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 dead[2] 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.

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[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).

[2] *E.g.*, Linda Berger, *Transcript-Afternoon Session*, 61 MERCER L. REV. 803, 809 (2010) [hereinafter Berger, *Transcript-Afternoon Session*]; Lee D. Goldstein, *High Theory and Low Practice: A Dream and Five Theses on Being A Left Lawyer and Legal Worker,* 8 UNBOUND: HARV. J. LEGAL LEFT 133, 162 (2013).

[3] Lee Epstein, *Some Thoughts on the Study of Judicial Behavior,* 57 WM. & MARY L. REV. 2017 (2016) (survey of studies about judicial decision making) [hereinafter Epstein, *Study of Judicial Behavior*]; Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical*

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,[4] the practice and concomitant instruction of legal advocacy remains strongly rooted in formalism.[5] 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

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Research on Judges, 13 ANN. REV. L. & SOC. SCI. 203, 203 (2017) [hereinafter Rachlinski & Wistrich, *Judging the Judiciary by the Numbers*]. *See* discussion infra notes 37–40.

[4] For the purposes of this article, the term "rhetoric" is defined in its classical sense of oral and written persuasive discourse. In particular, I focus on the rhetoric of formal legal argument such as those found in briefs filed or in oral argument made to a court. *See, e.g.,* Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129 (2006). There is an interrelationship between rhetoric and decision making. One informs the other. WENDY OLMSTED, RHETORIC: AN HISTORICAL INTRODUCTION 11 (2006).

[5] The term "formalism" is difficult to define and is often used pejoratively. *See* BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 159-162 (Princeton University Press, 2010) [hereinafter TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE]; Will Rhee, *Law and Practice,* 9 LEGAL COMM. & RHETORIC: 273, 293-94 (2012). *See also* Laura E. Little*, Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U. CAL. DAVIS L. REV. 925, 950-51 (2004). For the purposes of this article, I am defining the term as a theory that describes the adjudicative process by judges when making decisions in response to an advocate's rhetoric. *See* Brian Z. Tamanaha, *The Mounting Evidence Against the "Formalist Age",* 92 TEX. L. REV. 1667 (2014). *See also* Richard A. Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986) [hereinafter Posner, *Legal Formalism*]. Formalism also describes a form of legal rhetoric directed at a judge. *See, e.g.,* Linda L. Berger, *Studying and Teaching "Law As Rhetoric": A Place to Stand,* 16 LEGAL WRITING 3, 4 (2010).

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"[6] 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"[7] 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.[8]

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.

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[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*].

[8] "Neoformalism" here refers to an updated branch of formalism that acknowledges Legal Realism particularly as evidenced by empirical research and analysis. *See* David V. Snyder*, Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 622 n.3 (2001); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 165-86 (2006). *See also* Frederick Schauer, *Formalism,* 97 YALE L.J. 509, 509-11 (1990) [hereinafter Schauer, *Formalism*].

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

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[9] Mary Massaron Ross, *A Basis for Legal Reasoning: Logic on Appeal,* 3 J. ALWD 179, 180 (2006); Richard A. Posner, *Judges' Writing Styles (and Do They Matter?*), 62 U. CHI. L. REV. 1421, 1432 (1995); STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 3 (2d ed. Aspen 1995); Brian Leiter (Book Review), *Positivism, Formalism, Realism: Legal Positivism in American Jurisprudence by Anthony Sebok. New York: Cambridge University Press, 1998*, 99 COLUM. L. REV. 1138, 1144 (1999).

[10] FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND LIFE 137-66 (Oxford: Clarendon Press 1991).

[11] *Id.; see also* TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, *supra* note 5, at 165.

[12] Diane B. Kraft, *Creac in the Real World*, 63 CLEV. ST. L. REV. 567 (2015). *See also* Joel R. Cornwell, *Languages of A Divided Kingdom: Logic and Literacy in the Writing Curriculum,* 34 JOHN MARSHALL L. REV. 49, 76 (2000); Sabrina DeFabritiis, *1L Is the New Bar Prep*, 51 CREIGHTON L. REV. 37, 43 (2017); Laura P. Graham, *Why-Rac? Revisiting the Traditional Paradigm for Writing About Legal Analysis,* 63 U. KAN. L. REV. 681, 681-82 (2015).

[13] *See, e.g.,* Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories,* 13 LEGAL COMM. & RHETORIC 39, 40-41 (2016).

[14] *See, e.g.,* Schauer, *Legal Realism Untamed, supra* note 7, at 752.

[15] *See, e.g.,* Michael D. Gilbert, *Judicial Independence and Social Welfare,* 112 MICH. L. REV. 575, 603 (2014); Richard A. Posner, *Realism About Judges*, 105 NW. U.L. REV. 577, 580 (2011) [hereinafter Posner, *Realism About Judges*].

and only law.[16] Concomitantly, under these formalist notions, judges are supposed to apply such law mechanically and objectively when deciding a given set of facts.[17]

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.[18] Aristotle enumerates three means of "artistic" persuasion, including "*logos*," "*ethos*," and *"pathos."*[19] These means of persuasion each appeal and ultimately persuade a reader in different ways.[20] *Logos* is the means of persuasion that appeals to logic and reason.[21] *Ethos* refers to persuasion based on the writer's credibility and character.[22] *Pathos* refers to persuasion achieved through appeals to emotion, prejudice, bias, and other unconscious feelings of the audience.[23]

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

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[16] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (Thomson West 2008); Greene*, supra* note 6, at 1407-15.

[17] Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 636 (2011) [hereinafter Maroney, *The Persistent Cultural Script*]. *See also* HON. R.J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING (1997); Ross, *supra* note 9, at 182. *See infra* notes 22-24.

[18] MICHAEL SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 11–14 (2d ed. Wolters Kluwer Law & Business 2008) [hereinafter SMITH, ADVANCED LEGAL WRITING]; *see also* Michael Frost, *Ethos, Pathos & Legal Audience,* 99 DICK. L. REV. 85, 86 (1994).

[19] Greene, *supra* note 6; Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation,* 3 J. ALWD 75, 75-107 (2006).

