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JEDI OR JUDGE: HOW THE HUMAN MIND REDEFINES JUDICIAL OPINIONS

*Anne E. Mullins**

Obi-Wan Kenobi: "These aren't the droids you're looking for."

Stormtroopers: "These aren't the droids we're looking for."¹

I. INTRODUCTION

It's an iconic moment in American cinema: The Empire discovers that droids have escaped Princess Leia's ship with the plans for the Empire's battle station, the Death Star.² Jedi Master Obi-Wan Kenobi, Luke Skywalker, and R2-D2 and C-3PO—the droids with the plans—approach an Empire checkpoint manned by Stormtroopers.³ Just when it looks like the protagonists are in big trouble, Obi-Wan waves his hand and tells the Stormtroopers that R2-D2 and C-3PO aren't the droids they're looking for.⁴ With only the wave of a hand and the power of suggestion, the Stormtroopers dazedly agree.⁵

Judicial writing is not Star Wars, and judges are not Jedis; but how far apart are they? Current scholarship on judicial opinion writing focuses largely on how to write an effective judicial opinion.⁶ Few scholars pause to consider how the

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¹ STAR WARS: EPISODE IV—A NEW HOPE (20th Century Fox 1977).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., JENNIFER L. SHEPPARD, IN CHAMBERS: A GUIDE FOR JUDICIAL CLERKS AND EXTERNS (2012); ELIZABETH FAJANS ET AL., WRITING FOR LAW PRACTICE: ADVANCED LEGAL WRITING (2010); MARY L. DUNNEWOLD ET AL., JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE (2010); Gerald Lebovits

reader's mind works and what implications that has for judicial writing. To this end, most of the scholarship on judicial opinion writing assumes a conscious reader.⁷ The conscious reader evaluates the correctness of the opinion on the basis of substantive legal analysis alone. To the extent that the scholarship acknowledges persuasion in judicial writing, it usually does so in reference to crafting an analytically solid opinion.⁸ The focus on crafting an analytically solid opinion is unsurprising because a conscious reader is swayed by solid analysis alone.

Psychologists have determined that beneath the conscious, analytical exterior lurks the unconscious, intuitive mind.⁹ In the unconscious, the rules are different. Much like the Stormtroopers, the unconscious is persuaded by information collateral to solid analysis. The vast majority of current scholarship on judicial writing neither acknowledges nor explores the unconscious, intuitive side of the reader. The conception of readers as only conscious and analytical is fundamentally flawed. Further, the flaw is foundational because it has kept scholars of judicial opinion writing from engaging fully with their subject. Acknowledging the unconscious and intuitive side of the reader opens rich opportunities in the scholarly dialogue about judicial opinion writing.

As noted above, the current conception of the judicial opinion reader is limited. Part II explores the current scholarship on judicial opinion writing and shows that the traditional conception of the reader is conscious and analytical.¹⁰ As a result, the assumption is that judges persuade the reader through solid legal analysis alone. Part III explains that according to modern psychology, people actually employ two systems of thinking, one conscious and analytical and the other unconscious and intuitive.¹¹ Both minds work simultaneously, and judicial opinion readers use both as they read. Part IV explores the implications of a dual-system judicial opinion reader.¹²

& Lucero Ramirez Hidalgo, *Advice to Law Clerks: How to Draft Your First Judicial Opinion*, 36 WESTCHESTER B.J. 29 (2009); JOYCE J. GEORGE, *THE OPINION WRITING HANDBOOK* (5th ed. 2007); WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* (2007); Elizabeth Ahlgren Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES' J. 8 (1999).

⁷ See discussion *infra* Part II.C.

⁸ See discussion *infra* Part II.B.

⁹ See, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 9 (2013); Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: An Historical Perspective*, in *TWO MINDS: DUAL PROCESSES AND BEYOND* (Jonathan St. B. T. Evans & Keith Frankish eds., 2009) [hereinafter *TWO MINDS*]; Shelly Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 460 (1994); Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 123, 123–86 (1986).

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part IV.

II. TRADITIONAL CONCEPTS OF JUDICIAL WRITING (AND THE READER IT IMPLIES)

“[T]he craft of judicial writing—is a subject that is remarkably understudied.”¹³ To the extent that judges and scholars have studied judicial writing, the inquiries tend to focus on two broad areas: why judges write,¹⁴ and how judges should write.¹⁵ As explained further below, the current state of the scholarship rarely explicitly takes the mind of the reader into account.¹⁶ Nevertheless, the scholarship implicitly paints a portrait of the reader: The reader is at all times conscious and actively engaged, evaluating opinions based only on the strength of the analysis.

A. Why Judges Write Opinions

Why do judges write opinions? There are several answers to this question, but they tend to coalesce around three themes: resolving disputes,¹⁷ demonstrating and promoting the consistent application of the law,¹⁸ and justifying decisions.¹⁹ The most basic reason that judges write opinions is to resolve disputes and communicate the reasoning behind the resolution.²⁰ The dispute-resolution purpose serves a narrow audience composed of the litigants and their lawyers. As such, the judicial opinion informs these readers of the disposition and the reasons for it.²¹

Judges not only resolve disputes; they also serve the consistent application of the law. Serving the consistent application of the law is a two-part task: Judges must demonstrate consistent application of the law in the case before them, and they must also facilitate the consistent application of the law in the future.²² To

¹³ Samuel A. Alito, Jr. et al., *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 34 (2009).

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* Part II.C.

¹⁷ See *infra* note 20 and accompanying text.

