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# Writing, Cognition, and the Nature of the Judicial Function

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# Writing, Cognition, and the Nature of the Judicial Function

CHAD M. OLDFATHER\*

## TABLE OF CONTENTS

INTRODUCTION .....	1284
I. STANDARDS GOVERNING THE ISSUANCE OF OPINIONS .....	1288
A. TRIAL COURTS .....	1289
B. APPELLATE COURTS .....	1292
C. A PRELIMINARY ASSESSMENT .....	1295
II. THE DECISION-JUSTIFICATION DISTINCTION .....	1297
A. DECIDING VERSUS JUSTIFYING .....	1298
B. CRITIQUES OF THE DISTINCTION .....	1300
III. THE RELATIONSHIP BETWEEN WRITING AND COGNITION .....	1303
A. TEXT VERSUS ORALITY .....	1303
B. THE DISTINCTION BETWEEN WRITING AND THOUGHT .....	1305
C. TRANSFORMING THOUGHT (INTO TEXT) .....	1306
D. WRITING AND DECISIONMAKING .....	1309
1. Verbalization and Thought .....	1310
2. The Unconscious Thought Theory .....	1312
3. The Effect of Writing .....	1314
IV. WRITING AND THE FUNCTIONS OF JUDICIAL OPINIONS .....	1317
A. OPINIONS AS A MECHANISM FOR DISCIPLINING THE DECISIONMAKING PROCESS .....	1318
1. Refining the Decision-Justification Distinction .....	1319
2. Drawing the Line .....	1320

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3. Implications . . . . .	1324
B. OPINIONS AS THE EMBODIMENT OF PRECEDENT . . . . .	1327
1. Writing as a Vehicle for Information . . . . .	1327
2. Writing as Facilitating Logic . . . . .	1329
C. OPINIONS AS A SOURCE OF LEGITIMACY . . . . .	1333
1. Reasoned Elaboration . . . . .	1334
2. Perceived Legitimacy . . . . .	1336
D. TAKING ACCOUNT OF INSTITUTIONAL DIFFERENCES . . . . .	1339
CONCLUSION . . . . .	1342

#### INTRODUCTION

Writers commonly observe that only through writing do they truly come to understand their subject. The line “how do I know what I think until I see what I say?” resonates so broadly that it has been attributed to, among others, E.M. Forster, W.H. Auden, Raymond Carver, Oscar Wilde, Winston Churchill, and an anonymous little girl.<sup>1</sup> The suggestion is that the process of writing involves a fundamentally deeper sort of engagement with one’s subject matter than is possible through mere reflection or discussion, which in turn leads to better comprehension and more rigorous thought. Judges frequently invoke a similar sentiment via the phrase “it won’t write,”<sup>2</sup> which refers to situations where a

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1. For examples of such attributions, see Laura Apol, “*What Do We Do if We Don’t Do Haiku?*” *Seven Suggestions for Writers and Teachers*, 91 *ENG. J.* 89, 90 (2002) (attributing the line to a “famous poet”); Bruce Ballenger, *Methods of Memory: On Native American Storytelling*, 59 *COLLEGE ENG.* 789, 792 (1997) (attributing the line to Forster); Donald M. Murray, *The Explorers of Inner Space*, 58 *ENG. J.* 908, 908 (1969) (same); D. Shaw et al., *Approaches to Sharing Knowledge in Group Problem Structuring*, 54 *J. OPERATIONAL RES. SOC’Y* 936, 947 (2003) (attributing the line to psychologist Karl Weick); Alfred D. Sheffield, *The Baseless Fabric of “Basic” Criticism*, 6 *COLLEGE ENG.* 88, 88 (1944) (attributing the line to an anonymous little girl); Postings to <http://forum.quoteland.com/1/OpenTopic?a=tpc&s=586192041&f=099191541&m=4031943806&r=3541085931> (last visited Jan. 17, 2008) (attributing the line to numerous sources).

2. See Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 *TEX. TECH L. REV.* 869, 873 (1993) (“A decisionmaker who has reasoned through to a conclusion in print has reasoned in fact. Misconceptions and oversights of fact and law are discovered in the process of writing. Everyone familiar with the appellate process has heard the expression, ‘It won’t write that way,’ meaning that a tentative vote will not withstand the careful disciplines of record reading, legal research, and opinion drafting.”); Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 *U. CHI. L. REV.* 1421, 1447–48 (1995) (“Reasoning that seemed sound ‘in the head’ may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react. Many writers have the experience of not knowing except in a general sense what they are going to write until they start writing. A link is somehow forged between the unconscious and the pen. The link is lost to the judge who does not write.”); Alvin B. Rubin, Book Review, 130 *U. PA. L. REV.* 220, 227 (1981) (“Most [judges], conditioned by our professionalism, our background, and our ideals, have had an experience

result the judge initially thought appropriate turns out, upon an attempt to justify the result in an opinion, to be unacceptable.

This insight accords with longstanding conceptions of the judicial role, in which reasoned analysis stands as the core feature of legitimate judging.<sup>3</sup> It also suggests the possibility that preparation of a written opinion might be deemed an essential component of a legitimate judicial decision.<sup>4</sup> For if writing truly does lead to better reasoning, and if the application of reason is the defining feature of the judicial role, then it seems to follow that the process by which judges reach decisions ought to incorporate writing. Indeed, this impulse pervades the legal profession. From the perspective of the legal academy, the written opinion represents the archetypal judicial act—the principal mode of legal instruction involves the study of judicial opinions, and a substantial portion of legal scholarship focuses almost exclusively on the analysis and critique of opinions. This same instinct extends into the profession more generally, evidenced by strands of the recent debate over unpublished opinions<sup>5</sup> and the occasional scoldings by appellate courts of trial court judges who have failed to justify a decision.<sup>6</sup>

Yet despite the apparent strength of our collective professional intuition that proper judging involves writing, it is plain that writing cannot be an essential part of the act of judging. Or at least of *all* acts of judging. Many judicial decisions of unquestioned legitimacy are unaccompanied by a written opinion, ranging from evidentiary rulings made on the fly by a trial court judge to the Supreme Court's decisions not to grant certiorari. Nor are deviations from the practice of providing an opinion inconsistent with some deeply rooted, historical tradition. The nearly exclusive practice in English courts—whose system of course provided the template for our own—has long been for judges to provide

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that Judge Coffin describes. We read the briefs, we study the record, we decide that we will affirm or reverse, and we undertake to prepare an opinion stating the decision and its rationale. We find that 'it won't write'—our jargon for saying that we cannot prepare an opinion reaching the desired result in acceptable professional form.")

3. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978).

4. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 653 (1995) (noting the link between the "it won't write" concept and the ideal of rationality in judicial decisions).

5. For examples of the substantial number of articles addressing this debate, see Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); Michael B.W. Sinclair, *Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003).

6. E.g., In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1185 (9th Cir. Judicial Council 2005) (Kozinski, J., dissenting) ("It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system—a motion, an opportunity for the other side to respond, a statement of reasons for the decision, reliance on legal authority."); *Bright v. Westmoreland County*, 380 F.3d 729, 731–32 (3d Cir. 2004) (castigating a district judge for adopting as the court's own an opinion prepared by one of the parties).

largely extemporaneous, oral justifications for their decisions.<sup>7</sup> The writing-centered nature of the American system appears to have developed more as an accommodation to practical necessities arising from such factors as the comparatively vast geography of the United States and a relative lack of trained barristers than as the result of a considered decision concerning the appropriate components of a properly functioning judiciary.<sup>8</sup> But for these fortuities, we might just as easily have a system in which judicial opinions were primarily transcriptions of judicial speech rather than products of judicial writing.

This Article seeks to explore the significance of this historical accident and to analyze the relationship between writing and judging. This, in turn, requires consideration of the relationship between writing and reasoning. That relationship turns out to be more complex than commonly imagined. Despite the intuitive appeal of the sentiments recounted in the opening paragraph, one can easily imagine that this relationship might not always be beneficial. Writing might sometimes lead thought astray. Perhaps, for example, once one has committed in writing to a particular path of analysis, the fact of writing (as opposed to merely thinking or orally verbalizing) might blind one to alternative paths and thus lead to a comparatively worse analysis.

To assess these possibilities, the Article reviews the developing psychological research on the relationship between verbalization and problem solving,<sup>9</sup> as well as related research on the comparative strengths of conscious versus unconscious information processing.<sup>10</sup> That research suggests that the common understanding concerning the utility of judicial opinions *usually* holds true. In most cases the process of writing will improve the underlying decision, or at worst will have no effect on it. But this is not always the case. Some types of decisions are susceptible to what psychologists refer to as “verbal overshadowing,”<sup>11</sup> pursuant to which efforts to provide a verbal justification for a decision have negative effects on its quality. One must of course exercise caution in generalizing too broadly from the results of controlled experimentation based on situations far outside the legal context.<sup>12</sup> Still, it seems reasonable to conclude based on this research that writing—or at least certain forms of writing—could likewise have a negative effect on the quality of some judicial decisions. Sometimes, in other words, requiring an opinion would lead to a *worse* decision. Primarily these will be decisions that turn largely on the assessment of complex, fact-intensive situations in which largely inarticulable,

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7. See Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1171–78 (2004).

8. *Id.* at 1178–85.

9. See *infra* section III.D.

10. See *infra* section III.D.2.

11. See *infra* text accompanying notes 134–151.

12. See generally Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002) (critiquing “behavioral law and economics” scholarship based in part on its failure to account properly for the limitations of the psychological research on which it is grounded).

context-based judgments matter more than precision and technical analysis,<sup>13</sup> the sorts of decisions, in other words, as to which judges often do not issue opinions.

Of course, enhancement of decisional quality—however assessed—is only one of the recognized functions of judicial opinions. Prior work has identified two others—the creation and refinement of precedent<sup>14</sup> and the legitimization of judicial action.<sup>15</sup> In general, this literature does not explore the nature of these functions in great depth and has largely failed to consider the significance of the written nature of opinions to their fulfillment. This Article attempts to advance the discussion in both respects, by identifying and developing the contours of the respective functions, including by considering how they might play out differently at the trial and appellate levels, as well as by considering the extent of writing's contribution to the process.

The goal is not so much to generate definitive answers as to identify more fully at a general level the costs and benefits provided by written opinions. Doing so will help provide better grounding for ongoing debates over the appropriate anatomy of the evolving judicial role.<sup>16</sup> Pressures resulting from caseload increases have led to dramatic changes in judges' relationship to their written opinions, with most judges more likely to serve as an editor of opinions drafted by law clerks rather than as the originating author and with more cases being disposed of without the benefit of an opinion.<sup>17</sup> Such changes may be inevitable, and even warranted, but it is nonetheless important to know what has been lost in the transition. Under the traditional conception of the relationship between writing, reasoning, and judging, something is always lost when a court elects not to issue an opinion or when judges are not the actual authors of opinions issued under their names. To be sure, any such losses might not outweigh the gains from dispensing with writing, or from delegating the task to clerks. For example, whatever benefits might accrue to the quality of an evidentiary ruling were a judge required to provide a written explanation, such a requirement would render trials exceedingly cumbersome. But the working assumption seems to have been that an opinion's contribution would be positive, and that whatever the strength of the force the three functions of opinions would exert in any given situation, each would at the least be neutral and most often pull in favor of a written justification. As it turns out, however, these functions will at least occasionally stand in tension with one another, presenting

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13. See *infra* section III.D.1.

14. See *infra* section IV.B.

15. See *infra* section IV.C.

16. See, e.g., Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442 (1983); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty To Decide*, 94 *GEO. L.J.* 121 (2005); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982).

17. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 140–60 (1996) (discussing the roles and prevalence of law clerks in federal courts). Although I do not fully address the role of law clerks in this Article, I offer some preliminary thoughts below. See *infra* text accompanying notes 310–313.

the possibility that an opinion could serve as a detriment. In a world of increasingly scarce judicial resources, a better understanding of these relationships is critical to the effective deployment of those resources.

The remainder of the Article proceeds as follows. Part I briefly surveys the existing standards, such as they are, governing courts' determination of whether to write an opinion with respect to a given decision. Part II outlines and critiques the legal-philosophy literature addressing the question of whether there is a distinction between the processes of judicial decision and the justification of such decisions. Part III surveys the research from psychology and related fields concerning the effects of verbalization on problem-solving effectiveness. Part IV integrates the insights from Parts II and III with prior work on the functions of opinions, with particular emphasis on the extent to which the written nature of judicial opinions is important to the fulfillment of those functions. Part V considers the differing applicability of the analysis to trial versus appellate courts. Finally, the Conclusion draws on all of what precedes to sketch out some additional implications of the analysis, to offer some tentative reforms, and to outline future avenues for exploration.

### I. STANDARDS GOVERNING THE ISSUANCE OF OPINIONS

Prior to departing into a more theoretical consideration of the role of judicial opinions, we must pause to consider existing standards governing courts' issuance of opinions. Having those standards in mind will help to focus the inquiry, both by highlighting the factors that courts have identified as important to the determination of whether an opinion should be issued in a given case and by revealing the absence of other factors that might seem to be of equal importance.

The backdrop against which these standards must be viewed is one in which courts contend with ever-increasing caseloads.<sup>18</sup> Today's federal appellate judge, for example, faces a workload many times greater than that of her counterpart of fifty years ago.<sup>19</sup> Although the courts have accommodated this increase with a number of procedural modifications, perhaps the most prominent is the increased use of so-called "unpublished" opinions, which require less effort to generate, coupled with greater receptiveness to disposing of some cases with no

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18. For an overview of this phenomenon in the appellate context, see DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 385–419 (2006); see also Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume,"* 8 J. APP. PRAC. & PROCESS 101 (2006); Richard A. Posner, *Demand and Supply Trends in Federal and State Courts over the Last Half Century,* 8 J. APP. PRAC. & PROCESS 133 (2006).

19. The caseload of the federal courts of appeals in 2003 was more than fifteen times greater than in 1960. Compare OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2003 23 tbl.B-1 (2003) (60,661 cases commenced), with DIR. OF ADMIN. OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 210 tbl.B-1 (1961) (3,899 cases commenced).



opinion at all.<sup>20</sup> In the eyes of at least some judges, the practical need to process cases is the only legitimate basis for truncating or dispensing with the opinion at the appellate level.<sup>21</sup>

As the discussion in this Part reveals, the primary concept at work in formal standards governing the issuance of opinions is that of discretion. Subject to occasional, largely ad hoc requirements that courts write opinions in certain specified situations, judges at both the trial and appellate levels operate under, at most, loosely articulated guidelines that enable them to dispense with a written opinion upon nothing more than the court's conclusion that an opinion is not required.

#### A. TRIAL COURTS

A moment's reflection reveals that trial judges need not provide opinions supporting every decision they make. To take just one example, a judge making an evidentiary ruling in the course of a trial rarely pauses to give the matter sustained consideration, much less to provide a written account of the reasoning underlying the ruling. But not all evidentiary rulings are made in this fashion—the resolution of a pre-trial motion in limine might be explained in a written opinion, particularly if the question it resolves is dispositive (such as a ruling on the admissibility of expert testimony). Other decisions might be accompanied by an oral explanation, but still no writing. A host of variables seemingly factor into the determination, including the centrality of the issue under consideration to the lawsuit, whether the requirement of a decision arises at a stage in the case where it must be made quickly (as at trial), the relative ease of resolution, and the like.

Not surprisingly, trial judges work under an understood, though generally unarticulated, standard pursuant to which the question of whether to write an opinion in connection with any given decision lies squarely within a judge's discretion.<sup>22</sup> There are some specific exceptions. For example, some jurisdic-

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20. See, e.g., John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 124 (2006). For a short history of the unpublished opinion, including its relationship to the crisis of volume, see John P. Borger & Chad M. Oldfather, *Anastoff v. United States and the Debate over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 901–04 (2001).

21. See Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG (n.s.) 17, 19 (2000) (suggesting that “[t]he practical need to dispose of a certain percentage of cases on an expedited basis” is the only basis for the use of unpublished opinions, and that “[t]here is no strictly legal—let alone philosophical—justification for the practice”).

22. See JOYCE GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 72 (4th ed. 2000). For most courts in most contexts, the idea that trial judges enjoy this discretion as a default position is an unarticulated assumption. There are, however, a few situations where the concept is made explicit. See, e.g., FED. R. CIV. P. 52(a) (“It will be sufficient if the findings of fact and conclusions of law [made by a trial court following a bench trial] are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.”); FED. R. CRIM. P. 23(c) (providing, in bench trials in criminal cases, that “[i]f a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or



tions require trial judges to provide written justifications for departures from a presumptive sentence under sentencing guidelines.<sup>23</sup> Some district courts require by local rule the issuance of written justifications in connection with the disposition of habeas petitions.<sup>24</sup> More generally, and more colorfully, one judge has written of “woodshed avoidance”<sup>25</sup> reasons for writing opinions, including not only those situations where statutes require the issuance of an opinion but also those in which a trial court must demonstrate to an appellate court that it has exercised its discretion in an appropriate manner.<sup>26</sup> For the most part, however, trial judges enjoy a broad ability to dispense with a written justification as they see fit.

These relatively sparse standards pertaining to trial judges’ discretion to write are matched by an equally thin body of commentary. “Debate” might be too strong a word to characterize the occasional advocacy related to whether there ought to be relatively more or fewer oral dispositions. Some judges have argued that oral rulings ought to be utilized whenever possible, with writing reserved for limited categories of cases.<sup>27</sup> Others are more skeptical of oral dispositions.<sup>28</sup> But nobody suggests that either form of decision should be used exclusively, and everyone acknowledges that there are certain situations in which written decisions are appropriate.

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opinion”). And at least some courts have expressly recognized this general discretion. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Kenyon, 882 So. 2d 986, 989 (Fla. 2004) (noting the Florida Supreme Court’s lack of “authority to require a district court to write an opinion when the district court has determined that no opinion is necessary”).

23. *E.g.*, MINN. STAT. § 244.10, subdiv. 2 (2002) (“Whether or not a sentencing hearing is requested pursuant to subdivision 1, the district court shall make written findings of fact as to the reasons for departure from the Sentencing Guidelines in each case in which the court imposes or stays a sentence that deviates from the Sentencing Guidelines applicable to the case.”).

24. *See* N.D. CAL. CIV. R. 2254–9 (requiring all rulings on habeas petitions to be in written form). This is not a universal position. *See* S.D. CAL. CIV. R. HC3(j) (providing that a court’s ruling on a habeas petition may be made in writing or orally on the record).

25. The phrase plays off the expression “taken to the woodshed” as a euphemism for punishment. *See, e.g.*, Murray Chass, *Bad Boys III: A Week with Nothing but Trouble*, N.Y. TIMES, Sept. 4, 2005, § 8, at 2 (“Wells, the portly portsideer who pitches for Boston, was taken to the woodshed and spanked last week for his tirade against Commissioner Bud Selig and assorted others after his unsuccessful appeal of his six-game suspension.”); Nicholas D. Kristof, *The 2000 Campaign: The 1988 Campaign; For Bush, Thrill Was in Father’s Chase*, N.Y. TIMES, Aug. 29, 2000, at A1 (“‘He was the disciplinarian,’ remembered Andy Card, another aide. ‘I’m blessed that I never got taken to the woodshed. But if you were a disappointment to the campaign, he would let you know that you were a disappointment.’”).

26. *See* John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, N.Y. ST. BAR J., Sept. 2003, at 39. Of course, such justification may be and often is provided orally on the record. One can imagine, however, that just as a written opinion might come across as more authoritative to the parties, so might it to an appellate court.

