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of Selected Cases in the Seventh Circuit Court of Appeals**

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I. Introduction

Scholars have long been divided over the role, function, and significance, if any, of oral argument in judicial decision-making.¹ Federal courts seem similarly divided, as some circuits routinely grant oral argument in almost every case, while others grant oral argument in only a small fraction of appeals. This divide should not be dismissed as merely an idiosyncratic debate or as a response to excessive workload, particularly when one considers that approximately 53,000 appeals were filed in federal courts of appeals in the year ending September 30, 2016.² Since the Supreme Court grants *certiorari* in only approximately eighty cases each year, federal courts of appeal essentially act as the final arbiters of many

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¹ See, e.g., Warren D. Wolfson, *Oral Argument: Does It Matter?* 35 IND. LAW REV. 451, 454 (2002). Wolfson concludes that oral arguments may have an effect, although probably only in five to ten percent of cases. In contrast, Spaeth and Segal suggest that oral argument matters very little because judges decide cases based on policy preferences and political leanings. JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 280, 430–35 (2002). Segal and Spaeth are widely credited with developing the attitudinal theory. See RYAN A. MALPHURS, *RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS* 28 (Routledge Press 2013), crediting Segal and Spaeth for the attitudinal model. See also Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (reviewing study providing support for attitudinal theory).

² See federal courts management statistics 2016, http://www.uscourts.gov/sites/default/files/data_tables/Table2.02.pdf (last visited January 15, 2017). That number does not include data from the US Court of Appeals for the Federal Circuit. See *id.*

legal issues. That means that how the federal courts decide appeals, and the process through which they reach those decisions, including the granting or withholding of oral arguments, are important to the administration of justice.

Rule 34 of the Federal Rules of Appellate Procedure gives judges fairly broad discretion about whether to hear oral argument. The rule permits judges to dispense with oral argument if a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary because

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.³

Some courts interpret this as indicating that oral argument ought to be the rule, rather than the exception,⁴ others the reverse.⁵ For courts that view the rule as requiring oral argument in the absence of a valid reason not to have it, this requirement places enormous pressure on judges, given the number of appeals that are filed. However, routinely hearing oral argument is an effective use of judicial resources only if oral argument really does make a difference to the outcome of cases by aiding the decision-making process and advancing the administration of justice.

Consider the divergent approach taken by two federal circuits in their interpretation of Rule 34(c). The Eleventh Circuit, one of the busiest federal circuits with more than 5,000 appeals filed in 2015,⁶ hears oral argument in somewhere between ten and twenty percent (10-20%) of the

3 Rule 34(2) of Federal Rules of Appellate practice, https://www.law.cornell.edu/rules/frap/rule_34 (last visited Apr. 10, 2017) provides as follows:

- (2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
- (A) the appeal is frivolous;
 - (B) the dispositive issue or issues have been authoritatively decided; or
 - (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

4 This is the approach taken by the Seventh Circuit Court of Appeals.

5 The Eleventh Circuit is an example of a circuit that hears oral argument in only approximately one fifth of the cases that come before it. This is a result not only of the sheer volume of cases that are filed but also the court's belief that in most cases the matter may be decided on the briefs. See Mike Skotnicki, *A Peek Inside the Chambers: How the Eleventh Circuit Court of Appeals Decides Cases*, BRIEFLY WRITING, Apr. 9, 2012, <https://brieflywriting.com/2012/04/09/a-peek-inside-the-chambers-how-the-eleventh-circuit-court-of-appeals-decides-cases/> (last visited Apr.10, 2017).

6 See federal courts management statistics 2015, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b7_1231.2015.pdf (last visited Jan. 15, 2017). Additionally, Judge Urbina of the Eleventh Circuit stated that it is the practice of the Court to hear oral arguments only in about 20% of the cases. See Skotnicki, *supra* note 5, at 2.

7 According to 2016 statistics provided by the United States Federal Courts of Appeals, in the Eleventh Circuit 92.3% of cases were disposed of based on the briefs. See http://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2016.pdf (last visited Apr. 10, 2017).

cases filed.⁷ In contrast, the Seventh Circuit’s practice is to hear oral argument in almost every case of the nearly 2,500 appeals⁸ filed in that circuit, unless the parties do not request oral argument.⁹ While the Eleventh Circuit certainly has a heavier case load, no one would suggest it takes its duties and responsibilities less seriously because it hears fewer oral arguments. This dichotomous approach by the two circuits raises the question, How important is oral argument to a fully considered resolution of a case? If it is useful or even essential, are circuits that do not routinely avail themselves of oral arguments shortchanging litigants? Or, if oral argument makes little to no difference in the eventual outcome, are circuits that routinely hear oral arguments using judicial resources effectively?

To determine the answer to those questions, we have to examine both what judges themselves say about how, if at all, oral argument may influence case outcomes and examine what actually occurs during oral argument. Scholars and judges routinely describe oral argument as a “conversation” between the bench and counsel¹⁰ and a “conversation” among the judges on the bench.¹¹ Analyzing these “conversations” and then examining case outcomes in light of what took place at oral argument may provide us with insight about the role of oral argument in judicial decision-making.¹²

This article describes a study conducted on the oral-argument process at the Seventh Circuit Court of Appeals. The purpose of the study was to broadly analyze the “conversations” that took place during one hundred oral arguments in which any one or combination of three specific judges—Rovner, Posner, and Easterbrook—participated, in an attempt to discern whether particular characteristics of the oral questioning provided insight regarding case outcomes. Specifically, I analyzed whether the number of questions posed to each side was significant with respect to the case

8 See *id.*

9 Richard Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge’s Views*, 51 DUQ. L. REV. 3, 8 (2013) (“My court allows oral argument in all cases in which both sides have counsel; most of these are civil cases but a substantial minority are criminal.”)

10 RYAN C. BLACK, TIMOTHY R. JOHNSON, & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT—A DELIBERATE DIALOGUE 10 (2012). See also Talbot D’Alemberte, *Oral Argument: The Continuing Conversation*, 25 LITIGATION 12 (1999) wherein D’Alemberte cites a conversation with Justice Overton of the Florida Supreme Court in which Justice Overton told him, “[y]ou should think of your [oral] argument as the beginning of the judicial conference, and you are privileged to be there.”

11 BLACK ET AL., *supra* note 10, at 85–86. See also LAWRENCE WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 40 (2008), in which the author cites Justice Kennedy describing oral argument as the “Court having a conversation with itself through the medium of attorneys.”

12 I realize that discussions among judges at conferences that occur after oral argument, as well as the circulation of draft opinions are also extremely important factors, and I acknowledge this in part V of the article. However, there is little information available about these processes to consider their roles in the decision-making process.

outcome and whether the tone and content of the questions portended any particular outcome.¹³ I then analyzed the decisions in each of those cases to determine if the outcome had been foreshadowed in the exchanges that took place between the bench and counsel during oral argument. I also researched whether any of the judges had previously expressed any strong opinions about the types of cases before them, and whether the expression of a previous opinion seemed to play any role in the ultimate decision.

The obvious problem in examining the data proffered by oral argument is that it is extremely difficult to intuit which way judges were leaning on a case prior to oral argument, and how, if at all, oral argument factored into the decision-making process, absent the unlikely event of judges choosing to tell us.¹⁴ However, several political scientists have conducted studies on United States Supreme Court oral arguments and found that the side that is asked more questions during oral argument will likely lose the case.¹⁵ The likelihood of that side's losing is further increased if the tone and content of the judges' questions evince skepticism or hostility towards that side.¹⁶ This suggests that if a judge is skeptical about a particular side's arguments, she would have more questions for that side. A judge's skepticism may be evidenced by the tone, manner, or type of questions posed to the side that ultimately loses—specifically, when the judge poses questions in a hostile or adversarial way, connoted by word choice, tone, and affect.¹⁷ Hence, all of these factors were examined in my study.

If one may intuit a judge's initial leanings on a case by the number, tone, and content of her questions,¹⁸ one may then look to the outcome of the case and determine whether it was the expected outcome (i.e., the side that was asked more hostile questions lost) or contrary to expectations.¹⁹

¹³ As described in more detail in part IV *infra*, I evaluated the questions as neutral, hostile, or friendly. These evaluations were based on the judges' tone of voice, word choice, and the nature of the questions.

¹⁴ All of the judges in my study, as I discuss in part IV, have expressed some concern about the quality of the decisions of the Social Security Administration and immigration judges. Thus, they may be predisposed to regard decisions with some skepticism when petitions for review come before them.

¹⁵ Timothy R. Johnson, et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?* 29 WASH. U. J.L. & POL'Y 241, 259–60 (2009).

¹⁶ Sarah Levien Shullman, *The Illusions of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow their Decisions during Oral Argument*, 6 J. APP. PRAC. & PROCESS 271–72 (2004).

¹⁷ See Johnson et al., *supra* note 15, at 259–60.

¹⁸ I realize that assessing tone is subjective. Moreover, a judge may evince a neutral tone in questioning and yet be hostile towards a particular position advanced by counsel (content hostile). In the study I had several raters listen to the questions posed in the oral arguments, and if we did not agree on the tone, it was coded as a neutral question.

¹⁹ Most judges, including the judges in this study, aver that oral argument changes their mind somewhere between 10% and 20% of the time. Thus we might expect the outcome of a case to deviate from the predicted outcome somewhere between 10% and 20% of the time. In this study, the number proved to be about 10% of the time.

If the outcome is not as predicted, one might infer that oral argument played a role in changing a judge's initial predisposition towards the case.²⁰

This article will contend that despite judges' generally averring that they are open to changing their minds on cases during oral argument,²¹ in practice they are predisposed not to do so because they often approach oral argument with a particular inclination regarding the outcome. This inclination may be based on legal precedent, procedural issues, bias, or any combination of those and additional unknown factors. I suggest that, rather than remain open to being persuaded during oral argument, judges often reinforce their initial predisposition by posing hostile questions to the side that they are predisposed against.²² I argue here that the very tone, nature, and number of a judge's questions may subconsciously both reflect and reinforce that judge's bias. In other words, I posit that a judge's initial bias or leanings on a case may be confirmed by the type of questioning she initiates, which then effectively prevents the judge from changing her mind about the outcome of the case a process known as confirmation bias.²³ Because I infer that confirmation bias may result in oral argument's being used as a method of reinforcing initial bias, I suggest that oral argument may not be an effective use of judicial resources.

Part II of this article will describe and analyze the role of oral argument in judicial decision-making, primarily through canvassing studies done on Supreme Court oral arguments. Some of these studies suggest that oral argument is important in the decision-making process, while others suggest the converse.²⁴ I then discuss judges' views on oral argument and the potential ways in which interactions between the bench and counsel during oral argument may signal the outcome of a case. In

²⁰ Of course a judge may be persuaded by her colleagues during the judicial conference, or in writing or reading the draft opinion. Some judges have observed that when drafting an opinion on occasion it just "won't write," which indicates a flaw in the judicial reasoning and causes them to change their mind. See ABA Council of Appellate Lawyers, *Justice Scalia at the AEJI Summit in New Orleans*, APP. ISSUES, Feb. 2013, at 4, http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf. Justice Scalia noted in that interview that at least in the Supreme Court conferences, the justices do not try to persuade each other and that a justice very seldom changes his or her mind. *Id.* at 2.