[20]SMITH, ADVANCED LEGAL WRITING, *supra* note 18, at 11–14; Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 76 (2001-2002).

[21]*See* ARISTOTLE, RHETORIC 8 (W. Rhys Roberts trans., Modern Library 1st ed. 1954); SMITH, ADVANCED LEGAL WRITING, *supra* note 18, at 11.

[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*.[24] Rule-based analysis is deemed to be "the dominant form of reasoning" found in legal arguments made to judges.[25] This preference for appeals to logic and legal principles stems from formalist notions that assume judges primarily make decisions grounded in logic and law.[26] Thus, an advocate must appeal to logic and law when attempting to persuade a judge.[27] 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."[28] 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.

[25] SMITH, ADVANCED LEGAL WRITING, *supra* note 18, *cited in* Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda,* 46 WILLAMETTE L. REV. 255, 259-61 (2009). *See also* Price, *supra* note 24, at 995.

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

[27] *Id.*; Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?,* 97 CORNELL L. REV. 191, 217 (2012); The Honorable Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of A Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L. FORUM 1, 9 (2009) [hereinafter Davis, The Richness of Experience].

[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

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[29] Confirmation Hearings on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Before the S. Judiciary Comm., 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., appointee, Chief Justice United States Supreme Court), https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf [hereinafter Roberts Confirmation Hearings, Roberts Statement].

[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.

[31] Posner, *Legal Formalism*, *supra* note 5, at 180-81; Thomas C. Grey, (Book Review) *Modern American Legal Thought Patterns of American Jurisprudence. by Neil Duxbury. Oxford: Oxford University Press, 1995. $49.95.*, 106 YALE L.J. 493, 500 (1996).

[32] Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1225 (2015).

[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).

[34] Barzun, *supra* note 32, at 1225; Richard Delgado, (Book Review) *Toward A Legal Realist View of the First Amendment Dissent, Injustice, and the Meanings of America. by Steven H. Shiffrin. Princeton, New Jersey: Princeton University Press. 1999. Pp. Xiv, 204. $29.95.*, 113 HARV. L. REV. 778 (2000).

decision making process and the effect of forms of legal rhetoric on judges.[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.[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."[37] Early legal realists posited that judicial decision making is influenced by a judge's politics and ideology.[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.[39] Realists of all stripes

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[35] Posner, *Realism About Judges*, *supra* note 15, at 579; 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, at 203. *See also* Joshua B. Fischman, *Reuniting "Is" and "Ought" in Empirical Legal Scholarship,* 162 U. PA. L. REV. 117, 120 (2013).

[36] TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, *supra* note 5, at 67-108. *See also* Kathryn Abrams, *Some Realism about Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 507 (1999). *See also* Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality,* 2014 UTAH L. REV. 389, 445 (2014).

[37] ROBERT SATTER, DOING JUSTICE: A TRIAL JUDGE AT WORK 64 (1990), *cited in* Brian Leiter, *Rethinking Legal Realism: Toward A Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 n.6 (1997). *See also* Timothy P. O'Neill, *Law and "The Argumentative Theory"*, 90 OR. L. REV. 837, 845 (2012).

[38] Davis, *The Richness of Experience*, *supra* note 27, at 11-13 (quoting Joseph William Singer, *Legal Realism Now,* 76 CAL. L. REV. 467, 470-71 (1988)).

[39] 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, 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., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889 (2011), *cited in* DANIEL KAHNEMAN, 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, *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.[40]

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 Damazio among many others provide compelling evidence for the power of *pathos* over *logos* in decision making including judicial decision making.[41] 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.[42] 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.[43]

Matters in Decisionmaking, 40 FLA. ST. U.L. REV. 537 (2013). Another recent inquiry, conducted by Corey Rayburn Yung, identified partisanship as significantly influencing decision making by many judges on the federal courts. Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505 (2012). *See also* Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1924 (2013).

[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 Kahanet 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.[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.[45] Kahneman labeled the mental mechanisms that produce unconscious, intuitive decisions as "System 1" and the more deliberate, rational decision making as "System 2."[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.[47] Theorists note System 1's importance in creativity and imagination.[48]

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

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[44] KAHNEMAN, *supra* note 39.
[45] *Id.* at 29.
[46] *Id.* at 20–22.
[47] *Id.* at 20.
[48] Norris, P. and Epstein, S., *An Experiential Thinking Style: Its Facets and Relations With Objective and Subjective Criterion Measures,* 79 JOURNAL OF PERSONALITY, 1043–1080 (2011). *See also* Scott Barry Kaufman and Jerome L. Singer, Guest Blog, *The Creativity of Dual Process "System 1" Thinking,* Scientific American online (January 17, 2012), http://blogs.scientificamerican.com/guest-blog/the-creativity-of-dual-process-System-1-thinking/.
[49] KAHNEMAN, *supra* note 39.
[50] *Id.*
[51] Wistrich et al., *Heart Versus Head*, *supra* note 7, at 857-863; Rachlinski & Wistrich, *Judging the Judiciary by the Numbers*, *supra* note 3.
[52] *Id.*

with appeals to *pathos* and *ethos*, while System 2 thinking is associated with *logos*.[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*.

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.[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.[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.[56] He found the people with damaged orbitofrontal cortex were unable to make even simple decisions.[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.[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

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[53] Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias,* 14 LEGAL COMM. & RHETORIC 1, 33 (2017) [hereinafter Chestek, *Fear and Loathing*].

[54] Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader,* 89 OR. L. REV. 305, 310 (2010) [hereinafter Stanchi, *The Power of Priming*]; Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 166 (2012).

[55] KAHNEMAN, *supra* note 39. *See also* Chris Guthrie et al., *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 778 (2001) [hereinafter Guthrieet al., *Inside the Judicial Mind*].

[56] ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 34-51 (2005).

[57] *Id.*

[58] Antoine Bechara et al., *Emotion, Decision Making and the Orbitofrontal Cortex*, 10 CEREBRAL CORTEX 295, 295-307 (2000).

necessity of emotional and unconscious parts of the brain in the decision making process.[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.[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.[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.[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.[63]

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

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[59] Benedetto De Martino et al., *Frames, Biases, and Rational Decision-Making in the Human Brain*, 313 SCI. 684 (2006).

