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Judicial Overstating

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Abstract

Ostensibly, we are all Legal Realists now. No longer do legal theorists insist that judicial decision making fits the mechanical and formalist characterizations of yesteryear. Yet, the predominant style of American appellate court opinions seems to adhere to that improbable mode of adjudication. As argued elsewhere, opinions habitually provide excessively large sets of syllogistic reasons and portray the chosen decision as certain, singularly correct, and as determined inevitably by the legal materials (Simon, A Psychological Model of Judicial Decision Making, 1998).

This article examines two possible explanations for this rhetorical style of Judicial Overstating. First, we review the psychological research that suggests that judicial overstating is a product of the cognitive processes by which judges arrive at their decisions. Research on the Coherence Effect suggests that during the decision making process, the cognitive system spreads apart the opposing decisions by inflating one set of arguments and deflating the other, with the effect of making one decision seem considerably stronger than its rival. This leads the judge to perceive the chosen decision as stronger than it is, and thus to overstate the opinion.

It might also be possible that judges resort to overstatement because they believe that this form of reasoning promotes the legitimacy of the judiciary in the eyes of the public. We report on a recent experimental study that was conducted to test this possibility. We found that overstated and monolithic reasons did not promote the evaluations of the judges nor of the decisions they rendered. Actually, lay people gave slightly more favorable evaluations when the judges provided nuanced opinions that admitted to the appeal of both sides of the dispute (notably, the evaluations were most strongly related to the respondents' agreement with the outcome). Thus, to the extent that judges resort to this rhetorical style as a means to enhance the public's acceptance of their opinions, they are likely achieving the

opposite effect.

In our opinion, the certainty and singular correctness that are habitually reported in judicial opinions are not properties of the law, but artifacts of the judges' constructed representations of it.

JUDICIAL OVERSTATING

DAN SIMON AND NICHOLAS SCURICH*

INTRODUCTION

This article constitutes a step in a journey that commenced with the first author's initial encounters with judicial opinions during his first year of law school. Through the eyes of this neophyte, judicial opinions were the grand entrance into an awe-inspiring world, a world governed by the authoring judges' command over the legal materials. Invariably, the legal questions presented in the first pages of an opinion seemed intractable, yet somehow they were resolved in a most reassuring manner. Each opinion read like a *tour de force*, bursting with knowledge, skill and acumen. This was law at its full glory. Tough and bewildering cases were put to rest by means of singly correct legal answers, which were apparently embedded, almost unnoticeably, within the legal materials. Constitutional provisions, statutes, precedents, canons of interpretation, principles, logic, policy considerations, rules, facts, custom, and conventions of the profession all came together to form a robust and unequivocal edifice of law.

Yet, the ensuing awe of the judicial enterprise was accompanied by a tingling sense of bafflement. How could the seemingly intractable legal questions be resolved so resolutely? Why did the answers go unnoticed heretofore? Most disturbingly, how could dissenting opinions possibly produce similarly compelling arrays of arguments, all pointing towards the opposite conclusion?

Years later, this conundrum evolved into the principal topic of an S.J.D. thesis,[1] and an article entitled *A Psychological Model of Judicial Decision Making* (hereinafter, "*A Psychological Model*").[2] This set of issues also triggered a cottage industry of experimental research that explored the cognitive underpinnings of this inquiry at a basic-

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1. Dan Simon, From Conflict to Closure: The Bi-Directionality of Legal Reasoning (1997) (unpublished S.J.D. thesis, Harvard Law School) (on file with author).

2. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS. L.J. 1 (1998).

psychological level. That research identified a generic psychological process *coherence based reasoning*, which is manifested mostly in the phenomenon that we labeled the *coherence effect*.[3] This current article follows up on *A Psychological Model*, reporting on a recent psychological experiment that was designed to test a possible explanation for the conundrum.

I. JUDICIAL OVERSTATING AND ITS COSTS

The debate surrounding the nature of judicial reasoning goes to the heart of the judicial practice and, by extension, of law itself. It has been more than a century since the assault on the conception of adjudication as a mechanical and formalistic feat that can be performed by merely finding the correct law. It was Oliver Wendell Holmes Jr. who famously criticized the resort to syllogistic logic as means of solving difficult legal cases: "[t]he life of the law has not been logic: it has been experience";[4] "[g]eneral propositions do not decide concrete cases."[5] The putative syllogistic feature of judicial reasoning was rejected also

3. For experimental results, *see* Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 3 (1999) [hereinafter *Bi-Directional Reasoning*]; Dan Simon, Lien B. Pham, Quang A. Le, & Keith J. Holyoak, *The Emergence of Coherence Over the Course of Decision Making*, 27 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1250 (2001); Dan Simon, Chadwick J. Snow, & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY & SOCIAL PSYCHOL. 814 (2004); [hereinafter *Redux*]; Dan Simon, Daniel C. Krawczyk, & Keith J. Holyoak, *Construction of Preferences by Constraint Satisfaction*, 15 PSYCHOL. SCI. 331 (2004); Dan Simon, Daniel C. Krawczyk, Airom Bleicher, & Keith J. Holyoak, *The Transience of Constructed Preferences*, 21 J. BEHAV. DECISION MAKING, 1 (2008).

These findings have been replicated by a number of researchers in the United States and in Europe: Fred Phillips, *The Distortion of Criteria After Decision-Making*, 88 ORG. BEHAV. & HUMAN DECISION PROCESSES 769 (2002); C. Gustav Lundberg, *Modeling and Predicting Emerging Inference-Based Decisions in Complex and Ambiguous Legal Settings*, 153 EUR. J. OF OPERATIONAL RES. 417 (2004); Andreas Glöckner, *Does Intuition Beat Fast and Frugal Heuristics? A Systematic Empirical Analysis*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 309 (Henning Plessner et al. eds., 2008); C. Gustav Lundberg, *Models of Emerging Contexts in Risky and Complex Decision Settings*, 177 EUR. J. OPERATIONAL RES. 1363 (2007); Andreas Glöckner, Tilman Betsch & Nicola Schindler, *Coherence Shifts in Probabilistic Inference Tasks*, 23 J. BEHAV. DECISION MAKING 439 (2010); Christoph Engel & Andreas Glöckner, *Role-Induced Bias in Court: An Experimental Analysis,* J. BEHAV. DECISION MAKING (forthcoming).