²¹ Judge Myron Bright of the Eighth Circuit along with two of his colleagues conducted a study in which he found that oral argument changed his mind in 31% of the cases that came before him, his colleagues respectively changed their minds in 17% and 13% of the cases. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 nn. 32–33 (1986).

²² I argue in part III *infra* that this is a form of "confirmation bias," a recognized psychological phenomenon. See generally Charles Lord, Lee Ross, & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

²³ Confirmation bias is a widely observed phenomenon whereby people seek out and interpret information that is consistent with their expectations. Ivan Hernandez & Jesse Lee Preston, *Disfluency Disrupts the Confirmation Bias*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 178, 178 (2012).

²⁴ Proponents of the attitudinal model like Segal and Spaeth, *supra* note 1, aver that most cases are decided on the basis of a judge's preexisting attitude and ideology, which would suggest that oral arguments are not that important. Additionally, according to an article in the ABA Journal, Justice Alito reportedly asserted that "oral arguments aren't all that important,

part III of this article, I describe the phenomenon of confirmation bias and suggest how it may play out in the type and numbers of questions posed to each side during oral argument. Part IV will describe the results of a study I conducted on a database of oral arguments before the Seventh Circuit Court of Appeals that generally reinforces the findings found in the Supreme Court studies. Part V then addresses the contentions that oral argument might nevertheless serve a valid role in making justice visible or refining judicial opinions, even if confirmation bias is found to play a role in oral argument itself. Parts VI and VII conclude the project by suggesting that oral argument may not be an effective use of judicial resources and that information sought by the bench during oral argument might better be obtained by means of written questions posed to the respective parties.

II. The Role and Function of Oral Argument in Judicial Decision-Making

Rule 34 presupposes that oral argument may play a crucial role in the decision-making process, particularly in close cases. Indeed, common wisdom suggests that oral argument helps judges decide cases.²⁵ Not everyone agrees with this seemingly obvious contention.²⁶ Some would assert that oral argument serves little purpose and that cases may more expeditiously be decided on the briefs.²⁷ Others argue that oral arguments are merely “window dressing” justice and that cases have already been decided or will be decided on ideological grounds.²⁸ Yet many judges themselves tell us that oral arguments serve to clear up points of confusion

despite a popular belief to the contrary.” Debra Cassens Weiss, *Think Oral Arguments Are Important? Think Again, Justice Alito Says*. ABA JOURNAL May 17, 2011, http://www.abajournal.com/news/article/think_oral_arguments_are_important_think_again_alito_says/?from=widget (last visited Apr. 17, 2017).

²⁵ See generally Cynthia Kelly Conlon & Julie M. Karaba, *May It Please the Court: Questions about Policy at Oral Argument*, 8 NW. J. LAW & SOC. POL’Y 89 (2012).

²⁶ For example, Justice Alito suggested otherwise during a visit at St. Louis Law School, telling attendees that oral argument is unimportant. See Deb Peterson, *Supreme Court Justice Samuel Alito Speaks at St. Louis Law Day*, STL TODAY, May 16, 2011, http://www.stltoday.com/news/local/columns/deb-peterson/article_873af5a6-8008-11e0-8324-001a4bcf6878.html. Also, note the example of the Oklahoma Supreme Court discussed in *infra* part IIA.2.

²⁷ Judge Ruggero Aldisert of the Third Circuit Court of Appeals was a proponent of this approach, noting, “[T]he recent astronomical increase in appellate court caseloads emphasizes the importance of briefs and diminishes the grandness of oral arguments.” Ruggero Aldisert, *Perspective From the Bench*, 75 MISS. L.J. 645, 648 (2006). Judge Urbina of the Eleventh Circuit also supports it with caveats, noting, “[I]n many cases, the helpfulness of oral argument is overrated. It can, however, make the difference in a close case” Joel F. Urbina, *From the Bench: Effective Oral Advocacy*, LITIGATION, Winter 1994, at 3, 4. See also Joe Cecil and Donna Stienstra, who argue that based on their study of four federal courts of appeals “judges generally agree that there are many cases in which oral argument will not inform the disposition of a case.” JOE CECIL, DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 157 (Federal Judicial Center 1987).

²⁸ Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006) (citing SEGAL & SPAETH, *supra* note 1, at 280).

and really can and do make a difference in the outcome of the case.²⁹ They contend that arguments made by counsel may sway them if they are undecided, or even cause them to change their minds.³⁰ I will explore each of these arguments, and go on to suggest that rather than using questions to clarify points of contention during oral argument, judges may be subconsciously questioning counsel so as to elicit confirmation of preexisting biases.

A. Oral Argument Serves No (or Little) Purpose

Several political scientists have long asserted that oral argument serves no valid purpose as judges essentially decide cases based on their own beliefs on the issues.³¹ Segal and Spaeth christened this theory the “attitudinal model,” and conducted several studies that indicate a strong correlation between a judge’s ideological or political leanings and case outcomes.³² This theory is more applicable to Supreme Court arguments than Courts of Appeals arguments, as the Supreme Court decides more politicized cases, and the selection of Supreme Court justices has become a hyperpoliticized process.³³

1. Cases are Decided on the Basis of the Attitudinal Model

Segal and Spaeth discount the role of oral argument,³⁴ asserting that cases are often decided along ideological lines.³⁵ The evidence for this claim is based on studies conducted on Supreme Court oral arguments,³⁶ and thus might have less validity when applied to appellate-court

²⁹ Justice Blackmun posited that oral arguments were helpful, adding that “many times confusion (in the brief) is clarified by what the lawyers have to say.” Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry Blackmun*, 34 U. RICH. L. REV. 285, 298 (2000).

³⁰ Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999).

³¹ See generally SEGAL & SPAETH, *supra* note 1. See also MALPHURS, *supra* note 1 (crediting Segal and Spaeth with developing the attitudinal theory).

³² *Id.* See also Segal & Cover, *supra* note 1.

³³ In a 2016 speech, Chief Justice Roberts pointed out that Justice Scalia had been confirmed by a vote of 98 to 0, but the votes for “more[-]recent colleagues, all extremely well qualified for the court[,] . . . were . . . strictly on party lines for the last three of them, or close to it, and that doesn’t make any sense. That suggests to me that the process is being used for something other than ensuring the qualifications of the nominees.” Adam Liptak, *John Roberts Criticized Supreme Court Nomination Process Before There Was a Vacancy*, N.Y. TIMES Mar 21, 2016, https://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html?_r=0 (last visited Apr. 10, 2017). See also Richard A. Posner, *The Supreme Court Is a Political Court. Republicans’ Actions Are Proof*, WASH. POST, Mar. 9, 2016.

³⁴ SEGAL & SPAETH, *supra* note 1, at 430–35.

³⁵ This attitudinal model is endorsed by other scholars. See, e.g., THOMAS HANSFORD & JAMES SPRIGGS, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006); VIRGINIA HETTINGER, STEFANIE LINDQUIST, & WENDY MARTINEK, *JUDGING ON A COLLEGIATE COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (2006); DAVID KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 91 (2002).

³⁶ See, e.g., James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325 (2010); WRIGHTSMAN, *supra* note 11, at 132 *et seq.* describing the various studies that have been conducted on Supreme Court oral arguments.

arguments, for which fewer studies have been conducted.³⁷ Proponents of this position argue that a justice's vote on a case reflects that justice's values, emotions, attitude, and political leanings.³⁸ Wrightsman claims that "these attitudes and values serve as filters and cause the decision maker to pay more attention to those arguments supporting his or her bias, denigrating those arguments that do not."³⁹ In a Supreme Court that has become more divided among ideological lines, this argument holds some sway.⁴⁰ Songer and Link additionally point out that even critics of the attitudinal model have had to concede that "the ideological values and policy preferences of Supreme Court justices have a profound impact on their decisions in many cases."⁴¹ This model may have less validity when applied to Courts of Appeals whose caseload may be less politically charged.

If a judge's ideology plays a deciding role in case outcomes, oral argument may then be of little value.⁴² Though other scholars concur with that conclusion, their explanation of why this is so is based on reasons other than the attitudinal model.⁴³

2. Oral Argument Is Not Important because Cases Are Decided on the Briefs

The Oklahoma Supreme Court appears to wholeheartedly endorse the view that the briefs determine the outcome of cases. In Oklahoma, oral argument is rarely granted, as Rule 1.9 requires parties to file a motion setting forth the "*exceptional* reason that oral argument is necessary."⁴⁴ Over a ten-year period, the Oklahoma Supreme Court decided over one thousand cases, all but twelve without oral argument.⁴⁵ Although this

³⁷ Epstein, Landes, and Posner also point out that ninety-eight percent of decisions in federal appellate courts are unanimous. LEE EPSTEIN, WILLIAM M. LANDES, RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 54 (2013). Thus I infer that it is more difficult to determine how or if ideology played a role in the decision-making process.

³⁸ TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT, 13-17 (2004). See also Erwin Chemerinsky, *The Meaning of Bush v. Gore: Thoughts on Professor Amar's Analysis* 61 FLA. L. REV 969, 970 (2009) ("[F]irst, Justices have tremendous discretion in deciding constitutional cases; and second, how that discretion is exercised is frequently, if not inevitably, a product of the Justices' life experiences and ideology.")

³⁹ WRIGHTSMAN, *supra* note 11, at 30.

⁴⁰ See generally MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2012). Bailey and Maltzman acknowledge that law in the form of precedent

does matter, too, but that it is difficult to determine the precise roles played by judges' ideological and policy preferences from the role played by precedent. *Id.* at 47.

⁴¹ Donald Songer & Jessica Link, *Debunking the Myths Surrounding the Attitudinal Model of Supreme Court Decision Making* at *2 (Presentation to Annual Meeting of American Political Science Association, Sept. 2, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644573 (internal quotation, citation omitted).

⁴² WRIGHTSMAN, *supra* note 11, at 33. For example, in the 2001 Supreme Court term, when deciding cases involving prisoners' rights, the three most conservative justices sided with the state on all but two occasions out of a possible twenty-four votes, the four liberals on the Court found in favor of the prisoners with twenty-eight of a possible thirty-two votes. *Id.* at 33-34.

⁴³ See MALPHURS, *supra* note 1, at 28.

⁴⁴ Okla. Sup. Ct. R. 1.9 (emphasis added).

approach has its critics,⁴⁶ the court largely continues this practice, although the Court of Criminal Appeals hears oral arguments in all death penalty cases.⁴⁷

Other examples cited in support of the proposition that cases be decided on the briefs concern cases where a justice is not present for oral argument or even the judicial conferences, but nevertheless goes on to write the majority opinion in those cases. For example, Wrightsman noted that in 2004, then-Chief Justice Rehnquist missed oral arguments in forty-four cases because he was being treated for thyroid cancer.⁴⁸ Not only did he miss the oral arguments, he missed the conferences too.⁴⁹ Despite his absence from both arguments and conferences, Rehnquist assigned himself to write the opinions in four of those cases.⁵⁰

Another example of the briefs' mattering more than oral argument may be seen in the approach taken by the California Supreme Court. The California Supreme Court does hear oral arguments on all cases unless waived by the parties, but often uses oral argument to "test" the limitations of a "calendar memorandum":⁵¹ After reading the parties' briefs, the justices meet to discuss the case and formulate a draft opinion, which they then test out through the process of questioning during oral argument.⁵² Obviously, the justices reach their tentative opinion based on the parties' briefs but are ostensibly open to having their minds changed, or at least, their opinions modified, by oral argument, if it appears there are shortcomings in their initial approach.

