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How Judges Judge: Theories on Judicial Decision Making

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HOW JUDGES JUDGE: THEORIES ON JUDICIAL DECISION MAKING

by Timothy J. Capurso

The great tides and currents
which engulf the rest of men
do not turn aside in their course,
and pass judges by.

Benjamin N. Cardozo
The Nature of the Judicial Process, 1921

Whoever hath an absolute authority to interpret
any written or spoken laws,
it is he who is truly the Law-giver
to all intents and purposes, and not the person
who first wrote or spoke them.

Bishop Benjamin Hoadly, 1759

I. INTRODUCTION

The art of judicial decision-making is the cornerstone of the American justice system -- few other public officials have the power and influence of a presiding judge. Nevertheless, the process of how judges reach their decisions has baffled and intrigued legal scholars, lawyers, and litigants for centuries. The following article examines some of the theories regarding judicial decision-making and addresses the problems associated with each. The opinions of local acting judges, as well as a local practicing attorney, are included in this analysis, helping to shed a contemporary light on this jurisprudential issue. By combining parts of different theories with the practical insight of attorneys and local judges, a conclusion is reached based in both theory and practice of how judges judge.

II. AMERICAN LEGAL REALISM

Perhaps the most pervasive and accepted theory of how judges arrive at legal decisions is that enunciated by the Realists. The Realist view of the judicial process is associated with such important jurists as Oliver Wendell Holmes, Joseph Bingham, Jerome Frank, Eugene Ehrlich, and Karl Llewellyn. This theory is distinctively reactionary; it is largely based on the flaws perceived by Realists in earlier theories of judicial decision-making.

Realists stipulate that judges determine the outcome of a lawsuit *before* deciding whether the conclusion is, in fact, based on an established legal principle.[1] In other words, a judge reviews the facts presented and decides how he or she will rule without first analyzing precedent and statutory law. Once the judge has reached a conclusion, he or she will then look for existing principles in case law or statutory regulations that support the conclusion. Only in unique circumstances where such a premise cannot be found will the judge change his or her conclusion to one which can be justifiably maintained.[2] Realists flatly reject the idea that "a judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision."[3] The Realists present that a judge pursues a suitable foundation for a written opinion in law and fact only after an agreeable conclusion has been reached. The fact that a judge is supposed to be impartial is not sufficient to stifle a jurist's tendencies to follow his or

[1] *See* Jerome Frank, *The Law and the Modern Mind,* George C. Christie & Patrick H. Martin, JURISPRUDENCE: TEXT AND READING ON THE PHILOSOPHY OF LAW 844, 845 (West Publishing Co. 1995).

[2] *See id.*

[3] *Id.*

her human predispositions when arriving at a legal conclusion.[4]

A leading Realist scholar, Jerome Frank, maintains that the opinions written by the judiciary are an inaccurate depiction of actual thought processes which occur in a judge's mind.[5] Frank claims that judges' decisions are not based on a systematic analysis of fact and law, but rather on a perspicacious flash termed the "judicial hunch."[6] The transpiration of the judicial hunch was defined by Judge Hutcheson as the following:

> [A]nd brooding over the cause, [the judge] waits for the feeling, the hunch – that intuitive flash of understanding that makes the jump-spark connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way.[7]

In further support of Frank's theory, Judge Hutcheson candidly remarked that "[t]he judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination only appears in the opinion."[8] Similarly, in a letter written to Judge Chancellor Kent, Judge Hutcheson explained that once he ascertained the facts of a lawsuit, he could "see where justice lay," and thereafter would "sit down to search the authorities ... and although [he] might once in a while be embarrassed by a technical rule ... *[he] almost always found principles suited to [his] view of the case.*"[9]

The motivating impulse which leads a judge to his decision is his "intuitive sense of what is right or wrong in the particular case."[10] Once this decision is made, the judge will employ every means available to justify his or her decision within his or her own mind and to withstand criticism from his or her peers. The judicial hunch, according to Frank, "is a composite reaction to a multitude of responses to the stimuli set up by witnesses -- stimuli which encounter the judge's biases, stereotypes, preconceptions and the like."[11] This internal reaction or "hunch" that judges encounter forms the basis for a judicial conclusion by creating an emotional impulse. A judge, following this emotional impulse, then decides which solution is "right" in his or her own mind. The proposition that judges base their opinions on their own conceptions of what is "right" or "fair" concerning a particular set of circumstances is supported by the disparity in results among judicial decisions on similar matters.[12]

Narrowing-in on the Judicial Hunch

Once the Realist premise that judicial decisions are based greatly on a neurological flash -- the "judicial hunch" -- is accepted, the proper inquiry then becomes what elements create such a hunch. If one is to accept the Realists' presumption that judges base their decisions on intuitive hunches, then as Frank commented, "[W]hatever produces the judge's hunch makes the law."[13] The majority of Realists recognize the central role of the judicial hunch in decision-making, but differ as to the elements that establish the hunch. Charles G. Haines remarked that "judicial decisions are affected by the judge's view of public policy and by the personality of the particular judge rendering the decision."[14] Specifically, social, political, economic and cultural movements, coupled

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[4] *See id.*

[5] *See generally* Frank, *supra* note 1.