For reviews of the research, *see* Dan Simon & Keith J. Holyoak, *Structural Dynamics of Cognition: From Consistency Theories to Constraint Satisfaction*, 6 PERSONALITY & SOC. PSYCHOL. REV. 283 (2002); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004) [hereinafter *Third View*]; Stephen J. Read & Dan Simon, *Parallel Constraint Satisfaction as a Mechanism for Cognitive Consistency*, *in* COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION 66 (Bertram Gawronsky & Fritz Strack eds., 2012); Dan Simon, *In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 131(David Klein & Gregory Mitchell eds., 2010).

4. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963) (1881).

5. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

in Benjamin Cardozo's characterization of judging as predominantly plastic and malleable; logic, for him, was only one of several ingredients blended into the judicial decision.[6] The reliance on logical reasoning has been criticized also by Judges Leflar and Schaefer,[7] as well as by scholars such as John Dewey,[8] Felix Cohen,[9] and Richard Wasserstrom.[10]

By the same token, legal theorists assailed the claim to certainty that accompanied mechanical jurisprudence. Again, it was a cryptic statement by Holmes that set the stage: "[C]ertainty is an illusion, and repose is not the destiny of man."[11] Jerome Frank protested that judicial certitude was mostly a means of concealing the uncertainties inherent in the judging process. In his piquant image, judicial reasoning resembled "the necks of the flamingos in Alice in Wonderland which failed to remain sufficiently rigid to be used effectively as mallets by the croquet-players."[12] Judge Schaefer pointed out that decisions are written in terms of ultimate certainty even when they are based on a slight degree of conviction.[13] Karl Llewellyn was particularly impatient with what he called the "dressing up" of judicial opinions in the "garb of certainty." For any but the easiest cases, he stated, legal certainty has never existed and never will.[14] Llewellyn added that striving towards judicial certainty was nothing but "a waste of time."[15]

6. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161-62 (1921).

7. Judge Leflar challenged the impression created in opinions that conclusions which cannot be tortured into conceptual molds prescribed by logic are necessarily wrong. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 816 (1961); Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 4 (1966).

8. John Dewey stated that the syllogism "purports to be a logic of rigid demonstration, not of search and discovery." John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 21 (1924). The trouble with the syllogism was that while it "sets forth the *results* of thinking, it has nothing to do with the *operation* of thinking." *Id.* at 22. He spoke also of the "absurd because impossible proposition that every decision should flow with formal logical necessity from antecedently known premises." *Id.*

9. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

10. Richard Wasserstrom criticized judges' apparent need "to make it appear that the decision was dictated by prior rules applied in accordance with canons of formal logic." RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 16-17 (1961).

11. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

12. United States v. Rubenstein, 151 F.2d 915, 923 (2d Cir. 1945) (Frank, J., dissenting). This comment by Judge Frank is exceptional because it was made in a judicial opinion, albeit a dissent.

13. Schaefer, *supra* note 7, at 9.

14. KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 73 (Paul Gewirtz ed. & Michael Ansaldi trans., Univ. of Chi. Press 1989) (1928).

15. *Id.* Elsewhere Llewellyn echoed Holmes' view of certainty as merely "an illusion." *See* Karl Llewellyn, *Some Realism About Realism-Responding to Dean Pond*, 44 HARV. L. REV. 1242 (1931).

Yet, strangely, while we have all become Legal Realists,[16] if not Legal Skeptics,[17] the Realist critique seems to have left the judicial endeavor unscathed. The core observation that served as the backdrop for *A Psychological Model* was that judicial opinions continue to be based largely on syllogistic forms of argumentation. Judges continue to convey remarkably high levels of certainty in their decisions. Opinions persistently portray the chosen decision as singularly correct and as determined inevitably by the legal materials, leaving little room for judicial discretion. This rhetorical style can be summed up as *judicial overstatement*, and it is the predominant, albeit unofficial, mode of judicial reasoning in current American legal culture.[18] A similar critique of this style of reasoning was also made by Dan Kahan in his article, *The Supreme Court, 2010 Term, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, published in the Harvard Law Review.[19]

Judicial overstatement is best demonstrated by means of detailed analyses of judicial opinions, namely, by breaking a decision down to the inferences of which it is made.[20] Inferences are defined as any reasoning processes in which a new proposition is generated from some existing knowledge, that is, any mental 'move' from a premise to a proposition.[21] These include deducing a rule from precedents, applying a canon of construction to a given text, or choosing between a rule and its exception.[22]

16. Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503 (1988).

17. Judge Posner has suggested that "today we are all skeptics." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 453 (First Harv. Univ. Press 1990) [hereinafter POSNER, JURIS. PROBLEMS].

18. There are rare exceptions. For example, in some of his opinions, Judge Learned Hand candidly exposed the complexity of the case along with the conflict of the judge. The *T. J. Hooper* case is such an example. *See In re* E. Transp. Co. (The T.J. Hooper), 60 F.2d 737 (2d Cir. 1932). For a favorable view of Hand's openness, *see* Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915 (1961).

19. 125 HARV. L. REV. 1, 59-66 (2011) [hereinafter *Foreward*].

20. To be sure, judicial opinions do not provide accurate accounts of the judges' decision making process. Significant components of the mental processes involved in complicated cognitive tasks such as judging occur outside of the thinker's phenomenological awareness or with minimal awareness. The making of a good decision is convoluted in that it entails an extensive series of constructing and testing of a large number of combinations of legal arguments. Even if a full report of this process were possible, it would be unmanageably lengthy, very confusing, and thus quite useless. Opinions are best perceived as a snapshot image of the representation of the decision at the end point of the process: an exposition of the reasons that were perceived by the judge as best supporting the decision.

21. Simon, *supra* note 2, at 19.

22. *Id.*

A Psychological Model provided such an example by analyzing the decision of the United States Supreme Court in the case of *Ratzlaf v. United States*.[23] The case deals with the interpretation of a federal criminal law that requires banks to file reports of cash transactions exceeding $10,000. The relevant statutory provision, 31 U.S.C. § 5324(a)(3), prohibits "structuring" transactions in order to evade the reporting requirement, and sets forth criminal penalties for people who violate it "willfully."

Waldemar Ratzlaf was indebted more than $100,000 to a Reno casino for gambling losses.[24] To repay the debt without having the transaction reported, Ratzlaf went to eleven different banks and purchased a cashier check from each one for just under $10,000. He was charged with willfully structuring transactions with the purpose to evade the banks' reporting obligation. Ratzlaf was convicted, fined and sentenced to prison.[25] The appeal revolved around the statute's "willfulness" requirement. The Supreme Court concluded that the statute's *mens rea* element requires some form of special knowledge with respect to the reporting requirement, which the prosecution had not proved. Accordingly, Ratzlaf's conviction was overturned.[26]

The *Ratzlaf* case revolved around six core issues: (1) the textual meaning of the term willfulness; (2) the legislative intent underlying the willfulness provision; (3) the nefariousness of financial structuring; (4) the applicability of the "rule of lenity"; (5) the applicability of the principle "ignorance is no defense"; and (6) the effect of the decision on the ability to administer the statute.[27] Each of these six issues was inferentially related to the decision in that they directly supported either one of the decision's outcomes. Each of the six issues was backed by numerous supporting inferences organized along chains of inference.