B. According to Judges, Oral Argument Can Make a Difference in a Small but Significant Number of Cases

Despite the suggestions made that oral arguments may not matter much in the final determination of a case, comments from judges themselves seem to suggest that they do, at least in the minds of some judges. For example, in 1981, the U.S. Supreme Court contemplated (at Justice Sandra Day O'Connor's suggestion) not hearing oral arguments in all of the cases, as it had accepted an unusually high number of cases that year.⁵³ Justice Powell had some misgivings, responding, "I could agree with

45 Joseph Thai & Andrew Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695, 695 (2008).

46 See generally *id.*

47 Okla. Crim. App. R. 3.8.

48 WRIGHTSMAN, *supra* note 11, at 8.

49 *Id.*

50 *Id.* The cases were *Muehler v. Mena*, 544 U.S. 93 (2005), *Tenet v. Doe*, 544 U.S. 1 (2005), *Pace v. DiGuglielmo*, 544 U.S. 208 (2005), and *Van Orden v. Perry*, 545 U.S. 607 (2005). *Id.*

51 See THE SUPREME COURT OF CALIFORNIA 22, http://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf (last visited Apr. 10, 2017).

52 Interview with Justice Carol Corrigan, California Supreme Court, in at Notre Dame, Mar. 25, 2013 (on file with author).

53 WRIGHTSMAN, *supra* note 11, at 9.

[Justice O'Connor's] proposed change [but] my only concern is that we might abuse this privilege. I believe in the utility of oral argument, and also in the symbolism it portrays for the public."⁵⁴

Other judges too, have spoken out regarding their belief that oral argument plays a valuable role in the decision-making process. For example, Chief Justice Rehnquist noted,

Lawyers often ask me whether oral argument "really makes a difference." Often the question is asked with an undertone of skepticism, if not cynicism, intimating that the judges really have made up their minds before they ever come to the bench and oral argument is pretty much a formality. Speaking for myself, I think it does make a difference; in a significant minority of cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came to the bench. The change is seldom a full one-hundred-and-eighty-degree swing, and I find it is most likely to occur in cases involving areas of law with which I am least familiar.⁵⁵

Rehnquist's point that oral argument may assist the judges particularly with regard to areas of law with which they are unfamiliar has been echoed by Judge Posner of the Seventh Circuit, who has pointed out that judges are generalists,⁵⁶ whereas the lawyers arguing a case have attained a specialized knowledge of the law and facts in that case and thus may be able to assist the bench. Even Justice Scalia, initially dismissing oral arguments as a "dog and pony show,"⁵⁷ later noted that "things can be put in perspective during oral arguments in a way that they can't in a written brief."⁵⁸

Federal Circuit judges overall seem to endorse the view that oral arguments do matter, at least in a small but significant number of cases. Based on interviews conducted with judges by Bryan Garner, it seems clear that many judges believe that oral arguments may affect the outcome of cases.⁵⁹ Judges have also noted that occasionally a lawyer is a better

54 *Id.* at 9 (second alteration in original).

55 *Id.* at 39 (citation omitted).

56 RICHARD POSNER, REFLECTIONS ON JUDGING, 269 (2013). "In all likelihood he [the judge] is a generalist, lacking specialized knowledge of most of the fields of law that generate the cases that come before him. The advocate, in contrast, probably is a specialist . . ."

57 WRIGHTSMAN, *supra* note 11, at 40 (citing DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 260 (2000)).

58 *Id.*

59 See interviews by Bryan Garner with Supreme Court Justices and federal judges, <http://www.lawprose.org/bryan-garner/garners-interviews/>. Most judges reported that oral arguments may make a difference in the outcome of the cases in a small number of cases. See *id.*

“talker than writer,” suggesting that on occasion oral argument may be more persuasive than briefs.⁶⁰

The judges analyzed in the study conducted for this article also seem to believe that oral argument may change their minds on cases. Judge Rovner has noted that “oral argument can make a difference [in] the outcome of a case,”⁶¹ and estimated that oral argument changed her mind in 15 to 20 percent of the cases she hears.⁶²

Judge Posner also claimed that “although the average quality of oral arguments in federal court . . . is not high, the value of oral argument to judges is very high.”⁶³ Judge Easterbrook similarly suggested that oral argument can make a difference in between 5 to 10 percent of cases.⁶⁴ He also avers that advocates may lose their case at oral argument by not responding appropriately to the judges’ questions.⁶⁵

The fact that judges seem to believe that oral argument can be significant may itself affect their behavior, in that they may treat it as significant and act accordingly. This phenomenon has been studied by sociologists, and is known as the “Thomas Theorem.”⁶⁶ The theorem suggests that what lay people term “self-fulfilling prophecies” may have some foundation in science. As noted sociologists W.I. Thomas and Dorothy Swaine Thomas put it, “[I]f men define situations as real, they are real in their consequences.”⁶⁷ Thus, if judges believe that they can be persuaded by oral argument, they may be more likely to take it seriously and ostensibly may be open to changing their minds about a case as a result of oral argument.

C. Reading the Tea Leaves: Oral Argument and the Signaling Function

Regardless of whether judges believe that oral argument might change their minds on a case, oral argument may perform various other important functions. Among these functions are providing a forum whereby counsel, interested parties, and their fellow judges on the bench

⁶⁰ See WRIGHTSMAN, *supra* note 11, at 40–41 (citation omitted).

⁶¹ Kathleen Dillon Narko, *They Are Listening*, 22 CBA REC. 54, 54 (2008) (alteration in the original).

⁶² *Id.*

⁶³ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 160–61 (1999).

⁶⁴ Interview by Bryan Garner with Judge Frank Easterbrook, Seventh Circuit Court of Appeals (2011) at 4:39, <http://vimeo.com/23818679>.

⁶⁵ See generally *id.* This opinion is also held by Justice Ginsburg who noted, “I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of the clarification elicited at oral argument.” Ginsburg, *supra* note 30, at 570.

⁶⁶ See Robert K. Merton, *The Thomas Theorem and the Matthew Effect*, 74 SOC. FORCES 379, 379–80 (1995).

⁶⁷ *Id.* at 380 (citation omitted).

may derive some insight into a particular judge's position on a case through the tone and tenor of that judge's questions. I refer to this as a signaling function. This is important because judges generally do not tell us which way they are leaning on a case before oral argument. It is thus impossible to show how, or if at all, oral arguments change judges' minds. We are left to surmise from a judge's questions the position she might intend to take and then subsequently look at the opinion to see which way the judge voted.

It is not surprising, therefore, that observing questions posed by particular judges during oral argument and speculating on the implications of those questions has spawned a cottage industry of court watchers, particularly in Supreme Court cases.⁶⁸ Though the speculation might seem unscientific, studies have shown that merely noting if more questions are posed to one side enables an observer to predict that the side posed the most questions will ultimately lose the case.⁶⁹ One's accuracy in predicting the outcome increases if one is able to denote that more hostile questions were posed to that side.⁷⁰

The signals put out by a particular judge are not only available for the parties and court watchers to observe, but are also available to a judge's fellow judges. These signals may play a role in judicial efficiency in that they potentially shorten the time needed during the judicial conference to decide the case, as the rest of the panel may well be aware which way their colleagues are leaning by the signals they have put out.

1. Signaling to One's Colleagues on the Bench

It seems to come as no surprise to most judges that their colleagues on the bench tip their hands during argument. Former Chief Justice Rehnquist pointed out that "[t]he judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues."⁷¹ Justice Kennedy concurred, noting that during oral argument "the Court is having a conversation with itself through the intermediary of the attorneys."⁷²

⁶⁸ See, e.g., Jonathan Adler, *Things We Learned at Today's Oral Argument in King v. Burwell*, WASH. POST, Mar. 4 2015, https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/03/04/things-we-learned-at-todays-oral-argument-in-king-v-burwell/?utm_term=.7c697254e800 (last visited Jan. 27, 2017).

⁶⁹ Ryan C. Black, et al.; *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 572 (2011); EPSTEIN ET AL., *supra* note 37, at 316, acknowledging that "the losing party is indeed asked more questions."

⁷⁰ *Id.*

⁷¹ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 244 (2001).

⁷² WRIGHTSMAN, *supra* note 11, at 40 (citing DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 260 (2000)).

If a judge signals her position, the other judges may choose to signal back their concerns, or they may remain silent and raise any concerns during the judicial conference.⁷³

Even if a judge disagrees with the signaled outcome, she will still have to weigh whether she will ultimately vote against her colleague(s) in conference. This is where the collegiality factor may come into play.⁷⁴ Will it affect one's relationships with one's peers if a particular judge disagrees or concurs? Is this worth sacrificing potential leisure time or other income-producing-activity time to author a dissent or concurrence?⁷⁵

Signaling through oral argument may thus lead to judicial efficiency, shortening conference time because judges may go into conference knowing each other's positions on the cases. Posner notes that in conferences, judges "for the sake of collegiality often pull their punches when stating their view how a case should be decided."⁷⁶ However, the kinds of questions judges may ask during oral argument may also play an additional role—that of confirming the initial bias a judge may hold in respect of the argument advanced by one party.

2. Signaling and Foreshadowing the Outcome: Confirming Initial Bias

As noted, several studies conducted on Supreme Court cases have shown that the party asked the most questions during oral argument will typically end up on the losing side.⁷⁷ This is particularly true when the questions posed to that party are pointed or hostile.⁷⁸

⁷³ Johnson argues that there is clear evidence that Justice Powell listened to the questions of his colleagues and used them as a basis for forming coalitions for a majority opinion. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 126 (2004). One example of judges signaling to each other may be heard in the oral argument for *Brown v. EMA*, 546 U.S. 786 (2010), a case involving the sale of violent video games to minors. The recording is available at <https://www.oyez.org/cases/2010/08-1448>. At about the 12:30-minute mark, Justice Kennedy notes, "It seems to me all or at least the great majority of the questions today are designed to probe whether or not this statute is vague . . . and this indicates to me that the statute is vague." As for the judicial conferences, EPSTEIN ET AL., *supra* note 37, suggest that judicial conferences are "curiously stilted" with judges merely stating their position and casting their vote. The authors note that it is a "serious breach of etiquette to interrupt a judge when he has the floor" at 62. Posner also finds the conferences stilted, noting that "[o]nce a judge has indicated his vote in the case, even if tentatively, concern with saving face may induce him to adhere to the vote in the face of the arguments of the other judges, who moreover may be reluctant to press him to change his mind, feeling they'll offend him by doing so." Posner, *supra* note 56, at 129. It is thus difficult to intuit how much robust discussion takes place at the judicial conferences.

