AN EXAGGERATED DEMISE:
THE ENDURANCE OF FORMALISM IN LEGAL RHETORIC
IN THE FACE OF NEUROSCIENCE

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The reports of the death of formalism are greatly exaggerated.¹ Many scholars have stated that formalism is dead² and recent empirical studies and advances in the field of neuroscience appear to confirm its death.³ However, formalism is alive and well and living in legal rhetoric.

¹ This phrase is a variant of one attributed to Mark Twain who is said to have responded to a newspaper’s erroneous publication of his obituary by saying, “The reports of my death are greatly exaggerated.” There is some debate as to whether he actually made this statement. See W. JOSEPH CAMPBELL, THE YEAR THAT DEFINED AMERICAN JOURNALISM: 1897 AND THE CLASH OF PARADIGMS 79 (2006).
The present article explores why, despite the evidence of the powerful effect of emotion, bias, and other traditionally non-legal factors that influence judicial decision making and legal rhetoric, the practice and concomitant instruction of legal advocacy remains strongly rooted in formalism. The first part of this article establishes formalism’s traditional importance in legal rhetoric and the subsequent critique of formalism by legal realists. The article then examines the current realist scholarship based on neuroscience, neuropsychology, and related empirical studies that expose judicial decision making as powerfully influenced by factors outside of formalist ideas of the law and not connected to traditional concepts of rationality. These studies show how rhetoric that appeals to a judge’s unconscious cognition, such as through emotion and bias, are more powerful than appeals based in logic and rationality. In terms of legal rhetoric, such studies appear to demonstrate that appeals to *pathos* are more persuasive than appeals to *logos*.

Nevertheless, formalism (and its emphasis on *logos*) retains an important place in legal rhetoric due to its instrumental role in the
legal profession. Ironically, the responses to legal realist findings of the power of pathos ultimately reinforces formalism’s significance in legal rhetoric. This article examines two responses by scholars to these realist findings that reassert formalist positions concerning judicial decision making and as a result theorize as to what constitutes effective legal rhetoric. The first response is grounded in traditional formalism and seeks to disrupt the power of non-legal “pathetic” factors in decision making by finding ways to restrict, eradicate, or at least minimize such influences. The second response, more firmly grounded in realism, accepts and even embraces the role of such pathetic influences in judicial decision making. Notably, this second brand of realism is not necessarily rejecting formalism. Rather, it revises and reasserts formalist principles by “taming” the realist findings about judicial decision making and what should constitute effective legal rhetoric. This second brand of realism is a form of “neoformalism,” which embraces pathos but ultimately seeks to enhance the importance of logos and formalism for instrumental purposes in legal rhetoric and legal decision making.

The article ends by recognizing the limitations of formalism as exposed by realism but stresses the instrumental importance of formalism in the discourse and rhetoric of the legal profession and in the normative advancement of ideals underlying the rule of law.

6 Jamal Greene, Pathetic Argument in Constitutional Law, 113 Colum. L. Rev. 1389 (2013) uses this term.
7 I am using the word “tame” here in a way that expresses a view of realism that acknowledges the continuation of certain formalist principles. See Frederick Schauer, Legal Realism Untamed, 91 Tex. L. Rev. 749, 779-80 (2013) [hereinafter Schauer, Legal Realism Untamed]. See also Andrew J. Wistrich et al., Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?, 93 Tex. L. Rev. 855, 923 n.218 (2015) [hereinafter Wistrich et al., Heart Versus Head].
1. The Traditional Preference for Formalism Over Realism in Legal Rhetoric

Under traditional, formalist notions of judicial persuasion, an attorney seeking to persuade a judge is supposed to appeal only to “the law” and avoid appeals to emotion or other irrelevant non-legal considerations.9 Frederick Schauer posits that formalism is fundamentally about rules of law.10 Formalism promotes the adherence by judges to rules that alone should drive their decisions.11 Formalist legal rhetoric conforms to this model by asserting that persuasion is most effective through the presentation of legal argument, which appears rational, logical, and based on rules of law.12 Scholars have referred to this form of rhetoric as “old school,”13 “traditional,”14 and “legalistic.”15 The role of good persuasive legal rhetoric under these traditional notions is to advance arguments to the judge in a given case dispassionately and accurately based on law

11 Id.; see also TAMANAH, BEYOND THE FORMALIST-REALIST DIVIDE, supra note 5, at 165.
14 See, e.g., Schauer, Legal Realism Untamed, supra note 7, at 752.
and only law. Concomitantly, under these formalist notions, judges are supposed to apply such law mechanically and objectively when deciding a given set of facts.

Most scholars analyzing rhetorical preferences in persuasive legal argument refer to Aristotle’s *Rhetoric*, written in the year 350 B.C.E., which sets out the seminal components of persuasive speech. Aristotle enumerates three means of “artistic” persuasion, including “logos,” “ethos,” and “pathos.” These means of persuasion each appeal and ultimately persuade a reader in different ways.

Logos is the means of persuasion that appeals to logic and reason.

Ethos refers to persuasion based on the writer’s credibility and character.

Pathos refers to persuasion achieved through appeals to emotion, prejudice, bias, and other unconscious feelings of the audience.

Many legal writing textbooks, writing experts, and articles discussing persuasive writing explicitly or implicitly assert a

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22 *Id.*

23 Pathos within the contexts of this article gets to the range of unconscious effects rhetoric may have on an audience. In this way it is similar to ethos. *See* Jamar, *supra* note 20, at 75 (*pathos* in Aristotle’s Rhetoric refers to “the person’s state of mind, the target of the emotion, and the reasons for the feelings.” The emotions explored are anger (ch. 2), calmness (the opposite of anger) (ch. 3), friendliness toward someone and enmity (ch. 4), fear and confidence (ch. 5), shame and lack of shame (ch. 6), kindliness (or benevolence) and unkindliness (mean-spiritedness) (ch. 7), pity (ch. 8), indignation (ch. 9), envy (ch. 10), and emulation (meaning admiration resulting in the opposite of envy) (ch. 11)).
normative preference for *logos* over *ethos* and *pathos*. This preference for appeals to logic and legal principles stems from formalist notions that assume judges primarily make decisions grounded in logic and law. Thus, an advocate must appeal to logic and law when attempting to persuade a judge. For example, in their acclaimed book on legal writing, Bryan Garner and Justice Antonin Scalia state, “Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities . . . . The world does not expect logic and precision in poetry or inspirational pop philosophy; it demands them in the law.” Chief Justice Roberts expressed similar formalist sentiments, “Judges and Justices are servants of the law, not the other

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24 See, e.g., SMITH, ADVANCED LEGAL WRITING, supra note 18, at 259. Many textbooks do an excellent job of addressing *pathos*, *ethos* and *logos* but implicitly privilege *logos* as the dominant form of rhetoric. See, e.g., RICHARD K. NEUMANN, J. LYN ENTRIKIN & SHEILA SIMON, LEGAL WRITING 9-20, 185-91, 195-211 (3d ed. Wolters Kluwer 2015) (implicitly privileging formalism in laying out process of addressing rule while also discussing power of storytelling). See also Jessica E. Price, Imagining the Law-Trained Reader: The Faulty Description of the Audience in Legal Writing Textbooks, 16 WIDENER L.J. 983, 990 (2007); Kristen K. Robbins, Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning, 27 VT. L. REV. 483, 563 (2003) (citing Anita Schnee, Logical Reasoning “Obviously,” 3 LEGAL WRITING 105, 116 (1997)); Cornwell, supra note 12, at 76 (2000) (“Traditional Legal Writing courses have accepted the formalist structure uncritically....”). Note that Steven D. Jamar points out that while Aristotle, in his writings, devotes the most attention to *logos*, he did not necessarily see *logos* as normatively preferable to other forms of persuasion. Jamar, supra note 20, at 76.


26 Maroney, The Persistent Cultural Script, supra note 17, at 636. See also ALDISERT, supra note 17; Ross, supra note 9, at 182.