For example, the opinion's analysis of the core issue pertaining to the textual interpretation of the term "willfulness" is derived from five inference paths consisting of nineteen inferences, which draw upon thirteen precedents and three canons of interpretation. A similar assemblage of inferences is observed in the second core issue pertaining

23. 510 U.S. 135 (1994) (summary of facts at 135-37).

24. *Id.* at 137.

25. The trial judge instructed the jury that to convict for structuring, it is sufficient that the defendant knew of the bank's reporting obligation and that he structured with the intention of avoiding the reporting requirement. *Id.* at 135.

26. *Id.* at 136-37.

27. *Id.* at 140-49.

to the legislative intent behind the willfulness provision. That discussion is derived from four inference paths consisting of eighteen inferences that draw upon three legislative documents, five precedents, and three canons of interpretation. Similar pictures emerge when we examine the other four core issues involved in the decision. All in all, the majority's opinion consists of no fewer than sixty-four inferences, which combine into seventeen inference paths, which lead to the six branches of the decision that ultimately support the conclusion that the federal statute requires a special level of *mens rea*. As this heightened *mens rea* was not proved at trial, Ratzlaf's conviction was overturned. The crucial point here is the striking uniformity of the opinion: the Court's conclusion is supported by every single one of the sixty-four inferences, with not even one inference questioning the correctness of the conclusion or lending support to an alternative outcome.[28] Uniformity permeates the Court's treatment of every legal material mentioned in the opinion, including the twenty-three precedents, two statutory sources, and two congressional reports.

The stark coherence of the opinion of the Court's majority becomes even more perplexing in light of the fact that the dissenting justices endorse the opposite conclusion, which is similarly portrayed as singularly correct and supported by an apparently strong and coherent tapestry of inferences. A dissection of the dissenters' opinion reveals "sixty-one inferences, which funnel into seventeen inference paths, which lead to the six branches of the decision that ultimately support the decision to uphold the conviction. Here too, every one of the inferences support[s] the [corresponding] decision," and none challenge it.[29] "All of the authoritative texts consulted[,] including the twenty-four precedents, [numerous] statutory sources, two congressional reports, the ALI's model penal code, and a statement by the Attorney General[,]" support the the corresponding legal result.[30]

The degree of discord between the opinions is both pervasive and profound. For example, the majority employs a contextual interpretive theory of the term "willfulness,"[31] while the dissent insists on a textual approach.[32] The majority applies the "rule of lenity,"[33] but the dissent

28. For a detailed account of all of the inferences made in the opinions, *see* Simon, *supra* note 2, at 64, 67-68.

29. *Id.* at 71.

30. *Id.*

31. *Ratzlaf*, 510 U.S. at 141.

32. *Id.* at 151 (Blackmun, J., dissenting).

33. *Id.* at 148 (majority opinion).

adopts its exception,[34] and the dissent applies the rule "ignorance is no defense,"[35] while the majority endorses its exception.[36] Seven precedents were cited in both opinions, though the rival opinions derive opposite conclusions from them. One opinion applies the standard of the "nefariousness" of the financial structuring,[37] while the other dismisses its relevance,[38] and one opinion insists on the principle of "fair warning,"[39] while the other laments that the scheming appellant will be "laughing all the way to the bank."[40] Bizarrely, each opinion insists that there is no ambiguity in its reading of the law.[41] A reasonable person would surely maintain that if two factions of four or more Supreme Court justices reach opposite conclusions, the question is, in the least, ambiguous, if not downright intractable.

In sum, the *Ratzlaf* opinions provide compelling evidence of judicial overstatement. It is mathematically impossible that so many inferences—each of which was about as plausible as its opposite inference—will line up so uniformly and exclusively on one side of the debate.

It is likely that some of the inferences mentioned in the opinions actually played no role in reaching the decision. The research suggests that when making complicated decisions, people take only a limited number of factors into serious consideration.[42] Indeed, judges report that making the actual decision is typically based just on the big issues implicated in the case,[43] after which they (or their clerks) seek out

34. *Id.* at 157 (Blackmun, J., dissenting).
35. *Id.* at 151.
36. *Id.* at 149 (majority opinion).
37. *Id.* at 155 (Blackmun, J., dissenting).
38. *Id.* at 144 (majority opinion).
39. *Id.* at 148.
40. *Id.* at 162 (Blackmun, J., dissenting).
41. *Id.* at 147, 157.
42. Saad and Russo have demonstrated that, when provided with information of twenty-five attributes described as relevant to the decision task, most subjects relied mainly on only three to five attributes. Gad Saad & J. Edward Russo, *Stopping Criteria in Sequential Choice*, 67 ORG. BEHAV. & HUM. DECISION PROCESSES 258 (1996). A similar finding was made in a field survey of sentencing decisions: when interviewed, judges reported that they take into consideration a broad variety of factors, although close analysis of their actual decisions showed that they mainly relied on just three factors. *See* Vladimir J. Konenci & Ebbe B. Ebbesen, *An Analysis of the Sentencing System*, *in* THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS 293 (Vladimir J. Konecni & Ebbe B. Ebbesen eds., 1982). The research on the coherence effect shows that coherence shifts occur both pre- and post-decisionally, though the latter are not always statistically significant and tend to be of secondary importance. The research focuses on the initial phase of arriving at the decision. *See Bi-Directional Reasoning*, *supra* note 3; Simon, Pham, Le & Holyoak, *supra* note 3.
43. Former Chief Justice Rehnquist explained that when the Justices vote in conference, they have only a broad idea of their decisions. It is only at a later stage when "the necessity of deciding the subsidiary question becomes apparent." WILLIAM REHNQUIST, THE SUPREME COURT: HOW IT WAS,

additional reasons to embellish the opinions, a practice known as *opinion padding*.[44] Naturally, recruiting arguments to provide additional support to the decision makes the opinions seem even more coherent, unavoidable, and singularly correct. But it seems fair to say that opinions would be considered overstated even if we ignored the padded inferences and striped the opinions down to their handful of core issues. As seen in the *Ratzlaf* case, the six core issues had virtually nothing to do with one another, as they concerned substantive questions that were conceptually and causally independent of one another. Still, in the justices' opinions, they line up in unison to support the identical conclusion. It follows that these alignments must be explained by some factor that is external to the legal materials.[45]

It is important to note that there is nothing special about the *Ratzlaf* case. One can perform the same analysis on almost any appellate opinion and reach essentially the same results. Moreover, the *Ratzlaf* case is an especially good vehicle for examining judicial decision making because it deals with technical legal issues that do not appear to bear any of the trademarks of the social visions and ideological commitments that often color Supreme Court decisions. Indeed, each of the opinions was joined by justices who are normally associated with opposite sides of the traditional ideological divides.[46] Technical, non-ideological cases are best suited for peering into the judicial process because they tend to be least influenced by extra-legal forces and most sensitive to the sensibilities of the judicial profession. These cases represent judging at its best.