⁷⁴ See Harry Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) (arguing that "collegiality plays an important part in mitigating the role of partisan politics and personal ideology").

⁷⁵ Judge Posner has devised an equation devoted to how a judge maximizes his time, positing that judges with permanent tenure might be influenced by the utility derived from judging, leisure time, reputation, and the desire to avoid reversal that may result in "go along voting." See generally Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Things Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). See also Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753.

⁷⁶ RICHARD A. POSNER, REFLECTIONS ON JUDGING 129 (2013).

⁷⁷ Lee Epstein, William M. Landes, and Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433 (2010).

⁷⁸ See Johnson et al., *supra* note 15, at 259–60.

Johnson and his colleagues have established that the party asked the most questions was more likely to lose the case.⁷⁹ They analyzed transcripts of all Supreme Court cases from 1979 to 1995, including 2,000 hours of argument and approximately 340,000 questions.⁸⁰ The researchers counted the number of questions posed to each side, and also the number of words in each question to determine if the justices asked the losing side longer questions.⁸¹ They then used a multivariate analysis to determine whether there were correlations between a higher number of questions posed, the length of questions, and losing the case.⁸² Johnson also factored in the ideological nature of the case and coded the justices based on ideological leanings.⁸³ The study also factored amicus briefs filed by the Solicitor General into the equation, as cases in which the Solicitor General's office files a brief tend to be decided in favor of the government.⁸⁴ The study confirmed what smaller studies had already suggested—the more questions a party was asked during oral argument, and the longer the questions, the more likely that party was to lose the case.⁸⁵ That result held true even when the researchers factored in other variables for why the justices might decide a case a particular way.⁸⁶

Other studies have suggested that it is not just the number of questions posed to each side that matters, but rather it is the way in which those questions are posed that is significant, specifically whether the questions are hostile or friendly.⁸⁷ Ryan Black and his colleagues analyzed the word choice of the Supreme Court justices in oral arguments from 1979 to 2008.⁸⁸ Using the *Dictionary of Affect in Language* to gage the emotional content of the justices' words, they coded the words for affect to determine whether the linguistic behavior of justices telegraphed their views of the issue.⁸⁹ The researchers found that there was a strong correlation between words coded as unpleasant (reflecting strong emotional content) and a vote against the party to whom a justice used those words in questioning.⁹⁰

⁷⁹ *Id.* at 250.

⁸⁰ *Id.*

⁸¹ *Id.* at 251–53.

⁸² *Id.* at 254.

⁸³ *Id.* at 255.

⁸⁴ *Id.*; see also R.C. Black and Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court* (Mar. 10, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568381 (last visited Apr. 1, 2017).

⁸⁵ Lee Epstein et al., *supra* note 77, at 433 (finding “strong evidence” for the hypothesis that the losing side was asked

more questions during Supreme Court oral arguments).

⁸⁶ See Johnson et al., *supra* note 15, at 259–60.

⁸⁷ Shullman, *supra* note 16, at 290.

⁸⁸ See Black et al., *supra* note 69, at 574–75.

⁸⁹ *Id.* at 575.

⁹⁰ *Id.* at 576–77.

⁹¹ WRIGHTSMAN, *supra* note 11. Wrightsman and his collaborator, Jacqueline Austin, analyzed twenty-four cases from the Supreme Court's 2004 term and determined that the number of questions and their hostile content were good predictors of an adverse outcome. *Id.* at 140–41.

The idea that justices telegraph or tip their hands through the tone and number of questions has been confirmed by Lawrence Wrightsman,⁹¹ Epstein, Landes, and Posner,⁹² as well as by Sarah Shullman.⁹³ In examining the tone, nature (hostile vs. friendly), and number of the questions posed to each side by the justices, Shullman confirmed that the justices did indeed telegraph their positions on the issue by asking more questions and more hostile questions to the party who ultimately lost.⁹⁴ Shullman refers to this as “foreshadowing” because her research established that the form of questioning did indeed predict the justices’ ultimate decision.⁹⁵

From a psychological-theory perspective, there is nothing surprising in the finding that a side that is asked more hostile questions would end up losing. The theories of confirmation bias and belief perseverance may be at play here.⁹⁶ As noted, confirmation bias suggests that if one holds a particular view on an issue, then one tends to seek confirmation of, or evidence to support that belief.⁹⁷ Similarly, the theory of belief perseverance contends that individuals have “the tendency to cling to one’s initial beliefs even after receiving new information that contradicts or disconfirms the basis of that belief.”⁹⁸ These theories will be discussed more thoroughly below.

3. Framing Questions to Support Confirmation Bias or Belief Perseverance

Aside from signaling to one’s fellow judges, the kinds of questions that a judge poses during oral argument may perform another role—that of eliciting answers that support one’s inherent biases or beliefs about a particular case. Framing questions in a particular way may lead to answers being given that support the ruling that a judge ultimately wants to issue.

92 Epstein et al., *supra* note 77, at 433.

93 Shullman, *supra* note 16, at 290.

94 See *id.*

95 See *id.*

96 See generally Craig A. Anderson, *Belief Perseverance*, in 1 ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 109 (R.F. Baumeister & K.D. Vohs eds., 2007).

97 Judge Posner even acknowledges that this may be the case, noting, “My colleagues and I read the same briefs, hear the same oral arguments and sometimes react quite differently, either because of different priors, which can dominate . . . the probability one attaches to a decision one way or another after gathering evidence.” Epstein et al., *supra* note 77, at 130. Elsewhere Posner has noted that “[t]he tools I am calling priors can in principle and sometimes in practice be overridden by evidence. But often they are impervious to evidence, being deeply embedded in what we are, and that is plainly true of judging . . .” Richard A. Posner, *The Supreme Court is a Political Court. Republicans’ Actions are Proof*, WASHINGTON POST, MAR. 9, 2016, https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?utm_term=.a2dc260c4a0d (last visited Apr. 10, 2017).

98 *Id.* at 109.

A judge may do this, often subconsciously, as a way of justifying the outcome of a case. The process of framing questions so as to elicit evidence to support a particular outcome is part of a process termed “confirmation bias” by psychologists.⁹⁹ Moreover, it seems likely that in some cases, no matter what answer a judge might receive to her questions, she may persist in her belief about how the case should be decided—a form of “belief perseverance.” I will describe these phenomena below and suggest that they may be responsible for the increased number and more hostile tone of questions asked to the losing side.

III. The Possible Roles of Confirmation Bias and Belief Perseverance in Oral Argument

Confirmation bias has been described by Nickerson as selectively gathering or giving undue weight to evidence that supports one’s position and “neglecting to gather or discounting evidence that would tell against it.”¹⁰⁰ The process may be subconscious and even unmotivated. It is a phenomenon that has been documented in multiple instances and circumstances over a long period of time.¹⁰¹ Nickerson describes how people acting under the influence of confirmation bias “often tend to only or primarily seek information that will support their hypothesis or belief in a particular way.”¹⁰² This may explain why the phenomenon is sometimes referred to as “myside bias.”¹⁰³ Even when confronted with arguments or evidence that run counter to their hypothesis, individuals who operate under confirmation bias tend to give greater weight to the information that supports their belief, discounting or seeking to explain away the counter information.¹⁰⁴

This is not to say that judges who may act under the influence of confirmation bias do so because they have a vested interest in the outcome

99 Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998). I am not aware of any studies that have been done on confirmation bias in oral argument.

100 *Id.*

101 As far back as 1620, Francis Bacon posited, “The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be greater number and weight of instances to be found on the other side, yet these it either neglects or despises or else by some distinction sets aside and rejects; in order . . . that the authority of its former conclusion may remain inviolate.” FRANCIS BACON, *NOVUM ORGANUM* Book I (1620) Aphorism XLVI, http://www.constitution.org/bacon/nov_org.htm (last visited Apr. 10, 2017).

102 Nickerson, *supra* note 99, at 177.

103 Jonathan Baron, *Myside Bias in Thinking about Abortion*, 7 J. THINKING & REASONING 221, 221 (1995).

104 Kuhn notes that even when presented with evidence that contradicts their theory, people suffering from confirmation bias either fail to acknowledge the contradictory evidence or distort it in some way. Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 PSYCHOL. REV. 674, 677 (1989).

of the case. Studies have shown that the discounting of counterevidence and the seeking out of evidence to support one's position occurs even when individuals have no real stake in the truth value of their hypotheses (i.e. the outcome of the case).¹⁰⁵ The theory of confirmation bias thus provides another possible explanation, aside from the attitudinal model, as to why judges ask more questions of the losing side—it may be that they are seeking out information to support their innate hypothesis of the case, even though they may have no real stake in the outcome.

Moreover, it may be well founded for a judge to approach a case with a bias towards a particular side and that bias may not be indicative of any attitudinal or ideological bias on the part of the judge. It could merely be an indication that the judge is aware of relevant mandatory or persuasive precedent or policy and seeks confirmation whether the case before her falls within the parameters of that authority.

However, judges need to be conscious of potential bias, as a danger exists that judges may find what they are looking for when seeking to confirm an initial response.¹⁰⁶ Nickerson points out that

[g]iven the existence of a taxonomy[,] . . . there is a tendency to view the world in terms of the categories it provides. One tends to fit what one sees into the taxonomic bins at hand. In accordance with the confirmation bias, people are more likely to look for, and find, confirmation of the adequacy of a taxonomy than to seek and discover evidence of its limitations.¹⁰⁷

Nickerson refers to this process as “reification.”¹⁰⁸ Reification occurs when we think the taxonomic bins we are putting things into are actual reality, and we interpret information in accordance with that view.¹⁰⁹ To my knowledge, no study has been conducted on appellate judges and confirmation bias, but if one considers precedent or the decision of the lower court as “taxonomic bins” into which appellate judges are trying to fit the law and facts of the case before them, it is not hard to imagine that judges would much rather find a case analogous to existing precedent or consistent with the decision of the lower court, than find that precedent should be distinguished and the lower court reversed.¹¹⁰ An example of

105 Nickerson, *supra* note 99, at 176.

106 Posner refers to these biases as “priors” cautioning judges to be aware of their own priors, whether these be for the “police; for paramedics; for asylum seekers; for people with serious mental illnesses; and for marginal religious sects. He may have a range of antipathies as well . . .” POSNER, *supra* note 56, at 129–30.

107 Nickerson, *supra* note 99, at 183–84.

108 *Id.*

109 *Id.*

110 Obviously the common law is predicated on the premise that judges will decide cases in accordance with precedent, but that still leaves judges with the choice of whether the case before them is analogous to precedent or may be distinguished. As Epstein, Landes, and Posner point out, judges may have another motivating factor in deciding that the case before them is analogous to precedent as they, like everyone else, seek to maximize their leisure time. See Epstein et al., *supra* note 37, at 42.

seeking a result that is consistent with one's hypothesis has been seen in juries. Studies have found that when jurors form a bias towards one side early on in the case, their final decision is likely to be consistent with that bias, and jurors are more likely to remember statements that support their initial leaning than those that contradict it.¹¹¹

Moreover, once an individual has formed an early opinion on a subject, it is difficult to reverse that opinion. This is known as the primacy effect.¹¹² Thus, even though judges may tell us that they come to the bench willing to change their minds during oral argument, their initial leaning on a case may be difficult to overcome. Additionally, judges must surely be aware, even at a subconscious level, that the appellant's chances of prevailing on appeal are quite small. Thus if judges approach a case with an idea of how the case should be decided, are motivated to fit the case within the framework of existing precedent and affirm the lower court's decision, and know that that in most cases the appellant loses his or her appeal, the chances of overcoming one's initial bias and seeking out and accepting disconfirmatory evidence seem small.

