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# Law and the Argumentative Theory, 90 Or. L. Rev. 837 (2012)

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# Essay

TIMOTHY P. O'NEILL\*

## Law and “The Argumentative Theory”

Introduction .....	837
I. “The Argumentative Theory” .....	839
II. “Argumentative Theory” and the Law: A Lesson for Judges .....	843
III. “Argumentative Theory” and the Law: A Lesson for Moot Court Participants (and Lawyers) .....	851
Conclusion .....	853

### INTRODUCTION

Like many law professors, I have coached my share of moot court teams. As you probably know, in most competitions students either choose or are assigned one side of the case to brief. But for the oral argument segment of the competition, students must argue both sides of the case, “on-brief” and “off-brief,” often in alternate rounds.

At the end of a competition, with their heads still swimming with arguments and counterarguments, students will sometimes ask, “OK, so can you tell us which is the correct side?” I always say, “Of course I can. . . . The correct side is always the side you are currently arguing.”

Some students see this as a cynical response. But I remind them that a moot court issue is a special category of legal dispute. The reason the issue was chosen for the competition in the first place is the perception that there must be two very plausible sides to this

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\* Professor, The John Marshall Law School. I wish to acknowledge Michelle Andres for her excellent research assistance.

issue. And I always go on to tell them that the lawyer's job as advocate is not to lead the court to some single absolute "truth"; rather, it is simply to convince the court why her client's position is more legally and logically correct than the opposing side's position.

I thought of this recently when I read about a provocative new idea presented by cognitive scientists Hugo Mercier and Dan Sperber. They call it "The Argumentative Theory."<sup>1</sup> After examining this new concept, Stephen Pinker said that "[i]t is likely to have a big impact on our understanding of ourselves and current affairs."<sup>2</sup> Jonathan Haidt has called Mercier and Sperber's work "one of my favorite papers of the last ten years. I believe that they have solved one of the most important . . . puzzles in psychology."<sup>3</sup>

The puzzle is this: why are human beings so good at reasoning in some situations and so consistently, hopelessly wrong in others? Mercier and Sperber provide an elegant solution: it is because the function of human reasoning is not to logically arrive at the "right" answer.<sup>4</sup> On the contrary, the function of reasoning is to find support for an answer that the reasoner has already arrived at. In other words, the function of reasoning is argumentative. Its role is to create arguments intended to persuade. A skilled arguer is not necessarily after the truth; he is after arguments that support the views he already possesses so that he may convince others. Reasoning thus has a strongly social function.

Jonathan Haidt summarized the Mercier and Sperber thesis thusly: "[R]easoning was not designed to pursue the truth. Reasoning was designed by evolution to help us win arguments. That's why they call it the Argumentative Theory of Reasoning."<sup>5</sup> And another commentator reduced the thesis to one sentence: "Reasoning isn't about logic (it's about arguing)."<sup>6</sup>

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<sup>1</sup> Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57 (2011), available at <http://ssrn.com/abstract=1698090>.

<sup>2</sup> John Brockman, *The Argumentative Theory: A Conversation with Hugo Mercier*, EDGE (Apr. 27, 2011), <http://edge.org/conversation.php?cid=the-argumentative-theory>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Jonathan Haidt, Speech at the New Science of Morality: An Edge Conference (July 20, 2010) (transcript available at [http://edge.org/3rd\\_culture/morality10/morality.haidt.html](http://edge.org/3rd_culture/morality10/morality.haidt.html)).

<sup>6</sup> Morendil, *Reasoning Isn't About Logic (It's About Arguing)*, LESSWRONG (Mar. 14, 2010, 4:42 AM), [http://lesswrong.com/lw/1wu/reasoning\\_isnt\\_about\\_logic\\_its\\_about\\_arguing](http://lesswrong.com/lw/1wu/reasoning_isnt_about_logic_its_about_arguing).