¹⁸ See *infra* notes 21–27 and accompanying text.

¹⁹ See *infra* notes 28–35 and accompanying text.

²⁰ See, e.g., SHEPPARD, *supra* note 6, at 113; FAJANS ET AL., *supra* note 6, at 356 (noting that opinions, among other things, resolve disputes and communicate the disposition and the reasons for it); DUNNEWOLD ET AL., *supra* note 6, at 223 (explaining that a narrow purpose of the opinion is to inform the reader of basis for judgment); Lebovits & Hidalgo, *supra* note 6, at 29 (the primary purpose of the opinion is to give reasons); GEORGE, *supra* note 6, at 3 (noting that one purpose of the opinion is to resolve disputes); POPKIN, *supra* note 6, at 1 (one of the reasons judges write is to decide cases); Francis, *supra* note 6, at 8 (informing and explaining are two of the purposes of the judicial opinion).

²¹ See *supra* note 20 and accompanying text.

²² DUNNEWOLD ET AL., *supra* note 6, at 223 (one of the broad purposes of the opinion is “to create consistency in the law.”).

demonstrate that they have applied the law consistently in the case before them, judges must explain, in writing, the basis for their decisions.²³ Applying the law consistently is important because, as Judge Patricia Wald explains, “under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike.”²⁴

Judges must also enable future courts to apply the law consistently.²⁵ To facilitate consistent application of the law, judges must explain, in writing, the law they are applying.²⁶ They must also explain, deliberately and with great care, any developments of the law that the case before them requires.²⁷ Consistently applied laws permit parties to predict what courts will do and shape their behavior accordingly.²⁸ As a result, consistent application of the law is key to an efficiently functioning society.

Finally, judges write opinions to persuade their broader audiences that the court’s decision is correct and its reasoning is sound.²⁹ Put differently, judges write to justify their decisions.³⁰ As such, justification/persuasion preserves legitimacy

²³ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995).

²⁴ *Id.*

²⁵ See SHEPPARD, *supra* note 6, at 113 (opinions provide guidance to future courts); *see also* Hart v. Massanari, 266 F.3d 1155, 1176–77 (9th Cir. 2001) (where Judge Kozinski explained that “[w]riting an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants . . .”).

²⁶ Francis, *supra* note 6, at 8 (some of the reasons judges write opinions are to “set precedent [and to] state issues and legal principles”); Lebovits & Hidalgo, *supra* note 6, at 29 (opinions communicate the law).

²⁷ *See, e.g.*, FAJANS ET AL., *supra* note 6, at 356 (opinions communicate precedent); RUGGERO J. ALDISERT, OPINION WRITING 13 (2d ed. AuthorHouse 2009) (opinions record precedent); Lebovits & Hidalgo, *supra* note 6, at 29 (opinions develop the law and encourage consistency through articulating precedent).

²⁸ *See, e.g.*, FAJANS ET AL., *supra* note 6, at 356 (opinions make law and guide the behavior of other courts, legislatures, and parties).

²⁹ *See id.* at 355 (“[T]he opinion endeavors to convince its readers that the matter was properly decided.”); DUNNEWOLD ET AL., *supra* note 6, at 223 (“Another purpose of an opinion is to persuade. An appellate opinion should persuade readers that the court’s reasoning and ultimate decision are correct.”); Lebovits & Hidalgo, *supra* note 6, at 29 (judicial opinions are persuasive writing designed to convince possibly unfavorable audiences); GEORGE, *supra* note 6, at 3 (the purpose is to “persuade any concerned audience of the reasonableness of the disposition”).

³⁰ *See* SHEPPARD, *supra* note 6, at 113 (justifying opinions to the public is a purpose of writing); ALDISERT, *supra* note 27, at 12 (the purpose of opinions is to justify the result and ensure legitimacy of the court); Francis, *supra* note 6, at 8 (listing justifying as a reason for judicial opinions); POPKIN, *supra* note 6, at 2 (judges write opinions to serve the political goal of projecting authority to the public); Lebovits & Hidalgo, *supra* note 6, at 29 (opinions make judges accountable to the public).

and promotes credibility.³¹ Justice Samuel Alito calls this writing for “democratic acceptability.”³² Judge Wald agrees, suggesting that one of the primary reasons judges write is “to reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.”³³ As a result, “[t]he higher a court’s place in the judicial hierarchy, the more important it is for that court to rationalize its results.”³⁴ Rationalizing results is particularly important when the opinion advances the law.³⁵

There is some discomfort with the idea that judges engage in persuasion at all.³⁶ Professors Elizabeth Fajans, Mary Falk, and Helene Shapo characterize this discomfort best when they call the idea of persuasion in judicial opinion writing “incongruous.”³⁷ As they explain, “adjudicators are, of course, sworn to neutrality, not advocacy. Indeed, their legitimacy stems from their disinterested labor within the judiciary: they may neither favor nor disfavor groups or individuals and must bring to every case an open mind.”³⁸

A likely result of the discomfort with persuasion in judicial writing is that many scholars use the word “justify” instead of “persuade” when they appear to mean the same thing.³⁹ “Justify” is a more palatable proxy for the troubling “persuade.” None of the scholars who use the word justify has identified a reason

³¹ Hon. Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 13 (2009) (“Opinion writing is most intimately concerned with the decision-justifying process.”); Alito, Jr. et al., *supra* note 13, at 51 (noting that if courts “depart from the proper role then our work will not be accepted”).