27. *See* ROBERT E. KEETON, *KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM* 199 (1999); Robert O. Lukowsky, *The Case for the Oral Decision*, 4 TRIAL JUDGES’ J. 3, 3 (1965); *see also* Reuben Lozner, *Oral Versus Written Opinions*, 13 JUDGES’ J. 94, 94 (1974) (advocating increased use of oral opinions by administrative judges). Nesbitt quotes one judge who opined, “[W]e were elected to make decisions, not explain them. Don’t over-think this stuff.” Nesbitt, *supra* note 26, at 39. Another offered “the aphorism that one should not write when one can talk, and not talk when one doesn’t have to.” *Id.*

28. *See, e.g.*, David Harris, *The Case for the Written Decision—A Reply*, 5 TRIAL JUDGES’ J. 6, 24 (1966).

Beyond that, broad areas of agreement exist concerning a few rules of thumb applicable to making the decision whether to write. Timing will often be determinative. Some decisions by their very nature must be made quickly, cannot wait for the trial judge to work through writing a memorandum or opinion, and are not so momentous as to justify the commitment necessary for the court to issue an opinion on an expedited basis.<sup>29</sup>

The nature of the case likewise matters. If the record on which a court must base its decision is large or complex, or requires the resolution of significant evidentiary conflicts, most commentators suggest the use of a written justification on the grounds that doing so allows the judge to sharpen the analysis.<sup>30</sup> Writing might also be necessary in such cases for the court to effectively communicate its decision.<sup>31</sup> In a similar vein, these commentators suggest that opinions are unnecessary in simple cases involving few issues.<sup>32</sup> Judge Robert Keeton suggests writing opinions or memoranda “only when the issue is close and you need to explain why you have rejected arguments advanced by the loser.”<sup>33</sup>

Trial judges must also be mindful of the future role their decision might play. The prospect of an appeal might tip the scales in favor of writing in cases presenting a close issue or where the trial judge might otherwise want to present her position to the appellate court in the most effective way.<sup>34</sup> On a somewhat broader level, there are institutional reasons why trial judges might want to take the time to write. By virtue of being on the legal system’s “front lines,” trial judges enjoy a perspective that appellate judges do not. Novel issues necessarily present themselves first to trial judges, who consequently have the ability, and arguably the responsibility, to direct appellate courts’ attention to unsettled issues.<sup>35</sup> Moreover, by virtue of their greater contact with the parties and longer exposure to the course of litigation, trial judges have a different, and arguably better, sense of how the possible resolutions before an appellate court will work in the course of implementation both within the context of the case at hand and more broadly throughout the affected portions of the legal system. Because trial judges bear significant responsibility for that implementation, they have an incentive to share their views with the appellate court in cases that are likely to result in the making of new law.

Trial judges themselves may be involved in the making of law, at least in an

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29. See Lozner, *supra* note 27, at 94.

30. See GEORGE, *supra* note 22, at 72; Lozner, *supra* note 27, at 94.

31. See GEORGE, *supra* note 22, at 72.

32. See *id.*; Lozner, *supra* note 27, at 94.

33. KEETON, *supra* note 27, at 199.

34. See GEORGE, *supra* note 22, at 72 (suggesting that where the trial judge expects an appeal, “there is a need to explain to the appellate court the thought process and the reasoning behind the decision. If the decision is so self-evident that it needs no support, it may be better suited to an oral presentation”).

35. See Nesbitt, *supra* note 26, at 40.

informal sense. To be sure, trial court rulings have limited precedential effect.<sup>36</sup> But in certain sorts of large and unusual cases, the approach taken by the first trial court serves as a template, based on which similar, future cases are structured.<sup>37</sup> In these cases, a trial judge might elect to write so as to provide future courts and litigants with a starting point for the resolution of the cases they face.

#### B. APPELLATE COURTS

In the appellate context, it is not so apparent that some decisions may properly be made without an accompanying opinion. Indeed, as evidenced by the recent debate over so-called “unpublished” opinions, many lawyers, judges, and academics strongly believe not merely that appellate courts should always issue opinions but also that those opinions should always be accorded precedential value.<sup>38</sup> Whatever the sway of these expectations on courts’ behavior, at bottom the standard governing appellate issuance of opinions parallels that for trial courts—the determination of whether to write an opinion lies in the discretion of the court.<sup>39</sup>

This discretion does not go unexercised. Many appellate courts allow themselves to dispose of some portion of their cases via summary orders—that is, one-sentence memoranda stating simply that the case is affirmed. Indeed, some courts have used this as their principal means of docket management. The Third Circuit, for example, disposed of roughly sixty percent of its caseload via summary orders in the period from 1989 to 1996.<sup>40</sup>

Still, and in contrast to trial courts, the courts of appeals tend to have written standards setting forth the types of situations in which the court can dispense with a written opinion. Some courts have adopted rules identifying specific types of cases in which the use of a summary disposition is appropriate. For example, the Third Circuit’s internal operating procedures include a chapter

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36. See, e.g., Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power To “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135, 168 (2001) (“It is commonly accepted that federal district court decisions are treated like unpublished appellate decisions: they may be disregarded in future cases except for the purposes of res judicata and collateral estoppel.”).

37. See generally David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004) (suggesting that much of what counts as law in institutional-reform litigation comes about through a process of transjudicial administration, in which repeat players pattern litigation based on similar past cases rather than in response to legal standards imposed by higher courts).

38. See, e.g., Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999).

39. See *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (“We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances.”); see also DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 33.2 (4th ed. 2000) (“The court may decide your appeal without an opinion or may elect not to release its opinion for publication. In either event, there is little you can do about [it].”).

40. See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 162.

devoted to judgment orders.<sup>41</sup> The rules provide that a panel of the court may dispose of a case by a judgment order where the panel is unanimous, where the panel affirms or declines to review the decision being appealed, and where the panel “determines that a written opinion will have no precedential or institutional value.”<sup>42</sup> In addition, Procedure 6.2.2 provides:

A judgment order may be used when:

- (a) The judgment of the district court is based on findings of fact which are not clearly erroneous;
- (b) Sufficient evidence supports a jury verdict;
- (c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;
- (d) No error of law appears;
- (e) The district court did not abuse its discretion on matters addressed thereto; or
- (f) The court has no jurisdiction.<sup>43</sup>

The Fifth,<sup>44</sup> Eighth,<sup>45</sup> Ninth,<sup>46</sup> and Federal Circuits<sup>47</sup> have similarly detailed rules.

41. See 3D CIR. I.O.P. 6.1–6.4.

42. *Id.* at 6.2.1.

43. *Id.* at 6.2.2. Notably, a judgment order need not be completely summary, in the sense that it can include some reference to authority. Section 6.3.2 provides: “A judgment order may state that the case is affirmed by reference to the opinion of the district court or decision of the administrative agency and may contain one or more references to cases or other authorities.” *Id.* at 6.3.2.

44. The Fifth Circuit’s rules state:

The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: “AFFIRMED. See 5th Cir. R. 47.6.” or “ENFORCED. See 5th Cir. R. 47.6.”

5TH CIR. R. 47.6.

45. Eighth Circuit Rule 47B provides:

A judgment or order appealed may be affirmed or enforced without an opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision: (1) a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) the evidence in support of a jury verdict is not insufficient; (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or (4) no error of law appears.

8TH CIR. R. 47B.

46. Ninth Circuit Rule 36-2 provides:

A written, reasoned disposition shall be designated as an OPINION only if it: (a) Establishes, alters, modifies or clarifies a rule of law, or (b) Calls attention to a rule of law which appears to have been generally overlooked, or (c) Criticizes existing law, or (d) Involves a legal or factual issue of unique interest or substantial public importance, or (e) Is a disposition of a

The remaining federal courts of appeals employ somewhat more general guidelines. Seventh Circuit Rule 32.1 states simply, "It is the policy of the circuit to avoid issuing unnecessary opinions."<sup>48</sup> The First Circuit is forthright about its inability to issue opinions in every case, but opaque about how it determines which cases get summary treatment. Local Rule 36 provides:

The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation.<sup>49</sup>

The Second Circuit's rule provides:

The demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion.<sup>50</sup>

The Fourth,<sup>51</sup> Sixth,<sup>52</sup> Tenth,<sup>53</sup> and D.C. Circuits<sup>54</sup> have similarly general

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case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

9<sup>TH</sup> CIR. R. 36-2.

47. The Federal Circuit's rule provides:

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value: (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous; (b) the evidence supporting the jury's verdict is sufficient; (c) the record supports summary judgment, directed verdict, or judgment on the pleadings; (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or (e) a judgment or decision has been entered without an error of law.

FED. CIR. R. 36.

48. 7<sup>TH</sup> CIR. R. 32.1(a).

49. 1<sup>ST</sup> CIR. R. 36.0.

50. 2<sup>D</sup> CIR. R. 0.23.

51. Fourth Circuit Procedure 36.3 provides:

If all judges on a panel of the Court agree following oral argument that an opinion in a case would have no precedential value, and that summary disposition is otherwise appropriate, the Court may decide the appeal by summary opinion. A summary opinion identifies the decision appealed from, sets forth the Court's decision and the reason or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the Court's reasoning.

4<sup>TH</sup> CIR. I.O.P. 36.3.

52. Sixth Circuit Rule 36 provides:

standards. The Eleventh Circuit presently has no standard, having rescinded its rule entitled “Affirmance Without Opinion” on the ground that “only a min[u]scale portion of appeals are currently terminated in this manner.”<sup>55</sup>

### C. A PRELIMINARY ASSESSMENT

Despite the relative sparseness of existing standards governing when courts should issue written opinions, some generalization is possible. In both the trial and appellate contexts, there is clear evidence of a cost-benefit analysis at work. It is only a slight overstatement to suggest that the standards evoke images of judges who will grudgingly issue opinions when it is necessary to do so, but who generally view the gains associated with an opinion as unworthy of the effort. Such an attitude is not hard to fathom, given the caseloads facing judges at both levels.<sup>56</sup>

Even so, it seems clear that there is, in general, a reduced expectation that a trial court will issue an opinion, to the point where some district judges have an announced policy of using oral dispositions as their default means of issuing

In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. A written judgment shall be signed and entered by the clerk in accordance with the decision of the panel from the bench. Counsel may obtain from the clerk a copy of the transcript of the decision as it was announced from the bench.

6<sup>TH</sup> CIR. R. 36.

53. Tenth Circuit Rule 36.1 provides:

The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.

10<sup>TH</sup> CIR. R. 36.1.

54. District of Columbia Circuit Rule 36(b) provides:

The court may, while according full consideration to the issues, dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents or accompanied by a brief memorandum.

D.C. CIR. R. 36(b).

55. Memorandum from Thomas K. Kahn, Clerk for the U.S. Court of Appeals, Eleventh Circuit (Apr. 2006) (on file with author). The court’s prior rule 36-1 stated:

When the court determines that any of the following circumstances exist: (a) the judgment of the district court is based on findings of fact that are not clearly erroneous; (b) the evidence in support of a jury verdict is sufficient; (c) the order of an administrative agency is supported by substantial evidence on the record as a whole; (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record; (e) the judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

11<sup>TH</sup> CIR. R. 36-1 (rescinded 2006).

56. For an overview of the growth in federal caseloads since 1960, see POSNER, *supra* note 17, at 53–86.



their rulings.<sup>57</sup> And the articulated factors for trial courts to consider in determining whether to write opinions, such as the need for a speedy disposition, an especially complex case, or the more general notion of “woodshed avoidance,” all seem to be largely oriented toward what the individual judge might feel compelled to do in the context of a given case. Consideration of the institutional or systemic benefits that might flow from an opinion seemingly takes a back seat to individual expediency.

Standards at the appellate level suggest that the baseline assumption is that the court will issue an opinion, and that that assumption would be universally satisfied if only there were enough time. But “the demands of contemporary case loads”<sup>58</sup> do not allow for such a luxury, and the appellate courts must accordingly dispense with opinions in some portion of their cases. A review of these standards reveals that courts have had considerable difficulty articulating useful guidelines to govern that determination. Some of the standards acknowledge that “jurisprudential”<sup>59</sup> or other institutional<sup>60</sup> considerations come into play, but do not define what those might be. Attempts to be more specific have likewise proved troublesome. For example, by its terms, Section 6.2.2 of the Third Circuit’s internal operating procedures would seemingly allow the court to dispense with an opinion in any case where it affirms the decision of the district court.<sup>61</sup>

The existence of differing expectations and practices regarding judicial writing at the two levels of the judicial hierarchy ought not to trouble us, for the courts involved have differing functions. Viewed as a whole, the judiciary serves two primary purposes: First, to provide a peaceful mechanism for the resolution of disputes;<sup>62</sup> and second, to generate and clarify legal standards applicable to present and future disputes.<sup>63</sup> But responsibility for these larger systemic functions is not allocated evenly amongst the judiciary’s tiers. In the typical conception of the American judicial system, trial courts primarily serve the first function, while appellate courts primarily serve the second.<sup>64</sup>

These differing functions suggest that different considerations ought to drive the determination of whether to generate an opinion in each of the two contexts. To the extent that trial courts provide the first and best forum for dispute resolution, trial judges ought to focus on whether an opinion will further that mission in any given context. In this regard it is peculiar that prior discussions

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57. See *supra* note 27 and accompanying text.

58. See *supra* text accompanying note 50.

59. See 2D CIR. R. 0.23; 6TH CIR. R. 36.

60. See, e.g., 1ST CIR. R. 36.0; D.C. CIR. R. 36(b).

61. Indeed, for a time that was very nearly the approach the court took. See generally Gulati & McCauliff, *supra* note 40; see also 3D CIR. I.O.P. 6.2.2.

62. See Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–38 (1975); Ellen E. Sward, *Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 303–06 (1989).

63. See Scott, *supra* note 62, at 938–40; Sward, *supra* note 62, at 306–08.

64. For a general overview of the division of responsibility between trial and appellate courts, see MEADOR ET AL., *supra* note 18, at 1–9.



of the appropriateness of written opinions in trial courts have largely ignored the question of whether the process of generating an opinion will lead to better results, however measured, in some category of decisions typically faced by trial judges. If, for example, there is reason to believe that writing is especially helpful in resolving, say, credibility disputes, then the standards relating to trial court opinions should emphasize their usefulness in that context.

In the appellate context, in contrast, the inquiry ought to be somewhat different. Here, at least according to the standard account, the institutional role involves less emphasis on dispute resolution and more emphasis on the development and maintenance of legal standards, with the latter dominating the focus of courts of last resort.<sup>65</sup> Here, too, the relationship between the writing process and decisional quality is significant, but in a different way. Now the concern is perhaps less about writing's tendency to facilitate the accurate determination of largely historical questions—whether Party A's conduct ran afoul of Legal Rule X—and more about its effect on the generation and articulation of appropriate legal standards.

To be sure, there are additional factors that will bear on the need for a written opinion. I have already suggested that simple expediency is one. Maintenance of the perceived legitimacy of the judicial system is another. These considerations must certainly be factored into the mix. Before returning to these considerations, however, this Article will consider the question of what written opinions contribute that other forms of justification, or no justification at all, might not, as well as how those contributions might relate to institutional function. Such an analysis might, among other things, provide the basis for more precisely calibrated standards for when courts should write.

## II. THE DECISION-JUSTIFICATION DISTINCTION

Our inquiry begins with a fundamental question: what is the nature of the relationship between judicial decisionmaking and judicial opinion writing? If the two are distinct processes, it may be that one is relatively less important. If a distinction exists, and if we are concerned primarily about having a judicial system that generates good decisions, then we might be concerned about opinions only to the extent that they facilitate the process of good decisionmaking. Alternatively, we might be more concerned about generating good opinions—for example, on the theory that the opinion is the most enduring product of a lawsuit—in which case our emphasis ought to be reversed. And, as the preceding Part suggests, our sense of the relative importance of the two components might vary situationally according to where we stand in the judicial hierarchy. On the other hand, we might conclude that opinion writing is an integral part of the judicial decisionmaking process, and that it is therefore meaningless to speak of a distinction between the two. But this conclusion, too, might be

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65. *See id.* at 4–6.

situational. Perhaps, for example, this integral relationship holds only for decisions likely to have meaningful precedential effect.

#### A. DECIDING VERSUS JUSTIFYING

Although there is not extensive literature on the subject, most treatments of the topic of judicial opinion writing take the position that the process of opinion writing is distinct from that of making the decision that the opinion serves to justify.<sup>66</sup> Richard Wasserstrom undertook the first extensive consideration of the matter. He began with the observation that judicial opinions bear considerable similarity to one another in that they almost uniformly purport to describe a deductive process of decisionmaking.<sup>67</sup> As Wasserstrom put it:

It is one of the curious features of Anglo-American case law that regardless of the way in which a given decision is actually reached, the judge apparently feels it necessary to make it appear that the decision was dictated by prior rules applied in accordance with canons of formal logic.<sup>68</sup>

From this, Wasserstrom argued that judicial decisionmaking involves two distinct components.<sup>69</sup> The first is making the decision, which he refers to as the “process of discovery.”<sup>70</sup> The second is justifying the decision in terms of the appropriate legal standards, which he calls the “process of justification.”<sup>71</sup> Wasserstrom suggested that these processes have no necessary relation to one another.<sup>72</sup> A judge might stumble onto a decision by chance, or might be

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66. See, e.g., RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 548 (2d ed. 1996) [hereinafter ALDISERT, *PROCESS*] (“[T]he judicial resolution of a legal dispute implicates two separate processes: (1) deciding, or the process of discovering the conclusion, and (2) justifying, or the process of public exposition of that conclusion.”); RUGGERO J. ALDISERT, *OPINION WRITING* 31–34 (1990) (examining “a concept not widely acknowledged, or even recognized—the distinction between making a decision and justifying it”); BRUCE ANDERSON, “DISCOVERY” IN *LEGAL DECISION-MAKING I* (1996) (characterizing the contemporary, positivist view of legal reasoning as accepting “that there is, and should be, a ‘rigid’ distinction between the process of discovery (how a judge ‘actually’ reaches a tentative decision) and the process of justification (how a judge publicly justifies a decision).”). But see David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 *GEO. J. LEGAL ETHICS* 509, 513 (2001) (disagreeing with the suggestion that writing and deciding can be separated).

67. RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 16–17 (1961). A suggestion that appears frequently in the literature is that the dominant style of judicial opinions, typified by self-avowed constraint and a high degree of confidence, does not accurately reflect the process by which the decisions were reached. See, e.g., Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *RUTGERS L.J.* 1, 8–12 (1998).

68. WASSERSTROM, *supra* note 67, at 16–17.

69. *Id.* at 25.

70. *Id.* at 26–27.