## I

## "THE ARGUMENTATIVE THEORY"

Mercier and Sperber begin with some basic definitions. An "inference" in psychology is "the production of new mental representations on the basis of previously held representations."<sup>7</sup> Reasoning, on the other hand, is simply a type of inference. "*Reasoning* . . . refers to a very special form of inference at the conceptual level, where not only is a new mental representation (or *conclusion*) consciously produced, but the previously held representations (or *premises*) that warrant it are also consciously entertained."<sup>8</sup> Thus, in human reasoning, "premises are seen as providing *reasons* to accept the conclusion."<sup>9</sup> Psychologists such as Daniel Kahneman have differentiated between the mental mechanisms that produce inferences as opposed to those that engage in reasoning. They refer to the parts of the brain that produce inferences as "System 1" and to the parts of the brain that produce reasoning as "System 2."<sup>10</sup>

A person is not conscious of the inferences produced by System 1; the work takes place inside the brain at a "subpersonal" level. A person can be aware that he has reached a conclusion—the output of the inferential process—but unaware of the process that produced it. According to Mercier and Sperber, "All inferences carried out by inferential mechanisms are in this sense *intuitive*. They generate *intuitive beliefs*; that is, beliefs held without awareness of reasons to hold them."<sup>11</sup>

But aren't beliefs always supported by reasons? Some beliefs are, but some beliefs are not. Mercier and Sperber distinguish between two types of belief. System 1 "intuitive beliefs" are created unconsciously without reasoning.<sup>12</sup> "Reflective beliefs," however, are the product of System 2 conscious reasoning.<sup>13</sup> And what characterizes this type of reasoning is "awareness not just of a conclusion but of an argument that justifies accepting that

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<sup>7</sup> Mercier & Sperber, *supra* note 1, at 57.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 58; see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing System 1 and System 2 thinking).

<sup>11</sup> Mercier & Sperber, *supra* note 1, at 58.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

conclusion.”<sup>14</sup> Yet “reasoning” does not passively allow “argument” to sweep you towards a “conclusion.” Rather, arguments are *outputs* of intuitive conclusions. The conclusion comes before the argument. Arguments—that is, reasons to accept a conclusion—are driven by the already-determined conclusion.<sup>15</sup>

But if the conclusions have been unconsciously produced by System 1, then why is System 2 “reasoning” even necessary? Traditionally, scientists and philosophers have celebrated human reasoning as a way to correct mistakes in System 1 intuitions.<sup>16</sup> But Mercier and Sperber argue that reasoning, properly viewed, is not primarily about the reasoner trying to reach conclusions for himself.<sup>17</sup> Rather, the function of reasoning is argumentative. That is, a person uses reasoning to prepare to convince others that the conclusion that he has already reached is the correct conclusion. Reasoning is primarily concerned with social communication, not individual truth seeking.<sup>18</sup>

To take this out of the realm of tautology, Mercier and Sperber then attempt to show that certain widely acknowledged flaws in reasoning are only flaws if the purpose of reasoning is to reach a “correct” result. Yet they are not flaws at all if the purpose of reasoning is merely to win arguments.

They begin by noting those studies that purport to show that people have poor reasoning skills. Mercier and Sperber concede that these experiments show that people generally are not adept at solving abstract logical problems.<sup>19</sup> Yet their theory insists that abstract reasoning—reasoning with nothing real at stake—is not why humans use reasoning skills.<sup>20</sup> If their theory is correct, then studies should show that people are able to make and understand arguments in those situations where one person is genuinely trying to convince another person of something significant. And indeed they cite studies showing that people are adept at making, understanding, and evaluating arguments when there is a real issue at stake.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 59.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 61.

<sup>20</sup> *Id.*

For example, Mercier and Sperber cite a study where a participant was asked to think about a topic such as "What are the causes of school failure?"<sup>21</sup> After several minutes, the participant was then asked to state and defend his views to the experimenter; significantly, the experimenter did not challenge the participant's views in any way. The devisers of the study criticized the subjects for expressing only the side they were supporting and failing to think through the issue by anticipating counterarguments and rebuttals. They concluded that the arguments exhibited flawed reasoning.