³² Alito, Jr. et al., *supra* note 13, at 51; *see also* FAJANS ET AL., *supra* note 6, at 357 (observing “an institutional need for [judicial] decisions to be met with communal acceptance”).

³³ Wald, *supra* note 23, at 1372.

³⁴ *Id.* at 1375; *see also* GEORGE, *supra* note 6, at 4 (explaining that when the impact is broad, “the goal is to persuade”).

³⁵ *See* FAJANS ET AL., *supra* note 6, at 357 (When the opinion is making new law, “persuasion becomes paramount. In order to assure acceptance, in order to forestall reversal, critique, doubt, and misgiving, the opinion must convince its readers of its rightness.”).

³⁶ *See* Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286, 286 (2000). To this end, Professor Richard Cappalli asserts that “[o]pinions must be written not to persuade, but to communicate precedent.” *Id.* As a result, Cappalli critiques scholarship on opinion writing because there is “little emphasis on the precedent-setting function. Rather, writers emphasize persuasion as the main communicative task of the opinion.” *Id.*; *see also* Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 584 (1983) (quoting James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES J. 49 (1969) (“Rhetoric is best suited for the advocate; an opinion expresses a decision above the individual passions in the case.”)).

³⁷ FAJANS ET AL., *supra* note 6, at 355.

³⁸ *Id.*

³⁹ *See supra* notes 29–31 and accompanying text.

for choosing that word over persuade. The slightly different meanings of the two words, however, might provide some clues. The primary definition of “justify” is “to prove or show to be just, desirable, warranted, or useful.”⁴⁰ The definition seems to assume that there is positive value to the underlying subject—the underlying subject is “just, desirable, warranted or useful”; the person doing the justifying must “prove or show” that.⁴¹ Historical definitions of “justify” include “to confirm, maintain, or acknowledge as true, lawful, or legitimate” and “to prove or show to be valid, sound or conforming to fact or reason.”⁴² As these definitions show, “justify” has traditionally been tied to ideas of justice and legitimacy.

The primary definition of “persuade” is “to induce by argument, entreaty, or expostulation into some mental position (as a determination, decision, conclusion, or belief).”⁴³ Unlike justify, the primary definition of persuade does not assume the underlying value of the subject. Instead, the focus is on the act of changing another’s mind. A secondary definition is “to demonstrate or prove (something) to be true, credible, essential, commendable, or worthy.”⁴⁴ This definition overlaps with the definition of justify and assumes the underlying subject to have value. Given its primary definition, though, persuade seems to focus more on the action of the person doing the persuading rather than the inherent value of the underlying subject. Moreover, persuade does not share the historical links to justice and legitimacy that justify has.

When a judge persuades a reader, the judge induces the reader to believe the judge. When a judge justifies an opinion, the judge reveals the reasons that the opinion is just and correct. “Persuade” suggests advocacy, whereas “justify” suggests neutrality. Choosing the word “justify” likely allays the very discomfort that Professors Fajans, Falk, and Shapo identify when they discuss persuasion in judicial opinions.

B. How to Write Opinions

In addition to exploring why judges write, current scholarship provides guidance on how judges should write. This guidance has two focuses. First, there is the great debate about the proper approach that a writing judge should take, another skirmish in the battle between formalism and realism.⁴⁵ Second, beyond

⁴⁰ *Justify*, WEBSTER’S THIRD NEW INT’L DICTIONARY (Philip Babcock Gove et al. eds., 2002).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Persuade*, WEBSTER’S THIRD NEW INT’L DICTIONARY (Philip Babcock Gove et al. eds., 2002).

⁴⁴ *Id.*

⁴⁵ *See, e.g.*, RICHARD A. POSNER, REFLECTIONS ON JUDGING 105–30 (2013).

the broad focus of proper approach, there are volumes of technical instructions on how to write a good opinion.⁴⁶

Judicial writing has traditionally taken a formalist approach, in which judges appear to algorithmically apply the law to the facts and churn out a result.⁴⁷ A formalist opinion is carefully crafted to make the ultimate conclusion appear to follow neatly from the law, as explained and applied.⁴⁸ In other words, “[j]udges decide outcomes, and then tell the story in a way that makes the outcome look like a perfectly logical and necessary consequence of the law, handed to us from above, as applied to the facts, handed to us from below.”⁴⁹ Judicial opinions, therefore, are typically not reflective of the actual decision-making process that the judge conducts.

There are three responses to this reality. One is approval. J.J. George candidly asserts that “[t]he opinion should not include the path that the judge traveled during the decision-making process, but it should persuade the reader that it is the correct decision.”⁵⁰ Judge Richard Posner, on the other hand, condemns this response. In his view, judges should be straightforward about how they decide cases; they should not hide behind the trappings of formalism in an effort to exude expertise and orthodoxy.⁵¹ Judge Wald accepts it as a less-than-ideal practical reality borne of the institutional constraints that judges face.⁵² Judge Wald explains that, in an ideal world, a judge would gather and organize materials and her own thoughts, and the writing of the opinion would be a process of both decision-making and discovery, with each step carefully considered and

