks are fresh out of law school and fall into two camps, though they are not mutually exclusive. The first camp is eager to make a personal impression on the law, and one way to do so is to draft opinions that invite as many citations as possible. And what better way to invite citation than to insert several banal statements of law and quotations from earlier opinions, even when those statements of law are not at issue or when the precise wording of those legal points is unimportant. The second camp is rife with diffidence. The best way to hide a lack of confidence in one's own voice is to drown the opinion in quotations and other markers of scholarship, mimicking the long-winded opinions so prevalent today. I do not mean to pummel law clerks for these inclinations; I merely point out that these tendencies contribute to the mushrooming of opinions.

Judicial opinions thus tend to be more bureaucratic and robotic and less conversational and personal. More and more it seems judges and their clerks write opinions to resemble law review articles, perhaps out of the belief that those articles reflect a fastidiousness that imitation can capture. For example, many opinions now overflow with footnotes, block quotations, string citations, parentheticals, and (heaven forbid) tables of contents, despite that opinions have very different functions than law review articles and are typically read by a much wider audience.

I suspect another contributing cause to longer judicial opinions can be found in America's law schools. Law students are often taught to "show what they know" on exams by regurgitating as much as possible about a legal topic so that when they use buzz words or phrases their professors will award them points. I sus-

pect at least some law professors grade as much for the number of issues a student can spot as for clarity of thought. And though some legal-writing courses preach brevity, I do not believe it's common for law students to be rewarded for practicing what those courses preach. In this setting, a student is thus wise to err on the side of rabbit holes, and this tendency from our formative years in legal writing might sometimes carry over to judicial opinion writing, whether by clerks or judges.

Finally, I suspect judges fear the prospect of missing something important to a case more than the annoyance they cause a reader by including unimportant details or discussions. So judges feel pressure to include information of marginal relevance because they are more concerned with accusations of ignorance than accusations of verbosity.

There are probably more reasons why too many words find themselves in judicial opinions, but I'll leave that discussion aside. Instead, I hope to convince judges and law clerks to resist the pressures of volubility and focus instead on writing concise and clear-headed opinions.

The first virtue of short opinions is that they contain less dicta than long opinions. I suspect the reader is familiar with many of dictum's drawbacks, but I'll give some for good measure. Most importantly, dicta distract from an opinion's main points. A good opinion coaxes readers to follow the thread, without diverting attention to immaterial discussions. The next time you question whether you should mention a point of minimal concern, remember that coherence and persuasiveness are the biggest sacrifice of prolixity. When in doubt, leave it out.

Relatedly, an abundance of dicta suggests the author lacks a firm grasp on the legal difficulties at issue. It can also show that authors lack confidence in their opinions when they pepper them generously with distracting details and discussions, perhaps to hide difficult, controversial, or doubtful conclusions. I've learned that the best way to handle such matters is to shoot

them between the eyes, not to bury them in the weeds in the hope that no one finds them.

Dicta also tend to be less accurate. Judges often stray into the world of dicta without the benefit of argument from the parties, so it's easier to miss important points or authorities.¹ Even when the parties have briefed the point, judges are less inclined to think critically about information that has no bearing on the outcome of the case. In other words, if the judge does not expect the parties to call their statements into question, judges are less careful to ensure what they say is correct. I suspect, moreover, a dictum-laden opinion is less accurate overall because those who review the opinion drafts must spread their reviewing time over more material. It's easier to overlook mistakes, especially when a tired reviewer is rounding page 30 and is ready to finish the reviewing task. This is a common way for errors to creep into the law.

And finally, judges push the bounds of separation of powers when they utter dicta. Article III of the U.S. Constitution grants federal courts the judicial power to resolve certain cases or controversies. State constitutions generally contain similar grants of authority to state courts. Whatever the precise contours of "the judicial power," it seems generally to mean the power to adjudicate disputes, but when courts use dicta, which by definition are unnecessary to resolve the dispute before them, it raises questions about whether courts are exceeding their authority.²

Dictum is not the only problematic consequence of overlong opinions. Overlong opinions also tend to be wordier and thus less clear and direct. Spending time shaving stubble off your opinion can work wonders. It makes the opinion smoother and more persuasive. Perhaps most important, wordy opinions reflect an intellec-

1. Michael C. Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997, 2000 (1994) ("Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law.").

2. See Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259–60 (2006).

tual lethargy that offsets the reasoned consideration authors want to project.

Overlong opinions also raise the costs of litigation. In law as elsewhere, time is money. It generally takes less time and effort to read and understand a five-page opinion than a ten-page opinion. Judges and their clerks must also devote more time separating wheat from chaff in longer opinions. And since overlong opinions tend to be more difficult to comprehend, more effort is needed to make sense of them.³ Litigation already costs too much, and those with their sleeves caught in the litigation machinery already complain enough about the time and expense needed to litigate. Long judicial opinions give credence to their concerns.

I am not alone in this observation. More than a century ago, an anonymous author in the *Harvard Law Review* opined that “the judge who condenses his opinions as rigorously as is at all consistent with thoroughness is conferring a benefit on the entire profession.”⁴ A few decades later, a commentator in the *Yale Law Journal* suggested that “the verbosity or prolixity of judicial opinions . . . add[s] to the labors and consequent delays of the courts,” and may be one reason for a growing disrespect for the law.⁵ These observations are even more suitable today, and though it’s easier to keep that extra discussion in the opinion than to scratch it, remember that you are forever sentencing attorneys to grapple with the content. And they’ll make their clients pay for it.

The public, moreover, is not seriously interested in overlong opinions. In today’s 280-character culture, the public simply does not have the attention span to spend

3. Long opinions may also increase uncertainty about what the law is, which increases the likelihood of litigation. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 *CHI.-KENT L. REV.* 93, 107 (1989).

4. Note, *Judicial Opinions Long Drawn Out*, 9 *HARV. L. REV.* 537, 537 (1896).

5. Francis A. Leach, *The Length of Judicial Opinions*, 21 *YALE L.J.* 141, 141 (1911).

hours reading judicial opinions.⁶ Overlong opinions therefore encourage public ignorance of the law and the courts and thus discourage public participation in the judicial system. So if public education is one of your opinion-writing goals, think twice before including that extra word or thought.

Relatedly, overlong opinions are ripe for misinterpretation. I recently read an article online that explained the court for whom I work had held that citizens do not have the right to film public officials in public.⁷ When I checked the opinion cited for that proposition,⁸ I discovered that it says absolutely nothing about such a right one way or the other. I do not maintain that the opinion in that case was too long (it was actually a relatively short per curiam opinion); I submit that the media often has trouble understanding and explaining the work courts do.⁹ Why make it more difficult to report accurately on our work?

Overlong opinions also make it difficult for the most important members of the public, the parties before the court, to understand court decisions. Parties should not have to spend hours reading an opinion (often more than once) to figure out why the court decided as it did; attorneys should not have to act as professional interpreters of legalese. Opinions should be accessible and clearly and concisely explain the basis for decision. The best way to increase a court's legitimacy is to write opinions that allow even the losers to feel that the court reached a justifiable decision; what losers cannot stomach is a decision that makes no sense or that requires them to rely on their expensive attorneys to navigate and explain the vernacular.

6. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 247–48 (2010).

7. Dan Claxton, *Eighth Circuit: Citizens Do Not Have a Right To Film Public Officials in Public*, 13 KRCG (Aug. 9, 2017), <https://krcgtv.com/news/local/eighth-circuit-citizens-do-not-have-a-right-to-film-public-officials-in-public>.

8. *Akins v. Knight*, 863 F.3d 1084 (8th Cir. 2017) (per curiam).

9. See also Erwin Chemerinsky, *A Failure to Communicate*, 2012 B.Y.U. L. REV. 1705, 1705 (2012) (describing initial media confusion over the *Bush v. Gore* decision).

And finally, overlong judicial opinions might discourage law students and those thinking about becoming law students. When the uninitiated encounter one of today's long, inscrutable opinions, they may suspect they don't have what it takes to think, sound, or write like a lawyer. Unfortunately, many students' doubts are probably the product of encountering bad writing, not discovering some personal shortcoming. There's no difference between good writing and good legal writing. Good opinions make sense, and most should be easy for law students to grasp. Not to mention that law students can be an overburdened, anxious lot. I see no good reason to add to their stress.

I hope this piece convinces at least some to reconsider their preconceptions about the qualities of a good judicial opinion. When considering each word or idea in an opinion draft, keep in mind that everything that doesn't help hurts. Instead of erring on the side of inclusion, I recommend you commit to omit and elide with pride.

And I do apologize for not writing a shorter piece. I didn't have the time.

COVID-19 AND SUPREME COURT ORAL ARGUMENT:
THE CURIOUS CASE OF JUSTICE CLARENCE
THOMAS

Timothy R. Johnson, Maron W. Sorenson, Maggie Cleary,
and Katie Szarkowicz*

The Court will hear oral arguments by telephone conference on May 4, 5, 6, 11, 12, and 13 in a limited number of previously postponed cases. . . . The Chief Justice will call the first case, and he will acknowledge the first counsel to argue. . . . At the end of this time, the Chief Justice will have the opportunity to ask questions. When his initial questioning is complete, the Associate Justices will then have the opportunity to ask questions in turn in order of seniority.¹

There is no question that the COVID-19 pandemic has touched nearly every aspect of American political institutions. The White House Press Corps created a rotating schedule to ensure only every third briefing room

* Timothy R. Johnson is Morse-Alumni Distinguished Professor of political science and law at the University of Minnesota. His research focuses on judicial behavior, Supreme Court decision-making, and Supreme Court oral arguments. Maron W. Sorenson is an Assistant Professor of Government and Legal Studies at Bowdoin College. Her research focuses on judicial behavior and decision-making. Maggie Cleary is a graduate of the University of Minnesota, where she studied both political science and history. Katie Szarkowicz is a graduate of the University of Minnesota with a Bachelor of Arts degree in Political Science. She most recently worked for the Minnesota Democratic-Farmer-Labor Party as a Field Organizer.

1. Press Release, Supreme Court of the U.S., Regarding May Teleconference Arguments Order of Business (Apr. 28, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20.

seat was occupied,² several states expanded absentee and mail-in balloting,³ then-presidential candidate Joseph R. Biden, Jr. held a livestreamed town hall meeting about the pandemic,⁴ and the House of Representatives cast votes remotely for the first time in its 233-year history.⁵ Each of these changes was adopted with varying degrees of acceptance and success,⁶ but one thing is certain: there is no immediate end in sight to this pandemic.

An institution notoriously reticent (sometimes even hostile) to change, the U.S. Supreme Court was also forced to make institutional adjustments due to the pandemic. On March 16 and April 3 of 2020, the Court issued press releases postponing its normally scheduled oral arguments due to the pandemic.⁷ Just ten days later, it announced it would forego in-person arguments and proceed via telephone conference for thirteen of its final 2019 term cases.⁸ Further details of the telephonic sessions—including procedures for joining the conference

2. Steve Herman, *White House Journalists Voluntarily Scale Back Their Presence*, VOA (Mar. 16, 2020), <https://www.voanews.com/science-health/coronavirus-outbreak/white-house-journalists-voluntarily-scale-back-their-presence>.

3. See *COVID-19 and Elections*, NAT'L CONF. ST. LEGIS., <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx> (last visited Aug. 31, 2020).

4. *Joe Biden Holds COVID-19 Town Hall with Democratic Governors*, C-SPAN (May 14, 2020), <https://www.c-span.org/video/?472209-1/joe-biden-holds-covid-19-town-hall-democratic-governors>.

5. Nicholas Fandos, *With Move to Remote Voting, House Alters What It Means for Congress to Meet*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/politics/remote-voting-house-coronavirus.html>.

6. See Michael Wines, *As Trump Rails Against Voting by Mail, States Open the Door for It*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/vote-by-mail-trump.html>; Eric Wemple, *One American News Network has been Ousted from Coronavirus Briefing Rotation. Here's Why.*, WASH. POST (Apr. 2, 2020), <https://www.washingtonpost.com/opinions/2020/04/02/one-american-news-network-has-been-ousted-coronavirus-briefing-rotation-heres-why/>.

7. Press Release, Supreme Court of the U.S., *Regarding Postponement of March Oral Arguments* (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20; Press Release, Supreme Court of the U.S., *Regarding Postponement of April Arguments* (Apr. 3, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20.

8. Press Release, Supreme Court of the U.S., *Regarding May Teleconference Oral Arguments* (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20. Several of these cases were consolidated so that it actually held only ten argument sessions.

call and changes to norms of how the proceedings would be conducted—were made available in the April 28 press release, excerpted above. This seemingly mundane announcement marked the most substantial change to the Court’s oral argument process in half a century.⁹ Indeed, the Court purported to hear arguments by phone, the Justices would take turns asking questions in order of seniority, and the arguments would be livestreamed to the public for the first time in its history.¹⁰

While it was initially unclear how these changes would impact oral argument sessions, Court watchers focused a fair amount of attention on whether the new procedures would lead Associate Justice Clarence Thomas to participate.¹¹ Indeed, the (in)famously taciturn Justice is not known for speaking during arguments, doing so in just 39 of approximately 2,200 orally argued cases heard in his twenty-eight years on the bench. But given the new, take-turns format, the question was whether Thomas would participate when the Court convened via telephone on May 4, 2020. Those who tuned in for the

9. Initially, oral argument time was unlimited. *Understanding U.S. Supreme Court Oral Arguments*, CORNELL UNIV. LIBRARY, <https://guides.library.cornell.edu/SupCourtOralArguments> (last visited Oct. 8, 2020). In 1849 the Court limited it, for the first time, to two hours per side. *Id.* In 1925 it was again limited to one hour per side. *Id.* Then, in 1970, arguments were limited to 30 minutes per side. *Id.* Further, Chief Justice Burger changed the shape of the courtroom bench to make communication easier between Justices and counsel. Ryan C. Black, Timothy R. Johnson & Ryan J. Owens, *Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court’s Bench Reduced Interruptions During Oral Argument*, 43 J. SUP. CT. HIST. 83, 83 (2018). See generally TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (updated ed. 2011).

10. See Supreme Court of the U.S., *supra* note 1; Press Release, Supreme Court of the U.S., Media Advisory Regarding May Teleconference Argument Audio (Apr. 30, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20.

11. This assertion is evidenced by the attention given to Thomas after he spoke during the first arguments. See, e.g., Greg Stohr, *Supreme Court Tele-Argument Brings Minor Hiccups, Thomas Questions*, BLOOMBERG (May 4, 2020), <https://www.bloomberg.com/news/articles/2020-05-04/justice-thomas-speaks-during-supreme-court-phone-argument>; Brent Kendall & Jess Bravin, *Under Coronavirus Court Procedures, Clarence Thomas Finds His Voice*, WALL ST. J. (May 10, 2020), <https://www.wsj.com/articles/justice-clarence-thomas-finds-his-voice-11589036401>.

livestreamed session found their answer quickly: when called upon by Chief Justice John Roberts, only six minutes and five seconds into the day's first case, Thomas took his turn, starting with, "Yes, Ms. Ross—a *couple of questions*" (emphasis added).¹² All told, Thomas spoke multiple times in every one of the ten telephonic arguments that culminated the Court's 2019 term.¹³

Such a startling change in judicial behavior leads us to two interrelated research questions: *is Thomas' increased participation due solely to the telephonic format, or do other explanations account for his behavior?* In asking these questions, we specifically move away from media accounts of his participation, which focus on his silent streaks or speculate on reasons why he breaks such streaks.¹⁴ In Section I, we delineate several accounts of his silence on the bench, including observations by his colleague Justice Harry A. Blackmun; how the media picked up on his silence; Thomas' own observations about this phenomenon; and, finally, what scholars have said about it. In Section II, we analyze empirically Thomas' silence prior to and during the pandemic. In Section III, we provide a multivariate analysis to explain when he is most likely to speak during an argument session. In Section IV, we provide data on the impact Thomas has had on oral argument sessions when he does speak. Section V concludes with a summary and discussion of our findings and some thoughts on how we may expect Thomas to act if, post-pandemic, the Court moves back to traditional arguments.

I. ORAL ARGUMENT AND JUSTICE CLARENCE THOMAS:

12. Oral Argument at 6:05, U.S. Patent & Trademark Office v. Booking.com B.V., 140 S. Ct. 2298 (2020) (No. 19-46), https://www.supremecourt.gov/oral_arguments/audio/2019/19-46.

13. See *Argument Session: May 4, 2020–May 13, 2020*, SUPREMECOURT.GOV, https://www.supremecourt.gov/oral_arguments/argument_audio/2019 (last visited Sep. 25, 2020).

14. See, e.g., Neil A. Lewis, *2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard*, N.Y. TIMES (Nov. 27, 1993), <https://www.nytimes.com/1993/11/27/us/2-years-after-his-bruising-hearing-justice-thomas-can-rarely-be-heard.html>.

A CASE OF SILENCE

A. Justice Harry A. Blackmun Takes Note

It was not immediately evident that, during his career, Thomas would speak so little during oral argument sessions. However, little escaped the attention of fellow Justice Harry A. Blackmun. Indeed, Blackmun is perhaps as well-known for the meticulous notes he took during the Court's decision-making process as he is for the famous (and sometimes infamous) opinions he authored.¹⁵ During oral argument, Blackmun regularly predicted how he thought his colleagues would vote, noted questions and comments made by other Justices, rated the attorneys' arguments, and even kept detailed physical descriptions of the lawyers who argued.¹⁶ Subsequent scholarship demonstrated the utility of Blackmun's notes, as he clearly used them as more than just a way to pass the time.¹⁷

Blackmun also kept track of when he believed his colleagues were monopolizing the proceedings by asking too many questions.¹⁸ In fact, he noted his annoyance

15. See generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005); Amanda C. Bryan, Rachael Houston & Timothy R. Johnson, *Taking Note: Justice Harry A. Blackmun's Observations from Oral Argument about Life, Law, and the U.S. Supreme Court*, 45 J. SUP. CT. HIST. 44 (2020).

16. Bryan et al., *supra* note 15, at 51–52.

17. See generally RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, *ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE* (2012); Timothy R. Johnson, Paul L. Wahlbeck & James F. Spriggs, *The Influence of Oral Argumentation Before the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006); Eve M. Ringsmuth, Amanda C. Bryan & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RES. Q. 429 (2013).

18. See Timothy R. Johnson, *The Digital Archives of Justices Blackmun and Powell Oral Argument Notes* (2009) [hereinafter *Argument Archives*], <https://sites.google.com/a/umn.edu/trj/harry-a-blackmun-oral-argument-notes> (containing Blackmun's oral argument notes in every case for which they exist). Using these notes, Johnson coded for a variety of phenomena Blackmun wrote about. In this instance, as a basic indicator that Blackmun saw a real trend in Justices speaking so often, the mean of the *Too Many Questions* variable increases from 4.25 per term in the years preceding Justice Antonin Scalia's ascension to the bench, to 18.25 once Scalia arrives. In other words, once the notoriously loquacious Scalia was appointed, Blackmun's complaints in this matter

with such behavior on 141 separate occasions.¹⁹ In *Freeman v. Pitts*,²⁰ for example, he complained: “?s—K too many.”²¹ Similarly, in *Eastman Kodak Company v. Image Technical Services, Inc.*,²² Blackmun wrote “Scalia again,”²³ annoyed that the junior Justice spoke for roughly six minutes—or one-tenth of the sixty minutes usually allotted for the Justices to hear arguments.

Our point is this: even prior to Thomas’ appointment, Blackmun not only paid attention to *what* his colleagues said, but also noted *how much* they had to say.²⁴ Given this attention to detail, it is unsurprising that he also memorialized Thomas’ very first oral argument utterance. Indeed, dated November 5, 1991—just Thomas’ second day on the bench—Blackmun’s notes in *Collins v. City of Harker Heights*²⁵ include the shorthand phrase: “T asks his 1st?”²⁶ In the months and years to come, Blackmun made a particular habit of singling out

increased more than four-fold (data available from authors upon request). For more on how Scalia’s presence changed oral argument see Timothy R. Johnson, Ryan C. Black & Ryan J. Owens, *Justice Scalia and Oral Arguments at the Supreme Court in THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA* 245–272 (David A. Schultz & Howard Schweber eds., 2018).

19. See Johnson, *Argument Archives*, *supra* note 18.

20. 503 U.S. 467 (1992).

21. The transcription of Blackmun’s shorthand is “questions—Kennedy too many.” Justice Blackmun Oral Argument Notes (Oct. 7, 1991), in *Argument Archives*, No. 18-1290, <http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/89-1290.jpg>

22. 504 U.S. 451 (1992).

23. Justice Blackmun Oral Argument Notes (Dec. 10, 1991), in *Argument Archives*, No. 90-1029, <http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/90-1029.jpg>.

24. While not as often, Blackmun also considered, from time-to-time, that his colleagues were overly quiet. Indeed, on 15 occasions he penciled that the Justices asked too few questions (data available from authors upon request).

25. 503 U.S. 115 (1992).

26. The transcription is “Thomas asks his 1st question.” Justice Blackmun Oral Argument Notes (Nov. 5, 1991), in *Argument Archives*, No. 90-1279, <http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/90-1279.jpg>.

Thomas to note his oral argument behavior, including comments such as “T asks a ?,”²⁷ and “T asks a ? again.”²⁸

These handwritten references to Thomas end, however, after the 1992 term because, according to Court records and our data, Thomas did not speak during the entire 1993 term—Blackmun’s last on the bench. Thomas did, however, speak in seven and eight cases, respectively, during his first two terms (1991 and 1992), setting a record for participation he would not break until May 2020. Of these fifteen cases in which Thomas spoke before Blackmun’s retirement, Blackmun took note six times.²⁹ His comments range from *Cincinnati v. Discovery Network*,³⁰ where he wrote, “T asks his 1st ? o t Fall”³¹ to “T!”³² to, in the second-to-last case of the term, “CT asks a ?!”³³

In just two terms observing his oral argument behavior, it was clear Blackmun had come to characterize Thomas as a generally silent colleague who rarely spoke. And, when Thomas did speak, Blackmun was quick to

27. Justice Blackmun Oral Argument Notes (Nov. 10, 1992), in *Argument Archives*, No. 91-1160, <http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1992%20term/91-1160.jpg>. The case was *Arave v. Creech*, 507 U.S. 463 (1993).

28. Justice Blackmun Oral Argument Notes (Dec. 9, 1992), in *Argument Archives*, No. 91-1306, <http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1992%20term/91-1306.jpg>. The case was *United States v. Olano*, 507 U.S. 725 (1993).

29. The one exception was *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). Ironically, Thomas had nine separate speaking turns in this case but Blackmun took no specific note of them. He did, however, write “Lots o ?s” (lots of questions).

30. 507 U.S. 410 (1993).

31. The translation is “Thomas asks his 1st question of the fall.” Justice Blackmun Oral Argument Notes (Nov. 9, 1992), in *Argument Archives*, No. 91-1200, <http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1992%20term/91-1200.jpg>.

32. Justice Blackmun Oral Argument Notes (Mar. 3, 1993), in *Argument Archives*, No. 91-1833, <http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1992%20term/91-1833.jpg>. The case was *Lincoln v. Vigil*, 508 U.S. 182 (1993).

33. Justice Blackmun Oral Argument Notes (Dec. 9, 1992), in *Argument Archives*, Nos. 91-261, 91-274, <http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1992%20term/91-261,91-274.jpg>. The case was *Bldgs. & Constr. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass. /RI, Inc.*, 507 U.S. 218 (1993).

excitedly memorialize the phenomenon. The question is whether others would notice Thomas' behavior. It is to that question we now turn.

B. The Media Pick up on Blackmun's Insights

While Blackmun had a penchant for following Thomas' peculiar oral argument behavior, the media was not so fast to catch on. Although recent coverage of Thomas is saturated with stories about his silence, the media didn't first report on this aspect of his judicial behavior until 1993—his third term. In a broad piece, focused mostly on activities outside the Court, Neil A. Lewis framed Thomas' non-participation as part of a more general retreat from public life following the media circus covering his nomination and subsequent sexual harassment allegations against him.³⁴ Specifically, Lewis noted Thomas' complete silence during a sexual harassment case, adding, "Although he was outspoken when he served on the United States Circuit Court of Appeals for the District of Columbia, Justice Thomas has been the most reticent member of the Court. In fact, he rarely speaks at all."³⁵

This account appears to be the only media acknowledgement of Thomas' silence during his early years on the bench; the reason why is intuitive. Although he did not speak as much as his other colleagues, there were no long-term gaps between cases when Thomas spoke. As the data we outline below indicate, with the exception of 1993, he spoke at least once per term from 1991 to 1999.³⁶ Thus, though his behavior was certainly unusual compared to his colleagues, it was not newsworthy enough to generate extensive coverage. In fact, it appears there are no news articles dedicated specifically to his reserved courtroom demeanor during his first few years on the bench. Even Lewis's nod to Thomas' virtual

34. Lewis, *supra* note 14.

35. Lewis, *supra* note 14.

36. See *infra* Table 1a.

silence was buried in an article focused on, what was assumed to be, Thomas' prolonged response to his controversial confirmation hearing.

