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WRITTEN AND ORAL PERSUASION IN THE UNITED STATES COURTS: A DISTRICT JUDGE'S PERSPECTIVE ON THEIR HISTORY, FUNCTION, AND FUTURE

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The idea for this article developed several years ago as I was preparing to teach a course at the University of Melbourne Graduate School of Law, called “Effective Written Advocacy.” The course coincided with a trend in Australian courts toward a more writing-focused appellate process, while Canada had embarked on a similar transformation of its appellate practice more than a decade before. I wanted to know why, relatively early in our history, courts in the United States had rejected the oral tradition of the English legal system—both in advocacy and judicial opinions. My curiosity also coincided with an

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experiment I had been conducting since my confirmation as a federal district judge, which is to hold oral argument on virtually every motion of any substance, something I am told is not the norm in federal courts across the country. I wanted to think more systematically about the differing functions served by written and oral persuasion and why I found oral argument so enormously valuable. Finally, I wanted to consider the future of oral argument in a court system that is focused so heavily on efficiency.

My purpose is to provoke discussion, not provide solutions. I am heavily in the debt of those who have considered these issues in much greater depth than I—none more so than Professor Suzanne Ehrenberg, the author of a wonderful article entitled *Embracing the Writing-Centered Legal Process*.¹

I. HISTORY

As we all know, the English legal tradition has long favored speech over writing. Until relatively recently, everything English judges learned about a case, they learned at oral argument. They also issued oral judgments and do so to this day, although now they more often deliver them after reserving decision rather than proceeding *ex tempore*—that is, immediately following the oral argument. That the English courts chose a speech-centered legal process should come as no surprise, as speech has been the favored method of communication throughout the history of Western culture. Oscar Wilde noted that the “Greeks . . . regarded writing simply as a method of chronicling. Their test was always the spoken word.”² And as Professor Ehrenberg reminds us, Plato has Socrates explain in the *Phaedrus* that the written word is incapable of expressing thoughts as precisely as the spoken word. As

1. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 Iowa L. Rev. 1159 (2004).

2. Oscar Wilde, *The Critic as Artist*, in *Plays, Prose Writings and Poems* 1, 12 (Alfred A. Knopf 1991). For a history of Roman oratory see Cicero, *The Brutus*, in *On Government* 316-17 (Michael Grant trans., Penguin 1993) (“‘Well, then, we take Thucydides as our model.’ Excellent, if you propose to write history, but if pleading of cases is what you propose, not so good. Thucydides was a trustworthy and impressive recorder of historical actions. But these forensic courtroom disputations of ours were not his field.”).

Socrates puts it, while written words may seem to “understand what they are saying . . . if you ask them what they mean by anything they simply return the same answer over and over again.”³

At its inception, the United States borrowed much from the English legal system, relying heavily on Blackstone, Coke, and others to shape our legal culture. In fact, an order of the Supreme Court on August 8, 1791, advised that

this court consider[s] the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.⁴

However, early on, the courts of the new nation began to opt for a legal process in which writing played an increasingly critical role. Of course, we chose a written Constitution, with enumerated individual rights, and our courts also embraced a writing-focused legal process. This emphasis on writing appears to have begun with courts' own judgments. In fact, in 1784, the Connecticut legislature passed a law (the first in the nation) requiring all judges to “reduce to Writing” the reasons for their judgments.⁵ Many other states followed suit, so that, as Professor Tiersma notes, “American judges at the close of the eighteenth century were already beginning to draft their opinions in writing.”⁶ And Professor Surrency, in his seminal *History of American Law Publishing*, reports that “[a]ll evidence suggests that written opinions became the accepted practice within the first decades of the Nineteenth Century.”⁷

The Supreme Court relied heavily upon oral opinions in its early years. However, the second reporter to the Supreme Court, William Cranch, suggested that by 1801 the justices had adopted

3. Ehrenberg, *supra* n. 1, at 1170 (citing Plato, *Phaedrus* 97 (Walter Hamilton trans., Penguin 1988)).

4. 5 U.S. (1 Cranch) xvi (1803) (referring to Rule VII, issued Aug. 8, 1791).

5. See Acts & Laws of Conn. § 41, at 129 (Hudson & Goodwin 1796); see also William D. Popkin, *Evolution of the Judicial Opinion* 183-87 (NYU Press 2007).

6. Peter M. Tiersma, *The Textualization of Precedent*, 82 Notre Dame L. Rev. 1187, 1225 (2007).

7. Erwin C. Surrency, *A History of American Law Publishing* 42 (Oceana Publications 1990); see generally John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court, 1790-1945*, 77 Wash. U. L.Q. 137 (1999).

the practice of writing out their opinions in cases of difficulty or importance.⁸ Congress authorized the Supreme Court to appoint an official reporter of decisions in 1817,⁹ and in 1834, the Court issued an order marking the end of the era of oral opinions: The order required that opinions be delivered to the reporter, who would in turn return them to the clerk of the court for filing after publication.¹⁰ Even though the Supreme Court's opinions are written, the Court continues to this day to announce its opinions orally from the bench.

The early American emphasis on written opinions stood in marked contrast to the English practice of the time. The English judicial tradition has been described as one of "comprehensive orality."¹¹ Indeed, Sir Edward Coke wrote that requiring judges to write out their opinions would require immense labor by judges and take them away from their duties. He wrote that their records would be "Elephantini libri" and would "lose somewhat of their present authority and reverence."¹² I wonder what he would think today.

The emerging primacy of writing over speech in American courts was not limited to court judgments. We all learned in law school about the days-long orations by early Supreme Court advocates such as William Pinkney, William Wirt, and Daniel Webster.¹³ Yet it is said that those lengthy set-piece arguments

8. Surrency, *supra* n. 7, at 62 (noting in addition that Cranch became the reporter in 1801 when the Court moved from Philadelphia to Washington); *but see* Popkin, *supra* n. 5, at 82-83 ("one commentator suggests that Cranch may have referred only to the Justice's notes").

9. G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, in *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* vols. III-IV, 389 (Stanley N. Katz ed., MacMillan Pub. Co. 1988).

10. *Id.*; *see also* Popkin, *supra* n. 5, at 83 (asserting that "the 1834 order reflects a growing practice of written opinions, not their requirement"). Professor Popkin surmises that "what happened is that the practice of writing judicial opinions [in the Supreme Court], at least in important cases, began as a way for the judge to deliver oral opinions efficiently (by reading from a manuscript) and as a response to concerns about reportorial accuracy." *Id.*

11. Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 101 (W.S. Hein 1990) ("The heart of the English legal system and upon which all major aspects of it are based is the oral tradition.").