28 SCALIA & GARNER, supra note 16, at 32; Greene, supra note 6, at 1481.
way around. Judges are like umpires. Umpires don’t make the rules, they apply them.29

2. The Realist Critique of Traditional Formalism in Legal Rhetoric

In-depth realist examinations of how judges actually make decisions are at odds with formalist notions of judicial decision making and what therefore constitutes effective persuasion in the law.30 The school of legal thought called realism questioned formalist notions of how judges decide the law and, in turn, what might persuade them in a given case.31 Realism is identified most closely with scholars from the 1930s and more recently with a wide range of scholars, including those from the Legal Process School,32 the Critical Legal Studies movement,33 and many from interdisciplinary “Law and . . . ” schools.34 Of particular note are the realist empiricists, who have used scientifically sound empirical methods to study the judicial

30 Rachlinski & Wistrich, Judging the Judiciary by the Numbers, supra note 3, at 203. See also Wistrich et al., Heart Versus Head, supra note 7; Epstein, Study of Judicial Behavior, supra note 3 (survey of studies about judicial decision making.) See discussion infra at notes 38-40.
33 Barzun, supra note 32, at 1226 (discussing the differences between the legal realists and the CLS movement.) See also G. Edward White, From Realism to Critical Legal Studies: A Truncated Intellectual History, 40 SW. L.J. 819, 820 (1986).
decision making process and the effect of forms of legal rhetoric on judges.\textsuperscript{35}

Most realists posit that law is indeterminate and judges will use the law to justify a decision made on bases outside of the law.\textsuperscript{36} Rather than examining cases and rules of law and applying “the law” to the facts in a particular case, realists assert that judges “work[] backward from conclusion to principles and use principles only to rationalize pre-formed conclusions.”\textsuperscript{37} Early legal realists posited that judicial decision making is influenced by a judge’s politics and ideology.\textsuperscript{38} More contemporary realists have conducted empirical research confirming the strong role of politics and ideology and also demonstrating that judges make decisions based on bias, emotion, and other nonrational considerations, including whether the judge had recently taken a break or eaten a meal.\textsuperscript{39} Realists of all stripes

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\item \textsuperscript{38} Davis, \textit{The Richness of Experience}, supra note 27, at 11-13 (quoting Joseph William Singer, \textit{Legal Realism Now}, 76 Cal. L. Rev. 467, 470-71 (1988)).
\item \textsuperscript{39} Epstein, \textit{Study of Judicial Behavior}, supra note 3 (survey of studies about judicial decision making); Rachlinski & Wistrich, \textit{Judging the Judiciary by the Numbers}, supra note 3, at 203. A study by Jonathan Levav of Stanford and Shai Danziger of Ben-Gurion University showed a relationship between judicial decisions and the food breaks that the judges took during the course of their workday. Shai Danziger et al., \textit{Extraneous Factors in Judicial Decisions}, 108 Proc. Nat’l Acad. Sci. 6889 (2011), cited in DANIEL KAHNEMAN, \textit{THINKING, FAST AND SLOW} 43-44 (2011). Among other compelling empirical studies recently published is Brian Sheppard & Andrew Moshirnia’s study that indicates legal argument appears to serve as an instrument for judges to reach their desired results rather than as a tool of formal deliberation. Brian Sheppard & Andrew Moshirnia, \textit{For the Sake of Argument: A Behavioral Analysis of Whether and How Legal Argument}
stress that judges are human and, like all humans, are influenced in their decision making by nonrational considerations such as emotion.  

Over the past twenty years, the empiricist realists have used evidence from neuroscientists to provide the most compelling evidence of realism’s power in judicial decision making. The groundbreaking work of Daniel Kahneman and Antony Damasio among many others provide compelling evidence for the power of pathos over logos in decision making including judicial decision making. Such studies are evidently important in determining appropriate and effective rhetoric directed at decision makers like judges. While some scholars such as Brian Tamanaha have questioned the extent of realism’s power in judicial decision making, the overwhelming evidence demonstrates the strength of the realist position. It is the very strength of this scientific evidence that drives the saying that “formalism is dead” and raises the concomitant question as to why formalism continues to live.


40 This was also stated succinctly stated by a sitting judge: “Look, there is no doubt that judges are going to come out differently depending on their biases. That is true whether you are interpreting the Constitution or the Internal Revenue Code or the Affordable Care Act. Judges are human, and nothing, really, is going to succeed in utterly binding them.” Hon. Robert S. Smith, *Dilemmas of Liberty*, 83 FORDHAM L. REV. 51, 65-66 (2014). See also Sheppard & Moshirnia, supra note 39, at 555. But note that some stress that judges are different from others because of their training and the nature of their profession. See Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349, 370 (2016) [hereinafter Kahan et al., *Situation Sense*].

41 Kahneman, supra note 39.

42 See discussion infra notes 76-81.

43 See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949, 951 (1988) (“[I]n the last two centuries formalism has been killed again and again, but has always refused to stay dead.”); Jewel, supra note 13, at 77 (“Why is legal formalism not dead?”).
a. Realism and the framework of System 1 and System 2 Thinking

Daniel Kahneman’s well-known book, Thinking, Fast and Slow, provides a compelling argument for the realist position on judicial decision making and a framework for understanding why nonrational and nonlegal appeals can significantly affect judges.\textsuperscript{44} Kahneman identified two categories of thinking involved in the process of making a decision. These two types of thinking rely on very different components, and they originate and occur in different parts of the brain.\textsuperscript{45} Kahneman labeled the mental mechanisms that produce unconscious, intuitive decisions as “System 1” and the more deliberate, rational decision making as “System 2.”\textsuperscript{46}

In System 1 thinking, or “fast thinking,” a decisionmaker appears to make a decision very quickly based on unconscious factors such as emotion, intuition, or bias.\textsuperscript{47} Theorists note System 1’s importance in creativity and imagination.\textsuperscript{48}

System 2 thinking, or “slow thinking,” denotes decision making grounded in deliberate, rational thought.\textsuperscript{49} It is produced intentionally rather than instinctually and it uses the processes of logic and reliance on evidence.\textsuperscript{50} When applied to judicial decision making, it is normatively preferable, particularly under formalist notions of jurisprudence\textsuperscript{51} System 1 thinking, concomitantly, is inconsistent with formalist ideals for judicial decision making.\textsuperscript{52} In the context of examining rhetoric, System 1 thinking is associated

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  \item\textsuperscript{44} Kahneman, supra note 39.
  \item\textsuperscript{45} Id. at 29.
  \item\textsuperscript{46} Id. at 20–22.
  \item\textsuperscript{47} Id. at 20.
  \item\textsuperscript{49} Kahneman, supra note 39.
  \item\textsuperscript{50} Id.
  \item\textsuperscript{51} Wistrich et al., Heart Versus Head, supra note 7, at 857–863; Rachlinski & Wistrich, Judging the Judiciary by the Numbers, supra note 3.
  \item\textsuperscript{52} Id.
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with appeals to pathos and ethos, while System 2 thinking is associated with logos.\textsuperscript{53}

Close examination of System 1 and System 2 forms of thinking by cognitive and neuroscientists supports a finding of pathos being more important than logos in legal decision making. As such, legal rhetoric would theoretically be most effective if pathos was privileged over logos.

\textbf{b. The argument for the elevation of pathos over logos in legal rhetoric}

Recent neurological and cognitive science studies indicate that it is practically impossible to eradicate System 1 thinking from decision making.\textsuperscript{54} These studies provide support for the realist proposition that judges initially make decisions on unconscious, nonrational bases through emotion, intuition, or bias and then support the decision through the conscious System 2 thought process.\textsuperscript{55}

One of the leading researchers studying the neurobiology of decision making, Antonio Damasio, made a groundbreaking discovery when examining persons with damage to their prefrontal cortex, where emotions are believed to be generated.\textsuperscript{56} He found the people with damaged orbitofrontal cortex were unable to make even simple decisions.\textsuperscript{57} Damasio theorized, and subsequent studies seem to support, the idea that the decision making process needs an emotional component to be performed at all.\textsuperscript{58} Other researchers, such as Benedetto De Martino, used brain imaging scans, which showed dominance of emotional parts of the brain in decision making, providing additional support for the prominence and


\textsuperscript{55} Kahneman, supra note 39. See also Chris Guthrie et al., \textit{Inside the Judicial Mind}, 86 CORNELL L. REV. 777, 778 (2001) [hereinafter Guthrie et al., \textit{Inside the Judicial Mind}].

\textsuperscript{56} Antonio Damasio, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 34-51 (2005).

\textsuperscript{57} Id.

necessity of emotional and unconscious parts of the brain in the decision making process.\textsuperscript{59}

In the context of judicial decision making, cognitive studies empiricists provide rather compelling evidence for realist assertions concerning the power and effect of unconscious and nonrational thought on judicial decisions.\textsuperscript{60} For example, one significant study of judges interpreting a medical marijuana statute found judges issued decisions that were more favorable to emotionally sympathetic defendants.\textsuperscript{61} Similarly, a study asking a broad range of people to review a videotape of a police car chase found significant differences in the decision maker’s determinations as to whether the police were acting reasonably under the circumstances.\textsuperscript{62} The researchers found the decision maker’s background significantly influenced how they viewed the videotaped evidence, and whether they believed the police acted reasonably.\textsuperscript{63}

Other studies appear to show that decisions made unconsciously and quickly often lead to the best result by a decision maker.\textsuperscript{64} In one study, when some decision makers were required to slow down their


\textsuperscript{60} A problem with this assertion concerning decision making is that it is difficult to establish exactly what is occurring in the brain during the decision-making process. See William R. Ut tall, The New Phrenology: The Limits of Localizing Cognitive Processes in the Brain (2003); Ed Diener, Neuroimaging: Voodoo, New Phrenology, or Scientific Breakthrough? Introduction to Special Section on fMRI, 5 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 714-15 (2010). See also Jonathan H. Marks, Interrogational Neuroimaging in Counterterrorism: A "No-Brainer" or A Human Rights Hazard?, 33 AM. J.L. & MED. 483, 489-90 (2007).

\textsuperscript{61} Wistrich et al., Heart Versus Head, supra note 7, at 880.