One must acknowledge that judicial overstating bears serious implications for the law and the legal discourse. As discussed in *A Psychological Model*, excessive reasoning by judges takes a toll on the

HOW IT IS 294, 300-01 (1989). Judge Frank Coffin explained that only after deciding the main issues in a case would he and his clerks fully explore the authorities cited in the brief, sort out the cases, distinguish holdings from dicta, and analyze policy implications. *See* FRANK M. COFFIN, THE WAYS OF A JUDGE 100-108 (1980).

44. Judge Leflar explains: "[T]he judge to whom the case is assigned is then in effect told to make it look good." Leflar, *supra* note 7, at 817. A clerk of Justice Fortas tells of an instance where Fortas handed him a draft opinion and ordered "decorate it." LAURA KALMAN, ABE FORTAS, A BIOGRAPHY 271-72 (1990); *see also* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1441 (1995).

45. The base probability that six inferences (with a probability of 0.5 of being true) will align in perfect coherence is 1/64. In other words, we could expect a uniform alignment of all six issues only once of every sixty-four cases.

46. Justice Ginsburg's majority opinion was joined by Justices Stevens, Scalia, Kennedy and Souter. Justice Blackmun's dissent was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas.

integrity of the discourse.[47] The indiscriminate endorsement of all arguments that support the preferred outcome obfuscates the important distinctions among the arguments contained in the opinion. As readers, we are unable to distinguish between strong and weak arguments, between vital and trivial claims, and between propositions that deserve to bear gravitational force and those that were added merely to embellish the decision. This obfuscation is particularly troubling in light of the fact that decision makers tend to take only a limited number of factors into serious consideration, and that many of the reasons were included in the opinions merely as padding.

Judicial overstatement runs the risk of blunting the thoroughness that befits the judicial practice. As Holmes described: "I long have said that there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."[48] This tendency to endorse an overstated and one-sided view of the legal question is bound to prevent judges from appreciating the complexity of the case and tempt them to avoid grappling with the painstaking arguments. This lack of appreciation for the normative force of legal arguments is manifested bluntly in the familiar phenomenon of *vote-switching*. When a judge decides to change her vote, she is not only shifting her final conclusion from one decision to the other, but is also discarding multitudes of arguments, endorsing opposite canons of interpretation, and adopting contradicting interpretations of virtually every single legal source involved in the dispute. It is quite impossible to reconcile the practice of vote switching with the stern adherence to legal reasons and singular correctness as the opinions imply.

Judicial overstatement also hampers the judiciary's role in guiding public policy and social life. Overstated opinions that encompass almost every plausible argument in support of the decision inundate legal discourse with doctrinal propositions, many of which will not be taken seriously in subsequent cases. The more numerous and contradictory the propositions in a decision, the more equivocal the message sent to citizens and government agencies attempting to conduct their affairs effectively. This excess of precedent causes courts to become "less predictable and more quirky."[49] Indeed, it is doubtful that the

47. Simon, *supra* note 2, at 125-27, 129.

48. Yosal Rogat, *The Judge As Spectator*, 31 U. CHI. L. REV. 213, 247 (1964) (quoting Holmes).

49. Patricia M. Wald, *Some Thoughts on Judging as Gleamed from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987) [hereinafter Wald, *Some Thoughts on Judging*].

term "willfulness" has become any clearer following the *Ratzlaf* decision.[50] Moreover, overstated opinions might also fuel the proliferation of litigation. Cluttered and inflated decisions stock up the arsenal of available arguments and thus offer a putative basis for virtually any thinkable position. This creates a self-perpetuating cycle in that the more arguments presented to the judge, the more conflict and ambiguity exist in the case, and the greater the perceived need to endorse all the supportive arguments and reject all the opposite ones. As Judge Wald explains, "the more 'extras' an opinion contains, the more there is to take issue with and explain away in future opinions."[51]

It is important not to overlook the broader impact of judicial overstatement on legal discourse and the legal culture. More than just providing solutions to particular controversies, the judicial opinion is a major progenitor of legal discourse.[52] Court opinions serve as a medium through which lawyers are trained, socialized and professionalized.[53] Thus, the legal community internalizes the norm of overstating legal arguments and utilizing law's plasticity to simplify complicated legal issues.[54] The restructuring of legal materials becomes a key instrument in the legal toolbox; it is "the way we do" legal argument.

The judicial style of overstatement also undermines law's function as a meaningful forum for public debate—a medium through which people can express their views of the world, advocate their opinions, and voice their grievances. Judges are entrusted with the duty to listen responsively to these voices and try to integrate opposing perspec-

50. The majority opinion in *Ratzlaf* concedes that willfulness is a "word of many meanings." 510 U.S. at 141 (quoting Spies v. United States, 317 U.S. 492, 497 (1943)). Judge Posner has written, "'Willfully' is however, a classic legal weasel word. Sometimes it means with wrongful intent but often it just means with knowledge of something or other." Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 726 (7th Cir. 1986).

51. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1408 (1995).

52. *See* James Boyd White, *Rhetoric and Law: The Arts of Cultural and Communal Life*, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 110 (James Boyd White ed., 1985) [hereinafter White, *Rhetoric and Law*]; *see also* JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 101-02 (1990).

53. Frederick Schauer states, "As long as the appellate opinion remains the primary teaching vehicle in American law schools . . . those opinions will play a large part in determining the skills, aspirations, and self-understanding of American lawyers." *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1472 (1995). On teachers as role models, *see* BETTY A. SICHEL, MORAL EDUCATION: CHARACTER, COMMUNITY AND IDEALS 225-45 (1988).