[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. UTTAL, THE NEW PHREONOLOGY: 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).

[61] Wistrich et al., *Heart Versus Head*, *supra* note 7, at 880.

[62] Dan Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) [hereinafter Kahanet al., *Whose Eyes Are You Going to Believe?*].

[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.

[64] Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2006). *See also* GERD GIGERENZER & PETER M. TODD, SIMPLE HEURISTICS THAT MAKE US SMART 6 (Oxford University Press, Inc. 1999); Berger, *A Revised View of the Judicial Hunch,* 18 LEGAL COMM. & RHETORIC 1, 10-12 (2013) [hereinafter Berger, *A Revised View of the Judicial Hunch*]; MALCOM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 5-8 (Little, Brown & Co. 2005).

decision-making processes, they surprisingly made worse decisions.[65] 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.[66] Bandes writes, "Emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions."[67] 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.[68] Intuitively, people prefer a legal system administered by humans who are guided by emotion, empathy, and a moral sense of justice.[69]

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

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[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).

[66] SUSAN A. BANDES, *Introduction*, in THE PASSIONS OF LAW 1, 7 (Susan A. Bandes ed., 1999) [hereinafter BANDES, *Introduction*]; Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1435 (2006) [hereinafter Maroney, *Emotional Competence*]. *See also* Maroney, *The Persistent Cultural Script*, *supra* note 17, at 681.

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

[68] Susan A. Bandes, *Moral Imagination in Judging,* 51 WASHBURN L.J. 1, 10 (2011); Maroney, *The Persistent Cultural Script*, *supra* note 17, at 670. *See also* Melinda Carrido, *Revisiting the Insanity Defense: A Case for Resurrecting the Volitional Prong of the Insanity Defense in Light of Neuroscientific Advances,* 41 SW. L. REV. 309, 312 (2012).

[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.[70] As a result, when processing thought, humans use shortcuts or heuristics to facilitate thought and avoid cognitive overload.[71] This "cognitive load theory" helps explain the benefits of System 1 thinking in the decision-making process.[72]

These and other similar studies were recently collected in two useful articles, Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*[73] and Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*.[74] The collection of empirical data presented in these articles demonstrate the importance of *pathos* in legal rhetoric.[75] 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.[76] 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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[70] Andrew M. Carter, *The Reader's Limited Capacity: A Working Memory Theory for Legal Writers*, 11 LEGAL COMM. & RHETORIC 31, 41 (2014). *See also* Jewel, *supra* note 13, at 77.

[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.

[75] *See* Shai Danzigera, Jonathan Levavb, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions,* 108 PUB. NAT'L ACA. SCIENCE 6889 (April 26, 2011), http://www.pnas.org/content/108/17/6889. *But see* Andreas Glöckner, *The irrational hungry judge effect revisited: Simulations reveal that the magnitude of the effect is overestimated,* 11 JUDGMENT AND DECISION MAKING 601 (Nov. 2016).

[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*).[77] 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.[78] In most cases, Tamanaha argues, judges want and try their best to uphold their oaths to follow the law.[79] He calls this position "balanced realism" which he uses to reclaim the importance of formalism in the decision making process.[80] However, Tamanaha's thesis is not supported by the majority of studies by scholars of cognitive science that demonstrate the power of *pathos*.[81]

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 dent 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.[82] 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.[83]

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"[84] but that the debate today is not whether judges are motivated

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[77] TAMANAHA, 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] Kahanet 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.*
[84] Brian Leiter, *Legal Realisms, Old and New,* 47 VAL. U. L. REV. 949, 954 (2013). *See also* Gregory S. Alexander, *Comparing the Two Legal Realisms - American and Scandinavian,* 50 AM. J. COMP. L. 131, 131 (2002).

by extra-legal considerations; instead, the debate is about *when and how much* they are motivated by such considerations.[85] 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.[86] This is particularly true on the appellate level.[87] 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.[88] 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.[89] Rules of civil procedure and the realism of practice thus reserve only uncertain legal arguments for the judge.[90] 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.).

[89] *See* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 230 (2014). *See also* Dr. Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 49 (2004).

[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.[91] 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.[92] 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.[93] For example, Holger Spamann, Lars Klohn, and Avani Mehta Sood argue that a judge's feelings about litigants affects his determination of a legal issue.[94] Another study found that a judge's personal background influences his decision making.[95] Stories can also influence the decisions of appellate judges.[96] 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.[97] 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.

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confidentiality agreements."); Bruce A. Ericson, *Attitude of Judiciary*, 4 BUS. & COM. LITIG. FED. CTS. § 35:2 (4th ed.).

[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.

[94] Holger Spamann & Lars Klöhn, *Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges,* 45 J. LEGAL STUD. 255, 256-59 (2016); Avani Mehta Sood*, Applying Empirical Psychology to Inform Courtroom Adjudication-Potential Contributions and Challeng*es, 130 HARV. L. REV. F. 301 (2017).

[95] Jill D. Weinberg & Laura Beth Nielson, *Examining Empathy: Discrimination, Experience, and Judicial Decision Making*, 85 S. CAL. L. REV. 313, 351 (2012).

[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*.[98]

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.[99] 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.[100] 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.[101]

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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[98] Eileen A. Scallen, *Nobody Likes A Sophist Until They Need One,* 110 PENN. ST. L. REV. 923, 926-27 (2006).

[99] *See, e.g.,* Berger, *A Revised View of the Judicial Hunch*, *supra* note 64, at 18; Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 278 (2014); Jewel, *supra* note 13, at 77; Stanchi, *The Power of Priming*, *supra* note 54, at 307–12. *See also* Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC 45, 62 (2017).

[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).

[101] Govind Persad, *When, and How, Should Cognitive Bias Matter to Law?,* 32 LAW & INEQ. 31, 32 (2014).

judicial decision making continue to keep formalism alive,[102] thus advancing a new style of formalism or "neoformalism"[103] that engages realist findings while still advancing and privileging the structures of formalism.

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.[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.[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.[106] Under federal law and many state codes of judicial

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[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?").