⁴⁶ See, e.g., Charles G. Douglas, III, *How to Write a Concise Opinion*, 22 JUDGES J. 4 (1983); Aldisert et al., *supra* note 31; Cappalli, *supra* note 36, at 319–20 (providing a list of rules that judges should follow in their writing that focuses on lean, clear writing and minimizing dicta); Francis, *supra* note 6, at 8 (outlining the parts of the opinions and the application of law to facts); Thomas Gibbs Gee, *A Few of Wisdom's Idiosyncrasies and a Few of Ignorance's: A Judicial Style Sheet*, 1 SCRIBES J. LEGAL WRITING 55 (1990); Walker Gibson, *Little-Known Gems on Judicial Writing: Literary Minds and Judicial Style*, 6 SCRIBES J. LEGAL WRITING 115 (1997); Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 SCRIBES J. LEGAL WRITING 1 (2003); Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 JUDGES' J. 33 (1995); DUNNEWOLD ET AL., *supra* note 6; GEORGE, *supra* note 6; SHEPPARD, *supra* note 6; Erik Paul Belt, *Concerned Readers v. Judicial Opinion Writers*, 23 U. MICH. J.L. REFORM 463 (1990); ALDISERT, *supra* note 27; FEDERAL JUDICIAL CENTER, JUD. OPINION WRITING MANUAL (1991), <https://perma.cc/R9K5-LNX6> [hereinafter JUD. OPINION WRITING MANUAL].

⁴⁷ RICHARD A. POSNER, REFLECTIONS ON JUDGING 248–49 (2013). Judge Posner argues that the formalist opinion is on the rise, in large part because law clerks have assumed initial responsibility for drafting opinions in most judicial chambers. *Id.* at 254.

⁴⁸ See *id.* at 251–52.

⁴⁹ Wald, *supra* note 23, at 1387–88.

⁵⁰ GEORGE, *supra* note 6, at 25.

⁵¹ POSNER, *supra* note 47, at 106, 109–10, 252, 366.

⁵² Wald, *supra* note 23, at 1377–85.

determined to be solid in its own right and in relation to the overall opinion.⁵³ The judge “would go where the facts, logic, and that sense of ultimate rightness . . . took her. And like a gifted novelist, she would let the characters and the plot take on a life of their own, drawing her along toward one irresistible conclusion.”⁵⁴ The collective nature of appellate decision-making, personal relationships between panel judges, and judges’ limited time and heavy caseloads, however, make the ideal unrealistic.⁵⁵

Regardless of which position is best, the advice to judges and their clerks on how to write opinions typically focuses on technical application of the law to the facts, effective organization, and general clarity.⁵⁶ The latter two areas are really auxiliary to the first. Notably, almost none of the advice expressly connects how to write an effective opinion with meeting the goal of persuasion. Perhaps the connection is implicit. In other words, it may be obvious to those providing advice that the way to persuade is through solid legal analysis. However, as noted above, the idea of persuasion in judicial writing strikes some as “incongruous.”⁵⁷ Therefore, it is also possible that scholars have avoided addressing directly how to persuade in judicial writing.

C. *A Portrait of the Reader*

Good legal writing serves its intended purpose.⁵⁸ When one purpose of writing is to persuade a reader, guidance on how to write necessarily paints a portrait of that reader. As noted above, scholars sometimes leave implicit the

⁵³ Wald, *supra* note 23, at 1377.

⁵⁴ *Id.*

⁵⁵ Wald, *supra* note 23, at 1377–85.

⁵⁶ See, e.g., Douglas, III, *supra* note 46, at 4, 7 (encouraging a “clear, direct, and easy to read style” and promoting lean writing); Aldisert et al., *supra* note 31 (explaining the anatomy of a judicial opinion and providing guidance on effective writing style); Cappalli, *supra* note 36, at 319–20 (providing a list of rules that judges should follow in their writing that focuses on lean, clear writing and minimizing dicta); Francis, *supra* note 6, at 8 (outlining the parts of the opinions and the application of law to facts); Gee, *supra* note 46, at 55 (focusing on general writing style); Gibson, *supra* note 46, at 115 (encouraging the writer to acknowledge the complexity of the issues and that there are multiple perspectives from which to view an issue); Kimble, *supra* note 46, at 1 (providing guidelines for good judicial opinions using as a basis an empirical study the author conducted; focused on writing style and organization); Klein, *supra* note 46, at 33 (giving technical tips for writing good opinions); DUNNEWOLD ET AL., *supra* note 6, at 225–34 (providing instruction focused on clarity, organization, rigorous analysis); GEORGE, *supra* note 6, at 369–25 (providing advice focused on technical organization and writing style); SHEPPARD, *supra* note 6, at 114–28 (providing tips on drafting a well-organized, clear opinion); Belt, *supra* note 46, at 466–71 (providing guidance on more formalist style and technical writing); ALDISERT, *supra* note 27, at 141–79 (providing guidance focused on technical writing); JUD. OPINION WRITING MANUAL, *supra* note 46 (focusing on technical organization and style).

⁵⁷ FAJANS ET AL., *supra* note 6, at 355.

⁵⁸ Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1092 (2011).

connection between their guidance on how to write opinions and how to persuade the reader.⁵⁹ When their opinion-writing guidance focuses on solid legal analysis alone, the assumed reader is one who is persuaded by solid legal analysis alone. That reader is conscious and actively engaged in the task at hand. The conscious and engaged reader is persuaded by sound arguments that permit evaluation of how the judge applied the law to the facts.

Though most do not, some scholars have explicitly connected their guidance on opinion writing with persuasion.⁶⁰ Upon inspection, much of this advice underscores the conception of the reader as conscious and analytical. For example, Judge Wald writes openly about how judges select which facts to present and how to characterize those facts strategically; judges also shape the standard of review to match their desired outcome.⁶¹ Both of these persuasion tactics target an actively engaged, conscious, analytical reader. That reader will determine the soundness of the opinion by evaluating how the judge applied the law to the facts and whether the judge faithfully applied the standard of review. Some scholars advise opinion writers to “develop[] the kinds of reasons that are convincing because they are sound, and [write] about them clearly and authoritatively.”⁶² Again, persuasion through sound reasoning targets an actively engaged, conscious, analytical reader.