Yet Mercier and Sperber came to the opposite conclusion. According to their "argumentative theory," if the reasoner's goal is to convince others, the reasoner's first task is to marshal supporting arguments. The reason the participants did not also produce counterarguments is, quite simply, that the experimenter did not challenge their views. Mercier and Sperber then cite other studies showing that, when directly challenged, people are quite capable of rebutting contrary arguments.<sup>22</sup> In fact, these studies show that reasoning skills improve when people are challenged in argumentative settings.<sup>23</sup>

Mercier and Sperber then turn to what is widely regarded as a flaw in reasoning: "confirmation bias." Confirmation bias is defined as the "seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."<sup>24</sup> Conventional wisdom holds that confirmation bias places blinders on a reasoning person and leads to faulty thinking.

But Mercier and Sperber refuse to accept this as a flaw. After examining the results of several studies contending that confirmation bias is a defect in reasoning,<sup>25</sup> Mercier and Sperber draw very different conclusions. They see confirmation bias as occurring only when participants are producing arguments in situations in which their own claims are being actively challenged. Rather than a reasoning flaw, confirmation bias is merely an argumentative tool used to win over doubting opponents.<sup>26</sup>

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<sup>21</sup> *Id.* at 62.

<sup>22</sup> *Id.* at 62–63.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 63 (quoting R.S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomena in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998)).

<sup>25</sup> *Id.* at 63–66.

<sup>26</sup> *Id.* at 64.

So, too, with “motivated reasoning,” the tendency of people to reject evidence that contradicts their existing beliefs.<sup>27</sup> From an epistemic viewpoint, it is a flaw in reasoning that will perhaps lead to an incorrect result. But again, through the lens of argumentative theory, Mercier and Sperber see this not as a way people convince themselves of the truth of their opinions but rather as a tactic to be able to meet the challenges of others in an argumentative setting.<sup>28</sup>

Mercier and Sperber finally take on the classical view that reasoning—the conscious weighing of possible options and the consideration of pros and cons—is the proper way to come to the best decision. Of course, recent studies—given prominence by Malcolm Gladwell in *Blink*<sup>29</sup>—actually indicate that the best decisions are often made intuitively in split seconds.<sup>30</sup> On the other hand, there is evidence that sometimes people who are asked to actually provide reasons for a decision they will make may tend to make worse decisions.<sup>31</sup>

And Mercier and Sperber provide a reason for this: because reasoning’s purpose is essentially argumentative, it is geared “not towards the best decisions but towards decisions that are easier to justify.”<sup>32</sup>

Their final conclusion?

Reasoning can lead to poor outcomes not because humans are bad at it but because they systematically look for arguments to justify their beliefs or their actions. The argumentative theory, however, puts such well-known demonstrations of “irrationality” in a novel perspective. Human reasoning is not a profoundly flawed general mechanism; it is a remarkably efficient specialized device adapted

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<sup>27</sup> *Id.* at 66.

<sup>28</sup> *Id.*

<sup>29</sup> MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007).

<sup>30</sup> Mercier & Sperber, *supra* note 1, at 69.

<sup>31</sup> See, e.g., Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991). Wilson and Schooler’s 1991 study asked people to rank the quality of different brands of strawberry jam. People who were simply asked which jams were the best tasting produced results consistent with a Consumer Reports study. However, when people were asked to provide explicit reasons for their choices, they chose Consumer Reports’ worst-rated jam. Wilson and Schooler opined that “thinking too much” makes us focus on all sorts of variables that do not really matter. The study is also discussed in Jonah Lehrer, *We Are All Talk Radio Hosts*, WIRED (Aug. 5, 2010, 1:03 PM), <http://www.wired.com/wiredscience/2010/08/we-are-all-talk-radio-hosts>.

<sup>32</sup> Mercier & Sperber, *supra* note 1, at 69.

to a certain type of social and cognitive interaction at which it excels.<sup>33</sup>

## II

### "ARGUMENTATIVE THEORY" AND THE LAW: A LESSON FOR JUDGES

So what can a judge learn from "The Argumentative Theory"?

Mercier and Sperber have supported their work with an impressive amount of empirical evidence based on dozens of studies and experiments. But their basic thesis—that conclusions drive reasoning and not vice versa—has also been expressed over the years by a number of prominent judges and legal scholars. Consider this: "Judg[ment] begins . . . with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it."<sup>34</sup> That was written by Jerome Frank in 1930. Or this: "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."<sup>35</sup> That was Chief Justice Charles Evans Hughes in the 1930s.