[103] The term "neoformalism is used by some scholars to refer to the endurance and revival of formalism. *See* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse*), 95 IOWA L. REV. 195, 216 (2009); Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1119 (2013). *See also* Symposium, *Formalism Revisited,* 66 U. CHI. L. REV. 527 (1999). "Neoformalism" is also term applied to a school of contract jurisprudence. *See, e.g.,* John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 905 n.193 (2002).

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

[105] *See generally*, Rachlinski & Wistrich, *Judging the Judiciary by the Numbers*, *supra* note 3.

[106] Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U. L. REV. 943, 1003 (2011). *See also* W. Bradley Wendel,

conduct, a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[107] In addition, a judge must disqualify himself if "he has a personal bias or prejudice concerning a party . . . ."[108] 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.[109] Seeking recusal, however, can be difficult.[110]

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.[111] This model is reflected in what has been called the "intuition override model."[112] 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.[113] First, requesting the

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The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real, 42 MCGEORGE L. REV. 35, 39 (2010).

[107] 28 U.S.C.A. § 455(a) (Westlaw Current through P.L. 115-231).

[108] 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.'").

[109] *See* Prescott Loveland, *Acknowledging and Protecting Against Judicial Bias at Fact-Finding in Juvenile Court*, 45 FORDHAM URB. L.J. 283, 311 (2017). *See generally* Edward L. Wilkinson, *Judicial Disqualification and Recusal in Criminal Cases*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 76 (2016); Daniel Smith, *When Everyone Is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard*, 3 CASE W. RESERVE J.L. TECH. & INTERNET 66, 81-83 (2012); Jeffrey T. Fiut, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 BUFF. L. REV. 1597, 1610-22 (2009).

[110] Bam, *supra* note 106, at 956.

[111] Guthrie et al., *Blinking on the Bench*, *supra* note 104, at 36-37; Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEG. FORUM 271, 327 (2013).

[112] 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.

[113] 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.[114]

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.[115] The articulation of a judicial decision and the reasoning behind the decision, particularly in writing, forces System 2 thinking.[116] 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.[117] 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.[118] The written articulation of a decision reflecting *logos* also gives the public the impression of a judiciary grounded in law, logic, and rationality rather than arbitrariness and bias.[119]

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

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a more slow, System 2 deliberation by the judge may provide a more "rational" and logical ruling grounded in the favorable precedent.

[114] Guthrie et al., *Blinking on the Bench*, *supra* note 104, at 36.

[115] *Id.*; Gordon Bermant, *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.

[116] Martha J. Dragich, *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, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 57-58 (Houghton Mifflin 1980). *See also* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 120 (West Pub. 1994).

[117] Asha Amin, *Implicit Bias in the Courtroom and the Need for Reform,* 30 GEO. J. LEG. ETHICS 575, 590 (2017). *See also* Suzanne Levy, *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).

[118] *See, e.g.,* William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process,* 28 WM. & MARY L. REV. 633, 646 (1987).

[119] Levy, *supra* note 117, at 1172.

impartially and based on the law.[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."[121] Similar oaths are found under state laws.[122] Judges attest that they take such oaths seriously.[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.[124] An advocate seeking to reduce System 1 thinking by a

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[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, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1392 (2010). *See also* Michael A. Wolff, *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.").

[121] 28 U.S.C.A. § 453 (Westlaw Current through P.L. 115-231).

[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, *Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification,* 88 IND. L.J. 1089, 1103 (2013).

[123] Amin, *supra* note 117, at 587; Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think*, 108 MICH. L. REV. 859, 874 (2010); John F. Banzhaf III et al., *Protecting the Public Health: Litigation and Obesity,* 7 J.L. ECON. & POLICY 259, 268 (2010).

[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, *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.[125]

Finally, direct confrontation of an emotionally charged issue can reduce System 1 thinking and encouraging System 2 thinking in decision making.[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.[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.[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.[129]

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

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Biographies Shed Light on the Rule of Law, 67 SMU L. REV. 763, 766–67 (2014). *See also* Roberts Confirmation Hearings, Roberts Statement, *supra* note 29.

[125] *See generally* Melinda A. Marbes, Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors, 7 ST. MARY'S J. LEGAL MAL. & ETHICS 238, 269 (2017). *See also* Abdullahi Ahmed An-Na'im, *Banning Sharia Is A "Red Herring": The Way Forward for All Americans*, 57 ST. LOUIS U. L.J. 287 (2013).

[126] Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 383-92 (2008) [hereinafter Stanchi, *Playing with Fire*]; Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion,* 15 NEV. L.J. 605, 623 (2015) [hereinafter Chestek, *Of Reptiles and Velcro*]; Negowetti, *supra* note 99, at 315.

[127] Stanchi, *Playing with Fire*, *supra* note 126, at 383-92.

[128] Stanchi, *Playing with Fire*, *supra* note 126, at 388.

[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, *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.[130] 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.[131] Hence, there is a futility to such efforts.[132] Second, evidence suggests that System 1 thinking can lead to better decisions.[133] 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.[134] 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.[135] 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.[136]

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.[137] A narrative or story is traditionally viewed as a form of *pathos* because the narrative structure unconsciously elicits emotion.[138] However, narratives organize information in a form that allows a person to follow a logical sequence of thought.[139] It is thus, ultimately, a tool for *logos*.[140] 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.

[135] Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda,* 46 WILLAMETTE L. REV. 255, 259-61 (2009). *See also* Lea B. Vaughn, *Feeling at Home: Law, Cognitive Science, and Narrative*, 43 MCGEORGE L. REV. 999 (2012); Susan M. Chesler & Karen J. Sneddon, *Tales from A Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237, 274 (2017).

[136] See discussion *supra* at notes 1-8 and accompanying text.

[137] RUTH ANNE ROBBINS ET AL., YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 37-44 (Wolters Kluwer Law & Business) (2013); Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC 99, 135-37 (2012) [hereinafter Chestek, *Competing Stories*]. *See also* Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules,* 11 LEGAL COMM. & RHETORIC 51, 78 (2014). Vaughn, *supra* note 135, at 1028-29.