It was not until 2011—when Thomas had been silent for half a decade—that the media, writ large, began to focus on his lack of questions and comments. Newspapers, radio, and television outlets all analyzed what his silence meant and when, or whether, he would ever speak again.³⁷ In addition, debates between legal experts appeared in major newspapers about whether Thomas' behavior was good or bad for him and the Court or whether it mattered at all.³⁸

Two years later the media again brought Thomas' behavior to the fore when, in *Boyer v. Louisiana*,³⁹ he broke a seven-year silent streak with a joke about Yale, his law school alma mater.⁴⁰ Despite less-than-clear audio, the fact that Thomas' voice was even partially heard “set off a small quake” in the public gallery, between the journalists present, and among the Justices and arguing attorney (who, for a short time, could not stifle her laugh at his joke).⁴¹ Subsequent media coverage was extensive and almost comically in-depth,⁴² considering it was likely

37. See, e.g., Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES (Feb. 12, 2011), https://www.nytimes.com/2011/02/13/us/13thomas.html?_r=1&scp=4&sq=adam%20liptak&st=cse; Nina Totenburg, *Five Years Later, Justice Thomas Still Silent*, NPR (Feb. 22, 2011, 3:00 PM), <https://www.npr.org/2011/02/22/133971220/5-Years-Later-Justice-Thomas-Still-Silent>; Ariane de Vogue, *Justice Clarence Thomas' Silence Unmatched for 40 Years*, ABC NEWS (Feb. 22, 2011, 3:08 PM), https://abcnews.go.com/Politics/Supreme_Court/supreme-court-justice-clarence-thomas-celebrates-years-silence/story?id=12974416&page=1.

38. Jamal Greene et. al., *Opinion, Does Clarence Thomas' Silence Matter?*, N.Y. TIMES (Feb. 16, 2011), <https://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter>.

39. 569 U.S. 238 (2013).

40. Oral Argument at 41:12, *Boyer v. Louisiana*, 569 U.S. 238 (2013) (No. 11-9953), <https://www.oyez.org/cases/2012/11-9953>.

41. Robert Barnes, *Clarence Thomas Breaks Long Silence During Supreme Court Oral Arguments*, WASH. POST (Jan. 14, 2013), https://www.washingtonpost.com/politics/clarence-thomas-breaks-long-silence-during-supreme-court-oral-arguments/2013/01/14/a7c6023c-5e7a-11e2-9940-6fc488f3fed_story.html.

42. The *New York Times* and the *Washington Post* contextualized the joke by thoroughly analyzing his previous comments about Yale and his views about

the joke was merely an aside picked up by the Justices' microphones. Despite the media furor, the *Times* and *Post* both concluded that joking did not count as judicial participation; Thomas may have spoken, but he didn't truly break his silence by asking a question or making a substantive legal comment.

It is important to note that none of Thomas' previous questions or comments received such overblown news coverage. Certainly, the media previously discussed Thomas' silence but the *Boyer* coverage set a new precedent for reporting on his oral argument participation. Instead of, as is typical, focusing on a Justice's constitutional philosophy or jurisprudence, the media instead reported the length of Thomas' silent streaks and engaged in detailed analyses of what he said and why he may have said it.⁴³

Feeding that narrative, Thomas did not speak again during arguments, in any capacity, until February 29, 2016. On that date, during arguments in *Voisine v. United States*,⁴⁴ he shocked Court watchers, media

oral argument. The *Times* additionally scoured the remark for meaning: "The joke itself seemed good-natured, and it was made funnier by Yale Law School's reputation. While by some measure it is the best law school in the nation, it is also known for intellectual abstraction and disdain for the actual practice of law. The joke was also probably evidence of a recent warming trend between Justice Thomas and [Yale] law school, from which he graduated in 1974." Adam Liptak, *Justice Clarence Breaks His Silence*, N.Y. TIMES (Jan. 14, 2013), <https://www.nytimes.com/2013/01/15/us/clarence-thomas-breaks-silence-in-supreme-court.html>. The *Washington Post* focused on Thomas' public disdain for speaking during argument sessions. Robert Barnes, *Supreme Court Justice Clarence Thomas Finishes His Thought*, WASH. POST (Jan. 23, 2013), https://www.washingtonpost.com/politics/supreme-court-justice-clarence-thomas-finishes-his-thought/2013/01/23/3036773a-65a3-11e2-9e1b-07db1d2ccd5b_story.html.

43. See, e.g., Mark Joseph Stern, *Clarence Thomas Just Asked His First Question in a Decade on the Supreme Court*, SLATE (Feb. 29, 2016), <https://slate.com/news-and-politics/2016/02/clarence-thomas-asked-a-question-from-the-bench-to-defend-gun-rights.html>; Robert Barnes, *For the First Time in 10 Years, Justice Clarence Thomas Asks Questions During an Argument*, WASH. POST (Feb. 29, 2016), https://www.washingtonpost.com/politics/courts_law/for-first-time-in-10-years-justice-thomas-asks-questions-during-argument/2016/02/29/b47f2558-df00-11e5-846c-10191d1fc4ec_story.html; Garrett Epps, *Clarence Thomas Breaks His Silence*, ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/politics/archive/2016/02/clarence-thomas-supreme-court/471582/>.

44. 136 S. Ct. 2272 (2016).

members, and probably a few colleagues, when he spoke, not only once, but uttered substantive questions and comments eleven separate times.⁴⁵ Given the media's previously disproportionate coverage of a law school joke in *Boyer*, it is unsurprising that several major publications devoted entire articles to detailing an almost play-by-play account of Thomas' behavior.⁴⁶ *The Atlantic*, for example, provided the following commentary:

Though the vigilant marshals keep a tight lid on noise, it's safe to say that not since Clarence Darrow for the defense called prosecutor William Jennings Bryan himself to the stand has an American courtroom been so startled. Thomas has not asked a question in court since February 22, 2006.⁴⁷

Even *National Public Radio*, normally immune to hyperbole or sensationalist reporting, noted that Thomas' oral argument performance "drew gasps" before also reiterating the length of time since his last in-Court comments.⁴⁸

In addition to reporting upon the novelty of Thomas' participation, the prevailing theory about why he broke his silence centered on Scalia's death just two weeks earlier. Media accounts suggested Thomas spoke to fill the silence emanating from Scalia's former seat next to the Chief Justice.⁴⁹ *The Atlantic* suggested, "of course, [Justice Thomas'] sudden loquacity comes barely two weeks after his comrade in arms, Antonin Scalia, died,"⁵⁰ while *The New York Times* speculated Scalia had "passed the baton" to Thomas in order to keep the spirit of

45. See Transcript of Oral Argument at 51, *Voisine v. United States*, 136 S. Ct. 2272 (2016) (No. 14-10154), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-10154_g31h.pdf.

46. See, e.g., Stern, *supra* note 43; Barnes, *supra* note 43.

47. Epps, *supra* note 43.

48. Laura Wagner, *Clarence Thomas Asks 1st Question from Supreme Court Bench in 10 Years*, NPR (Feb. 29, 2016, 1:40 PM), <https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years>.

49. Epps, *supra* note 43.

50. Epps, *supra* note 47.

originalism alive.⁵¹ Whether or not these accounts accurately explain his sudden (and unexpected) outburst, Thomas quickly slipped back into the judicial silence for which he had become (in)famous.

A final wrinkle in the media's coverage of Thomas revealed itself three years later following arguments in *Flowers v. Mississippi*⁵²—a case focused on racial discrimination in jury selection. Although news stories presented the common refrain that Thomas had “surprised court watchers on Wednesday when he made a rare intervention in court arguments,”⁵³ some media outlets suggested he had a particular interest in *Flowers* because race was a key issue.⁵⁴ Specifically, Thomas questioned petitioner's counsel about the race of any jurors preemptively struck by *Flowers*'s trial attorney,⁵⁵ an exchange that led CNN news correspondent Joan Biskupic to conclude that when Thomas does speak “it has often related to race.”⁵⁶

Clearly, the media has taken a keen interest in Thomas' oral argument behavior but have not provided systematic explanations for why he chooses to break his silence when he does. That has not prevented speculation, however. Beyond generally conjecturing about his taciturn nature, accounts suggest two main reasons for why Thomas chooses to speak: to fill the originalism void left by Scalia and to offer comment upon issues related

51. Adam Liptak, *Clarence Thomas Breaks 10 Years of Silence at Supreme Court*, N.Y. TIMES (Feb. 29, 2016), <https://www.nytimes.com/2016/03/01/us/politics/supreme-court-clarence-thomas.html>.

52. 139 S. Ct. 2228 (2019).

53. Adam Shaw, *Clarence Thomas Makes Rare Intervention During Supreme Court Arguments*, FOX NEWS (Mar. 20, 2019), <https://www.foxnews.com/politics/clarence-thomas-makes-rare-intervention-during-supreme-court-arguments>.

54. See Jordan S. Rubin & Greg Stohr, *Thomas Asks Rare Question About Race in Jury Selection (4)*, BLOOMBERG L. (Mar. 20, 2020, 1:45PM), <https://news.bloomberglaw.com/us-law-week/thomas-asks-rare-questions-about-race-in-jury-selection-4>.

55. Transcript of Oral Argument at 57, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-9572_2c8f.pdf.

56. Joan Biskupic, *Justice Clarence Thomas Asked a Question for the First Time in 3 Years—Here's Why*, CNN POL. (Mar. 20, 2019, 6:52 PM), <https://www.cnn.com/2019/03/20/politics/clarence-thomas-question/index.html>.

to race.⁵⁷ Because neither of these accounts have been verified, we next go straight to the source and detail Thomas' own stated oral argument philosophy.

C. *Thomas' Account of His Silence*

Although Thomas generally refrains from speaking to the press and participating during oral arguments, he does talk regularly and publicly about his oral argument behavior. He offers a number of reasons for his silence, beginning with a general reticence to speak at all in public. When asked about his lack of oral argument participation during a December 12, 2000, Question and Answer session, Thomas revealed that he grew up speaking a country dialect—Geechie Gullah—and therefore lacked the confidence to speak up: “[T]hey used to make fun of us back then. . . . [I] just started developing the habit of listening.”⁵⁸

Beyond the issue with his childhood dialect, Thomas believes lawyers should be allowed to present arguments without constant interruption. Instead of speaking so much, he would rather the Justices “hear a coherent presentation by counsel without unnecessary interruptions by his colleagues.”⁵⁹ In other words, it seems he would prefer oral arguments to proceed as they did prior to 1850. During these early years, attorneys—such as Daniel Webster—were as much orators as they were legal analysts and so Justices largely listened to the arguments rather than engaging with counsel.⁶⁰ As Thomas puts it, “I think we should listen to lawyers who are arguing their cases, and I think we should allow the advocates to advocate.”⁶¹

57. See, e.g., Epps, *supra* note 43; Rubin & Stohr, *supra* note 54.

58. Neil A. Lewis, *The Election; Clarence Thomas Speaks Out*, N.Y. TIMES (Dec. 17, 2000), <https://www.nytimes.com/2000/12/17/weekinreview/the-election-clarence-thomas-speaks-out.html>.

59. Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005, 1012 (2015).

60. JOHNSON, *supra* note 9, at 2.

61. Liptak, *supra* note 51.

For Thomas, allowing the advocates to advocate means eliminating nearly all questions from the bench: “Unless I want an answer I don’t ask things. . . . I don’t ask for entertainment, I don’t ask to give people a hard time.”⁶² Thomas has even gone so far as to express disdain for the *Family Feud* atmosphere created by the Justices’ jockeying for turns to pose questions or to offer comments about a case.⁶³ Stemming from his desire for the Justices to treat advocates courteously, Thomas seems unwilling to add to the chaos in an attempt to “[get] a word in edgewise” when surrounded by his more loquacious colleagues.⁶⁴

Perhaps, most succinctly, Thomas says he does not ask questions during oral argument because, for him, there are simply “too many questions” already asked.⁶⁵ This indicates Thomas values hearing the lawyers’ arguments more than (what he considers) the unnecessary questions and comments made by his colleagues. In short, he believes questions should not be the focus of oral arguments: “I don’t see where that advances anything. . . . Maybe it’s the Southerner in me. Maybe it’s the introvert in me, I don’t know. I think that when somebody’s talking, somebody ought to listen.”⁶⁶

Thomas offers one final (empirically disputed)⁶⁷ reason for his minimal participation at oral arguments:

62. Lewis, *supra* note 58.

63. Adam Liptak, *No Argument: Thomas Keeps 5-year Silence*, N.Y. TIMES (Feb. 12, 2011), https://www.nytimes.com/2011/02/13/us/13thomas.html?_r=1&ref=clarencethomas.

64. Liptak, *supra* note 42.

65. Kaitlynn Riely, *A Supreme Presence in Pittsburgh*, PITTSBURGH POST-GAZETTE, Apr. 10, 2013, at Local Section, <https://www.pressreader.com/usa/pittsburgh-post-gazette/20130410/281943130355271>.

66. Eric Sturgus, *Clarence Thomas Gives Supreme Court History Lesson*, POLITIFACT (Apr. 16, 2012), <https://www.politifact.com/georgia/statements/2012/apr/16/clarence-thomas/clarence-thomas-gives-supreme-court-history-lesson/>.

67. See BLACK ET AL., *supra* note 17, at 13–17; Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1168 (2019); Johnson et al., *supra* note 15, at 55–57; Timothy R. Johnson, Ryan C. Black, Jerry Goldman & Sarah Treul, *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, 244–45 (2009) [hereinafter *Inquiring Minds*]; Timothy R. Johnson, James F. Spriggs & Paul J. Wahlbeck, *Supreme*

according to him, they don't matter much. He believes briefs are the most useful for providing the Court with arguments about which side should win a case, and why.⁶⁸ The bottom line is that, whether for personal or practical reasons, and with the exception of a few cases over the course of his career, Thomas has simply chosen not to participate during oral arguments in any meaningful way.

D. Scholarly Interpretations of Thomas' Silence

While Thomas provides consistent reasons for his silence at oral argument it is unclear whether these personal reasons explain, systematically, his judicial behavior. In our survey of scholarly literature, we were able to find only one single article dedicated exclusively to Clarence Thomas' oral argument behavior.⁶⁹ Written much like a love letter, RonNell Jones and Aaron Nielson express their admiration for Thomas' questioning style and implore him to participate more often in these proceedings.⁷⁰ They also compile an impressive dataset comprised of (at the time) every traceable utterance voiced by Thomas in open Court.⁷¹ With these data, Jones and Nielson categorize Thomas' remarks in order to create a (sort of) custom-built speaking profile including him acting as a "Fact Stickler, Boundary Tester, Attorney Respector, Statute Parser, Insight Provider, Plain Speaker, and Team Player."⁷² From this paradigm, Jones and Nielson offer some of the same theories for why Thomas remains quiet (respect for attorneys) and for why he

Court Oral Advocacy: Does it Affect the Justices' Decisions?, 85 WASH. U. L. REV. 457, 468 (2007).

68. Michael L. Huggins, *Best Approach to Oral Arguments from the Bench?*, AM. BAR ASS'N (Feb. 2, 2016), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/best-approach-to-oral-arguments-from-bench/>.

69. RonNell Andersen Jones & Aaron L. Nielson, *Clarence Thomas the Questioner*, 111 NW. U. L. REV. 1185 (2017).

70. *Id.* at 1186.

71. *Id.* at 1190–92.

72. *Id.* at 1187.

sometimes chooses to speak (issues that pique his interest such as race).

Beyond Jones and Nielson, several scholarly accounts move past the basic observation that Thomas is mostly silent on the bench.⁷³ What these additional works have in common is that they all draw a direct connection between his comments in *Virginia v. Black* and his racial identity. The arguments range from the generic: “race plays [a prominent role] in many facets of Thomas’ jurisprudence,”⁷⁴ to extended analyses on the interaction between race and judicial decision-making.⁷⁵ On the latter point, Onwuachi-Willig and Charles, for example, argue (separately) that Thomas’ comments in *Black* were especially persuasive to his colleagues.⁷⁶ More specifically, Charles claims Thomas’ past experiences as an African-American man “brought sensitivity to the issue” and spurred him to “analyz[e] the harm caused by cross burning from his perspective as a person of color.”⁷⁷ Onwuachi-Willig echoes this sentiment, attributing Thomas’ persuasiveness to his “race and experiences with racism as a black man growing up in the segregated South that shaped his view of a burning cross.”⁷⁸

Beyond these scant accounts, scholars who study Supreme Court oral arguments largely leave Thomas out of their analyses because his silent behavior, for the most part, makes statistical models intractable.⁷⁹ Of course,

73. See generally, e.g., Scott D. Gerber, *Justice for Clarence Thomas: An Intellectual History of Justice Thomas’ Twenty Years on the Supreme Court*, 88 U. DET. MERCY L. REV. 667 (2011); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575 (2004); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005).

74. Gerber, *supra* note 73, at 679.

75. See generally Charles, *supra* note 73; Onwuachi-Willig, *supra* note 73.

76. See generally Charles, *supra* note 73; Onwuachi-Willig, *supra* note 73.

77. Charles, *supra* note 73, at 608.

78. Onwuachi-Willig, *supra* note 73, at 1004.

79. Cf., e.g., Ryan C. Black, Sarah A. Treul, Timothy R. Johnson & Jerry Goldman, *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572 (2011) (using a statistical model that does not mention Justice

these omissions create their own set of problems, namely that political scientists and legal scholars know very little about what drives Thomas' silence or what, more importantly, drives him to speak in specific cases. In the next section we provide such an explanation.

II. JUSTICE THOMAS AND ORAL ARGUMENT: A CAREER OF (RARE) INTERRUPTED SILENCE

Thomas' behavior is interesting precisely because he doesn't act when most others do. He speaks so infrequently that many analyses of oral argument actually exclude him to avoid skewed results.⁸⁰ Our study, which focuses especially on his change in behavior due to the telephonic sessions, provides in-depth attention to each of his oral argument utterances in a way not done for any other Justice. To do so, we build a profile of his behavior through a variety of lenses and, ultimately, offer a statistical model to explain his speaking patterns for the in-person sessions.⁸¹ We simultaneously explore (and compare) his oral argument behavior in the ten telephonic sessions from May 2020 and conclude with, perhaps, the most important question—what effect (if any) does Thomas have when he breaks his silence in open court?

We begin our profile with a focus on the cases in which Thomas spoke (39 out of 2,284), a number small enough to depict in Tables 1a and 1b. Specifically, it lists his participation from 1991–2018 (Table 1a) and in 2019 (Table 1b). A cursory glance at Table 1a reveals that several cases where Thomas broke his silence are high-profile, or salient,⁸² including major decisions regarding free

Thomas); Johnson et. al, *supra* note 67 (using multiple techniques to improve statistical modeling of oral argument).

80. *Cf.*, e.g., Black et al., *supra* note 79; Johnson et al., *Inquiring Minds*, *supra* note 67.

81. For the sake of clarity, we draw a bright line at the Court's oral argument rule change that took effect in May of 2020. We therefore refer to arguments occurring prior to this line as either *pre-May 2020*, or *in-person*, and label those after the cut point as *May of 2020* or *telephonic* sessions.

82. See generally Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000).

speech (*Wisconsin v. Mitchell*⁸³ and *Virginia v. Black*⁸⁴), separation of church and state (*Lamb's Chapel v. Center Moriches Union Free School District*),⁸⁵ criminal procedure (*Voisine v. United States*⁸⁶ and *Flowers v. Mississippi*⁸⁷), gerrymandering of Congressional districts (*Miller v. Johnson*),⁸⁸ and affirmative action (*Gratz v. Bollinger*).⁸⁹

**Table 1a: In-Person Arguments
in which Thomas Spoke (1991–2018)**⁹⁰

Term	Case
1991	United States v. Fordice
1991	Collins v. City of Harker Heights
1991	Union Bank v. Wolas
1991	Morales v. Trans World Airlines, Inc.
1991	Evans v. United States
1991	Ankenbrandt v. Richards
1991	Burlington Northern Railroad Company v. Ford
1992	Arave v. Creech
1992	City of Cincinnati v. Discovery Network, Inc.
1992	United States v. Olano
1992	Lincoln v. Vigil
1992	Lamb's Chapel v. Center Moriches Union Free School
1992	Building & Construction Trade Council v. Associated Builders & Contractors
1992	Smith v. United States
1992	Wisconsin v. Mitchell

83. 508 U.S. 476 (1993).

84. 538 U.S. 343 (2003).

85. 508 U.S. 385 (1993).

86. 136 S. Ct. 2272 (2016).

87. 139 S. Ct. 2228 (2019).

88. 515 U.S. 900 (1995).

89. 539 U.S. 244 (2003).

90. Cases in bold type (in both Table 1a and 1b) are considered salient by a leading measure (see *supra* note 82). Because Epstein and Segal's measure is updated only through 2009, we conducted their same search for whether a case after the 2009 term appears on Page 1A of the New York Times. Two post-2009 cases in Table 1a meet this criterion (*Voisine* and *Flowers*) and four cases in Table 1b meet it (*McGirt*, *Little Sisters*, *Vance*, and *Mazars*).

1994	United States v. National Treasury Employees Union
1994	Miller v. Johnson
1994	Capitol Square Review and Advisory Board v. Pinette
1995	United States v. Chesapeake & Potomac Telephone
1996	Robinson v. Shell Oil Company
1996	Klehr v. A.O. Smith Corporation
1996	Boggs v. Boggs
1997	Rogers v. United States
1997	Pennsylvania Department of Corrections v. Yeskey
1998	NASA v. Federal Labor Relations Authority
1999	Nixon v. Shrink
1999	Apprendi v. New Jersey
2000	Buckhannon Board & Care Home, Inc. v. West Virginia
2001	Lorillard Tobacco Company v. Reilly
2001	U.S. Airways v. Barnett
2001	Department of Housing and Urban Development v. Rucker
2001	United States v. Drayton
2002	Virginia v. Black
2002	Gratz v. Bollinger
2005	Georgia v. Randolph
2005	Holmes v. South Carolina
2005	Rice v. Collins
2015	Voisine v. United States
2018	Flowers v. Mississippi

These high-profile cases comprise just over 15 percent (six out of thirty-nine) of all cases in which Thomas spoke. This is consistent with the rate of cases considered salient by Epstein and Segal's measure. On the other hand, they represent only 1.75 percent of all the cases where Thomas was present for in-person oral arguments (39 out of 2,284). Thus, even in many salient cases he remained silent.

We turn next to Table 1b, which presents us with an interesting conundrum. Because COVID-19 impacted the Court's schedule beginning in March of 2020—when it still had twenty cases left to hear—ten were docketed for telephonic arguments and ten were held over to the October 2020 term. As Adam Liptak notes, the ten

scheduled for arguments were “most of the major ones.”⁹¹ These included disputes concerning access to President Trump’s tax returns (*Trump v. Vance* and *Trump v. Mazars U.S.A., LLP*), a jurisdiction case that reaffirmed Native American treaty rights to a large portion of eastern Oklahoma (*McGirt v. State of Oklahoma*), and a religious freedom case (*Little Sisters of the Poor Saint Peter and Paul Home v. Pennsylvania*). In summary, while Thomas spoke in all four salient telephonic cases, he also spoke (multiple times) in every telephonic case.

Table 1b: Telephonic Arguments in Which Thomas Spoke (2019 Term)

Term	Case Name
2019	McGirt v. State of Oklahoma
2019	Agency for International Development v. Alliance for Open Society International, Inc.
2019	Our Lady of Guadalupe School v. Morrissey-Berru
2019	Little Sisters of the Poor Saint Peter and Paul Home v. Pennsylvania
2019	Patent and Trademark Office v. Booking.com B.V.
2019	Chiafalo v. Washington
2019	Colorado Department of State v. Baca
2019	Barr v. American Association of Political Consultants, Inc.
2019	Trump v. Vance
2019	Trump v. Mazars U.S.A., LLP

Overall, these initial tables provide the sum total of all cases in which Thomas spoke at oral argument since he joined the Court in 1991. And, while it is true that he had perfect participation during the telephonic sessions, it is premature to conclude that the Court’s change in format is the single driver of his behavioral change. Despite the salience of many of these cases, it was far from certain that Thomas would participate. As we elucidate in the sections below, the defining trait of Thomas’

91. Adam Liptak, *The Supreme Court Will Hear Arguments by Phone. The Public Can Listen In.*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html>.

historical oral argument style was, after all, one of taciturnity.

A. Thomas' Term Level Speaking Data

Beyond examining the lists of cases in which Thomas spoke, another useful way to analyze change in his oral argument behavior is to examine his participation over time. In so doing, we ask whether his 100 percent participation rate in the telephonic arguments was part of a larger trend, or whether his speaking patterns truly changed once the Court altered its oral argument procedures.

To establish a baseline pattern of behavior, Table 2 contains the frequency of Thomas' participation and his total speaking turns, by term. Note that, in the first twelve terms of his career (1991–2002), he was reticent to speak but was not completely silent in the way he was for most of his remaining service. Although he did not participate during the 1993 term, Thomas spoke in seven and eight cases, respectively, over his first two terms and spoke in at least one case per term between 1994 and 2002. In general, during his first twelve terms on the Court, Thomas' speaking average was more than two cases per term.