Another example of conclusion-driven reasoning is found in Justice William O. Douglas's story about the work habits of Chief Justice Harlan Fiske Stone. Douglas said that Stone would write draft opinions with blanks after legal points. He would then tell his clerks to find case precedent to support the points.<sup>36</sup> In the same vein, Laura Kalman's biography of Abe Fortas relates a story from a former Fortas clerk. Fortas once dropped a draft opinion on the clerk's desk with this curt direction: "Decorate it."<sup>37</sup> The clerk interpreted this to mean that he was to find case citations to support the legal conclusions Fortas had already reached.<sup>38</sup>

More recently, Justice Anthony Kennedy described judging in this way: "You know, all of us have an instinctive judgment that we make. . . . But, after you make a judgment, you then must formulate the

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<sup>33</sup> *Id.* at 72.

<sup>34</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 108 (Anchor Books 1963) (1930).

<sup>35</sup> WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 8 (1980).

<sup>36</sup> *Id.* at 171.

<sup>37</sup> LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 271–72 (1990).

<sup>38</sup> *Id.*



reason for your judgment into a verbal phrase, into a verbal formula.”<sup>39</sup>

Judge Richard Posner has described the docket of the U.S. Supreme Court as being “dominated by cases in which the conventional sources of legal authority, such as pellucid constitutional text or binding precedent . . . do not speak in a clear voice.”<sup>40</sup> If the correct decision were clear, the Supreme Court would not have granted review.<sup>41</sup> Thus, according to Posner,

[I]t is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one uses terms like “correct” and “incorrect” in this context, all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it.<sup>42</sup>

Thus, according to Posner, “From a practical standpoint, constitutional adjudication by the Supreme Court is also the exercise of discretion—and that is about all it is.”<sup>43</sup>

Stanley Fish has described the way judges work by distinguishing between “using” theory and “making use” of theory.<sup>44</sup> Fish argues that no one in any practice, much less law, “uses” theory in the sense of consciously following a set of rules in order to get to a result. Rather, a judge “makes use” of theory to convince the legal community that her ruling is not merely based on personal whim or caprice. “Using theory” in this way enables the judge to show that her ruling is “the inevitable production of a principled and consistent history.”<sup>45</sup> It enables the judge to claim that her decision is “more or less dictated by the inexorable laws of the judicial process.”<sup>46</sup>

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<sup>39</sup> Interview by the Academy of Achievement with Anthony Kennedy, Supreme Court Justice, in New York City, N.Y. (June 3, 2005) (transcript available at <http://www.achievement.org/autodoc/page/ken0int-1>); see also Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16, 19 (quoting the Academy of Achievement interview).

<sup>40</sup> Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 42–43 (2005). Material from this article is incorporated into RICHARD A. POSNER, *HOW JUDGES THINK* 269–323 (2008).

<sup>41</sup> Posner, *supra* note 40, at 43.

<sup>42</sup> *Id.* at 40.

<sup>43</sup> *Id.* at 41.

<sup>44</sup> Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

<sup>45</sup> *Id.* at 1791.

<sup>46</sup> *Id.* at 1793.

Thus, Mercier and Sperber's work provides some solid empirical support for a position that has been articulated by some of the most astute legal theorists and judges of the last century. Reasoning—or, in Fish's terminology, the use of theory—is used not as a vehicle to discover truth but rather as a way of convincing others that we have already discovered it.

But here is the irony. At the very time Mercier and Sperber are actually providing empirical support for this position taken intuitively by some of the best legal minds of the twentieth century, several of America's most prominent lawyers and judges are now denying its validity. For example, take a look at Sonia Sotomayor's testimony during her Supreme Court confirmation hearing before the Senate Judiciary Committee in 2009. Here is her exchange with Senator John Kyl (R-AZ):

KYL: Let me ask you about what [President Obama] said—and I talked about in my opening statement whether you agree with him. He used two different analogies. He talked once about the first 25 miles of a 26-mile marathon, and then he also said in 95 percent of the cases the law will give you the answer and the last 5 percent legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge's heart. Do you agree with him that the law only takes you the first 25 miles of a marathon and that that last mile has to be decided by what's in the judge's heart?