Conceptualizing what occurs during oral argument through the lens of confirmation bias in one sense builds on, yet departs from, the attitudinal model described by Segal and Spaeth.¹¹³ Pursuant to the attitudinal model, judges approach a case with a particular set of political beliefs or ideological biases. I argue that pursuant to the confirmation bias theory that I have described, judges often come to the bench with a particular belief or predisposition regarding how the case should be decided. That predisposition may not necessarily be based on political or ideological values but rather could be based on a number of other factors, including precedent, proceedings in the court below, a particular bias against a party, or prejudice on a particular issue. I argue further that confirmation bias may be at work in that judges may consciously or subconsciously frame their questions in such a way as to solicit answers designed to confirm these biases. Moreover, even if the answers a judge receives do not confirm the judge's original impression of the case, a judge may be more likely to disregard these disconfirmations and persevere in her original assessment of the case (a characteristic that denotes belief perseverance).

The effects of confirmation bias have been documented in various spheres of activity from medical diagnoses to jury situations.¹¹⁴ Another

111 *Id.* at 185.

112 Sean Duffy & L. Elizabeth Crawford, *Primacy or Recency Effects in Forming Inductive Categories*, 36 *MEMORY & COGNITION* 567, 568 (2008).

113 See generally Segal and Spaeth, *supra* note 1, at 221 *et seq.*

114 HUGO MERCIER, DAN SPERBER, *THE ENIGMA OF REASON* 271 (2017).

example derived from a study conducted by Saul Kassim and his colleagues¹¹⁵ provides an additional useful illustration of the theory. In Kassim's study, two groups of students designated to act as police interrogators were primed to believe that the suspects (also psychology students) they were about to interrogate were either guilty or innocent of a mock theft. The priming occurred when one group of interrogators (the guilty-expectation group) was told that four out of five people that they would interrogate were guilty of the crime. In contrast, the other group (the innocent-expectation group) was told that only one person of the five they would interrogate was guilty. Both groups were then told to select six questions from a list of questions provided by the experimenters. Unbeknownst to the participants, twelve of the twenty-four questions on the list had been coded as "guilt presumptive." Both groups were also required to select interrogation techniques from a list of techniques provided by the experimenters. Half of the techniques were coded as high in coerciveness, half as low in coerciveness. The authors' hypothesis was that a presumption of guilt would set into motion a more pressure-filled interrogation.¹¹⁶ The hypothesis proved to be correct. The authors found that the group primed to expect guilt chose more guilt-presumptive questions, used more coercive techniques during interrogation, and were more likely to judge the suspects guilty than the innocent-presumptive group.¹¹⁷

Although one should be cautious about reading too much into this study, it might provide some insight into the behavior of at least some judges at oral argument in two meaningful ways. First, as suggested above, if a judge believes that oral argument is important and could affect her decision on a case, then she might be more likely to participate more fully and pay more attention to oral argument—this could be seen as akin to the Thomas Theorem. A converse example of this would be the behavior of Justice Thomas during oral argument: let us assume, as he himself has suggested, that he allegedly sees little value in oral argument because the judges have "made up their minds 99% of the time."¹¹⁸ His behavior confirms this through his choice to not participate in oral argument by refraining from asking questions during argument.¹¹⁹

¹¹⁵ Saul M. Kassim, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187 (2003).

¹¹⁶ See *id.*

¹¹⁷ *Id.* at 199.

¹¹⁸ WRIGHTSMAN, *supra* note 11, at 25 (citation omitted).

¹¹⁹ According to David Karp, Justice Thomas does not let what occurs during oral argument affect his view of the case. As an example of this, Karp notes that in *Doggett v. United States*, Justice Thomas dissented, stating that the Constitution's guarantee of a speedy trial did not protect a defendant who had waited eight years for trial due to the prosecutor's delays. Yet,

The second way in which confirmation-bias and belief-perseverance theories might provide some insight into the behavior of judges during oral argument is in situations when a judge comes to the bench at oral argument with a predisposition as to how the case should be decided. This attitude, predisposition, or bias might influence the tone, types, and number of questions put to each party. It also might influence the manner in which a judge might ask those questions. Just as the group in Kassim's study was primed to believe in the guilt of the subjects they were interrogating, and therefore chose more guilt-presumptive questions and coercive interrogation techniques,¹²⁰ so too may judges who have a bias regarding an issue frame a question more hostilely to elicit an answer that conforms with their bias.

An example of this might be the kinds of questions posed by Judge Posner to Matthew Kairis, the attorney representing Notre Dame in *University of Notre Dame v. Sebelius*,¹²¹ a case in which Notre Dame was seeking relief from being compelled to provide its employees with contraception, pursuant to the Affordable Care Act, or even formally fill out the forms that would exempt them from compliance with the Act. Kairis argued that Notre Dame's Catholic beliefs prohibited it from being complicit in providing contraceptives to its employees, as the use of artificial contraception is prohibited by the Catholic Church. Three years prior to hearing this case, in November 2010, Judge Posner wrote on his blog in a post entitled *Contraception and Catholicism*,¹²² "It is always difficult to decide whether a religious tenet of a hierarchical religion, such as Roman Catholicism, reflects religious belief or institutional strategy." He went on to write, "The biggest problem that the Church faces in backing off its traditional condemnation of contraception is a potential loss of religious authority, which is no small matter in a hierarchical church."¹²³ Although Posner's post was directed at the then-pope's suggestion that use of condoms might be morally justified as a means of saving lives when a party was afflicted with HIV/AIDs, Judge Posner demonstrated some fairly strong views about the Catholic Church's position on contraception—as an authoritarian Church seeking to impose its views on its

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during oral argument, Justice Thomas did not say a word to hint about his view of the case. Karp argues that by remaining silent during oral argument, Justice Thomas fails to air his positions to public debate. See David A. Karp, *Why Justice Thomas Should Speak at Oral Argument*, 61 FLOR. L. REV 611, 624 (2009) (internal citations omitted).

¹²⁰ See Kassim, *supra* note 115, at 199.

¹²¹ 743 F.3d 547 (2014), *cert. granted, vacated sub nom U. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015), http://media.ca7.uscourts.gov/sound/2015/lj.13-3853.13-3853_04_22_2015.mp3 (last visited Apr. 10, 2017).

¹²² Richard Posner, *Contraception and Catholicism—Posner*, The Becker–Posner Blog (Nov. 28, 2010), <http://www.becker-posner-blog.com/2010/11/contraception-and-catholicismposner.html>.

¹²³ *Id.*

followers. Posner's feelings on the subject seemed to manifest themselves in the tone and types of questions put by Posner to Kairis during the oral argument in the *Notre Dame* case.¹²⁴ These views and the manner in which Posner posed questions¹²⁵ to Kairis seem to indicate confirmation bias.

Consider this exchange between Posner and Kairis excerpted from the oral argument in the case:

Posner: Is there some sanction that Notre Dame imposes on employees or students who use contraception?

Kairis: No.

Posner: Why not? This is a . . . well, let me ask you this. Is use of contraception a mortal sin or a venial sin?

Kairis: Your Honor, I don't know the answer.

Posner: Well, you should. It's a mortal sin if the person using contraception knows the Church forbids it. So, if Notre Dame is really serious about this, why doesn't it do anything about the violations, which apparently are widespread?

Kairis: Notre Dame has no interest in vetoing or controlling other people's choices. Notre Dame has an interest in controlling its own choices.

Posner: You're kidding. The Catholic Church is not interested in affecting other people's choices?¹²⁶

Not surprisingly, Judge Posner ruled against Notre Dame in this case.¹²⁷ His previous designation of the Catholic Church as an authoritarian church afraid of losing its moral authority regarding the issue of contraception may indicate a form of confirmation bias on this issue as manifested in the content and tone of his questions to Kairis.

Confirmation bias also seems to be evident in cases before the Seventh Circuit involving appeals from a denial of social-security disability benefits or from a denial of political asylum.¹²⁸ In both of these kinds of

¹²⁴ See generally the oral argument, note 121, *supra*.

¹²⁵ Posner's irritation with Kairis's conduct was obvious throughout the argument. After being frequently interrupted by Kairis, at one point Posner told him to stop interrupting or Posner would not let him continue with his argument.

¹²⁶ This exchange begins at the 32:25 minute mark in the oral argument. http://media.ca7.uscourts.gov/sound/2015/lj.13-3853.13-3853_04_22_2015.mp3 (last visited Apr. 10, 2014).

¹²⁷ The issue is not with Posner's legal ruling in this case, but rather that the tone and content of his questions suggest that he had already made up his mind and was not going to use oral argument as an opportunity to be persuaded.

¹²⁸ See, e.g., JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSAL FOR REFORM 77 (2009), in which Ramji-Nogales suggests that the Seventh Circuit is often skeptical of the decisions made by immigration judges. Judge Posner seems to confirm this, noting, "immigration judges are heavily overworked, and the immigration bar is weak The federal courts of appeals . . . reverse these decisions at a very high rate, often because the immigration judges and the Justice Department's lawyers display an appalling ignorance of foreign countries . . ." Posner, note 56, *supra* at 140–41.

cases, the Seventh Circuit's rate of reversal is far greater than, for example, the Eleventh or Fourth Circuits,¹²⁹ although the Seventh Circuit is clearly not alone in its criticism of immigration judges.¹³⁰ With regard to immigration appeals, Judges Posner and Rovner have spoken or written extremely disparagingly about the positions advanced by the Justice Department in some cases. For example, Judge Posner wrote in one opinion that "the adjudication of these [asylum] cases at the administrative level has fallen below the minimum standards of legal justice."¹³¹ He has estimated that the Seventh Circuit reverses immigration-law judges' decisions thirty-four percent of the time.¹³² The deferential standard of review that applies in these cases, namely substantial deference, should mean that reversals are relatively rare. In *Ahmad v. INS*,¹³³ the Seventh Circuit itself noted that under the substantial-deference standard, credibility determinations "should only be overturned under extraordinary circumstances[,] yet that is not in fact the case."¹³⁴

Judge Posner is not alone in his criticism of the government's arguments in many immigration cases. During one oral argument Judge Rovner remarked to Cindy Ferrier, the lawyer representing the government, "It is so cruel to send a lovely human being like you in here to be a messenger of such madness, such nonsense."¹³⁵ In yet another case, the court derided the immigration judge for "factual error, bootless speculation and errors of logic."¹³⁶ The court went on to note that "[t]hese have been common failings in recent decisions by immigration judges and the Board."¹³⁷ Not surprisingly, in oral arguments involving immigration cases

129 According to the U.S. Dept. of Justice Immigration Law Advisor's statistics for May, 2015, the Seventh Circuit had a 25% reversal rate for immigration claims for the months of January through May 2015; the Eighth Circuit had a zero percent reversal rate for that same period. See John Guendelsberger, *Circuit Court Decisions for May 2015*, 9 IMMIGR. L. ADVISOR 5, 5 (2015), <http://www.justice.gov/sites/default/files/pages/attachments/2015/06/30/ilavol9no6.pdf>. Moreover, Jaya Ramji-Nogales and her coauthors assert that an asylum seeker in the Seventh Circuit has an 1800% greater chance of receiving a remand in an asylum case than a person living in Virginia, Maryland, West Virginia, or the Carolinas. JAYA RAMJI-NOGALES ET AL., *supra* note 128, at 77.