71. *Id.*

72. *Id.* at 27. Although there is no necessary relationship between discovery and justification in the context of any particular decision, Wasserstrom notes that, in a larger sense, there is likely to be an asymmetrical relationship between them. “That is to say, a procedure of discovery may be adopted if it succeeds in ‘generating’ more conclusions that can be justified within the accepted logic of justification than any other discovery procedure.” *Id.*

inspired by something completely external to the law, such as a flash of insight while gazing at the sunset. An opinion describing that process would tell us how he reached his decision, but it would not speak to whether the decision was justified. Wasserstrom argued that this not only demonstrates the distinction between decision and justification, but also undermines any criticism of judicial opinions based on their failure to provide an accurate description of the decision-making process.<sup>73</sup> That, he contends, is not their purpose, which is instead to demonstrate that a decision is valid in light of existing authority.<sup>74</sup> Indeed, Wasserstrom argues that “[t]o insist—as many legal philosophers appear to have done—that a judicial opinion is an accurate description of the decision process there employed if and only if it faithfully describes the procedure of discovery is to help to *guarantee* that the opinion will be found wanting.”<sup>75</sup>

Martin Golding further develops this conception of judging by analogy to the process of scientific discovery.<sup>76</sup> Golding draws on philosophy of science, in which the distinction between discovery and justification is frequently illustrated by chemist Friedrich August Kekule von Stradonitz’s “account of how the idea of representing the molecular structure of benzene by a hexagonal ring came to him while dozing in front of his fireplace and seeing the flames dancing about in snake-like arrays.”<sup>77</sup> Despite the clear relevance of this story to any inquiry into how hypotheses are generated, it is not helpful in answering the question whether a hexagonal ring is a scientifically valid representation of the benzene molecule. In a similar fashion, a judge might have the resolution of a case occur to her in a flash of insight triggered by some stimulus external to the law. But, Golding reasons, the appropriateness of that result can only be demonstrated by reference to justifying reasons.<sup>78</sup> The judicial opinion thus serves a function analogous to experimentation in science in that it provides a mechanism for testing the validity of a hypothesis.<sup>79</sup> And this justification is, for Golding, the only significant part of the process. He acknowledges that “it would be unfortunate if a judge’s argument was a mere rationalization and if the judge did not sincerely hold the reasons he explicitly gives. But in an important respect this fact, whenever it is a fact, is irrelevant to the justifiability of the decision.”<sup>80</sup> Thus Golding draws a distinction between “explanatory” and “justifying” reasons, with only the latter being of significance. “The crucial question

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73. *Id.* at 28–29.

74. *Id.*

75. *Id.* at 28.

76. Martin P. Golding, *A Note on Discovery and Justification in Science and Law*, in JUSTIFICATION 124, 124–25 (J. Roland Pennock & John H. Chapman eds., 1986).

77. *Id.* at 125.

78. See MARTIN P. GOLDING, LEGAL REASONING 2 (1983).

79. *Id.* at 2–3; Golding, *supra* note 76, at 134 (“The ‘testing’ of a proposed decision, so to speak, occurs in the ‘rationalization’ given in the opinion, that is, in the argument that shows that the decision can be inferred from correct propositions of law.”). For a detailed critique of science-law analogy, see ANDERSON, *supra* note 66, at 39–52.

80. GOLDING, *supra* note 78, at 8.

is whether the given reasons are adequate to establish the conclusions, and not whether they were the products of hunch, bias, or personal value-predisposition.”<sup>81</sup>

#### B. CRITIQUES OF THE DISTINCTION

The decision-justification distinction is subject to two primary critiques. The first stems from the notion that the distinction relies too heavily on objectivity and certainty in law. The suggestion that we need not worry about judges’ actual motivations so long as their decisions can be justified by reference to law assumes that the law is settled and meaningfully constrains judicial decisionmaking. But the law is not always settled, not only in the sense that some questions remain unresolved but also in the sense that, not infrequently, parallel lines of authority will appear to govern the resolution of a given issue in conflicting ways.<sup>82</sup> More generally, the Legal Realists long ago demonstrated that even “settled” law allows judges room in which to maneuver.<sup>83</sup> One need not accept the proposition that law provides no constraint at all in order to reach the conclusion that opinions justifying decisions in accordance with “objective” legal standards might mask decisions motivated by non-legal, and potentially improper, considerations.<sup>84</sup>

It is this last point that is most significant. Insofar as the functions of judicial opinions include those of providing guidance to parties who must structure their affairs in accordance with law and judges who must render decisions in accordance with law,<sup>85</sup> it is important that judicial opinions speak as fully and candidly as they can to why the court decided as it did.<sup>86</sup> If a court issues opinions that speak only of doctrine where doctrine does not capture all of the factors driving its decisions, parties and judges looking to act in such a way as not to run afoul of that court will lack all the information they need in order to do so. A lower court judge might follow the letter of the law perfectly. But if in

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81. Golding, *supra* note 76, at 128.

82. See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1394 (1995) (noting the existence within a single jurisdiction of distinct “winning” and “losing” formulations of what purports to be the same legal standards).

83. For an overview of Legal Realism, see Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261–79 (Dennis Patterson ed., 1999).

84. See ANDERSON, *supra* note 66, at 4 (arguing that “different logical justifications could be used to justify conflicting outcomes. Hence the indeterminacy of formal decision-making leaves open the question of substantive elements being the real determinants of the decision”).

85. See Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 787–93 (2006) (discussing the functions of judicial opinions). Indeed, Golding expressly acknowledges these functions. See GOLDING, *supra* note 78, at 9–10.

86. For discussions of the significance of candor in judicial decisionmaking, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979); Oldfather, *supra* note 16, at 155–60; Micah Schwartzman, *The Principle of Judicial Sincerity*, 94 VA. L. REV. (forthcoming June 2008); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

doing so she fails to account for a higher court's unarticulated preferences—whether they be based on equitable assessments or on more clearly improper factors such as a party's race or economic status—she might, nonetheless, find herself being reversed. Put another way, if a court's decisions are explained by somewhat consistent reasons that are absent from its justifications, the existence of those explanatory reasons is likely to lead to the exercise of judicial power for reasons that will not be apparent merely from reading the justifications provided in past decisions. Those sorts of reasons, and not whether a decision was inspired by a sunset, are what advocates of judicial candor have in mind.

The second critique of the decision-justification distinction is that it fails to account for the nuances of judicial decisionmaking and thus to provide an accurate description of the judicial process. Although neither speaks directly to the point, both Golding and Wasserstrom implicitly view the decision of which party should win in a given suit, rather than the rationale, as the decision subject to justification.<sup>87</sup> That, however, seems to be an inappropriately narrow conception of what judges decide. Indeed, the identity of the winner of a given case will typically matter only to the parties to that case. The same holds even if we conceive of specific legal or factual disputes as the relevant unit of decision. For everyone else to whom the court's decision will be significant, including those who must order their affairs in compliance with the law and judges who must decide future cases in accordance with the law, it is the court's rationale, and perhaps even the precise language in which it articulates that rationale, that is significant.<sup>88</sup> Thus the content of the justification is an important part of a court's decision. To illustrate by way of a simple example, a decision that a defendant is not liable because his conduct was not negligent is different from a decision that he is not liable because the plaintiff was contributorily negligent. At the broad level on which Wasserstrom and Golding operate, the "decision" is the same: defendant wins. And while the defendant in that case will care only about the result in the sense that he is not liable, future defendants, and those who wish to avoid becoming defendants, will care about why the defendant was not liable. Significantly, they will only care about what the court provides in the way of a rationale. For future defendants, in other words, the important component of the court's decision is not the identity of the winner, but rather the

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87. See GOLDING, *supra* note 78, at 8–9 (equating the court's "decision" with its "conclusion," which is to be justified to an audience consisting most prominently of the losing litigant); WASSERSTROM, *supra* note 67, at 1–3 (referring to courts deciding "cases").

88. See Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) ("[W]hen we are in the pit of actual application, we will discover that it is not what the Supreme Court held that matters, but what it *said*. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of holding."). Ninth Circuit Judges Kozinski and Reinhart have justified their support for nonprecedential opinions by reference to the fact that the phrasing of their decisions has precedential consequence. See Alex Kozinski & Stephen Reinhart, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions*, CAL. LAW., June 2000, at 44 (noting that for an opinion to properly be designated as precedential, the members of the court must agree not only on the result, but also on its phrasing).

rationale that the court offers in support.

What this suggests is that any attempt to separate decision and justification is not merely artificial, but also inaccurate as even a simplified description of the process. What seems more likely instead is a process in which the act of writing feeds back to modify the justification (and hence the decision) as it is being formulated.<sup>89</sup> “Decision” is thus not a singular moment that precedes justification and is either confirmed or rejected on the basis of the “testing” that occurs via the process of justification. Decision is instead an ongoing process that might begin with a flash of insight, and that might be influenced by additional flashes of insight during its course, but that begins with a broad-level decision (defendant wins) and then proceeds through a process of narrowing (defendant wins because plaintiff was contributorily negligent) and refinement (defendant wins because plaintiff was contributorily negligent and that finding is appropriate because of X, Y, and Z). And even this description is undoubtedly too linear and simplistic to capture the complexity of the relationship. In some instances the transformation will be so substantial as to result in a different decision even at the Wasserstrom and Golding level of which party wins, but more often the process will result in modifications of rationale and phrasing that affect the reach of the court’s decision in future cases. The important point is that the decision is not complete until the justification is complete.

This will not always be true. There are, after all, such things as “easy cases,” as to which settled law provides a clear answer. In those situations the deductive process depicted in the typical opinion is likely to be an accurate description of how the court actually decided the case. For example, if the law is clear that contributory negligence does not bar a plaintiff from recovering, but the trial court nonetheless gave a contributory-negligence instruction to the jury, then the appellate judges reviewing the case are more likely to have drawn on their knowledge of the law relating to contributory negligence in deciding the case than they are to have relied on any hunch or flash of insight. In such a situation the value to future actors is not likely to be substantial, since the opinion’s contribution to the body of law would only be to provide a small additional increment of assurance that contributory negligence is not a bar to recovery.

Ultimately, it seems most appropriate to conclude that any distinction between decision and justification that regards them as wholly separate processes is, at best, partially correct. That is to say, there is undoubtedly some perhaps large set of cases in which the law is not indeterminate, in which the nature of the appropriate decision follows naturally from the settled law, and in which a court’s decision can accurately be characterized as having been made prior to and apart from the process of justification. These conditions do not hold for all cases, of course. And for those cases in which they do not, there is reason to suspect that the process of justification will lead to changes in the content of the

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89. The suggestion is consistent with Dan Simon’s bi-directional account of the judicial reasoning process. See Simon, *supra* note 67, at 122–23.



justification. In the American legal system, of course, the process of justification typically involves the creation of a written opinion setting forth the court's reasoning. The remainder of this Article considers how that process might affect the decisionmaking that it purports merely to reflect.

### III. THE RELATIONSHIP BETWEEN WRITING AND COGNITION

Judges writing about the opinion-writing process commonly observe that the process of writing an opinion serves as a valuable check on the decisionmaking process. The phenomenon is most often captured in the phrase "it won't write."<sup>90</sup> The core idea is that judges at least occasionally find that a result or line of reasoning that seemed appropriate at one point in the decisionmaking process no longer seems so attractive when the judge attempts to transfer it to paper. Perhaps the authorities the judge thought justify one result turn out instead to justify another. Or perhaps writing reveals gaps in what appeared to be an unbroken chain of logic. Whatever the mechanism by which the act of writing disciplines the process of decision, the key point is that judges seem to agree that the process of creating a written justification for a decision will often alter the terms of the justification, and thus in an important sense alter the decision itself.

The basic notion that writing serves to refine thought has likewise had a consistent presence in the academic literature on the writing process.<sup>91</sup> Only recently, however, have cognitive scientists begun to study the relationship in more depth. Although the research remains in its early stages, it has already revealed that writing's benefits are not universal. That is, while many types of decisionmaking benefit from being made pursuant to a process that incorporates a written component—including perhaps most of the sorts of decisions that judges are called upon to make—not all do. This Part outlines the research on the psychology of writing, as well as related research that might shed light on the relationship between writing and judging.

#### A. TEXT VERSUS ORALITY

If it is an overstatement to say that the use of text is necessary to a legal system, it is only slightly so. Writing freezes verbalization, ensuring continuity of content and facilitating publicity.<sup>92</sup> The commitment of a rule to writing thus allows for broader and more consistent dissemination of the rule. It is no coincidence that every modern legal system utilizes written codes and records

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90. See *supra* note 2 and accompanying text.

91. See, e.g., JUDITH A. LANGER & ARTHUR N. APPLEBEE, *HOW WRITING SHAPES THINKING: A STUDY OF TEACHING AND LEARNING* 3–5 (1987); FRANK SMITH, *WRITING AND THE WRITER* 1 (2d ed. 1994) ("Not only can a piece of writing communicate thought from writer to reader . . . but also the act of writing can tell the author things that were not known (or not known to be known) before the writing began.").

92. See Paul Bergman, *The War Between the States (of Mind): Oral Versus Textual Reasoning*, 40 *ARK. L. REV.* 505, 525 (1987).



of court decisions, and that preliterate societies typically lack what we would characterize as a system of law.<sup>93</sup>

The use of text provides another advantage. Words captured in writing can be more easily manipulated in thought. While speech exists for only an instant,<sup>94</sup> text remains to be reviewed and reconsidered. Because the reader need not devote great effort to storing the content of text in his memory, he can expend more energy on understanding and assessing the material.<sup>95</sup> This enables more complex processing. Indeed, written text may be essential to the widespread use of syllogistic reasoning,<sup>96</sup> which figures prominently in legal discourse.<sup>97</sup> In sum, as Ronald Collins and David Skover put it, “[t]he typographic word enhances all of the values associated with the supremacy of law—uniformity, predictability, universality, and analytical applicability of printed commands. With its systematic categories and abstract concepts, typographic law emphasizes detached and logical analysis.”<sup>98</sup>

Text, then, seems necessary to law, and is an important component of the type of methodical, logical reasoning that is the hallmark of legal systems.<sup>99</sup> To say this, however, is not necessarily to say that the act of writing is equally important. Text need not be the product of writing. Legal texts could be generated through the transcription of speech. The means of creation do not affect the central virtues that the use of text brings to a legal system. Whether the process of writing might add value in its own right is a separate question.

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93. See JACK GOODY, *THE DOMESTICATION OF THE SAVAGE MIND* 11 (1977); WALTER J. ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* 33–34 (1982) (discussing the difficulties faced by a primarily oral culture in seeking to work through a complex problem); see also Ehrenberg, *supra* note 7, at 1186 (noting the centrality of writing to a sophisticated legal system).

94. Cf. ONG, *supra* note 93, at 31–32 (“[S]ound has a special relationship to time unlike that of the other fields that register in human sensation. Sound exists only when it is going out of existence. It is not simply perishable but essentially evanescent, and it is sensed as evanescent.”).

95. See *id.* at 39 (discussing the way in which “[w]riting establishes in the text a ‘line’ of continuity outside the mind” which allows the reader to concentrate on assessment).

96. Syllogisms can be viewed as “an act of graphic representation, in the sense that laying out an argument in this way is hardly a characteristic feature of oral discourse but . . . is one whose formal presentation depends upon the written word.” JACK GOODY, *THE INTERFACE BETWEEN THE WRITTEN AND THE ORAL* 279 (1987).

97. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 42 (1990) (noting that “most legal questions are resolved syllogistically”) (emphasis omitted).

98. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 *STAN. L. REV.* 509, 534 (1992).

99. See Schwartzman, *supra* note 86, at 4. Schwartzman states:

Judges are charged with the responsibility of adjudicating legal disagreements between citizens. As such, their decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the reasons for their decisions. Those who fail to give sincere legal justifications violate this condition of legitimacy. They act against the demands of the adjudicative role assigned to them.

## B. THE DISTINCTION BETWEEN WRITING AND THOUGHT

Although the idea that writing is merely transcription of thought has a superficial appeal, psychologists and linguists agree that it is inaccurate. As Steven Pinker observes, we commonly have the experience of making a statement, either orally or in writing, and immediately recognizing that “it wasn’t exactly what we meant to say.”<sup>100</sup> It follows, he argues, that “there has to be a ‘what we meant to say’ that is different from what we said.”<sup>101</sup> What is more, “[w]hen we hear or read, we usually remember the gist, not the exact words, so there has to be such a thing as a gist that it not the same as a bunch of words.”<sup>102</sup> The language of thought is distinct from language as we typically conceive of it, and while it is in many respects less complex than the language of words,<sup>103</sup> it is also capable of carrying a great deal more information at any given moment.<sup>104</sup>

This latter observation holds on two levels. First is the level of conscious thought. I am aware, as I write this, of considerably more information about what I want to say than I can possibly put into words (either orally or in writing) with anything approaching simultaneity. I have a plan not only for what the next paragraphs will say, but also for how what I am about to say ties in with the rest of the observations and arguments that, as I write this, I also have mostly yet to make. The task of writing this Article would be considerably easier were I able to translate all that information into text as quickly as I can think it. By the time this is published, however, I will have spent an inordinate amount of time organizing, reorganizing, and otherwise manipulating the raw information presently contained in my thoughts. The second level at which thought can carry more information than language is that of unconscious thought. Humans are able to process considerably more information than we are consciously aware of processing.<sup>105</sup> Our minds grapple with information even when our attention is directed elsewhere.

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100. STEVEN PINKER, *THE LANGUAGE INSTINCT* 57 (1994).

101. *Id.*

102. *Id.* at 58.

103. *Id.* at 82 (noting that, while thought is in many respects richer than language, “mentalese must be simpler than spoken languages; conversation-specific words and constructions (like *a* and *the*) are absent, and information about pronouncing words, or even ordering them, is unnecessary”).

104. *Id.* at 81. Pinker states:

The representations underlying thinking, on the one hand, and the sentences in a language, on the other, are in many ways at cross-purposes. Any particular thought in our head embraces a vast amount of information. But when it comes to communicating a thought to someone else, attention spans are short and mouths are slow. To get information into a listener’s head in a reasonable amount of time, a speaker can encode only a fraction of the message into words and must count on the listener to fill in the rest.

*Id.*

105. *See infra* section III.D.2.

## C. TRANSFORMING THOUGHT (INTO TEXT)

Because thought can carry more information than language, and because it operates in a fundamentally different way, verbalization necessarily entails a process of translation. The writer must take her thoughts, the meaning of which are clear to her even though they may be somewhat unformed, and put them into words. She must, in other words, move from an immediately accessible (to her) private meaning to a public meaning that can be accessed solely through the medium of words.<sup>106</sup> However difficult this may be in the context of speech, it requires vastly more effort to put thoughts into writing. An oralist can rely on intonation, gesture, and other non-verbal cues to convey much of her intended meaning.<sup>107</sup> Her words can consequently be relatively imprecise, because the audience will have the ability to interpret them in the context of her delivery. With writing, in contrast, the words themselves must do all the work, and the writer must take care to make appropriate selections.<sup>108</sup> She cannot control the context in which they will be read, nor can she provide cues to aid in the interpretation of ambiguity. As Ronald Kellogg points out, “writing anything but the most routine and brief pieces is the mental equivalent of digging ditches.”<sup>109</sup>

This level of effort is necessary not merely because of the difficulty involved in moving from the realm of thought to speech. Just as writing cannot convey the contents of one’s thought, it also does not merely distill thought. Sophisticated writers engage in a constant process of “metacognition”—monitoring and evaluating both their thoughts and the felicity with which they have put those thoughts into words.<sup>110</sup> As a result, the process of writing involves the transformation of thought. Writers have long expressed the sentiment that only through writing can one come to fully understand the subject matter about which one is writing.<sup>111</sup> Psychologists agree that the process of writing leads one to engage with a subject, and to manipulate one’s thoughts regarding that subject, in a

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106. RONALD T. KELLOGG, *THE PSYCHOLOGY OF WRITING* 10, 25 (1994). Kellogg explains, “Writers must be able to represent their inner experiences, feelings, beliefs, and attitudes such that they can then be shared and understood in a public forum. Forging the relationship between personal and consensual symbols is difficult and may never be completely successful.” *Id.* at 10.

107. “Many a page of prose and many a narrative has been devoted to expressing what was, in effect, a sob, a moan, a laugh, or a piercing scream. The written word spells out in sequence what is quick and implicit in the spoken word.” MARSHALL McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 79 (1964); *see also* David R. Olson, *From Utterance to Text: The Bias of Language in Speech and Writing*, 47 *HARV. EDUC. REV.* 257, 263 (1977).