Table 2: Cases and Total Speaking Turns per Term, 1991–2019

Term	Arguments in Which Thomas Spoke	Total Speaking Turns
1991	7	21
1992	8	30
1993	0	0
1994	3	28
1995	1	3
1996	3	29
1997	2	20
1998	1	29
1999	2	16
2000	1	5
2001	4	18
2002	2	12
2003	0	0
2004	0	0
2005	3	10
2006	0	0
2007	0	0
2008	0	0
2009	0	0
2010	0	0
2011	0	0
2012	0	0
2013	0	0
2014	0	0
2015	1	11
2016	0	0
2017	0	0
2018	1	3
1991–2018 (total)	39	235
2019 (live)	0	0
2019 (telephonic)	10	78

Figure 1 presents these data in a starker way by breaking down the percent of cases per term (top panel) and per month of the 2019 term (bottom panel) in which Thomas spoke at least once in a case. Consider, first, the

top panel. The left half of the figure documents a period of varying participation for Thomas, punctuated by one term of silence. During this talkative stretch (1991–2002), he still never spoke in more than 7.1 percent of cases per term (1992) and only breached the 5 percent mark one other time—in his first term (1991). That said, Thomas was not completely silent: through the 2002 term, he never went more than one term without speaking (1993).

Figure 1: Participation in Oral Argument Over Time

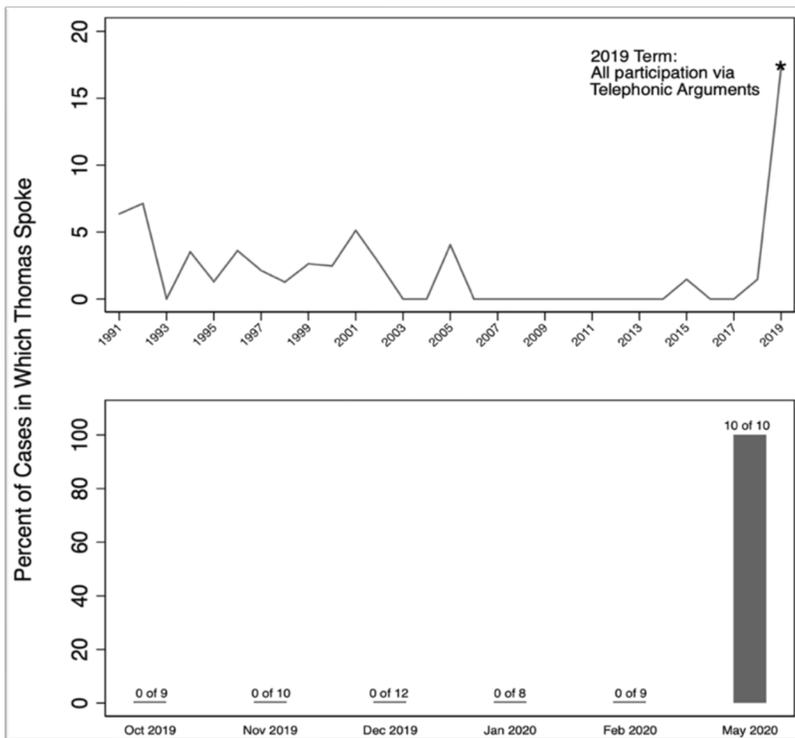


Figure 1: Percent of cases per term (top panel) and per month (bottom panel) in which Thomas spoke. Top panel depicts 1991–2019 while bottom panel specifies May of 2020.

In contrast, the next era (2003–2018) which we dub “mostly silent,” shows Thomas breaking his silence in only three of the next sixteen terms (2005, 2015, 2018)

before a veritable eruption of utterances in May 2020. Indeed, in stark contrast to Thomas' "mostly silent" and even "talkative" eras, the apex of the top panel of Figure 1 is a dramatic increase. This peak of 17.2 percent participation for the 2019 term represents Thomas' career high (a full 2.4-fold increase from his prior career high) and is clearly driven, exclusively, by his loquacity in the Court's telephonic arguments.

To unpack the point that Thomas' transformation is seemingly driven by the Court's change to telephonic arguments and the procedures involved in them, the bottom panel of Figure 1 divides the 2019 term into its monthly argument sittings. Across the forty-eight in-person argument sessions held between October 2019 and February 2020, Thomas uttered not a single word in open court. In contrast, in May 2020, he spoke in 100 percent of the telephonically argued cases. Nobody, perhaps not even his colleagues on the bench, could have predicted such behavior from a Justice who, for so long, and so publicly, dismissed oral arguments and eschewed his fellow Justices for their vigorous participation!

To flesh out these data, we turn to several examples of Thomas' participation behavior. After not speaking at all in the 2003 and 2004 terms, he spoke in three criminal rights cases during the 2005 term: *Georgia v. Randolph*⁹² (a search and seizure case), *Rice v. Collins*⁹³ (a *habeas corpus* case), and *Holmes v. South Carolina*⁹⁴ (a due process case). In *Holmes*, argued on February 22, 2006, Thomas made his last oral argument remarks for ten terms by quibbling with the Assistant Deputy Attorney General for South Carolina about the specifics of a key precedent—*State v. Gregory*⁹⁵:

Justice Thomas: Counsel, before you change subjects, isn't it more accurate that the trial court

92. 547 U.S. 103 (2006).

93. 546 U.S. 333 (2006).

94. 547 U.S. 319 (2006).

95. 198 S.C. 98 (1941). What is impressive about Thomas' focus on *Gregory* is that it is a South Carolina State Supreme Court decision—an area of law in which he would not necessarily be versed.

actually found that the evidence met the *Gregory* standard?

Mr. Zelenka: No. He specifically found, I believe, from my reading—

Justice Thomas: Well, he says—

Mr. Zelenka: —that it didn't meet the *Gregory* standard.

Justice Thomas: Well, he says at first blush, the above arguably rises to the *Gregory* standard. However, the engine that drives the train in this *Gregory* analysis is the confession by Jimmy McCaw White. And then he goes on to say that that, of course, can't be introduced because it's hearsay. So it—it seems as though he says that if it is to be believed what Jimmy White says, it meets the *Gregory* standard. So I don't quite understand where *Gay*,⁹⁶ which is subsequent to—to this case—where *Gay* comes in because it didn't seem to be the standard that the trial court applied.

And then there was silence—for exactly ten years and one week—until the Court heard arguments in *Voisine v. United States* on February 29, 2016.⁹⁷ *Voisine*, another criminal rights case, concerned whether bodily injury via recklessness qualified as a misdemeanor crime of domestic violence, thus triggering federal suspension of Second Amendment rights.⁹⁸ Thomas was insistent with his questioning and clearly viewed the law at issue as an overreach of federal power.⁹⁹ When Assistant Solicitor General Ilana Eisenstein argued on behalf of the United States he spoke an astonishing eleven times—the most since 2001 when he spoke fourteen times in *U.S. Airways, Inc. v. Barnett*.¹⁰⁰ In *Voisine*, Thomas was

96. *State v. Gay*, 343 S.C. 543 (2001).

97. 136 S. Ct. 2272 (2016). *Holmes* was argued February 22, 2006 and *Voisine* was argued February 29, 2016.

98. The key issue focused more specifically on the provision of federal law that prohibited people who had committed domestic violence misdemeanors from obtaining a firearm.

99. Oral Argument at 41:57, *Voisine v. United States*, 136 S. Ct. 2272 (2016) (No. 14-10154), <https://www.oyez.org/cases/2015/14-10154>.

100. 535 U.S. 391 (2002).

particularly concerned with whether the Court had ever allowed a fundamental right to be stripped for someone who had simply committed a misdemeanor:

Justice Thomas: Ms. Eisenstein, one question. Can you give me—this is a misdemeanor violation. It suspends a constitutional right. Can you give me another area where a misdemeanor violation suspends a constitutional right?

Ilana Eisenstein: Your Honor, I—I'm thinking about that, but I think that the—the question is not—as I understand Your Honor's question, the culpability necessarily of the act or in terms of the offense—

Justice Thomas: Well, I'm—I'm looking at the—you're saying that recklessness is sufficient to trigger a violation—misdemeanor violation of domestic conduct that results in a lifetime ban on possession of a gun, which, at least as of now, is still a constitutional right.

Ilana Eisenstein: Your Honor, to address—

Justice Thomas: Can you think of another constitutional right that can be suspended based upon a misdemeanor violation of a State law?¹⁰¹

Thomas ultimately voted against the United States, which is consistent with a line of legal and political science research that demonstrates Justices speak more often to the attorney of the litigant against whom they are more likely to vote.¹⁰² However, a host of commentators

101. Transcript of Oral Argument at 35–36, *Voisine v. United States*, 136 S. Ct. 2272 (2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-10154_g31h.pdf.

102. The first studies to reach this conclusion were based on very small sample sizes. In a study of ten oral arguments in the October 2002 Term, Shullman noted, among other things, that the Justices generally ask more questions (helpful or hostile) of litigants who went on to lose. 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, 273 (2004). In 2005, John Roberts (who was then a regular Supreme Court advocate) found that eighty-six percent of the time the party receiving the most inquiries from the bench ultimately lost the case in a study of twenty-eight cases. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75 (2005). In 2009, Johnson et al. found the same result in a

suggested that, perhaps, Thomas was speaking in an effort to fill the void left by the Court's most conservative voice—Scalia—who had died just over two weeks prior to the argument session.¹⁰³ While this was certainly a reasonable hypothesis given the timing, Thomas returned to his silent ways for more than three terms after *Voisine*, effectively refuting this claim.

When Thomas again spoke, he did so in *Flowers v. Mississippi*,¹⁰⁴ yet another criminal rights case concerning racially motivated preemptive strikes used by the prosecution during *voir dire*. This time, however, he spoke only three times and suggested race may not have been a key factor in Mississippi's use of preemptory challenges. And, as in *Voisine*, Thomas dissented based on this point. After *Flowers*, his silence returned for the remainder of the 2018 term and for the vast majority of the 2019 term.

This chronological analysis of Thomas' participation suggests three broad conclusions—first, in the early years of his tenure (1991–2002), he was “talkative”—at least mildly active with 87.5 percent (thirty-five of thirty-nine) of his in-person utterances emanating from these terms. Second, the sporadic behavior during his “mostly silent” period (2003–2018) seems at least partially driven by Thomas' interest in criminal rights cases; during these terms he spoke in five cases—all covering varying aspects of criminal procedure or criminal due process rights. Finally, the bottom panel of Figure 1 leads us to the inescapable conclusion that the Court's change to

larger more rigorous study. Timothy R. Johnson, Ryan Black, Jerry Goldman & Sarah Treul, *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 (2009).

103. See, e.g., Robert Barnes, *For First Time in 10 Years, Justice Clarence Thomas Asks Questions During an Argument*, WASH. POST (Feb. 29, 2016), https://www.washingtonpost.com/politics/courts_law/for-first-time-in-10-years-justice-thomas-asksquestions-during-argument/2016/02/29/b47f2558-df00-11e5-846c-10191d1fc4ec_story.html; Mark Joseph Stern, *Welcome to the Show, Clarence Thomas*, SLATE (Feb. 29, 2016), <https://slate.com/news-and-politics/2016/02/why-voisine-v-united-states-a-case-about-domestic-violence-and-gun-rights-inspired-clarence-thomas-to-break-his-10-year-silence.html>.

104. 139 S. Ct. 2228 (2019).

telephonic arguments produced a profound change in Thomas' rate of participation. The interesting question (which we address in the conclusion) is how he will act if, or when, the Court retreats to its original oral argument format.

B. Thomas' Focus on Substantive Issues

Given Thomas' apparent interest in criminal rights cases, and to determine what, if any, other issue areas interested him, we turn next to a breakdown of the types of cases in which he spoke. To make this determination we utilize the Supreme Court Judicial Database (SCDB),¹⁰⁵ which provides data on a variety of variables relating to Court decisions including the *Issue* involved in a case.¹⁰⁶ Tables 3a (in-person arguments) and 3b (telephonic arguments) list every case, organized by the SCDB variable *Issue*, where Thomas spoke at least one time.

Table 3a: Legal/Policy Issue Areas in Which Justice Thomas Spoke, 1991–2019¹⁰⁷

Issue Area	Number of Cases	Number of Speaking Turns	Mean Turns per Case
<i>Criminal Rights</i>	11 (28.20%)	38 (16.17%)	3.5
Civil Rights	9 (23.08%)	45 (19.15%)	5.0
Free Speech	5 (12.82%)	44 (18.72%)	8.8
Judicial Power	4 (10.26%)	20 (8.51%)	5.0
Federalism	4 (10.26%)	25 (10.64%)	6.3
<i>Religion</i>	2 (5.13%)	20 (8.51%)	10.0
Economic Activity	2 (5.13%)	9 (3.83%)	4.5

105. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *The Supreme Court Database*, WASH. U. L. (Sept. 2019), <http://Supremecourtdatabase.org>.

106. Spaeth et al., *Supreme Court Database Codebook 19* (2019), http://scdb.wustl.edu/_brickFiles/2019_01/SCDB_2019_01_codebook.pdf.

107. Italicized issues are aggregations of several categories because, for instance, the SCDB has *Issue* codes for both free exercise and religious establishment cases. Here, we combined the two categories into one. Similarly, we combined various aspects of criminal procedure and due process cases (related to criminal procedure) into a larger category *Criminal Rights*.

Unions	1 (2.56%)	29 (12.34%)	29.0
Attorneys	1 (2.56%)	5 (2.13%)	5.0

The breakdown of *Issue Areas* contained in Table 3a provides many insights to Thomas' pre-May 2020 behavior. To begin, there is no doubt that he cares more about some issues than he does about others. Most prominently, Table 3a makes clear the merit of our discussion about Thomas' interest in criminal rights cases (including *voir dire*, search and seizure, sentencing, and the death penalty). He also spoke quite often in civil rights and free speech cases. Interestingly, he showed some increased interest in federalism and judicial power cases as well.

Another way to consider the data in Table 3a is by the mean number of Thomas' speaking turns, per case, for each issue category. These data reveal contradictions in his speaking patterns. For example, while he participates most often in criminal rights cases he also speaks, on average, the fewest times in such cases. Contrast this with his participation in *NASA v. Federal Labor Relations Authority*,¹⁰⁸ the unions case in which he spoke an astonishing twenty-nine times. While this may not be a fair comparison given there is only one unions case in the data, he also spoke, on average, ten times in each of the religion clause cases and nearly nine times in each of the five free speech cases. Finally, his focus on the rights of minority groups (civil rights cases) elicited almost five turns per case. The key is that Thomas spoke in a wide range of arguments from 1991 to February 2019 with clear variation in how much he spoke when he did so.

Table 3b extends our analysis to examine issues from the telephonic cases that piqued Thomas' interest (i.e., all cases). Recall from our discussion above that, in May 2020, the Court scheduled telephonic arguments for "most of the major" cases and held the remaining ten over for the following term.¹⁰⁹ In other words, the issues,

108. 527 U.S. 229 (1999).

109. See Liptak, *supra* note 91.

and the cases categorized within them, are of higher salience, on average.

**Table 3b: Legal/Policy Issue Areas
in Which Thomas Spoke, May 2020**

Issue Area	Number of Cases	Number of Speaking Turns	Mean Turns per Case
Executive Authority	2 (20%)	24 (30.77%)	12.0
Article II (Electoral College) ¹¹⁰	2 (20%)	18 (23.08%)	9.0
Religion	2 (20%)	14 (17.95%)	7.0
Free Speech	2 (20%)	13 (16.67%)	6.5
Native Americans and State Juris.	1 (10%)	5 (6.41%)	5.0
Trademarks	1 (10%)	4 (5.13%)	4.0

Indeed, four of the issue areas include two cases (executive power, Article II, religion, and free speech) with the remaining two issue areas (Native American law/treaties and trademark law) each containing one case. Unlike the data in Table 3a, Thomas' mean speaking turns per case do not contradict his overall participation. Recall that during in-person cases, Thomas spoke least often (3.5 turns per case) in the issue area where he participated the most frequently (criminal rights). Alternatively, his mean turns per case in Table 3b (the top four issue areas) received much more of Thomas' attention than did the bottom two. Specifically, he averaged 8.6 speaking turns across the four primary issue areas versus only 4.5 turns across the less-salient categories. As with the data from Figure 1, these data demonstrate that Thomas exhibited a loquaciousness that was, at a minimum, unexpected.

In the end, it seems clear that during in-person and telephonic arguments Thomas often chose to speak in cases focused on highly salient issues. This is consistent with existing literature that correlates speaking turns at

110. The Supreme Court database does not have a code for Electoral College cases (although the update that includes the 2019 term surely will). As such, we added this code to the table.

oral argument with the degree to which a case is considered important to the Justices.¹¹¹

C. Types of Questions and Comments Raised by Thomas

We turn to a final way of understanding Thomas' oral argument behavior by examining his unique questioning style. In particular, we utilize a taxonomy that details the types of information Justices seek during oral argument—from policy concerns, constitutional matters, how external actors (e.g., Congress) may react to decisions, the facts of the case, possible controlling precedents, and threshold issues (e.g., mootness or ripeness).¹¹² Using these categories, Johnson showed that, as policy oriented actors, Justices focus the vast majority of their oral argument turns seeking information about policy and external actors' preferences.¹¹³ Table 4 depicts Thomas' utterances coded by Johnson category, and separated by in-person and telephonic arguments. Comparing Thomas' questioning style with Johnson's findings yields interesting results.

Table 4: Focus of Justice Thomas' Speaking Turns During Oral Arguments¹¹⁴

Issue Type	1991–2018	May 2020
Policy Issues	117 (52.95%)	40 (56.34%)

111. See generally Ryan C. Black, Maron W. Sorenson & Timothy R. Johnson, *Towards an Actor Based Measure of Supreme Court Salience: Information Seeking and Engagement During Oral Arguments*, 66 POL. RES. Q. 804 (2013); RYAN C. BLACK, AMANDA BRYAN & TIMOTHY R. JOHNSON, *ISSUE SALIENCE IN INTERNATIONAL POLITICS* 241 (Kai Opperman & Henrike Viehrig eds., 1st ed. 2011).

112. For a full description of each type see JOHNSON, *supra* note 9, at 33 (Table 2.1).

113. JOHNSON, *supra* note 9, at 40 (Table 2.4).

114. The numbers in columns 1 and 2 differ from Thomas' total utterances for two reasons. First, not all speaking turns fall into a specific category. Second, as per Johnson's analysis (Table 2.4) utterances may be double counted (i.e., they could be policy and constitutional questions at the same time). *Note*: Issue areas may be double-counted, as per Johnson (2004).

Constitutional Issues	19 (8.60%)	10 (14.08%)
External Actors'	10 (4.52 %)	10 (14.08%)
Preferences		
Facts	62 (28.05%)	1 (1.41%)
Precedent	13 (5.88%)	8 (11.27%)
Threshold Issues	0 (0.00%)	2 (2.82%)

Consider, first, Thomas' focus on policy issues, which Johnson defines as "legal principals the Court should adopt, courses of action the Court should take, or a Justice's beliefs about the content of public policy."¹¹⁵ Thomas' attention to policy issues is consistent across in-person and telephonic arguments (52.95% and 56.34%, respectively) and comports with Johnson's findings. In addition, during the telephonic sessions, Thomas uses the same number of turns to speak about the preferences of Congress (or other external actors). However, as a percentage, he shows a clear increase in how many of his speaking terms he dedicates to these utterances. Finally, note the precipitous drop in Thomas' turns devoted to clarifying case facts. These utterances comprised 28.05% of his in-person turn but decreased to just 1.41% of them during the telephonic cases. This change clearly comports with Jones and Nielsen's argument that Thomas is often a "Fact Stickler."¹¹⁶

Taken together, we posit that these significant changes in Thomas' questioning behavior are a product of the telephonic procedures: he was called upon and allowed time to speak without the cacophony of the Court's typical in-person, free-for-all, sessions. While we do not have enough data to test this hypothesis, one potential explanation is that, with the telephonic sessions, Thomas knew he would be called upon to speak. Due to the expectations that come with being called upon, he prepared questions (and comments). He then spoke as he knew he could do so without being interrupted by his (usually) more loquacious colleagues. This preparation, and knowledge, in turn led Thomas to act just like other

115. JOHNSON, *supra* note 9, at 40.

116. Jones & Nielson, *supra* note 69, at 198.

Justices have for some time—as policy-minded seekers of legal and policy information that will help him decide a case as close as possible to his preferred outcome.

III. SYSTEMATIC ANALYSIS OF THOMAS' DECISION TO SPEAK DURING ORAL ARGUMENT

The data from the previous sections paint an interesting picture of how Thomas acted during in-person argument sessions (1991 to February 2019) and how his behavior changed during telephonic arguments. In this section we seek systematic evidence as to whether two of the key explanations offered for his silence—*cases that address race* and the *verbosity of his colleagues*—are accurate. Further, we seek to determine whether Thomas' *ideological position* on the bench may influence his behavior during oral arguments. We do so by analyzing all cases where Thomas sat for oral arguments between the 1991 and 2018 terms.¹¹⁷ More specifically, we examine the oral argument transcripts from these cases,¹¹⁸ which includes 2,062 orally argued cases. Since we model why Thomas chooses to speak, we code our dependent variable as one if he participates in a case and zero otherwise.

117. We do not include the 2019 term in this model because the data from the SCDB does not yet exist for the recently ended term. Further, theoretically, we view the ten telephonic arguments, where the Chief called on each Associate Justice to speak in order of seniority, as fundamentally different from the in-person, free-for-all sessions. Thus, we lose these fifty-eight cases but believe it is the correct choice for this model.

118. In order to determine the cases in which Thomas spoke, we parsed the oral argument transcripts using Oyez's "speaker" JSON encoding. This initially yielded thirty-eight cases where he participated. We removed one of the thirty-eight and added two cases after verifying the findings of Jones and Nielsen. Jones & Nielsen, *supra* note 69, at 201–03. They found that Thomas was misidentified as having participated in *Booth v. Churner*, 532 U.S. 731 (2001), when he did not, and was not identified in two transcripts where audio makes clear he did so. Thus, we have thirty-nine cases (prior to May 2020) where Thomas spoke at least once.

A. *Variables of Interest*

The model includes several explanatory variables to test the extent to which the above descriptive findings, as well as key claims from media and scholarly accounts, systematically affect Thomas' propensity to speak at oral argument. We are particularly interested in three phenomena.

1. *Case Addresses Race*

First, given anecdotal accounts that Thomas was apt to participate in cases involving issues related to race, we include a variable—*Case Addresses Race*—that captures whether this issue was a predominant consideration in the case at hand. To create this variable, we began with cases from the SCDB that inescapably address this issue. These included the fine-grained issues of the Voting Rights Act of 1965, desegregation, desegregation of public schools, and affirmative action.¹¹⁹ We then identified five additional issues that could, but did not necessarily, address race: voting, reapportionment, employment discrimination, *voir dire* jury influence, and death penalty jury influence. To ensure these cases actually addressed race, we read each case syllabus and only included them in our variable if race was a key factor.¹²⁰ Finally, we added cases that addressed racially motivated hate speech or crimes. To confirm we included the proper cases, we surveyed a prominent case book in the field, law review articles, and the ACLU's website documenting the effects of race in death penalty cases.¹²¹ This

119. Spaeth et al., *supra* note 10606, at 98–99.

120. For example, employment discrimination cases can take on a variety of central complaints (*i.e.*, age, gender, race, disability), however reading an opinion's syllabus often makes abundantly clear the grounds for complaint (*e.g.*, “willful violation of the Age Discrimination in Employment Act of 1967” from *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In circumstances where the opinion syllabus did not clearly indicate the case was related to race, we coded our *case addresses race* variable as “no” (*e.g.*, *Eldman v. Lynchburg College*, 535 U.S. 106 (2002)).

121. See generally LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE (10th ed. 2019);

process yielded a total of sixty-five cases that addressed race, seven of which feature oral argument utterances from Thomas.¹²²

2. *Colleagues' Verbosity*

Second, Thomas has stated on numerous occasions that he believes his fellow Justices speak too much during oral argument.¹²³ In fact, this is one of the main reasons he proffers for not speaking during these proceedings. To determine if he is less likely to speak when his colleagues talk more in a case, we include *Verbosity*, which is a count of all utterances made by Thomas' colleagues in each case. We generated this variable by counting each Justices' speaking turns demarcated in the oral argument transcripts collected via Oyez.¹²⁴

3. *Ideological Position*

Third, existing literature about judicial ideology and Supreme Court oral arguments suggests the possibility that Thomas' oral argument behavior may be affected by his ideological position relative to the Court's swing

Thomas D. Brooks, *First Amendment—Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703 (1994); William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463 (2002); *Race and the Death Penalty*, ACLU, <https://www.aclu.org/other/race-and-death-penalty> (last visited Aug. 7, 2020).

122. While the SCDB codebook stipulates that, "Although criteria for the identification of issues are hard to articulate, the focus here is on the subject matter of the controversy rather than its legal basis." Spaeth et al., *supra* note 105, at 45. This means that cases such as *RAV v. St. Paul*, 505 U.S. 377 (1992), and *Virginia v. Black*, 538 U.S. 343 (2003)—two cases that dealt with cross-burning as specifically intimidating to black citizens—are both coded in the Database as First Amendment issues. Although the subject matter of these controversies is whether or not historic symbols of hate are protected expressions under the First Amendment, the presence of racial issues plays a prominent role in these two (and other) cases. Thus, we included them in our count of race-based cases.