Significantly, however, some of the advice on how to persuade indicates that there might be something more to persuasion than a strong and well-developed analysis.⁶³ This advice, in turn, hints that the reader might possess more than an actively engaged and conscious mind, swayed by solid analysis alone. For example, some scholars argue that judges need to write for “communal acceptance”; in other words, approval of their decisions by the larger communities they serve to preserve their legitimacy.⁶⁴ In so doing, judges are “push[ed] toward a rhetoric of persuasion—a rhetoric that can be compelling and thoughtful, but also lacking in candor if overdone. The best opinions use rhetorical devices only to bolster clear explanations of the grounds of their results.”⁶⁵ This rhetoric of persuasion is presented as separate from the substantive explanation of the reason for the decision. Beneath this separation is an awareness, albeit unexplored, that the reader might be susceptible to persuasion by means other than strong and well-developed analysis.

⁵⁹ See *supra* notes 56–57 and accompanying text.

⁶⁰ See, e.g., Wald, *supra* note 23, at 1386–94, 1408–12; FAJANS ET AL., *supra* note 6, at 211–12 (incorporated by reference into chapter on judicial writing).

⁶¹ Wald, *supra* note 23, at 1386–94, 1408–12.

⁶² FAJANS ET AL., *supra* note 6, at 212 (incorporated by reference into chapter on judicial writing).

⁶³ *Id.* at 357; Kate O’Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507, 508 (2009).

⁶⁴ FAJANS ET AL., *supra* note 6, at 357.

⁶⁵ *Id.*

Similarly, Professor Kate O'Neill suggests that Judge Posner uses rhetorical devices that cause his readers "to receive more information than they may consciously perceive as being communicated."⁶⁶ In suggesting that readers may receive more information than they may consciously perceive as being communicated, Professor O'Neill implicitly acknowledges that judges write for both the conscious and unconscious reader.⁶⁷

I share Professor O'Neill's observation that readers sometimes receive more information than they consciously realize. More specifically, though, I argue that judges prompt readers to use judgmental heuristics, or decision-making shortcuts, which increase the persuasive power of their opinions.⁶⁸ Judicial opinion readers "are not always rational actors, and judges do not persuade . . . with only their analysis. Judges capitalize on psychological tactics that influence us to do what they tell us to do or to conclude that their decisions are, in fact, the correct ones."⁶⁹ While my scholarship touches on why psychological persuasion tactics work, that discussion is collateral to the endeavor of identifying what influence tactics judges use and how they use them.⁷⁰ The analysis assumes that there is something more to the reader than the conscious and analytical mind.

For the most part, scholars have not yet purposefully and deliberately examined the mind of the judicial opinion reader. The majority of the scholarship paints a portrait of the judicial opinion reader as a conscious and engaged reader; one who uses a conscious mind to evaluate the judge's analysis. This reader is swayed by solid legal analysis presented in the form of well-developed arguments. Indeed, there is symmetry between the traditional formalist opinion and the assumed reader.

This portrait of the reader is only partly accurate. Readers of judicial opinions use their conscious minds and are swayed by solid legal analysis. Missing from the portrait is the readers' unconscious. In addition to their conscious minds, readers also use their unconscious, intuitive minds to evaluate and interpret what they read. To the extent that judicial writing scholars have acknowledged the duality of the opinion reader's mind, none explore the reasons that cognitive and social psychologists and behavioral economists advance to explain that duality.

⁶⁶ O'Neill, *supra* note 63, at 508.

⁶⁷ See *id.* Professor O'Neill does not probe the conscious/unconscious divide further, or explore why the divide exists.

⁶⁸ Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111, 1113–55 (2014).

⁶⁹ *Id.* at 1112.

⁷⁰ *Id.* at 1113–16.

III. INSIDE THE READER'S MIND

As most scholarship on judicial opinion writing indicates, there is a “dogmatic assumption” that “the human mind is rational and logical.”⁷¹ People, however, are actually of two minds: one is rational and logical; the other, fast and intuitive.⁷² Modern psychologists have been exploring this dichotomy for more than thirty years,⁷³ but the theory that people have two different ways of thinking dates back to antiquity.⁷⁴

There is widespread agreement among psychologists and philosophers that people are of two minds, but theories about how exactly the two minds work are evolving.⁷⁵ Furthermore, while the theories are the subject of overlapping research across disciplines,⁷⁶ there appears to be limited dialogue across disciplines.⁷⁷ In the absence of a definitive and coherent theory among scholars, this article will use the approach laid out by Professor Daniel Kahneman to refer to and define the two minds.⁷⁸

Professor Kahneman explains that people have a fast brain and a slow brain.⁷⁹ He labels these brains using terminology widely used in psychology, coined by Professors Keith Stanovich and Richard West.⁸⁰ The fast brain is the “System 1” brain.⁸¹ It “operates automatically and quickly, with little or no effort and no sense

⁷¹ KAHNEMAN, *supra* note 9, at 9.

⁷² See, e.g., KAHNEMAN, *supra* note 9; IN TWO MINDS, *supra* note 9; Chaiken & Maheswaran, *supra* note 9; Petty & Cacioppo, *supra* note 9, at 123–86.

⁷³ See KAHNEMAN, *supra* note 9, at 13; IN TWO MINDS, *supra* note 9, at 1.