108. *See, e.g.*, DAVID R. OLSON, *THE WORLD ON PAPER: THE CONCEPTUAL AND COGNITIVE IMPLICATIONS OF WRITING AND READING* 91 (1994) (elaborating on the hypothesis “that whereas spoken utterances tend to indicate both what is said and how it is to be taken, written ones tend to specify only the former”).

109. KELLOGG, *supra* note 106, at 17.

110. *Id.*

111. Kellogg characterizes the self-reports of professional writers as revealing a process involving “a struggle to generate and shape ideas, with the translation from the personal realm of thought to the public realm of text spurring further invention and insight on the part of the writer.” *Id.* at 25.

unique way.<sup>112</sup> Kellogg uses the phrase “active construction,” meaning “a struggle to generate and shape ideas, with the translation from the personal realm of thought to the public realm of text spurring further invention and insight on the part of the writer.”<sup>113</sup> As a consequence, someone who has written about a topic will almost inevitably emerge from the process with different thoughts about the topic. The change may be significant, involving a radically different assessment of the subject matter, or it may simply involve a greater appreciation for nuance. In either case, the writer’s knowledge has been transformed by the process.

Psychologists Carl Bereiter and Marlene Scardamalia suggest that the process of writing can occur under one of two fundamental models.<sup>114</sup> The first is the “knowledge telling” model. Under this model, writing resembles ordinary conversational speech in that the writer simply translates whatever knowledge he already has into textual form.<sup>115</sup> Although the process entails some knowledge transformation, the writer’s primary goal is to convey existing, intact blocks of information from his memory to his audience.<sup>116</sup> This is the model followed by young and otherwise unsophisticated writers, who focus most of their effort on retrieving information from memory, making a basic assessment of its appropriateness to the topic, and generating sentences.<sup>117</sup> Writers engaged in knowledge telling tend not to focus on organization or to seek to achieve specific rhetorical goals and do not devote a great deal of effort to editing.<sup>118</sup>

Bereiter and Scardamalia’s second model is the “knowledge transforming” approach.<sup>119</sup> As its name suggests, the hallmark of this method is that it “enable[s] the individual to accomplish alone what is normally accomplished only through social interaction—namely, the reprocessing of knowledge.”<sup>120</sup> This, they posit, is a fundamentally different process. Writers engaged in knowledge transformation are not simply doing a better job at the same task as compared to those engaged in knowledge telling. “What distinguishes the more studied abilities [of knowledge transformers] is that they involve deliberate, strategic control over parts of the process that are unattended to in the more naturally developed ability [relied on by knowledge tellers].”<sup>121</sup> For these writers, the act of writing involves the reworking of thought. Such writers

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112. *Id.* at 16.

113. *Id.* at 25.

114. CARL BEREITER & MARLENE SCARDAMALIA, *THE PSYCHOLOGY OF WRITTEN COMPOSITION* 5–6 (1987). Although their discussion proceeds as if one were either one sort of writer or the other, they acknowledge that in reality the processes on which they focus may be points on a continuum. *See id.* at 29.

115. *See id.* at 9–10.

116. *Id.* at 22, 29.

117. *See* KELLOGG, *supra* note 106, at 88.

118. *See id.*

119. BEREITER & SCARDAMALIA, *supra* note 114, at 5–6.

120. *Id.*

121. *Id.* at 6.

engage in simultaneous acts of problem-solving. In what Bereiter and Scardamalia call the “content space,” writers address problems relating to their beliefs and knowledge concerning the topic about which they are writing.<sup>122</sup> Here “one works out opinions, makes moral decisions, generates inferences about matters of fact, formulates causal explanations, and so on.”<sup>123</sup> In the “rhetorical space,” writers grapple with the need to achieve certain rhetorical goals.<sup>124</sup> Here the focus is on word choice, organization, and the like. These processes interact as writers consider “whether the text they have written says what they want it to say and whether they themselves believe what the text says.”<sup>125</sup> Bereiter and Scardamalia contend “that this interaction between the two problem spaces constitutes the essence of reflection in writing.”<sup>126</sup>

For instance, recognition that a key term will not be understood by many readers gets translated into a call for definition; search within the content space for semantic specifications leads to a realization by the writer that he or she doesn’t actually have a clear concept associated with the term, and this realization sets off a major reanalysis of the point being made.<sup>127</sup>

As Bereiter and Scardamalia acknowledge, these models are not descriptively accurate in the sense that people are either one sort of writer or another, or that they engage in only one type of writing during the course of any given writing project.<sup>128</sup> Writers’ behavior in reality more likely falls along a continuum on which their two models represent core concepts.<sup>129</sup> Other variables also come into play. For example, those with greater subject-matter expertise approach the task of writing relating to the content of their expertise in ways that are qualitatively different from novices.<sup>130</sup> Experts are more sensitive to the rhetorical goals of their task, while novices remain relatively more focused on content, and experts are likely to go about the planning process differently.<sup>131</sup> This difference is starkly illustrated by the distinction between knowledge telling and knowledge transformation, but it also appears to be the case that those with greater subject-matter expertise will generally have to invest less effort to produce an equivalent product.<sup>132</sup> This is not to suggest that subject-matter expertise makes writing easy, only that it introduces efficiencies that may in turn be offset by additional aspects of the tasks attended to by experts (but to a lesser

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122. *Id.* at 302; *see also* KELLOGG, *supra* note 106, at 34.

123. BEREITER & SCARDAMALIA, *supra* note 114, at 302.

124. *Id.*

125. *Id.* at 11.

126. *Id.* at 302.

127. *Id.* at 303.

128. *Id.* at 29.

129. *See id.*

130. *See* KELLOGG, *supra* note 106, at 72–74.

131. *Id.* at 86–87.

132. *Id.* at 88, 89, 91–93.

degree, if at all, by novices).<sup>133</sup>

#### D. WRITING AND DECISIONMAKING

Most commentary on the relationship between writing and thought, whether relating to judging or otherwise, proceeds no farther than the observation that the former affects the latter. The unstated assumption is that the transformation in thought engendered by writing is uniformly desirable. But that might not be so. To say that writing transforms the writer's thinking is only to say so much. Any such transformation with respect to the writer's understanding of her subject matter need not be either consequential or positive. Perhaps the effect of writing is simply to reinforce the preconceptions one brought to the task, such that, having written, the writer holds her views more strongly but with no deeper level of understanding and without regard to their validity. Or perhaps writing does change the writer's assessment of a topic, but not for the better. Someone who has started writing might, for example, become so influenced by the conceptual path she has started down that she fails to appreciate other aspects of her subject that might have occurred to her had she not become captured by the words she has put on paper.

Still another potential dynamic comes into play when the writing is intended not merely to describe, but also to serve as part of a decisionmaking process. Even if writing does lead at least occasionally to changed decisions, it may not be the case that those decisions are necessarily better than the decisions that would have resulted in the absence of writing. Writing might simply serve as an echo chamber, pursuant to which one's confidence in a decision is increased even if the decision itself is not improved. Alternatively, writing may alter thought processes in such a way as to negatively affect the decisional calculus. A decision that may seem more logical and considered may in fact be suboptimal.

Although the research remains in its early stages, studies suggest that the relationship between writing and cognition is less straightforward than traditional accounts have assumed. Consistent with the standard account, research has suggested a positive link between writing and subject-matter comprehension.<sup>134</sup> The relationship between writing and effective decisionmaking, in contrast, appears to be more complex. Due partly to the fact that it is difficult to assess decisional quality, this research remains in its early stages.<sup>135</sup> That said, a small body of studies suggests that writing is beneficial to some kinds of decisionmaking, but detrimental to others.

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133. *See id.* at 204 ("Even when a writer sacrifices on performance in an attempt to lessen the investment of cognitive effort in a writing task, the degree of automatization obtained is only relative. In sharp contrast to what is seen in the development of other skills, as writers mature and gain expertise, they invest more effort and reflective thought in the task.").

134. *See* Winston Sieck & J. Frank Yates, *Exposition Effects on Decision Making: Choice and Confidence in Choice*, 70 *ORG. BEHAV. & HUM. DECISION PROCESSES* 207, 207 (1997).

135. *See id.*



## 1. Verbalization and Thought

Because the transformation from thought to text involves an intermediate step from the language of thought to the language of communication, we begin our review by considering the research relating to the relationship between thought and verbalization generally. Indeed, most of the research exploring the relationship between justifying one's reasoning and problem-solving effectiveness has involved oral rather than written justification. Much of that research is consistent with the traditional understanding that the process of verbally justifying one's choices leads to better choices, at least insofar as the situation is one in which the best choice equates to the most logical choice. For example, subjects asked to verbalize aloud when solving the "Tower of Hanoi" problem,<sup>136</sup> which requires thinking to proceed in a series of incremental, logical steps, performed better than those who were not.<sup>137</sup>

But verbalization does not always improve performance. In a series of experiments, psychologist Jonathan Schooler has explored what he calls the "verbal overshadowing effect."<sup>138</sup> This effect comes into play when one confronts situations involving aspects that are difficult to verbalize. One example is the recognition of faces.<sup>139</sup> Subjects asked to provide verbal explanations while engaged in a facial recognition task tend to focus on aspects such as the facial features that can easily be verbalized to the relative exclusion of the less-readily articulable aspects of the process of facial recognition (such as how those features relate to one another).<sup>140</sup> As a result, those who are asked to verbalize during the process perform more poorly than those who are not.<sup>141</sup> In similar fashion, verbalization can negatively affect performance in the context of "insight problems," problems that do not require rigorous, sustained thought to be solved, but rather involve the recognition of a single aspect of the problem,

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136. The Tower of Hanoi problem requires subjects, in as few moves as possible, to transfer discs of varying diameter (or, alternately, labeled with sequential numbers) from one peg to another, subject to two rules: subjects can only move one disc at a time and discs of larger diameter (or with a higher number) cannot be placed on discs with smaller diameter (or a lower number). See, e.g., Leif Stinnesen, *The Influence of Verbalization on Problem-Solving*, 26 SCANDINAVIAN J. PSYCH. 342, 343-44 (1985).

137. See Mary E. Ahlum-Heath & Francis J. Di Vesta, *The Effect of Conscious Controlled Verbalization of a Cognitive Strategy on Transfer in Problem Solving*, 14 MEMORY & COGNITION 281 (1986); Stinnesen, *supra* note 136.

138. E.g., Joseph M. Melcher & Jonathan W. Schooler, *Perceptual and Conceptual Training Mediate the Verbal Overshadowing Effect in an Unfamiliar Domain*, 32 MEMORY & COGNITION 618, 618-19 (2004) (providing an overview of the "verbal overshadowing effect").

139. Sean M. Lane & Jonathan W. Schooler, *Skimming the Surface: Verbal Overshadowing of Analogical Retrieval*, 15 PSYCHOL. SCI. 715, 715 (2004). For a brief overview of the research relating to the verbal overshadowing effect in the context of facial recognition, see Christian A. Meissner & Amina Memon, *Verbal Overshadowing: A Special Issue Exploring Theoretical and Applied Issues*, 16 APPLIED COGNITIVE PSYCHOL. 869, 869-71 (2002).

140. See Lane & Schooler, *supra* note 139, at 715.

141. See generally Jonathan W. Schooler & Tonya Y. Engstler-Schooler, *Verbal Overshadowing of Visual Memories: Some Things Are Better Left Unsaid*, 22 COGNITIVE PSYCHOL. 36 (1990).



often after coming to an impasse, that makes solution easy.<sup>142</sup> For example: “A prisoner was attempting to escape from a tower. He found in his cell a rope that was half long enough to permit him to reach the ground safely. He divided the rope in half, tied the two parts together, and escaped. How could he have done this?”<sup>143</sup> The answer involves the realization that a rope consists of multiple strands that could be unraveled and then tied together to double its length.<sup>144</sup> Subjects who were asked to describe their process of attempting to solve the problems solved significantly fewer problems than those who were not.<sup>145</sup> Notably, the performance of subjects participating in the same study who were asked to solve logic problems was not affected by verbalization.<sup>146</sup>

Verbalization can likewise negatively affect the ability to assess analogies. Sean Lane and Jonathan Schooler conducted two experiments in which subjects were asked to determine whether stories were analogous to one another.<sup>147</sup> Half were asked to think out loud while making their determination, while half were not. In both experiments, verbalization made it less likely that subjects would uncover deep structural analogies between stories, instead focusing on surface similarities.<sup>148</sup> Lane and Schooler posited that this resulted from the accessibility and articulability of surface-level features of the stories as opposed to deeper structural features and concluded that the finding “fits with research demonstrating that verbalization biases subjects toward verbalizable processes.”<sup>149</sup> Schooler and his colleagues have likewise shown that verbal overshadowing affects performance on tasks like assessing the quality of various strawberry jams<sup>150</sup>

142. See Jonathan W. Schooler et al., *Thoughts Beyond Words: When Language Overshadows Insight*, 122 J. EXPERIMENTAL PSYCHOL.: GEN. 166, 166, 177 (1993).

143. *Id.* at 182.

144. *Id.* Another example: “A dealer in antique coins got an offer to buy a beautiful bronze coin. The coin had an emperor’s head on one side and the date 544 B.C. stamped on the other. The dealer examined the coin, but instead of buying it, he called the police. Why?” *Id.* Here the answer requires recognition of the fact that nobody in the year we now refer to as 544 B.C. (“before Christ”) would have referred to it in that way, or even could have known to do so. *Id.* at 183.

145. *Id.* at 170–77. The effect appeared under two different experimental designs. In the first, “subjects were interrupted after 2 min of working on each problem. The interruption lasted 1.5 min. During that time, those in the verbalization condition were instructed to write out all relevant thoughts that had occurred during the first 2 min of solving the problem.” *Id.* at 170; see also *id.* at 172 (noting the use of the same basic procedure in a second experiment). In the second, subjects were asked “to think aloud while solving each problem.” *Id.* at 174; see also *id.* at 176 (noting the use of the same basic procedure in an additional experiment).

146. *Id.* at 177, 183.

147. Lane & Schooler, *supra* note 139.

148. *Id.*

149. *Id.* at 718.

150. 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). The experiments in this study involved having subjects rate strawberry jams in one experiment and college course alternatives in the other. Some subjects were asked to reflect on their ratings while others were not. These groups’ ratings were then compared against expert assessments of the same items. These comparisons revealed that introspection led to choices that were less consistent with expert assessment, and thus to “worse” choices. *Id.*

and making college course selections.<sup>151</sup>

## 2. The Unconscious Thought Theory

Schooler has described the verbal overshadowing effect as involving a phenomenon in which “verbalization may cause such a ruckus in the ‘front’ of one’s mind that one is unable to attend to the new approaches that may be emerging in the ‘back’ of one’s mind.”<sup>152</sup> Psychologist Ap Dijksterhuis and his colleagues have explored a similar insight in developing and testing what they refer to as the “Unconscious Thought Theory.”<sup>153</sup> According to this theory, people have the ability to process a vast amount of information without consciously devoting effort to the task.<sup>154</sup> The distinction between conscious and unconscious thought turns on attention: “Conscious thought is thought with attention; unconscious thought is thought without attention (or with attention directed elsewhere).”<sup>155</sup>

A key difference between the two types of thought lies in their relative capacities. Conscious thought has limited capacity. It can generally do only one thing at a time and has only enough capacity to store roughly seven items.<sup>156</sup> As a result, “conscious thought by necessity often takes into account only a subset of the information it should take into account.”<sup>157</sup> In addition, conscious thought, like verbalization, tends to focus attention on the more salient aspects of a problem, and thereby to lead to inappropriate weighing of the relevant attributes.<sup>158</sup> This, in turn, leads to the conclusion that conscious thought provides the best means for decision only in certain circumstances. The key is not to strain its capacity. Thus, conscious thought works well for relatively simple decisions involving few variables.<sup>159</sup> Conscious thought is also best

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151. *Id.* Rosalind Tordesillas and Shelly Chaiken replicated this second portion of Wilson & Schooler’s experiment with some modifications. Rosalind S. Tordesillas & Shelly Chaiken, *Thinking Too Much or Too Little? The Effects of Introspection on the Decision-Making Process*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 625 (1999). They concluded that introspection is harmful to decisionmaking when it diverts attention away from the information most relevant to the analysis. *Id.* at 630.

152. Schooler et al., *supra* note 142, at 169.

153. Ap Dijksterhuis & Loran F. Nordgren, *A Theory of Unconscious Thought*, 1 PERSP. PSYCHOL. SCI. 95 (2006).

154. *Id.* at 96. Others also have studied the power of unconscious processing. See, e.g., GUY CLAXTON, *HARE BRAIN, TORTOISE MIND: WHY INTELLIGENCE INCREASES WHEN YOU THINK LESS* (1997); TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* (2002). Many of these ideas were popularized in MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

155. Dijksterhuis & Nordgren, *supra* note 153, at 96. Put more formally, “[w]e define conscious thought as object-relevant or task-relevant . . . thought processes that occur while the object or task is the focus of one’s conscious attention . . . . Unconscious thought refers to object-relevant or task-relevant cognitive or affective thought processes that occur while conscious attention is directed elsewhere.” *Id.*

156. *Id.*

157. *Id.* at 96.

158. See Ap Dijksterhuis et al., *On Making the Right Choice: The Deliberation-Without-Attention Effect*, 311 SCIENCE 1005, 1005 (2006)

159. See Dijksterhuis & Nordgren, *supra* note 153, at 103.

when rule-following is appropriate. “During conscious thought, one can deal with logical problems that require being precise and following rules strictly, whereas during unconscious thought one cannot.”<sup>160</sup> But because of its limited capacity, conscious thought fares less well as tasks become more complex. Dijksterhuis and Nordgren use the example of the effort to select from among a number of houses that are comparable on a general level but dissimilar in their particulars.<sup>161</sup> Just as with verbal overshadowing, people fail to take all relevant considerations into account, focusing instead “on attributes that are accessible, plausible, and easy to verbalize.”<sup>162</sup> They employ mental shortcuts—people tend to resort to stereotypes more when engaged in conscious thought, and when faced with a task that requires the consideration and processing of large amounts of information (such as when serving as a juror) tend to quickly form a sense as to the appropriate result and then interpret subsequent information in light of that expectancy.<sup>163</sup>

Unconscious thought, in contrast, has a vastly greater capacity. Dijksterhuis and Nordgren estimate that conscious thought can process from ten to sixty bits of information per second.<sup>164</sup> “The entire human system combined, however, can process about 11,200,000 bits per second.”<sup>165</sup> Dijksterhuis and his colleagues formulated the “deliberation-without-attention” hypothesis to characterize our ability to put this vast processing power to work to make “back of the mind” assessments.<sup>166</sup> While unconscious thought is incapable of the analytic precision of conscious thought, its greater capacity makes it less susceptible to deterioration in decision quality as complexity increases.<sup>167</sup> As a result, they contend that unconscious deliberation will lead to better choices both where a large amount of information must be taken into account and in the context of decisions that call for weighing the relative importance of significant factors.<sup>168</sup> What is more, in these sorts of situations unconscious processing appears to result in more consistent decisions over time as compared to those reached consciously.<sup>169</sup> This process, it bears noting, is not instantaneous. Unconscious processing of complex decisions involves the relatively slow integration of the large amounts of information “into relatively sound summary judgments, giving the pieces of information (more or less) appropriate weights depending on their relative importance. In principle, this means that the quality of decisions made after unconscious thought is independent from the complexity of the problems.”<sup>170</sup>

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160. *Id.* at 101.