12. Edward Coke, *The Reports of Sir Edward Coke* (new ed., Joseph Butterworth and Son 1826), pt. 2, at v.

13. Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, in *Supreme Court Historical Society Yearbook* 22, 23 (S. Ct. Historical Socy. 1985) (noting that "[t]he Supreme Court entertained these orations not only without

prompted Chief Justice Marshall to quip that the “acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says.”¹⁴ The emphasis on oratory in the Supreme Court nonetheless continued well into the nineteenth century. In 1821, the attorneys in *Gibbons v. Ogden* argued for six days. John Quincy Adams and Roger Baldwin argued for eight days in the *Amistad* case in 1841.¹⁵ But by then pressure had already begun to build for a move away from such lengthy oratory and toward a writing-focused legal process in the Supreme Court.

The first writing requirement in the Supreme Court was adopted in 1795; the Supreme Court’s Rule 8 required attorneys to submit “a statement of material points of the case.”¹⁶ Then, in 1821, the Supreme Court rules made their first reference to the word “brief,” requiring “a printed brief or abstract . . . containing the substance of all the material pleadings, facts and documents . . . and the points of law and facts intended to be presented.”¹⁷ As Chief Justice Rehnquist once explained,¹⁸ these early “briefs” were quite brief indeed, totaling no more than six to ten pages in length. Still, it was a start, and was quite different from the practice prevailing before the King’s Bench at that time.

limitation upon time but also without interruption”).

14. White, *supra* n. 9, at 182; Albert Jeremiah Beveridge, *The Life of John Marshall* vol. 4, 83 (Houghton Mifflin Co. 1919).

15. Three days into the *Amistad* argument, Justice Barbour died. The argument continued without him.

16. 3 U.S. (3 Dall.) 120 (1795). As David Frederick has explained, “[t]hat rule might be read by modern eyes to be an invitation to file a written brief, but if it was, the bar did not get the hint. Instead, lawyers interpreted that rule as requiring them to fill their oral presentations with citations and long excerpts of learned treatises in support of the argument.” David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. S. Ct. History 1, 3 (2005).

17. 19 U.S. (6 Wheat.) v (1817) (referring to Supreme Court Rule XXX). “Brief” was then used in English practice to refer to the document that a solicitor would give the barrister who would argue the case for the solicitor’s client; the brief contained the statement of facts, pleadings, and documentation needed for the case. Martineau, *supra* n. 11, at 62; see also David M. Walker, *The Oxford Companion to Law* 152 (Oxford U. Press 1980).

18. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. App. Prac. & Process 1, 2 (1999) (noting the December 1854 filing of “[n]ine pages of briefs in three cases” then before the Supreme Court); see also R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 Am. J. Leg. History 482 (1994).

Because of the demands of travel in early nineteenth-century America, the Supreme Court in 1833 gave counsel the option of submitting their cases on the papers, ordering that “in all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, if the Counsel on either or both sides shall choose so to submit the same.”¹⁹ This innovation was prompted by the Court’s desire to “accommodate Counsel, and save expense to parties.”²⁰ The Supreme Court later clarified that such cases “shall stand on the same footing as if there were an appearance of counsel.”²¹

No doubt influenced by their burgeoning workload and the demands of riding circuit, the Justices imposed the first limits on oral argument in 1849, restricting each advocate to two hours of oral argument, absent special leave of the Court.²² The same rule provided that counsel would not be permitted to present oral argument unless he first filed a printed abstract of points and authorities. The brief thus became an essential feature of Supreme Court practice because it allowed counsel to make up for lost argument time. Furthermore, in an important innovation that served to emphasize the primacy of written submissions, the new rule cautioned counsel that attorneys would be prohibited from referring to any book or case that was not referenced in the points and authorities.²³ The brief thus began to mark the metes and bounds of oral argument.

In 1858, the Supreme Court limited oral argument even further by restricting the number of attorneys who could argue on each side to two; without leave of the Court, therefore, oral argument was restricted to a maximum of eight hours.²⁴ By 1871, about a year after Congress had enacted legislation to establish the office of the Solicitor General, the Supreme Court

19. 32 U.S. (7 Pet.) iv (1833).

20. *Id.*

21. 36 U.S. (11 Pet.) vii (1837). See Cozine, *supra* n. 18, at 490-93 for a description of early cases submitted on written submissions.

22. 48 U.S. (7 How.) v (1849) (Rule 54); *see also* Frederick, *supra* n. 16, at 12 (“Not only was the Court’s docket increasing, but the Justices were not receiving any relief from their circuit-riding duties.”).

23. Frederick, *supra* n. 16, at 12-13; *see also* David C. Frederick, *Supreme Court and Appellate Advocacy* 25 (West Group 2003) [hereinafter Frederick, *Advocacy*].

24. 62 U.S. (21 How.) xii (1858) (Rule 21).

acted to cut argument even further—to a maximum of two hours per side regardless of the number of advocates.²⁵

With oral argument time shrinking and briefs becoming more important, the Supreme Court took steps in 1884 to dictate the content of the briefs submitted to it by adopting a new Rule 21. The new version required “a brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with . . . references to . . . the authorities relied upon.”²⁶ The attorneys were thus required to relate their arguments to specific legal authorities or record citations. While shorter than their modern-day counterparts, these late nineteenth-century briefs are recognizable to today's practitioners. As Chief Justice Rehnquist put it, “[w]ith these new requirements, the modern brief was born.”²⁷

The trajectory of developments in oral versus written persuasion that occurred in the Supreme Court was mirrored in, perhaps even led by, state appellate courts.²⁸ First, state courts required minimal written submissions, then they allowed written submissions in lieu of argument, and finally, they limited the length of oral argument in all cases.²⁹ For example, oral argument in the New York Court of Appeals was limited to two hours in 1850. By 1860, written submissions in that court are said to have resembled the modern-day brief.³⁰ The 1860 rules of the Massachusetts Supreme Judicial Court required a “printed or written statement of the points on which [the attorney] intends to rely, and the authorities intended to be cited in support of them.” The Massachusetts rules also limited oral argument to two hours per side.³¹ Professor Ehrenberg thus concludes that

[t]he history of appellate practice in nineteenth-century America, therefore, shows a movement from the use of oral argument as the court's principal means of learning about a case, with the brief as a supplement, to the use of oral

25. 78 U.S. (11 Wall.) ix (1870) (Rule 21).