123. See *supra*, Part I, Section C.

124. See *supra* note 118.

vote.¹²⁵ The reason for this conjecture is intuitive. Note, first, that he has been the most ideologically extreme Justice since his appointment in 1991,¹²⁶ a position which often puts him in a bad bargaining position relative to his colleagues.¹²⁷ However, existing research demonstrates oral arguments begin the bargaining and opinion writing process for the Justices.¹²⁸ Thus, Thomas may be more likely to speak during these proceedings when his *Ideological Position* indicates he may be in a better position to influence his colleagues' views about the case (i.e., when he is less ideologically extreme). The point is that, despite always being the most conservative Justice, he is sometimes more ideologically aligned with his colleagues and therefore in a better position to bargain. Thus, we include a measure of this distance, which we calculate as the absolute value of the difference between Martin-Quinn ideal-point estimates for Justice Thomas and the median Justice.¹²⁹

4. *Control Variables*

Beyond our three variables of interest, we include several variables to control for other explanations for Thomas' behavior. First, while scholars and news reporters focus on race as a driver of Thomas' behavior, Table 3a also suggests three other issues areas from the SCDB that draw his attention: *Criminal Rights*, *Civil Rights*, and *First Amendment cases*. We add a variable for each

125. See generally RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (2012).

126. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 145 (2017). Martin and Quinn scores are the accepted (and oft utilized) measure of Supreme Court Justice ideology.

127. See generally FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

128. See generally BLACK ET AL., *supra* note 125.

129. Martin-Quinn scores are scores created to measure the ideology of U.S. Supreme Court justices, Martin & Quinn, *supra* note 126.

of these categories, coded one if a case falls into the issue area and zero otherwise.

Third, we include a dichotomous variable—*Judicial Review*—that takes on a value of one for all cases that review the constitutionality of a state or federal law. We include this variable as a proxy for legal salience with the intuition that Justices are generally more interested (and therefore more likely to speak) in cases when they are asked to invoke this power.¹³⁰ While judicial review cases garner the attention of Court watchers, they account for only 29.2 percent of the cases in our dataset.

Finally, existing literature demonstrates the Court is reverse-minded.¹³¹ In this vein, we control for the possibility that Thomas is similarly contrarian and, therefore, likely to speak more often in cases he believes were wrongly decided. Because Thomas has been the Court's conservative anchor since his appointment in 1991, we assume he generally disagrees with liberal lower court decisions. Thus, using the SCDB's variable, *Lower Court Decision Direction* (dropping the twenty-eight cases with unspecifiable decision directions) we code liberal lower court decisions as one and conservative ones as zero.¹³²

B. Results

Because the dependent variable in our model is dichotomous, we estimate a logistic regression. The results, presented in Table 5, show that our model performs well despite the infrequency of Thomas' participation (he spoke in only thirty-nine cases prior to May 2020).¹³³ In particular, we find support for two of

130. MALTZMAN ET AL., *supra* note 127, at 46.

131. *See generally* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

132. For a discussion on how the SCDB determines *Lower Court Disposition Direction*, see Spaeth et al., *supra* note 105, at 37.

133. In addition to the model presented in Table 5, we estimated an additional model that adds a specific variable for *case salience*, as measured by Tom S. Clark, Jeffrey R. Lax & Douglas R. Rice, *Measuring the Political Salience of Supreme Court Cases*, HARV. DATAVERSE (2015), <https://doi.org/10.7910/DVN/29637>. We choose not to present those results as Clark's variable was only

our hypotheses: that Thomas is more apt to participate in cases that address race and in cases when he is more ideologically aligned with the Court median. In addition, civil rights cases are significantly related to whether or not he speaks.

generated through the 2009 term, cutting our observations nearly in half ($N=1392$). Despite this, the truncated model still performs well ($\chi^2_{(9)} = 44.15$; $p < .01$) and all of our statistically significant independent variables of interest remain significant and signed in the same direction. Details of this model are available from the authors upon request.

Table 5: The Propensity that Thomas Speaks at Oral Argument, 1991–2018

	Coef.	S.E.
Case Addresses Race	1.873**	(0.677)
Verbosity	-0.001	(0.002)
Ideological Distance from Median	-1.249**	(0.354)
Criminal Rights	0.538	(0.414)
Civil Rights	1.491*	(0.617)
First Amendment	0.304	(0.629)
Judicial Review	-0.054	(0.373)
Lower Court is Liberal	0.096	(0.350)
<i>N</i>	2062	
log-likelihood	-173.86	
$\chi^2(\text{df})$	48.91	

Table 5: Logistic regression of the probability Thomas participates in oral arguments. Robust standard errors reported in parentheses next to maximum-likelihood parameter estimates.

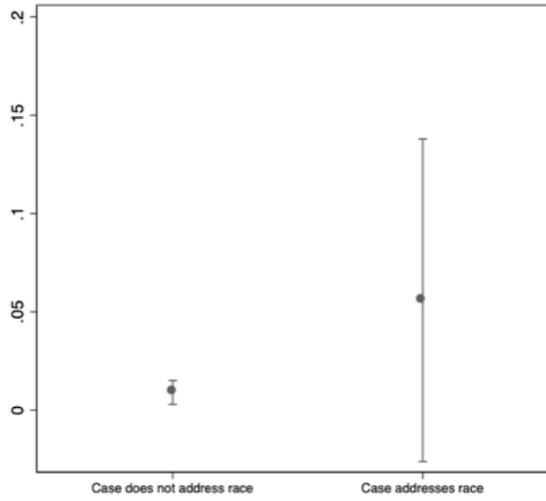
Significance level (two-tailed test): ** 1%, *5%.

Because logistic regression estimates are non-linear, and therefore difficult to interpret, Figure 2 provides a graphical representation of our three key findings.¹³⁴ Consider, first, the left panel which depicts the effects of *Case Addresses Race*. Recall that this variable is dichotomous and that we predicted the presence of race-based factors would increase Thomas’ probability of participating. The increase in point-estimate supports this prediction. Specifically, when a case does not address race, Thomas has just a 0.009 [0.003, 0.015] probability of participating in oral argument versus a 0.056 [-0.026, 0.138] probability when issues of race are present. This represents a six-fold increase in Thomas’ participation rate and provides solid support for scholarly and media-based

134. At the outset of discussing our substantive results, we acknowledge that all of our graphed point estimates, while significant, fall below a 0.1 probability. We understand this is low, in an absolute sense. However, Thomas only participates in 1.75 percent of all cases so is not very likely to speak during in-person arguments at all. Thus, even though our predicted probabilities demonstrate he is still not very likely to speak in any case, he is significantly more likely to do so in the circumstances depicted in Figure 2.

assertions that he clearly pays attention when race-based factors are present.

Figure 2: Predicted Probabilities that Thomas Speaks at Oral Argument, 1991–2018



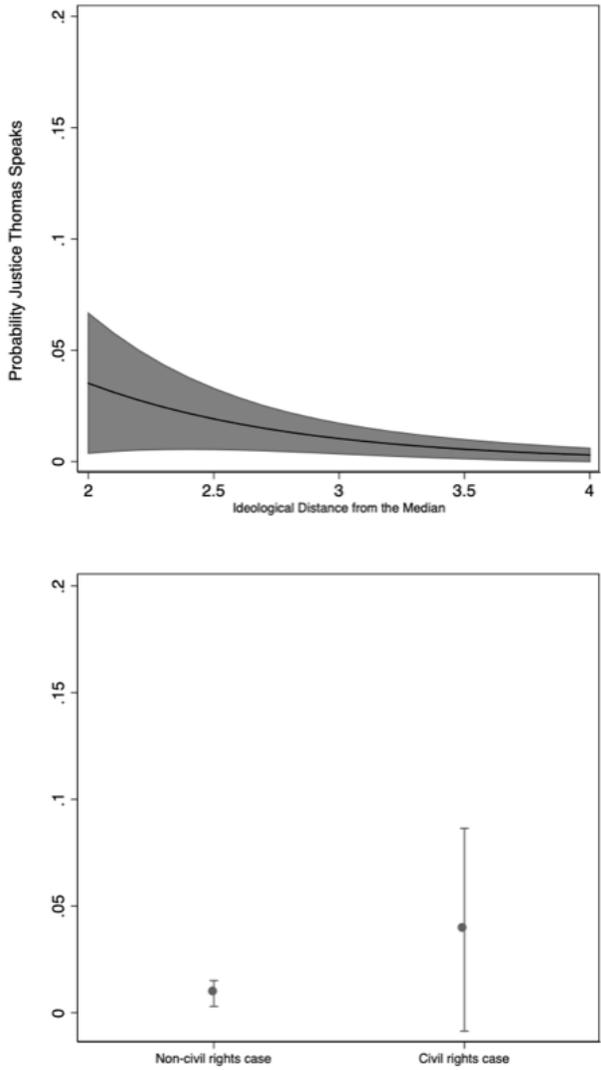


Figure 2: Predicted probability that Thomas participates in oral argument conditional on cases addressing race (left panel), ideological distance from the Court median (center panel), and cases addressing civil rights (right panel). All other variables held at their median or modal values.

Two examples represent the polar extremes of Thomas’ increased propensity to participate in cases that

address race. Consider his, perhaps, most famous oral argument exchange from *Virginia v. Black*.¹³⁵ During the session he spoke seven times—all during the arguments presented by Deputy Solicitor General Michael Dreeben. Dreeben was arguing as *amicus curiae* for the United States in support Virginia's contention that its law (banning cross burning if it had the intent to intimidate others) did not violate the First Amendment. Thomas' first two turns make clear his disagreement with such an interpretation.¹³⁶

Justice Thomas: Mr. Dreeben, aren't you understating the . . . the effects of . . . of the burning cross? This statute was passed in what year?

Michael R. Dreeben: 1952 originally.

Justice Thomas: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and . . . and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was . . . isn't that significantly greater than intimidation or a threat?

Michael R. Dreeben: Well, I think they're coextensive, Justice Thomas, because it is—

Justice Thomas: Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism on . . . of and the effect of the cross, the burning cross. I . . . I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has . . . it was intended to have a virulent effect. And I . . . I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.

Thomas' exchange with counsel suggests a particular sensitivity to, and understanding of, cross burning that goes beyond Dreeben's initial description. But in a

135. 538 U.S. 343 (2003).

136. Oral Argument at 23:21, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107), <https://www.oyez.org/cases/2002/01-1107>.

different case (and context) he exhibits a quite disparate view of race. *Gratz v. Bollinger*¹³⁷ was an affirmative action case brought by two white students denied entry to the University of Michigan's undergraduate program. Thomas used oral arguments to probe the specific admissions policy:

Justice Thomas: Mr. Payton, do you think that your admissions standards overall at least provide some headwind to the efforts that you're talking about?

John A. Payton: Yes, I do. I think they do in all sorts of ways. They are certainly producing black students, white students, Hispanic students, Native American students who go out into our communities and change their communities.

Justice Thomas: You may have misunderstood me. I mean the . . . Ms. Mahoney said earlier that the problem of law school admissions, in response to Justice O'Connor, that it was for the elite schools, it was more a problem at the elite schools, when she was talking about Boalt Hall, for example, you meant . . . you suggested or alluded to in your argument today that, you know, you don't want to choose between being an elite school and the whole diversity issue. It . . . would it be easier to accomplish the latter if the former were adjusted, that is the overall admissions standard?

John A. Payton: I think that—

Justice Thomas: Now, I know you don't want to make the choice, but will you at least acknowledge that there is a tension?

In contrast to his questions in *Black*, in *Gratz* Thomas seemed to argue against race-based considerations by pushing the University of Michigan to acknowledge that its affirmative action admissions program forces the school to choose between quality students and diversity in the student population. The point, for us, is that, however he viewed racial issues (more

137. 539 U.S. 244 (2003).

liberally as in *Black* or more conservatively as in *Gratz*) when they are a focal point in a case, Thomas is absolutely more likely to make comments, and question counsel.

The middle panel of Figure 2 depicts a probability curve for the impact of *Ideological Distance from the Median* on Thomas' propensity to speak. The downward slope aligns with literature that explains the role of ideology on the Court's decision-making process and on oral arguments specifically. Even if Thomas is never very close to the median Justice, when he does move in that direction, he is more willing to speak. Moving from the maximum ideological distance to the minimum ideological distance yields an 800 percent increase in the probability that he will participate in oral arguments (0.004 [0.001, 0.007] versus 0.036 [0.004, 0.068]). In other words, even the Court's most ideologically extreme conservative Justice realizes there are times when his bargaining position is greater and, when he knows this, he acts by speaking during oral argument.¹³⁸

Finally, we examine results for our troika of control variables: *Criminal Rights*, *Civil Rights*, and *First Amendment Cases*. Although our preliminary analysis suggested Thomas would be more likely to speak in *Criminal Rights Cases*, our analysis indicates such disputes do not, in fact, impact the probability he will participate ($z=1.3$; $p=0.193$). The results are similar for *First Amendment Cases* ($z=0.48$; $p=0.628$). We do, however, find a significant relationship between *Civil Rights* and Thomas' propensity to speak. This relationship is depicted in the right-hand panel of Figure 2, which shows that Thomas is 4.3 times more likely to participate in a case containing civil rights issues (0.009 [0.003, 0.015] versus 0.039 [-0.009, 0.086]).

These results lead to our final question: how does Thomas affect the proceedings when he does speak? It is to that question we now turn.

138. See BLACK ET AL., *supra* note 125, at ch. 2.

IV. WHAT EFFECT DOES THOMAS HAVE WHEN HE DOES SPEAK DURING ORAL ARGUMENT?

Due to his silence in open court, scholars have debated the extent to which Thomas has an effect on how the Court makes decisions.¹³⁹ Others, however, point out that his silence in argument sessions makes no difference because the impact he does have manifests itself behind the scenes during the opinion-writing process and in later cases where his majority opinions are often viewed as quite influential.¹⁴⁰ But this does not mean that Thomas has not had a direct impact when he speaks during argument sessions. Here we provide data to support this claim.

We begin with data on the degree to which Thomas' colleagues pick up on his lines of questioning as well as on the comments he makes. While this is a difficult concept to operationalize, we do so by counting the number of times his colleagues refer back to questions or comments he made during an argument session. Table 6 presents these data for all cases prior to May 2020 (row 2) and for cases during the telephonic arguments (row 3).

139. See, e.g., Jamal Greene et al., *Does Clarence Thomas' Silence Matter?*, N.Y. TIMES (Feb. 16, 2011), <https://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter>.

140. See, e.g., Emma Green, *The Clarence Thomas Effect*, ATLANTIC (July 10, 2019), <https://www.theatlantic.com/politics/archive/2019/07/clarence-thomas-trump/593596/>.

**Table 6: Justice Thomas' Direct Impact
on Oral Argument: Colleague References**

Time Frame	Argument Sessions in which Thomas Spoke	References to Thomas
1991–Feb. 2019	39	11
May 2020	10	17

The data in Table 6 demonstrates that, when he does speak during oral argument, Thomas' colleagues pick up on his comments and lines of questioning.¹⁴¹ They then seem to flesh out these points during both in-person arguments and telephonic sessions. Consider the following exchange from *Voisine*.¹⁴² Here, the quintessential median, Justice Anthony Kennedy, referred back to Thomas' question about what explicitly might be a misdemeanor that triggers a federal ban on a given right.

Justice Kennedy: I—I suppose one answer is—just a partial answer to Justice Thomas' question is SORNA, a violation of sexual offenders have to register before they can travel in interstate commerce. But that's not a prevention from traveling at all. It's just a—it's a restriction.

Later in the same argument, Justice Stephen Breyer also referenced Thomas' point, further demonstrating the importance of his line of questioning, even to the liberal wing of the bench.

Justice Breyer: Do it—what is it we have—they raised this in their brief. They say, let's focus on the cases in which there is a misdemeanor battery conducted without an intentional or knowing state of mind. Now, they say if this, in fact, triggers—this is the question Justice Thomas asked—if this, in fact, triggers a lifetime ban on the use of a gun, then do

141. This is akin to Justices listening to one another in an attempt to build coalitions during the decision-making process. See, e.g., BLACK ET AL., *supra* note 125, at 48–84; JOHNSON, *supra* note 9, at 57–70.

142. 136 S. Ct. 2272 (2016).

we not have to decide something we haven't decided.
And I think it would be a major question.

While Kennedy and Breyer pushed Thomas' point in *Voisine*, his impact on how his colleagues may think about a case during oral arguments is muted by the fact that he spoke so little during in-person sessions. As Table 6 shows, he did so in only thirty-nine cases between 1991 and February 2020 although his colleagues referenced back to utterances eleven times—about a third of the time.

This behavior changes, however, in the telephonic arguments. Remember that Thomas spoke in all ten of these cases. And, as he did, his colleagues referenced his questions or comments twelve times—or more than once per case. Like the old E.F. Hutton commercials it seems that, when Thomas spoke in May 2020, his colleagues listened.¹⁴³ Consider an example from *Trump v. Mazars*.¹⁴⁴ In this case Thomas spoke an astonishing fourteen times.¹⁴⁵ In turn, his colleagues referenced his questions or comments six times. Justice Breyer did so on a critical point:

Justice Breyer: All right. I'd—I'd like to follow up on both Justice Thomas' and Justice Ginsburg's questions. As to Justice Thomas' questions, are you saying that Sam Ervin's subpoenas, which were done under the legislative power at the time of Watergate, which were fairly broad, are you saying they were unlawful, that a court should not enforce them? Yes or no? And as to Justice Ginsburg's question, I would like to know why, since in Watergate and other cases, Watergate particularly, the Court gave contested material involving the very workings of the Presidential office to the prosecutor, why isn't

143. For those too young to be familiar with the E.F. Hutton line of advertisements, we refer you to Eclecto Tuber, *Tom Watson In E.F. Hutton Commercial: When E.F. Hutton Talks . . .*, YOUTUBE (May 2, 2017), https://www.youtube.com/watch?v=wd7gC_IzmMM.

144. 140 S. Ct. 2019 (2020).

145. This is tied for the fourth most verbose case of Thomas' career. The reason it is astonishing is that, by the time *Mazars* was argued, it was clear the Chief was controlling when the associate Justices were allowed to ask questions and he, ostensibly sought to bring a level of equity to speaking time.

whatever standard applies to personal papers a weaker one, not a stronger one?

The key is that, when he spoke, Thomas clearly had an impact on how the telephonic arguments progressed. This is consistent with Johnson's contention that speaking during oral arguments is essential for the Justices as they think about how they want to vote, what coalitions may form (both majority and dissenting), and what legal and policy arguments will control their votes.¹⁴⁶

Beyond colleagues listening to him, Thomas had another effect on the arguments. This second effect, however, is one he purports to eschew—interrupting counsel while they are speaking. More to the point, and as we note above, Thomas says that one of the main reasons he does not speak is that he believes the proceedings should be a time for counsel to make their arguments—much as they did in earlier Court eras.¹⁴⁷

The data in Table 7 tell a different story. During the thirty-nine in-person cases, Thomas interrupted counsel eighty times, or twice per case on average. While this average decreases during the telephonic arguments, he still interrupted counsel an average of once per case. Given existing findings that interruptions can and do have an effect on how the Court decides, it is interesting and surprising that the quietest Justice in modern history acts similarly to his colleagues when he chooses to speak.¹⁴⁸

146. Timothy R. Johnson, *When Justices Talk Among Themselves*, N.Y. TIMES, (Feb. 17, 2011), <https://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter/when-justices-talk-among-themselves>.

147. For a discussion of how argument sessions proceeded in the Marshall era, see JOHNSON, *supra* note 9, at 1.

148. Most literature on interruptions focuses on how Justices interrupt one another. See generally Timothy R. Johnson, Ryan Black & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331 (2009); Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017). However, Kimmel and his colleagues address how attorney interruptions affect the Court as well. See Christopher M. Kimmel, Patrick A. Stewart & William D. Schreckhise, *Of Closed Minds and Open Mouths: Indicators of Supreme Court Justice Votes During the 2009 and 2010 Sessions*, FORUM (July 31, 2012).

**Table 7: Incidents of Justice Thomas
Interrupting Counsel during Oral Arguments**

Time Frame	Argument Sessions in which Thomas Spoke	Number of Times Thomas Interrupted Attorneys to Speak
1991–Feb. 2019	39	80
May 2019	10	10

V. CONCLUSION

The analysis we provide here tells a clear story about the U.S. Supreme Court’s quietest Justice. As it turns out, even Thomas’ scant speaking patterns comport with the behavior of Justices who have served with him since 1991. That is, he speaks in cases that include issues important to him and he speaks more often when he is ideologically closer to the median Justice. He also uses his speaking turns to raise policy related issues and questions about external actors’ preferences.

Perhaps most interestingly, Thomas actually plays a key role for his colleagues when he speaks as they frequently reference issues he raises. And, finally, despite all his public statements about the extent to which he dislikes it when his colleagues interrupt attorneys’ arguments, Thomas is also guilty of this sin. In short, he is, in the end, just a typical Justice who happens to be quiet most of the time. This lesson is an important one, but our analysis provides one additional insight.

Specifically, the changes in Thomas’ behavior during the telephonic sessions—speaking multiple times in every case—are best explained by the alternate argument format and procedures. From his very first utterance on May 4, 2020 (“Yes, Ms. Ross—a couple of questions”),¹⁴⁹ it was clear Thomas came prepared and was determined to participate. Even when the Chief was forced to initially skip Thomas’ turn during arguments

149. Oral Argument at 6:05, *supra* note 12.

in *Trump v. Vance*,¹⁵⁰ Thomas still got in a question. Indeed, as the transcript indicates, Roberts offered Thomas his turn but quickly moved on to Justice Ruth Bader Ginsburg when Thomas did not immediately respond:

Chief Justice Roberts: Thank you, counsel. Justice Thomas? Justice Thomas? Justice Ginsburg?

Whether the Chief simply wanted to keep the argument moving or whether he believed, like many of those listening, that Thomas would remain silent, Roberts returned to Thomas following Ginsburg's interaction with counsel:

Chief Justice Roberts: Thank you, counsel. Justice Thomas?

Justice Thomas: Yes. Thank you, Chief. Counsel, the—I'm very interested, do you think that there are any implied powers for the Congress to request or to subpoena private documents?

Where, pre-May 2020, Thomas seemed entirely content to stay silent in over 98 percent of cases for which he heard arguments, during the telephonic sessions he took each and every opportunity to speak. Time will tell whether he will continue down this path or simply go back to his *status quo* silence. However, if the pandemic forces the Court to hold telephonic arguments when it opens the October 2020 term, we do not expect him to be silent. Perhaps the new Justice Clarence Thomas will be heard again.

150. Transcript of Oral Argument at 9–11, *Trump v. Vance*, 140 S. Ct. 2412 (2020), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-715_h3ci.pdf.

REMOTE ORAL ARGUMENTS IN
THE AGE OF CORONAVIRUS:
A BLIP ON THE SCREEN OR A PERMANENT FIXTURE?

Margaret D. McGaughey*

In March 2020, most oral arguments in state and federal appellate courts were as they always had been: in person. By mid-March, COVID-19 struck and courts were faced with the difficult decision of how to balance on one hand, the need for advocates to plead their cases and the public's right of access to the courts, and on the other, the health risks of in-person arguments. Some courts, the United States Supreme Court among them, chose to hear arguments by telephone conference only. Others opted for audio-video arguments using such platforms as Zoom or Microsoft Teams. Still other courts used a combination of audio-only and audio-visual arguments. For judges and lawyers alike, this was an unanticipated and occasionally unsettling experiment.

This article is the sequel to “May It Please the Court or Not: Appellate Judges’ Preferences and Pet Peeves About Oral Argument.”¹ The follow-up describes the approaches to remote oral arguments that have been taken by four appellate courts: the Supreme Court, the United States Court of Appeals for the First Circuit, and the Supreme Judicial Courts of Maine and Massachusetts. Telephone interviews were conducted

* Margaret D. McGaughey is the former Appellate Chief of the United States Attorney’s Office for the District of Maine. She has argued 450 criminal appeals to the First Circuit.

1. 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 (2019).

with many of the same jurists who were interviewed for the first article. One of them is an Associate Justice of the Supreme Court.² Seven of the jurists sit on the First Circuit.³ Four are current or former justices of the highest courts of Maine⁴ and Massachusetts.⁵ Interviews were also conducted of five lawyers who were among the first to present remote arguments in their respective courts.⁶ The purpose of the interviews was to explore the reactions of judges and lawyers to remote arguments, to understand how their preparation and performance differed, to identify the costs and benefits of alternatives to in-person arguments, and to offer suggestions for how to avoid the pitfalls of remote presentations and, instead, make them as effective as possible.⁷

I. HOW VARIOUS COURTS HAVE ADAPTED

A. Supreme Court

In response to health concerns surrounding COVID-19, the Supreme Court established a model that

2. Associate Justice Stephen G. Breyer graciously contributed his thoughts. Telephone interview with Justice Stephen G. Breyer, Associate Justice, Supreme Court of the United States (Jul. 14, 2020) (on file with author).

3. Sincere thanks go to Chief Judge Jeffrey R. Howard and Judges David J. Barron, William J. Kayatta, Jr., Kermit V. Lipez, Bruce M. Selya, the late Juan R. Torruella, and former Chief Judge Sandra L. Lynch, who suggested this article.

4. Former Chief Justice Daniel E. Wathen, Acting Chief Justice Andrew M. Mead, and Associate Justice Catherine R. Connors of the Supreme Judicial Court of Maine provided valuable perspectives.

5. Only weeks before his September 14, 2020, death, Chief Justice Ralph D. Gants of the Supreme Judicial Court of Massachusetts kindly agreed to be interviewed.

6. Attorneys Randall Kromm, Julia Lipez, Lauren Zurier, and Scott Meisler were among the first lawyers to argue in the First Circuit. Nolan Reichl presented the first remote argument to Maine's Supreme Judicial Court. All of them were helpful in giving lawyers' reactions to remote arguments.