\textsuperscript{63} Id. The study found: “African Americans, low-income workers, and residents of the Northeast, for example, tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats.” Id. at 841.

decision-making processes, they surprisingly made worse decisions. Assuming the formalist goal is to improve decision making, these studies undermine the rationale of formalists who advocate subverting System 1 cognition.

Scholars such as Terry A. Maroney and Susan Bandes make a compelling argument that emotion is essential for proper judicial decision making. Bandes writes, “Emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions.” Maroney argues convincingly that most people would want a judge to feel some emotion in her work in making decisions. A person who acts without emotion would be no better than an automaton or might even be considered a psychopath. Intuitively, people prefer a legal system administered by humans who are guided by emotion, empathy, and a moral sense of justice.

One theory as to why System 1 cognition is so powerful and instrumental to all decision making posits that human cognition has

65 Timothy D. Wilson & Jonathan W. Schooler, Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991), cited in Timothy P. O'Neill, Law and "The Argumentative Theory", 90 OR. L. REV. 837, 842 n.31 (2012). Such a result is explained as possibly due to the decision maker’s veering from the best decision (made unconsciously) to what becomes a more expedient decision (made more deliberatively).


67 BANDES, Introduction, supra note 66, at 7; Maroney, Emotional Competence, supra note 66, at 1435.


69 Ryan Calo, Robots As Legal Metaphors, 30 HARV. J.L. & TECH. 209, 217 (2016). See also Ireland v. Mitchell, 226 Or. 286, 294, 359 P.2d 894 (1961) (“A trial judge is not a mere automaton whose function is limited to reciting the words approved by statute or by the Supreme Court.”); Logue v. Dore, 103 F.3d 1040, 1046 (1st Cir. 1997) (“[A]ppellate courts cannot expect that a trial judge, under siege, will function as a bloodless automaton.”).
limitations. As a result, when processing thought, humans use shortcuts or heuristics to facilitate thought and avoid cognitive overload. This “cognitive load theory” helps explain the benefits of System 1 thinking in the decision-making process.

These and other similar studies were recently collected in two useful articles, Lee Epstein, Some Thoughts on the Study of Judicial Behavior and Jeffrey J. Rachlinski & Andrew J. Wistrich, Judging the Judiciary by the Numbers: Empirical Research on Judges. The collection of empirical data presented in these articles demonstrate the importance of pathos in legal rhetoric. Many show that appeals to emotion or intuition have powerful effects on the decision maker and ultimately appear to influence the decision and the subsequent logic applied by the decision maker. Furthermore, there is evidence that pathos or System 1 thinking can even lead to better decisions in certain contexts. Consequently, it makes sense to assert that pathos should be elevated over logos in legal rhetoric.

c. “Balanced Realism” and the Movement to Reclaim Formalism in Legal Rhetoric

Some important scholarship on judicial decision making and persuasion have pushed back against the realist position concerning the power of System 1 thinking in judicial decision making.

Brian Tamanaha argues in his compelling book, Beyond the Formalist-Realist Divide, that law (logos) plays the dominant role in judicial decision making as opposed to non-legal considerations.

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71 Carter, supra note 70, at 41.
72 Id. See also Jewel, supra note 13, at 77; Malone & Gross, supra note 70.
73 Epstein, Study of Judicial Behavior, supra note 3 (survey of studies about judicial decision making).
74 Rachlinski & Wistrich, Judging the Judiciary by the Numbers, supra note 3, at 203.
76 Epstein, Study of Judicial Behavior, supra note 3 (survey of studies about judicial decision making); Rachlinski & Wistrich, Judging the Judiciary by the Numbers, supra note 3.
(pathos). He maintains that realists overstate their position and that non-legal factors such as ideology only play a role in a small number of cases where the law is uncertain and political or emotional considerations are immediate. In most cases, Tamanaha argues, judges want and try their best to uphold their oaths to follow the law. He calls this position “balanced realism” which he uses to reclaim the importance of formalism in the decision making process. However, Tamanaha’s thesis is not supported by the majority of studies by scholars of cognitive science that demonstrate the power of pathos.

There are some recent studies that provide support for Tamanaha’s view and appear to show judges are more immune to appeals to pathos than asserted by many realists. For example, a recent empirical study of judicial decision making led by Dan M. Kahan posits that judges by dint of their legal training and professional experience develop “situational sense” that focuses their attention on the law and screens out factors that inhibit legal decision making. A 2015 study by Andrew J. Wistrich, Jeffery J. Rachlinski, and Chris Guthrie also indirectly supports Tamanaha’s balanced realism position that judges decide cases based on the law and not on emotion when the law is clear.

Additionally, embedded in his work, Tamanaha acknowledges the powerful role non-legal considerations play in judicial decision making. Tamanaha essentially concedes that “we are all realists, now” but that the debate today is not whether judges are motivated

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77 TAMANAH A, BEYOND THE FORMALIST-REALIST DIVIDE, supra note 5.
78 Id. at 186–87.
79 Id. at 185.
80 Id. at 6-7.
81 See infra notes 92-96.
82 Kahan et al., Situation Sense, supra note 40, at 370–74. The study was conducted using 253 sitting judges, 800 members of the general public, 217 practicing lawyers and 284 law students and showed judges and lawyers as less susceptible to bias based on their cultural values, at least with regard to analyzing statutes. Id.
83 Wistrich et al., Heart Versus Head, supra note 7, at 899-900. The study presented hypothetical cases before some 1,800 state and federal judges and placed them “in a dilemma between ‘heart’ and ‘head,’ requiring them to choose between faithfully applying the law and reaching an unjust result in the particular case before them or bending the law to achieve justice . . . . The results . . . [indicated] the judges follow the law when it is clear and are influenced by emotional and other extralegal factors only when it is not.” Id.
by extra-legal considerations; instead, the debate is about when and how much they are motivated by such considerations. The works of Kahan and Wistrich are consistent with this observation.

Both Kahan’s and Tamanaha’s “balanced realism,” however, overstates the power of formal legal rules (or logos) in the actual determination of most judicial decisions. Most cases decided by judges do not involve clear-cut application of legal rules or principles to facts, but rather require judgments by the judge in uncertain and unsettled matters of law or fact finding. This is particularly true on the appellate level. In cases involving clear-cut issues of law and fact, where simple logical and rational reasoning would be determinative, the decision making role is usually taken from the judge because such cases are overwhelmingly resolved out of court. In addition, the high cost of litigation, as well as the good faith requirements of Fed. R. Civ. Pro. 11, facilitates the weeding out of clear-cut legal issues that would require the time and expense of a court proceeding. Rules of civil procedure and the realism of practice thus reserve only uncertain legal arguments for the judge. Consequently, in such cases, the

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85 Tamanaha, Beyond the Formalist-Realist Divide, supra note 5, at 145–48.
86 Id. at 95–96; Brian Leiter, American Legal Realism, in The Blackwell Guide to Philosophy of Law and Legal Theory 50–53 (Martin P. Golding & William A. Edmundson eds., 2005), file:///C:/Users/atodd1/Downloads/SSRN-id339562.pdf [hereinafter LEITER, American Legal Realism]
87 Leiter, American Legal Realism, supra note 86, at 52.
88 William W. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 707–08 (1989) (“[N]inety-five percent of the civil cases filed in federal courts are terminated before trial.”); David F. Herr et al., Fundamentals of Litigation Practice § 4:2 (2018), Westlaw LITPAC (“Although the statistics vary, somewhere between 95 and 98 percent of all civil cases end in settlement or dismissal before trial or final hearing.”). But see David A. Sklansky & Stephen C. Yeazell, Comparative Law Without Leaving Home, What Civil Procedure Can Teach Criminal Procedure, and Vice Versa, 94 Geo. L.J. 683, 696 n.37 (2006) (claiming lower estimates for settlement of civil and criminal cases.).
90 See Leiter, supra note 86, at 52. See also Huang, supra note 89, at 49 (“Whether there has been such a frivolous litigation explosion is a descriptive and historical question that is empirically challenging to resolve because nearly all lawsuits settle, with many of the settlements involving
judge’s personal response to the issues and not the law may dictate the judge’s decision. This personal response based on pathos then drives the interpretation of the indeterminate law presented to the judge. When both sides to a lawsuit make good faith arguments based in the law, a judge’s preferences outside of the legal arguments has great weight. Tamanaha’s and Kahan’s work does not take such realist concerns sufficiently to heart.

Since the publications of Tamanaha’s book and Kahan’s study, new research continues to undercut or at least significantly qualify the importance of formalism in judicial decision making as posited by Tamanaha and Kahan. For example, Holger Spamann, Lars Klöhn, and Avani Mehta Sood argue that a judge’s feelings about litigants affects his determination of a legal issue. Another study found that a judge’s personal background influences his decision making. Stories can also influence the decisions of appellate judges. These studies, to a far greater degree than posited by Tamanaha, confirm the power of System 1 thinking and the importance of pathos in judicial decision making and legal rhetoric. Thus, while Tamanaha seeks to reassert the importance of formalism, his rationale is incomplete and ultimately not sufficiently supported by the full panoply of scholarship of neuroscience and cognitive studies. The question, thereby, remains as to why formalism continues to be privileged over pathos in legal rhetoric.