26. 108 U.S. 585 (1884) (Rule 21).

27. Rehnquist, *supra* n. 18, at 3.

28. Cozine, *supra* n. 18, at 498-523.

29. Ehrenberg, *supra* n. 1, at 1182.

30. Cozine, *supra* n. 18, at 521 (describing contents of “typical” briefs filed in New York's highest court by 1860); *see also* Ehrenberg, *supra* n. 1, at 1182.

31. Cozine, *supra* n. 18, at 500 (quoting Mass. Rule XXX and Rule XXXI, 80 Mass. (14 Gray) 349 (1860)).

argument as a supplement to the brief.³²

These developments of the nineteenth century continued into the twentieth and twenty-first centuries, with courts in the United States increasingly de-emphasizing oral argument and placing more and more emphasis on written persuasion. The Supreme Court continues to rely on oral argument, though argument time since 1984 has been limited to one-half hour per side.³³ And Professor Meador has shown that the federal courts of appeals began disposing of cases without argument around the middle of the twentieth century.³⁴ Currently, Rule 34 of the Federal Rules of Appellate Procedure permits federal appellate courts to dispense with argument where

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.³⁵

Today, the Second Circuit may be the only circuit in the country to hold oral argument in virtually every case other than routine immigration cases, although the Sixth and Seventh Circuits also hold argument in most non-pro se cases. The Administrative Office of the United States Courts reports that in the twelve-month period ending December 31, 2007, the federal courts of appeals disposed of a little over 31,000 appeals on the merits; oral argument was held in about 8,700, and nearly 23,000 were disposed of on the briefs.³⁶ The Fifth Circuit

32. Ehrenberg, *supra* n. 1, at 1183 (footnote omitted).

33. U.S. S. Ct. R. 28(3).

34. See Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 Md. L. Rev. 732, 732-34 (1983); see also Ehrenberg, *supra* n. 1, at 1162 (pointing out that “[o]ver the past 150 years, appellate courts . . . have increasingly limited the role of oral argument”).

35. Fed. R. App. P. 34(a)(2)(A)-(C).

36. Administrative Office of the United States Courts, Office of Judges Programs, Statistics Division, *Statistical Tables for the Federal Judiciary December 31, 2007* at tbl. B-1 (chart entitled *U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending December 31, 2007*) (Admin. Office of the U.S. Cts. 2008) (also available at <http://www.uscourts.gov/stats/dec07/B01Dec07.pdf> (accessed Sept. 21, 2009; copy on file with Journal of Appellate Practice and Process)).

disposed of 4,900 appeals on the merits in that period but held oral argument in only 1,000, about twenty percent of all appeals that it resolved on the merits; the Eleventh Circuit held argument in about the same percentage of cases, disposing of approximately 3,000 appeals on the merits and holding argument in only about 600 cases. This movement away from oral argument prompted a Senate Judiciary Subcommittee in 1999 to recommend that “[c]ourts [of appeals] with permissive standards for granting oral argument, or which grant oral argument every time it is requested, should seriously consider modifying their policies so that the deciding judges might exercise increased discretion not to hear cases they do not believe warrant oral argument.”³⁷

Of course, oral argument in many federal district courts is even more rare than in the federal courts of appeals. Indeed, at a recent hearing of the Judicial Conference’s Civil Rules Advisory Committee on proposals to amend Rule 56, which governs summary judgment, a chief complaint of practitioners—plaintiffs’ and defendants’ lawyers alike—was that district court judges rarely, if ever, provide an opportunity for oral argument on summary judgment motions. There appears to be a widespread belief among both court of appeals and district court judges that oral argument is inefficient and consumes too much court time, without attendant benefit. This rejection of oral argument has also been accompanied by a movement away from oral judgments and opinions.

So, why did the United States legal system opt relatively early for a more writing-focused legal process, while oral persuasion retained its primacy in England (as well as in Canada and Australia) for far longer? In truth, we are not exactly sure, though there are a number of likely reasons. For one, early in our history, there were not many professional lawyers trained in the oral tradition of English courts. Also, there was a profound distrust of courts in early nineteenth-century America,³⁸ leading

37. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals* 10 (Mar. 1999).

38. See e.g. Gordon S. Wood, *The Radicalism of the American Revolution* 323-25 (Alfred A. Knopf 1992) (outlining the rise of an independent judiciary). Indeed, distrust of the courts has a long history in the United States. See e.g. Alexander Hamilton, *The Federalist Papers*, No. 78 471 (New American Library 1961). (“To avoid an arbitrary

(in part I suspect) to statutory requirements that courts put their judgments in writing. Undoubtedly as well, the new nation wanted to build a body of binding precedent, something England already had. Thus, Connecticut's law requiring written opinions also required them to be kept on file so that "thereby a Foundation be laid for a more perfect and permanent System of common Law in this State."³⁹ In short, the very different demands on the judiciaries in each country contributed to their differing approaches to oral and written persuasion.

For another reason, consider that this country, even then, was significantly larger than England. Given the size of the United States, travel was difficult, making it easier and less costly to submit one's arguments in writing to far-away courts.⁴⁰ Commercial printers, and then typewriters, also became more available throughout the nineteenth and early twentieth centuries. The increasing workload of appellate courts also meant they could no longer devote days to oral argument, particularly when the judges themselves often did not find the lengthy arguments very useful.⁴¹ As is true today, the need for efficiency drove courts to written submissions. And as courts increasingly came to rely on the parties' written advocacy, lengthy oral arguments were seen as inefficient and unnecessary.

I should also add that as courts relied more and more on written submissions and constricted oral argument, American lawyers turned from speech to writing as their principal form of persuasion. Victor Hugo observed that the printing press destroyed the cathedral, for "[o]nce writing replaced stone sculpture and stained glass as the principal medium for education, the days of stone carving as a fine art were

discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.").

39. Acts & Laws, *supra* n. 5; see also Popkin, *supra* n. 5, at 88-93 (discussing the reasons for written opinions in nineteenth-century state courts).