7. Rachel Cossar contributed useful practical suggestions for arguing remotely.

some other courts have followed.⁸ For its ten-case May 2020 term, the Court opted for telephone conferences, in part out of concern regarding the security of audio-visual platforms.⁹ The question was not the security of the exchanges between the Court and the lawyers because, for the first time, Supreme Court arguments were livestreamed. Rather, at issue was the prospect of hacking internal Court communications. There was also a fear that static or other external influences could disrupt the proceedings.

Each Justice was allotted a specific number of minutes to ask questions and was told in advance what that timing would be. Following the relatively new custom of allowing lawyers two minutes to argue without interruption,¹⁰ the Justices each used their allotted time to ask questions in order of seniority, with Chief Justice John G. Roberts going first. If time remained, or if one Justice had not used the permitted time, additional questions could be asked, again according to seniority. Lawyers who had reserved rebuttal time were then allowed a summation.

The Justices were not physically together for the arguments. Justice Stephen G. Breyer, for example, was in his home in Massachusetts. The late Justice Ruth Bader Ginsburg participated from her hospital bed.¹¹ In an effort to make sure the arguments proceed-

8. Press Release, Supreme Court of the United States, Press Release Regarding May Teleconference Arguments Order of Business (Apr. 28, 2020), https://supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20; Press Release, Supreme Court of the United States, Press Release Regarding October Oral Argument Session (Sep. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-16-20.

9. Thomas Brewster, *Warning: Zoom Makes Encryption Keys in China (Sometimes)*, FORBES (Apr. 3, 2020), <https://www.forbes.com/sites/thomasbrewster/2020/04/03/warning-zoom-sends-encryption-keys-to-china-sometimes/#5d6aa1c43fd9>.

10. GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 7 (2019), https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf.

11. Ariane de Vogue & Veronica Stracqualursi, *Ruth Bader Ginsburg Participates in Supreme Court Arguments from Hospital*, CNN (May 6, 2020), <https://www.cnn.com/2020/05/06/politics/ruth-bader-ginsburg-supreme-court-coronavirus/index.html>.

ed smoothly, a member of the Court's IT staff monitored them remotely.

Justice Breyer said he did not find that the number of minutes given to him to pose questions was frustrating. Rather, he saw as a strong point of the Court's protocol that it required the Justices "to focus on our questions and to be succinct . . . and to listen carefully to what the responses were." The protocol, in combination with the audio-only format, "required considerable concentration, perhaps more than normal, and I think that was a good thing." Having a designated amount of time for questions also encouraged more participation by all members of the Court.¹² It seemed to Justice Breyer that for the lawyers, the protocol produced shorter, crisper, more succinct answers.

Justice Breyer also saw negatives in this format. His experience is that, done well, oral argument becomes a conversation. He pointed out that when Judge Learned Hand helped to design the courtroom in the Second Circuit, the bench was placed almost at eye level with the lawyers "to entice the lawyer into a conversation where they are both focusing on the legal problem and not just the client."¹³ A significant loss in the audio-only format was the absence of eye contact. In in-person arguments, looking at other members of the Court can help the Justices identify what is bothering one other, which can be productive during the argument itself, in conference, or both. The protocol also made it more difficult to follow up on another Justice's questions. For Justice Breyer, who has always enjoyed oral

12. Timothy R. Johnson et al., *COVID-19 and Supreme Court Oral Argument: The Curious Case of Justice Clarence Thomas*, 21 J. APP. PRAC. & PROCESS 113 (Winter 2021). Adam Liptak, *Were the Supreme Court's Oral Arguments a Success?*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/supreme-court-phone-arguments-lyle-denniston.html?searchResultPosition=2> (noting that during the telephonic arguments, the characteristically taciturn Justice Clarence Thomas spoke in 100% of the cases).

13. See United States Court of Appeals for the Second Circuit, *Virtual Tour, Thurgood Marshall Courthouse*, <https://www.ca2.uscourts.gov/photos/slideshow.html#9> (last visited Oct. 8, 2020).

argument, one distinct negative in the remote format is that “there rarely is a light moment.”

Notwithstanding these negatives, Justice Breyer believed there will be no long-term impact on the administration of justice because oral argument is “a very small part of the entire proceeding.”¹⁴ Oral argument can help to shape the discussion, in part because the lawyers know the case more thoroughly than the Justices do. If the remote format results in increased focus by Justices and lawyers on each question and answer, the significance of oral argument could increase. The primary persuasion, however, takes place in the briefs and in the end, what matters is the way an opinion is written, which “will affect tens or hundreds of millions of people who are not in the courtroom.” Whether remote arguments will continue after COVID-19 abates may be a matter for the Court’s discussion.¹⁵

B. First Circuit

Although by March 2020 Boston had become a hotbed of COVID-19, the First Circuit was able to complete its March term without incident or illness. Lacking the tradition and the technology for online arguments, the court took on submission most of the cases that had been scheduled for argument in April and May in order to put the necessary changes in place. More complex cases that the judges thought needed oral argument were put over to a later term.

By June, the First Circuit began hearing oral arguments either of two ways: some audio-only and others audio-visual, using the platform Microsoft Teams

14. See Justice Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, BROOKINGS INST. 24 (Oct. 17, 2005), <https://www.brookings.edu/wp-content/uploads/2012/04/20051017Breyer.pdf> (“[T]he oral argument is only the tip of an iceberg. Most of what we do is done in writing, most of what we do is based on the briefs, and the oral argument sometimes is important, but it’s only a small part of the process.”).

15. In September 2020, the Supreme Court announced that it would continue to hold oral arguments by telephone for the start of the October 2020 term. October Oral Argument Session, *supra* note 8.

(Teams), which the Executive Offices of the United States Courts recommended. The choice of format was made by the panel hearing that day's cases. Judge Sandra L. Lynch,¹⁶ for example, had retreated to a vacation home where she had a malfunctioning iPad, no broadband internet, and remote access only by a hotspot that produced unreliable connections. She participated only in telephone conference arguments, one of which was heard en banc.

Although the First Circuit's IT and clerk staffs are lean in comparison to other courts, they undertook to train both judges and lawyers in the use of audio and audio-visual technology. Approximately a week before the first scheduled argument, the courtroom deputy held by telephone conference a general orientation session for all lawyers who would argue on a given day. This included a description of the protocol to be followed and directions for such details as muting the microphone when not arguing. The courtroom deputy also practiced the technology with the lawyers.

On argument day, the lawyers were told to connect thirty minutes before their scheduled time. After the lawyers were on the line, the judges announced that they had joined. The courtroom deputy then began the proceeding with a modified call similar to what the Supreme Court used for its remote arguments. Although the tradition is for the deputy to direct that "all rise" and then say, "draw near, give your attendance and you shall be heard," the phrases "all rise" and "draw near" were omitted.

The First Circuit's protocol for the audio-only arguments was modeled after the Supreme Court's. Judge William J. Kayatta¹⁷ and Judge David J. Barron¹⁸ re-

16. Telephone interview with Judge Sandra L. Lynch, Circuit Judge, United States Court of Appeals for the First Circuit (Jul. 1, 2020) (on file with author).

17. Telephone interview with Judge William J. Kayatta, Circuit Judge, United States Court of Appeals for the First Circuit (Jun. 30, 2020) (on file with author).

18. Telephone interview with Judge David Barron, Circuit Judge, United States Court of Appeals for the First Circuit (Aug. 11, 2020) (on file with author).

ported that, knowing they would have only a fixed amount of time to ask questions, they tended to formulate them ahead of time. Although opening summations have not been the custom in the First Circuit, each lawyer was given a brief period to argue without interruption. The judges then divided the remaining time evenly among themselves and posed questions in order of seniority. Whichever judge was presiding orchestrated the transition from one judge to another, in part so that advocates who were unfamiliar with the judges' voices would know who they were addressing. The presiding judge also kept time, a function generally performed by the courtroom deputy.

A member of the First Circuit's IT staff monitored the arguments, as did the courtroom deputy. The arguments could be heard on YouTube with a thirty-second delay. For the first day's arguments, fifty-two people listened by YouTube.

The clerk's office provided similar pre-argument training to the lawyers who argued by Teams. Julia Lipez's¹⁹ Department of Justice computer could not interface with the First Circuit's Teams application, so she needed to argue from home, using her personal desktop computer. The courtroom deputy held a separate session with her and others who had similar problems to ensure that Teams worked on their devices.²⁰

During the Teams arguments, the judges each appeared individually on a screen. Only the arguing lawyer was visible on another screen and the audio of the non-arguing lawyer was muted. According to Chief Judge Jeffrey R. Howard,²¹ who presided over both audio-only and audio-visual arguments, the Teams arguments were generally less strictly orchestrated than the

19. Telephone interview of Julia Lipez, Assistant United States Attorney, United States Attorney's Office for the District of Maine (Jul. 3, 2020) (on file with author).

20. The First Circuit's IT staff and the courtroom deputy, Daniel Toomey, garnered high praise for their patience and help with the technology.

21. Telephone interview with Chief Judge Jeffrey R. Howard, Chief Judge, United States Court of Appeals for the First Circuit, (Jul. 2, 2020) (on file with author).

telephone conference presentations and resembled more closely an in-person argument. He and Judge Lynch agreed that in either the audio-only or the audio-visual format, there is more pressure on the presiding judge to be alert to technical difficulties, maintain control of the proceedings, and ensure that everyone has their say.

1. One First Circuit Judge's Remote Experience with the Ninth Circuit

Before the virus hit, First Circuit Senior Judge Kermit V. Lipez²² had agreed to sit by designation with the Ninth Circuit. As he pointed out, the Ninth Circuit is much larger geographically and in the number of judges than the First Circuit. The Ninth Circuit's IT staff is also more numerous, and they were already familiar with remote platforms. Even before the pandemic, the Ninth Circuit had been holding remote oral arguments, for example, when the court sat in more than one location on a given date or illness or some personal issue prevented a judge from joining a panel. The Ninth Circuit's audio-visual platform is not Teams but Zoom.²³

When it became apparent that Judge Lipez's participation would be remote, a Ninth Circuit staff member contacted him to explain that court's system and protocol. At the time, Judge Lipez had closed his chambers in Portland, Maine, and was working from home in a guest bedroom, surrounded by briefs and documents piled high on a double bed. Concerned about the background against which he would appear remotely, Judge Lipez opted for a virtual background of plain wooden planks. During an orientation session, the Ninth Circuit IT staff member said of the background, "all you need is antlers." Taking this as polite suggestion to choose

22. Telephone interview with Judge Kermit V. Lipez, Senior Circuit Judge, United States Court of Appeals for the First Circuit (Jul. 1, 2020) (on file with author).

23. An informal survey of the Appellate Chiefs in United States Attorney's offices across the country reflected a general preference for Zoom.

something else, Judge Lipez obtained from the First Circuit staff a substitute virtual background of the en banc courtroom in Boston.

Judge Lipez was slated to participate from his home in Maine with Ninth Circuit Senior Judge Randy Smith, who was physically in his chambers in Pocatello, Idaho, and Circuit Judge Johnnie Rawlinson, who planned to participate from her chambers in Las Vegas, Nevada. Two days before the arguments, however, violent protests required closing the Las Vegas courthouse, so Judge Rawlinson joined from a study in her home. During one argument, Judge Rawlinson's internet connection failed, and her image suddenly disappeared from the video screen. Judge Smith tried to signal the arguing lawyer to stop but suspended the argument briefly while the IT staff attempted to reconnect Judge Rawlinson. Because they were unable to do so, Judge Rawlinson completed her participation by an audio-only connection and Judge Smith assumed Judge Rawlinson's role as the presiding judge.

2. The Judges' Reactions

The First Circuit judges' reactions to the audio-only and audio-visual arguments varied. The differences may be explained in part by divergent views regarding the utility of oral argument generally. The late Judge Juan R. Torruella,²⁴ for example, believed that too many cases are granted oral argument even when they are held in person.

Chief Judge Howard observed that, on the whole, the lawyers seemed more comfortable with remote formats than some of the judges, likely because lawyers have become accustomed to communicating by conference call, Zoom, or Teams. Judge Lynch, who presided over several audio-only arguments, concluded that the

24. Telephone interview with Judge Juan R. Torruella, Circuit Judge, United States Court of Appeals for the First Circuit (Jun. 30, 2020) (on file with author). Judge Torruella passed away on October 26, 2020, as this article was being finalized for publication.

telephone format worked well, and the Supreme Court's protocol produced arguments that were more orderly than in-person presentations, had greater participation by the judges, and possibly produced better opinions. Judge Barron found that the structure helped to avoid distractions and kept him on track. Judge Torruella, by contrast, was frustrated by his inability to pursue issues when they naturally arose during the argument.

Judge Lynch acknowledged that following the Supreme Court protocol "lock step" was somewhat unsatisfying for the judges, but says that as time passed, the audio-only arguments became more natural. She, for example, ceded time to other judges she sensed had more questions than she did. The judges became bolder about stopping lawyers who did not answer questions and intervening in the dialogue between a lawyer and another judge. Judge Barron commented that the Teams format created a somewhat surprising sense of intimacy, perhaps because the screens of the three members of the panel and the arguing lawyer were all the same size. Being able to see the full face of the other judges on the video screen also made it easier for the judges to interject because on the bench, they sit beside each other and have only sideways views.

Judge Bruce M. Selya, who participated in both audio-only and audio-visual presentations, thought that using the Supreme Court's telephone format changed the character of the arguments and diminished that experience for him because "one of the hallmarks of oral argument . . . is a very free-flowing exchange among the judges."²⁵ A negative effect of confining judges to a certain number of minutes was that the allotted time "belonged exclusively to that judge" and the others were reluctant to interject or ask follow-up questions. In addition, the rank order and strict time allotments tended to force the judges to stick to one issue, even though he or she might have questions regarding more

25. Telephone interview with Judge Bruce M. Selya, Senior Circuit Judge, United States Court of Appeals for the First Circuit (Jul. 30, 2020) (on file with author).

than one subject. Having listened to the Supreme Court's audio-only arguments, Judge Selya concluded that they lacked the flavor of in-person presentations.

Although Chief Judge Howard thought the lawyers generally acquitted themselves well, for Judge Lynch, the quality of advocacy varied. The consensus of the judges was that good lawyers tended to be good, no matter what the format. Even in the telephone conference format, which allows no one to see anyone else, the good lawyers successfully struck a conversational tone. The others, Judge Lynch thought, "were pretty much the way they always are." Judge Selya agreed that just as in in-person presentations, "the lawyers who would attempt to be responsive were attempting to be responsive and the lawyers who preferred to be evasive preferred to be evasive." Even though the images on the video screens were small, they gave advocates some opportunity to establish eye contact with the judges, which is an essential ingredient of an effective in-person argument. Judge Barron commented that for lawyers, a certain degree of stage fright may be diminished by the remote formats because there is no audience in the gallery.

The First Circuit judges who used both formats generally agreed that the audio-visual arguments produced a more natural, easier give-and-take. According to Scott Meiser,²⁶ who has also argued in the Ninth Circuit, that court so significantly prefers the audio-visual format that it has directed government attorneys to use it exclusively. Judge Kayatta, who terms himself "bullish" about the effect of oral argument on the public's perception of courts, agreed that the audio-visual format is preferable to audio-only. Nevertheless, he remained uncomfortable that litigants may think that because their case was not argued in person, they have lost to "the judge behind the green curtain." Judge Barron shared the concern about public access to courts.

26. Telephone interview of Scott Meisler, Attorney, United States Department of Justice (Jul. 30, 2020) (on file with author).

3. *Lawyers' Reactions*

The lawyers who argued in the First Circuit by conference call found the experience more orderly, but also more stilted and less spontaneous than in-person presentations. Lawyers and judges alike tried to avoid interrupting or talking over each other. It was harder to hear when a judge started talking. Lacking eye contact, it was difficult to sense how the judges were responding. Pauses were longer and more disconcerting than in person. Lauren Zurier,²⁷ who generally represents the appellee and thus most often is in a reactive position, found it harder to pivot from one argument to another and more difficult to turn the argument into a conversation. She also did not feel the same rush of adrenaline that for her is part of the argument experience.

However, an advantage of the audio-only format was that the advocates could have at hand more documents than they would customarily take to the podium. Although Zurier generally puts a brief outline in a binder, knowing that the judges could not see her, she organized documents in stacks across the desk where she sat to argue. Meisler took advantage of the judges' inability to see to use the search function on his laptop to find the answer to a question concerning a somewhat obscure fact.

Randall Kromm²⁸ presented the first Teams argument before the First Circuit. The size of the judges' screens made it harder for him to make eye contact, so Kromm tried to focus on the judges' tones of voice instead. Having presented approximately 100 First Circuit arguments, he found it more difficult than usual to interpret the reaction of judges who were silent during the argument. However, he was somewhat more relaxed

27. Telephone interview of Lauren Zurier, Assistant United States Attorney, United States Attorney's Office for the District of Rhode Island (Jun. 30, 2020) (on file with author).

28. Telephone interview of Randall Kromm, Assistant United States Attorney, United States Attorney's Office for the District of Massachusetts (Jun. 30, 2020) (on file with author).

knowing that he did not have a gallery full of people sitting behind him. Julia Lipez thought that looking directly at the camera, as she was advised to do, was somewhat counterintuitive because in an in-person argument, her natural inclination is to focus on whatever judge is questioning her. In contrast to Kromm, she thought the equal size of the images of judges and lawyers created a more intimate, somewhat more informal atmosphere than an in-person presentation.

Timing presented challenges for the lawyers. Instead of the light system that is traditional in courtrooms, the presiding judge kept track of the time limits and the courtroom deputy announced when advocates had five minutes remaining. Kromm, who relies on body language as a sign that the judges have no further questions, found the cues harder to read and wound up ending with five minutes to spare. Nevertheless, Kromm was pleasantly surprised by the experience and thought the quality of the argument did not suffer because of the format.

In addition to his audio-only argument in the First Circuit, Meisler had argued by audio-visual means in a number of other circuits. He agreed that even with the audio-visual format, it was harder to assess whether the judges were engaged in his argument and when to stop talking. What helped him was beginning his presentation with an explanation of which issues he planned to cover so that the judges could re-direct him if they chose. The telephone conference argument was somewhat easier for Meisler because he is accustomed to conversations on the telephone. However, either format does make it difficult for an advocate to decide whether to shift to a different point as opposed to waiting for the judges to respond.

C. Maine Supreme Judicial Court

Even before COVID-19, Maine's Supreme Judicial Court had been livestreaming its oral arguments. In

April 2020, the Law Court²⁹ began having remote arguments, all of them by Zoom. Nolan Reichl,³⁰ who presented the first remote argument, participated in advance in what amounted to a chambers conference in which the lawyers and justices discussed some of the logistical details of the process. Although an initial suggestion for keeping time was to have a clock counting backwards on one screen, the lawyers thought that would be too ominous and distracting. Instead, it was agreed there would be a screen that the court clerk would monitor to change the colors from white (uninterrupted time) to green (questioning) to yellow (one minute remaining) and finally red (stop). The lawyers were also given a virtual background depicting a view of the lectern from the bench.

Several days before the arguments, the clerk contacted the lawyers to install Zoom if necessary, teach the lawyers how to use it, and ascertain their level of comfort with the technology.³¹ On the day of argument, the lawyers signed in fifteen minutes ahead of time to do a sound check of their microphones with the clerk. The judges then signed on individually. One minute before the scheduled time, the clerk allowed the lawyers to join and counted down to start the audio but continued to monitor the session. The Law Court did not adopt the United States Supreme Court's protocol. Instead, the court followed its traditional argument format in which the Chief Justice welcomed the lawyers and gave a lawyer who reserved time three minutes in which to argue without interruption before the justices began asking questions.

29. When sitting as an appellate court, Maine's Supreme Judicial Court is known as the Law Court. *Supreme Court*, STATE OF MAINE JUDICIAL BRANCH, https://www.courts.maine.gov/maine_courts/supreme/ (last visited Oct. 8, 2020).

30. Telephone interview of Nolan Reichl, Partner, Pierce Atwood, LLP (Jul. 8, 2020) (on file with author).

31. The Supreme Judicial Court's clerk, Matt Pollack, appears to have been indispensable to the functioning of that court's remote arguments.

1. Justices' Reactions

Acting Chief Justice Andrew M. Mead³² was “pleasantly surprised” that the technology generally worked well. The lawyer in one argument had trouble with the Zoom settings, but after the clerk telephoned him and walked him through the process, there were no further glitches. To Chief Justice Mead, the audio-video arguments seemed more orderly than in-person arguments. Unless they were speaking, the Justices muted their microphones, which their fellow jurists could see. Name plates on the screens and the illumination of the screen of a justice asking a question allowed the lawyers to know which jurist they were addressing. Chief Justice Mead had generally been somewhat reluctant to interject himself into a colloquy between another justice and a lawyer, but the act of unmuting a microphone by a colleague who intended to enter the conversation made it easier for the justices to interrupt each other politely. Chief Justice Mead’s take on the lawyers was that because they were so accustomed to speaking from a podium in a courtroom, they were a bit more tentative and cautious when arguing remotely.

Justice Catherine R. Connors³³ found it helpful to see a screen stating “protected time” as opposed to the customary light on the clerk’s desk below the bench. For her, body language, on which she relied heavily as a practitioner, was almost entirely missing. As Chief Justice Mead explained, “everyone is bolted down,” so it was more difficult to read subtle cues such as a judge sitting back to signal the end of an exchange with a lawyer.

Former Chief Justice Daniel E. Wathen³⁴ left the bench before remote arguments came into common use

32. Telephone interview with Chief Justice Andrew M. Mead, Acting Chief Justice, Supreme Court of Maine (Jul. 2, 2020) (on file with author).

33. Telephone interview with Justice Catherine R. Connors, Associate Justice, Supreme Court of Maine (Jul. 2, 2020) (on file with author).

34. Telephone interview with Chief Justice Daniel E. Wathen, Chief Justice (Ret.), Supreme Court of Maine (Jul. 15, 2020) (on file with author).

but mediated a case with lawyers in five different states via Zoom. By his own description “someone who resists technology,” he approached the mediation “with great trepidation and certain that something would be lacking without the personal connection.” To his surprise, the process worked well and served as a lesson to “stay open to new ways.”

2. Lawyers’ Reactions

For Reichl, as for Judge Barron and Julia Lipez, the audio-visual format created an argument environment that was more intimate than in person because everyone’s image was the same size. It may have been the circumstance of presenting the first COVID-19 argument, but Reichl thought the atmosphere was entirely collegial and there was almost a sense of kinship. Reichl was conscious of all the visual cues he might give, which the Zoom format accentuated. On his “best behavior,” he avoided slouching, audible sighs, or facial expressions.

Nevertheless, Reichl was aware of the features of the courtroom experience that were absent. The majestic courtroom in which the Law Court sits, which is lined with the portraits of generations of justices, creates a sense of dignity and significance that was lacking in the remote format. Like Zurier, Reichl also felt less of an adrenalin rush. If anything, the sense of isolation he experienced when arguing from his home created a bit of nervous energy. Unlike in-person presentations, Reichl was unable to size up his opponent at the beginning of his argument or shake hands at the end.

D. Massachusetts

After the virus hit, the Supreme Judicial Court of Massachusetts (SJC) began hearing oral arguments tel-

ephonically.³⁵ Several days in advance, the clerk³⁶ reviewed with the lawyers the protocol and did a dry run to work through any issues regarding audibility. The SJC followed the same protocol as the United States Supreme Court, with justices asking questions in order of seniority. One difference was that unlike Supreme Court Chief Justice Roberts, who aimed to enforce the time limitations, the late Chief Justice Ralph D. Gants³⁷ adhered to his previous practice of allowing arguments to continue as long as any justice had questions. As a result, the remote arguments tended to be longer than in-person. A change in practice, which Chief Justice Gants said the lawyers appreciated and the SJC likely will keep, was that the court allowed lawyers a few minutes of uninterrupted time to present the essence of their case before the justices launched in with questions.

According to Chief Justice Gants, the SJC's first experience with telephonic arguments was its most challenging. Only weeks after the court closed, an emergency pleading was filed that sought the release of pretrial detainees in light of COVID-19. It involved seven parties with different perspectives and lasted three hours. Although the justices were concerned about public access to the argument, they were not confident that the sound quality would be good if the argument were broadcast live, so they opted for a delayed feed. Even that was delayed, however, because of the three-hour duration of the argument.

In Chief Justice Gants's view, telephonic arguments were more controlled and contained than in-person arguments because of the need for lawyers to be able to identify invisible justices and the interest of

35. As of this writing, all of the SJC's arguments were telephonic. If in-person arguments could not resume in September 2020, the court planned to transition to Zoom.

36. Chief Justice Gants described Francis Kenneally as "our quite wonderful clerk."

37. Telephone interview with the late Chief Justice Ralph D. Gants, Chief Justice, Supreme Judicial Court of Massachusetts (Aug. 5, 2020) (on file with author).

preventing lawyers and justices from talking over each other. The protocol of justices asking questions in order resulted in “some clumsiness” in waiting their turns and a tendency to ask questions that otherwise might not be asked. In-person arguments produce “a cleaner exchange” and make it possible to ask questions when they arise.