130 Judge Fuentes of the Third Circuit strongly criticized the immigration judge in *Wang v. Attorney General*, noting, "We have stressed previously that '[a]s judicial officers [immigration judges] have a responsibility to function as neutral and impartial arbiters and must assiduously refrain from becoming advocates for either party.' Here, we find the immigration judge (I) failed that basic requirement." 423 F.3d. 260, 263 (3d Cir. 2005) (internal citation omitted).

131 *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

132 Melissa Harris, *Chinese Legal Scholars Hear Words of Wisdom from Judge Richard Posner*, <http://articles.chicagotribune.com/keyword/richard-posner/featured/2>.

133 163 F.3d 457 (7th Cir. 1999).

134 *Id.* at 461.

135 Cited in Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, http://www.nytimes.com/2005/12/26/us/courts-criticize-judges-handling-of-asylum-cases.html?_r=0

136 *Pramantarev v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006).

137 *Id.*

in my study, substantially more hostile questions are directed at counsel for the Attorney General than the Appellant.¹³⁸

Judge Easterbrook, who has a reputation as a textualist¹³⁹ and conservative jurist, is far more circumspect about expressing his opinions on any matter outside of court than Judge Posner.¹⁴⁰ Yet even he in *Banks v. Gonzales*¹⁴¹ felt compelled to suggest that the immigration bureaucracy could well benefit from the use of country experts who could assist immigration judges and asylum officers in determining whether a claimant's version of events was plausible, given the political situation in a particular country.¹⁴² The immigration process, as it currently stands, left Judge Easterbrook to bemoan "why . . . immigration officials so often stand silent at asylum hearings and leave the IJ to play the role of country specialist, a role for which an overworked lawyer who spends his life in the Midwest is so poorly suited?"¹⁴³

Thus when one considers these prior expressions of opinion, it is difficult not to intuit that the judges may be skeptical about the government's position in an immigration appeal. Based on their past experiences with these agencies, the judges in my study seem primed to exhibit bias against the government.¹⁴⁴ This bias often manifests itself in the tone and content of questions posed to counsel representing these agencies. For example, in *Samirah v. Holder*,¹⁴⁵ after hearing counsel for the Attorney General's explanation of why the alien could not return to the U.S. to apply for an adjustment of status, Judge Posner postulated, "The law cannot be that ridiculous."¹⁴⁶ And, "Everything that you say makes the government's position more ridiculous."¹⁴⁷

Judge Posner has been similarly critical of the Social Security Administration in reviewing denial of claims for social-security benefits. In several opinions he manifested open derision towards decisions of the

138 See study conducted on 100 cases before the Seventh Circuit on file with the author (hereinafter Venter study) described in part IV.B., *infra*

139 See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

140 There are countless examples of Judge Posner's lack of temperance with the BIA. For example in *Cecaj v. Gonzales* he noted, "Suppose you saw someone holding a jar, and you said, 'That's a nice jar,' and he smashed it to smithereens and said, 'No, it's not a jar.' That is what the immigration judge did."

440 F.3d 897, 899 (7th Cir. 2006).

141 *Banks v. Gonzales*, 453 F. 3d 449 (7th Cir. 2006).

142 *Id.* at 453.

143 *Id.* at 454.

144 See Venter study on file with the author.

145 627 F.3d 652 (2010).

146 Oral argument at 42:38, http://media.ca7.uscourts.gov/sound/2010/migrated.orig.08-1889_09_08_2010.mp3.

147 *Id.* at 42:28.

administrative law judges who deny appellants' claims. For example, in *Goins v. Calvin*,¹⁴⁸ in which the obese plaintiff had a Chiari I malformation (a condition where the part of the cerebellum and brain stem has been pushed into the spinal cord) along with a degenerative-disc condition, Posner described the administrative law judge's summary of the MRI as "barely intelligible mumbo jumbo."¹⁴⁹ He went on,

If we thought the Social Security Administration and its lawyers had a sense of humor, we would think it a joke for its lawyer to have said in its brief that the administrative law judge "accommodated [the plaintiff's] obesity by providing that she could never [be required as part of her work duties to] climb ladders, ropes, or scaffolds, and could only occasionally climb ramps or stairs, balance, kneel, crawl, stoop, and/or crouch." . . . Does the SSA think that if only the plaintiff were thin, she could climb ropes? And that at her present weight and with her present symptoms she can, even occasionally, crawl, stoop, and crouch?¹⁵⁰

Though it is true we should not assume that judges take the bench as blank slates in each case, we might expect that they have not prejudged the case; otherwise oral argument would be unnecessary. It would be naïve to suppose that judges approach each matter without some preconceived understanding about how the case should likely be decided, as they have read the briefs and relevant portions of the record, are familiar with the judicial precedent on point, and have likely read a bench memo on the case. Still, many of the questions analyzed in the study discussed below evidence some form of confirmation bias or belief perseverance, bringing into question the role and value of oral argument.

IV. The Study—Testing the Hypothesis of Whether Judges Display Confirmation Bias through the Number and Tone of Their Questions

A. The Judges in This Study

The three judges selected for this study, Rovner, Easterbrook, and Posner, were chosen for their similar length of experience on the bench, for their record of asking multiple questions in oral argument, and for the fact that they had all been appointed by presidents from the same political party.¹⁵¹

148 764 F.3d 677 (7th Cir. 2014).

149 *Id.* at 682.

150 *Id.*

151 The actual party was irrelevant, but I wanted to try and minimize ideological differences among judges in the study.

B. The Study—Parameters and Methodology

In this study I listened to one hundred randomly selected oral arguments from cases heard in 2007 to 2014, wherein at least one of the three judges listed above (the study judges) constituted a member of the panel. On several occasions two of the three study judges were on a panel. In those cases, the questions asked by each study judge were tallied as separate scores. I counted the number of questions asked of each side by each of the study judges, as well the total number of questions asked of each side by judges who were not included in the study (nonstudy judges). Questions asked by nonstudy judges were also included because these affect the number of questions that study judges are able to ask, or that they might want to ask (if for example, a question a study judge might have is asked by another judge). I also counted the number of questions asked by the study judges on rebuttal and the total number of questions asked by nonstudy judges on rebuttal. The database of one hundred cases comprised civil (45), criminal (29), and administrative agency (26) cases, which were all coded separately.

I also rated the tone and nature of the questions put to the attorneys for each side by the study judges to determine if they were hostile, neutral, or friendly in nature, or if they afforded evidence of confirmation bias. I discussed these criteria with my research assistants and had them verify my classification of questions by listening to the oral arguments and independently verifying the number of hostile, positive, and neutral questions.

To determine whether the questions were hostile in nature, I examined the word choice used by judges and listened to the tone of the question to determine whether it was positive, neutral or negative. I characterized as hostile questions those in which the judge's tone sounded angry (indicated by a raised voice or word choice like "idiotic" or a phrase that indicated annoyance or anger), those in which the judge impatiently interrupted counsel when counsel was attempting to answer a question, cases in which the judge asked rapid-fire questions barely affording counsel a chance to answer the question before being asked another, as well as those questions in which a judge sounded skeptical about counsel's position. An example of hostile questioning can be seen in the exchange that is described in part III, *supra*, between Judge Posner and Attorney Matthew Kairis, excerpted from the oral argument of *University of Notre Dame v. Sebelius*,¹⁵² in which Posner's questions to Kairis were asked in a tone of cynicism and disbelief. All questions denoted as hostile were rated and verified by my two research assistants.

Judge Posner made it easy to characterize questions as hostile by his tone of voice (which becomes raised and louder) and his interactions with counsel (in which he often exhorts them to answer his questions more directly). For example, in *Stanojkova v. Holder*,¹⁵³ Judge Posner instructed counsel in a harsh tone to “[a]nswer yes or no, is that not clear?”¹⁵⁴ Moreover, after listening to multiple oral arguments, it became apparent with respect to Judge Posner that the phrase, “I don’t understand . . .” or “I don’t get it . . .” or “no, no, no, no,” often prefaced a hostile question.¹⁵⁵ Judge Easterbrook’s hostile questions were denoted by his tone of voice, which becomes louder, more forceful, harsh sounding, and impatient.¹⁵⁶ Judge Rovner’s tone does not usually alter, even when asking a hostile question (which she is less prone to do), but the content of the question becomes more negative and her voice becomes slightly higher pitched, which seems to indicate incredulity.

Neutral questions were characterized by unemotional tone and neutral word choice. Examples of this type of question might be a question inquiring about facts from the record below, such as, “Did you represent the defendant at trial?”

I also coded questions that I saw as positive, i.e., that were designed to assist counsel in making a point favorable to the position that counsel wanted the court to adopt. Positive questions included those in which the judge appeared by tone, content or word choice to agree with or respond favorably to an argument advanced by counsel. An example of this type of question can be seen in the exchange in *Stanojkova v. Holder*,¹⁵⁷ a case involving an appeal from the denial of asylum to two ethnic Albanians from Macedonia.¹⁵⁸ The couple sought asylum, alleging persecution on the grounds of political opinion and ethnicity or race¹⁵⁹ after the police broke into their house and assaulted them. During the assault, the police forced the pregnant female appellant to completely disrobe. She was not raped, although she feared she would be. Their attorney argued that even though she had not been raped, forced disrobing still amounted to persecution.¹⁶⁰ The immigration judge and the Board of Immigration Appeals

¹⁵³ 645 F.3d 943 (7th Cir. 2011).

¹⁵⁴ See http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at 18:30.

¹⁵⁵ An example of this can be heard in the *Notre Dame v. Sebelius* oral argument referenced *supra*, note 121.

¹⁵⁶ For the record, Judge Posner has written that questioning during oral argument should be aggressive. See POSNER, *supra* note 56, at 129.

¹⁵⁷ *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011).

¹⁵⁸ *Id.* at 944–45.

¹⁵⁹ The mistreatment of ethnic Albanians by the Macedonian government has been documented since 1999. See REGIONAL AND ETHNIC CONFLICTS: PERSPECTIVES FROM THE FRONT LINES 10 (Judy Carter, et al., eds., 2009).