40. See Cozine, *supra* n. 18, at 494.

41. Like his modern-day counterparts, Justice Story complained to the advocates of his day about the length and poor quality of their oral advocacy. Justice John Catron apparently urged Chief Justice Roger Taney to "take responsibility for suppression of irrelevant oratory." See Carl Brent Swisher, *The Taney Period, 1836-64*, in *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* vol. V, 278 (Macmillan & Co., Inc. 1974); Frederick, *Advocacy*, *supra* n. 23, at 25.

numbered.”⁴² So, too, here. Just as the so-called vanishing trial has led to fewer opportunities to hone lawyers’ trial skills, the decline in argument provided fewer occasions to practice the subtle art of oral advocacy.

No doubt there are other reasons for the divergence of approaches in the legal systems of the United States and England. Some have suggested that the persistence of the oral tradition in England is simply because barristers—who hold the majority of power in the English legal system—see the American focus on written submissions as posing a threat to their authority and possibly even their survival.⁴³ Also, it may be that lawyers in England are simply more interested in, or attached to, their traditions than are lawyers in the United States to theirs. Therefore, English lawyers may have hewed more strongly to their traditional speech-centered legal process for that reason alone, and not because it was superior to written persuasion.⁴⁴ An undue attachment to past practices can certainly be seen as a form of inertia—confusing the familiar with the necessary. But as Professor Kronman has reminded us, tradition can also enjoy a certain moral prestige of its own.⁴⁵

II. FUNCTION

While we may not know the precise causes of the shift in focus by United States courts from speech to writing, I believe we can probably say that it was not the result of any conscious and systematic decision about the differing functions that oral and written persuasion should play in our legal system.

In their collection of essays on the theory and research regarding persuasion, Professors Dillard and Pfau observe that how individuals exercise influence via communication is a

42. See e.g. Richard Hyland, *A Defense of Legal Writing*, 134 U. Penn. L. Rev. 599, 625-26 (1986) (attributing this insight to Victor Hugo)).

43. Ehrenberg, *supra* n. 1, at 1177-78; see also Martineau, *supra* n. 11, at 132.

44. Martineau, *supra* note 11, at 130. According to one commentator, English common-law courts “constantly tinkered with procedural changes to improve their case administration” and efficiency. Edward Brunet, *Summary Judgment is Constitutional*, 93 Iowa L. Rev. 1625, 1648-49 (2008) (citing S.F.C. Milsom, *Historical Foundations of the Common Law* (Butterworths 1969) and J.H. Baker, *An Introduction to English Legal History* (4th ed., Oxford U. Press 2005)).

45. See Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029 (1990).

question “so basic and so important that it has challenged scholars for centuries.”⁴⁶ You will be relieved to know that I do not propose to survey here the substantial scholarship devoted to that challenging issue. Nor do I intend to enter the never-ending philosophical debate over the value of speech versus writing—a debate that has been described as an

ideological conflict between those who view the written language as something sacred and superior to speech, and those who consider writing to be a mere Johnny-come-lately, an excrescence of speech, which is the only “true” language.⁴⁷

Rather, I hope to focus some attention on the different strengths and weaknesses of oral and written persuasion, because it is clear to me that each mode of persuasion should fulfill a different and important role in our legal system. I will begin with writing and what I believe is its greatest strength.

A. Writing

Writing, Abraham Lincoln famously remarked, is the great invention of the world.⁴⁸ As lawyers and judges, most of us believe—I certainly do—that the process of committing one’s arguments and reasoning to writing requires a greater level of critical and creative thinking than merely expressing one’s thoughts orally. Hence the well-known directive “See how it writes.” We are more precise when we put our thoughts in writing than when we verbalize them: Once we commit our words to paper, we can more easily see and understand the form

46. *The Persuasion Handbook: Developments in Theory and Practice* ix (James Price Dillard & Michael Pfau eds., Sage Publications, Inc. 2002) [hereinafter *The Persuasion Handbook*].

47. Mario Pei, *Is Language Abused?* in *Language Today: A Survey of Current Linguistic Thought* 1, 9-10 (Mario Pei ed., Funk & Wagnalls Co. 1967); see also D.W. Cummings, *American English Spelling* 463 (Johns Hopkins U. Press 1988) (“[I]n the early twentieth century the emphasis shifted to the spoken language. Speech was viewed as the ‘real’ language; writing was at best a secondary shadow. In the past two decades, however, attention has shifted back to the written language and its orthography. The orthographic discipline appears to be experiencing a reawakening.”).

48. Abraham Lincoln, U.S. Pres., Lecture, *Second Lecture on Discoveries and Inventions* (Feb. 11, 1859) (available at Ashland University, Ashbrook Center for Public Affairs, Document Library—Civil War Era, <http://teachingamericanhistory.org/library> (accessed Oct. 14, 2009; copy on file with Journal of Appellate Practice and Process)).

and shape of our arguments, we can revisit them often, gaining needed distance between readings. This process of writing and reading, re-writing and re-reading, allows us to gain greater insight into the foundations (and the cracks in the foundations) of our arguments.⁴⁹ In short, written ideas are subject to more sustained thought, consideration, and improvement than those expressed orally.

Good writing is clear thinking revealed.⁵⁰ Poor writing, by contrast, inevitably indicates a lack of clarity in thought.⁵¹ This is not a new proposition. In 1783, Hugh Blair, who had a profound effect on American rhetoric in the nineteenth century, wrote that

whenever we express ourselves ill, there is, besides the mismanagement of Language, for the most part, some mistake in our manner of conceiving the subject. Embarrassed, obscure, and feeble Sentences are generally, if not always, the result of embarrassed, obscure, and feeble thought.⁵²

The process of writing, therefore, should lead to more critical legal analysis and better legal arguments or reasoning. Professor Ehrenberg puts it this way:

Through this dialogue, the writer can engage in a much fuller and richer consideration of contradictory evidence, counter arguments, and the complex elements of a subject than is ever possible in oral communication alone. . . . [T]he ability to read what we have written permits a greater distancing between the individual, language and reference than speech, a greater objectification which increases the analytic potential of the human mind. The orator, as opposed to the writer, can more easily deceive himself and

49. See generally Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 J. Legal Writing Inst. 1 (2000) (discussing theories about, and research into, writing as a means of learning, and including information about the types of learning likely to be enhanced by various law-school writing assignments).

50. See Ambrose Bierce, *Write It Right: A Little Blacklist of Literary Faults* 13 (Grabhorn-Hoyem 1971) (asserting that good writing is “clear thinking made visible”).