54. *See* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 847 (1988); *see also* POSNER, JURIS. PROBLEMS, *supra* note 17, at 100.

tives.[55] These expectations are often hampered by the judicial tendency to embrace one side indiscriminately while rejecting the other outright. Rather than emphasizing commonalties and broadening social consensus, the judicial one-sidedness pushes the opposing parties further apart. The judicial opinion, then, entrenches the boundaries that separate people; it solidifies parochialism and perpetuates pre-existing power arrangements.[56]

The remainder of this article will be concerned with examining two possible explanations for the phenomenon of judicial overstating.

II. WHY JUDICIAL OVERSTATING?

A. The Cognitive Explanation

One possible explanation for judicial overstatement lies, at least in part, in the judges' cognitive process itself. According to this approach, the form and style of judicial reasoning is inextricably related to the mental processes by which judicial decisions are made: judges portray their decisions as singularly-correct because that is the way they actually perceive the legal dispute at the time they make their decision. Thus, to understand judicial reasoning one must investigate the cognitive process through which these decisions are made.

Exploring this explanation was the core objective of *A Psychological Model* and the experimentation on which it relied.[57] The ensuing theory of *coherence-based reasoning* helps explain the basic psychological process by which people—not just judges—process complex reasoning tasks, such as making judgments and decisions in all walks of life. A common feature of complex decision tasks is that they typically comprise of a multitude of attributes, such as facts, concepts, propositions, and values. The task facing the decision maker is comprised of both processing the individual attributes and integrating them into a discrete choice. One of the core features of coherence based reasoning is that these two mental tasks are deeply interrelated, and their interrelationship bears a strong impact on the outcome of the process.[58]

55. *See* Martha Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 11 (1987); *see also* WHITE, *Rhetoric and Law*, *supra* note 52, at 47, 135; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

56. For a similar view, *see* Kahan, *Foreward*, *supra* note 19, at 59.

57. *Bi-Directional Reasoning*, *supra* note 3, at 4.

58. The cognitive process that undergirds coherence based reasoning is *parallel constraint satisfaction*, which is grounded in a connectionist architecture. Each of the decision's attributes is said to exert and influence on the decision and on all the attributes to which it is inferentially related, and it is influenced by them in return. Such relationships impose a *constraint* on each of

Coherence-based reasoning follows on the heels of *cognitive consistency theories*,[59] a family of theories that flourished in the 1950s and 1960s, which relied in turn on *Gestalt* psychology.[60] At the core of these approaches is the notion of structural dynamics, which captures the relationships between and within the cognitive structure and its constitutive parts. A cognitive set is said to be coherent when all of its constituent elements share the same dynamic values and the elements of opposite characters have opposite values. Dynamic forces of coherence hold cognitive structures in position, whereas incoherence generates pressure for change.[61] Complex tasks are, by nature, incoherent sets, which is what accounts for their initial difficulty. Although, as the decision maker works through the process, her mental representation of the task evolves naturally towards a state of coherence. The cognitive system *imposes* coherence on the attributes so that the subset of attributes that supports the emerging decision becomes stronger (even those attributes that at first seemed incorrect) and the opposite subset weakens (even those attributes that at first seemed correct).[62] The effect of structural forces on the constitutive attributes means that a conclusion emerges from the integration of the attributes, but also that the emerging conclusion influences the individual attributes in return.[63] Hence, the *bi-directional* nature of the process.

Throughout the process, the task undergoes a substantial change from its initial state of complexity to its modified state of coherence.

the related components. In complex cases, no constraint can determine the decision by itself, hence, each attribute constitutes a *soft* constraint. The cognitive process involved in making complex tasks is driven by a recursive, mutual cross activation of all the constraints, until the point of coherence, or equilibrium, is obtained. This process is thus said to be driven by a coherence-maximizing algorithm. *See* Stephen J. Read & Lynn C. Miller, *Dissonance and Balance in Belief Systems: The Promise of Parallel Constraint Satisfaction Processes and Connectionist Modeling Approaches*, *in* BELIEF, REASONING, AND DECISION-MAKING: PSYCHO-LOGIC IN HONOR OF BOB ABELSON 209, 213 (R. C. Schank & E. J. Langer eds., 1994); *see also* Read & Simon, *supra* note 3.

59. Most notable were Fritz Heider's *balance theory* and Leon Festinger's *cognitive dissonance theory*. *See* Fritz Heider, *Attitudes and Cognitive Organization*, 21 J. PSYCHOL. 107 (1946); FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONSHIPS 176-77 (1958); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 13 (1957).

60. *See* Max Wertheimer, *Laws in Organization of Perceptual Forms*, *in* A SOURCE BOOK OF GESTALT PSYCHOLOGY 71 (Willis D. Ellis, ed., 1967); Stephen J. Read, Eric Vanman & Lynn Miller, *Connectionism, Parallel Constraint Satisfaction Processes, and Gestalt Principles: (Re)Introducing Cognitive Dynamics to Social Psychology*, 1 PERSONALITY & SOC. PSYCHOL. REV. (1997).

61. For reviews of structural dynamics, consistency theories and their relation to Gestaltian theory, *see* Hazel Markus & R. B. Jazonc, *The Cognitive Perspective in Social Psychology*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 137, 197-218 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985); *see also* Read & Simon, *supra* note 3.

62. *Third View*, *supra* note 3, at 516-17; *see also* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS, 33-36, 174-177 (2012).

63. *Bi-Directional Reasoning*, *supra* note 3, at 23.

This transformation is said to *spread apart* the opposing attributes, with the effect of differentiating the attractiveness of the vying outcomes, thus making one decision look considerably stronger than the other. In all, this *coherence effect* is adaptive in that discrepant attractiveness of the choices facilitates confident decisions.[64] It should be noted that the coherence effect does not necessarily, or even frequently, lead to incorrect decisions. Its primary consequence is the strengthening of the emerging decision, by way of distorting the decision task: inflating one set of attributes and deflating the other. It is important to note that decision makers are mostly unaware that their evaluation of the attributes is skewed by the coherence effect.[65] As a result, the decision maker's experience of certainty and singular correctness are, by and large, phenomenologically genuine.

This approach to decision making is readily applicable to legal decision making. The judicial decision making process culminates in a mental representation of the legal materials being substantially lopsided, with one subset of arguments perceived as compelling, and the other seeming unconvincing, if not flat wrong. This disparity leads to an easy and confident choice between the vying judicial outcomes, making the chosen decision appear singularly correct. This altered view of the arguments (supplemented with the *ex post facto* rationalization of the outcome, as discussed below) is then reported in the judicial opinion as declarative of the law governing the case.