¹⁶⁰ http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3.

had found this act insufficient to constitute persecution.¹⁶¹ The question below provides an example of a positive question posed by Judge Rovner to the appellants' counsel:

Judge Rovner: Aren't there cases in which courts have found persecution based on a sexual assault which did not go beyond disrobing and groping?¹⁶²

Counsel: There are your Honor, and thank you for raising that.¹⁶³

C. Findings

My findings were consistent with studies conducted on Supreme Court oral arguments, in that in ninety percent of the cases in my study, the side that was asked more questions lost. In some cases, the disparity between the number of questions asked of each side was stark. For example, Judge Posner asked the losing side an average of 11.3 questions with only 3.4 to the winning side (asking the losing side around three times as many questions). Judge Easterbrook asked the losing side seven questions and the winning side four on average, (almost twice as many questions to the losing side). Judge Rovner asked on average almost three times as many questions of the losing side by posing 10.4 questions to the losing side and 3.3 to the winning side.

Though traditionally the losing side is the appellant, as only between four and sixteen percent of appellants prevail on appeal,¹⁶⁴ in the study sample I looked at, the Seventh Circuit seems to reverse more cases on appeal than the national average, particularly administrative-law cases, in which the reversal rate was thirty-eight percent. Moreover, the pattern of the losing side being asked more questions was consistent, no matter whether the side that ultimately lost the case was the appellant or the appellee.

The number of questions posed by the study judges to the losing side was generally consistent with the number of questions posed by nonstudy judges to the losing side; i.e., both study and nonstudy judges asked on average almost twice as many questions to the losing side as they did to the winning side. There were ten cases in which this did not occur. One might speculate that the nonstudy judges had a difficult time getting an

¹⁶¹ *Stanojkova v. Holder*, 645 F.3d 943, 946 (7th Cir. 2011).

¹⁶² http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at :58.

¹⁶³ http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at 1:03.

¹⁶⁴ Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 659 (2004). The author explains that there are different rates of success depending on whether it is the former plaintiff or defendant who is appealing. *Id.*

opportunity to ask questions in some of these cases because the study judges were relatively active questioners.

The exchanges between counsel on the losing side and the bench were also markedly more hostile with the tone of the judges, their choice of words, their tone, and their willingness to interrupt and disagree with a contention advanced by counsel being markedly more unfriendly to the side that ultimately lost the case. On average, the three study judges each asked three or four hostile questions per argument to the losing side and none to the winning side. The number of questions varied depending on whether the arguments were long or short arguments. In short arguments, each side is limited to ten minutes, while in long arguments each side generally gets twenty minutes or even more. The questions to the losing side also began much earlier in counsel's argument, commencing almost immediately after counsel approached the podium.

The judges also seemed to be framing the questions in such a way so as to obtain support for a preexisting premise or bias. In all of the cases where I saw evidence of confirmation bias, the side asked questions that suggested confirmation bias lost the appeal. For example, in *Baskin v. Bogan*,¹⁶⁵ a challenge to Wisconsin's statutory ban on same-sex marriage, Judge Posner asked counsel for the State of Wisconsin "why are all those obstacles thrown in the path of these people?"¹⁶⁶ And, "[s]o tradition *per se* is not a ground for continuing. So we have been doing this stupid thing for a hundred years or a thousand of years, we'll keep doing it because it is tradition. Don't you have to have some empirical or common sense reason justifying it?"¹⁶⁷ It should be noted that Posner had said in a June 2014 interview with Joel Cohen, prior to hearing oral argument in *Baskin-Wolf* that he was "much less reactionary than [he] used to be," noting that he had previously been opposed to same sex marriage but that "was still the dark ages regarding public opinion of homosexuality. Public opinion changed radically in the years since. My views have changed about a lot of things."¹⁶⁸

Posner's obvious irritation with the Attorney Generals in the *Baskin-Wolf* cases,¹⁶⁹ and with counsel for Notre Dame in the *Notre Dame*

¹⁶⁵ 766 F.3d 648 (7th Cir. 2014) (hereinafter "Baskin-Wolf"). This case was consolidated with *Wolf v. Walker* because the two cases involved the same issue. Note that the phrase "stupid thing" foreshadows the outcome.

¹⁶⁶ <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D09-04/C:14-2526:J:Posner:aut:T:fnOp:N:1412339:S:0 at 3:10>.

¹⁶⁷ *Id.* at 4:30.

¹⁶⁸ Cohen's interview with Posner is available at Joel Cohen, *An interview with Judge Richard A. Posner*, ABA JOURNAL (Jul. 1, 2014, 10:20 AM CDT), http://www.abajournal.com/magazine/article/an_interview_with_judge_richard_a_posner/.

¹⁶⁹ 766 F.3d 648 (7th Cir. 2014).

case¹⁷⁰ due to their inability to answer his questions to his satisfaction, may also have influenced the judges in writing their opinions. Judges are only human and may become irritated or even enraged at counsel if the judges feel their questions are not being answered or counsel is being disingenuous. Counsel's behavior may make the tone of the opinion much more harsh, which in turn may influence the lower court or administrative law judge when they reconsider the matter. For example, in his written opinion on the *Baskin–Wolf* cases,¹⁷¹ Judge Posner specifically referred to counsel's unpersuasive answers during oral argument. After reciting the Indiana Attorney General's response at oral argument to a question about whether Indiana's prohibition on same-sex marriage was about "successfully raising children," Judge Posner derided that argument in the opinion, concluding, "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."¹⁷² It is unclear whether Judge Posner's comments were prompted by counsel's inability to proffer a reasonable justification for the state's ban on same-sex marriage or were based on Posner's "prior" belief that prejudice against homosexuals belongs in the "dark ages."¹⁷³ Judge Posner similarly referenced the inadequate answers of Wisconsin's Attorney General in his written opinion.

However, judicial experience, along with the further opportunities that judges have to consider the case during conference and the drafting process, mean that a judge's annoyance with counsel's behavior during oral argument would not generally translate into counsel's losing the case on that basis.¹⁷⁴ In the Supreme Court, for example, the poor performances of advocates does not seem to jeopardize their cases, despite the fact that Justice Ginsburg has suggested that one may lose one's case at oral argument.¹⁷⁵ There are several examples of an advocate performing particularly badly during oral argument but nevertheless going on to win the case. For example, the oral argument performance of Solicitor General

170 743 F.3d 547 (7th Cir. 2014).

171 766 F.3d at 662.

172 *Id.*

173 See Cohen, *supra* note 168.

174 Most judges are able to separate their annoyance at counsel from the merits of the case before them. An example of this can be seen in the opinion handed down in *United States v. Boyd*, 475 F.3d 875, 876–77 (7th Cir. 2007) where the court noted, "We are . . . distressed at the sloppiness with which the case has been handled by both sides . . ."

175 Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999), noting, "I have seen few victories snatched at oral argument from a total defeat . . . But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument." Justice Ginsburg is obviously referring to the argument and not to counsel's performance as an advocate. Specifically, an argument can lose a case if the lawyer can't explain the substantive answers to questions in a way that will help the Court come to a conclusion in the lawyer's client's favor.

Donald Verrilli in the *National Federation of Independent Business v. Sebelius*,¹⁷⁶ was widely panned by pundits, one of whom noted that he “[s]ound[ed] less like a world-class lawyer and more like a teenager giving an oral presentation for the first time.”¹⁷⁷ Jeffrey Rosen derided him not for his “nervous” presentation but rather for his failure to offer a limiting principle despite being repeatedly pushed by the Court to do so.¹⁷⁸ In contrast, his opponent in that case, Paul Clement, who has been described as a “god” who gave “the argument of his life,”¹⁷⁹ lost; Verrilli won. Similarly in the recent case of *United States v. Rodriguez*,¹⁸⁰ Attorney O’Connor, in a nervous, stumbling, first time before the Supreme Court, won the case for Rodriguez, despite barely being able to articulate a complete sentence.¹⁸¹ Though this gives one confidence that it is not the style of delivery that is important, it also calls into question the importance of oral argument in the decision-making process, if, in addition to eloquence not necessarily mattering very much, counsels’ responses are not substantively helpful.

Given the findings that the losing side gets asked more questions and specifically more hostile questions, does oral argument really serve a purpose if the eventual outcome of a case has essentially already been decided and judges are using oral argument merely to confirm their existing biases? Because oral argument has been seen as an integral part of the appellate process, alternative justifications for it should be considered before calling for its elimination as a general practice in the Seventh Circuit.

V. The Functions of Oral Argument in the Administration of Justice

A. Oral Argument Serves a Formal Function of Epitomizing Justice Being Done

Although scholars are divided about the impact of oral argument on the final decisions of courts, most agree that oral arguments serve the role

176 567 U.S. 519 (2012).

177 Adam Serwer, *Obama’s Supreme Court Disaster*, MOTHER JONES (Mar. 27, 2012, 3:00 PM), <http://motherjones.com/mojo/2012/03/obamacare-supreme-court-disaster>.

178 J. Lester Feder, *Did Verrilli Choke and Does it Really Matter?* POLITICO (Mar. 27, 2012, 06:37 PM EDT), <http://www.politico.com/story/2012/03/did-verrilli-choke-and-does-it-really-matter-074559>.

179 *Id.*

180 135 S. Ct. 1609 (2015).

181 The oral argument is available at: http://www.oyez.org/cases/2010-2019/2014/2014_13_9972. For commentary on counsel’s performance see <https://www.bloomberg.com/view/articles/2015-01-22/supreme-court-tries-to-define-a-traffic-stop> (last visited Apr. 10, 2017).

of making justice visible.¹⁸² Since neither the parties, their advocates, nor the public are privy to either the informal discussions about cases conducted among judges and their clerks, nor the formal conferencing that takes place among judges after hearing oral argument, the argument itself serves as a visual and aural encapsulation of how justice is done, particularly since the briefs are usually read only by the attorneys writing them, along with the judges and their clerks. The interactions between the judges and counsel and the specific questions asked during oral argument serve to draw attention to the judges' concerns on various issues and become part of the deliberative process of deciding cases by applying legal precedent to facts. One of the functions of oral argument, therefore, is to reinforce the notion of deliberative and process-oriented justice, since oral argument is ostensibly open to the parties and the general public. It is a visual manifestation of getting one's day in court.

Gregory Pingree argues that making the administration of justice visible through mechanisms like oral argument is crucial:

Positive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch. Indeed, this collective perception is the very source of judicial legitimacy, the sine qua non of our common law system.¹⁸³

This justification may carry some weight in cases involving important social issues like *Baskin–Wolf*.¹⁸⁴

Whether this function holds up under closer observation is another question altogether. One might ask to whom justice is made visible during oral arguments, especially if one recalls that very few people are present for most oral arguments. In most cases, only the attorneys for each side are present; clients usually do not attend, although of course they may. The courtroom may also contain other attorneys waiting for their cases to be called, interested law students, or clerks. Most of those people do not need to see justice being done; they generally know enough about how the process works. Moreover, if an uninitiated person (e.g., a nonlawyer, interested member of the public) really wanted to see justice being done in appellate court, there are several obstacles to overcome. Finding out about

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182 Proponents of the attitudinal approach contend that oral argument matters little because cases are decided on the basis of the judge's political inclinations. Compare those views with Thai and Coats, *supra* note 45, who argue that oral argument is symbolically important to see justice being done.

183 David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 143 (2012) (quoting Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1102 (2007)).