161. *Id.* at 95–96.

162. *Id.* at 100.

163. *Id.* at 98.

164. *Id.* at 96–97.

165. *Id.* at 97.

166. *See* Dijksterhuis et al., *supra* note 158.

167. *Id.* at 1006.

168. *Id.*; Dijksterhuis & Nordgren, *supra* note 153, at 100.

169. *See* Dijksterhuis & Nordgren, *supra* note 153, at 100–01 (citing Loran F. Nordgren & Ap Dijksterhuis, *Conscious Thought and Decisional Noise* (2006) (unpublished manuscript)).

170. *Id.* at 103.

There are qualifications. First, subject-matter expertise may ameliorate some of the shortcomings of conscious thought. In other words, those who are knowledgeable about the subject of their conscious reflection tend not to be led as far astray by the process of reflection as those who are not.<sup>171</sup> Second, unconscious processing is only effective if the information on which it is based is effectively acquired in the first instance.<sup>172</sup> Dijksterhuis and Nordgren call this “the ‘best of both worlds’ hypothesis: Complex decisions are best when the information is encoded thoroughly and consciously, and the later thought process is delegated to the unconscious.”<sup>173</sup> Finally, the Unconscious Thought Theory remains in the early stages of development. At present, the theory implies that unconscious thought is preferable where the goal is the general goal of making a “good” decision.<sup>174</sup> Thus one who is attempting to choose the most suitable house for oneself would do well to follow its dictates. It is not, however, clear that this conclusion holds when the goal is more specific, such as to assess whether a certain house is best not for oneself, but for someone else.<sup>175</sup>

In this case, attributes different from the ones you are used to, such as the absence of stairs, become important. It is not clear whether unconscious thought is good at making such decisions. Relatively specific goals often imply strict rules, and as we have argued, conscious thought is better at following rules.<sup>176</sup>

### 3. The Effect of Writing

Based on the research outlined in the preceding two subparts, it seems difficult to predict the effect that writing might have on decisional processes. One could imagine that writing could offset some of the negative effects encountered with oral verbalization. Decisional processes required to assess the extent to which two situations are analogous, for example, might benefit from the knowledge-transformative effects of writing and thereby uncover the deep analogies obscured by oral verbalization.<sup>177</sup> This might occur because writing facilitates the use of logic in conscious thought, because the greater time commitment required by writing allows for more unconscious processing to occur, or because of some combination of the two. On the other hand, it might be that writing introduces its own negative effects. Once writing is underway, the writer may become committed to the course of reasoning she has

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171. *See id.* at 106 n.4; *see also* Timothy D. Wilson et al., *The Disruptive Effects of Explaining Attitudes: The Moderating Effect of Knowledge About the Attitude Object*, 25 J. EXPERIMENTAL SOC. PSYCHOL. 379 (1989).

172. Dijksterhuis & Nordgren, *supra* note 153, at 106.

173. *Id.* at 107.

174. *See id.*

175. *See id.*

176. *Id.*

177. *See supra* text accompanying notes 147–151.

started to articulate and thereby become to some extent blinded to alternative approaches.

Relatively little work has explored the relationship between writing and decisionmaking or problem solving. The studies that exist, however, suggest that, like oral verbalization, writing can sometimes help and sometimes hinder performance. In one study, Winston Sieck and Frank Yates explored the impact of written exposition on subjects' susceptibility to "framing effects."<sup>178</sup> Framing effects result from people's tendency to accept information in the form in which it is provided, which in turn leads them to analyze the same situation differently depending on the given reference points, or "frames."<sup>179</sup> Thus, for example, consumers will tend to purchase additional insurance coverage when doing so is part of a default package that provides the ability to opt out of the additional coverage for a discount, but will not purchase it where the coverage is not included in the default package but may be added for an additional fee.<sup>180</sup> This is so even where the economics of the two alternatives are identical. Sieck and Yates found, in each of the three experiments they conducted, that subjects who engaged in written exposition of their thought processes were less influenced by framing effects.<sup>181</sup> They explained this finding "by suggesting that writing encourages people to actively manipulate the information presented to them in the problem description,"<sup>182</sup> which in turn increases the salience of aspects of the problem that were previously obscured by the frame. With more of the relevant information under active consideration, better decisions are likely to result.<sup>183</sup>

But just as verbal overshadowing can lead people to overemphasize the more readily verbalizable aspects of a problem in the context of oral explanation, Sieck and his colleagues posited that a similar effect might hold in the context of written justification.<sup>184</sup> In a pair of studies, they examined the effect of written justification on subjects' judgment regarding the extent to which stories were analogous. They hypothesized that justification would decrease the ability

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178. Winston Sieck & J. Frank Yates, *Exposition Effects on Decision Making: Choice and Confidence in Choice*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207 (1997).

179. See, e.g., B.A. Mellers et al., *Judgment and Decision Making*, 49 ANN. REV. PSYCHOL. 447, 455–56 (1998). Framing effects and related cognitive shortcuts have been the subject of a considerable amount of legal scholarship in recent years. For a small sampling, see Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 27–28 (2003); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 205–06, 210–11 (2006); Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 417–22 (2006); Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313 (2006).

180. Mellers et al., *supra* note 179, at 456 (discussing Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35 (1993)).

181. Sieck & Yates, *supra* note 178, at 216.

182. *Id.* at 210.

183. See Winston R. Sieck et al., *Justification Effects on the Judgment of Analogy*, 27 MEMORY & COGNITION 844, 844 (1999).

184. *See id.*

to distinguish between good and bad analogies by leading subjects to focus on more readily articulable, but less appropriate, similarities.<sup>185</sup> Their results were consistent with this hypothesis.<sup>186</sup> The experimenters found that subjects asked to provide justifications for their selections focused more on surface-level rather than deep-structural commonalities between situations.<sup>187</sup> This, they concluded, likely resulted from the easier-to-verbalize nature of the surface-level similarities.<sup>188</sup> While written justification led subjects to actively manipulate the information presented to them, that manipulation focused their attention on its verbalizable aspects.<sup>189</sup> “The verbalized elements become more active in memory via rehearsal and, hence, are more influential on subsequent actions.”<sup>190</sup>

As with oral verbalization, then, written justification appears beneficial to certain types of decisionmaking and at least potentially stands as a hindrance to others. The key consideration concerns the extent to which the important aspects of the situation are verbalizable. When they are, written justification should lead to better decisions. When they are not, in contrast, written justification may lead decisionmakers astray. It is important not to overstate this point. For one thing, the body of research underlying it is exceptionally thin. Although it is consistent with the larger body of research exploring verbal overshadowing, the differences between written and oral verbalization counsel against the belief that the effect operates in the same way in both contexts. To suggest that those who provide a written justification for a decision may be subject to verbal overshadowing is not to suggest that written justification is as susceptible to the phenomenon as oral justification. Writing involves the generation of text, which enables the writer to subject her own thought to the greater scrutiny afforded by text.<sup>191</sup> The writer may be able to recognize and therefore remedy the incompleteness of her justification in a way that the oralist cannot.<sup>192</sup> In addition, the process of providing a written justification takes longer than that of providing an oral justification, thereby allowing more time for both conscious and unconscious processing. As a result, there is good reason to imagine that writing might be less susceptible to verbal overshadowing.

The expected format of the justification might also matter. A justification focused on demonstrating that the decisionmaker took account of the appropriate decisional inputs, rather than attempting to articulate too finely how she balanced those inputs, would seem less likely to sway the underlying decision. Such a justification would consist primarily of knowledge telling rather than

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185. *See id.* at 847, 851.

186. *See id.* at 850, 852.

187. *Id.*

188. *Id.* at 853.

189. *See id.* at 844–45, 853.

190. *Id.* at 845; *see also id.* at 853.

191. *See supra* section I.A.

192. *Cf.* Ehrenberg, *supra* note 7, at 1189–90 (arguing that “[t]he classic speech-centered legal process . . . does not truly offer the same opportunities for self-reflection and critique offered by the writing-centered legal process”).



knowledge transformation, thereby lessening the likelihood that the process of writing would affect the substance of the decision. Alternatively, a decision-maker could be required to speak to certain factors deemed crucial to the analysis, or otherwise encouraged to write in such a way as to uncover more than the immediately articulable justifications for decisions. Indeed, Sieck and his colleagues suggest that increased precision of the written justification might ameliorate the overshadowing effect.<sup>193</sup>

#### IV. WRITING AND THE FUNCTIONS OF JUDICIAL OPINIONS

Prior scholarship has identified three primary functions served by judicial opinions.<sup>194</sup> The first is to discipline judges in the decisionmaking process. The key idea here is that the act of writing helps to ensure that judges properly reason through the issues put before them. The second is to facilitate the system of precedent. Opinions memorialize judicial decisions so they can function as authoritative statements of law governing the resolution of future cases. The third is to legitimate those decisions. Roughly stated, opinions provide the parties and the public with assurance that a given decision is not arbitrary, but rather is the product of the reasoned application of appropriate legal standards. As we will see, these functions overlap to a considerable extent.

Although these functions are identified with relative consistency in the literature on judicial opinions, prior work has largely failed to develop either their scope or implications or to consider the ways in which they might stand in tension with one another. To an even greater degree, prior work lacks systematic consideration of how these functions might play out at the different levels of the judicial hierarchy. This is not to suggest that prior commentators do not recognize that Supreme Court opinions serve different purposes (or, at least, serve similar purposes in different ways) than trial court opinions.<sup>195</sup> As is the case with the functions of opinions more generally, however, identification of the phenomenon has not led to development of its implications or to consideration of the different applicability of these functions at different levels, and how that might in turn have implications for when and how opinions are and ought to be generated at the varying levels of the judicial hierarchy.

The goal of this section is to build on the previous literature by more comprehensively exploring and refining the functions of written judicial opin-

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193. See Sieck et al., *supra* note 183, at 853.

194. See, e.g., ALDISERT, PROCESS, *supra* note 66, at 604–10; APPELLATE JUDICIAL OPINIONS 79–90 (Robert A. Leflar ed., 1974); THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 119–21 (1994). Although not expressly broken down into the same three functions, Llewellyn's analysis is similar. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26–27 (1960). These are by no means the only conceivable reasons why judges write opinions. For a relatively comprehensive list of potential reasons for a judicial opinion, see GEORGE, *supra* note 22, at 387–90.

195. See, e.g., WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 55–74, 90–115 (1996) (devoting separate chapters to “style and substance” in opinions from the Supreme Court and the lower federal courts).



ions. In doing so, the analysis pays particular attention to the value that writing plays in fulfilling these functions, relative to an alternative regime without written opinions, such as one in which judicial decisions were justified orally. In addition, it considers the ways in which the different functions of opinions play out at the various levels of the judicial hierarchy. Although much of the discussion is descriptive in nature, it is ultimately driven by the normative questions of whether and when opinions are desirable. It consequently does not consider, for example, many of the historical reasons for the precise manner in which the American system developed.<sup>196</sup>

#### A. OPINIONS AS A MECHANISM FOR DISCIPLINING THE DECISIONMAKING PROCESS

Most judges, like most others to have opined on the subject, buy into the notion that writing provides an important discipline on thought. In the judicial context, the idea is encapsulated in the suggestion that sometimes an opinion “won’t write.”<sup>197</sup> On occasion, a result that seemed appropriate and justified when merely thought about cannot survive the journey to written form. Consistent with this, commentators agree that opinions serve as an important constraint on judicial decisionmaking.<sup>198</sup> As Thomas Baker puts it, “[a] decisionmaker who must reason through to a conclusion in print has reasoned in fact.”<sup>199</sup>

Our study of the relationship between writing and cognition suggests that this understanding is largely appropriate. Legal decisionmaking, much like solving the Tower of Hanoi, often requires thought to proceed in logical steps, such that a decisionmaking process with a written component could be expected to increase its effectiveness.<sup>200</sup> But the preceding analyses suggest that there may be situations in which this understanding does not hold. To the extent that judges must make decisions of the sort susceptible to verbal overshadowing, opinions might serve as a hindrance rather than an aid.

To briefly recap, we have seen that the distinction between decision and justification is not so clear as prior work has suggested.<sup>201</sup> There are undoubtedly some situations in which the act of justification follows in a straightfor-

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196. For example, conducting legal business in writing, rather than orally, was undoubtedly more convenient in the early history of the United States, where neither transportation nor communication technology made such orality feasible given the large geographic area of the country. *See* Ehrenberg, *supra* note 7, at 1179–80 (discussing a cluster of factors that likely caused the American system to diverge from the English). It also seems likely that a court that decides cases via writing will be positioned to handle a larger number of cases than one working in a purely oral process. Efficiency considerations underlie those small modifications that have been made to the oral nature of the English process. *See id.* at 1177.

197. *See supra* text accompanying note 2.

198. *E.g.*, FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57–58 (1980) (noting that the process of writing acts as a constraint on judging).

199. BAKER, *supra* note 194, at 120.

200. *See supra* text accompanying notes 136–137.

201. *See supra* Part II.

ward way from the making of a decision and neither alters the content of the decision nor stands in itself as something that ought to be regarded as a component of the decision. But for many (perhaps even most) judicial decisions, the process of justification can move the judge away from his initial understanding of the proper resolution. Sometimes this movement may result in the sort of dramatic turnabout that affects the identity of the winner. More often, it will affect the rationale or the terms of the justification, which will themselves have independent significance in a precedential sense. In these situations it is not appropriate to characterize decision and justification as separate processes. The psychological research concerning the relationship between verbal justification and decisionmaking effectiveness is consistent with these insights. Whether conducted orally or in writing, the process of justification will at least sometimes affect the quality of decision. And contrary to common belief, the effect is not always beneficial. This research suggests that, rather than a simple dichotomy between decision and justification, judicial decisions fall into three categories. The next subpart explores them in turn.

### 1. Refining the Decision-Justification Distinction

*a. Pure Decision.* The first category includes those instances in which decision and justification can appropriately be regarded as separate processes. Call them “pure decision.” These are the so-called “easy cases,” in which the law is determinate and its application clear. In such a situation an experienced judge can easily make her decision based simply on hearing the contentions of the parties and considering them in light of the governing standard. Take for example a criminal defendant who argues that his conviction should be overturned because the jury should not have believed the prosecution’s chief witness. If that is all there is to the argument, that is clearly a losing case. A judge who writes an opinion justifying the decision will be engaged almost exclusively in knowledge telling, such that the process of writing would have no transformative effect on her thought.<sup>202</sup> The law assigns the function of assessing credibility to the jury, and the defendant here has alleged nothing to remove this case from the scope of that rule. Defendant loses, and the reasons for that result are the same regardless of whether a justification follows the decision. Purely as a descriptive matter, then, the two processes of decision and justification can be regarded as distinct for the simple reason that the act of justification will not affect the substance of the decision.

*b. Positive Justification.* The second category of decisions includes those in which, descriptively speaking, justification affects decision and in which, normatively speaking, that is a desired relationship. I will refer to these as “positive justification” cases. Here the process of writing the opinion involves knowledge

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202. See *supra* text accompanying notes 114–118.

transformation.<sup>203</sup> The judge gains an enhanced appreciation of the law, of the particular nature of the dispute, or of the relationship between the two. That, in turn, leads to a result that is somehow “better” than would have been the case without writing. Most, if not all, depictions of the relationship between writing and judging, and indeed between writing and thought more generally, take positive justification to be the natural result of the process.<sup>204</sup>

*c. Negative Justification.* The cases in our third category include those in which, descriptively speaking, justification affects decision, but in which, normatively speaking, the transformation adversely affects the quality of the underlying decision. These I will call “negative justification” cases. The key characteristic of a negative-justification situation is that attempts to articulate too finely the reasons for one’s decision might lead to verbal overshadowing, in which the judge justifies the underlying decision by reference to available, plausible-sounding reasons. One result is a mismatch between the actual reasons for the judge’s decision and the publicly provided reasons. Such a mismatch would be troubling not only because it would obscure the true reasons for the decision at hand, but also because the publicly provided reasons would be the only ones available to future courts, resulting in the possibility of skewed doctrine. But there is another, perhaps more significant, consequence. Because a focus on those reasons will distract the judge from the factors on which she would otherwise base her decision and that would form the basis of a more accurate decision, the influence of the writing process will undermine decisional quality in the case at hand.<sup>205</sup> This could result directly in one party winning rather than another, or, more subtly, to lead the judge to misbalance equitable and contextual factors, thereby leading to suboptimal conclusions regarding the extent to which certain evidence will be admitted, discovery allowed, and the like. At the same time, the sway of our collective intuitions regarding writing’s positive effects on thought will lead the judge to be more confident in the decision than if she had not written.

## 2. Drawing the Line

The fact that the traditional understanding has been that writing is beneficial to judging is hardly surprising. Law by its very nature seems to require resort to concepts capable of being captured in words.<sup>206</sup> As our uneasiness with Justice Stewart’s “I know it when I see it”<sup>207</sup> approach to obscenity suggests, articulabil-

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203. See *supra* text accompanying notes 119–127.

204. See *supra* text accompanying notes 2–4, 197–199.

205. This phenomenon, coupled with the sense that expertise may ameliorate some of the effects of verbal overshadowing, provides an alternative explanation for the fact that we do not require any sort of written justification from juries, but do ask judges serving as factfinders to issue findings of fact. See FED. R. CIV. P. 52(a) (in actions tried without a jury, requiring judges to set forth findings of fact, either orally in open court or in an opinion or memorandum filed by the court).

206. See *supra* section III.A.

207. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ity seems to be a prerequisite to legality.<sup>208</sup> Judges who report that a decision “will not write” do so on the understanding that a decision that cannot be justified in writing is not an appropriate decision. Notwithstanding Holmes’s famous epigram,<sup>209</sup> logic plays a central role in most legal decisionmaking. The written word thus strikes us as integral to the process. The act of writing, it seems to follow, should likewise be beneficial. It requires the translation of the imprecise, raw material of thought into the concrete, communicable finished product of text. The process of translation in turn leads the writer to reconsider the content of her thought once she has put it on paper. Written ideas are more susceptible to sustained scrutiny and therefore, presumably, to being further refined and improved. Thus just as oral verbalization facilitates solving a problem like the Tower of Hanoi, which requires a methodical, logical approach, and as written verbalization reduces framing effects,<sup>210</sup> so does the act of writing a judicial opinion provide valuable discipline on the process of deciding a case.

But a moment’s reflection reveals this to be an incomplete depiction. The doing of law is replete with situations in which judges must make decisions based on complex, multifaceted inputs, subject to a host of competing considerations.<sup>211</sup> Does the potential prejudicial impact of this evidence substantially outweigh its probative value?<sup>212</sup> Do the equities of the situation support the imposition of a temporary restraining order?<sup>213</sup> These judgments look more like facial recognition than syllogistic reasoning. The sorts of decisions involved require something along the lines of a conclusion about empirical reality, yet

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208. See generally Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1025 (1996) (noting the traditional understanding that “the exercise of judicial power is not legitimate if it is based on a judge’s personal preferences rather than law that precedes the case, on subjective will rather than objective analysis, on emotion rather than reasoned reflection”).

209. “The life of the law has not been logic; it has been experience.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover 1991) (1881).