SOTOMAYOR: No, sir. That's—I don't—wouldn't approach the issue of judging in the way the president does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law.

KYL: And—

SOTOMAYOR: The judge applies the law to the facts before that judge.<sup>47</sup>

Later that day, Professor Louis Michael Seidman of Georgetown blogged the following:

I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to

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<sup>47</sup> Paul Kane, *Kagan Sidesteps Empathy Question, Says "It's Law All the Way Down"* WASH. POST, June 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062903935.html> (quoting Justice Sotomayor's July 14, 2009, confirmation hearing).

be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? . . . To claim otherwise—to claim that fidelity to uncontested legal principles dictates results—is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith. What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today? That judges and [J]ustices must live these lies throughout their professional careers [sic]?<sup>48</sup>

Almost a year to the day later, Senator Kyl asked Elena Kagan, yet another Obama Supreme Court nominee appearing at her confirmation hearing, the same question about whether she agreed with President Obama's marathon analogy and about the need for a judge to have heart and empathy. Here is her response:

Senator Kyl, I think it's law all the way down. . . . [T]he question is what the law requires. . . . And people can disagree about how . . . they apply [law] to a case. But it's law all the way down, regardless. . . . I don't know what the president was speaking about specifically. . . . But at the end of the day what the judge does is to apply the law. And as I said, it might be hard sometimes to figure out what<sup>49</sup> the law requires in any given case, but it's law all the way down.

Mercifully for Justice Kagan, Professor Seidman did not comment on her testimony. But both Sotomayor and Kagan won confirmation to a Supreme Court whose current Chief Justice, John Roberts, analogizes judging to no more than objective baseball umpiring.<sup>50</sup>

So why this lack of sophistication from people who are currently our nation's top judges? Why do these judges insist that a complex legal question is amenable to an objectively "correct" answer? Robin West has recently suggested that it may be in response to a general perception of the "radical indeterminacy" of law.<sup>51</sup> And she contends that "[r]adical legal indeterminacy is no longer the view of outliers; it

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<sup>48</sup> Louis Michael Seidman, Comment to *The Federalist Society Online Debate Series: The Sotomayor Nomination, Part II*, FEDERALIST SOC'Y (July 13, 2009), <http://www.fed-soc.org/debates/dbtid.30/default.asp>.

<sup>49</sup> Kane, *supra* note 47.

<sup>50</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

<sup>51</sup> Robin West, *The Anti-Empathic Turn*, NOMOS (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1885079](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885079) (manuscript at 43).

is, rather, a widely shared conventional wisdom."<sup>52</sup> So in response we see a "craving for certainty in the face of a presumed indeterminacy that underscores a good bit of both law and legal writing."<sup>53</sup>

The faith that Sotomayor, Kagan, and Roberts purportedly have in the ability of legal reasoning to reach an objectively correct answer thus runs headlong into Mercier and Sperber's cautionary conclusions concerning the limits of reasoning in general. At the very time psychologists are preaching humility in our abilities to discover truth, Supreme Court Justices seem naively optimistic that simply using "law all the way down" will lead to the one correct answer.

And the irony is this: the more an appellate court opinion uses conventional legal reasoning to demonstrate that a close legal question is amenable to only one possible answer, the more the losing party tends to question the fairness of the court's decision. Dan Kahan has expressed this phenomenon thusly: "The Court engages in reasoned elaboration of its decisions to promote confidence in its impartiality. But far from easing public anxiety, the doctrines, rules, and procedures that the Court uses to try to assure us of its neutrality only intensify the polarizing effect."<sup>54</sup>

Why is this true?