91 See O’Neill, supra note 37, at 844.
92 Id. at 845.
93 See Rachlinski & Wistrich, Judging the Judiciary by the Numbers, supra note 3, at 203-04.
96 Kenneth D. Chestek, Judging by the Numbers: An Empirical Study of the Power of Story, 7 J. ALWD 1, 3 (2010) [hereinafter Chestek, Judging by the Numbers].
97 Chestek, Judging by the Numbers, supra note 96.
3. Formalist Rhetoric in the Face of Realist Findings

If the application of realist theories to judicial decision making is correct, it stands to reason that the teaching of advocacy should de-emphasize formalism and emphasize and elevate realism over formalism. In other words, the finding that *pathos* has greater influence than *logos* in judicial decision making implies that scholars and teachers of legal rhetoric should rethink the traditional, formalist approach to the subject. Legal rhetoric should follow the path of the ancient Sophists, who are said to have emphasized the art of persuasion and argument based in *pathos* over the pursuit of truth through *logos*.  

There is a body of scholarship, much of it in the last few years, that wrestles with how legal rhetoric should respond to the conflict between realism and formalism. The scholarship in this area usually takes one of the following two approaches. The first approach is to recognize the realist considerations in judicial decision making about the power of *pathos* and System 1 thinking, and in response urge legal professionals and judges to work to impede or restrict such considerations in judicial decision making. The second approach is to embrace and incorporate *pathos* and System 1 considerations, such as emotions and bias, into legal advocacy and the judicial decision making process.

These two approaches both recognize the power of realism’s findings about *pathos* and System 1 thinking and both advance the importance of *logos* and a legal rhetoric firmly grounded in formalism and System 2 thinking. Notwithstanding the acceptance of realist findings under both of these approaches, scholars of rhetoric and

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100 *See, e.g.*, Rachlinski & Wistrich, *Judging the Judiciary by the Numbers*, *supra* note 3; Jerry Kanget al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169 (2012).
judicial decision making continue to keep formalism alive,\textsuperscript{102} thus advancing a new style of formalism or “neoformalism”\textsuperscript{103} that engages realist findings while still advancing and privileging the structures of formalism.

\textbf{a. Inhibiting Pathos (System 1 Thinking) to Enhance Logos (System 2 Thinking)}

In the face of the evidence that non-rational or non-legal factors influence judges’ decisions, a number of scholars promote traditional System 2 decision making over System 1 by applying mechanisms that inhibit judges’ System 1 thinking.\textsuperscript{104} Through such mechanisms, an advocate can achieve the formalist jurisprudential ideal of judicial decisions based solely or primarily on rational legal reasoning and dispassion. Mechanisms to reduce judges’ System 1 thinking include seeking outright removal or recusal of a judge who clearly is or appears susceptible to undue System 1 decision making, and more subtly “nudging” of a judge to be more deliberative or “slow” in her thinking when making decisions.\textsuperscript{105} These techniques promote logos by seeking to remove or reduce pathos in the judicial decision making process.

Court rules permit an attorney to request the recusal of a judge who has a bias or, in some cases, even the appearance of impartiality in a given case.\textsuperscript{106} Under federal law and many state codes of judicial

\textsuperscript{102} Weinrib, supra note 43, at 951 (“[I]n the last two centuries formalism has been killed again and again, but has always refused to stay dead.”); Jewel, supra note 13, at 77 (“Why is legal formalism not dead?”).


\textsuperscript{104} See, e.g., Rachlinski & Wistrich, \textit{Judging the Judiciary by the Numbers}, supra note 3; Chris Guthrie et al., \textit{Blinking on the Bench: How Judges Decide Cases}, 93 CORNELL L. REV. 1, 31 (2007) [hereinafter Guthrie et al., \textit{Blinking on the Bench}]; Kanget al., supra note 100, at 1169.

\textsuperscript{105} See generally, Rachlinski & Wistrich, \textit{Judging the Judiciary by the Numbers}, supra note 3.

conduct, a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” In addition, a judge must disqualify himself if “he has a personal bias or prejudice concerning a party . . . .” A legal advocate who suspects the judge to whom she is writing has a personal bias or prejudice that makes the judge’s impartiality suspect, needs to consider seriously the option of asking the judge to recuse herself. Seeking recusal, however, can be difficult.

Encouraging judges to take time to deliberate before making a decision is a subtle and effective mechanism for encouraging more logical, System 2, cognitive decision making. This model is reflected in what has been called the “intuition override model.” Advocates who have clients or issues that may provoke emotionally negative reactions by judicial decision makers should actively seek such ways to slow the decision making process.


28 U.S.C.A. § 455(b)(1) (Westlaw Current through P.L. 115-231). See also 34 Mass. Prac., Landlord and Tenant Law § 23:2 (3d ed. 2018), Westlaw 34 MAPRAC § 23:2 (internal quotations omitted) (“When confronted with a recusal motion a ‘judge [must] consult first his own emotions and conscience’ to ascertain if he is free from disabling bias or prejudice. If the judge passes the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was a proceeding in which ‘his impartiality might reasonably be questioned.’”).


Bam, supra note 106, at 956.


Guthrie et al., Blinking on the Bench, supra note 104, at 29; Berger, A Revised View of the Judicial Hunch, supra note 64, at 17.

For example, an attorney who has favorable legal precedent for seeking to exclude unfavorable evidence that prejudices her client should encourage the judge to take time in ruling on the issue since the prejudicial effect of the evidence may provoke an initial System 1 negative response by the judge, but
opportunity to submit written motions, as opposed to only oral motions, can have the salutary effect of slowing the deliberation process down to promote System 2 decision making.\footnote{Guthrie et al., \textit{Blinking on the Bench}, supra note 104, at 36.}

Second, an advocate can encourage second order thinking in the decision making process by trying to avoid having the judge rule from the bench on a particular issue.\footnote{\textit{Id.}; Gordon Bermant, \textit{Courting the Virtual: Federal Courts in an Age of Complete Inter-Connectedness}, 25 OHIO N.U.L. REV. 527, 532 (1999). Rulings on admission of evidence can be particularly sensitive to first order thinking since such decisions are made quickly and judges are given wide discretion on such matters.} The articulation of a judicial decision and the reasoning behind the decision, particularly in writing, forces System 2 thinking.\footnote{Martha J. Dragich, \textit{Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose A Greater Problem?}, 44 AM. U.L. REV. 757, 781 (1995); Frank M. Coffin, \textit{The Ways of a Judge: Reflections from the Federal Appellate Bench 57-58} (Houghton Mifflin 1980). \textit{See also} Thomas E. Baker, \textit{Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals} 120 (West Pub. 1994).} If a judge is unable to articulate a rational basis for her decision based on the law, the judge is unlikely to issue that decision.\footnote{Asha Amin, \textit{Implicit Bias in the Courtroom and the Need for Reform}, 30 GEO. J. LEG. ETHICS 575, 590 (2017). \textit{See also} Suzanne Levy, \textit{Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions}, 16 U. PA. J. CONST. L. 1161, 1172 (2014).} To issue a decision that does not articulate a rational or logical basis in the law would cause the judge to face possible reversal by higher courts, condemnation by other members of the profession and peers, and possible sanctions and discipline.\footnote{See, e.g., William G. Ross, \textit{The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process}, 28 WM. & MARY L. REV. 633, 646 (1987).} The written articulation of a decision reflecting \textit{logos} also gives the public the impression of a judiciary grounded in law, logic, and rationality rather than arbitrariness and bias.\footnote{Levy, supra note 117, at 1172.}

Some mechanisms for inhibiting System 2 thinking are inherent in the judicial system. For example, the judicial oath and codes of judicial conduct are mechanisms that require a judge to decide cases
impartially and based on the law.\textsuperscript{120} Federal law requires judges to swear (or affirm) that they “will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States.”\textsuperscript{121} Similar oaths are found under state laws.\textsuperscript{122} Judges attest that they take such oaths seriously.\textsuperscript{123} Certainly, judges’ testimony given in judicial confirmation hearings demonstrates the importance of the judicial oath of impartiality and the primacy of using the law to govern disputes.\textsuperscript{124} An advocate seeking to reduce System 1 thinking by a

\textsuperscript{120} See Roberts Confirmation Hearings, Roberts Statement, supra note 29, at 279-80 (“[The rule of law is] the only client I have as a judge. The Constitution is the only interest I have as a judge. The notion that I would compromise my commitment to that principle that has been the lodestar of my professional life since I became a lawyer because of views toward a particular administration is one that I reject entirely. That would be inconsistent with the judicial oath.”), cited in Robert Alleman & Jason Mazzone, \textit{The Case for Returning Politicians to the Supreme Court}, 61 HASTINGS L.J. 1353, 1392 (2010). See also Michael A. Wolff, \textit{Law Matters: What Do Judges Believe . . . Really?}, Missouri Courts: Judicial Branch of Government (Feb. 27, 2006), https://www.courts.mo.gov/page.jsp?id=90090 (“When citizens come to courts to serve as jurors, we instruct them to set aside their persons beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.”).