⁷⁴ See IN TWO MINDS, *supra* note 9, at 1–2; Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 *PERSPS. ON PSYCHOL. SCI.* 223, 223 (2013). These theories, however, are not without critique. For discussion of the primary criticisms, and responses to them, see *id.* at 223–41.

⁷⁵ Evans & Stanovich, *supra* note 74, at 223, 237.

⁷⁶ *Id.* at 223; Eliot R. Smith & Jamie DeCoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 *PERSONALITY SOC. PSYCHOL. REV.* 108, 108 (2000).

⁷⁷ Evans & Stanovich, *supra* note 74, at 223.

⁷⁸ Professor Kahneman is the Eugene Higgins Professor of Psychology, Emeritus, and Professor of Psychology and Public Affairs, Emeritus, at Princeton University. He won the Nobel Prize in Economic Sciences in 2002 for his work in the psychology of judgment and decision-making and behavioral economics. In 2013, he won the Presidential Medal of Freedom for his pioneering research. His book, *THINKING, FAST AND SLOW* (Farrar, Straus and Giroux 2011), is an international bestseller.

⁷⁹ KAHNEMAN, *supra* note 9, at 13.

⁸⁰ *Id.* at 20–21.

⁸¹ *Id.* at 20.

of voluntary control.”⁸² The slow brain is the “System 2” brain.⁸³ It “allocates attention to the effortful mental activities that demand it, including complex computations. The operations of the System 2 brain are often associated with the subjective experience of agency, choice, and concentration.”⁸⁴

A. *The System 2 Brain*

The System 2 brain is the actively engaged, analytical thinker.⁸⁵ Professor Kahneman explains that our concept of ourselves is intimately bound up in our System 2 brains: “When we think of ourselves, we identify with System 2, the conscious, reasoning self that has beliefs, makes choices, and decides what to think about and what to do.”⁸⁶ Operating the System 2 brain requires effort and attention.⁸⁷ The problem with the System 2 brain is that it is inherently lazy.⁸⁸ As a result, System 2 is frequently unwittingly guided by its less taxing, more nimble partner, System 1.⁸⁹

B. *The System 1 Brain*

The System 1 brain is the “source of rapid and often precise intuitive judgments. And it does most of this without your conscious awareness of its activities.”⁹⁰ In many of its operations, the System 1 brain relies on judgmental heuristics.⁹¹ Judgmental heuristics are thought processes that help answer difficult questions adequately and usually correctly.⁹² In other words, they are “highly economical and usually effective” decision-making shortcuts.⁹³

⁸² *Id.*

⁸³ *Id.* at 21.

⁸⁴ *Id.*

⁸⁵ *See id.*; *cf.* Chaiken & Maheswaran, *supra* note 9, at 460 (referring to System 2 brain thinking as systematic processing).

⁸⁶ KAHNEMAN, *supra* note 9, at 21.

⁸⁷ *Id.* at 22, 31; *cf.* Chaiken & Maheswaran, *supra* note 9, at 460.

⁸⁸ KAHNEMAN, *supra* note 9, at 31.

⁸⁹ *Id.* at 31; *see also* Wouter Kool et al., *Decision Making and the Avoidance of Cognitive Demand*, 139 J. EXPERIMENTAL PSYCHOL. 665, 665–82 (2010) (testing the traditional assumption that the brain avoids hard work and will operate to exert the least amount of effort, and concluding, based on a set of six experiments, that there is a “law of least mental effort”).

⁹⁰ KAHNEMAN, *supra* note 9, at 58.

⁹¹ *Id.* at 97–105.

⁹² *Id.* at 98 (“The technical definition of heuristic is a simple procedure that helps find adequate, though often imperfect, answers to difficult questions.”).

⁹³ DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 20 (1st ed. 1982); *see also* Serena Chen & Shelly Chaiken, *The Heuristic-Systematic Model in Its Broader Context*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 73 (1999).

For example, anyone who has traveled to a new place, particularly where the language is foreign, has relied heavily on the judgmental heuristic of social proof (i.e., following the crowd) to make it through the day: You watch others to see what they are doing in a wide variety of circumstances, from greeting new people properly to getting a ticket for the subway system, and you mimic their behavior. Chances are that if you do what the others are doing, you are probably doing whatever it is the “right” way. Imagine how tedious the day would be if, instead of relying on the decision-making shortcut of what others are doing, you hauled out your smartphone or your travel guide to research each unfamiliar step of the day as you encountered it. Instead of getting to the places that you would like to be, you would be stuck in slow motion trying to complete the most basic of tasks. Judgmental heuristics allow us to speed up the decision-making process significantly and in a usually reliable way.

The System 1 brain is always operating, and it is more active than people realize.⁹⁴ “In the picture that emerges from recent research, the intuitive System 1 brain is more influential than your experience tells you, and it is the secret author of many of the choices and judgments you make.”⁹⁵ To this end, when people encounter a complex or difficult question not inherently amenable to System 1 resolution, their System 1 brain substitutes a different question in its place that it can answer.⁹⁶

While the System 1 brain is useful and highly efficient, it is not without its flaws.⁹⁷ The decision-making shortcuts it uses fail, frequently in predictable manners.⁹⁸ This causes what psychologists call “cognitive biases.”⁹⁹ Significantly, even experts fall prey to System 1 biases.¹⁰⁰ For example, Professors Chris Guthrie, Jeffrey Rachlinski, and Judge Andrew Wistrich conducted an empirical study of 167 federal magistrate judges to determine whether they used judgmental heuristics in their decision-making.¹⁰¹ The study found that judges did, in fact, use heuristics, and those heuristics produced systematic errors in judgment.¹⁰²

⁹⁴ See KAHNEMAN ET AL., *supra* note 93, at 25; KAHNEMAN, *supra* note 9, at 13.