First, Kahan looks at the influence of both psychology and judicial craft norms on opinion style. He begins by noting that "[j]udicial opinions are notoriously—even comically—unequivocal. It is rare for opinions to acknowledge that an issue is difficult, much less that there are strong arguments on both sides."<sup>55</sup> As for the psychological reason, Kahan anticipates Mercier and Sperber by noting the tendency of people to emphasize evidence favorable to their positions and to downplay evidence that is not.<sup>56</sup> As for the craft norm, Kahan notes that "[j]udges . . . are likely to believe that frankly acknowledging the vulnerability of their reasoning to counterarguments will invite the suspicion that they are deciding on the basis of some personal value or interest."<sup>57</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 58 (2011).

<sup>55</sup> *Id.* at 59.

<sup>56</sup> *Id.* at 60 (discussing the concept of "coherence-based reasoning").

<sup>57</sup> *Id.*

Yet Kahan argues that exactly the opposite is true. When two sides are divided on an issue they both care about, a profession of certainty from one side actually increases, rather than shrinks, the conflict between the two groups. Kahan cites studies showing that within a group that agrees on one side of an issue, there is a dynamic that tends to stifle doubts and uncertainties.<sup>58</sup> Thus, the group's public pronouncements will actually appear to be more single-minded and extreme than the views of individual members of the group really are.

And how do people on the opposing side view this expression of absolute certainty? They react by becoming even more convinced that their opponents must be "either deluded, dishonest, or both."<sup>59</sup> And, of course, "part of the evidence that the other side *must* be blinded by partisanship is just how uniformly and strongly *one's peers* reject the other side's view of the matter."<sup>60</sup> So that side, in turn, increases its own professed certainty and the cycle begins again.

The result is what Kahan calls "exaggerated certitude in judicial opinion writing."<sup>61</sup> This dynamic is reminiscent of the old joke about the doctor telling the patient, "I have some bad news. You have six months to live." When the patient responds, "I'd like a second opinion," the doctor says, "OK, I think you're ugly, too." When a judicial opinion—especially a U.S. Supreme Court majority opinion in a five-to-four case—is couched in completely unequivocal language, its message to the other side is: "You're wrong. And, by the way, you are stupid and perhaps dishonest, too."

What Mercier and Sperber's work should make an appellate judge appreciate is that the reasoning skills she uses so adroitly are geared not to discover absolute truths but rather to convince others of the wisdom of her own position. This insight should promote at least a degree of humility in a judge's belief that she alone possesses the truth.

So is there any specific recommendation concerning how a judge should write an opinion? Kahan recommends that judges should cultivate the quality of *aporia* in their opinions.<sup>62</sup> Kahan defines *aporia* as a "mode of philosophical or argumentative engagement" that recognizes "an inescapable (perhaps tragic) difficulty . . . of the

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<sup>58</sup> *Id.* at 60–61.

<sup>59</sup> *Id.* at 61.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 62.

problem or phenomenon under investigation."<sup>63</sup> It acknowledges "the limited amenability of the *problem* [itself] to a satisfactory solution."<sup>64</sup> Kahan stresses that an aporetic approach does not preclude a judge from reaching a definitive outcome or resolution. "But it necessarily treats as *false*—a sign of misunderstanding—any resolution of the problem that purports to be unproblematic."<sup>65</sup> And Kahan cites studies suggesting that an aporetic approach may indeed "reduce the culturally polarizing effects of opinions in constitutional law."<sup>66</sup>

At this point, a judge might fairly ask "OK, so reasoning is basically a rhetorical tool. But is reasoning totally self-serving? Is there any aspect of reasoning that actually helps us arrive at fairer decisions?" On this issue, Hugo Mercier has offered some guidance.

After studying Mercier and Sperber's work, Jonah Lehrer rather pessimistically concluded that we need to change our metaphors for reasoning.<sup>67</sup> Lehrer noted that we like to think of our reasoning power as enabling us to think like scientists in our quest to find the truth. But Lehrer said that the voice in your head is not a scientist—it is actually a talk radio host: "That voice in your head spewing out eloquent reasons to do this or do that doesn't actually know what's going on . . . . Instead, it only cares about finding reasons that sound good . . . . (Put another way, we're not being rational—we're rationalizing.)"<sup>68</sup>

Mercier responded to Lehrer's comments by saying that his study's findings were not as pessimistic as Lehrer seemed to think.<sup>69</sup> Mercier said that while people show bias in the *production* of arguments, humans are actually quite adept at *evaluating* arguments. This is because, in an evolutionary sense, a person is better off being

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 62 n.347.