\textsuperscript{121} 28 U.S.C.A. § 453 (Westlaw Current through P.L. 115-231).

\textsuperscript{122} See, e.g., WIS. STAT. ANN. § 757.02 (West 2018); IOWA CODE ANN. § 602.10106 (West 2018). The Oath Clause requires: “all . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.” U.S. Const. art. VI, cl. 3. See generally, Michelle L. Jones, \textit{Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification}, 88 IND. L.J. 1089, 1103 (2013).


\textsuperscript{124} See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: S. Comm. on the Judiciary, 109th Cong. 655-56 (2006) (“When you take that judicial oath, you become a different person. You decide cases not to reach the result that you would like, but based on what the facts and the law command”) (statement of Edward R. Backer, U.S. Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania), cited in Harvey Rishikof & Bernard Horowitz, \textit{Clues of Integrity in the Legal Reasoning Process: How Judicial
judge can find a way either gently or explicitly to remind the judge of her oath on this point.\textsuperscript{125} Finally, direct confrontation of an emotionally charged issue can reduce System 1 thinking and encouraging System 2 thinking in decision making.\textsuperscript{126} An advocate seeking to persuade a judge in a situation where the attorney fears a judge may be unconsciously motivated by emotion, intuition, bias or other components that instill System 1 thinking, may wish to draw direct attention to the issue.\textsuperscript{127} Doing so is advisable because the opposing party will likely attempt to include the negative information in its communications with the court. Thus, conveying such negative information from one’s own client’s point of view can make it more sympathetic.\textsuperscript{128} Second, confronting the issue directly encourages the court to focus on the law rather than any emotional responses the facts may raise and thus encourage System 2 thinking in the decision making.\textsuperscript{129}

Other mechanisms inherent in the judicial system work to reduce System 1 thinking in favor of System 2 thinking by judges. In


\textsuperscript{128} Stanchi, \textit{Playing with Fire}, supra note 126, at 388.

\textsuperscript{129} Nicole E. Negowetti suggests “when representing a father in a custody bench trial, counsel might open with: “Your Honor, although the ‘tender years’ doctrine of young children always being awarded to the mother has been overturned, it appears to be alive and well in a few cases. In this case, the father is seeking custody based on the following factors.” Negowetti states that this method “reminds the judge of a specific bias without accusing her of embracing the bias. Negowetti, supra note 99, at 315 (citing Mark A. Drummond, \textit{Section of Litigation Tackles Implicit Bias: Implicit Bias Can Be Eliminated by Awareness}, A.B.A. LITIG. NEWS (Spring 2011), at 20, 21, http://www.charnalaw.com/documents/aba-litigation-news-implicit-bias.pdf).
additional to the oath of office and confirmation hearings discussed above, these mechanisms include judicial training, the use of judicial panels, and the advancement of more specialized courts. These mechanisms are consistent with neoformalist aspirations to recognize the power of pathos but strive to ground decision making in logos over pathos.

b. Pathos as Logos:
   Embracing Pathos to Enhance Logos

Despite all the mechanisms available to advocates and inherent in the judicial system, the project to eliminate or reduce System 1 thinking has significant shortcomings. First, as discussed earlier, some evidence suggests that System 1 thinking cannot be eliminated or divorced from the decision-making process. Hence, there is a futility to such efforts. Second, evidence suggests that System 1 thinking can lead to better decisions. Thus, it is normatively preferable to embrace and even appeal to System 1 thinking. Indeed some scholars who recognize the realist considerations in judicial decision making argue that advocates should embrace and incorporate pathos into their advocacy to appeal to System 1 decision making. To this end, authors can employ strategies connected to narrative theory and principles of “good writing” to directly appeal to pathos. Ironically, these strategies that appeal to pathos also advance logos. Similarly, formalist appeals to logos elicit and serve to enhance pathos. Thus, far from killing formalism, realist appeals to pathos ultimately serve to elevate formalism in legal rhetoric.

i. Strategies related to Narrative Theory

The rhetorical tools below lighten a reader of legal text’s cognitive load and thereby facilitate thought about the subject being

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130 Kahanet al., Whose Eyes Are You Going to Believe?, supra note 62, at 898 (recommending that “a judge engage in a sort of mental double check when ruling on a motion that would result in summary adjudication”); Michele Benedetto Neitz, Socioeconomic Bias in the Judiciary, 61 CLEV. ST. L. REV. 137, 163 (2013) (recommending training to overcome socioeconomic bias); Negowetti, supra note 99, at 315 (recommending potential bias be brought to judge’s attention.)

131 See discussion supra at notes 54–76 at accompanying text.

132 Id.

133 See Maroney, The Persistent Cultural Script, supra note 17, at 681 (referring to emotion).
addressed. While these tools are forms of cognitive manipulation as described by legal realists, these realist tools also facilitate System 2 thinking based in *logos* and thus advance the formalist goal of good decision making. This taming of System 1 thinking to inure to the benefit of System 2 thinking can be characterized as promoting a “neoformalist” position that seeks to acknowledge realist findings in the service of formalist objectives.

This particular neoformalist position is promoted in the scholarship of the legal narrative or “Applied Legal Storytelling” movement, which recognizes that System 1 and System 2 thinking are intertwined in such a way that they reinforce each other. A narrative or story is traditionally viewed as a form of *pathos* because the narrative structure unconsciously elicits emotion. However, narratives organize information in a form that allows a person to follow a logical sequence of thought. It is thus, ultimately, a tool for *logos*. Presenting a client’s position or even a rule of law in the form

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134 Carter, supra note 70, at 41.
136 See discussion supra at notes 1-8 and accompanying text.
140 Paskey, supra note 137, at 76-78. While narrative theory is the subject of recent scholarship, it can be traced back in time to the classic orators of
of a story taps into the way humans process, store, and retrieve information and is thus a powerful tool for persuasion. Indeed, Stephen Paskey argues that storytelling is “grounded in the very nature of law itself.”

Legal narrative rhetoric scholars posit that the choice of words posed to a decision maker is powerful in influencing the cognitive processing of the decision. Intuitively, most writers know to describe events or actions in favorable or unfavorable light by utilizing certain narrative devices. These devices include presenting a particular person’s point of view, using positive or negative adjectives or adverbs, and ordering events in ways that promote a version of events. The simple order of facts or even adjectives can have


141 ROBBINS ET AL., supra note 137, at 37-44; Chestek, *Competing Stories*, supra note 137, at 135-37. See also Paskey, supra note 137.

142 Paskey, supra note 137, at 51.


significant effect on the reader’s consciousness. Empirical evidence appears to support these findings.

The use of alliteration and anaphora when articulating legal rules can be persuasive due to their appeal to System 1 cognition. Similarly, the use of analogy and metaphor are shown to be powerful writing tools for advocates seeking to persuade judges. Such appeals to pathos by advocates are not normatively undesirable but rather are appropriate tools of legal rhetoric that can advance a judge’s attention to the legal issues in a case and ultimately contribute to good decision making.

In one experiment, subjects were asked to read two sets of the same adjectives describing two people but the adjectives were presented in different orders. The study found that the initial adjective in the set had the most significant effect and caused readers to have very different impressions of the person being described. Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, “Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,” 153 U. PA. L. R. 1251 (2005). See also Edna Sussman, What Lurks in the Unconscious: Influences on Arbitrator Decision Making, 32 ALTERNATIVES TO HIGH COST LITIG. 149, 154 (2014). See also Adam M. Samaha, Starting with the Text-on Sequencing Effects in Statutory Interpretation and Beyond, 8 J. LEGAL ANALYSIS 439, 462 (2016).


Berger, Metaphor and Analogy, supra note 148, at 164. See also Patricia M. Wald, 19 Tips from 19 Years on the Appellate Bench, 1 J. APP. PRAC. & PROCESS 7, 21 (1999) (“Pepper your briefs or argument with relevant metaphors or quotations and I can guarantee the best ones will reappear in the judges’ opinions.”). But see Carrie Sperling & Kimberly Holst, Do Muddy Waters Shift Burdens?, 76 MD. L. REV. 629, 657 (2017). See also Berkey v.
More subtle pathetic devices like priming, anchoring, and framing can also have significant effects on a decision maker’s unconscious cognition. Priming is a powerful tool advocates use to advance a client’s position by making a decision maker unconsciously receptive to an idea through its earlier introduction. Anchoring is a related device that can significantly alter a decision maker’s cognitive processing of a particular issue. In anchoring, a decision maker uses a favorable starting point for deliberating about an issue to be decided, particularly when deciding issues involving numbers. Such a starting point or anchor provides a heuristic or shortcut for the decision maker when thinking about the particular issue.