51. Hyland, *supra* n. 42, at 623 (noting that “good legal writing is still clear conceptual thinking, convincingly displayed”); see also Carl Bereiter & Marlene Scardamalia, *The Psychology of Written Composition* 302-03 (Lawrence Erlbaum Assoc. 1987) (discussing the role of reflection in the process of writing).

52. Hugh Blair, *Lectures on Rhetoric and Belles Lettres* 245 (Harold F. Harding ed., So. Ill. U. Press 1965) (facsimile of 1783 original).

others with an internally inconsistent argument because the oral mode makes criticism more difficult.⁵³

Judge Posner recently made this same point. In a published opinion, he lamented that a district judge had imposed an out-of-guidelines sentence orally and suggested that when a judge decides to impose a non-guidelines sentence, “he write out his reasons rather than relying entirely on the transcript of his oral remarks.”⁵⁴ As Judge Posner noted, “[t]he discipline of committing one’s thoughts to paper not only promotes thoughtful consideration but also creates a surer path of communication with the reviewing court.”⁵⁵

Beyond the value that writing provides to counsel (or a judge) in sharpening his or her own arguments or reasoning, written submissions also allow the recipient of the writing to better understand our arguments—in Judge Posner’s words, writing is a “surer path of communication.” Writing thus enhances learning, not only by the author, but also by the reader.

53. Ehrenberg, *supra* n. 1, at 1188 (internal quotation marks omitted) (citing Jack Goody, *The Logic of Writing and the Organization of Society* 142 (Cambridge U. Press 1987)); Blair, *supra* n. 52, at 245-46 (“Thought and Language act and re-act upon each other mutually.”); but see Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 *Geo. L.J.* 1283, 1303 (2008) (“[W]hile many types of decisionmaking benefit from being made pursuant to a process that incorporates a written component—including perhaps most of the sorts of decisions that judges are called upon to make—not all do.”); *Ill. Bell Tel. Co., Inc. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) (Posner, J.) (pointing out that “[a]lthough the dual federal-state regulatory scheme for the telecommunications industry is complex and even arcane, the parties did not need to assault us with 200 pages of briefs brimming with jargon and technical details,” and that “[c]larity, simplicity, and brevity are underrated qualities in legal advocacy”).

54. *U.S. v. Higdon*, 531 F.3d 561, 565 (7th Cir. 2008). See also *In re Jones*, 768 F.2d 923, 932 (7th Cir. 1985), in which Judge Posner, concurring, explained:

When a judge decides a case by an oral opinion he should make that opinion tentative, should reserve judgment, and should ask the court reporter to transcribe the opinion. When the judge gets the transcript he should edit it, polish it, add the necessary citations, amplify it if necessary, and then issue it together with the judgment order. Both the delay caused by this procedure and the added work for the judge should be slight, and outweighed by the benefits to the parties and counsel of getting a finished judicial product on which they can base an informed judgment on whether to appeal and how to brief and argue the appeal, and by the fact that the judge will not be open to the accusation that he gives more consideration to litigants whose cases are appealed than to other litigants.

Id. at 932 (Posner, J., concurring).

55. *Higdon*, 531 F.3d at 565; see also Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* 57-58 (Houghton Mifflin 1980) (noting that writing acts as a constraint on judging).

For just like the author, the reader can return to the written submissions time and again in the process of seeking to gain a greater understanding of the issues. A comment during oral argument passes in an instant and the full import of a particular oral comment may be lost in the back and forth of questioning. But the point made in a written brief remains available as a source for repeated consultation and thought.

Perhaps, too, because today our ability to learn aurally has diminished so substantially, most of us find it necessary to see (and I mean literally to see) an argument before we can grasp it.⁵⁶ Indeed, the British philosopher Stephen Toulmin describes an argument as “an organism.” He points out that

[i]t has both a gross, anatomical structure and a finer as-it-were physiological one. . . . [The] paragraphs . . . represent the chief anatomical units of the argument—its organs, so to speak. But within each paragraph, when one gets down to the level of individual sentences, a finer structure can be recognized. . . . It is at this physiological level that . . . the validity of our arguments has ultimately to be established or refuted.⁵⁷

Today at least, we need this organism before us on paper. We need to see the text before we can properly assess the validity—or invalidity—of the arguments advanced.

Written briefs, while perhaps costly, are also a superior and more efficient method of conveying detailed information to a judge. No matter how well we judges may take notes, it is difficult to absorb, let alone retain, numerous factual details or other case-specific information if they are provided only orally. As Lord Donaldson, Master of the Rolls, acknowledged in his 1986 annual review, “Judges, like anyone else, can absorb written material more quickly if they read it themselves, than if it is read to them.”⁵⁸ That is why early courts in the United States required lawyers to provide their points, authorities, and citations in writing. And, of course, when it comes time to draft

56. See Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 184-85 (Princeton U. Press 1949) (quoting F.C.S. Schiller: “[T]o put an argument in syllogistic form is to trip it bare for logical inspection. We can then see where its weak point must lie, if it has any.”).

57. Stephen E. Toulmin, *The Uses of Argument* 94 (Cambridge U. Press 1958).

58. Martineau, *supra* n. 11, at 120-21 (quoting 1996 annual review by the Master of the Rolls).

an opinion, it is always handy for the judge to have the written submission, and all of its points and authorities, at hand. Put differently, because the judge need not expend great effort in capturing and storing an argument to memory, he can expend more energy on understanding it and assessing its persuasiveness.⁵⁹

Enough of the strengths. What of the weaknesses of written persuasion? For one, it is not as responsive as oral persuasion. As Socrates pointed out, if you ask the written word what is meant, the words “simply return to the same answer over and over again.” Counsel may not cover in the brief a point the judge believes is important and would like the parties to address. Or the court might be confused about an issue discussed by the parties in their briefs. More than once when I was an attorney, I showed up for oral argument only to discover that the judges had certain important points all wrong. Of course, now that I am a judge I understand fully that the misunderstanding was my fault, not that of the judges. If there had been no oral argument, however, I would not have had the opportunity to set the record straight. Indeed, I would not even have known of the misunderstanding until I saw the opinion.

Worse yet, the parties’ briefs may be two ships passing in the night, neither ever coming to grips with the other side’s key points. This is true even in reply briefs. Frankly, this is what I frequently find in briefs filed in my court, even by good lawyers. And often it is not wholly unintentional. For some reason that remains a mystery to me, too many lawyers believe that it is to their advantage to avoid unfavorable issues by not directly responding to them in their briefs.