[138] Paskey, *supra* note 137, at 58. *See also* Philip N. Meyer, *Shaping Your Legal Storytelling Voice and Perspective Can Affect How the Law Is Applied to the Facts of Your Case*, 100 ABA J. 26 (October 2014); Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice,* 11 J. APP. PRAC. & PROCESS 1, 3 n.7 (2010), *cited in* Will Rhee, *Law and Practice*, 9 LEGAL COMM. & RHETORIC 273, 313 n.180 (2012).

[139] Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys,* 14 LEGAL COMM. & RHETORIC 99. *See also* Chestek, *Competing Stories*, *supra* note 137, at 129.

[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.[141] Indeed, Stephen Paskey argues that storytelling is "grounded in the very nature of law itself."[142]

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.[143] 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.[144] The simple order of facts or even adjectives can have

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ancient Greece and Rome. Stephanie A. Vaughan, *Persuasion Is an Art . . . But It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 653 (2009).

[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.

[143] Talmage Boston, *Excerpt from Raising the Bar: The Crucial Role of the Lawyer in Society*, 75 TEX. B.J. 374, 375 (2012); Stephen E. Smith, *A Rhetorical Exercise: Persuasive Word Choice,* 49 U.S.F. L. REV. 37, 37-39 (2015). Empirical studies confirm the power of such devices. For example, in one study, subjects were shown a video of a car crashing into a wall. The subjects' estimates of the speed of the car differed significantly if the subject was asked" how fast" the car was going as opposed to "how slow" or "what speed" it was going. Elizabeth F. Loftus and John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, JOURNAL OF VERBAL LEARNING AND VERBAL BEHAVIOR, 13, 585-89 (1974), http://www.ufo.it/testi/reich.htm. *See also* Robert M. Reyes et al., *Judgmental Biases Resulting from Differing Availabilities of Arguments*, 39 J. OF PERS. SOC. PSYCH. 2-12 (1980), *cited in* Susie Salmon, *Use Your Words*, 53 ARIZ. ATT'Y 12, 12 (January 2017).

[144] Cathren Koehlert-Page*, Come A Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399, 409 (2011) (use of point of view, chronology, and legal mechanics for advocacy).

significant effect on the reader's consciousness.[145] Empirical evidence appears to support these findings.[146]

The use of alliteration and anaphora when articulating legal rules can be persuasive due to their appeal to System 1 cognition.[147] Similarly, the use of analogy and metaphor are shown to be powerful writing tools for advocates seeking to persuade judges.[148] 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.[149]

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[145] 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).

[146] *See generally*, William D. Woodworth*, The Ethics and Science of the Legal Writing Art: An Interdisciplinary Approach,* 67 SYRACUSE L. REV. 329, 338 (2017).

[147] *See* Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create A More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 LEGAL WRITING 65 (2010). *See also* THE BLOOMSBURY COMPANION TO COGNITIVE LINGUISTICS 197 (Jeannette Littlemore, John R. Taylor eds., 2014); Christian Obermeier et al., *Aesthetic and Emotional Effects of Meter and Rhyme in Poetry,* 4 FRONT PSYCHOL. 10 (2013) (showing that meter and rhyme have an impact on aesthetic liking, emotional involvement). An example where one judge did not appreciate alliteration see *Pollet v. Aurora Loan Services*, A-10-CA-580-SS, 2010 WL 11541765, at *2 (W.D. Tex. Oct. 6, 2010).

[148] Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POLICY 147, 156 (2013) [hereinafter Berger, *Metaphor and Analogy*]. *See also* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment,* 108 PSYCHOL. REV. 814, 814 (2001).

[149] 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.[150] Anchoring is a related device that can significantly alter a decision maker's cognitive processing of a particular issue.[151] In anchoring, a decision maker uses a favorable starting point for deliberating about an issue to be decided, particularly when deciding issues involving numbers.[152] Such a starting point or anchor provides a heuristic or shortcut for the decision maker when thinking about the particular issue.[153]

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.[154] Scholars have shown that many people make non-rational decisions due to the intuitive sense

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Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Justice Cardozo states, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

[150] Stanchi, *The Power of Priming*, *supra* note 54, at 307–12. *See also* Venter, *supra* note 99, at 62 (2017) (citing Sean Duffy & L. Elizabeth Crawford, *Primacy or Recency Effects in Forming Inductive Categories*, 36 MEMORY & COGNITION 567, 568 (2008)).

[151] Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1693 (2013); Guthrie, et al., *Inside the Judicial Mind*, *supra* note 55, at 787-790; Danya Shocair Reda, *How the Anchoring Effect Might Have Saved the Civil Rule-Makers Time, Money, and Face,* 34 REV. LITIG. 751, 752 (2015).

[152] Reda, *supra* note 151, at 752.

[153] In one study, judges' final award damages were significantly affected by the amount of the demand made at the settlement conference even though the cases were the same. Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 422 (2011).

[154] Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1315 (2008) (explaining how the way in which judges think about an issue depends on how doctrine is framed); Frederick Schauer, *Do Cases Make Bad Law?,* 73 U. CHI. L. REV. 883, 897-98 (2006)). *See also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981) (http://psych.hanover.edu/classes/Cognition/Papers/tversky81.pdf.).

of loss aversion,[155] preference for status quo,[156] sunk cost compulsion,[157] and extreme aversion.[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.[159] Advocates must be conscious of the power of these devices that appeal to the

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[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., *supra* note 59.

[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, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 784-85 (2014), *cited in* Justin R. Pidot, Governance and Uncertainty, 37 CARDOZO L. REV. 113, 172 (2015). *See also In re Modafinil Antitrust Litig.,* 837 F.3d 238, 256 (3d Cir. 2016).

[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.

[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 adversion" 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., *Context Dependence in Legal Decision Making,* 25 J. LEGAL STUD. 287, 288 (1996), *cited in* Paul Bennett Marrow, *Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations*, 74 N.Y. ST. B.J. 46 (JULY/AUGUST 2002).

[159] Stanchi, *The Power of Priming*, *supra* note 54, at 307-12. *See also* Tversky & Kahneman, *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 assertion[162] 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

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[160] Judith D. Fischer, *Summing It Up with Panache: Framing A Brief's Summary of the Argument*, 48 JOHN MARSHALL L. REV. 991, 992 (2015); Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 462 (2014).

[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.