184 766 F.3d 648 (7th Cir. 2014).

the arguments, when they are scheduled, and then getting through security into the federal building are some of the many challenges. One must then find the courtroom and follow somewhat dense and technical legal arguments. The court then takes the matter under advisement, but the public and parties are not privy to the judges' discussions during the judicial conferences following the arguments. An interested individual must wait several months before the decision is released and then must decipher dense legal reasoning to unpack the gist of the opinion. Even then, many decisions are not necessarily published, and an individual would have to be relatively sophisticated to find the decision on the court's website and parse its nuances. Additionally, individuals have already had their day in court in the form of a trial below, so justice, per se, has already been made visible.

B. The Role of Oral Argument in Assisting Judges in Delineating Rules and Crafting Their Opinions

The role of oral argument in crafting the limits on a rule should not be underestimated. In multiple oral arguments judges ask counsel where the line should be drawn. For example, in the *Stanojkova* case both Judge Posner and Judge Woods asked both counsel for both parties to help them craft a test that defined what kinds of bad acts rise to the level of "persecution" that warranted a granting of asylum.¹⁸⁵ After reminding counsel about a prior asylum-appeal case in which the court held that being beaten with the butt of a gun and being threatened did not constitute persecution, Judge Posner asked, "What can we do to bring some coherence to our persecution jurisprudence?"¹⁸⁶ Judge Woods pursued this line of questioning, asking, "If you were writing our opinion and you got to the part that says—here's the law of persecution, this is when it is enough and this is when it isn't, and I think that's what Judge Posner was asking you to draft for us. What would you say?"¹⁸⁷ Unfortunately, counsel in this argument had no coherent response for the judges, telling the court that "unfortunately today I was prepared to argue about the law of sexual assault and persecution."¹⁸⁸ Although the court attempted to push her to define the concept of persecution more generally and challenged her argument that sexual assault should be treated differently from other forms of assault in finding persecution, counsel for the appellants did not

185 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3.

186 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at the 2.15 mark. I coded this as a neutral question.

187 *Id.* at 3:38.

188 *Id.* at 2:22.

offer the court much assistance in clarifying its general persecution jurisprudence, merely asserting that sexual assault was “different” but unable to articulate exactly how or why.¹⁸⁹

Yet some judges contend that these types of exchanges with counsel during oral argument can make an opinion better. For example, Justice Burger noted that when he was on the New Jersey Supreme Court and that court did not hear oral argument routinely, “[t]he low quality of final judgments was traced directly to that practice. . . . Thus the New Jersey Supreme Court rule [now] requires oral argument of every case granted review.”¹⁹⁰ The California Supreme Court also appears to endorse this approach.¹⁹¹

Additionally, scholars have called on the Oklahoma Supreme Court to grant oral argument, in part because they believe it will lead to better opinions. Andrew Coats, along with his coauthor, has urged the court to “require oral argument as a rule rather than allow it as a rare exception”¹⁹² because it “tests, refines and furthers the deliberative process.”¹⁹³ Thai and Coats argued that if the court were to take the time to hear oral argument, rather than waste the court’s time, it could shorten the time needed to decide a case, as it constitutes a “Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.”¹⁹⁴

However, crafting a rule is something that judges themselves could do during conference without oral argument. Moreover, if judges wanted the parties’ assistance on those particular matters, they could get it through written submissions rather than require counsel to present themselves in person to respond, often at great expense, for a procedure that routinely lasts ten minutes.¹⁹⁵ This would correspond more closely to the procedure generally followed by the European Court of Human Rights.¹⁹⁶ That court

189 While counsel’s reluctance to engage in a broader discussion might have been a source of frustration to the judges on the bench in that case, it is counsel’s ethical obligation to be a zealous advocate for her client, i.e., to argue that the sexual assault her client had suffered constituted persecution. The lawyer was not necessarily ethically obliged to help judges craft a broad rule that might benefit future litigants by clarifying a particular area of law. Arguably, the duty to improve the law, required by Paragraph 5 of the Preamble to the Model Rules of Professional Conduct, might encompass this situation. See Model Rules of Professional Conduct: Preamble & Scope, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, https://americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

190 WRIGHTSMAN, *supra* note 11, at 10.

191 See part II *supra*.

192 Thai et al., *supra* note 45, at 716.

193 *Id.*

194 *Id.* at 717.

195 I do acknowledge that, at its best, oral argument in the form of a conversation can help focus the court’s attention on the heart of the issue and assist the court in crafting an appropriate response to the legal issue.

196 See Rule 64(2) of the Rules of Procedure of the European Court of Human Rights, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

affords counsel time for oral argument (referred to as submissions) uninterrupted by questions. However, judges may subsequently pose questions to counsel on the issues in the case, though the judges usually wait until the end of counsel's submissions to do so; they generally do not interrupt counsel.¹⁹⁷ Counsel may take some time to think about the answer to the judges' questions before responding. This procedure would seem to allow for a more thoughtful response than merely thinking on one's feet and responding with whatever comes to mind.¹⁹⁸

Another option, albeit a highly impractical and expensive one, would be to follow the example of the United Kingdom Supreme Court, where counsel provide the court and their opponents with thick binders filled with case authority¹⁹⁹ and the court and counsel look at the exact language crafted in previous cases and discuss how it might apply in the case before the court. The obvious downside to this approach is that arguments may (and do) last days. The positive side is that the court releases its opinions very promptly, often within three weeks of hearing oral argument because the issues and authority have been canvassed so thoroughly during oral argument.

VI. Oral Argument: A Need for Reform and Possible Alternatives

Based on the evidence offered above, the answer to the question about how important oral argument is to the outcome of many cases would appear to be "not very." Oral arguments do not necessarily seem to be the best method of helping to refine opinions or even focusing the panel's attention on the true essence of a case. If one considers that oral arguments in the Seventh Circuit last only ten minutes per side on short-argument days, and that the court may hear as many as nine arguments in a row, it might be particularly difficult for a judge to focus his or her attention on the specifics of a case in that short amount of time, particularly after having listened to multiple previous arguments on potentially

197 See Rule 64(2) of the Rules of Procedure of the European Court of Human Rights, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

198 Of course, the argument could be made that counsel should anticipate the question during oral argument and be prepared to respond to it.

199 Rule 22(4) of the Supreme Court Rules provides that "The appellant and every respondent (and any intervener and advocate to the Court) must then sequentially exchange their respective written cases and file them, and every respondent (and any intervener and advocate to the Court) must for the purposes of Rule 23 provide copies of their respective written cases . . ." Sup. Ct. R., https://www.supremecourt.uk/docs/uksc_rules_2009.pdf. Rule 24 provides, "The volumes of authorities that may be referred to during the hearing must be prepared in accordance with the relevant practice direction and the requisite number of copies of the volumes of authorities must be filed . . ." Sup. Ct. R. 24 (U.K.), https://www.supremecourt.uk/docs/uksc_rules_2009.pdf.

completely different areas of the law. Moreover, as the study shows, oral arguments may be dominated by one particular judge who might have an axe to grind on an issue.

Additionally, oral arguments seem to only generally change judges' minds in a limited number of cases.²⁰⁰ In many of the cases I studied, the tone, nature, content and number of the questions posed by the judges seemed to indicate the judge had already made up his or her mind on the matter, and it was going to be essentially impossible for counsel to change the judge's mind. Because confirmation bias appears to influence the tone and content of a judge's questions, oral argument seems to serve in many cases as a means of justifying a judge's initial decision on a case. This does not seem an effective use of a judge's time.

Moreover, oral arguments are only one step in the process of turning out a final opinion on the case. Even if oral arguments were to succeed in changing a judge's initial leanings on a case, it is not always clear that a judge's newfound view of the case would prevail. Judges vote on the case during judicial conferences, and if one then realized that one's other two colleagues felt differently about the case, a judge might change her mind once again at that point. Judges are also free to change their minds when writing an opinion or when drafts of opinions are circulated, and also might come to feel differently about a case during discussions with their clerks.²⁰¹

Given that oral argument may serve little useful purpose in many cases, one must then consider the alternatives, particularly given the precedent-making function of courts of appeals. The role of a federal court of appeals like the Seventh Circuit is not only to decide the outcome of a particular appeal but to craft precedent for that circuit. This is a particularly important function given the small number of cases granted certiorari by the United States Supreme Court.²⁰² A court of appeals is thus very interested in how its decision should be crafted, as that decision essentially articulates a rule for similar cases. Based on the arguments I listened to, counsel were often unable to articulate a good response to that type of question. Moreover, counsel often seemed taken aback by some of the questions posed by the court and did not articulate effective responses

200 In my study the number appears to be about ten percent.

201 Judges acknowledge that sometime the opinion "just won't write." See Justice Scalia's comments to the ABA in *Appellate Issues* in Gaëtan Gerville-Réache, *Justice Scalia at the AJEI Summit in New Orleans*, APP. ISSUES 4 (2013), http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf.

202 In 2014 the Court's caseload was the lightest it has ever been, at 71 cases. According to the 538 blog, there has been a downward trend in the number of cases the Court hears. See *The Supreme Court's Caseload is on Track to be the Lightest in Seventy Years*, <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/> (last visited Apr. 13, 2017).

to questions that caught them off-guard. Judge Posner has noted that the quality of oral argument in federal lower courts and the Supreme Court is not good.²⁰³ It might therefore be more effective to email counsel questions that the court would like addressed and give counsel a short time to respond in writing to those questions. It would also be more cost- and time-effective, as counsel would not have to attend argument in person. Similarly, judicial resources would be put to better use, as the judges could read counsel's responses to questions at a time when they are not tired. The Seventh Circuit routinely listens to up to nine arguments in a row on short-argument days, which has to be extremely tiring for judges. If they do not have counsel before them, judges may also be less likely to become annoyed or irritated at counsel and less likely to allow that annoyance to color their view of counsel's argument.²⁰⁴

VII. Conclusion

Although this is a small study, both in the number of cases and the number of judges examined, it seems to suggest that confirmation bias may be one of the factors at work in the types of questions that judges pose to counsel for litigants against whom they ultimately rule. Confirmation bias manifests itself in the number and tone of questions posed to a side that ultimately loses the case. Tuchman's theory that "all subsequent activity becomes an effort to justify it"²⁰⁵ when confirmation bias is present seems to be born out often with respect to oral argument. Although Judge Posner believes that experience and temperament can help judges counteract their "priors,"²⁰⁶ confirmation biases may be so entrenched that judges themselves may not realize they are present.

Courts should carefully consider the merits of an appeal before granting oral argument. Oral argument should be granted only for cases for which two judges are confident that oral argument could make a difference in the outcome, or for cases that are highly important to the public. On cases for which courts do decide to grant oral argument, judges should be mindful of their biases and their tone, and of the number and content of their questions so that they do not seek to reinforce already existing leanings.

203 See Posner, *supra* note 56, although he did concede that it can be helpful to judges.

204 It is difficult not to speculate, for example, about the role that Judge Posner's obvious annoyance with Matthew Kairis might have played in the outcome of the *University of Notre Dame v. Sebelius* case.

205 Cited in Nickerson, *supra* note 99, at 191.

206 "Although the average quality of oral argument in federal courts (including the Supreme Court) is not high, the value of oral argument to judges is very high." RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 160–61 (1999).