⁹⁵ KAHNEMAN, *supra* note 9, at 13.

⁹⁶ *Id.* at 12.

⁹⁷ *Id.* at 25.

⁹⁸ See KAHNEMAN ET AL., *supra* note 93, at 20.

⁹⁹ *Id.* at 18; see also KAHNEMAN, *supra* note 9, at 4.

¹⁰⁰ See KAHNEMAN, *supra* note 9, at 18; Carey K. Morewedge & Daniel Kahneman, *Associative Processes in Intuitive Judgment*, 14 TRENDS IN COGNITIVE SCI. 435, 436 (2010).

¹⁰¹ See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

¹⁰² See *id.* at 816–20.

One of the cognitive biases studied was anchoring.¹⁰³ Anchoring happens when a known reference point affects a person's judgment.¹⁰⁴ Frequently, reliance on an anchor makes sense because the anchor conveys accurate information about value.¹⁰⁵ Sometimes, however, the anchor provides no relevant information, and the anchor still impacts behavior.¹⁰⁶ For example, people considering hypothetical settlement offers were more likely to accept a final offer of \$12,000.00 when the opening offer was \$2,000.00; those with an opening offer of \$10,000.00 were more likely to reject the \$12,000.00 sum.¹⁰⁷

In the study of magistrate judges, the experimenters provided all participating judges the same description of a personal injury suit in which only damages were at issue.¹⁰⁸ They asked the judges to determine how much they would award the plaintiff in damages.¹⁰⁹ Before asking some of the judges to rule on damages, however, the experimenters presented them with a motion to dismiss for failure to meet the jurisdictional minimum of \$75,000.00 in damages.¹¹⁰ Under the facts of the case, the motion was meritless because the plaintiff's potential damages clearly exceeded the jurisdictional minimum.¹¹¹ The experimenters hypothesized that \$75,000.00—an amount entirely irrelevant to the plaintiff's damages—would anchor the judges who ruled on the motion to dismiss.¹¹² The experimenters were right. The judges who did not rule on the motion to dismiss awarded an average of \$1,249,000.00.¹¹³ Those who ruled on the motion to dismiss awarded an average of \$882,000.00.¹¹⁴ The difference was statistically significant, and, as the study demonstrates, people are susceptible to cognitive biases even when they are heavily incentivized to get it right.¹¹⁵

Given that the System 1 brain is always operating, it is impractical to constantly monitor it.¹¹⁶ However, it is possible to be aware of the System 1 brain

¹⁰³ *Id.* at 784–94.

¹⁰⁴ *Id.* at 787–88.

¹⁰⁵ *Id.* at 788.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 789.

¹⁰⁸ *Id.* at 790–91.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 791.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 791, 820.

¹¹⁶ KAHNEMAN, *supra* note 9, at 29.

and its limitations, particularly because System 1 cognitive biases are predictable.¹¹⁷ Through awareness, people can avoid some of the System 1 biases.¹¹⁸

C. *Meeting of the Minds*

According to Professor Kahneman, Systems 1 and 2 are always active when we are awake and they operate in a highly efficient parallel manner.¹¹⁹ “System 1 runs automatically and System 2 is normally comfortable in a low-effort mode, in which only a fraction of its capacity is engaged. System 1 continuously generates suggestions for System 2: impressions, intuitions, and feelings.”¹²⁰ If System 2 approves System 1’s suggestions, “impressions and intuitions turn into beliefs, and most of the time, System 2 adopts the suggestions of System 1 with little or no modification.”¹²¹ System 2, however, takes over when System 1 encounters difficulty.¹²² When System 1 encounters a problem not amenable to System 1 resolution (think complex multiplication)¹²³ or a surprising scenario, it calls on System 2 to assist.¹²⁴ So, while System 2 can and does override System 1, most of System 2’s thoughts and conclusions originate in System 1.¹²⁵

IV. JEDI AND JUDGE

Most, though not all, scholarship on judicial writing presumes a System 2 reader. This is likely because, as Professor Kahneman explains, our concept of ourselves is our System 2-selves.¹²⁶ Therefore, when scholars—judicial opinion readers themselves—conceive of the reader, they project their own self-image in that reader’s place. As a result, the image of the judicial opinion reader is a System 2 reader alone. System 1, however, is always operating beneath the surface, gathering input, processing it, and providing immediate impressions and suggestions to System 2.¹²⁷ Thus, the true judicial opinion reader is a dual-system reader.

The incomplete image of the judicial opinion reader has truncated dialogue about judicial opinion writing and particularly persuasion in judicial writing. The assumption that readers are persuaded by solid analysis alone is flawed.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 24–25; *see also* Morewedge & Kahneman, *supra* note 100, at 439.

¹²⁰ KAHNEMAN, *supra* note 9, at 24.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 24–25.

¹²⁴ *Id.*

¹²⁵ *Id.* at 25.

¹²⁶ *Id.* at 21.

¹²⁷ *See* KAHNEMAN ET AL., *supra* note 94, at 25; KAHNEMAN, *supra* note 9, at 13.