210. See *supra* section III.D.3.

211. The extent to which such decisions do and ought to occur in law are the subjects of much debate. See Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 235–52 (1990) (providing critical analyses of the jurisprudential and proceduralist debates relating to judicial discretion). Drawing on some of the same psychological research as this Article, Chris Guthrie, Andrew Wistrich, and Jeff Rachlinski concluded that “the judges [they] tested . . . largely based their judgments on intuition, but also demonstrated some ability to override intuition with deliberation.” Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 28 (2007). They suggest that judges, like everyone else, possess both intuitive and deliberative systems for making judgments. Consistent with the analysis here, they suggest that intuitive decisionmaking will generally lead to better results in the context of the legal system, but conclude “that judges should use deliberation as a verification mechanism especially in those cases where intuition is apt to be unreliable either because feedback is absent or because judges face cues likely to induce misleading reliance on heuristics.” *Id.* at 33; see also Hal R. Arkes & Victoria A. Shaffer, *Should We Use Decision Aids or Gut Feelings?*, in *HEURISTICS AND THE LAW* 411–23 (G. Gigerenzer & C. Engel eds., 2006) (canvassing research assessing the relative utility of intuitive decisionmaking versus that made via “decision aids” and concluding that the latter are generally superior to the former).

212. See FED. R. EVID. 403.

213. See FED. R. CIV. P. 65(b).

may be of the sort that are best made not on the basis of sustained, conscious reflection, but rather via a summary, almost intuitive determination, perhaps after having let one's unconscious processing mechanisms sort through the various factors under consideration. By their nature these decisions turn on relatively inarticulable factors. Because both verbalization and conscious reflection lead one to focus one's attention on the more concrete, salient aspects, to the relative exclusion of other important considerations, decisionmaking suffers in two ways. First, a judge acting in these situations will very likely not be able to articulate all the reasons for his decision, making full candor unattainable.<sup>214</sup> Second, he might be led to make a worse decision if he tried to articulate his reasons because the act of providing a justification will lead him to overweigh the articulable components of his analysis relative to other factors.<sup>215</sup>

Suggesting that these categories exist, of course, does little to illuminate the question of which cases fall into which category. Most everyone would agree that there are cases that qualify as "easy" cases. It would be considerably more difficult, one imagines, to attain similarly strong agreement regarding precisely which cases are the "easy" ones. A parallel dynamic would hold with respect to the distinction between positive justification and negative justification, stemming largely from the difficulties involved in determining whether one judicial decision is better than another. The psychological research on which I have drawn involved problem solving and decisionmaking undertaken in situations where the subject's performance could be objectively assessed. That is to say, there were some answers that were incontrovertibly better than others. Unaddressed is the question of whether and to what extent verbalization affects the quality of one's approach to things like policy questions that have no accepted correct answers. Some judicial decisions relate more closely to the research, such as those that require findings of historical fact. There is, after all, some objectively correct, if unverifiable, answer to the question "what happened?" and it may be the sort of answer best reached through a process that gives full play to assessments of things like witness credibility which are best performed without verbalization. In addition, the sorts of context-bound determinations judges must often make during the course of litigation, such as those relating to the admissibility of evidence, also seem likely to require consideration of a large range of complex inputs. The application of an established legal standard to a given set of facts presents a similar dynamic, in that one can reasonably and

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214. For discussion of the importance of candor in judicial decisionmaking, see *supra* note 86 and accompanying text.

215. The effect could perhaps be understood as the availability, or salience, heuristic operating at a micro level. The act of putting a rationale or decision factors into writing makes them more salient to the decisionmaker relative to other factors or analytical paths, thus leading the decisionmaker to overweigh them. For a description of the availability and salience heuristics, see Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 800 (2004). For a discussion of the potential negative influence of the availability heuristic on judicial decisionmaking, see Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 895-97 (2006).

meaningfully speak of a “best” answer to the question whether set of facts X triggers the application of rule of law Y.

The same may not hold if the question concerns the appropriate content of a rule of law, despite the fact that determining the answer to such a question requires the balancing of complex social considerations that might be no more articulable than a full account of facial features. In part, this may be a function of the differing aims of the two tasks. Much of the point of formulating a rule of law is to generalize and to intentionally minimize the significance of the particular.<sup>216</sup> What is more, for these types of decisions there is typically no agreed-upon way to determine whether the result generated in a given case is the “best” possible result, or even if it is “better” than at least some subset of the alternatives.<sup>217</sup> Consider, for example, a court engaged in the process of statutory interpretation. Reasonable observers can and do disagree over the basic question of whether a court should properly take legislative history into account in determining how the statute ought to apply in a specific situation.<sup>218</sup> As the millions of words devoted to arguing over this basic issue attest,<sup>219</sup> the mere fact of putting one’s analysis in writing does not ensure that that analysis will be better in some ultimate sense. In similar fashion, a court contemplating the extension of a tort doctrine must attempt to assess the likely consequences of a legal change for the affected parties, prioritize those in conjunction with an assessment of the various policy goals of tort law, and check all of that against its conception of justice. In these contexts any assessment of decisional quality may have to be qualified. Decisions justified in writing may not be better or

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216. See Schauer, *supra* note 4, at 651–54 (suggesting that reason-giving is appropriate in contexts where abstraction and generalization are desirable, but not where contextualization and particularization are important); see also Schauer, *supra* note 215, at 891 (“Plainly the case-based rulemaker, paradigmatically the common law judge, will perceive her task in terms of determining both how this case and also other cases of *this kind* ought to be decided . . . .”) (emphasis added).

217. Judge Posner has suggested, for example, that the Supreme Court exercises virtually unbounded discretion in shaping the contours of constitutional law:

[T]he Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature’s. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment. To such cases the constitutional text and history, and the pronouncements in past opinions, do not speak clearly. Such cases occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call.

Richard A. Posner, Foreword, *A Political Court*, 119 HARV. L. REV. 32, 40 (2005). But he also disclaims any ability to discern whether any particular exercise of this discretion is better than the alternatives. “The problem . . . is that there are certain to be equally articulate, ‘reasonable’ people who disagree and can offer plausible reasons for their disagreement, and there will be no common metric that will enable a disinterested observer (if there is such a person) to decide who is right.” *Id.* at 41.

218. See generally William N. Eskridge, Jr., *Interpretation of Statutes*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 83, at 200–08 (presenting a brief history of the development of statutory interpretation since the 1890’s).

219. For a brief overview of the debate, see Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1461–64 (2007).



more accurate in some global sense. On the other hand, they also will not be worse, and they might be better on their own terms. If, for example, I am a judge who takes the position that the only legitimate way to interpret a statute is to focus on the text, perhaps I will do a better job of textual analysis if I am forced to articulate that analysis in a written opinion than if I am not.

This problem of determining in which of the three categories a given decision falls has another aspect, namely that even were there agreement on the location of the boundaries between the three categories, there may be no reliable way to make an *ex ante* determination of which category a particular case falls into. A judge might, for example, initially believe that a given case is “easy” and therefore involves pure decision: the law seems clear, as does its application. But as she starts to write, she may conclude that her initial judgment was wrong, and that the decision she thought was obvious is instead wrong or more nuanced. She might find, in other words, that the process of justification is affecting the process of decision.

In a world in which a written opinion will have either a positive effect or no effect on the decision with which it is associated, this sort of error would be significant only if it led the judge to forego writing in a case where writing would have a positive effect. But the likelihood of such an error could be minimized via a blanket requirement of an opinion. One substantial implication of recognizing the concept of negative justification is that it reveals the problem to be more complex. The proper resolution of whether to issue a written opinion requires not merely a determination of whether writing will affect the decision, but also whether its effects will be positive or negative. In other words, is this positive justification or negative justification? If it is the former, we want the judge to engage in the standard form of legal justification, telling us, with reference to the appropriate legal standards, what factors led her to resolve the case as she has. If it is the latter, however, we would want something else. Perhaps no justification at all, or perhaps a different sort of justification, one that focuses not on trying to articulate the reasons for her decision but rather that provides assurance that she reached the decision in the appropriate manner. For example, in a negative-justification situation we might ask a judge not to provide a conventional-looking judicial opinion, but rather a document designed to provide some assurance that the judge has taken all of the appropriate factors into consideration, but without any attempt to ascribe the relative weights of those factors in the decision.

### 3. Implications

As the preceding discussion suggests, the practical implications of recognizing writing’s potential negative effects on decisionmaking are unclear. In part this is because they are a function of normative determinations about the nature of judging that are beyond the scope of this Article. To conclude that one methodology will produce greater rationality or better decisions according to some other metric is not to answer the question of whether some lesser quantum

of decisional quality satisfies the obligations of the judicial role. Moreover, because opinions serve multiple functions,<sup>220</sup> the role that an opinion will play in shaping a given decision will not necessarily be determinative in any given case. We might, for example, conclude that an opinion is desirable in a particular negative-justification situation because of the need to supply precedent and enhance systemic legitimacy, despite the fact that the decision itself would be in some respect suboptimal.<sup>221</sup>

Still, it is possible to make some generalizations regarding the implications of the effect of writing on judicial thought. In positive-justification situations we should prefer, and perhaps even require,<sup>222</sup> written opinions, consistent with longstanding intuitions that doing so will generate better decisionmaking. What is more, to the extent we think it critical for judicial decisions to be made by judges rather than, say, their law clerks, we should insist that judges themselves write those opinions, since it is the process of writing that provides the desired discipline on thought.<sup>223</sup>

Pure-decision situations, in contrast, present no apparent occasion to require an opinion, at least insofar as decisional quality is concerned. If the decision is truly independent from any subsequent justification, then by definition the justification will not change the quality of the decision. As a result, there is no apparent need for an opinion to be written by the judge as opposed to a law clerk. The opinion's function would not be to improve thought, but rather to provide verification of the decision's consistency with the appropriate legal standards.

That said, one might still prefer a writing requirement even in pure-decision situations, for the simple reason that it is impossible to know with complete certainty whether what initially appeared to be a pure-decision situation would turn out on further reflection not to be. On this view, the value of a writing requirement would not accrue via its immediate effects on decisional quality or accuracy, but rather because it would serve as a check on the initial mechanism for sorting cases.<sup>224</sup> Although the value of opinions for this purpose would be maximized were the deciding judge also the author of the opinion (thus serving

220. See *supra* note 194 and accompanying text.

221. This is, in a sense, a variant on the notion that sometimes it is more important that a thing be decided than that it be decided correctly. *Gilman v. City of Phila.*, 70 U.S. (3 Wall.) 713, 724 (1865) ("It is almost as important that the law should be settled permanently, as that it should be settled correctly.").

222. See McGowan, *supra* note 66, at 555–82 (arguing that judges should always write the opinions issued under their names based in part on the understanding that the process of writing will improve the quality of the opinions and the decisions they reflect).

223. *Id.* at 555 ("Judges should write their own published opinions.").

224. One can find traces of this position in prior work addressing the question of whether there ought to be a default writing requirement. See, e.g., LLEWELLYN, *supra* note 194, at 27 (opining that there are enough truly meritless appeals, and enough pressures on the appellate docket, that nothing is lost if these cases are decided without opinion); ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE* 241–42 (1983) (suggesting that an opinion is always necessary to ensure that the court engages in thoughtful review); ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 390–91 (1941) (suggesting

as a check on the decision), here too one could justify delegating the function to a law clerk on the understanding that if the clerk were to determine that a decision simply cannot be justified, the decision would no longer be treated as a pure decision.

Negative-justification situations present the most interesting challenge, and not only because the phenomenon has largely gone unrecognized. Here, of course, the potential result of the process of providing a traditional, substantive written justification for a decision is a reduction in the quality of that decision via verbal overshadowing.<sup>225</sup> In these situations, both the notion of verbal overshadowing and the Unconscious Thought Theory suggest that the best decisions will often be those that are simply made, without even an attempt to reason one's way to a conclusion, much less to provide an elaborate justification of that decision. On the other hand, these are not "easy" cases as to which a decision is automatic. While it is tempting to romanticize the quality of snap judgments made by judges without justification, it is also apparent that a tendency toward greater accuracy across a range of decisions does not guarantee the accuracy of any individual decision. As a consequence, we might prefer to have some assurance that the decision is the product of something more than whim. The Unconscious Thought Theory literature suggests that the benefits of unconscious thought are achieved after the information necessary to a decision is carefully absorbed.<sup>226</sup> Thus an opinion relating to a decision of the sort as to which writing is not likely to be beneficial—typically a highly contextual, fact-bound situation—would do well to focus more on describing the process the judge undertook in making the decision. Thus it ought to look something like a checklist of factors that the judge has taken into consideration more than an attempt to assign weights to those various factors.

One final point warrants mention. The discussion in this subsection has focused on the potential benefits of written justification, in the form of an opinion, versus no justification at all. As noted above, however, there is a third option, namely that of oral justification of decisions. The research canvassed in Part II suggests that the transformation of thought involved in providing an oral justification may differ in kind and degree from that resulting from written justification. We might accordingly suppose that oral justification will sometimes be more appropriate as a discipline on the decisionmaking process. It might be, for example, that in at least some circumstances an oral justification would be less susceptible to verbal overshadowing than a written justification, perhaps because with respect to some types of decisions, the more sustained attention (or some other feature) that arises from thought connected to writing exacerbates the effects of verbal overshadowing. Were that the case, it would

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that a short statement of the points considered and reasons for decision, rather than a full-blown opinion, will often suffice for decisions made by intermediate appellate courts).

225. *See supra* section IV.A.1.c.

226. *See supra* text accompanying notes 172–173.

make sense to utilize a decisionmaking process incorporating an oral rather than written component. For now, however, this must remain as speculation. The psychological research on which the conclusions in this section are largely based has not yet advanced to the point where it allows for even informed speculation about the possible differences between the two forms of justification in the judicial context.

#### B. OPINIONS AS THE EMBODIMENT OF PRECEDENT

From the lawyer's perspective, the most visible role that judicial opinions play is that of being the raw material of precedent. Indeed, any precedent-based system that failed to utilize the judicial opinion, or something like it, would look very different from our own. Parties, lacking access to the courts' explanation of their decisions in the courts' own words, would have to ground their arguments in different authority. At the same time, judicial decisions would likely take on a different character, as courts would lack the ability to support decisions with careful elaborations. As this suggests, the written aspect of opinions interacts with their precedential functions in at least two ways. First, the written opinion serves to convey information about the content of precedent. Second, the process of writing affects the nature of that content.

##### 1. Writing as a Vehicle for Information

The very notion of precedent—the idea that present courts are bound by their prior decisions and therefore obligated to decide the cases before them in a manner that is consistent with those prior decisions<sup>227</sup>—implies the need to know what those prior decisions are. In our system, judicial opinions serve that function. There is, to be sure, considerable room for debate concerning precisely how the mechanism of precedent works.<sup>228</sup> Under a strict view, it is only the *ratio decidendi* that bind future courts, with any of the rest of what the court chooses to say in the course of its disposition standing as mere dicta.<sup>229</sup> On another view, what matters is not merely what the court said, but how it said it, such that the court's chosen formulation of a legal rule in a prior case should be regarded as consequential in (if not dispositive of) a subsequent case even if the language at issue was not directly implicated in the decision of the prior case.<sup>230</sup> More realistically, lawyers and judges undoubtedly adopt both of these views,

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227. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

228. See generally Larry Alexander, *Precedent*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 83, at 503–13 (outlining debates over the scope and strength of precedential constraint).

229. See ALDISERT, PROCESS, *supra* note 66, at 607 (arguing that it is a court's "decision" rather than its "opinion" that governs future cases, and that "the decision of the case will be measured by the precise adjudicative facts that give rise to the rule of the case").

230. See Schauer, *supra* note 88, at 683 (suggesting that, from the practical perspective of those who must apply Supreme Court opinions, "it is not what the Supreme Court held that matters, but what it said").

depending upon which suits their needs at any given time.<sup>231</sup> Under either view, the judicial opinion serves as the repository of the information to which litigants and judges refer in subsequent cases in order to determine what the law is (or might be).

Such a regime is not inevitable. One can imagine a legal system that adheres to the concept of precedent but that does not utilize written judicial opinions. Even in a system in which judges did not speak at all to the reasoning behind their decisions, observers could still track the results in cases, categorize the factual situations that led to those results, and, based on that information alone, attempt to divine the principles underlying those previous decisions. Parties could then make arguments to the court based on those patterns of results and perceived principles and thereby seek to pressure the court to decide the case before it in a manner consistent with its prior decisions.<sup>232</sup> Such a system would, of course, be much different and much more limited than our own.<sup>233</sup> Unless their case was virtually identical to some past case decided by the court, parties would be constrained from arguing from authority in the way that they can now. Under the system of precedent as practiced in the contemporary United States, parties can argue to the court, in effect, “You must decide this case in a particular way because you decided a previous case in a similar manner, and did so for the following reasons that you articulated in your disposition of that case and that are equally applicable here.” Under a system where the courts generate merely results and not opinions, in contrast, the arguments would be much more limited. There, the most the parties could say would be along the lines of, “You must decide this case in a particular way because to do so is consistent with the way in which you have decided apparently similar cases in the past.”<sup>234</sup>

There is an intermediate position as well. Rather than taking the time to provide written opinions justifying their decisions, judges could provide oral justifications. These, in turn, could be summarized or transcribed and thereby used as more-or-less authoritative sources of precedent on which to base arguments to subsequent courts. Indeed, the English system operates largely in this manner, with appellate courts having traditionally ruled on cases extemporaneously at the conclusion of oral argument.<sup>235</sup> Such a regime would likely differ from the contemporary American process in significant ways—the English

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231. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 77–75 (1996) (noting that lawyers and judges vacillate between broad and narrow conceptions of precedent as it suits them).

232. See Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978) (“Rules ordinarily cannot emerge from an outcome unless the reasons for that outcome are given.”).

233. See *id.*

234. See James Boyd White, *What’s An Opinion For?*, 62 U. CHI. L. REV. 1363, 1365 (1995) (suggesting that a lack of opinions would deprive litigants and the public of the ability to state what a case means “in an accurate and authoritative way”).

235. See Ehrenberg, *supra* note 7, at 1169–70. English courts no longer issue extemporaneous opinions in the majority of their cases. *Id.* at 1169. When they do, the process is as follows:

process involves vastly more protracted oral argument, for example<sup>236</sup>—but could obviously serve as a mechanism for creating precedent.

Indeed, viewed solely in terms of their capacity to transmit information, there appear to be no significant distinctions between the American and English systems. So long as a system in which judicial decisions are issued and justified orally includes some mechanism for recording the content of the judges' explanations, it is the equivalent of the American system in terms of the accessibility of the content of precedent. The content of the information conveyed may be qualitatively different in the two contexts, but in both systems it is (at least given roughly equivalent storage media) possible for litigants in subsequent cases to make precedent-based arguments to the court which are grounded in the court's previous statements concerning what the law is and, at least occasionally, concerning why the law is as it is.

## 2. Writing as Facilitating Logic

Given the equivalence of written and oral (but recorded) justifications as vehicles for conveying the substance of precedent, a preference for one system over the other in terms of the precedent-creation function of opinions must accordingly be based in something else. One likely possibility is that precedent generated via a written opinion will be meaningfully different in nature than precedent based on oral justification due to the method of its production. An obvious point of difference might be substance. Law generated via writing might simply be "better," in the sense that thought connected with and constrained by writing will lead to superior decisions, however measured, which will in turn stand as more desirable precedent. This is potentially a source of substantial advantage and should not be overlooked. The bases for a possible distinction based on the quality of the law, however, parallel those discussed in the preceding subsection and need not be repeated.<sup>237</sup>

In addition to its effect on the substance of precedent, the written opinion might also affect the form of precedent by affecting the way in which judges are able to give reasons for their decisions. To fully appreciate this point it is

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[T]he presiding judge will, with minimal or no preparation, present a remarkably organized, coherent speech lasting from thirty to sixty minutes. The judge will typically state at length the facts of the case and the issues that have been raised on appeal. He will explain how the court is deciding the case and give a brief explanation of why he reached his decision, but he will cite little precedent and will provide only a superficial analysis of the legal issues. Then the other judges on the panel will describe their own independent rationale for the result, providing evidence that they have, in fact, done their own thinking.