Like priming and anchoring, framing is a powerful rhetorical device whereby the advocate constructs a particular point of view that then guides the audience’s interpretation. Scholars have shown that many people make non-rational decisions due to the intuitive sense
of loss aversion,\textsuperscript{155} preference for status quo,\textsuperscript{156} sunk cost compulsion,\textsuperscript{157} and extreme aversion.\textsuperscript{158} Framing an argument to appeal to these and other intuitions can effectively persuade in a way that bolsters the legal rules underlying the argument.\textsuperscript{159} Advocates must be conscious of the power of these devices that appeal to the

\textsuperscript{155} With loss aversion, a decision maker is less likely to favor a decision that is framed as a loss compared to the same decision framed as a gain. For example, in one study, two groups of people were given the same amount of money and given the choice to keep part of the money or gamble all the money and double the money or possibly lose it all. When one group of people were told “they would ‘keep’ 40% of their money if they didn’t gamble, the volunteers chose to gamble only 43% of the time.” The other group was told they could “lose” 60% of the money if they didn’t gamble, they chose to gamble 62% of the time. Framing their decision as either “keeping” the money or “losing” the money made a significant difference in behavior. De Martino et al., \textit{supra} note 59.

\textsuperscript{156} A number of studies show that a decision maker is more likely to make a decision in favor of continuing a course of behavior when he or she has devoted past efforts compared to if such effort had not been expended in the past. Thus, an attorney advocating for delay or extension in a trial is more likely to prevail in such motions where the court has already devoted significant time and effort. Framing such a motion to take advantage of this cognitive is a form of advocacy that appeals to a judge’s irrational preferences. Kevin J. Lynch, \textit{The Lock-In Effect of Preliminary Injunctions}, 66 Fla. L. Rev. 779, 784-85 (2014), \textit{cited in} Justin R. Pidot, Governance and Uncertainty, 37 Cardozo L. Rev. 113, 172 (2015). \textit{See also} \textit{In re Modafinil Antitrust Litig.}, 837 F.3d 238, 256 (3d Cir. 2016).

\textsuperscript{157} The sunk cost fallacy may also come into play with a judge’s past positions on a given issue. If a judge has taken a position on a particular issue in past cases, the judge’s continuing support for that position may not only stem from a logical consistency but from a more unconscious or irrational entrenchment of a past position. Such entrenchment has been documented in what is called the “backfire effect” discussed below infra.

\textsuperscript{158} An attorney may wish to begin an argument with a broad but weak argument for the purpose of framing the alternative legally stronger argument as a compromise position. Due to the phenomena of “extreme aversion” the judge most likely would reject the weak argument but then be more inclined toward the alternative. Such framing is similar to the advocative device of priming. Kelman et al., \textit{Context Dependence in Legal Decision Making}, 25 J. Legal Stud. 287, 288 (1996), \textit{cited in} Paul Bennett Marrow, \textit{Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations}, 74 N.Y. St. B.J. 46 (July/August 2002).

\textsuperscript{159} Stanchi, \textit{The Power of Priming}, \textit{supra} note 54, at 307-12. \textit{See also} Tversky & Kahneman, \textit{supra} note 154, at 453-54.
unconscious decision making of a judge. Failure to do so could put a client in a significant disadvantage when advocating on his behalf.160

System 1 thinking comes into play with arguments that advance a negation.161 Trying to negate an assertion made by an opposing party can have the unconscious effect of reinforcing the unfavorable assertion162 or at least continuing to influence reasoning of the issue in question in ways that are not connected to conscious rational thinking.163

Negative assertions for some arguments face the “problem of the backfire effect,” where the reader is not persuaded by evidence going against her deeply held pre-existing position.164 This type of cognitive error is quite problematic because of its apparent antipathy to rational


161 Chestek, Fear and Loathing, supra note 53, at 3; Chestek, Of Reptiles and Velcro, supra note 126, at 617-19; Stanchi, Playing with Fire, supra note 126, at 383-92.

162 A number of studies show that when people hear or read a negation such as “Adam is not a drug addict,” rather than simply processing and comprehending the assertion, the person processes the core supposition first (“Adam is a drug addict”) and then the negation (“not”). Such a two-step cognitive process causes the unfavorable assertion (“Adam is a drug addict”) to be repeated and reinforced in the reader’s cognitive processing. See Rachel Giora, A Good Arab Is Not a Dead Arab—a Racist Incitement: On the Accessibility of Negated Concepts, in EXPLORATIONS IN PRAGMATICS: LINGUISTIC, COGNITIVE AND INTERCULTURAL ASPECTS, 129–62 (2007). See also George Lakoff, THE ALL-NEW DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 1-2 (2014).

163 This phenomenon is labelled the “continued influence effect.” Hollyn M. Johnson & Colleen M. Seifert, Sources of the Continued Influence Effect: When Misinformation in Memory Affects Later Inferences, 20 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1420, 1431-33 (1994). When a person learns of events that later turn out to be false, the discredited information continues to influence reasoning and understanding even after being corrected. Id. A legal writer is more advocative if she, rather than directly stating the negation, instead provides assertions that provide counter-factual information that indirectly negate the negative assertion or preemptively raises the negative information to inoculate against its effect. See Chestek, Of Reptiles and Velcro, supra note 126, at 610, 628-29.

decision making and formalistic notions of how a decision maker is supposed to assess information and reach a rational decision. A recognition of the dangers of reinforcing bias through such a backfire effect must be the part of any advocate’s use of pathetic argument.

All of these powerful rhetorical devices that appeal to pathos, however, by convention and culture are surrounded or cloaked in formalist rhetoric. Since formalism is paramount, pathetic rhetoric is advised as best presented through stealth and under the guise of traditional, logos rhetoric. Despite the normative benefits of pathos to judicial making, pathos remains suspect and subordinated to formalism.

**ii. “Good writing” as an appeal to pathos**

Since formalist conventions of legal writing are expected by judges, rhetoric directed at a judge must exhibit its traits. In doing so, these formalistic traits grounded in the appearance of logos simultaneously have positive emotional appeal. One of the fundamental adages of good writing is to “know your audience.” Effective legal rhetoric will take the expressed and implied preferences of its audience into account in order to enhance its efficacy. Good legal advocacy requires, at a minimum, some knowledge of the background and orientation of the judge to whom

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165 Glaeser & Sunstein, supra note 162; Nyhan & Reifler, supra note 162, at 307.
167 Susan A. Bandes, Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty, 33 VT. L. REV. 489, 492–93 (2009) (“To label an influence ‘emotional’ is to say it is inappropriate—the very opposite of the reasoned discourse on which the legal system is premised.”); Shepherd & Cherrick, supra note 166, at 162 (“Many trial lawyers err on the opposite end of the spectrum by thinking that one may present an unrestrained, visceral argument when, in fact, appellate judges resent such a display of feeling in their courtroom.”).
168 See Steven D. Hardin, The Essential Rules of Practice, 40 RES GESTAE 40, 42 (1997). See also Chad Baruch, Everything You Wanted to Know About Legal Writing but Were Afraid to Ask, 17 J. CONSUMER & COM. L. 9, 10 (2013).
169 See id.
arguments are directed.\textsuperscript{170} “Knowing your audience” directs a good advocate to know as much as she can about the judge to whom she writes.\textsuperscript{171} Background research can uncover not only grounds for recusal but also, of equal importance and more practical application, the judge’s explicit and implicit preferences for written documents and legal arguments.\textsuperscript{172} Indeed, professional rules obligate an attorney to review the local rules of a given court and adhere her writing to the expressed preferences of the judge.\textsuperscript{173} However, doing


\textsuperscript{172} See generally Edward D. Cavanagh, Rulemaking, Litigation Culture and Reform in Federal Courts, 35 AM. J. TRIAL ADVOC. 49, 49-51 (2011); Robert E. Larsen, Should a lawyer file a trial brief in every case?, 1 NAVIGATING THE FEDERAL TRIAL § 1:43 (2018 ed.) (pointing out need to follow local rules); See Lisa Blue & Robert B. Hirschkorn, 1 BLUE’S GUIDE TO JURY SELECTION § 2:1 GETTING TO KNOW THE PERSON (West & ATLA 2016).

\textsuperscript{173} Karella v. Ameritech Info. Sys., Inc., 953 F. Supp. 945, 948 (N.D. Ill. 1996) ("[T]he Local rules apply to everyone, and litigants . . . must undertake sufficient investigation to ensure that they comply with the procedural and substantive requirements of the [district court]."); Hon. Zachary J. Hawthorn, TXCLE Firearms Law What Every Texas Lawyer Needs To Know, Additional Layers – Local Rules and Standing Orders, 2016 WL 10608509 (2016) ("Compliance with the local rules is an ethical obligation every licensed attorney must follow."). Many judges supplement the rules of civil procedure for their particular jurisdiction by publishing their own “standing orders” and rules. See, e.g., THE HON. SUSAN J. DLOTT, STANDING
so explicitly appeals to the judge’s pathos and makes the judge more receptive to the underlying position being advocated.

The obligation to determine the judge’s preferences concerning writing, however, goes beyond adhering to the judge’s expressed preferences about fonts, citation forms, and page lengths of a document. With little effort, an attorney can usually find biographical information about a judge that can inform the advocate about potential bias on the part of a judge. Such bias can take the form of past or current activities of a judge that fall far short of the standard for recusal but nonetheless can provide pause about the persuasive techniques an advocate will use. A good lawyer will want to construct her arguments and rhetorical choices in light of the ascertainable biases.