One problem this flawed assumption causes is that judges are probably not fully aware of how they are persuading readers and how they might persuade readers better.¹²⁸ While there is not yet empirical research on persuasion in judicial opinions, studies in other contexts illustrate that people are not always the most accurate judges of what will be compelling to their audience.¹²⁹ For example, in 2007, Professors Noah J. Goldstein, Robert B. Cialdini, and Vidas Griskevicius explored marketing campaigns to persuade hotel guests to reuse their towels.¹³⁰ Many hotels attempt to persuade guests to reuse their towels by appealing to their guests' commitment to environmentalism.¹³¹ A request might ask the guest to conserve natural resources and protect the earth.¹³² Whomever formulated the appeal-to-environmentalism strategy likely projected himself or herself in the guest's place and thought about what kind of message might be persuasive.¹³³ The appeal-to-environmentalism is rational; it is the kind of message that assumes and targets a conscious mind. In fact, the appeal-to-environmentalism strategy is not the most successful strategy.¹³⁴

The most successful strategy in getting guests to reuse their towels is telling them that a significant number of other guests reuse their towels.¹³⁵ The strategy is even more persuasive when the guest is told that a significant number of guests who stayed in that particular room reused their towels.¹³⁶ This strategy capitalizes on social proof and similarity, which are judgmental heuristics used in System 1 decision-making; put simply, if everybody else is doing it, then it is probably a good idea.¹³⁷ The persuasion is even more compelling when "everybody else" is made up of people who are similar to the message target.¹³⁸ Notably, just having stayed in the same hotel room is not a similarity with any meaningful significance; nevertheless, the similarity is deeply compelling.¹³⁹

¹²⁸ See NOAH J. GOLDSTEIN ET AL., YES! 50 SCIENTIFICALLY PROVEN WAYS TO BE PERSUASIVE 11 (Free Press 2009).

¹²⁹ See, e.g., Noah J. Goldstein et al., *A Room with a Viewpoint: Using Social Norms to Motivate Environmental Conservation in Hotels*, 35 J. CONSUMER RES. 472 (2008).

¹³⁰ *Id.*

¹³¹ *Id.* at 472.

¹³² *Id.*

¹³³ See GOLDSTEIN ET AL., *supra* note 128, at 16 ("[P]sychological research shows that people are often wrong about what motivates them to engage in certain behavior.").

¹³⁴ Goldstein et al., *supra* note 129, at 479–80.

¹³⁵ *Id.*

¹³⁶ *Id.* at 475–79.

¹³⁷ *Id.* at 479–80.

¹³⁸ *Id.*

¹³⁹ *Id.* at 475–79.

As the hotel towel reuse study illustrates, being unaware of the audience's System 1 means that attempts at persuasion may not always hit the mark. Awareness of the reader's System 1 would probably change how some judges communicate information. The writing judge may want to avoid System 1 persuasion to the greatest extent possible; alternatively, the writing judge may want to capitalize on the reader's System 1 for maximum persuasive impact. Relatedly, judicial opinion readers are probably not fully aware of how they are being persuaded.¹⁴⁰ Awareness of their own System 1 and how it operates would make readers savvier consumers of judicial opinions.

Introducing a complete image of the judicial opinion reader creates rich opportunities in scholarly dialogue about judicial opinion writing. The first step in that dialogue is to examine how judges are already persuading the reader through System 1; this examination has begun, but there remains much uncharted territory.¹⁴¹ How are judges using psychological persuasion? Are judges using some tactics more than others? Are some tactics more effective than others? To what extent does psychological persuasion reflect traditional rhetoric, and where do the two diverge?

An in-depth examination of psychological persuasion in judicial opinions could lay the groundwork for future empirical research on how judges could more effectively persuade the reader's System 1. Further exploration of how judges target System 1 would also equip scholars to discuss the ethical implications of System 1 persuasion: Are we comfortable with it? If so, to what extent? Would it matter if the persuasion happened in the context of a newly minted judicial system trying to build credibility and establish legitimacy versus a well-established system? Would it matter if the judges were elected or appointed?

Ultimately, the guiding principle of effective writing is to know the audience.¹⁴² Current scholarship does not consider the dual-system reader and creates a gap in our concept of judicial opinion writing and reading. A more accurate picture of the judicial opinion reader changes how we think about, write about, and read judicial opinions.

¹⁴⁰ One of Professor O'Neill's main points is that when law faculty are unaware of the rhetoric used in judicial opinions, they and their students may be receiving information without being completely aware of it. See O'Neill, *supra* note 63, at 508. Professor O'Neill, however, does not explicitly connect this unconscious receipt of information to the System 1 brain.

¹⁴¹ See Mullins, *supra* note 68.

¹⁴² See Phelps, *supra* note 58, at 1092.

V. CONCLUSION

The “dogmatic assumption” that “the human mind is rational and logical” is a flawed one.¹⁴³ It is also foundational to the traditional conception of the judicial opinion reader: conscious, analytical, and persuaded by solid analysis alone. As a result, judicial opinion writing, a subject already considered to be “remarkably understudied,”¹⁴⁴ requires more scholarly attention, particularly with regard to the reader’s System 1 brain.

Judges are not Jedis. Judges cannot convince readers of the correctness of their decisions with only the wave of a hand and the power of suggestion. But the reader’s ever-present System 1 is open to persuasion, and this persuasion occurs without the reader’s conscious awareness. When judges target the reader’s System 1, they are closer to Jedis than they initially appear.

¹⁴³ KAHNEMAN, *supra* note 9, at 9.

¹⁴⁴ Alito, Jr. et al., *supra* note 13, at 44.