*Id.*

236. *Id.*

237. This is not to suggest that the quality of the law generated via a given decision cannot be distinguished from the quality of the results reached by the court measured in the context of that case. An opinion could conceivably create good law based on a bad result in the case before the court, and vice-versa, but there is no reason to believe that the relationship between the nature of the process used to reach the decision and the quality of the decision will differ as between these two qualities.



necessary to take a step back. The act of giving reasons for a decision is the crucial part of the creation of precedent.<sup>238</sup> In doing so, a judge (or court) commits herself to a higher level of abstraction.<sup>239</sup> As Frederick Schauer demonstrates, a court offering a reason for its decision necessarily takes the question at hand to a higher level of generality by grouping the case before it with all cases as to which that reason applies.<sup>240</sup> It says, in effect, that its result is appropriate because of the presence (or absence) of factor X. That, in turn, implies a commitment on the part of the court to be bound by that reason in future cases.<sup>241</sup> The presence or absence of factor X in future cases will at least presumptively require the same result in those cases.

Writing affects this process because it provides the writer greater control over her output than speech provides the speaker.<sup>242</sup> She therefore has more ability to shape the manner in which she characterizes factor X. Of course, in a system in which all justifications for judicial decisions were oral, a judge would undoubtedly view the task as more akin to that of a writer than that of a conversationalist and so would take care to choose words carefully out of the awareness that specific words matter. Even so, writing provides advantages. The author of an opinion has the opportunity to puzzle over language and to try out different formulations and structures of the reasons given to justify a decision. Thus, one can strive for considerably more precision in a written opinion than one can in an oral justification (unless one were to write out the oral justification beforehand). One can, as a result, do much more in the way of categorization, placing this particular case within a line of preceding cases, and articulating rules or standards that will govern future cases.

This ability to be precise is generally regarded as a good thing.<sup>243</sup> Judicial opinions are “performative utterances.”<sup>244</sup> It matters not only what a court says, but in many instances how the court says it. Subsequent courts, lawyers, and private and public actors often parse the language of an opinion just as they would a statute.<sup>245</sup> The greater the clarity with which a court states the propositions that led it to its decision, the greater the certainty with which those who wish to structure their affairs in compliance with the law will be able to do so. The same applies to judges who must act in accordance with the law articulated in those opinions and to lawyers who must make arguments and advise clients

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238. See White, *supra* note 234, at 1365–67 (outlining the role of judicial reason-giving in the ability to make precedent-based arguments).

239. See Schauer, *supra* note 4, at 638–54.

240. *Id.* at 638–42.

241. *Id.* at 642–45.

242. See *supra* section III.A.

243. See, e.g., Henry M. Hart, Jr., Foreword, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959) (suggesting that “the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment” of subsequent actors in the legal system).

244. See McGowan, *supra* note 66, at 570 n.299 (quoting *AFL-CIO v. Bradley*, 795 F.2d 310, 320 (3d Cir. 1986) (Aldisert, J., dissenting)).

245. See Schauer, *supra* note 88, at 683.

on the basis of them. Likewise, a legislature that seeks to monitor judicial action in order to determine whether to act in response will be better positioned to do so if it can easily determine what the court has said. These benefits might be sufficient to counterbalance any detriment caused by the writing process in negative-justification situations. We might be willing to tolerate suboptimal assessments of the appropriate content of doctrine in order to promote certainty and to facilitate a stable regime of precedent.

But the precision that follows from writing may not be a universally positive feature. The ability to give reasons, and thereby to make a commitment to a higher level of abstraction, implies the ability to choose to what level of abstraction to commit. Assuming that future courts can be relied upon to regard themselves as bound by the reasons given in prior cases, present courts have the incentive to decide cases on relatively broad grounds so as to give maximum effect to their preferences. Writing affords a present court the ability to take full advantage of this opportunity. The court not only has the ability to carefully articulate the grounds for its decision, but also to include in its discussion material that, while not necessary to its decision, it might use as “precedent” in subsequent cases. The ability to give reasons that are regarded as binding also enhances the courts’ power relative to the other branches of government.<sup>246</sup> If the executive must conform its conduct to the judiciary’s articulation of what the law requires, then the judiciary can increase the scope of its control over the executive simply by increasing the breadth at which it provides that articulation.<sup>247</sup> Here, too, a court’s ability to articulate those reasons in writing magnifies this effect. Thus, those who favor a minimalist approach to judging, in which courts strive to decide only the specific dispute before them, might prefer the English approach. The minimalist court leaves things undecided. “It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions.”<sup>248</sup> The traditional English approach appears both in concept and in application to lead to decisions on grounds that are, in general, more narrow than is the case with written opinions.<sup>249</sup>

There is another sense in which writing may not be desirable in the creation of precedent, which stems from the phenomenon of verbal overshadowing.<sup>250</sup>

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246. See Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44–45 (1993) (outlining the argument that treating judicial opinions as binding law rather than as mere explanations for judgments enhances the power of the judiciary relative to the other branches).

247. See *id.* at 74–75.

248. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix (1999).

249. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 280 (1987) (discussing the relatively more restrained, party- and dispute-focused approach of English courts as compared to those in the United States); see also Ehrenberg, *supra* note 7, at 1185–86 (discussing the role of the writing process in the difference between English and American judicial opinions).

250. See *supra* section III.D.

Simply put, the verbalization involved in writing may lead the judge writing the opinion to focus her justification on the articulable aspects of the decision to the relative exclusion of its other, and perhaps more significant, components.<sup>251</sup> This is not to suggest that written opinions are more susceptible to the effects of verbal overshadowing than oral justifications. Indeed, the reverse is probably true.<sup>252</sup> But because the judge, as the author of a written opinion, has more control over the process of verbalization, and thus the time and ability to generate a relatively precise justification, any verbal overshadowing that remains is likely to be magnified in the analytic processes of subsequent courts relying on the opinion as precedent. Such courts will take the factors articulated in the prior court's opinion to constitute the entire universe of matters appropriate for consideration, even if they were not the only factors driving the prior court's decision or are not, in some abstract sense, the factors that should form the sole bases for decision. This sort of problem creeps up with some frequency in the law. For example, prior work exploring the use of metaphors in judicial opinions has recognized the tendency of metaphors to "capture" thought and to lead those in the sway of the metaphor to focus on some aspects of a problem while ignoring others.<sup>253</sup> Similarly, the literature on informational regulation highlights the need to be mindful in creating disclosure mechanisms because when information is disclosed about a product consumers will focus on that information to the relative exclusion of other features that ought to be just as important to their decision.<sup>254</sup>

In sum, while a written record of prior decisions seems critical to a precedent-based system such as ours, the question of whether that record ought to be produced by the act of writing is more difficult. The process of writing may produce decisions, and thus precedent, that are better than those that would result from alternative processes, such as those generated orally. But writing also gives the decisionmaker greater control over the language in which those decisions are described, and thus the ability to define the scope of those decisions with greater precision. This feature will serve as a detriment to the extent that it leads to the propagation of decisional shortcomings that are

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251. There are shades of the rules-versus-standards distinction here. As Frederick Schauer points out, the process of giving a reason is implicitly a process of appealing to a rule. *See* Schauer, *supra* note 4, at 638–51. Rules are, of course, both over- and under-inclusive. Analogously, if I start to write I will not only be constrained by what I can articulate, but might also become captive to the conceptual framework based on which I have started writing, in which case I will craft an opinion that articulates a rule formed from an incomplete set of inputs. Of course, sometimes this may be inevitable and inherent to the process of making law; law by its very nature seems to require rules or standards that are articulable to some significant degree. Just as we recognize that rules, by narrowing the focus of any given analysis, will lead to suboptimal results in some portion of situations, so we might recognize that the act of writing might have the same tendency, in that once I have started to write, I have developed a considerable amount of inertia in terms of my approach to the problem I am addressing.

252. *See supra* text accompanying note 193.

253. *See* GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 10–13 (1980); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1071–73 (1989).

254. *See* Oldfather, *supra* note 85, at 780–87.

themselves a product of the writing process. More generally, however, the distinctions between written and other forms of justification have no inherent normative valence. That is, one's answer to questions concerning the appropriate scope of the power of current courts relative to future courts and the other branches of government depends to a large degree on one's view regarding larger debates concerning the proper role of courts.

The significance of the precedent-facilitating function of opinions will also vary from case to case. Opinions in positive- and negative-justification cases will generally serve as precedent in a straightforward manner. Cases falling within the pure-decision category, in contrast, will typically involve the relatively mechanical application of established legal standards to the facts of the particular case.<sup>255</sup> While it is perhaps not accurate to suggest that there are no potential precedential consequences of such a decision,<sup>256</sup> viewed as a matter of degree, the contribution any such decision might make to the relevant body of law will be minimal. One might as a result conclude that, absent a compelling legitimacy-based reason to issue an opinion, the decisional process in such a case can properly be undertaken without a written component.<sup>257</sup>

#### C. OPINIONS AS A SOURCE OF LEGITIMACY

Judges are very mindful of the role that their opinions play in legitimizing their decisions. Supreme Court Justice Tom Clark remarked, "We don't have the money at the Court for an army and we can't take out ads in the newspaper, and we don't want to go out on a picket line in our robes. We have to convince the nation by the force of our opinions."<sup>258</sup> In a similar vein, D.C. Circuit Judge Patricia Wald notes that judicial opinions "reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do."<sup>259</sup> The core idea is that the primary source of judicial

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255. See *supra* section IV.A.1.a.

256. The most prominent recent proponent of this position is the late Judge Richard Arnold. See Arnold, *supra* note 38, at 221–23. Judge Arnold's position was, for a brief period, adopted by the Eighth Circuit via a decision for which he wrote the court's opinion. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"). The decision was later vacated as moot by an en banc decision of the Eighth Circuit. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

257. The debate over the propriety of unpublished opinions implicitly reflects this calculus. Some of the arguments against the practice, such as Judge Arnold's, have been rooted primarily in the understanding that the precedential contributions of any given decision will never be so insubstantial as to justify dispensing with a written component (which must, the reasoning continues, be binding on that court in the future). See, e.g., Arnold, *supra* note 38, at 221–23. Others flow to a greater extent from the assertion that the need to maintain systemic legitimacy supplies the primary argument against unpublished decisions. See generally Pether, *supra* note 5.

258. RICHARD KLUGER, *SIMPLE JUSTICE* 706 (1976) (quoting Justice Clark).

259. Wald, *supra* note 82, at 1372.

legitimacy lies in reasoned appeals to appropriate legal authority.<sup>260</sup> As the Supreme Court has put it, the Court's legitimacy (and that of the judiciary more generally), is based on "the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all."<sup>261</sup>

### 1. Reasoned Elaboration

Of course, "legitimacy" is a slippery concept with many potential meanings.<sup>262</sup> In one sense, it might refer to the bases on which action is founded. On this view, legislative action is legitimate because of legislators' democratic pedigree. A legislature can pass a law and expect others to comply based simply on the legislature's status: its members having been duly elected by the people, the legislature is entitled to pass whatever laws it chooses, and it need not provide (nor even, for the most part, have) good reasons for its decision.<sup>263</sup> The judiciary's place is different. Although judges certainly could, and perhaps occasionally do, act solely on the basis of the authority of their position, the simple fact of having attained the status of a judge does not generally entitle one to reach whatever decisions one pleases. Instead, we expect courts to tell us why a given result is correct and to do so with reference to appropriate legal materials.<sup>264</sup>

In a broad sense, this requires what the members of the Legal Process school

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260. See ALDISERT, PROCESS, *supra* note 66, at 607 ("[T]he acceptability and vitality of the decision are usually measured by the quality of the reasons that originally supported it."). For a sophisticated treatment of this topic, see Schwartzman, *supra* note 86, at 11–25 (providing an argument for public justification of legal decisions).

261. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

262. As previous commentators have noted, precisely what is meant by "legitimacy" in this context is not always clear. See Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1397 (2000) (suggesting that legitimacy can be viewed in terms of general acceptance within the legal community or more broadly in terms of general acceptance throughout the entire populace); see also Leslie Gielow Jacobs, *Even More Honest than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV. 363, 368–72 (contrasting the notion of interpretive legitimacy, which stems from decisionmaking guided by legal standards rather than personal preference, with legitimacy arising from a public perception that the courts are operating in an appropriate manner); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285 (1989) (noting the distinction between legitimacy as used in political philosophy and as used in its sociological sense).

263. See Schauer, *supra* note 4, at 636–37.

264. As Schauer notes, and as the discussion in this Article has revealed, judges often act without giving reasons. *Id.* Moreover, the typical depiction of the distinction between legislatures and the judiciary in terms of democratic legitimacy may be overblown. See generally Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (arguing that adjudication is considerably more democratically legitimate than commonly understood). Still, the expectation, as evidenced above, is that judicial action must be based on reasons apart from the simple authority of the office in order to be legitimate. See *supra* note 260 and accompanying text.

referred to as “reasoned elaboration.”<sup>265</sup> The idea for the process theorists was simply that a court must justify its decision in a way that is not merely rational, but that also demonstrates that the application of the particular legal standard at issue in the case before it is consistent with the application of that standard in prior cases.<sup>266</sup> This notion can be generalized somewhat. Whatever the criteria by which one chooses to assess a judicial decision (which need not necessarily include consistency or any of the other features advocated by the process theorists), a judicial opinion provides a window on the court’s decisional process and thus allows some room for assessment of whether a court in a given case has acted in accordance with those criteria rather than pursuant to some other, illegitimate standard.<sup>267</sup> That window is not necessarily complete. However desirable full judicial candor regarding the reasons for a court’s decision might be as an ideal,<sup>268</sup> it seems unrealistic to expect that courts will consistently reveal all the motivations behind their decisions, assuming it is even possible to do so.<sup>269</sup> Moreover, as the Legal Realists demonstrated, legal doctrine often leaves plenty of room for a court to justify whatever result a judge might prefer to reach in a given case.<sup>270</sup> A judge unable to finesse doctrine but motivated to reach a particular result might be able to reach that result by manipulating the facts. Thus an opinion in a given case might superficially meet the test of reasoned elaboration even if the reasons that are elaborated do not represent the full set of factors underlying the decision. Opinions thus serve only imperfectly to ensure that judicial decisions are legitimate in the sense of being based in appropriate authority.<sup>271</sup> Still, they provide some such assurance,

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265. For an overview of the content and development of the concept of reasoned elaboration, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 285–91 (1973).

266. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147–48 (William N. Eskridge, Jr. & Philip P. Frickey, Jr. eds., 1994).

267. See MARTINEAU, *supra* note 224, at 241–42. For a discussion of the ways in which this is an imperfect constraint, see LLEWELLYN, *supra* note 194, at 27 n.18.

268. See sources cited *supra* note 86.

269. See *id.*

270. See Leiter, *supra* note 83.

271. There is considerable basis for questioning whether the opinion form as currently implemented provides as much of a constraint on judicial behavior as is commonly imagined. The basis of this skepticism is the almost equally common observation that judicial opinions inevitably read as though the case were easy and the result foreordained, even in difficult cases. See LLEWELLYN, *supra* note 194, at 26 (discussing what he calls the “single right answer” style of judicial opinion). This is true of both majority and dissenting opinions. See Jacobs, *supra* note 262, at 367 (“To me, most recent constitutional decisions look like shouting matches rather than the honest and thoughtful explanation more likely to engender the respect and willingness to obey that legitimacy requires.”). Others have tied the capacity of opinions to constrain judicial behavior to the constraining nature of the applicable law: if there are multiple ways to justify a given decision, or if there are justifications available for a range of decisions, then a requirement that judges provide a written justification for a decision creates only a minimal constraint. See Maltz, *supra* note 262, at 1400–01 (suggesting that “the practical significance of the constraining function can easily be overstated” and “cases in which a judge is unable to produce an opinion that will adequately vindicate his initial impression of a case (at least in the judge’s own mind) are likely to be relatively rare”).



certainly relative to a world in which judges do not have to give a justification for their decisions.

## 2. Perceived Legitimacy

Another potential way in which opinions might help to ensure the judiciary's legitimacy is by fostering the public perception that courts are addressing conflicts in an appropriate manner. This might happen in one of two ways. The first is more generalized, in that opinions provide "the public," or at least some portion thereof, with the ability to monitor whether courts are making decisions based on appropriate grounds.<sup>272</sup> Thus in the context of a given decision, interested observers can assess a court's explanation for the decision in light of their favored conception of how judicial decisions ought to be made. Ideally, the decision will carefully reason its way to a conclusion, or at least provide evidence of the court doing so. Opinions also contribute to a sense of legitimacy by providing a basis on which to take action should an individual decision fail to measure up. In that case, those observers can respond by appealing to a higher court, attempting to secure a legislative response, or subjecting the court to a public critique.<sup>273</sup>

This process plays out in a slightly different way across a broader range of cases. While it might be difficult to assess whether a court has acted appropriately in the context of an individual case, such an analysis becomes more feasible over a longer run of cases. By looking at a court's performance over time, observers can determine whether the court really has treated like cases alike.<sup>274</sup> Relatedly, such a perspective allows for an assessment of candor, or the extent to which a court's stated justifications for its decisions appear to be the actual reasons. A court in any given case may say that its decision is justified by resort to a certain set of justifications, and it may be difficult to contest that suggestion based on a single data point. But if the same court over a series of cases offers the same set of reasons for its decisions, and if the decisions themselves appear to diverge from the stated justifications, a different sort of critique becomes possible. Now one can suggest that the articulated doctrine needs to change because it does not appear to adequately capture all the features of the cases that the court apparently deems relevant. Or, if one is feeling more cynical, one can suggest that the court is acting disingenuously. Either way, a court that consistently fails to match outcomes with its articulated bases risks taking a hit to its legitimacy.

The legitimization of the judiciary via written opinions takes place on a more localized level as well. Research demonstrates that the process by which

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272. See Oldfather, *supra* note 85, at 790–92.

273. See *id.*

274. For a recent example of such an examination, see Sarah E. Ricks, *The Perils of Unpublished Non-precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217 (2006).

litigants' cases are handled is the most important factor in determining their satisfaction with the legal system.<sup>275</sup> Four of the key attributes affecting perceptions of process include participation, trustworthiness, respect, and neutrality.<sup>276</sup> All of these involve, to varying degrees, assessments that can be affected by a judicial opinion. First, a sense of participation is critical. Parties want to feel that they have had a meaningful opportunity to present their position to the decisionmaker.<sup>277</sup> An opinion, simply by engaging with the parties' arguments, can provide such assurance.<sup>278</sup> Second, assessments of the system's trustworthiness are based on perceptions of fairness and the extent to which the court takes the parties' arguments into consideration.<sup>279</sup> The process of justification is critical to this perception. By providing a reasoned explanation for its decision, a court will, at a minimum, give the parties a basis for concluding that, whether they won or lost, each side received an appropriate hearing of their grievances.<sup>280</sup> Third, perceptions of respect stem from the treatment accorded to the parties by the decisionmaker. "[B]eing treated politely, with dignity and respect, and having respect shown for one's rights and status within society, all enhance

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275. See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 882–83 (1997). For a comprehensive overview of this research, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 820–26 (2001).