<sup>65</sup> *Id.* at 62. For an example of a judge using an aporetic approach in decision making, see Judge Gerard E. Lynch's opinion in *United States v. Davis*, 648 F.3d 84 (2d Cir. 2011). The case concerned a heated dispute over who was the proper owner of a Camille Pissarro monotype. Judge Lynch began his opinion by observing, "Unlike in the Judgment of Solomon, *see* 1 Kings 3:16–28, neither party has blinked, and we are therefore in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss." *Id.* at 86.

<sup>66</sup> Kahan, *supra* note 54, at 64.

<sup>67</sup> Lehrer, *supra* note 31.

<sup>68</sup> *Id.*

<sup>69</sup> Hugo Mercier, Comment to *The Reason We Reason*, WIRED (May 4, 2011, 3:22 PM), [http://www.wired.com/wiredscience/2011/05/the-sad-reason-we-reason/#disqus\\_thread](http://www.wired.com/wiredscience/2011/05/the-sad-reason-we-reason/#disqus_thread).

convinced rather than clinging to false beliefs. “When people are in groups and argue about logical, mathematical or factual problems, they robustly converge on the best solution. If the production of argument was unable to influence other people, it would be pointless. But if listeners were not mostly influenced for their better good, they would not be listening.”<sup>70</sup>

Mercier then mentioned something that should be of interest to any judge on a collegial appellate court: “The evolutionary logic suggests that reasoning can lead us towards the truth, if only we reason with people who disagree with us to start with.”<sup>71</sup>

In other words, the way appellate decisions are theoretically reached by panels of judges should be an optimal way of reaching the best result. Ideally, individual judges with conflicting views should present them for evaluation by the group. Their colleagues’ critiques may then result in a change of the views of one or more judges.

Do appellate courts really operate this way? It is doubtful. First, recall Mercier’s finding that people in groups converge on the best answer when they are dealing with “logical, mathematical or factual problems.” A difficult legal issue is arguably a much different problem. As noted above, an individual judge comes to a legal issue with values and proclivities that may make him invulnerable to argument.

Second, several recent books about case conferences within the U.S. Supreme Court—or at least those conducted by Chief Justice Rehnquist—suggest the futility of using the conference as a vehicle for changing a Justice’s vote. Here is how Jeffrey Rosen described Rehnquist’s style of presiding at a conference:

He ran an especially tight ship . . . . Briskly going around the table . . . he refused to let discussion wander. Some colleagues complained that this format discouraged active debate, but Rehnquist argued that *because most of the [J]ustices had already made up their minds*, a protracted colloquy would be a waste of time.<sup>72</sup>

And Justice John Paul Stevens recently wrote admiringly of Rehnquist’s style:

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 195 (2006) (emphasis added).

At our conferences on argued cases, he insisted that each of us speak only in turn, and he protested additional debate or discussion after the first round of comments was completed. He was equally firm in those protests regardless of whether the speaker agreed or disagreed with his own views.<sup>73</sup>

Perhaps this is a function of the U.S. Supreme Court's small, rarefied docket. The "hot button" issues the Supreme Court often decides—burning the American flag, demonstrating at a veteran's funeral, abortion—may tend to produce hardened views among the Justices that are immune to group discussion. Perhaps this is why Chief Justice Rehnquist believed that the Justices at conference were largely impervious to opposing arguments.

It may be that collegial courts work best when intermediate appellate courts consider run-of-the-mine cases where judges do not start out with strong emotional proclivities. Mercier and Sperber insist that human reasoning works well in evaluating arguments. Relying on a group of judges to evaluate both the arguments of the parties, as well as their colleagues' critiques of these arguments, may actually be the best way to achieve the optimal result. As Mercier said, "The evolutionary logic suggests that reasoning can lead us towards the truth, if only we reason with people who disagree with us to start with."<sup>74</sup>

The lesson an appellate judge could take from Mercier and Sperber's work may be to understand the line between evaluating an argument and producing one yourself. When judges in a collegial setting begin producing their own arguments, discussion has probably reached a point of diminishing returns.