[164] Nyhan & Reifler, *supra* note 162, at 307-08. *See also* Adam Grant & Sheryl Sandberg, *When Talking About Bias Backfires*, N.Y. TIMES, Dec. 6, 2014, http://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html?_r=0.

decision making and formalistic notions of how a decision maker is supposed to assess information and reach a rational decision.[165] 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.[166] Despite the normative benefits of *pathos* to judicial making, *pathos* remains suspect and subordinated to formalism.[167]

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."[168] Effective legal rhetoric will take the expressed and implied preferences of its audience into account in order to enhance its efficacy.[169] 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.

[166] *See* Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?,* 4 DREXEL L. REV. 417, 453 (2012); John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 3 J. ALWD 154, 156 (2006) ("An argument to a judge requires counsel to engender emotion in a subtle and more skillful manner."); Jewel, *supra* note 13, at 75.

[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.[170] "Knowing your audience" directs a good advocate to know as much as she can about the judge to whom she writes.[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.[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.[173] However, doing

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[170] *See id.* ("'Research your judge's background, find out something about his or her education, legal career and professional activities before joining the bench.'"). *See also* Rishikof & Horowitz, *supra* note 124, at 763. In view of the research that shows a judge's background affects her decision, there is an argument that an advocate has an ethical obligation to do some research into a judge's background if properly advocating for a client appearing before that judge. *See, e.g.,* David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 377 (2012); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156 (2009); Jon B. Gould & Kenneth Sebastian Leon, *A Culture That Is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643, 667 (2017); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179-81 (2013); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases,* 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 333, 339 (1962); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1786 (2005).

[171] Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, 43 TEX. J. BUS. L. 593, 596 (2009); Jessica Ronay, *A Mother Goose Guide to Legal Writing*, 36 U. LA VERNE L. REV. 119, 128 (2014).

[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. HIRSCHHORN, 1 BLUE'S GUIDE TO JURY SELECTION § 2:1 GETTING TO KNOW THE PERSON (West & ATLA 2016).

[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.[174] 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.[175] A good lawyer will want to construct her arguments and rhetorical choices in light of the ascertainable biases.[176]

Connected to narrative theory is the recognition of the emotional appeal of "good writing" in a more elemental sense.[177] Good writing

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ORDER ON CIVIL PROCEDURES, UNITED STATES SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION AT CINCINNATI (Feb. 2018), http://www.ohsd.uscourts.gov/sites/ohsd/files/Dlott%20Civil%20Procedure%20Standing%20Order%201.pdf.

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 non-compliance with rules limiting briefs to 50 pages, double spacing, and specified margins).

[174] *See* Rishikof & Horowitz, *supra* note 124, at 763; Gould & Leon, *supra* note 170, at 668; BLUE & HIRSCHHORN, *supra* note 172.

[175] 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.

[176] *Id.*

[177] 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.[178] A reader of legal writing is not a robot who can simply process strings of facts and thoughts and produce the proper outcome.[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.[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.[181] The positive emotion (*pathos*) makes the audience more susceptible to the logical, rational (*logos*) argument.[182] In other words, a reader's expectations of good writing can activate System 1 thinking.[183]

The foundation of good writing is good organization, and a well-organized argument can elicit positive *pathos* that can advance persuasion.[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.[185] Categorizing legal issues is part of

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Model Plain Language Law, 33 STAN. L. REV. 255, 284 (1981) (recognizing the subjective nature of defining "good writing").

[178] E. Scott Fruehwald, *Review: The Sense of Style: The Thinking Person's Guide to Writing in the 21st Century!,* 23 PERSPS. TEACHING LEGAL RES. & WRITING 173, 174 (2015); Mary Barnard Ray, *Writing on the Envelope: An Exploration of the Potentials and Limits of Writing in Law,* 49 DUQ. L. REV. 573, 593 (2011); Jewel, *supra* note 13, at 61.

[179] Calo, *supra* note 69, at 217.

[180] Jewel, *supra* note 13, at 61; Fruehwald, *supra* note 178, at 173-74.

[181] Hardwick, *supra* note 19, at 75-107. *See also* Desmond Manderson, *Et Lex Perpetua: Dying Declarations & Mozart's Requiem,* 20 CARDOZO L. REV. 1621, 1642 (1999).

[182] Harold Anthony Lloyd, *Cognitive Emotion and the Law,* 41 L. & PSYCHOL. REV. 53, 56 (2017).

[183] *See* Hardwick, *supra* note 19, at 79-84.

[184] Tonya Kowalski, *Strengthen Your Paragraphs with Tailored Topic Sentences*, J. KAN. B. ASS'N , Oct. 2012, at 12, 12, 17. *See also* Beth D. Cohen and Pat Newcombe, *What Legal Writer can Learn From Paint Nite*, 25 PERSPS. TEACHING LEGAL RES. & WRITING 35 (2016); Julie Williamson, *Making the Arbitrator's Job Easier*, COLO. LAW., Aug./Sept. 2017 at 32, 35; Osbeck, *supra* note 166, at 436 (citing RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 55 (6th ed. 2009)).

[185] *See* Jewel, *supra* note 13, at 62-68; *see also* Michal Shur-Ofry, *Ip and the Lens of Complexity,* 54 IDEA 55, 83 (2013).

organizing a legal argument and is central to effective legal rhetoric.[186] 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.[187]

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.[188] 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.[189]

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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[186] Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us about the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 185 (2014); Jewel, *supra* note 13, at 40; Shur-Ofry, *supra* note 185, at 83. *See generally* GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1990).

[187] Beryl Blaustone, *Improving Clinical Judgment in Lawyering with Multidisciplinary Knowledge About Brain Function and Human Behavior: What Should Law Students Learn About Human Behavior for Effective Lawyering?*, 40 U. BALT. L. REV. 607, 632 (2011). *See also* STEVEN HARNAD, *To Cognize is to Categorize: Cognition is Categorization, in* HANDBOOK OF CATEGORIZATION IN COGNITIVE SCIENCE 22-28 (Henri Cohen & Claire Lefebvre eds., 2006).