276. Tyler, *supra* note 275, at 887.

277. *Id.* at 887–89.

278. One significant function of judicial opinions, which I will call "participation reinforcement," has been largely absent from prior scholarship. The core idea here is that judicial opinions are a critical component of the adversarial system. This is so in that judicial attentiveness to the parties' arguments, which is evidenced in a significant way through judicial opinions, also serves an instrumental purpose in legitimizing judicial action. It does so by maintaining the incentive for the parties to bring fully developed arguments to the court.

As I have argued more fully elsewhere, party participation is crucial to the legitimacy of adjudication under the dominant conceptions of the American adjudicative process. See generally Oldfather, *supra* note 16. This is so regardless of whether a court is engaged in "classic" adjudication involving a bilateral dispute between private parties or "public law" adjudication of a dispute with implications extending beyond the parties directly before the court. In either case, it is the parties who are best positioned to supply the court with the information necessary for it to resolve the dispute before it. This is not to suggest that the parties will always provide complete information. Adversaries may stake out extreme positions and give relatively short shrift to those that are more moderate. Parties to public-law disputes may not share the same interests and perspectives as the entire group of those who will be affected by the outcome of the litigation. But even so, because the parties to a lawsuit will want to win, they will be motivated to provide the court with a relatively thorough and complete set of arguments and other inputs for its decisionmaking process.

The parties, then, have a natural incentive to provide a court with the information that it needs. Decisionmaking that is responsive to the parties' contentions will strengthen this incentive; decisionmaking that consistently fails to be responsive risks the demise of the entire mechanism. A potential litigant who does not believe that a court will meaningfully consider her claim as she conceives of it is not likely to bring her claim to that court. She will either seek an alternative forum or choose not to bring her claim at all.

279. Tyler, *supra* note 275, at 889.

280. See Jacobs, *supra* note 262, at 384 (noting that providing an opinion "may engender respect . . . by treating the losing litigants and the public at large as deserving of an explanation").

feelings of fairness.”<sup>281</sup> Particularly in contexts where an opinion is the primary point of contact between the court and the parties, judicial writings have the potential to convey the court’s respect for the parties. Finally, neutrality involves an assessment of the extent to which the decisionmaker remains impartial, providing neither side with an unfair advantage.<sup>282</sup> Here again, an appropriately crafted opinion can signal such an approach.

On balance, the legitimacy function seems to pull slightly toward written rather than oral justifications. Indeed, the notion of “reasoned elaboration” provides one way of defining what it means for one decision to be better than another. That is, a decision that comports with the requirements of reasoned elaboration, while at the same time giving the appearance that it is doing so, would be preferable to one that fails on either or both counts. So viewed, one might imagine that writing would always be preferable, because the act of writing puts the judge into greater contact with the legal materials that are to govern her decision, thereby enhancing their constraining effect.<sup>283</sup> In addition, the greater control afforded by writing will enable the court to work more effectively to achieve both ends. And of course the legal profession’s intuitions regarding the nature of proper judging seem likewise to support a general call for written opinions in support of the perceived legitimacy of judicial action.<sup>284</sup> But there are counterweights. Most significantly, if one is inclined to suspect that courts often mask decisions based, in some fundamental sense, on something other than proper legal considerations, then one might question the strength or consistency of writing’s contribution to actual legitimacy based on the suspicion that writing also allows courts to engage in greater manipulation. That is, one might suspect that it would be easier to “cover up” an unprincipled decision through a written opinion than through a process of oral justification.

That said, written opinions do not appear to be necessary to maintaining judicial legitimacy in its more localized sense. Indeed, along some of the critical measures, such as interpersonal respect, opinions might be comparatively bad at enhancing the perception of legitimacy. The bulk of judicial legitimacy arises out of the process of justification.<sup>285</sup> So long as courts provide appropriate reasons for their decisions, it would not, in general, appear to matter whether those reasons were provided orally and transcribed or via a written opinion. Indeed, small claims court judges routinely make decisions that are accepted as

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281. Tyler, *supra* note 275, at 891.

282. *Id.* at 892.

283. There is another potential dimension to the constraining effect of writing. The format of an opinion can affect not merely how a judge decides, but what she decides. Although courts presently enjoy almost unbounded latitude in terms of opinion format, one possible mechanism for shaping decisionmaking would be to make certain components of an opinion mandatory. See Oldfather, *supra* note 85, at 794–801.

284. See *supra* text accompanying notes 3–6.

285. See *supra* text accompanying notes 258–64.

legitimate despite the fact that they are oral and basically off-the-cuff.<sup>286</sup>

Of course, to suggest that written opinions are not strictly necessary to legitimate judicial action is not to suggest that written opinions provide no benefits. Here, to some extent, the legitimacy analysis overlaps with the other functions that opinions are thought to fulfill. If, as considered above,<sup>287</sup> the process of writing enhances the reasoning process, then reasoned elaboration might require written rather than oral justification, and judicial legitimacy might, at least in some cases, depend on writing. Similarly, a written opinion might be perceived as embodying a more thoughtful, and therefore more legitimate, process, thereby suggesting that perceptual legitimacy might likewise be enhanced by writing.

#### D. TAKING ACCOUNT OF INSTITUTIONAL DIFFERENCES

Despite the differing institutional functions of trial and appellate courts,<sup>288</sup> and despite the somewhat different standards at the two levels concerning the issuance of opinions,<sup>289</sup> the literature on judicial opinions has failed to systematically address how these institutional differences ought to be taken into account. The preceding analysis allows for the creation of a general outline of the differing ways in which the functions served by opinions will be implicated in the two contexts. To a large degree, it turns out that current practices reflect, however inadvertently, an appropriate balance. Speaking broadly, we should expect to see, as we do, fewer opinions from trial courts. This is because trial courts will more often confront the sorts of context-specific rulings as to which writing might produce a less-accurate decision, will less frequently be concerned with creating precedent, and will typically have other mechanisms through which to satisfy legitimacy-based expectations.

Of course, that broad-level consistency between the expected and actual relative frequencies of opinions at the trial and appellate levels does not always obtain once one sharpens the inquiry. Consider first the relationship between opinions and decisional accuracy. Commentators have suggested that trial courts ought to issue opinions with respect to decisions based on complex records or the resolution of significant evidentiary conflicts.<sup>290</sup> Those cases, however, often turn on the assessment of contextual and other difficult-to-verbalize factors that appear most likely to be the sort most susceptible to verbal overshadowing and thus to fall into the negative justification category.<sup>291</sup> Appel-

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286. See generally John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467 (1988). Of course, not all decisions issued by judges in small claims court are so regarded. Conley & O'Barr found wide variation in the approaches adopted by such judges in deciding cases, which in turn resulted in widely different levels of litigant satisfaction. *Id.* at 504–07.

287. See *supra* section IV.A.

288. See *supra* section I.C.

289. See *supra* Part I.

290. See *supra* text accompanying note 30.

291. See *supra* section IV.A.1.c.

late courts, in contrast, are much less likely to face such decisions.<sup>292</sup> Appellate courts rarely engage with the underlying merits of a trial court's resolution of the sort of issues likely to be susceptible to negative-justification effects. Such decisions are almost uniformly reviewed under an "abuse of discretion" or "clearly erroneous" standard.<sup>293</sup> Significantly, appellate scrutiny in these situations often reflects concern with the adequacy of the trial court's process and, as I have suggested, ought to be the focus of trial court opinions justifying such decisions.<sup>294</sup>

The precedent-bearing function of opinions, in contrast, is implicated to a much greater degree in the appellate setting than at the trial court level. The articulation and refinement of legal standards is one of the two primary tasks of intermediate appellate courts and is the predominant mission of courts of last resort.<sup>295</sup> The precedent-related functions of opinions accordingly take center stage in the appellate process. Trial court rulings, in contrast, do not bind future courts in any strict sense.<sup>296</sup> For this reason, any precedent-related benefits conferred by judicial writing are relatively less important at the trial court level. That is not to suggest that precedential effects are completely absent. A well-reasoned opinion from a trial court can certainly serve as persuasive authority in any future court. A trial court's approach to a novel or complex case may likewise provide a template that serves as something of a *de facto* precedent for subsequent cases.<sup>297</sup> These possibilities in turn suggest that non-judicial actors will rely on trial court opinions to guide their conduct.

Trial court opinions can also support the creation of precedent in indirect ways, such as by serving as the mechanism via which trial judges participate in the appellate process. Most basically, trial court opinions provide appellate courts with something to review. A decision that is simply made unaccompanied by any statement of reasons is more difficult to assess on its merits and thereby harder to defend. In addition, trial judges enjoy a unique perspective because of their position. They are the first to confront issues and can, because of their closeness to the litigation from which a given issue arises, offer informed and valuable insights regarding the likely effects of a particular legal rule. None of this, of course, places the trial court opinion in the position of actually serving

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292. Perhaps the most common situation in which appellate courts must make decisions that might be characterized as involving the potential for negative justification occurs in the exercise of discretionary jurisdiction. A court, such as the U.S. Supreme Court or a state supreme court, that has the ability to choose which cases to take, might do a worse job in selecting from those presented to it were it required to justify itself. There are, of course, other reasons for not requiring an explanation of a denial of discretionary review, including workload implications and the likelihood that lawyers would attempt to use such explanations in precedential fashion, but the lack of a justification requirement also makes sense on accuracy grounds.

293. See MEADOR ET AL., *supra* note 18, at 222–85 (describing in detail standards of review).

294. See *supra* text accompanying note 226.

295. See DANIEL J. MEADOR & JORDANA S. BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 4 (1994) ("Error correcting and lawmaking are the core appellate functions.").

296. See Lee & Lehnhof, *supra* note 36, at 168.

297. See Zaring, *supra* note 37.

as precedent. But it does convey the trial judge's input into the process of generating precedent,<sup>298</sup> and to the extent that purpose is better served via written opinion, provides an additional precedent-based reason for preferring written opinions at the trial court level.

Turning finally to the legitimacy-based arguments for written opinions, we again confront a situation where the case for opinions is stronger in the appellate context than in the trial context, at least as those processes are currently constituted. This, too, is partly a product of institutional function. Again, appellate courts' institutional role is more heavily slanted toward the resolution of legal issues, while trial courts, which must of course also rule upon legal issues, bear primary (and in many respects ultimate) responsibility for the resolution of factual disputes. To the extent that the former is thought to involve relatively more and the latter relatively less application of logic, written opinions would be more crucial to the legitimacy of appellate courts for the same reasons that written opinions arguably stand as a better source of reasoned elaboration.

In terms of perception, opinions are relatively more important at the appellate level simply because they provide one of the few windows into the decisionmaking process. Aside from oral argument, which is no longer available in many, perhaps even most, appellate cases, and which is subject to stringent time constraints,<sup>299</sup> judicial opinions provide the public with its only insight into how appellate judges go about the process of deciding cases. As a consequence, absent a change to a system in which judges provide oral rulings from the bench, written opinions seem crucial to maintaining the perceived legitimacy of the appellate courts. Indeed, the ongoing controversy over appellate courts' frequent use of nonprecedential, "unpublished" opinions in recent decades demonstrates the extent of the link between written opinions and appellate legitimacy.<sup>300</sup>

The dynamic is, at least in theory, different in the trial courts. The nature of litigation in a trial court provides for more-frequent interaction between the parties and the trial judge, such that the air of mystery that surrounds the appellate court decisionmaking process is less present simply by virtue of the fact that the trial judge seems to be more visible and more engaged with the case. This is most true in the context of those cases that actually go to trial. There the judge is a continuous presence, ruling on evidentiary objections, instructing the jury, running the courtroom, and otherwise standing watch over the process. The parties and the public can monitor this process as it happens, thereby reducing the need for opinions as a check on substantive legitimacy or to enhance perceived legitimacy. The greater range of opportunities for interac-

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298. See ALDISERT, *PROCESS*, *supra* note 66, at 608 (placing the lower court along with the parties in the category of participants who "have an all-pervasive interest in the case, an interest in the error-correcting activity of the appellate court").

299. See BAKER, *supra* note 194, at 109–10.

300. See *supra* note 5 and accompanying text.



tion between the parties and the judge also means that the judge has means other than a written opinion available to credit participation and to signal to the parties that he is doing so.

But the typical process in the trial courts has also undergone a change. Trials are said to be a vanishing phenomenon.<sup>301</sup> Judges must engage in “managerial judging,”<sup>302</sup> pursuant to which many of the crucial decisions in a case are made out of the public eye. In addition, cases are increasingly channeled away from traditional adjudication and into alternative mechanisms such as mediation, which has itself evolved in such a way as to decrease parties’ satisfaction with and perceptions of the legitimacy of the process.<sup>303</sup> To the extent that these changes have resulted in trial judges being less engaged with the parties, thereby making decisions in a manner that resembles the manner in which appellate courts make their decisions, written opinions should be viewed as more important to maintaining the legitimacy of the trial court process.

#### CONCLUSION

There would be no small amount of irony involved were I to attempt to conclude this Article with a detailed set of prescriptions regarding when judges ought to write. The analysis has revealed that the questions involved are complex and that the functions served by judicial opinions are implicated to varying degrees depending upon a host of variables including the nature of both the case at hand and the court charged with its resolution. What is more, having undertaken this inquiry via a lengthy writing, I must remain mindful of the possibility that my analysis might be subject to some of the very cognitive shortcomings I have identified. Finally, there is the fact that our understanding of the relationship between writing and effective cognition remains in the early stages of development, such that bold pronouncements are inappropriate.<sup>304</sup>

It nonetheless remains possible to draw some general conclusions. At a broad level, the analysis validates the largely discretionary scheme of current standards relating to judicial writing outlined in Part I. There are simply too many variables involved to articulate a precise, detailed set of rules for when a court ought to be required to issue a written justification in connection with a particular decision. Nor are the effects of written justification relative to oral justification clear enough to allow us to stake out any firm rules for when an oral justification might be appropriate.

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301. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

302. See generally Resnik, *supra* note 16.

303. See generally Welsh, *supra* note 275.

304. See generally Mitchell, *supra* note 12 (cautioning against and critiquing the overeager extension of psychological research by legal scholars).

That said, the analysis does support the identification of a framework of factors that can facilitate more-nuanced consideration of whether an opinion ought to be generated in a given situation and by what process. The psychological research concerning the effects of writing on thought supports the conclusion that judicial decisions may be divided into the pure-decision, positive-justification, and negative-justification categories, as well as a rough identification of the lines dividing them. Indeed, while the advancement of the psychological research might ultimately support a more fine-grained categorization, full precision is likely unattainable. For example, there may be no meaningful way to precisely and categorically identify the sorts of “easy cases” that fall into the pure-decision category, and to some degree its boundaries will undoubtedly lie in the eye of the beholder.<sup>305</sup> We can perhaps say a little more about negative justification. An ultimate list of negative-justification situations would likely include many of the situations that the federal appellate courts have identified as not requiring the issuance of opinions, such as decisions concerning the sufficiency of evidence, the exercise of expressly granted discretion, and the like.<sup>306</sup> What is not clear, though potentially of great significance to the operation of our judicial system, is the extent to which the analysis of indeterminate questions of law is susceptible to verbal overshadowing. The possibility that efforts to verbalize one’s reasoning in the context of such analyses will lead to conclusions that are somehow verifiably worse than would be the case absent such efforts strengthens the case for judicial modesty, such as by counseling in favor of minimalist decisions and perhaps greater deference to the decisions of the other branches of government. But such conclusions, if they can be reached at all, must await the completion of considerable additional research.

In addition, the analysis supports more focused critique of existing practices. For example, standards focusing on a lack of “institutional value”<sup>307</sup> are too vague, simply because “institutional value” is not a concept with any accepted meaning. It should be replaced with the functional and other considerations identified in this Article. Likewise, a standard focusing merely on complexity as a trigger for writing<sup>308</sup> is too general.<sup>309</sup> A decision requiring complex statutory analysis would certainly call for an opinion. A decision requiring the assessment

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305. One likely point of difference will be between the new and the experienced judge, with the pure-decision category being larger for the latter. This highlights another potential benefit of opinion writing, namely that the process of writing enhances learning. For an overview of the literature on this point, see Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 1 (2000).

306. See *supra* section I.B.

307. See *supra* text accompanying note 41.

308. See *supra* text accompanying note 30.

309. These are mere examples. Other standards are subject to similar critiques. The Third Circuit’s Rule 6.2.2 is ultimately so broad as to allow the court to dispense with an opinion in any case in which it is affirming. The First Circuit’s rule is merely a statement of discretion, and standards referencing the “jurisprudential purpose” of an opinion are no more helpful than those referencing institutional purposes. See 1ST CIR. R. 36.0.

of a complex factual assessment, in contrast, might not. Or it might call for a different kind of opinion altogether.

As that suggests, we can also draw conclusions regarding the format of decisions. One of the lessons of the Unconscious Thought Theory research is that the sorts of highly nuanced decisions that are likely to be susceptible to negative justification are best made only after appropriate consideration of all the relevant inputs. Thus it may not be the case that we want to dispense with opinions altogether, but instead that the opinions speak to the process by which the decision was reached rather than to the merits of the decision itself. In effect, obtaining the best decisions might require judges to provide something of a checklist of the items taken into consideration.

Above all, the analysis suggests the need and provides some context for further inquiry into the relationship between writing and decisionmaking, both at the level of basic psychology and in the specific confines of the judicial role. One significant aspect of that relationship that I have only alluded to in this Article is the fact that it is rarely the case that judges, at least in the federal courts, are the initial authors of the opinions that go out under their names.<sup>310</sup> My analysis suggests that this should not trouble us with respect to pure-decision situations, in which decision and justification remain separate, with the former remaining a product of the judge.<sup>311</sup> The implications are not so clear in the case of positive justification. While the process of writing will improve the quality of the analysis, if the judge is not the author, then it is not the judge's analysis that benefits. The resulting performative utterance,<sup>312</sup> and thus in a meaningful sense the decision, is not fully a product of the judge. Of course, most judges are careful editors of the drafts prepared by their clerks. It remains an open question whether the process of editing does or can impose the same discipline on thought provided by authorship in the first instance. If, as I suspect, the author and editor roles are not equivalent in this respect,<sup>313</sup> this Article's analysis provides yet another reason to be skeptical of the manner in which judicial practice has evolved in the past fifty years.

Our heavy reliance on writing in the judicial process might in a fundamental sense be the product of historical fortuity. It has nonetheless come to be

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310. See Posner, *supra* note 217, at 61 (“Today, most judicial opinions, including many Supreme Court opinions, are ghostwritten by law clerks. Many appellate judges have never actually written a judicial opinion.”).

311. See *supra* section IV.A.3.

312. See *supra* text accompanying note 244.

313. Most commentators who have addressed the issue view the processes as qualitatively different. See DAVID M. O'BRIEN, JUDGES ON JUDGING 34 (2004) (quoting Chief Justice Rehnquist as asserting that “[t]he line between having clerks help one with one's work, and supervising subordinates in the performance of *their* work, may be a hazy one, but it is at the heart . . . [of] the fundamental concept of ‘judging’”); McGowan, *supra* note 66, at 556 (arguing that editing does not require the same systematic process of selecting words as writing and places the editor at a farther remove from the parties and the dispute); Posner, *supra* note 2, at 1448 (suggesting that the judge who delegates writing responsibility employs “a traditional method of avoiding having to confront the consequences of one's decisions”).

regarded as perhaps the central feature of the judicial function in America. Given that, a more refined understanding of the role of writing in decisionmaking is necessary not only for us to fully appreciate the nature of the system we currently have, but also for us to make appropriate modifications to that system going forward.