Chief Justice Gants suggested that for the lawyers, telephone conferences require a “different voice” in order to strike the conversational tone that makes oral argument effective. There were occasional mishaps that took lawyers off balance, for example, arguing from phones with poor reception, but they were resolved quickly. Chief Justice Gants measured the quality of argument “not in terms of its drama, not in terms of the capacity of people or how a justice is going to react to an answer. That may be what an advocate cares about, but I don’t.” He agreed with some of his federal colleagues that “a good advocate is going to be a good advocate whether it be in person or on Zoom or on the phone.”

For Chief Justice Gants, the point of argument was being able to ask questions, obtain answers, and explore concerns in an effort to reach the right decision. Ultimately, jurists “read and we write and we listen and we can do all of that virtually.” He saw “no material chance” that any decision turned out differently because it was argued remotely.

II. BENEFITS OF REMOTE ARGUMENTS

One benefit of remote arguments is that, with live broadcasts or YouTube postings, the public may have greater access to the courts. Zurier pointed out that the victim in her case would have been unable to attend a hearing in Boston but felt engaged in the process by being able to listen to the argument on the court’s YouTube posting. Judge Barron’s view was that if extended public access has been possible by remote means in the unusual circumstance of a pandemic, it may be

advisable to continue YouTube broadcasts after the crisis abates.

In-person arguments require litigants to incur significant expenses: travel costs, hotels, meals. In geographically dispersed circuits like the First Circuit,³⁸ the same is true of the judges. YouTube broadcasts may be a reasonable and cost-free substitute for the attendance of a lawyer's co-counsel or a client who lives at a distance and may help to reduce the financial burden of an appeal.

Especially now that many courts have the technology in place, there could be an efficiency in holding arguments remotely. As Chief Justice Mead explained, remote arguments may be particularly helpful for emergency proceedings in jurisdictions like Maine, where the litigants and judges may be geographically far apart, but remote access allows them to convene quickly.

Maine's Supreme Court has experienced an unexpected benefit from its remote arguments. That court sits in a large, stately courtroom in which voices tend to echo. Although all seven justices are equipped with microphones, there is a single amplifier, which poses the danger that advocates who are unfamiliar with the justices' positions on the bench or voices can become confused as to which jurist is addressing them. Because the Zoom protocol lights up the screen of the justice who is talking, this issue does not exist.

III. DOWNSIDES OF REMOTE ARGUMENTS

Everyone saw as a significant cost of remote arguments reduced eye contact or the loss of it entirely. Judge Selya recalled that when he was in practice, he could often get a good sense of how the panel was reacting just by looking at them. In audio-only arguments,

38. The First Circuit hears appeals from the Districts of Maine, Massachusetts, New Hampshire, Rhode Island, and the distant District of Puerto Rico. *About the Court*, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, <https://www.ca1.uscourts.gov/about-court> (last visited Oct. 8, 2020).

there are no visual cues. Zurier, among other advocates, struggled to find a reasonable substitute. Even with audio-visual arguments, Chief Justice Mead estimated that eye contact is at best 80% effective. Justice Connors, who recently rose to the bench from an active appellate practice, reinforced the view of many judges that the ability to turn oral argument into a conversation is much harder in remote formats because of the physical separation of the judges from each other and the lawyers and the pauses occasioned by the technology.

Judge Selya pointed out with a regional court like the First Circuit, whose northernmost district is Maine and southernmost district is Puerto Rico, a significant part of the argument experience for the judges is being in each other's physical presence. The brief moments the judges spend together talking about the particulars of a case before entering the courtroom and the chemistry that develops when questions are being asked by three people who know each other well, understand how each other works, and can see each other's reactions, are all either lost or diminished in either remote format. So was Judge Selya's habit of passing an occasional note to his colleagues during an argument. For Maine's Law Court, remote arguments make it impossible to follow that court's tradition of inviting lawyers who argue for the first time back to the justices' chambers.

As Chief Justice Gants observed, oral argument requires significant focus in any event, but audio-only arguments require an even higher level of concentration because "one is relying on one's ears as opposed to one's eyes." Confirmed by Justice Breyer and Chief Justice Gants, Judge Selya found remote arguments to be more physically taxing for the judges.

IV. ADVICE FOR LAWYERS ARGUING REMOTELY

A. Substantive Advice

Many of the judges believed that the shortcomings they observed in remote arguments are common to oral arguments generally but are accentuated by the remote formats. Their suggestions for improved technique when arguing remotely reinforced what the judges have said about in-person arguments.

As she would with an in-person argument, Judge Lynch advised counsel who argue remotely to “be prepared to answer any possible question they think they are going to get.” She explained that judges become frustrated when, instead of answering questions, lawyers read from a prepared script. Although this is a problem with in-person arguments, she thought it occurred more frequently in the audio-only presentations, perhaps because the litigants believed that because the judges could not see them, they did not know that the lawyers were reading their remarks.

Judge Barron agreed that there is no “upside” to failing to answer a question whether arguing remotely or in person. Even though in the remote setting, a lawyer might more easily avoid discomfort and get away with dodging an inquiry, an unanswered question will only leave the judges with lingering concerns. Especially in the audio-only format, “there are no second chances.” Judge Barron also agreed that giving a speech rather than engaging in a dialogue is not effective in person and even less so in the remote formats.

Judge Lynch stressed the importance of listening, which is another common problem but is only more apparent in remote arguments. She advised, “if you do not understand the question, you are better off stopping and saying you don’t understand and asking for clarification than you are just proceeding with your canned remarks.” Judge Lynch conceded that in audio-visual remote arguments, there are more cues and facial expressions can be seen to some extent. With audio-only

arguments, there are only verbal cues. Her experience has been that “counsel seemed to ignore even the verbal cues that were given by the judges that they were not answering the question.” During in-person arguments, judges are aware of how their colleagues are reacting. With audio-only arguments, the judges cannot see each other—and the lawyers cannot see them—so being attentive to verbal cues becomes even more important.

Chief Justice Gants advised that even a remote argument “needs to remain conversational. It needs to focus on the substance. One needs to put aside the idea that you need to be dramatic, but you need to be equally persuasive.” Judge Selya emphasized that lawyers’ answers should be shorter, more succinct, and clearer in remote arguments. He found that in in-person presentations, lawyers tend to build up to an answer before giving it. He advised lawyers arguing remotely to give short answers to questions first and then explain them. Judge Kayatta encouraged lawyers to have a colleague in the room who is not visible but can find facts in the record or relevant cases on a computer and pass notes to the arguing advocate.

B. Staging Advice

When a lawyer argues in person, all of the staging decisions have already been made. The lighting, placement of the podium in relation to the judges, microphone, and background, for example, are in place and are the same for all advocates. According to Judge Kayatta, a skilled lawyer knows how to take advantage of the idiosyncrasies of each courtroom. With remote arguments, all of those fixtures are absent, and the advocate must create them. Although the lawyers who argued remotely say they prepared the substance of their arguments no differently than when appearing in person, both judges and advocates highlighted the greater need to pay attention to the logistics.

1. Technology

For judges and lawyers alike, the greatest source of anxiety in remote arguments has been the technology: whether they had the proper equipment and whether it would be reliable. Almost everyone reported witnessing at least one technical snafu. The type of computer, size of the screen, and location of the microphone and camera are all important. Internet reliability has been a major concern. Although Julia Lipez had no difficulties arguing from her home, she listened to an argument that was presented after hers and heard the lawyer's connection fail. The consensus of both judges and lawyers was that hard-wired, broadband internet access is more stable and consistent than hot spots. For audio-only arguments, landlines have less static and fewer interruptions than do cell phones. The lawyers generally tested their equipment multiple times before they argued to make sure it worked.

2. Physical Surroundings

Several lawyers opted to argue from their offices, where they could minimize the risk of disruption by putting a Do Not Disturb sign on the door. Even in the office setting, it was necessary to eliminate possible distractions. Personal and office telephones and call-forwarding features were silenced. Audible notices of emails and calendared events on such programs as Microsoft Outlook were disabled. Additional computers were turned off.

Other lawyers were unable to go to their offices and instead argued from their homes. Some of them experienced the same connectivity problems as the judges. There were also added complications of young children in the house who might be tempted to interrupt the argument or pets that might sneak into the room and wander onto the speaker's lap or desk.

3. *Audio Quality*

Making sure the judges could hear was high on the advocates' list of priorities. Zurier, who argued by telephone conference, had to sit during her argument in order to be close enough to the speaker on her telephone. Reichl, who argued by Zoom, obtained a separate, high-quality microphone that he placed below his computer so that his voice was amplified, but the microphone was not visible. Julia Lipez also spoke through a microphone that was plugged into her computer. She was told by colleagues who listened to the recording of her argument that she could be heard more clearly than other lawyers. Kromm said he practiced speaking more slowly than he does in person to account for time lags in the audio-only format. Volume was another focus of attention. Some people tended to speak more loudly on remote methods, and they could seem to be shouting.

4. *Lighting*

Whatever space is used for presenting a remote argument, the advice was that it should be well lit, whether by natural or artificial means. The light should not come from behind, above, or beside the advocate because of the shadows such lights cast. Although mystery is useful in theater, one objective of oral argument is creating an atmosphere of candor and openness, which can be achieved in part by aiming light directly at the advocate's face. According to Rachel Cossar,³⁹ a Boston-based consultant on remote presentations, a ring light that distributes the light is preferable to a single bulb, which both can be blinding to the advocate and can illuminate only part of the speaker's face.

39. Telephone interview of Rachel Cossar, Founder, Choreography for Business, LLC (Jul. 17, 2020) (on file with author).

5. Background

Cossar also recommended using an actual background instead of a virtual one because notwithstanding advances in technology, any movement made against a virtual background appears artificial and detracts from the advocate's professionalism. Whatever actual background is chosen should be well-organized, intentional, and free of distractions. Bookcases or office settings are often the best actual background.

6. Camera Placement

Reichl recommended that any lawyer arguing by Zoom use the HD video setting because it creates a sharper image. The camera used to project the argument should be at the advocate's eye level. If the camera is placed too high, the advocate can appear like a plaintive child. A camera placed too low can cause the advocate to stoop, which risks losing the appearance of command and authority that are essential to communicating an advocate's sense of confidence. Looking directly into the camera at eye level fosters eye contact with the judges, which is critical to reading what visual cues there are and appearing engaged in the argument. Reichl, who argued from home, lowered the chair to his desk to achieve the best angle.

The judges recommended against advocates staring blankly into the camera. Using external monitors while the argument takes place on a computer with a built-in camera can be problematic because the judges see the advocate in profile, not head-on. Advocates should try not to look down or away from the camera to avoid having the judges see only the top of their head and or giving the impression of paying less than full attention. Any notes that are required should be placed so that the lawyer can consult them without looking down.

There should be enough distance between the camera and the advocate to allow for hand gestures. Bringing the camera too close to the advocate's face can appear invasive. According to Cossar, the best distance is

an arm's length plus 2½ to 3 inches from the speaker's fingertips to the back of the screen. Few speakers can avoid the temptation of looking at themselves on camera and doing so is almost always distracting. Some, but not all, platforms have a "hide yourself" function. To increase engagement with the judges, a true professional will activate that function.

7. *Body Placement*

One objective in effective remote presentations is to replicate as much as possible the atmosphere of a courtroom. Zurier pointed out that many advocates are accustomed to arguing on their feet and from a podium. Several lawyers who presented audio-only arguments chose to stand nonetheless. Some found it useful to obtain a podium for either audio-only or audio-visual arguments.⁴⁰ However, Julia Lipez was advised not to stand so she would not be tempted to roam, and her image would remain fixed on the screen.

In audio-visual arguments, the camera should capture only the upper body. When Judge Lipez sat with the Ninth Circuit, one advocate was shown full-body, looking up as if to a bench. To both Judge Lipez and his law clerks, the effect was distorted. Even in an in-person argument, the podium generally allows only the upper torso to be visible to the judges. Good posture is especially important because of the sense of control it creates.

8. *Dress*

Part of any lawyer's preparation for oral argument is doing whatever is necessary to put the advocate in the proper frame of mind. Wearing the same type of

40. Lisa Blatt, who presented the first telephonic argument in the Supreme Court, opted for a lectern placed on her dining room table. Brandon Sanchez, *She Has Argued 40 Cases in Front of the Supreme Court. The Latest Was From Her Dining Room*, WALL ST. J. (May 21, 2020), <https://www.wsj.com/articles/she-has-argued-40-cases-in-front-of-the-supreme-court-the-latest-was-from-her-dining-room-11590053400>.

clothes the advocate would wear in an in-person argument can help.⁴¹ Although Zurier's and Meisler's arguments were audio-only, both of them dressed the same way they do for in-person presentations. One caveat with respect to audio-visual arguments is that the color of the advocate's clothing should contrast to—not blend in with—the color of the background. Cossar's view was that solid colors generally project better on screen than do patterns. What should be avoided is any suggestion by the lawyer's appearance that remote arguments are more casual than in-person ones. Chief Justice Mead reported hearing complaints from other courts about lawyers appearing in T-shirts or even pajamas.

9. *Facial Expressions*

Natural facial expressions are, of course, entirely absent in audio-only arguments. As good as technology can be, facial expressions tend to get lost even in the audio-visual format. Appropriate gestures like a nodding one's head can signal a sense of engagement and paying attention. However, these signals may take more time to be transmitted and should be slower than in person. A bit of exaggeration also helps to fill the small square of the visual image. When listening to questions, although the advocate should look directly into the camera, attempts to make eye contact should be with the judge who is posing the questions, not someone else.

10. *Gestures*

Cossar pointed out that on a remote screen, an advocate needs to maximize the space. Although the temptation is to keep hands and arms below the screen, when arguing in person, advocates generally bring their hands above the rim of the podium. They should do the same in remote arguments so that any hand gestures

41. Admittedly superstitious, Blatt is reported to wear the same suit every time she argues. *Id.*

appear normal. However, because any movement can be seen, Judge Kayatta warned lawyers not to touch their face during the argument and to avoid wandering.

11. Practice

Even in the era of in-person arguments, advocates participated in moot courts in which peers tested the substance of their arguments and critiqued such aspects of their presentation as the responsiveness to questions, the timbre of the advocate's voice, the pace of speech, the appearance of engagement, and any annoying mannerisms.⁴² Such practice is even more important for remote advocates. All of the lawyers recommended conducting moot courts using the same technological medium as will be used in the actual argument. As a result, for their audio-only presentations, Zurier and Meisler declined their colleagues' offer of in-person moot courts in favor of multiple test runs held by conference call so that they could become accustomed to any time lags. Both of them did more than one moot court, each with a different group of lawyers. They also listened to remote arguments given in other courts to get a sense of what the differences would be.

V. CLOSING REFLECTIONS

How long remote arguments will be the norm is anyone's guess. In Chief Justice Gants's view, which Judge Selya and Chief Justice Mead shared, if any function of the judicial system is amenable to returning to more normal arguments, it is an appellate court. Judge Selya envisioned the possibility of holding arguments in the en banc courtroom so that the judges can be distanced from each other, and lawyers can speak from separate microphones.

42. 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, 159 (2019).

Chief Justice Gants suggested that in the future, remote arguments may be used more frequently in intermediate appellate courts, where the cases can be more routine, than in courts of last resort. Most advocates given the chance to argue in a state's highest court will seize it. Zoom or Teams arguments may also be logistically easier for intermediate courts, where there are only three judges on the screen, not seven or nine.

Regardless of the benefits in costs and efficiency, no one appeared to hope that remote arguments will replace in-person presentations. As Judge Kayatta pointed out, human beings are essentially social creatures and communicate better in person. Judge Selya agreed that something is lost by the absence of human contact. For him, part of the enjoyment of oral argument is facing the lawyers directly, the brief exchanges among the judges before and after the arguments, and the in-person contact during conferences.

As echoed by Judge Lynch and Chief Justice Gants, Chief Judge Howard was confident that even remotely, justice is being meted out and no party is suffering from a lack of attention to their cause. Nevertheless, something is lost. As Chief Judge Howard summed it up:

One of the real hallmarks of our democracy and our experiment in republicanism is the majesty and mystique and on the other side of it, the friendliness of a courthouse, where any person can come in and have their case heard in front of other people. It's not some remote electronic mechanism and then you get an opinion whether you won or lost. There's the give and take in a personal atmosphere. So for me personally, I'll miss that.

COVID-19, ZOOM, AND APPELLATE ORAL ARGUMENT: IS THE FUTURE VIRTUAL?

Pierre H. Bergeron*

The days when the titans of the Supreme Court bar, folks like John W. Davis,¹ could command the justices' attention (or at least their indulgence) for hours, even days, are but a distant memory.² Indeed, to the modern appellate lawyer, even contemplating an oral argument longer than fifteen minutes might seem like a flight of fancy. Some courts restrict certain arguments to five or ten minutes.³ And nationally, the percentage of cases with *any* oral argument continues to plummet.⁴

* Judge, Ohio's First District Court of Appeals. I have sat on Zoom oral argument panels both at the First District as well as the Ohio Supreme Court and would like to thank court staff and the presenting lawyers for their patience and flexibility. I would also like to thank my law clerks and interns (Abbey Aguilera, Tori Gooder, Justin Ewing, Sebastian West, and David Liang) for their research assistance, and Andrew Pollis and John Korzen for extremely helpful feedback on earlier drafts.

1. See WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 462 (1973).

2. Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, SUP. CT. HIST. SOC'Y Y.B. 22, 23 (1985) ("Arguments in the Supreme Court sometimes lasted as long as ten days.").

3. See, e.g., PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 170 (2020), <http://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf> ("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 commonly allots between 5 and 15 minutes per side. Time allocations vary depending on which judge is presiding over a given calendar and on the particulars of the cases on that calendar.").

4. See, e.g., David R. Cleveland & Steve Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROC. 119 (2012); Robert P. Coleman III, *The Vanishing Oral Argument: Why It Matters and What to Do About It*, A.B.A. (Feb. 18, 2020), <https://>

Against this backdrop, the global COVID-19 pandemic arrived. While the pandemic poses a multitude of questions that might well cause us to re-evaluate certain prior practices and assumptions, I focus in this article on its impact on oral argument. We have all seen (and perhaps even participated in) the new phenomenon of Zoom oral arguments, but the concept of telephonic or video arguments is actually not novel. Several courts incorporated them, often on an ad hoc basis, even before the pandemic.⁵

What is novel now is the ubiquity of virtual oral arguments, with the majority conducted on the Zoom platform (and I will use “Zoom” generally as a shorthand for video oral arguments, recognizing some courts might use different platforms). Many appellate courts have been forced to embrace this technology, like it or not, because the virus greatly limited options for in-person arguments. The question now posed for all appellate courts is: how should we view oral argument when matters return to “normal”? Will these experiences convince us that oral argument should be curtailed further, as a relic of a bygone era, or will they underscore how much we miss the experience and persuade us that we need to explore ways to increase the percentage of oral arguments? My guess is that most appellate judges will fall somewhere between the two extremes, but it is worth taking a moment to re-evaluate the practice of oral argument and see what lessons the pandemic might offer.

Part of the debate over the efficacy of oral argument emanates from something I’ve observed at countless continuing legal education seminars on appellate practice where, invariably, the presenting judge is asked: “Does oral argument ever change your mind?” Often, the

www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/the-vanishing-oral-argument/.

5. *Videoconferenced Arguments Guide*, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, <https://www.ca10.uscourts.gov/clerk/videoconferenced-arguments-guide> (last visited Oct. 16, 2020); Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Court of Appeals*, FED. JUD. CTR. (2006), <https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf>.

answer is “almost never,” or something to that effect.⁶ To the practitioners, this sends the message that oral argument does not really matter. And if that’s the case, then why worry about it? Why go the extra mile in preparing if you don’t think your effort will matter? Or, worse, why show up at all—why not just submit on the briefs without oral argument?

In this article I explore these questions by examining the impact of oral arguments on appellate decision-making. In Part I, I review the appellate practice backdrop, where oral arguments have been on the decline over the last number of years. In Part II, I examine the effect of COVID-19 on oral arguments in the appellate courtroom. Part III explores my personal experience and the response of practicing attorneys and judges to virtual oral arguments. Finally, in Part IV, I defend the concept of oral arguments, concluding that judges and lawyers alike need to learn to appreciate the importance and impact of oral argument on appellate decision-making, and that, in keeping with that perspective, we should incorporate the practice of Zoom arguments in an appellate court’s repertoire.

As I will explain below, the seminar participants above ask the wrong question and, as appellate judges, we need to reframe that question when it is posed to us in order to highlight the benefits of argument. We want to encourage lawyers to request oral argument and to be fully prepared. In a post-pandemic landscape, I see a path to broadening the importance of oral argument as well as expanding opportunities for lawyers (particularly

6. Such answers have often caused people to ponder whether oral argument matters at all. *See, e.g.*, Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 451 (2002) (“I detect among judges a growing disdain for oral arguments. We don’t look forward to them as much as we used to.”); 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 COMM. & RHETORIC: JALWD 45, 49 (2017) (“This article will contend that despite judges generally averring that they are open to changing their minds on cases during oral argument, in practice they are predisposed not to do so because they often approach oral argument with a particular inclination regarding the outcome.”); Coleman, *supra* note 4, (“One might wonder, though, why the presumption appears to be against oral argument, rather than for it.”).

junior lawyers) to partake of it. Zoom arguments will enable counsel to present arguments that clients might have vetoed previously for travel and costs reasons, particularly in courts with a broad geographic reach. Some counsel have discovered that they are better suited at Zoom arguments than gripping a lectern in an appellate courtroom (some judges might find it more suited to them as well). I don't mean to suggest we should allow Zoom arguments to supplant in-person ones, but making Zoom arguments available will broaden the overall availability of oral argument, hopefully expand opportunities for junior lawyers to argue, and stimulate counsel to better appreciate oral argument's significance.

This article, in short, presents an argument for the continued significance and importance of oral argument (including reasons why I believe the practice is valuable), but also suggests that we can avail ourselves of new technologies (such as Zoom) to potentially broaden the appeal of oral arguments and increase public access to them.

I. THE DECLINE OF ORAL ARGUMENTS

Years ago, when I served as a law clerk on the U.S. Court of Appeals for the Sixth Circuit, the court permitted every (counseled) party the opportunity for oral argument so long as counsel requested it. Over time, however, perhaps owing to the perception of subpar oral arguments, the court gradually pared back that practice and began screening cases in advance to determine whether they warranted oral argument.⁷ Fast-forward to today, and oral argument at the Sixth Circuit, much like most of its sister circuits, is essentially a rarity.⁸ Indeed,

7. SIXTH CIRCUIT INTERNAL OPERATING PROCEDURES § 34, 94 (amended 2012), [ca6.uscourts.gov/sites/ca6/files/documents/rules_procedures/Full%20Rules%20w%20FRAP%20.pdf](https://www.ca6.uscourts.gov/sites/ca6/files/documents/rules_procedures/Full%20Rules%20w%20FRAP%20.pdf) (“Panels determine which of the cases assigned to them will receive oral argument and which do not require oral argument.”); Squire Patton Boggs, *Case Management in the Sixth Circuit*, SIXTH CIR. APP. BLOG (Aug. 26, 2011), <https://www.sixthcircuitappellateblog.com/news-and-analysis/case-management-in-the-sixth-circuit-the-future-of-oral-argument/>.

8. Most of the recent data, at least on the federal side, puts the percentage of oral argument around 20% of the cases (which is a roughly 50% drop from 20

a Task Force Report prepared by the American Academy of Appellate Lawyers (“AAAL”) concluded: “there is no doubt that [oral argument] is declining almost everywhere.”⁹

So why has oral argument declined? Courts justify the decline in oral arguments for various reasons, but I want to highlight a few of them. First, courts typically protest that the demands of their dockets just do not permit frequent oral arguments. Time spent preparing for and participating in oral argument, so the reasoning goes, detracts from other matters at hand for a busy appellate judge, such as opinion writing.¹⁰ This is a fair critique—to a point. While time spent on the bench refereeing oral argument could certainly be allocated elsewhere, I’m less convinced that the time spent “preparing” for argument represents a lost cause. Judges should spend time on the case regardless of whether oral argument will occur, and 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.

Second, the appellate judicial mindset has shifted a bit, and I suspect that many judges simply do not find oral argument as helpful as in generations past.¹¹ A

years ago). See ADMINISTRATIVE OFFICE OF US COURTS TABLE B-10, <https://www.uscourts.gov/data-table-numbers/b-10> (last visited Aug. 16, 2020). The phenomenon is not unique to the federal appellate courts. See, e.g., 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.”).

9. 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, 99 (2018).

10. *Id.* at 94–95.

11. See Shapiro, *supra* note 2, at 28–29 (“The importance of oral argument in furnishing information is reduced by the plenitude of relevant written material and the assistance the Court receives in analyzing that material.”).

number of factors might explain this perspective, but generally, I think it involves the wealth of information that we, as judges, now have at our fingertips before we step to the bench for argument. In many courts, the practice of circulating bench memos among judges in advance of argument telegraphs how judges are inclined to rule. If Judge Smith is the authoring judge on a case and she sends me a bench memo prior to argument that thoroughly analyzes the case and reaches the result (affirm or reverse) that I was already leaning towards, and I then learn that our third panel member, Judge Jones, agrees as well, the cascading effect of these assessments has the tendency of suggesting that oral argument is unnecessary. The caliber of contemporary law clerks and the level of preparation in advance (by clerk and judge alike), often leaves little to debate by the time that argument arrives in many cases. Indeed, we sometimes know aspects of the case better than the lawyers; if we uncover relevant authority not cited by the parties and raise it at argument, we often encounter blank stares. And if lawyers go through the motions because they do not think arguments matter much,¹² you have a recipe for disaster, with everyone walking away from the argument thinking they have wasted their time.