[188] Wayne Schiess, *Writing to the Trial Judge – For Motions*, 12 SCRIBES J. LEGAL WRITING 131, 136 (2008-2009); Charles T. Frazier, Jr., *Changing Habits, New Principles: Legal Writing in the Electronic Age – Part 2,* DRI FOR THE DEF., Dec. 2017, at 96; Berger, *Metaphor and Analogy, supra* note 148, at 156.

[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."[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."[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.[192] This rhetoric based on *pathos* is legally-relevant rational thought.[193]

On a similar note, two thousand years ago, Aristotle acknowledged the complex interplay between logical and emotional arguments in persuasive writing.[194] Logical argumentation, according to Aristotle, derives its power from its emotional resonance with the reader.[195] People in general are emotionally predisposed to value arguments that are, or appear to be, rational and logical.[196] As Steven Jamar puts it, "[P]eople are persuaded by reason because people value reason."[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.[198] In legal rhetoric, *logos* elicits *pathos* and *pathos* elicits *logos*.[199]

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[190] Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1063 (2006).
[191] Maroney, *Emotional Competence, supra* note 66, at 1403.
[192] Berger, *A Revised View of the Judicial Hunch*, *supra* note 64, at 23.
[193] *Id.* at 23-24.
[194] Frost, *supra* note 18, at 91, 111; Chestek, *Judging by the Numbers, supra* note 96, at 5-6.
[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.").
[196] Jamar, *supra* note 20, at 102.
[197] *Id.*
[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.").
[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."[200] Many other scholars assert, "[F]ormalism is dead."[201] 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.[202] 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.

[201] Dennis Patterson, *What Is at Stake in Jurisprudence*?, 28 OKLA. CITY U. L. REV. 173, 180 (2003). *See also* William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1399 (1997); Dan Simon, *The Double-Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 OR. L. REV. 1033, 1070 (2000); Berger, *Transcript-Afternoon Session*, *supra* note 2, at 809; Goldstein, *supra* note 2, at 162.

[202] A particularly pernicious example of rhetorical formalism can be found in the language and reasoning of *Plessy v. Ferguson*. 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). A more modern and mundane example of rhetorical formalism is evident in Chief Justice Roberts' methodical decision concerning Federal Rule of Civil Procedure 42(a) in *Hall v. Hall,* 138 S. Ct. 1118 (2018). *See also* Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms, in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 15, 17 (Cornell W. Clayton & Howard Gillman eds., 1999) (noting that "precedent, *stare decisis*, and formalism continue to be the way most law students experience law and the way judges describe what they do in written opinions"); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1499-1500 (1996) ("'Legal formalism is the effort to make sense of the lawyer's perception of an intelligible order.'"); Geyh, *supra* note 27, at 228.

these actions, the tools of formalism provide the structure for the attorney to analyze and communicate her findings about the law and the facts.[203] On this basic level, formalism is the shared discourse of the practicing legal community.[204]

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.[205] In first year law courses, particularly legal writing classes,[206] students are taught formal rules of law and are assessed on their ability to apply those rules in a logical, usually deductive manner.[207] Such formalist discourse is pronounced in many law school final exams and most markedly on the bar exam.[208] This formalist discourse grounded in *logos* must be mastered by all lawyers in order to be eligible to practice law.[209]

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[203] According to the "Balanced Realists," formalism dominates the determination of simple or clear-cut legal matters. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, *supra* note 5, at 185-87.

[204] Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 96 (2000); Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1557–58 (1990). *See also* Davis, *The Reports of My Death*, *supra* note 189.

[205] Jeremiah A. Ho, *Function, Form, and Strawberries: Subverting Langdell*, 64 J. LEG. EDUC. 656, 660 (2015) ("But a strong imprint of Langdell's model, preserved in formalist conceptions, still remains [in law school classes]."). *See also* Morris S. Arnold, *For Al Witte*, 69 ARK. L. REV. 13, 15 (2016) (describing a law professor's teaching method); D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 155 n.136 (2011).

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

[207] Jess M. Krannich, James R. Holbrook & Julie J. McAdams, *Beyond "Thinking Like A Lawyer" and the Traditional Legal Paradigm: Toward A Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 386 (2009); Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 916 (2006); DeFabritiis, *supra* note 12, at 43-44; Graham, *supra* note 12, at 681-82.

[208] Denise Riebe, *Readers' Expectations, Discourse Communities, and Effective Bar Exam Answers*, 41 GONZ. L. REV. 481, 490 (2006). *See also* Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success,* 8 J. BUS. & TECH. L. 223, 246-47 (2013); 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.[210] Novice learners benefit from the psychologically pleasing form of *logos* and formalist methods of discourse.[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.[212] For example, the use of deductive syllogisms provide a scaffold for the learning of law, legal culture, and the jargon of the profession.[213] Once these formal rules are learned,[214] they can then be the starting point for a deeper discussion of principles and policies sought to be advanced by the law.[215]

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

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[210] *See* DeFabritiis, *supra* note 12, at 43-44; Ho, *supra* note 205, at 665. *But see* Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919, 1934 (2017).

[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.

[212] Webb, *supra* note 211, at 336.

[213] Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse,* 20 LEGAL STUD. F. 7, 32-45 (1996). The word "jargon" here is used in a non-pejorative sense. *See* Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking about Legal Writing*, 85 MARQ. L. REV. 887, 889-90 (2002).

[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).

[215] *See generally* Philip H. Osborne & Alvin Esau, *Curriculum Reform at Robson Hall*, 39 MAN. L.J. 179, 185 (2016); Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191, 1193-94 n.7 (2006); Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ALWD 3, 4 (2002).

[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.").

exalting of the formalist position.[217] In the confirmation hearings of Justices Gorsuch, Sotomayor, Roberts, Kavanaugh[218] and others, each candidate swore they would make decisions on the bench based on the law and only the law.[219] Whether these judges in fact adhere to this principle does not diminish the fact that legal rhetoric directed at these judges is expected in form to appear to do so.

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.