Like the work of a good fairy, the cognitive mechanisms that facilitate the decision making process are mostly imperceptible to the judges. Lacking any awareness of the coherence effect's impact on their decisions, judges seek external explanations for their sense of inevitable correctness. The most natural candidate is the law itself, which leads judges to perceive the law as constraining, objective, and certain. In actuality, though, these properties are merely artifacts of the judges' cognitive processing. Coherence is not a property *of* the legal materials, but a feature *imposed upon* them. To the judge, this lopsided representation seems natural and genuine. To the astute reader, however, the opinion amounts to judicial overstatement. But just as we ought not to accept the judicial account of singular correctness, we ought to rejects the critics' charge that the judicial endeavor is insincere.[66]

64. For a discussion on the findings of confidence, *see Third View*, *supra* note 3, at 532-33.

65. *Bi-Directional Reasoning*, *supra* note 3, at 6, 10.

66. For example, Duncan Kennedy claims that judicial decision making is a disguised form of ideology. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 2, 92 (1997). Harold Lasswell described opinions as rationalizations designed to cover-up ulterior reasons for decisions. *See* HAROLD

B. Persuasion

An alternative explanation for judicial overstatement is that judges believe that this discursive style makes their opinions more persuasive. The intuition here is that judges' audiences will be more inclined to trust decisions that convey certainty and singular correctness than opinions that betray doubts or misgivings over the decision. Observers note that deductive-like, confident opinions are deemed to "carry conviction,"[67] and thus to promote the institution's legitimacy.[68] Indeed, there are some indications that judicial overstatement has come to be expected by the public, and even by the legal profession.[69]

The persuasiveness of judicial overstatement is an empirical question that can be tested, and so we did. In the article *Lay Judgments of Judicial Decision Making* (hereinafter "*Lay Judgments*"), we report on a psychological experiment that was designed to test this proposition.[70] The core objective of this study was to compare lay people's judgments of judicial decisions that were accompanied by one of four modes of reasoning. Importantly, the study compared decisions accompanied by

LASSWELL, POWER AND PERSONALITY 38, 65-88 (1948). Lawrence Solan views opinions as a "concealment of unattractive truths." LAWRENCE SOLAN, THE LANGUAGE OF JUDGES 176 (1993). Jeffrey Segal and Harold Spaeth protest that legal opinions merely rationalize choices that are based on the personal preferences of judges. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 33, 363 (1993).

On the candor debate, *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); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); *see also* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

67. Schaefer, *supra* note 7, at 9.

68. Paul Gewirtz observes that the judicial rhetoric is closely related to the legitimacy of the institution. Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1042 (1996). The judiciary's need for institutional legitimacy is exacerbated by its self-conscious status as an unelected branch of government, commonly referred to as the *counter-majoritarian anxiety*. Cardozo observed "discretion, unmeasured and unregulated, is felt to open the door to tyranny and corruption." Benjamin N. Cardozo, *Jurisprudence*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7, 23 (Margaret E. Hall ed., 1947). Posner calls this phenomenon the "formalist anxiety." POSNER, JURIS. PROBLEMS, *supra* note 17, at 143. He explains that judges favor an interpretive formulation of their practice because "it casts them in a less creative, and therefore less usurpative-seeming, role." *Id.* at 46.

69. Justice Breyer's admission of open-endedness in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), was criticized by his fellow justices as being standardless, for losing sight with the doctrine—in short, for being "adrift." *Id.* at 780-81. This opinion sparked an article in the *New York Times*. *See* Linda Greenhouse, *When a Justice Suffers From Indecision*, N.Y. TIMES (July 14, 1996),
http://www.nytimes.com/1996/07/14/weekinreview/the-nation-when-a-justice-suffers-from-indecision.html. The article included a comment by Floyd Abrams, a leading First Amendment practitioner, who found the decision "disturbing." *Id.* Abrams explained: "[W]hen the Court deliberately avoids the use of legal doctrine, it means you don't know what the law is." *Id.*

70. Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. OF EMPIRICAL LEGAL STUDIES 709 (2011).

two-sided reasoning with decisions accompanied by *monolithic reasoning*. As described below, the *monolithic reasoning* treatment was intended to approximate the uniformity of judicial overstatement, whereas the two-sided reasoning was intended to represent a more nuanced and forthright form of reasoning that implies that difficult cases do not lend themselves to singularly correct and unequivocal decisions.[71]

1. Methods

The key aspects of the study's methods were as follows (for a complete description, see *Lay Judgments*): 700 lay participants participated in the study over the Internet in return for a small monetary award.[72] Participants were presented with three legal cases in a randomized order. Before the cases were presented, participants were given a favorable account of the process that led to these decisions.[73] Specifically, they were told that all the decisions followed the appropriate legal procedure, the cases were argued by competent lawyers, and the decision makers spent considerable effort thinking about the dispute. Participants were also informed that they were not required to have any legal knowledge.[74] They were also told that there were no right or wrong answers to these questions, and encouraged to convey how they personally felt about the issues.[75] Each case contained a set of instructions, the case information, and the measures.[76] The case information contained a description of the factual and legal issues involved, followed by three principal arguments made by the lawyers of each of the parties.[77]

One of the cases, called the *Waste Disposal Corporation*, was based loosely on a 2001 decision of the United States Supreme Court (Solid Waste Agency v. US Army Corps of Engineers).78 This case described an appeal filed in a federal appellate court by a garbage disposal com-

71. The final mode of reasoning has been labeled *aporia*, which stands for the conspicuous acknowledgment of complexity, *see* Dan Kahan, *Foreward*, *supra* note 19, at 62.

72. The sample was comprised of 375 (53%) females and 325 (47%) males, with a mean age 33.04 (*S.D.* = 16.71) and median 35 (range = 18-78; *IQR* = 18). Thirty percent of the participants described themselves as liberal, 28.4% as moderate, and 41.6% as conservative. Three participants who were trained as lawyers were dropped from all analyses.

73. *Id.*

74. *Id.*

75. *Id.*

76. Simon, *supra* note 70, at 712.

77. *Id.* at 713-14.