In sum, then, while written persuasion may not always be as responsive as a good oral presentation, briefs are far more efficient than oral argument in conveying large amounts of information. Requiring parties to put their arguments and reasoning in writing also improves the quality of their arguments, and one hopes, the courts’ opinions as well.⁶⁰

59. Oldfather, *supra* n. 53, at 1304.

60. *But see id.* at 1317-44 (canvassing research literature and concluding that sometimes requiring a written opinion will lead to a worse decision).

B. Oral Presentation

In our rush toward efficiency, however, we often ignore or de-value the strengths of oral argument. I would like to begin with the importance of the spectacle, or ceremonial, aspects of oral argument, something to which we do not pay adequate attention. Part of the reason that the English legal system has clung to oral argument is the English belief that justice must be seen in order to be done.⁶¹ In the English legal system, litigants and the public can watch the judges as they receive information about the case, consider that information and the arguments of counsel, and ultimately deliver their opinions. Not so here. In fact, in the federal courts of appeals, oral argument is the only avenue that citizens have for contact with appellate judges.

There is great value in allowing litigants and the public to see judges facing lawyers and one another and grappling with the issues in the cases before them.⁶² Otherwise, briefs go in one end of the opinion factory (also known as the federal court building) and opinions come out the other end, without any chance for the public or the parties to understand who really decided the case and whether the decisionmakers truly understood the parties' concerns. I do not mean for a moment to confuse the ability to see the process in action with accountability for the results of that process; in the latter sense, there is plenty of accountability in our current system.⁶³ But some oral argument is essential to provide the judicial branch—the “least democratic and most isolated branch of government”—with what Judge Myron Bright of the Eighth Circuit described as “some semblance of public visibility and

61. See Ehrenberg, *supra* n. 1, at 1166; Daniel J. Meador, *English Appellate Judges from an American Perspective*, 66 *Geo. L.J.* 1349, 1363 (1978); Martineau, *supra* n. 11, at 102-03.

62. See William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 *Mercer L. Rev.* 1015, 1021-22 (1984) (noting that, among its other benefits, “oral argument serves a function over and above its usefulness in adding to the presentation of the briefs of the parties,” and pointing out that “[i]t has the value that any public ceremony has”); Eugene R. Fidell, *A Modest Proposal*, *Natl. L.J.* 23 (Feb. 4, 2008) (“Reducing the judicial process to the transmission and receipt of electrons and PDF files, without any live courtroom activity, may speed things up (although, in candor, this seems questionable), but it comes at an institutional cost.”).

63. See Ehrenberg, *supra* n. 1, at 1194-95; Martineau, *supra* n. 11, at 118-20.

accountability.”⁶⁴ Or as Chief Justice Rehnquist recognized, “[o]ral argument is important as a means of giving judges a continuing awareness of their relationship and dependence on others; without it, the judge is isolated from all but a limited group of subordinates.”⁶⁵

Beyond visibility and accountability, oral argument serves other important functions as well. When properly conducted, oral argument can be responsive to the concerns of judges in ways that briefs simply cannot. At its best, oral argument is a conversation between the lawyer and the judge about the case. The argument gives a judge the opportunity to try ideas out on counsel, to clarify the judge’s own thinking, or to put direct questions about issues that may puzzle the judge or that the lawyer did not cover in his brief.⁶⁶ In a very real sense, argument is the last chance for the judge to give the party who may soon lose the case an opportunity to respond to the judge’s concerns and to straighten the judge out if she needs it. Argument also gives judges the chance to test what a particular holding might mean beyond the case at hand.

As a consequence, appellate opinions often comment on clarifications or concessions made at oral argument.⁶⁷ When

64. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 36 (1986); see also Judith Resnick, *Courts, In and Out of Sight, Site and Cite*, 53 Villanova L. Rev. 771, 783-84 (2008) (noting that public processes promote democratic values).

65. Rehnquist, *supra* n. 62, at 1022 (quoting Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 17 (West Pub. Co. 1976)); see also Clint Williams, *Justice Thomas Extols the Need to Listen*, Fulton Co. Daily Rep. (Oct. 24, 2008) (quoting Justice Thomas, who was commenting on the value of oral argument, as saying that oral argument was essential on a broader level, because “[i]t’s important for people in our society to feel they can have their say”) (also available at <http://www.law.com/jsp/article.jsp?id=1202425512909> (accessed Sept. 24, 2009; copy on file with Journal of Appellate Practice and Process)).

66. See Shapiro, *supra* n. 13, at 29 (“If a point is irrelevant, it can be cut off. If weaknesses have been obscured by a mass of detail in the briefs, the Court can expose those weaknesses through questions and answers. The Court can, in short, break down problems into manageable components and focus light where it is most needed through the questioning process.”).

67. See e.g. Frederick Liu, *Citing the Transcript of Oral Argument: Which Justices Do it and Why*, 118 Yale L.J. Pocket Part 32, 33 (Sept. 1, 2008) (“In the roughly 2600 opinions written during this fourteen-year span, there were 787 citations of the transcript.”) (archived at <http://yalelawjournal.org/content/view/699/14/> (accessed Sept. 24, 2009; copy on file with Journal of Appellate Practice and Process)); Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* 122 (St. U. of N.Y.

arguing in a written brief with one's opponent, all the incentives are to be unreasonable, and that is especially true if counsel knows there will not be any argument, and therefore, counsel will not have to answer to a judge for what was written in the brief. Lawyers may feel perfectly at ease making extreme arguments in their papers that they would never make with a straight face directly to a judge. In contrast, all of the incentives on counsel are to be reasonable at argument, because there they are in a face-to-face conversation with a knowledgeable and prepared judge. That is why concessions are made at oral argument and rarely, if ever, in briefs.⁶⁸

Lawyers can also enhance (or lose) credibility with the court during oral argument in many more ways than is possible in a written submission. With trials vanishing, oral argument is one of the few opportunities lawyers have to interact with the judge. Lawyers are held accountable at oral argument. There is no place to hide when one stands at the lectern before the judges; it truly is a lonely spot. Counsel have no choice but to respond to the court's questions about aspects of the case that they might have purposefully ignored in their briefs. And as Justice Scalia and Bryan Garner note in their recent book on advocacy, "the quality of oral argument can convey to the court that the brief already submitted is the product of a highly capable and trustworthy attorney, intimately familiar with the

Press 2004) (indicating that data "suggests . . . that the oral arguments in a case provide unique information the justices use when they make substantive choices about the merits of a case").