Connected to narrative theory is the recognition of the emotional appeal of “good writing” in a more elemental sense. Good writing

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Courts have dismissed actions or sanctioned attorneys for failure to follow briefing rules. See White Budd Van Ness P’ship v. Major-Gladys Drive Joint Venture, 811 S.W.2d 541, 541 (Tex. 1991) (dismissing action based upon improper type size and margins); see also Westinghouse Elec. Corp. v. N.L.R.B., 809 F.2d 419, 425 (7th Cir. 1987) (imposing sanctions for noncompliance with rules limiting briefs to 50 pages, double spacing, and specified margins).

See Rishikof & Horowitz, supra note 124, at 763; Gould & Leon, supra note 170, at 668; Blue & Hirschhorn, supra note 172.

As a simple example, (taken from the authors own litigation practice,) when an advocate represents a residential tenant who is being evicted by a landlord, the knowledge that the judge is currently the owner of residential property that she leases for profit is important. Such knowledge would likely cause the advocate to frame the defense of the tenant in a way that does not denigrate or demonize landlords as can be found in some stock cultural narratives about “evil landlords.” In addition, the advocate may not want to emphasize the unequal bargaining power between landlords and tenants, since the judge might not be receptive to this characterization based on her experience as a landlord. A good advocate must consider this potential bias and plan to effectively advocate for his client in light of this factor in the judge’s decision-making process.

Id.

Hardwick, supra note 19, at 79-86. For a discussion of what constitutes good legal writing, see Kristen K. Robbins, The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write, 8 LEGAL WRITING 257, 282 (2002); Woodworth, supra note 146, at 333. But see Bernard Black, A
mechanics can lighten a reader’s cognitive load through short, easy to follow sentences and paragraphs that are connected through effective transitions and appropriate groupings of ideas and facts.\textsuperscript{178} A reader of legal writing is not a robot who can simply process strings of facts and thoughts and produce the proper outcome.\textsuperscript{179} Facts and ideas need to be presented in a way that necessarily draws and appeals to the reader’s unconscious expectations of the discourse.\textsuperscript{180}

When the reader’s expectations of good, clear, logical writing are met, the reader will not only consider the substance of the arguments, but the reader will also experience an emotional reaction.\textsuperscript{181} The positive emotion (\textit{pathos}) makes the audience more susceptible to the logical, rational (\textit{logos}) argument.\textsuperscript{182} In other words, a reader’s expectations of good writing can activate System 1 thinking.\textsuperscript{183}

The foundation of good writing is good organization, and a well-organized argument can elicit positive \textit{pathos} that can advance persuasion.\textsuperscript{184} Good organization of an advocate’s argument is persuasive because it lightens the readers’ cognitive load and permits them to easily follow the writer’s paradigm or theme in a way that favorably influences the readers.\textsuperscript{185} Categorizing legal issues is part of

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\textsuperscript{179} Calo, supra note 69, at 217.
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\textsuperscript{180} Jewel, supra note 13, at 61; Fruehwald, supra note 178, at 173-74.
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\textsuperscript{181} Hardwick, supra note 19, at 75-107. \textit{See also} Desmond Manderson, \textit{Et Lex Perpetua: Dying Declarations & Mozart’s Requiem}, 20 \textsc{Cardozo L. Rev.} 1621, 1642 (1999).
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\textsuperscript{183} \textit{See} Hardwick, supra note 19, at 79-84.
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\textsuperscript{185} \textit{See} Jewel, supra note 13, at 62-68; \textit{see also} Michal Shur-Ofry, \textit{Ip and the Lens of Complexity}, 54 \textsc{Idea} 55, 83 (2013).
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organizing a legal argument and is central to effective legal rhetoric. Writers can create positive pathos by framing a legal issue within a certain category, which produces a cognitive shortcut for the audience that can promote the message of the advocate.

A simple writing device for achieving good organization and facilitating cognitive processing is to “chunk” complex text up into shorter and easier to understand parts. Using summary sentences and transitional words and phrases, as well as appropriate headings and subheadings, facilitates the cognitive functions of the reader. These devices not only allow for more attention to System 2 cognitive functions, but also induce a more favorable impression of the writer, thereby promoting the pathos of the writing itself.

Judge Richard Posner wrote that “[e]motion is a form of thought, though compressed and inarticulate, because it is triggered by, and

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189 Professor Kristen Davis makes a similar point when discussing the role of formal memos in the practice of law. She states, “The memo’s formalism forces well-developed deliberation that leads to creative problem-solving and advice giving. It provides a rhetorical ‘space between’ for knowledge construction; the memo itself is the construction of legal advice, not just the recording of it.” Kirsten K. Davis, “The Reports of My Death Are Greatly Exaggerated”: Reading and Writing Objective Legal Memoranda in A Mobile Computing Age, 92 OR. L. REV. 471, 522 (2013) [hereinafter The Reports of My Death]. See also MARY BETH BEAZLEY, HIDING IN PLAIN SIGHT: "CONSPICUOUS TYPE" STANDARDS IN MANDATED COMMUNICATION STATUTES, 40 J. LEGIS. 1, 37 (2014); RUTH ANNE ROBBINS, PAINTING WITH PRINT: INCORPORATING CONCEPTS OF TYPOGRAPHIC AND LAYOUT DESIGN INTO THE TEXT OF LEGAL WRITING DOCUMENTS, 2 J. ALWD 108, 125 (2004).
more often than not produces rational responses to information."\textsuperscript{190} This realist position accepts the importance of System 1 thinking but does so, notably, in order to advance decisions based on the formalist principles of sound logic and rationality. This neoformalist position asserts that "emotion cannot be eliminated but instead should be better understood."\textsuperscript{191} Appeals to emotion or other System 1 thinking mechanisms "do not look like 'legal' arguments" based on analogical or deductive reasoning, but neither are they non-legal.\textsuperscript{192} This rhetoric based on pathos is legally-relevant rational thought.\textsuperscript{193}

On a similar note, two thousand years ago, Aristotle acknowledged the complex interplay between logical and emotional arguments in persuasive writing.\textsuperscript{194} Logical argumentation, according to Aristotle, derives its power from its emotional resonance with the reader.\textsuperscript{195} People in general are emotionally predisposed to value arguments that are, or appear to be, rational and logical.\textsuperscript{196} As Steven Jamar puts it, "[P]eople are persuaded by reason because people value reason."\textsuperscript{197} Lawyers and judges, due to their particular guild and training, have an even stronger cultural predisposition to react emotionally or intuitively in a positive manner towards arguments posed in rational garb.\textsuperscript{198} In legal rhetoric, logos elicits pathos and pathos elicits logos.\textsuperscript{199}

\textsuperscript{191} Maroney, Emotional Competence, supra note 66, at 1403.
\textsuperscript{192} Berger, A Revised View of the Judicial Hunch, supra note 64, at 23.
\textsuperscript{193} Id. at 23-24.
\textsuperscript{194} Frost, supra note 18, at 91, 111; Chestek, Judging by the Numbers, supra note 96, at 5-6.
\textsuperscript{195} Jamar, supra note 20, at 78 ("Speeches using paradigms are not less persuasive, but those with enthymemes excite more favorable audience reaction."); ARISTOTLE, supra note 21, at 26 ("enthemes excite the louder applause.").
\textsuperscript{196} Jamar, supra note 20, at 102.
\textsuperscript{197} Id.
\textsuperscript{198} Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 465 (1897) ("This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.").
\textsuperscript{199} Chestek, Competing Stories, supra note 137, at 129; Lloyd, supra note 182, at 56.
It is the cultural expectations by judges (and society as a whole) about formalist rhetoric that causes such formalist *logos* rhetoric to elicit *pathos*. However, explicit appeals to *pathos* are likely to undercut the effectiveness of legal rhetoric due to the primacy of formalist convention in the outward discourse of judicial decision making and in written judicial opinions. In the face of the abiding but stealth power of *pathos* to influence judicial decisions, *logos* remains the outward face of legal rhetoric. It is *logos*, not *pathos*, that provides the form, structure, and style of legal rhetoric.

4. Instrumental Formalism: The Enduring Utility of *Logos* in Legal Rhetoric

Despite its predicted demise, formalism organizes and directs legal rhetoric. Brian Tamanaha argues that “formalism possesses a great potential for confusion with no compensating, redeeming theoretical value.” Many other scholars assert, “[F]ormalism is dead.” But such statements are incorrect. Whether for good or ill, the foundation of legal advocacy and judicial decision making is formalist in structure and form. On any given day, an attorney is likely to process many “simple” legal issues when addressing a legal matter. While realist forces such as emotion may strongly influence

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200 Tamanaha, Beyond the Formalist-Realist Divide, supra note 5, at 162.
these actions, the tools of formalism provide the structure for the attorney to analyze and communicate her findings about the law and the facts. On this basic level, formalism is the shared discourse of the practicing legal community.