78. *Id.* at 713.

pany. The company appealed a lower court's decision to uphold a decision by the Army Corps of Engineers to prevent the corporation from developing a landfill in an abandoned gravel pit. The Corps denied the permit because the site had become a habitat for migratory birds. The dispute revolved mostly around the statutory jurisdiction of the Corps in deciding such matters, which relied in turn on the classification of the site as a Navigable Water. Each of the sides presented three principal arguments to the court in support of its position.[79]

The case of *Quest v. Smith* was an abbreviation of the materials used in previous experimental research.[80] Briefly, the case involved a libel suit brought by a corporation, Quest Technologies, against one of its investors, Jack Smith, for posting a derogatory message on an Internet message board. The corporation claimed that Smith's posting triggered a sell-off of its stock, which ultimately caused the company's downfall. The case was decided by a single judge. The fate of this suit hinged to a large degree on the legal precedent that governed the availability of libel liability for messages posted on the Internet. That issue entailed deciding whether the Internet is more similar to a newspaper (which traditionally is open to libel suits) or to a telephone system (where libel has traditionally been barred).[81]

The case of Jason Wells was an abbreviation of the materials used in other research.[82] This case involved a decision by an arbitrator in a disciplinary procedure initiated by a construction company against one of its employees, Jason Wells. The company alleged that Jason Wells broke into its safe and stole $5,200 from it. The evidence in this *whodunit* case was all circumstantial. This case revolved around factual assessments, rather than questions of law.[83]

The design was a two (decision for either party) x four (one of four types of reasoning) between-subjects factorial, with participants being randomly assigned to one of eight possible conditions in each of the three studies.[84] In half of the conditions, the judges decided in favor of one side of the dispute and in the other half they favored the opposite side.[85] After reading the cases, participants were presented with the judges' decisions. The decisions were accompanied by one of

79. *Id.* at 725-27.
80. *Id.* at 714.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 712, 726-27.
85. *Id.* at 712.

four modes of reasoning: (1) no reasoning at all ("no reason" condition); (2) a single reason supporting the decision ("single reason" condition); (3) three reasons all supporting the chosen decision ("monolithic reasoning" condition); and (4) three reasons supporting each side of the dispute, followed by a conclusion that, on balance, one decision was stronger than the other ("both sides" condition). The monolithic reasoning treatment was intended to provide a proxy for judicial overstatement, at least in the uniform support that it lent the chosen decision and the implicit rejection of the arguments made by the losing side. The both-sides treatment was intended to mimic a decision that acknowledged the complexity of the case.[86]

After hearing the court's decision, participants responded to eight items that measured their reactions to the decisions.[87] Some of the items elicited evaluations of the decision itself. For example, participants were asked, "How satisfied are you with the manner in which the decision was made?" and "To what extent was the decision made thoughtfully?" Other items probed for evaluations of the judges. For example, participants were asked "How competent is this court?" and "To what extent does the decision justify the authority given to courts to make these decisions?"[88] These questions were presented on two webpages each; the order of the webpages and the order of questions within each page were fully randomized. On a separate webpage, participants were asked to indicate their own decision (i.e., "If you had to decide the case, what would your decision be?"), followed by a measure of their confidence in that decision.[89]

2. Results

As the results were very similar for the five items that evaluated the decisions and the three items that evaluated the judges, we collapsed all eight dependent variables into a single composite measure, referred to as "favorability evaluation."[90] Since there were very small differences among the cases, Figure 1 will present the primary results, combined from all three cases. For a detailed analysis of the results, see *Lay Judgments*.

86. *Id.* at 721.

87. *Id.* at 712.

88. All ratings were made on an 11-point likert scale, where (0) indicated negative values (e.g., "not at all satisfied") and (10) indicated positive values (e.g., "extremely satisfied").

89. Simon, *supra* note 70, at 713.

90. The Cronbach alpha of this composite was .96.

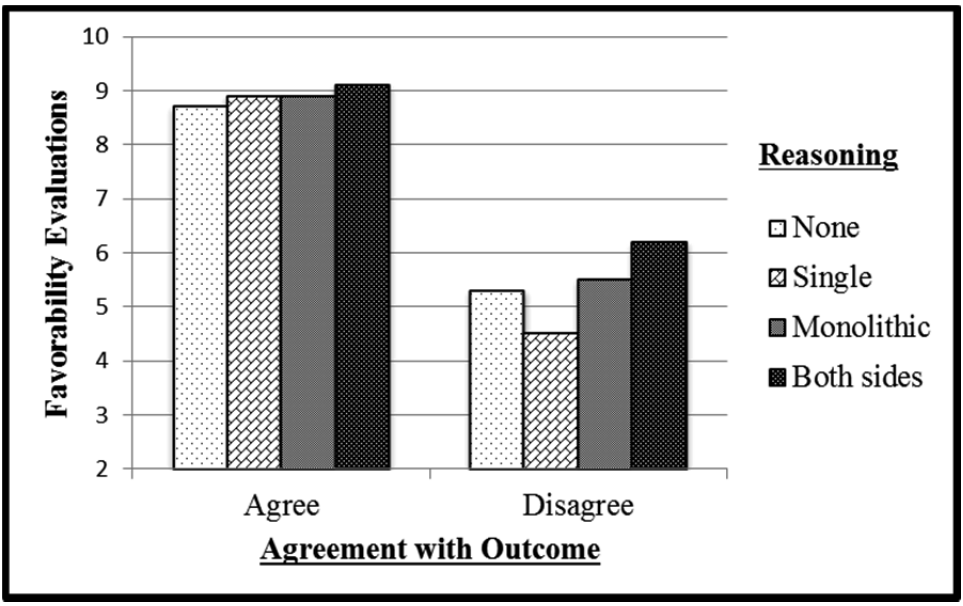

Figure 1: Participants' evaluations, shown separately for each of the four conditions of judicial reasoning. Data are shown separately for participants who agreed with the outcomes of the judges' decisions (4 columns on left hand side), and participants who disagreed with the court's decisions (4 columns on the right hand side).

Figure 1 shows clearly that the evaluations of the court's decisions were highly contingent on whether participants agreed with the outcomes of the judges' decisions. When the participants agreed with the case outcomes, they evaluated the decisions and the judges very highly. But when they disagreed with the outcomes, they offered fairly low evaluations (despite the favorable accounts of the procedures and lawyering competency). This pattern was observed irrespective of whether the court's decision favored the plaintiff or the respondent.

Figure 1 also provides interesting observations of the effects of judicial reasoning. When participants agreed with the outcomes of the judges' decisions, no differences were observed among the four types of judicial reasoning. However, participants were sensitive to the different modes of reasoning when they disagreed with the judges' deci-

sions.[91] Decisions accompanied by reasons that recognized the arguments of both sides were rated most favorably; decisions accompanied by monolithic reasoning and decisions that provided no reasons at all were rated approximately equal; while decisions accompanied by a single reason received the lowest evaluations.[92] The key finding here is that decisions accompanied by monolithic reasoning received lower evaluations than decisions that provided good reasons for both sides of the dispute.[93] In other words, lay participants seem to prefer decisions that admit to complexity and open-endedness of the legal issue over ones that only acknowledge the strength of the winning side. This finding calls into question the value of monolithic reasoning as a persuasive device.[94]

CONCLUSION

American appellate judicial decision making continues to display a split personality: while in this post-Realist era it is considered common knowledge that difficult cases entail tough choices between comparably strong yet imperfect conclusions, judges continue to depict their decisions as anything but that. To this day, judges continue to present their decisions with an exaggerated abundance of reasons that portray the chosen decision as singularly correct and inevitably mandated by the legal materials.