68. In a different context, the Supreme Court when speaking of the Confrontation Clause has noted the value of face-to-face encounters and the truth that emerges from them:

What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." . . . The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness, the right of confrontation "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails."

Coy v. Iowa, 487 U.S.1012, 1017-18 (1988) (footnotes omitted). I am indebted to Peter Keisler for suggesting this particular insight.

facts and the law of the case.”⁶⁹ Or, I might add, just the opposite.

Oral argument is also an important opportunity for judges on appellate courts to speak to each other through counsel before they must vote on the case. As Justice White once observed,

All of us on the bench [are] working on the case, trying to decide it [The lawyers] think we are there just to learn about the case. Well, we are learning, but we are trying to decide it, too. . . . [I]t is then that all of the Justices are working on the case together, having read the briefs and anticipating that they will have to vote very soon, and attempting to clarify their own thinking and perhaps that of their colleagues. Consequently, we treat lawyers as a resource rather than as orators.⁷⁰

Or as now-Chief Justice, then Judge, Roberts put it, oral argument “is the organizing point for the entire judicial process.”⁷¹

Similarly, oral argument gives the lawyers the chance to clarify their arguments, to examine issues from a different perspective, or to change the emphasis of their presentations. By the time oral argument occurs, counsel usually have a well-honed sense of the strengths and weaknesses of their arguments and which issues are likely to be determinative. It is usually a more developed sense than counsel had at the time the briefs were written. Therefore, there is a maturity and spontaneity in the face-to-face conversation at a good oral argument that cannot be achieved in the written brief. Often, that spontaneity has a way of unlocking more insights about the issues in the case

69. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 140 (Thomson/West 2008); see also Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 104 (1994) (“[P]ersuasive discourse depends as much on the advocate’s character and credibility (*ethos*) as it does on the logic of the argument or the emotional content of the case.”); Ronald J. Waicukauski, JoAnne Epps & Paul Mark Sandler, *Ethos and the Art of Argument*, 26 Litig. 31, 32 (Fall 1999) (“[R]esearch proves what Aristotle suggested more than 2000 years ago. . . . A speaker who is perceived to be intelligent and authoritative will generally be more persuasive.”).

70. Stephen M. Shapiro, *Appeals—Questions, Answers, and Prepared Remarks*, 15 Litig. 33, 33 (Spring 1989) (quoting in part Byron White, *The Work of the Supreme Court: A Nuts and Bolts Description*, N.Y. State Bar J. 346, 383 (Oct. 1982)) (internal quotation marks omitted).

71. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. S. Ct. History 68, 70 (2005).

than volumes of briefs.⁷² As Yogi Berra might have said, “You can hear a lot by listening.”⁷³

Though this may not often happen at the Supreme Court or even in many appellate courts, I also find that cases before me often turn out to look quite different after oral argument than I may have supposed before argument. Oral argument puts matters into perspective.⁷⁴ A case that seemed from the briefs to raise broad issues may after argument turn out to be capable of disposition by a quite narrow decision. Nuance is more likely to emerge in the live exchange between the lawyer and judge. And although most cases have many points that can (and usually are) argued in the briefs, most cases have no more than one truly determinative point. Oral argument allows a judge to isolate and clarify that pivotal or determinative issue in the case, an issue that the lawyers may have intentionally sought to obscure in their written briefs.

Admittedly, oral argument does not often cause judges to change their views entirely about which party should prevail. But the exchange of ideas among the judges and the lawyers during oral argument can provide judges with a measure of confidence in their decisionmaking that cannot be provided by written briefs alone.⁷⁵ Moreover, if clients attend, the argument can increase their confidence in the judiciary and ease the lawyers’ burden of explanation and justification. Finally, speech is dynamic in a way that writing can never be. Oral argument can convey a sense of urgency, sincerity, and (dare I say?) emotion that is not easily communicated by a written brief, for the speaker has at his disposal intonation, gesture, and other

72. See Ltr. from Alan B. Morrison, President, American Academy of Appellate Lawyers, to Senate Judiciary Committee (Dec. 29, 1999) (commenting on Senate Judiciary Subcommittee Chairman’s Report, *supra* n. 37) (available at http://www.appellateacademy.org/publications/oral_argument.pdf (accessed Sept. 24, 2008; copy on file with Journal of Appellate Practice and Process)).

73. Berra once pointed out that “[y]ou can observe a lot by watching.” See LTD Ent., *Yogi Berra—The Official Website, Yogi-isms*, <http://www.yogiberra.com/yogi-isms.html> (accessed Oct. 15, 2009; copy on file with Journal of Appellate Practice and Process).

74. See Scalia & Garner, *supra* n. 69, at 140.

75. See John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 Cornell L.Q. 6, 7 (1956) (“[O]ral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute . . . for . . . getting at the real heart of an issue and in finding out where the truth lies.”).

non-verbal cues that are unavailable to the writer.⁷⁶ Put differently, while “spoken utterances tend to indicate both what is said and how it is to be taken, written ones tend to specify only the former.”⁷⁷ As a consequence, speech can be more immediate and sincere than a writing, which can often seem more distant and potentially ambiguous.⁷⁸

In sum, written persuasion must maintain its central role in our judicial system. Inevitably, the brief must continue to carry the lion’s share of the persuasion load. But oral persuasion can and should play a critical supplemental role. Unfortunately, this is a role that may often be sacrificed on the altar of efficiency.

III. FUTURE

So what of my experiment and thoughts for the future of oral persuasion in our courts? The way I conduct argument is the same way it is done at the appellate level. I read the briefs, the record, and relevant cases before the argument; discuss the case thoroughly with my law clerks; and use the argument to get answers to my questions. Unlike an appellate court, however, I can and do devote more than twenty or thirty minutes to each case, and I do not have to share my time with other judges. In fact, in the *No Child Left Behind* case,⁷⁹ the argument lasted over four hours, and it is not unusual for arguments in my court to span an hour or two. However, with less complex motions—

76. See Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1978); David R. Olson, *From Utterance to Text: The Bias of Language in Speech and Writing*, 47 Harv. Educ. Rev. 257, 263 (1977). Indeed, in a text originally published in 1888, the authors offered this observation about the value of oral advocacy:

What is heard creates a much more decided impression than what is read. . . . Voice and gesture give force and emphasis. Points are more forcibly and more distinctly presented to the mind by an oral argument than by a written brief. The collision on points of difference is more marked, and the agreement on points conceded more noticeable, in an oral argument than in a written discussion.