To this end, formalism provides the central pillar of the curriculum of most law school classes and the foundation to how legal discourse is taught. In first year law courses, particularly legal writing classes, students are taught formal rules of law and are assessed on their ability to apply those rules in a logical, usually deductive manner. Such formalist discourse is pronounced in many law school final exams and most markedly on the bar exam. This formalist discourse grounded in logos must be mastered by all lawyers in order to be eligible to practice law.

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203 According to the “Balanced Realists,” formalism dominates the determination of simple or clear-cut legal matters. TAMANHA, BEYOND THE FORMALIST-REALIST DIVIDE, supra note 5, at 185-87.


206 Kraft, supra note 12. See also Cornwell, supra note 12, at 76; DeFabritiis, supra note 12, at 43-44.


209 See generally DeFabritiis, supra note 12, at 43-44; Riebe, supra note 208, at 490.
Further, formalism provides a structure for the teaching of law.\textsuperscript{210} Novice learners benefit from the psychologically pleasing form of *logos* and formalist methods of discourse.\textsuperscript{211} *Logos* can lighten a student learner’s cognitive load by breaking complex issues into understandable categories that can be tied together through organizational chains of logic.\textsuperscript{212} For example, the use of deductive syllogisms provide a scaffold for the learning of law, legal culture, and the jargon of the profession.\textsuperscript{213} Once these formal rules are learned,\textsuperscript{214} they can then be the starting point for a deeper discussion of principles and policies sought to be advanced by the law.\textsuperscript{215}

Formalism is certainly not dead outside of law classes and the bar exam either.\textsuperscript{216} One can turn to any of the recent judicial nomination hearings of United States federal court judges to hear full-throated


\textsuperscript{211} See generally Laura A. Webb, *Why Legal Writers Should Think Like Teachers*, 67 J. LEG. EDUC. 315, 336 (2017); DeFabritiis, supra note 12, at 43-44; Kraft, supra note 12, at 568.

\textsuperscript{212} Webb, supra note 211, at 336.


\textsuperscript{214} Many professors would indicate that the more important skill for students to learn is not the Blackletter law itself, but rather how to find and then critically analyze the Blackletter law. See Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method A Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 276 (2007). The paradox of the case method of teaching is that it usually assesses students based on formalism by expecting the deductive application of Blackletter law on a final written exam. Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 437 (1989); Philip C. Kissam, *The Ideology of the Case Method/Final Examination in Law School*, 70 U. CIN. L. REV. 137, 153 (2001); Adam G. Todd, *Exam Writing As Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 89 (2003).


\textsuperscript{216} See Berger, *Transcript-Afternoon Session*, supra note 2, at 809 (“Except for U.S. Supreme Court confirmation hearings and law school exams, formalism is dead.”).
The endurance of formalism and the primacy of *logos* in legal rhetoric are warranted for beneficial and pragmatic reasons.\(^{220}\)

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\(^{217}\) See Maroney, *The Persistent Cultural Script*, supra note 17, at 636.


\(^{220}\) William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 22 (1998) (“Formalism might be understood as giving priority to rule of law values such as transparency, predictability, and continuity in law.”); Schauer, *Formalism*, supra note 8, at 510 (“At the heart of the word
Formalism is grounded in an ideal.\textsuperscript{221} Formalism, at its core, advances the “rule of law.”\textsuperscript{222} The aspirations of formalism are ones most jurists admire—the desire to resolve disputes and make the decisions about the law predictably, rationally, free of improper bias, and consistent with democratic institutions.\textsuperscript{223}

Furthermore, the integrity of the judicial system rests in the notion that judges will strive to reach decisions that are impartial and based on rules of law.\textsuperscript{224} The anti-formalist position of elevating ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to rule.”).


\textsuperscript{222} Michael C. Dorf, Book Note, \textit{Richard A. Posner, Divergent Paths: The Academy and the Judiciary}, 66 J. LEGAL EDUC. 186, 199 (2016) (“Everyone is a formalist at least to the extent that he or she thinks that in a great many circumstances, the combination of authoritative text and social convention provides reasonably clear answers to a great many questions that, absent clear law, would lead to conflict. How old must one be in the state of Illinois to purchase alcohol? What is the statute of limitations for the federal crime of mail fraud? When does a president’s term start? \textit{Et cetera}. Formalism—understood in this minimal sense—is a moral principle roughly synonymous with belief in the rule of law.”). \textit{See also} Antonin Scalia, \textit{A Matter of Interpretation: Federal Courts and the Law} 25 (Amy Gutmann ed., Princeton Univ. Press 1997) (“The rule of law is about form. . . . Long live formalism. It is what makes a government a government of laws and not of men.”).

\textsuperscript{223} Little, \textit{supra} note 5, at 951-52.

*pathos* over *logos* potentially undermines the public’s image of the judicial system meeting the formalist ideals.\(^{225}\) The articulation of a decision based on *logos* gives the public the impression of a judiciary grounded in law, logic, and rationality, rather than arbitrariness and bias.\(^{226}\) If a judge cannot articulate what can pass as a rational basis for her decision, the judge is unlikely to issue that decision.\(^{227}\) Failing to issue a decision meeting formalist conventions of rationality and logic may very well cause the judge to face possible reversal by higher courts, condemnation by other members of the profession and peers, and possible sanctions and discipline.\(^{228}\)

There are other considerations that can explain judges’ continuing adherence to the guise of formalism. Judges, as do others in the legal profession, aspire to formalist ideals and seek to administer justice impartially.\(^{229}\) The desire for professional advancement, the approval of others in the profession, and the nature of their training all pressure judges to ground their decisions in formalist rhetoric.\(^{230}\) While some argue that such use of formalism serves as a mask to cover the actual non-rationality of judicial decision making, the prevalence


\(^{226}\) Robin Feldman, *A Conversation on Judicial Decision-Making*, 5 HASTINGS SCI. & TECH. L.J. 1, 3 (2013) (“At the very least, the crafting of reasoned, orderly structures of logic has the potential to create the appearance of fair and rational decision-making and to inspire the confidence upon which the consent of the governed may be based.”).


\(^{229}\) Maroney, *The Persistent Cultural Script*, supra note 17, at 630-40. See supra notes 24–29, 82.

The forms and conventions of formalist rhetoric are nevertheless paramount. Even if formalism's ideals of promoting predictability and rationality are illusory, formalism conveys to the public a mask of rationalism and certainty that helps resolve social conflict. The legitimacy of the judicial system is enhanced by formalism's actual or apparent tropes of logic. To this end, the advocate seeking to persuade a judge is bound to present his arguments in formalist conventions. Indeed, judges are known to cut and paste an advocate's exact words into the judge's opinion. Designing a piece of advocative writing to be easily incorporated into a judge's decision is a form or tool of rhetoric that appeals to the judge's non-legal, realist administrative needs. Such a pragmatic realist approach to advocacy improves the persuasiveness of the writing. The irony is

236 David E. Sorkin, Appellate Briefs--A Reader’s Perspective, ILL. B.J., May 1995, at 255, 256; Poulos, supra note 227, at 532–33 (“Finally, logic and reason are the tools that allow the other internal constraints to function. Without them, lawyers could not persuade judges and judges could not persuade colleagues to make or reject a proposed new rule.”).
238 I tell the students in my legal writing classes to be aware, when writing to a judge, that she usually is extremely busy, has many other cases occupying
that this realist appeal is achieved through the use of what must appear to be formalist discourse.

5. Conclusion

Empirical evidence stemming from neuroscience and other related interrelated disciplines ultimately demonstrate the powerful role of non-rational influences in judicial decision making and support for the realist critique of formalism. However, legal formalism remains the central guiding structure for legal discourse and legal rhetoric. Formalism, or at least the appearance of formalism, is central to and is privileged in legal rhetoric over pathos. To this end, legal advocates who seek to persuade a judge must employ a nuanced approach to the use of both logos and pathos. This "neoformalist" approach to logos acknowledges the importance of formalist forms of legal reasoning in the judicial decision-making process. The neoformalist position simultaneously acknowledges the power of realist components of decision making grounded in pathos. However, due to the nature of the legal profession, pathos and logos are not completely separate components of rhetoric but instead are intimately intertwined.²³⁹

Neuroscience and cognitive studies demonstrate the intimate connection between formalism and realism that allows formalism to continue to dominate legal rhetoric despite the power of realism. Formalism is not dead but lives. However, it is peacefully coexisting with realist understandings of what constitutes effective legal rhetoric. Neuro and cognitive science shows good pathos will influence logos. Similarly, good logos will elicit pathos. Thus, lawyers must be fully fluent in formalist logos rhetoric but must be conscious of the power of unconscious pathos as well. As a result, the teaching of legal rhetoric needs to reflect the realist components of effective

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²³⁹ In describing legal rhetoric, Kenneth Chestek uses the metaphor of a strand of DNA. Chestek, Competing Stories, supra note 137, at 129 (“Persuasion is like a double helix: one strand of logos wound tightly with a strand of narrative reasoning, . . . [T]he two strands must complement each other in a natural way.”).
advocacy while self-consciously acknowledging formalism as the dominant form of such discourse.