Third, and tied into the two points above, judges are sensitive to the costs and delays attendant to oral argument, and courts often think they are doing parties, but perhaps not lawyers, a favor by dispensing with argument.¹³ This attitude might seem somewhat paternalistic, but I have heard several appellate judges express, in some form or fashion, the notion that argument in a particular case would just subject the clients to needless expense if we (the appellate panel) have already made up

12. Coleman, *supra* note 4 (noting the responsibility of attorneys to “be better prepared for arguments” and expressing the author’s frustration that “under-prepared attorneys could be ruining the chance for the rest of us to participate” in oral arguments).

13. William H. Pryor Jr., Opinion, *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html> (“Fewer oral arguments mean lower attorneys’ fees for litigants.”).

our minds.¹⁴ Having spent almost twenty years in private practice, with clients keeping a vigilant eye on billings, I can certainly appreciate that concern. So, while I am not insensitive to the costs of legal proceedings, I also recognize that a lawyer and client can make an educated choice about whether oral argument—or even pursuing an appeal, for that matter—is worth the cost.

One could offer myriad reasons for why oral argument is declining, and there is probably a kernel of truth to all of them. We can debate the reasons but not the effects: oral argument has declined for years, which raises question about its future viability.

II. ENTER COVID-19 AND ZOOM

With a backdrop of declining oral arguments nationally, the COVID-19 pandemic began to sweep through the country (and world) early in 2020 and caused dramatic changes in our legal system as courts struggled to remain open without jeopardizing the health and safety of everyone who entered the courthouse.¹⁵ We appellate judges had a little easier time with this because we don't have to worry about trials, grand jury proceedings, probation departments, and the like. I do not mean to suggest our work has been easy by any stretch, but we just do not have the same daily interactions with the public that our trial colleagues do.

14. See, e.g., Coleman, *supra* note 4 (discussing a “widely held judicial belief that briefing is sufficient for a determination of a case on appeal, and that it is beneficial to forego oral argument, so as to not waste resources”); Martin & Freeman, *supra* note 9, at 102 (“Some judges express concern about the cost of oral argument to the parties.”).

15. AMERICAN ACADEMY OF APPELLATE LAWYERS TASK FORCE ON REMOTE ORAL ARGUMENT RECOMMENDATIONS FOR COURTS HEARING ORAL ARGUMENT REMOTELY 1 (last visited Aug. 16, 2020), [hereinafter AAAL REMOTE ORAL ARGUMENT REPORT] <https://www.appellateacademy.org/publications/AAAL-Remote-Task%20ForceCourt-Recs.pdf> (“The COVID-19 pandemic poses extraordinary challenges for the nation’s appellate courts and the lawyers who practice in them.”).

But our primary interaction with lawyers and the public occurs during oral argument. As states across the country shut down during the early stages of the pandemic, appellate courts confronted a difficult choice with what to do about oral argument. Many courts suspended oral argument for at least a while, sometimes affording parties the chance to submit the case without oral argument in order to avoid delay.¹⁶ Such measures were necessarily interim in nature, as appellate courts wrestled with how to proceed, particularly as we became aware that COVID-19 was not going away anytime soon. In light of that reality, courts considered various alternatives: telephonic argument,¹⁷ video/Zoom arguments, enforced social distancing arguments sometimes with masks,¹⁸ and arguments with plexiglass barriers.¹⁹

Arguments by telephone might have initially been attractive to several federal appellate courts, particularly since those courts already had a track record of utilizing that medium for argument.²⁰ But oral argument

16. For a very helpful overview in how state supreme courts approached the pandemic, please see MOSTLY SUNNY WITH A CHANCE OF ZOOM, FIX THE COURT, (April 17, 2020) [hereinafter, "FIX THE COURT REPORT"], <https://fixthecourt.com/wp-content/uploads/2020/04/Remote-state-supreme-court-report-FTC.pdf>.

17. The U.S. Supreme Court was the most notable example of a court utilizing telephonic argument. Hilary Reed, *A Historic Day for the Supreme Court*, APP. ADVOC. BLOG (May 4, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/05/a-historic-day-for-the-supreme-court.html ("Today the Supreme Court heard oral argument via telephone conference for the first time. . .").

18. See FIX THE COURT REPORT, *supra* note 16; *The 12th District Court of Appeals During COVID-19*, CLERMONT SUN (July 30, 2020), <https://www.clermont-sun.com/2020/07/30/the-12th-district-court-of-appeals-during-covid-19/> ("The judges, attorneys, court staff and the public are required to wear face masks when in the courtroom and common areas and all have their temperatures taken before entering the courthouse. The courtroom itself is sanitized between arguments in order to combat potential spread of the virus.").

19. My own court experimented, for a while, with arguments with masks and plexiglass barriers. Some of these arguments went fine, but oral argument can be a stressful experience for counsel under normal circumstances and adding a mask to the equation made for some awkward moments. Counsel sometimes had trouble hearing the judges' questions as well. At the same time, several lawyers thanked us for letting them come into court because, to them, it almost felt like a return to "normal."

20. Jill M. Wheaton, *Appellate Advocacy in the Age of COVID-19*, A.B.A. (May 27, 2020), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/special/appellate-advocacy-in-the-age-of-covid-19/ ("Some judges,

by phone is often a challenging endeavor—counsel cannot observe facial expressions of the judges to gauge reactions or to pause for a question.²¹ And oftentimes advocates run over a judge’s question because it may be difficult to hear the interruption. Judges can also encounter challenges as they trip over their colleagues’ questions or perhaps (inadvertently or not) interrupt them. Nor can judges pick up on nonverbal cues being telegraphed by their colleagues. The U.S. Supreme Court experimented with questioning in order of seniority to try to bring some structure to telephonic arguments, with mixed success.²² As veteran Supreme Court advocate Carter Phillips observed, the telephonic arguments “seemed stilted to me because there was no real interaction among the justices in the questions they asked beyond the frequent comment that a question was a follow-up to a previous question by one of the other justices.”²³

Zoom quickly emerged as the default choice for many appellate courts. On the one hand, it seemed simple enough (I mean, people were doing Zoom happy hours, right?). But on the other, it did require some basic technological resources that not every court, particularly state courts, had.²⁴ Several state supreme courts stepped

especially in the federal court system, are more comfortable doing phone arguments than video.”); AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 3 (“Audio-only technology is an option that some appellate courts have employed for several decades.”).

21. AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 3 (“The ‘cues’ that visual interaction brings to an argument are lost when argument is conducted over the phone.”).

22. See Kent Streseman, *Chief Justice Roberts, Timecop: data-driven analysis of telephonic oral argument in the Supreme Court*, APP. ADVOC. BLOG (May 20, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/05/timecop-litman-on-telephonic-oral-argument-in-the-supreme-court.html; Reed, *supra* note 17.

23. Randy Maniloff, *8 of the Nation’s Leading Lawyers Discuss Impacts of COVID-19 on Their Practice Areas*, ABA J. (June 2, 2020), <https://www.abajournal.com/web/article/leading-lawyers-discuss-the-impact-of-the-pandemic-on-practice-areas>.

24. Charles R. Macedo, *The Impact of COVID-19 on Law Firms: Disruption, Acceleration and Innovation*, LAW.COM (June 8, 2020), <https://www.law.com/mid-market-report/2020/06/08/the-impact-of-covid-19-on-law-firms-disruption-acceleration-and-innovation/> (discussing court systems that lacked computer infrastructure to make use of certain technology).

up to provide technology grants to facilitate remote work as well as remote court appearances.²⁵ Before too long, most federal and state appellate courts embraced Zoom arguments.²⁶ That evolution thus begs the question—how has that worked so far?

III. APPELLATE JUDGES AND LAWYERS' REACTIONS TO ZOOM ORAL ARGUMENT

A. *Reactions to Zoom*

Early in the pandemic, I circulated a survey to several federal and state appellate judges and lawyers who I know and I requested that they share it with colleagues.²⁷ I also posted a link on #AppellateTwitter, which reached an audience of Twitter users (judges and lawyers) as well. While this was not methodologically sound survey with an appropriate sample, it was designed to gather an impressionistic sense from judges and lawyers (with many responding across the country) as to the efficacy of this new medium of Zoom arguments as all of this unfolded in real time. I've also supplemented my results with my own experiences in Zoom arguments as well as reactions in the press or blogosphere.

25. Anne Yeager, *Chief Justice's Program Funds \$6 million in Technology Grants For Local Courts*, Cr. NEWS OHIO (May 1, 2020), <http://www.courtnews-ohio.gov/happening/2020/remoteTechGrants050120.asp>; Press Release, Michigan Courts News Release, Michigan Courts Receive \$4.5 Million Grant to Respond to COVID-19 Pandemic (June 19, 2020), https://courts.michigan.gov/News-Events/press_releases/Documents/CESF%20Press%20Release.pdf.

26. Madison Alder & Allie Reed, *All U.S. Appeals Courts Embrace Argument Streaming Due to Covid*, U.S. L. WK. (Aug. 4, 2020), <https://news.bloomberglaw.com/us-law-week/all-u-s-appeals-courts-embrace-argument-streaming-due-to-covid> (noting that, by July, all federal circuit courts were livestreaming oral arguments); Wheaton, *supra* note 20 (“Having studied what other state courts were doing, Jim learned that most court systems were using Zoom or WebEx. Other platforms being used, although not as often, include GoToMeeting, Microsoft Teams, and Skype.”).

27. All survey results (of the nearly sixty responses) on file with the author. [hereinafter “Survey”]. I will leave it to a political scientist, in the aftermath of this pandemic, to conduct an appropriate survey in keeping with norms of statistical analysis.

1. *A New Leaf: Appellate Judges Embrace Virtual Technology*

Let's turn first to the judges. With the caveat that just about everyone said that they preferred in-person arguments to Zoom, appellate judges seemed to embrace this new technology with somewhat surprising enthusiasm. Part of the reason for that is that many viewed telephonic arguments as inadequate, and thus not a viable option.²⁸ But appellate judges found the Zoom technology relatively easy to use and a reasonably adequate substitute for in-person oral arguments.²⁹ One state supreme court justice remarked, "The video oral arguments have worked well. I'm looking forward to returning to live oral arguments, but I think there may be a place for video oral arguments in the future."³⁰ A justice from a different state echoed the point: "Zoom has been fantastic."³¹

One state intermediate appellate judge found the video arguments "quite effective" and saw an "unexpected" benefit that the video arguments increased public access to the proceedings: "The public, other attorneys or out of town attorneys can easily view [the arguments] whereas before the audience was far less."³² Another judge, however, expressed concern that "the Zoom arguments are not as open to the public as our previously held arguments in open court."³³ This debate over access is important, and perhaps we can explain the contrasting perspectives by examining how, or if, an appellate court posts its arguments online and its method for allowing access to outside participants. The AAAL Remote

28. One federal appellate judge captured the point well: "Video is far superior to phone." *See id.*

29. *See id.* By all accounts, "[t]echnologically, the cases have gone off largely without a hitch." Olivia Covington, *Zooming In: Lawyers Describe Pros and Cons in Remote Oral Arguments*, IND. LAW. (May 26, 2020), <https://www.theindiana-lawyer.com/articles/zooming-in-lawyers-describe-pros-and-cons-in-remote-oral-arguments>.

30. *See* Survey, *supra* note 27.

31. *Id.*

32. *Id.*

33. *Id.*

Argument Report highlights this point, urging courts to consider public access issues in implementing a video argument protocol.³⁴

Another state appellate judge, whose court covers multiple counties, relayed positive feedback from lawyers on Zoom arguments who previously had to travel significant distances for the arguments: “Zoom arguments have been welcomed by counsel who would [otherwise] have to travel.”³⁵ A state supreme court justice from a more rural state echoed the point: “My state is quite large geographically, so it might be a good option for lawyers who have to travel.”³⁶

While Zoom certainly had its converts, other judges remained on the fence. A state intermediate appellate judge professed uncertainty as to whether “video oral arguments are an adequate substitution for in-person arguments” given that their court had not conducted that many, but still acknowledged that the video arguments were “helpful.”³⁷

The debate will certainly linger on the virtues of Zoom arguments, but the survey I conducted, reinforced by a number of discussions I’ve had with appellate judges, confirmed an openness to a future in which video arguments will continue to play an on-going role. As one state supreme court justice explained, although her court has not yet discussed that point, “I think they will continue to be part of what we do.”³⁸ Other judges appeared a bit more reticent, suggesting that Zoom arguments should be limited post-pandemic to “special circumstances,” but even that limitation seems to acknowledge a future for the practice.³⁹ As one judge synthesized these points, he admitted that Zoom provided a useful tool to navigate these uncharted waters, but observed “a different level of advocacy by the parties, and while the

34. AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 4.

35. *See* Survey, *supra* note 27.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

judges are engaged, it is simply not as intense and focused as in the courtroom.”⁴⁰ Building on this, several judges unequivocally checked “no” when asked if they envisioned any future for video arguments in their courts. Other commentators have likewise expressed uncertainty as to whether courts should livestream oral arguments in the future.⁴¹

2. *Appellate Lawyers Share Their Thoughts*

On the other side of the lectern, appellate lawyers have (not surprisingly) a multitude of views on Zoom oral arguments. Appellate practitioners generally found the technology reasonably user-friendly, and they appreciate efforts of bar associations and courts “to provide assistance and training to appellate lawyers.”⁴² In addition to local bars, national organizations such as the National Center for State Courts published resources to help lawyers and courts as they climb the learning curve on video oral arguments.⁴³

Some lawyers appreciated certain “luxuries” allowed by the new format, such as having case files, relevant precedent, and exhibits at the ready on their desk when they typically would be unable to lug all of those materials to the podium.⁴⁴ And certainly, despite all efforts to maintain formality, a reduced formality necessarily comes with Zoom, which might be comforting, particularly to less-experienced lawyers who might find the courtroom imposing.

40. *Id.*

41. Adler & Reed, *supra* note 26 (“Not every federal appeals court that adopted livestreaming is certain to keep it once the pandemic is over.”).

42. *Id.*

43. NCSC, *Remote Oral Arguments: A Checklist for Judges and Justices*, Version 1 (June 25, 2020), https://www.ncsc.org/__data/assets/pdf_file/0027/41787/RRT-PPP-Appellate-Judges-Checklist-for-Remote-Oral-Argument-6-48-2020-v2.pdf.

44. Covington, *supra* note 29. Practice pointer—this poses a danger for lawyers as well. Do not get buried in a sea of paper and be unable to find the key document that the panel is likely to question about.

Technology-related concerns remain top of mind for lawyers, with one lawyer expressing frustration with other lawyers' failure to "shut[] down distracting apps [or] knowing how to mute the device."⁴⁵ Both the judges and lawyers should possess adequate knowledge of equipment they are using. But, of course, even the most technologically savvy of us cannot completely guard against everything that could go wrong in a Zoom argument—as one Indiana lawyer reported, during his Zoom argument before the Indiana Supreme Court, the fire alarm in his building went off.⁴⁶

Others picked up on the access point, suggesting that Zoom be relegated to a "temporary fix" because "it's important that oral arguments occur in a public courtroom."⁴⁷ Access certainly emerges as a theme in this article, and both lawyers and judges continue to debate which way this point cuts. I, for one, am encouraged by the attention on this issue and think it bodes well as we consider future utilization of streaming arguments.

Some lawyers suggested retooling the framework of argument for this medium: "Remote argument would probably be best if attorneys had less opening remarks (or none at all) and just more opportunity to provide substantive answers to the panel[']s questions."⁴⁸ This comment reflects a broader theme that cut across a number of the survey results, when I posed the question of what change(s) would lawyers like to see at oral argument—many respondents seemed interested in receiving a list of topics to be prepared for in advance.⁴⁹ The AAAL describes this practice as "focus letters" that would specify "which issues counsel should be prepared to argue orally" as a means of increasing the efficiency and value of oral argument (more on that later).⁵⁰

45. See Survey, *supra* note 27.

46. Covington, *supra* note 29.

47. See Survey, *supra* note 27.

48. *Id.*

49. *Id.*

50. Martin & Freeman, *supra* note 9, at 106.

One lawyer bemoaned the fact that “oral argument has been dying slowly for the past several years,” and viewed Zoom arguments as a harbinger of its finale.⁵¹ That point, of course, is particularly worrisome and represents part of the genesis of this article. Oral argument could be marching off to the sunset unless we advocate for its rightful place in appellate practice and look critically at how we can improve it.

*B. Cautionary Tales:
Not All Practical Solutions are Practicable*

One issue that appellate courts must be mindful of, notwithstanding the Zoom cheering section, is that Zoom arguments are not necessarily a practical solution in many corners of our country that lack reliable internet access.⁵² I had a conversation with a supreme court justice from a rural state who recounted an argument in which the lawyer’s internet access kept failing, so that the court probably heard only around half of his argument. Vermont Chief Justice Paul Reiber expressed a similar concern about the effects of poor internet connection and other technology gaps in his state.⁵³ And this problem is not confined simply to lawyers as many courts permit pro se litigants to present oral arguments.⁵⁴ How can we ensure that pro se litigants have adequate access

51. See Survey, *supra* note 27.

52. See Matthew Krumholtz, *Coronavirus Highlights Unequal Access to Legal Services in Rural Communities*, N.Y. ST. BAR J. (Apr. 28, 2020), <https://nysba.org/coronavirus-highlights-unequal-access-to-legal-services-in-rural-communities/>.

53. See Bob Kinzel & Lydia Brown, *Vermont’s Chief Justice on COVID-19 and the Court System*, VPR (Jun. 10, 2020) (discussion of the topic of broadband access starts at 22:20), https://www.vpr.org/post/vermonts-chief-justice-covid-19-and-court-system?utm_source=dlvr.it&utm_medium=twitter#stream/0.

54. In Ohio, for example, state rules require appellate courts to permit oral argument, unless one of the parties is both incarcerated and pro se or the local jurisdiction has adopted a rule requiring parties to request oral argument. OHIO APP. R. 21(A) (2020); see Pierre Bergeron, *Pro Se Appellate Arguments—“Thank You for Listening to Me,”* PROCEDURAL FAIRNESS BLOG (Mar. 3, 2020), <https://proceduralfairnessblog.org/2020/03/03/pro-se-appellate-arguments-thank-you-for-listening-to-me/>.

to technology sufficient to present a Zoom oral argument?⁵⁵

As alluded to earlier, Zoom also presents questions about public and media access to oral argument.⁵⁶ Some courts, including many state supreme courts, already provided streaming video access to oral arguments (live and archived) pre-pandemic.⁵⁷ Other courts provided audio recordings of oral arguments on their websites.⁵⁸ While some appellate judges see a virtue in Zoom as increasing access to argument, such an increase only happens if the courts permit streaming viewing of the arguments and provide a reliable archive of them. For the courts that did not provide access pre-pandemic via the internet or other means, public access now presents certain challenges like how to house video files on a court's website, although some courts might turn to YouTube for help in this regard.⁵⁹

Beyond access issues, Zoom poses various data and security concerns, particularly for courts with aging

55. See Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies>; Jamiles Lartey, *The Judge Will See You on Zoom, but the Public is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out>.

56. *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, U.S. CTS. (Apr. 3, 2020), https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings?utm_campaign=uscnews&utm_medium=email&utm_source=govdelivery. Needless to say, the process is not uniform on the state court side.

57. See, e.g., Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 14 (Summer 2017) (noting that, as of 2017, “[t]hirty-five state courts of last resort regularly live stream or televise their arguments.”).

58. See *Audio Files of Completed Arguments*, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, <https://www.ca6.uscourts.gov/audio-files-completed-arguments> (last visited Oct. 16, 2020).

59. The Ninth Circuit's website, for instance, contains an archive of oral argument videos that are stored on YouTube. See *Audio and Video*, U.S. COURTS FOR THE NINTH CIRCUIT, <https://www.ca9.uscourts.gov/media/> (last visited Oct. 16, 2020). My court recently started a YouTube channel, https://www.youtube.com/channel/UCzkPGbm2ibQ_-NoA_LHFucA?view_as=3Dsubscribe.

technological infrastructure. The recent surge in the use of videoconferencing platforms has revealed privacy and data security vulnerabilities. For example, Zoom users have experienced “Zoombombing,” whereby intruders interrupt a call, often armed with inappropriate material, and these interruptions have invaded judicial proceedings.⁶⁰ Recordings of sensitive conversations conducted through Zoom and which include personally identifiable information have also been found scattered online.⁶¹ And, of course, courts house reams of sensitive information, posing a lucrative target for hackers.⁶² Although Zoom software updates have addressed many of these security flaws (and these examples do seem rather isolated), the company’s security practices remain under scrutiny.⁶³ Maryland’s second highest court actually suspended Zoom arguments for a period of time out of security concerns, but eventually resumed them after the implementation of further security protocols.⁶⁴

Whether a court uses Zoom or some other provider,⁶⁵ the AAAL provides some helpful considerations in implementing any type of remote video argument system. These reflect a variety of issues that virtually all appellate courts have wrestled with during the pandemic: (1)

60. Anne Cullen, *Markey Calls for Privacy Rules on Videoconference Providers*, LAW360 (Apr. 8, 2020), <https://www.law360.com/articles/1261740/markey-calls-for-privacy-rules-on-videoconference-providers>; Raychel Lean, *Hacker Streams Porn into Florida Court Hearing by Infiltrating Zoom: An Intruder Marred the Court Proceedings*, LAW.COM (July 10, 2020), <https://www.law.com/dailybusinessreview/2020/07/10/hacker-streams-porn-into-florida-court-hearing-by-infiltrating-zoom/>.

61. Drew Harwell, *Thousands of Zoom Video Calls Left Exposed on Open Web*, WASH. POST (Apr. 3, 2020), <https://www.washingtonpost.com/technology/2020/04/03/thousands-zoom-video-calls-left-exposed-open-web/>.

62. Tim Starks, *The Cyberthreat to U.S. Courts*, POLITICO (July 13, 2020), <https://www.politico.com/newsletters/weekly-cybersecurity/2020/07/13/the-cyberthreat-to-us-courts-789121>.

63. Rae Hodge, *Zoom Security Issues: Zoom Buys Security Company, Aims for End-to-End Encryption*, CNET (May 8, 2020), <https://www.cnet.com/news/zoom-security-issues-zoom-buys-security-company-aims-for-end-to-end-encryption/>.

64. Steve Lash, *Court of Special Appeals Postpones Arguments: Cites Concerns with Zoom*, DAILY REC. (Apr. 10, 2020), <https://thedailyrecord.com/2020/04/10/court-of-special-appeals-postpones-arguments-cites-concerns-with-zoom/>.

65. Wheaton, *supra* note 20 (discussing various options besides Zoom).

ensuring that the sound quality is accurate and consistent, investing in technology infrastructure improvements if needed; (2) guaranteeing public access in some form or fashion while also making sure that the remote public cannot interrupt or interfere with an oral argument; (3) putting in place a technology support system to assist judges and lawyers; and (4) recommending “dry runs” with the technology to maximize the chances of everything running smoothly during the actual arguments.⁶⁶

C. *Wither SCOTUS?*

Much ink has been spilled debating whether the Supreme Court should allow cameras in its courtroom in order to broadcast oral arguments.⁶⁷ But this is really a one-sided “debate,” with many commentators urging the Supreme Court to permit cameras, but the Court steadfastly holding the line against it. I won’t rehash all of the points ably made by prior commentators on the wisdom of opening up the Supreme Court to televised argument, but instead I will offer this: even the Supreme Court had to adapt during the pandemic, as it resorted to telephonic arguments. One might question why the Supreme Court went the subpar telephonic route rather than availing itself of video argument. I have to believe that the answer lies in the Court’s concern that permitting Zoom arguments, even on a temporary basis, would undermine its historic refusal to permit video transmission of oral arguments. The Court has typically brushed aside pleas for video access to arguments as something that might encourage grandstanding or that might enable comments to be taken out of context.⁶⁸ But as Judge Steve Leben points out in an article written pre-pandemic, “state

66. See AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 3–5.

67. See generally Chemerinsky & Segall, *supra* note 57.

68. Steve Leben, *Getting It Right Isn't Enough: The Appellate Court's Role in Procedural Justice*, 69 U. KAN. L. REV. 13, at 40–41 (2020).

courts have not had a problem with grandstanding attorneys (or justices).”⁶⁹

In all the articles and reports I have read in a judicial system awash with Zoom arguments, I likewise have not heard of episodes where lawyers or judges acted inappropriately because cameras were rolling. If anything, what we are seeing now simply normalizes the practice of video oral arguments. Attorneys and judges are starting to view such arguments as nothing really out of the ordinary. And with Zoom arguments becoming pervasive at the federal circuit courts of appeals as well as at the state supreme courts and courts of appeals, the Supreme Court’s antiquated notion about video broadcast of arguments becomes even more difficult to defend. If virtually every appellate court in the country has at least experimented with video oral arguments, why can’t the Supreme Court? The Court can seize this moment to effectuate this change, which will help with transparency and legitimacy. After all, as Judge Leben argues, televised oral arguments can “demonstrate to the public that [the Court] is sincerely interested in the parties’ arguments and trying to decide the case based on neutral principles.”⁷⁰ While it may be overly optimistic to expect the Supreme Court to change its practices anytime soon, maybe these cracks in its façade will grow and ultimately usher in a more user-friendly Court from the technological perspective.