Byron K. Elliott & William F. Elliott, *The Work of the Advocate* (2d ed., Bobbs-Merrill Co. 1911).

77. David R. Olson, *The World on Paper: The Conceptual and Cognitive Implications of Writing and Reading* 91 (Cambridge U. Press 1994).

78. See J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743, 756 (1987) (pointing out that speech is “immediate, unambiguous, and sincere,” while writing can often seem “distant, ambiguous, and potentially misleading”).

79. See *Conn. v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

such as a motion for more definite statement, motion to remand, or simple motion to dismiss—I will often hold oral argument over the telephone (with my court reporter) so that the lawyers do not have to drag themselves to the New Haven Courthouse. That said, ordinarily, I do not hold arguments in cases in which one of the parties is pro se. And while I do not do it as often as I would like, I do issue oral rulings, though I heed Judge Posner's advice and write out my thoughts in advance. Typically, I also do not deliver the opinion on the day of argument but delay it a week or so.

I started this experiment as a way to contribute to the legal profession. Judge Edward Becker once remarked that affording oral argument to lawyers, who generally want it, is a mark of respect for our joint profession. I agree with that sentiment, so I thought I would provide a measure of respect to lawyers by offering oral argument as a sort of educational opportunity. I never thought I would be the chief beneficiary of the arguments. But I quickly found that I was very wrong. Holding oral argument helps me as much as, or even more, than it helps counsel. My law clerks also find argument helpful and would revolt if I did away with argument because it also makes their lives easier.

I am told by other judges that they do not have time for argument because it is inefficient. I have two responses. First, I readily acknowledge that I come from a district that has managed to get its caseload under control. I do not have a docket of 800 or 1200 civil cases, or anything close to it. Therefore, I recognize that I have a luxury others do not: time for oral argument. I would note, however, that many other districts and judges have caseloads similar to mine, and that many courts of appeals have experienced flat or declining dockets outside of immigration cases.⁸⁰ Trials are also vanishing, we are told. As a consequence, I believe that in many cases, we can make more time for oral argument if we are committed to it.

Second, I have come to believe that I do not have enough time to dispense with oral argument. That is, I find oral

80. See Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume"*, 8 J. App. Prac. & Process 101, 113 (2006) ("Today, most of us seem to be content in believing that the courts of appeals survived the 'crisis of volume,' whether it was real or imagined.").

argument is a time saver. It makes me more efficient and effective. I say this because, as I mentioned before, the briefs in cases before me often do not map onto one another. Whether intentionally or otherwise, lawyers frequently do not address each other's central points or do so only glancingly. Oral argument, therefore, allows me to clarify issues, obtain concessions, gain perspective, and even eliminate issues that I might otherwise have to discuss in a written opinion. I learn a lot from oral argument, and it gives me an extra measure of confidence that I do, indeed, fully understand the relevant facts and issues and that I am ruling only on those issues that absolutely need my decision.

I readily admit that in this sense, oral argument at the district court level may be quite different from what it is at the appellate courts. There, the issues are usually more focused and discrete than they are in the district court, where counsel rightly want to try out issues that may be quite unfocused and to preserve all possible avenues for appeal. Because the issues are more specific at the appellate level, there may be less risk of error in understanding what the parties really mean in their arguments and also less likelihood that the lawyers will completely ignore their opposing counsel's arguments. As a consequence, and perhaps counter-intuitively, I suggest that district courts may benefit from oral argument more than appellate courts.

I am also told that lawyers are not good oral advocates and that as a result, oral argument is a waste of time. But of course, denying lawyers a chance at oral argument as a punishment for their lack of competence yields a self-fulfilling prophecy, for lawyers are unlikely to develop strong oral-argument skills if they almost never have the opportunity to use them. And even if many lawyers will never become good oral advocates, that is not a reason to dispense with oral argument. I find value in requiring lawyers to respond to my questions, even when the lawyers are not so good. I believe that Judge Posner got it right when he observed that “[a]lthough the average quality of oral argument in federal courts (including the Supreme Court) is not high, the value of oral argument to judges is very high.”⁸¹ I agree too with

81. Richard A. Posner, *The Federal Courts: Challenge and Reform* 160-61 (Harvard U. Press 1996).

Chief Justice Roberts, who summed up the value of oral argument this way after his first year on the District of Columbia Circuit: “My main conclusion after a year of being on the other side of the bench is that *oral argument is terribly, terribly important*. I feel more confident about that now than I ever did as an advocate.”⁸²

Despite my commitment to oral argument, however, I would agree that a set-piece argument is not a good use of any lawyers’ or judges’ time. Nor is it useful for a judge to hold oral argument without mastering the briefs, issues, cases, and record. Using oral argument as a way for the judge to come up to speed on the case squanders an opportunity for both counsel and the court, and it is a shameful waste of money for clients, who must foot the bill for what is ultimately an empty exercise. Making oral argument effective thus places burdens on the judge, though they are burdens that I believe a judge should want to shoulder.

Finally, I believe that oral argument helps me, as a judge, reflect on the issues presented in the case. “Persuasion is sometimes characterized as opinion change that follows from consideration of reasoned discourse,”⁸³ and to me, reflection equates with consideration of reasoned discourse. John Dewey described reflection as “turning a topic over in various aspects and in various lights so that nothing significant about it shall be overlooked—almost as one might turn a stone over to see what its hidden side is like or what is covered by it.”⁸⁴ That is how I use oral argument—to turn a case, or an issue, upside down and over and over again, hoping to see its hidden side, to ensure that I fully understand it and all of its implications. The value of this process leads me to believe that in our headlong, and not altogether inappropriate, rush toward judicial efficiency, we should not—indeed, we must not—forget the value of reflection and the role that oral argument can play in that most critical of all judicial endeavors.

82. Roberts, *supra* n. 71, at 69 (emphasis added).

83. *The Persuasion Handbook*, *supra* n. 46, at xv.

84. John Dewey, *How We Think* 57 (Prometheus Books 1991).

IV. CONCLUSION

After experimenting with oral argument in my courtroom, I have concluded that oral persuasion is not a substitute for written briefs. It is only a supplement. Yet it is a vital supplement. And so it should remain.