The experiment described in Lay Judgments provides preliminary evidence to suggest that this style of overstatement cannot be justified, nor plausibly explained, as a means of bolstering the persuasiveness of the opinions. We found that to the extent that participants were at all sensitive to the judicial reasoning, they gave lower, rather than higher, evaluations to cases accompanied by monolithic reasoning, as compared with nuanced two-sided reasoning.

A substantial body of experimental research suggests that the likely explanation for judicial overstatement can be found in the cognitive

91. The discrepant sensitivity based on agreement with the outcomes of the decisions manifests the phenomenon of selective scrutiny. *See* Simon, *supra* note 62, at 38, 42.

92. The evaluations of the four modes of reasoning were as follows: no reasons (M = 5.11, SD = 2.42); single reason (M = 4.47, SD = 1.99); monolithic reasoning (M = 5.18, SD = 2.26); and both-sides reasoning (M = 5.87, SD = 2.5).

93. This comparison was statistically significant: $t(300) = -2.51$, $p = .013$.

94. We also found that decisions that gave no reasons were rated higher than decisions accompanied by a single reason ($t(299) = 2.49$, $p = .013$). In other words, it appears that under some conditions, giving a singular reason can make the decision less acceptable than giving no reasons at all.

processes by which the decisions are made. Judges overstate the reasons for their decision because that is how they perceive the task after the coherence effect has spread it apart into two imbalanced sets of reasons. The certainty, inevitability, and singular correctness flow naturally and genuinely from this lopsided mental representation. While this phenomenon is driven by innocuous causes, it is detrimental to the legal discourse that it spurs.

It is not hard to imagine a judicial style of reasoning that would better serve the judicial function in society. Judge Richard Posner has advocated a pragmatic jurisprudence designed to be less imperious and more straightforward: "[T]he highest realistic aspiration of a judge faced with a difficult case is to make a 'reasonable' (practical, sensible) decision, as distinct from a demonstrably correct one."[95] In a legal culture of pragmatic judging, judicial overstatement would be unnecessary and misplaced. Judges would not be expected to construct elaborate and overbearing opinions that endorse virtually every argument that has a positive implication for the chosen decision. Instead, they would be expected to identify the few arguments which they believe to be valid and influential, while admitting that some good arguments support the opposite outcome. To be sure, the suggestion that judges forego their adherence to coherent opinions does not mean that the judge need expose every doubt and insecurity in the opinion. An appropriate style of judicial reasoning would chart a middle ground between "letting it all hang out"[96] and making everything stick.

It must be acknowledged, however, that altering the cognitive process by which judges decide difficult cases does not readily lend itself to modification. Recall that the cognitive restructuring that undergirds the coherence effect occurs mostly automatically. Asking judges to alter habits of mind, of which they are generally unaware and over which they have little control, is a tall order.[97] Indeed, attempts to counter the coherence effect in the laboratory have been met with mixed success,[98] though corrective measures are likely to be consider-

95. POSNER, JURIS. PROBLEMS, *supra* note 17, at 456.

96. *See* Wald, *supra* note 51, at 1411.

97. On the difficulties of overcoming unwanted processing that occurs automatically, *see* Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULLETIN 117 (1994). Wilson and Brekke define "mental contamination" as situations in which people engage in biased processing and hold incorrect theories about their biases. *Id.*

98. An initial study indicated that a de-biasing intervention could reduce the coherence effect by about one-half. *See*, *Third View*, *supra* note 3, at 544-48. That finding, however, was not replicated in subsequent (unpublished) experiments. Still, under intense social pressure in the

ably more effective in real life settings that impose appreciable negative consequences for failing to abide by them, as suggested below. A simpler and more feasible way to alleviate some of the ill effects of judicial overstatement would be to reduce, or eliminate, the practice of opinion padding. Appending legal authorities to merely prop up already made decisions is a vacuous ritual that harms the integrity of the judicial endeavor. As this task is performed consciously, it is, in principle, modifiable.

Either way, to change the current habits of judicial overstatement, it would be necessary that judges be motivated to alter practices which they find useful and adaptive.[99] Having self-selected into the profession and having persevered in this discursive culture, judges are likely to be inclined to maintain these professional habits. Thus, the impetus for change will need to come from the outside.[100] Ideally, the legal community will demand pragmatic opinions and sanction judges for overstating their decisions. For this to happen, judges and their audiences must feel comfortable with the wielding of power by this non-majoritarian institution through decisions devoid of putative certainty. Importantly, the legal community must come to acknowledge that the judicial account of certainty, constraint and singular correctness is not a property of the law, but an artifact of their constructed representations of it.

real world, it might be possible to reduce the coherence effect, as evidenced by the gradual shifts in social norms regarding stereotyping, prejudice and gender equality. *See e.g.,* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

99. *See* Susan Fiske, *Stereotyping, Prejudice and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, 357, 385-91; Richard E. Petty & Duane T. Wegner, *Attitude Change: Multiple Roles for Persuasion Variables*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 331; *see also* DAVID F. BARONE ET AL., SOCIAL COGNITIVE PSYCHOLOGY: HISTORY AND CURRENT DOMAINS 165, 211 (1997); Wendi L. Gardner & John T. Cacioppo, *Automaticity and Social Behavior: A Model, a Marriage, and a Merger*, 10 ADVANCES SOC. COGNITION 133, 136 (Robert S. Wyer, ed., 1997); Wilson & Brekke, *supra* note 97, at 125, 134. This line of theory dates back to Gordon Allport. *See generally* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954).

100. Extrinsic motivation is typically impelled by cultural norms backed by social sanctions. Indeed, the social sanction is one of the few available means to motivate people to become more attuned to their automatically processed behaviors and to take better control of them. For example, it is the changing cultural response to sexual harassment and prejudice that has affected change, however moderate, in these largely automatic behaviors. *See* Roy F. Baumeister & Kristin L. Sommer, *Consciousness, Free Choice, and Automaticity*, 10 ADVANCES SOC. COGNITION, 75, 78 (Robert S. Wyer ed., 1997); *see also* JOHN A. BARGH, *Conditional Automaticity: Varieties of Automatic Influence in Social Perception and Cognition*, *in* UNINTENDED THOUGHT 3, 4 (James S. Uleman & John A. Bargh eds., 1989); BARONE ET AL., *supra* note 99, at 211.