IV. A DEFENSE OF THE MODERN ORAL ARGUMENT AND HOW WE INTEGRATE ZOOM

Oral argument has been a fixture of appellate arguments since the dawn of appellate courts. But just because a practice is long-standing does not prove that it should be retained. The effects of the pandemic have caused us to reevaluate so many practices, both in our lives and in the judicial system. This begs the question

69. *Id.* at 40.

70. *Id.* at 40.

that I started with: does oral argument have a future, and if so, what does it look like? Of course, my answer to the first part is yes, and I jump off with that defense before taking a peek at a potential future.

A. *Why Retain Oral Argument?*

One could offer numerous reasons for why we should retain oral argument, but I would like to focus on three: procedural fairness, improved decision making, and the value of forced collaboration.

1. *Oral Argument Ensures Procedural Fairness*

We must remember that the lay public often misunderstands appellate courts because they seem shrouded in mystery.⁷¹ Our only “communications” to the public occur during oral arguments and when we release our opinions. Oral argument “puts the decision-making process on display, reinforcing the court’s role as a viable branch of government.”⁷² This exercise thus provides clients and the public alike with a glimpse into the appellate court’s decision-making process that (hopefully) cultivates “an appreciation that informed judges decide their disputes.”⁷³

Sitting in our ivory towers and never letting the public see our work process firsthand will inevitably lead to an erosion of trust and confidence in the judiciary. We would become just another faceless bureaucracy, viewed with mistrust and skepticism. On the other hand, every time that we appear in court and actively listen and show by our questions that we are familiar with the case and understand the issues, we help build public confidence that we are doing our jobs. (I will acknowledge the risk of the opposite occurring. In one high-profile appeal I

71. Martin & Freeman, *supra* note 9, at 103 (“The judicial branch is the least understood branch of government, with intermediate appellate courts the least understood among the judicial branch’s sectors.”).

72. *Id.* at 94.

73. *Id.* at 95.

argued years ago, the panel sat stone-faced throughout the argument and didn't ask a single question, prompting my client to wonder whether they even read the briefs.) Judge Leben puts it more eloquently than I could: "The way a judge acts during oral argument leaves an impression about whether the judge genuinely seems to want to hear the litigant's position, acts in a respectful manner to the parties and their attorneys, and seems sincerely interested in a fair resolution."⁷⁴

The opportunity to at least glimpse the sausage being made is particularly important for courts that might issue perfunctory orders to decide some cases. Put yourself in the position of someone reading a two-page decision that basically says "you lose" without much explanation.⁷⁵ How does that person feel? Do they believe that the court seriously entertained their case and arguments? Oral argument can play a role here in showing that the judges did their homework. If a party loses but believes their case has been thoroughly considered, they are more apt to respect the process.⁷⁶

I also believe that judges have an obligation to be visible in the community, and oral argument is one facet of that. Further erosion of oral argument or just going through the motions in oral argument "risks alienating the public we serve."⁷⁷ In my experience, many lawyers enjoy the experience of getting to come to court and debating their case with the appellate panel. The more we chip away at that right and experience, the more we remove that connection and render the lawyers less vested in the appellate process and less likely to defend the institution when questioned by their clients. We must also appreciate that the fewer opportunities for argument render it difficult, if not impossible, for junior lawyers to

74. Leben, *supra* note 68, at 31.

75. I'm not suggesting that every case needs a lengthy opinion; some cases can be appropriately resolved in short order. I'm just considering this point from the party's perspective.

76. Leben, *supra* note 68, at 22 ("Researchers have convincingly shown that the public's view of the justice system is driven more by how they are treated by the courts than whether they win or lose their particular case.")

77. *Id.* at 21.

gain experience presenting oral arguments. We do a disservice to the next generation of appellate lawyers by continuing to scale back argument opportunities and may create subpar oral arguments as a self-fulfilling prophecy.

2. Oral Argument Impacts the Decision-Making Process

Recall the hypothetical question I mentioned at the outset about how often oral argument changes a judge's mind. That question reflects too narrow a focus because "[o]ral argument can sharpen issues and reveal their nuances," even if a judge walks out of argument with the same inclination—to affirm or to reverse—with which she entered the argument.⁷⁸ That is why the question lends itself to a false perception. I could offer numerous examples during my time on the bench of oral argument that might not have changed the ultimate result, but that certainly changed how we approached the opinion.

But sometimes it can definitely change minds. I recall a case from about a year ago where both sides waived oral argument, electing to submit on their briefs. I arrived at the conference where we were going to discuss the case with my two fellow judges, only to learn that the three of us harbored three vastly different perspectives on the case and how to resolve it. What an opportunity squandered by the counsel who did not want to show up! We needed to reach a consensus on the case, and counsel could have served as our guide in that process. Instead, they abdicated, leaving it to us to sort out.

Let me offer another example that ties in with the procedural fairness point above. Many years ago, I represented a client appealing a judgment to a federal appellate court. The appeal was neither a slam-dunk nor a complete long shot, and we requested oral argument. The court denied our request for oral argument and subsequently issued an unfavorable opinion (from my client's

78. Martin & Freeman, *supra* note 9, at 96.

perspective) that evidenced a complete misunderstanding of the facts at hand and our arguments. For whatever reason, the court did not seem to grasp what the case was really about, and if it had granted our request for oral argument, I'm confident that we could have cleared up any confusion. Instead, what happened? Without argument, we receive this decision, and the client thinks that the court did not take their case seriously. So, they instruct us to petition for rehearing, which consumes more judicial and party resources. And after denial of that (probably ill-fated) rehearing petition, the client is soured on the whole legal process. The court could have ruled against us in a defensible manner, which the client would not have been happy about but could have accepted. But denying oral argument and sending out this type of flawed, but avoidable, end product can undermine the losing party's confidence in the judicial system.

Oral argument can enrich our understanding of cases, which directly impacts how we write opinions, and thus the evolution of case law. Even in simple cases, judges can receive confirmation that the question at hand is really as straightforward as it appears. I know in some cases, whether because of a messy record or mediocre briefing, I thought I understood certain issues, but oral argument helped provide that assurance (or show me otherwise). Cases and record cites often emerge at argument in sharper relief, enabling us go back and consider those points anew in light of the argument. And sometimes, when counsel appreciates at oral argument that his case is about to go down in flames, he can shift gears to try to engineer a "soft landing"—in other words, shifting from trying to win to trying to salvage a palatable loss. This is particularly important for repeat appellate players who, like the judges, may have broader concerns about the direction of the caselaw than just the single case at hand.

I recall my experience in practice, where typically it would be four to six months (if not longer) between the completion of briefing and the argument date. After leaving the case alone for a while, I would pick it back up and

always see it in a slightly different light. Points would emerge that I really wanted to highlight at argument. I do not know whether any of this nuance ever persuaded any appellate judges, but hopefully this refined perspective on the case proved more helpful to them than the briefing alone.

When an appellate judge is asked “how often does oral argument change your mind,” I would suggest reframing the question and conveying the many ways in which oral argument can impact a judge’s perspective on a case. That sends the message (the correct one, I believe) that oral argument is not just a hollow exercise, but rather a vital part in the decision-making process. If we, as appellate judges, want better oral arguments, we need to let the bar know that it matters.

3. Oral Argument Distills the Value of Collaboration

I do not think anyone should overlook the value of conference in the overall calculus of the worth of oral argument. Particularly in courts with jurisdiction over numerous counties or states, oral argument may be one of the rare occasions when the judges gather together in person, sometimes even breaking bread afterwards. In a world where many judges communicate regularly through email, it is difficult to overstate the value of collaborating in person.

Think back to my scenario above where Judge Smith sends me the bench memo. Without the conference occasioned by oral argument, we might resolve this case by a few terse emails. Maybe (hopefully) we reach the right result. But my experience in conferences is that your colleagues can push you and share perspectives on a case that might differ from your own. That debate back and forth is not only helpful in terms of the resolution of a particular case, but also in building collegiality between colleagues. If you never see your colleagues in person, it is much easier to attack them in a dissent, and far too many examples abound these days of attacks that border on the personal or even cross the line. Therefore, the judicial collaboration that comes along with oral argument

inevitably leads to better decision-making and hopefully a more cohesive court as well.

B. Zoom Increases Access to Justice

Zoom, if properly used, can become a powerful tool to both increase access to justice and to enable courts to modernize.⁷⁹ But courts must be mindful that not everyone (lawyers and parties alike) has access to reliable broadband internet.⁸⁰ This barrier can spark creativity—in my court, for instance, we resolved to house a computer terminal in our courthouse where someone without internet access could come and log into Zoom in order to present their argument. Such a solution is not perfect—after all, it requires a person to come to court—but we are certainly confronting a situation that defies simple solutions. And many courts have risen to the challenge and resolved to utilize the pandemic as a means to increase public access to the judiciary.⁸¹

Zoom has also lifted the veil on the process of how appellate courts actually function. The federal D.C. Circuit reported that around 90,000 people logged into to “attend” two high-profile arguments during the pandemic, and a Michigan Court of Claims hearing garnered 50,000 viewers.⁸² Needless to say, not even a fraction of those people could actually fit in a courthouse if the courts cut off livestreaming access, nor did many people even bother to attend arguments in person pre-pandemic.⁸³ This renewed interest in the appellate process

79. See Erika Rickard & Qudsiya Naqui, *Coronavirus Accelerates State Court Modernization Efforts*, PEW (June 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/06/18/coronavirus-accelerates-state-court-modernization-efforts>.

80. See Krumholtz, *supra* note 52.

81. See John W. Fraser, *Despite COVID-19, Michigan Courts are More Accessible Than Ever*, LEGAL EXAMINER (July 13, 2020), <https://lansing.legalexaminer.com/technology/despite-covid-19-michigan-courts-are-more-accessible-than-ever/> (“[T]he Michigan Supreme Court has pioneered public access to Michigan judicial proceedings as part of the judiciary’s response to COVID-19.”).

82. Alder & Reed, *supra* note 26.

83. Leben, *supra* note 68, at 31 (“[M]ost of the time, few if any members of the public come to watch appellate arguments.”).

by the general public has convinced some that “Covid-19 has made U.S. courts more transparent.”⁸⁴

And it can continue to do so. I do not think, for a second, that Zoom should take the place of live oral arguments, because like virtually all of the appellate judges with whom I spoke, I can’t wait to get back to in-person arguments. But we should be flexible and allow for Zoom arguments, post-pandemic, in situations where the parties request it, particularly when the argument would necessitate travel or other expenses that could be avoided with Zoom. Zoom argument has also shown us that we can livestream arguments and that people actually pay attention. Even if a court decided to dispense with Zoom arguments, it should nevertheless embrace the livestreaming and posting of its oral arguments. Many courts are now seeing what several state supreme courts at the vanguard of this movement have known for a long time: livestream arguments are both a valuable resource for lawyers and clients as well as a transparency tool in this modern age. Given what we have witnessed during the pandemic, I would view it as a step backwards if courts suddenly pulled the plug on this vital means of public access.

C. A Brave New Post-COVID Appellate World Awaits

The Seventh Circuit recently announced that all of its oral arguments for the balance of 2020 would take place virtually, either by Zoom or telephone.⁸⁵ Given the spiking COVID-19 cases that we are witnessing as of this writing in August 2020, I would be surprised if nearly all of the appellate courts currently using Zoom didn’t follow suit. Even assuming that every court could throw open its doors on January 1, 2021, for in-person arguments, many courts by then will have at least six months or more of experience with Zoom. My prediction is that as

84. Alder & Reed, *supra* note 26.

85. U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, ORDER REGARDING COVID-19 (2020), http://www.ca7.uscourts.gov/news/COVID-19_order_through2020_Dec31.pdf.

judges and lawyers alike grow more comfortable with this medium, it will be here to stay in some manner.

We should embrace this medium for at least limited use post-pandemic. Zoom has the potential, as described above, to broaden public access and understanding of appellate courts and their process. In this day and age where mistrust for most governmental institutions runs deep, such transparency can prove vital in protecting the integrity of the judiciary in the public's mind.

Some lawyers will also discover that they present much better arguments in the virtual format rather than in person. Even some judges might have similar revelations about their own questioning at oral argument (consider the noted example of Justice Thomas).⁸⁶ I do not mean to suggest that an advocate's whims should dictate whether Zoom arguments persist, but rather if we want to increase the caliber of arguments overall, Zoom may help move us towards that end.

As we consider how technological innovations can enhance oral argument, we must also place a renewed focus on oral argument to ensure its long-term vitality. The AAAL task force report presented a number of ideas in this respect that I would commend to your attention,⁸⁷ but I want to focus on a couple of issues.

First, we must help cultivate the next generation of appellate lawyers. Right now, it is exceedingly difficult for junior lawyers to obtain meaningful oral argument experience. I know that when I first started practicing, it probably took a dozen or so arguments before I became comfortable with the practice and found my oral argument "voice." Nowadays, even a self-proclaimed appellate lawyer might not crack double digits in arguments

86. Justice Clarence Thomas rarely asks any questions at oral argument, but he began interjecting regularly once the Supreme Court started utilizing telephonic arguments. See Timothy R. Johnson et al., *COVID-19 and Supreme Court Oral Argument: The Curious Case of Justice Clarence Thomas*, 21 J. APP. PRAC. & PROCESS 113 (Winter 2021); Bill Rankin, *Suddenly Gabby Justice Thomas Asks Questions During Oral Argument*, ATLANTA J. CONST. (May 10, 2020), <https://www.ajc.com/news/local/suddenly-gabby-justice-thomas-asks-questions-during-oral-arguments/doClBtjLaMaH03n62JNj5H/>.

87. Martin & Freeman, *supra* note 9, at 104–08.

until well into their second decade of practice. It is unrealistic to expect optimal arguments if counsel never get the experience.

So how do we do that? A couple of thoughts come to mind. Appellate courts that restrict oral argument should consider granting it—even if it would otherwise be denied—if a junior lawyer is going to argue. The Federal Bar Association advocates for a similar approach at the trial level to ensure that junior lawyers get in-court experience in the district courts, and there is no reason why appellate courts could not implement a similar concept.⁸⁸ Hand in hand with that, bar associations or similar organizations should be more deliberate about appellate mentoring, particularly for organizing moots for lawyers undertaking their first arguments. The moot process, properly done, can significantly improve an advocate's presentation. Relatedly, courts should consider creating some type of pro bono appointment program that would also help provide argument at-bats for aspiring appellate lawyers. One of the chronic problems in the legal profession is matching the underprivileged clients who need quality legal representation with junior advocates who desperately need the experience and are willing to work pro bono. Arizona's Court of Appeals has instilled such a program that could be utilized as a model.⁸⁹ And consider how we could overlay Zoom on such a program—pro bono lawyers without funding might not be able to afford to travel to an oral argument, and Zoom could solve that problem by obviating the need for travel expenses.

Appellate courts should also revisit their court-appointed list (usually for criminal appeals) with a fresh perspective and consider whether they could diversify their lists and perhaps fold in some of the junior lawyers

88. Robert A. Mittelstaedt & Brian J. Murray, *Who Should Do the Oral Argument*, 38 ABA LITIG. 48 (2012) (discussing programs similar to FBA's proposals and raising interesting points about when junior lawyers, rather than the senior lawyer, should present oral argument).

89. *Pro Bono Representation Program*, ARIZONA COURT OF APPEALS, <https://www.azcourts.gov/coa1/Court-Programs/Pro-Bono-Representation-Program> (last visited Oct. 16, 2020).

handling pro bono appeals. Moreover, courts should mandate periodic training to ensure that appointed counsel remain abreast of developments in the law affecting these class of cases (training related to Zoom arguments may also be useful). In connection with all of this, courts may wish to reconsider how they handle the whole process related to *Anders* briefs, which is always a subject that inspires debates among appellate judges.⁹⁰

And we should not limit our training focus to lawyers. Several law schools now host appellate litigation clinics that enable students to work on actual cases and sometimes to even present the oral argument.⁹¹ I have seen some really remarkable oral arguments by law students both at moot court competitions and in oral arguments in my court. We need to do all that we can to promote and encourage these efforts in order to spark an interest and passion for appellate advocacy in these students. Zoom can also broaden their horizons by enabling students to appear before courts notwithstanding a lack of funding to travel there.

Second, appellate judges need to play an active role in helping educate lawyers about oral arguments and what we want to see. (Lawyers cannot read our minds, at least most of the time.) We need to be generous with our time and say “yes” to invitations to come speak about oral argument. And during the pandemic, I have seen firsthand a number of appellate judges stepping up in seminars, many of which are free, to help educate the bar about Zoom oral arguments, and we need to continue that work. But we also need to think about the message we convey during those opportunities. If we want better oral arguments, we must explain how oral arguments impact our decisional process. And be proactive—if your local bar does not have some type of appellate mentoring

90. For an excellent discussion of this issue, see Andrew Pollis, *Fixing the Broken System of Assessing Criminal Appeals for Frivolousness*, 53 AKRON L. REV. 481 (2019).

91. See, e.g., *Appellate Litigation Clinic*, CASE WESTERN RES. U. SCH. OF L., <https://case.edu/law/clinic> (last visited Oct. 16, 2020); *Sixth Circuit Appellate Clinic*, U. OF CIN. C. OF L., <https://law.uc.edu/real-world-learning/clinics.html> (last visited Oct. 16, 2020).

program, reach out to someone and see if you can help get that started. Some efforts like that might only need a judicial nudge and could end up having a significant impact.

Third, we need to put ourselves in the advocate's shoes every now and then. Here is where "focus letters" that I referenced earlier could come into play. Both in my survey and in recent articles about oral argument, I've seen great interest from the bar in some type of focus letter practice by which an appellate court would send a letter, in advance of argument, informing counsel where they should focus. I certainly know when I was practicing, I would have welcomed such overtures. While it is unrealistic to expect appellate courts to send out a letter in every such case, as we (judges) prepare for argument, in many cases we might see (1) a question of jurisdiction that the parties did not notice; (2) intervening authority that might impact the disposition; (3) problems in the record that have not been answered by the briefing; or (4) potentially dispositive issues that the parties touched on in the brief but did not fully develop. In my early tenure on the bench, I would notice an issue like one of those and come to argument ready to quiz counsel on it. But then I realized counsel was not prepared for such questions and so I generally did not receive helpful answers. Now, when I see something like this (assuming my colleagues agree), our court will send a notice to counsel advising them to be prepared at argument to address the point (and consider how we can use technology to improve that process). This requires a modest step on our part but often leads to a much more meaningful oral argument, which leads to improved decision-making.

The bottom line is that appellate courts and appellate lawyers are at a moment where we must re-evaluate oral argument and think critically about what is working and what is not. Zoom might be the lightning rod to spark that discussion, and I would encourage courts to step back and use the pause imposed on us by the pandemic experience as a catalyst for improving oral argument overall. Because if we want this tradition of oral

argument to endure, as I suspect most would readily acknowledge, then we need to be open to some changes and to taking a leadership role to implement them.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAY

CLERKS IN THE TIME OF CORONAVIRUS
(WITH APOLOGIES TO GABRIEL GARCÍA MÁRQUEZ*)

Michael Daly Hawkins**

I. THE “OLD” NORMAL

The relationship between judges and clerks is both close and critical. Clerks come to chambers as essentially strangers to one another, the staff, and the judge. Communicating with each other, learning on the fly, and having the ability to adjust to short attention spans are essential. Clerks quickly adapt to the pace of the work of chambers. If done right, the unit becomes cohesive as a small law firm, where the firm members constantly bounce ideas off one another and have the judge available for consultation. They learn that the judge’s assistant is the Mother Superior/First Sergeant, the keeper of chambers protocol and history, someone who never forgets their names or that of their children long after they

* The Nobel Prize laureate author of *LOVE IN THE TIME OF CHOLERA*, first published as *EL AMOR EN LOS TIEMPOS DEL CÓLERA* (1985), then released in English by Knopf in 1988 and made into a 2007 movie of the same name. Gabriel García Márquez, *LOVE IN THE TIME OF CHOLERA* (Alfred A. Knopf trans., 1988).

** Senior Judge, U.S. Court of Appeals (9th Cir.). The views and mistakes are mine alone.

have left the nest. This would describe the pre-pandemic work atmosphere of most, if not all, appellate chambers.

II. THE “DOG” DAYS OF ISOLATION

All of this changed dramatically in mid-March 2020, with the impact of COVID-19. Shutdown orders put our chambers group suddenly at a considerable distance. Three of my clerks are married, live in the area, and could shelter at home. My fourth clerk was living alone in an apartment. My initial concern for her situation was alleviated when she adopted a beautiful Husky mix from a local shelter. At that point, none of us knew how long our isolation from each other would last. It soon became apparent that this was not a week-long, or even month-long, hiatus. With my encouragement, the clerk with the new dog moved home to the Midwest and continued to work remotely from there. Two other clerks followed the canine acquisition process, leaving the last clerk with the two she already had.¹

A. *What Is Lost*

Individual chambers will lose the mentoring relationship between judge and clerks, and the ability among clerks to bounce ideas off one another and with the clerks in other chambers in the same building. This will be a long-term problem if the pandemic persists. Because the chamber shutdown occurred in March, this year’s clerks at least worked roughly half the year under normal conditions. Future clerks may start and even finish their clerkships physically distant from both judge and fellow clerks. The lack of contact with other clerks and judges can lead to impressions based solely on panel email exchanges, impressions that may not reflect the actual

1. Pet adoptions and fostering skyrocketed across the country during the shutdowns. See Cameron Oaks, *‘The call has been answered’: Animal shelters across the U.S. are emptying amid coronavirus pandemic*, NBC NEWS (Apr. 19, 2020, 7:00 AM) <https://www.nbcnews.com/health/health-news/call-has-been-answered-animal-shelters-across-u-s-are-n1186351>.

collegiality that exists between other judges and their clerks that would ordinarily result from personal contact. Remote contact also means there are no common spaces where clerks can gather and share ideas and concerns.

B. The Gift of Technology

Thanks to the remarkable efforts of our central court staff, we adjusted to life with videoconferencing. Judges were able to Zoom in or Google Meet with clerks on a regular basis. Appellate courts that livestream their oral argument sessions give clerks the ability to watch arguments in the cases they have worked on. Technology allows us to hold video arguments with counsel in their offices and judges at separate locations. A recent panel of our court included an out-of-state visiting judge who, sequestered in New York, feared she would only be able to participate by telephone. Not to worry—staff shipped a video camera, and she was able to join the panel on equal footing with the other members of the panel. All judges miss live arguments and the ease of interchange, particularly with well-prepared counsel. Counsel should employ the best technology available and not argue by telephone when the other side is on crystal-clear video. We are fortunate in the timing of the pandemic. It is difficult to imagine how this would have played out twenty years ago.

C. The Reverse Parental Lecture

Depending on our age, many of us have experienced having our children caution us about maintaining social distancing and sheltering at home—the reverse of the conversation we had with our own children the first time they took the car out for a date. At least one of my colleagues experienced this with clerks. Worried about their judge's age, they did not feel comfortable with the judge being in chambers. Fortunately, clerks seem perfectly comfortable working remotely. Some judges prefer to go

into chambers for video arguments for panels. The video equipment works better there, and there is no danger counsel will become fixated on the content of the judge's bookshelves or be distracted by a child wandering by into view.

III. THE NEW NORMAL?

Now several months into this new reality, we are left to wonder whether this may, in some fashion, turn out to be the new normal. The interviewing and hiring of clerks, a process that, virus or not, goes on from year to year, is likely to be done remotely for the duration. At this writing in late 2020, a committee of our judges is studying this possibility. A benefit of this for clerk applicants will mean they avoid the annual travel routine for interviews. I recently hired a clerk following a video interview who will work remotely for her entire clerkship. Unless air travel becomes much safer, I may never see her in person until clerk reunion time.

A. The Benefits

The necessity of remote work brought about some benefits. Dressing for office work, long commutes, searching for parking spaces, and expensive urban apartments were replaced by home workstations, and casual clothes. Judges and clerks who, pre-pandemic, faced long, stressful commutes now savor the time saved by working remotely. When off-camera, the hardest decision is often whether, or when, to move to shorts and flip-flops.

B. The Long-Term Normal

If living with this novel coronavirus has taught us anything, it is the peril of underestimating its strength and persistence. This virus is as stealthy as the slyest criminal, as nasty as the best NFL linebacker, and as potentially deadly as a rattlesnake on a remote hiking trail.

It may be with us for some time, which leads to considering the impact it could have on the nature of our physical arrangements. Judges and clerks might choose to make home their principal place of business. This, in turn, may affect the future buildout of courthouse chambers. One commentator described the post-pandemic office this way:

One-way corridors, buffer zones around desks, and clear plastic screens to guard against colleagues' coughs and sneezes may become office standards after coronavirus stay-at-home orders are lifted.²

C. *The Patience to Wait*

Dr. Florentino Ariza, the romantic protagonist of *Love in the Time of Cholera*, was passionately in love with Fermina Daza in their youth. When Fermina marries a wealthy, well-born doctor, Florentino is devastated. After many years, Fermina's husband dies, and Florentino shows up at the funeral to tell her he has waited "fifty-one years, nine months and four days" for her. Our wait to return to normal won't be nearly as long as Florentino's, but it will require much more patience than most of us are used to. The hope is that we, as the late-life love of Florentino and Fermina did, will get through to the other side with the knowledge that our relationships with one another will survive and may, with this experience, be even richer.

2. Jane Ross, *The End of the Open Plan Office?* REUTERS WIRE SERVICE, (May 5, 2020).