[218] *See* Brett M. Kavanaugh, Opinion, *I Am an Independent, Impartial Judge*, WSJ, Oct. 4, 2018, https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822 ("[A] good judge must be an umpire—a neutral and impartial arbiter who favors no political party, litigant or policy."). The confirmation hearings of Justice Brett Kavanaugh provide a possible exception to this position in the hearings held on September 27, 2018, where *pathos* appeared to play an important component of the candidate's and the Judiciary Committee's considerations. *See* Robert Barnes, Seung Min Kim & Elise Viebeck, *Charges and denials fuel an emotional hearing as Kavanaugh nomination hangs in the balance*, WASH. POST, Sept. 27, 2018, https://www.washingtonpost.com/politics/courts_law/in-emotional-testimony-ford-says-she-is-100-percent-certain-that-kavanaugh-assaulted-her/2018/09/27/774fb8ea-c26b-11e8-b338-a3289f6cb742_story.html?utm_term=.491878162b3b.

[219] *See* Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2054 (2017) (citing Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 31 (2005) and Confirmation Hearing on the Nomination of the Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2017)); Maroney, *The Persistent Cultural Script, supra* note 17, at 636. Similarly, Neil Gorsuch stated during his confirmation hearing, "I just wanted a judge to come in and decide on the facts and the law of my client's case and leave what he had for breakfast at the breakfast table. And part of being a good judge is coming in and taking precedent as it stands and your personal views about the president have absolutely nothing to do with the good job of a judge." *Live Coverage of Judge Neil Gorsuch's Confirmation Hearing. Aired 10-10:30a ET*, CNN, Mar. 21, 2017, http://transcripts.cnn.com/TRANSCRIPTS/1703/21/cnr.03.html.

[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.[221] Formalism, at its core, advances the "rule of law."[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.[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.[224] The anti-formalist position of elevating

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'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*.").

[221] Robert P. Burns, *The Jury As A Political Institution: An Internal Perspective*, 55 WM. & MARY L. REV. 805, 813 (2014); Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7, 15-16 (2006).

[222] Michael C. Dorf, Book Note, *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? *Et cetera*. Formalism—understood in this minimal sense—is a moral principle roughly synonymous with belief in the rule of law."). *See also* ANTONIN SCALIA, 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.").

[223] Little, *supra* note 5, at 951-52.

[224] The Preamble to the ABA Model Code of Judicial Conduct states, "The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." MODEL CODE OF JUDICIAL CONDUCT PREAMBLE [1] (AM. BAR ASS'N 2011), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf. *See also* Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610-11 (2002); Jeffrey M. Sharman, *Judicial Ethics: Independence, Impartiality, and Integrity,* INTER-AMERICAN DEVELOPMENT BANK, May 1996, at 1, 15 (1996), https://publications.iadb.org/bitstream/handle/11319/2681/Judicial%20Ethics%3A%20Independence%2C%20Impartiality%2C%20and%20Integrity.pdf?sequence=1 ("[J]udges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system.").

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

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[225] Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 17 (1997); James L. Hyer, Obergefell v. Hodges *and Issues of Judicial Civility*, 87 N.Y. ST. B. ASS'N J., Sept. 2015, at 46, 46.

[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.").

[227] John W. Poulos*, The Judicial Process and Substantive Criminal Law: The Legacy of Roger Traynor*, 29 LOY. L.A. L. REV. 429, 533 (1996) ("The process of writing the opinion focuses the inquiry of judges, affects their analysis, and influences the way it is crafted.").

[228] Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 89-90 (1985); GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE 390-91 (1980). *Cf.* Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2283-88 (1991). Conduct prejudicial to the administration of justice such as a breach of the ethical canons contained in the Code of Judicial Conduct may lead a judge to be sanctioned. *See In re* Hague*,* 315 N.W.2d 524, 532 (Mich. 1982) (judge sanctioned for disobeying orders from superior court, refusing to follow higher courts' decisions, and abuse of the contempt power).

[229] Maroney, *The Persistent Cultural Script*, *supra* note 17, at 630-40. *See supra* notes 24–29, 82.

[230] Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 971 (1995).

of the forms and conventions of formalist rhetoric are nevertheless paramount.[231] Mask or no mask, a judge uses the discourse of formalism to articulate and justify her decisions.[232]

Even if formalism's ideals of promoting predictability and rationality are illusory,[233] formalism conveys to the public a mask of rationalism and certainty that helps resolve social conflict.[234] The legitimacy of the judicial system is enhanced by formalism's actual or apparent tropes of logic.[235] To this end, the advocate seeking to persuade a judge is bound to present his arguments in formalist conventions.[236] Indeed, judges are known to cut and paste an advocate's exact words into the judge's opinion.[237] 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.[238] The irony is

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[231] Daniel Hinkle, *Cynical Realism and Judicial Fantasy*, 5 WASH. U. JURISPRUDENCE REV. 289, 318 (2013); Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory,* 73 CALIF. L. REV. 119, 122 (1985); Tun-Jen Chiang, *Formalism, Realism, and Patent Scope*, 1 IP THEORY 88, 89 (2010).

[232] Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1666 (1990) (noting that "professional discourse has always been predominantly formalist"); Simon, *supra* note 201, at 1070.

[233] A core tenet of realism posits that formalism does not in fact create predictability or rationality. *See, e.g.*, Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 267 (1961); Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 383 (2007).

[234] Lyrissa Barnett Lidsky, *Defensor Fidei*: *The Travails of A Post-Realist Formalist*, 47 FLA. L. REV. 815, 835 (1995); Walter Otto Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699 (1978).

[235] Christopher J. Peters, *Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication,* 46 IUS GENTIUM 23, 25 (2015) ("Legal formalism promotes democratic legitimacy."); Daniel Z. Epstein, *Rationality, Legitimacy, & the Law*, 7 WASH. U. JURISPRUDENCE REV. 1, 9 (2014); Hinkle, *supra* note 231, at 308.

[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.").

[237] Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism*, 45 ARIZ. ST. L.J. 1077, 1085 (2013).

[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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her mind and is likely to be receptive to writing and arguments that will make her job easier and reduce the time needed to accomplish the judge's work. This means designing the written document in a way that facilitates the judge, with minimal effort, to be able to adapt the advocate's writing directly into her decision. *See generally* Daniel E. Monnat & Paige A. Nichols, *From Cover to Content: Ten 21st Century Tips for Effective Appellate Briefing*, CHAMPION, Aug. 2017, at 51, 53.

[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.