### III

#### "ARGUMENTATIVE THEORY" AND THE LAW: A LESSON FOR MOOT COURT PARTICIPANTS (AND LAWYERS)

So what can our moot court students, who are forced to alternatively argue both sides of an issue, learn from Mercier and Sperber?

First, consider Chief Judge Alex Kozinski's insightful article entitled *In Praise of Moot Court—Not!*<sup>75</sup> Chief Judge Kozinski criticizes the practice of having moot court participants argue both

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<sup>73</sup> JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 171 (2011).

<sup>74</sup> *Id.*

<sup>75</sup> Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178 (1997).



sides of an issue in alternating rounds. He contends that not only is this unrealistic but it may also have a detrimental effect on a student's professional development. This is because the student knows that while he is currently arguing one side in a round, by the next round he can only prevail by defeating the argument he is now making. Kozinski worries that the result of this is that "[t]he bond between lawyer and client, which is the essence of first-rate advocacy, is lost. This is an attitude that, if carried forward in practice, can have dire consequences. . . . [A] moot court graduate may approach real-life clients with the same degree of detachment."<sup>76</sup>

But Mercier and Sperber's work suggests some responses to Judge Kozinski. First, the reasoning skills developed in law school are not intended to be used by a hermit on a mountain seeking legal truth. Rather, consistent with Mercier and Sperber's thesis, a law student learns that he is specifically developing skills to be used in practicing advocacy—skills intended to win arguments. Just as courts do not issue advisory opinions, lawyers do not make arguments purely for the sake of making arguments. Lawyers construct reasoned arguments solely to win cases.

How does a law student develop this skill? Recall the study Mercier and Sperber cited where the subject was asked to present his views on a subject such as "What are the causes of school failure?"<sup>77</sup> The devisers of the study were critical of the failure of the subjects to anticipate counterarguments. The devisers concluded that the subjects exhibited flawed reasoning. Yet Mercier and Sperber countered that the study itself was flawed because no one challenged the views of the subjects. They cited other studies showing that people are best at rebutting contrary arguments when they are directly challenged by others.<sup>78</sup>

Thus, to ask a law student to prepare the arguments for one side as if she were representing a client may not be the most effective way to encourage her to prepare for counterarguments and rebuttals. Mercier and Sperber contend that people generate better arguments when engaged in a real debate. When moot court students are forced to argue both sides, they are being forced not only to anticipate counterarguments from the other side; they are also forced to actually experience the case from the other side of the dispute.

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<sup>76</sup> *Id.* at 186.

<sup>77</sup> See *supra* notes 21–23 and accompanying text.

<sup>78</sup> *Id.*

By arguing both sides, moot court participants learn an important lesson. Students see that legal disputes can support a cogent argument on each side. The legal reasoning skills students learn in order to practice law should make students appreciate that many legal disputes are such that a good argument can be mounted by each side of the dispute. The advocate's role is simply to support her client's position through legal reasoning in the most effective (and ethical) way possible.

Moot court participants learn that "there are two sides to every issue" is more than a cliché; their own experience teaches them that it is a fact. This should make them agree with Mercier and Sperber: the tools of reasoning are not meant to discover absolute truth but rather to convince others that they represent the better side.

#### CONCLUSION

Dan Kahan expressed it well when he noted that "[j]udicial opinions are notoriously—even comically—unequivocal."<sup>79</sup> Mercier and Sperber's work should provide lawyers and judges with some needed perspective. Lawyers are advocates, not philosophers. Lawyers use reasoning skills not to discover truth but rather to present the strongest possible arguments to support their clients. Likewise, judges are not philosophers but arbiters. Judges use reasoning skills to evaluate arguments and to explain why the results they have settled on are the fairer results.

So where is truth in law? Perhaps William James said it best over a century ago: "The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events."<sup>80</sup> Lawyers and judges do not discover truth; on the contrary, they use their professional skills to create it.

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<sup>79</sup> See *supra* note 55 and accompanying text.

<sup>80</sup> WILLIAM JAMES, THE MEANING OF TRUTH 1 (1909).