[6] *Id.* at 847 (emphasis added).

[7] J.C. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision,* 14 CORNELL L.Q. 274, 278 (1929).

[8] *Id.* at 285.

[9] Frank, *supra* note 1, at 844, n. 163.

[10] *Id.* at 847.

[11] Jerome Frank, *What Courts Do In Fact,* 26 ILL .L .REV. 645, 656 (1932).

[12] Many of the Realist writings at this time often cite a survey of sentences comprised of thousands of minor criminal cases by several judges of the City Magistrate's Court in New York City, where the results indicated extreme discrepancies in judicial decisions among similar and often identical cases. Everson, *The Human Element in Justice,* 10 J. CRIM. L. & CRIMINOLOGY 90 (1919).

[13] Frank, *supra* note 1, at 848.

[14] Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of the Judge,* 17 ILL. L. REV. 102 (1922).

with the judge's individual temperament, personal impulses, and lifelong experiences, create a predisposition whereby certain judges are inclined to arrive at certain decisions.[15] To Haines, the factors most likely to influence judicial decisions are: (1) "direct influences" which include: (a) legal and political experiences; (b) political affiliations and opinions; and (c) intellectual and temperamental traits; and (2) "indirect and remote influences" which include: (a) legal and general education; and (b) family and personal associations, including wealth and social status.[16] Significantly, Haines excludes formal rules of logic, established legal principles and precedent as critical factors in the judicial decision-making process.

In his article *The Psychologic Study of Judicial Opinion*, Theodore Schroeder hypothesizes that "every judicial opinion necessarily is the justification of every personal impulse of the judge in relation to the situation before him, and the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration in emotional tone."[17] These predispositions, with varying degrees of significance, "unconsciously attach themselves to the conscious consideration of every problem"[18] a judge confronts. Judicial conduct may be traced "by a chain of causation running back to the earliest infancy."[19] The study of analytic psychology attempts to uncover some of the "potent, yet submerged impulses governing the actions of judges"[20] and concludes that "there can never be a judge without predispositions (or prejudices)."[21] Therefore, according to the analytic psychologist "every [judicial] opinion . . . amounts to a confession."[22]

Schroeder treats judicial opinions as mere justification of a judge's desires. These justifications are, in turn, the surface manifestations of a life-long chain of influences.[23] Such influences are the motivating factors a judge relies upon when making a decision even though they are omitted from the record.[24] According to Schroeder, the fabric of the judicial hunch is not as obtrusive as a judge's legal background or social status, but rather a deeper psychological imprint that is instilled upon the judge's intellect by every life experience.

Jerome Frank recognizes that rules and principles of law, as well as the political, economic, and moral prejudices of a judge, may produce the judicial hunch.[25] However, Frank regards these ideas as superficial. He argues that hidden, more unobtrusive traits, which are unique to the individual jurist, are responsible for producing the judicial hunch.[26] These unique idiosyncrasies -- a judge's racial antagonism, his or her affection or animosity for a particular group or individual, a judge's economic or political prejudices, or even a singular experience or memory -- "may affect the judge's initial hearing of, or recollection [of], . . . the credibility which the judge will attach to the witness's testimony."[27] Frank presents that a mere cough, twang, or gesture by a lawyer or witness may illicit these unconscious biases which are constantly operating and thus, influence the judge's ruling.[28] Additionally, the conscious desire of the judge to be admired as someone who is *not* prejudiced against a particular group or class may dictate his or her decision in a particular case.[29] Frank concludes that "[t]he particular traits, dispositions, biases and habits of the particular judge will, then, often determine what he decides to be the law."[30]

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[15] *See id.* at 106-16.

[16] *See id.* at 115-16.

[17] Theodore Schroeder, *The Psychologic Study of Judicial Opinion*, 6 CAL. L. REV. 89, 93 (1918).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 90.

[23] *See id.* at 93.

[24] *See id.* at 93-94.

[25] *See* Frank, *supra* note 1, at 848.

[26] *See id.* at 849.

[27] *Id.* at 852.

[28] *See id.*

[29] *See id.* at 855.

[30] *Id.* at 853.

The Written Opinion

The subtle influences which predominate the judicial hunch may be intentionally (if the judge accepts that these preconceptions exist) or unintentionally (if the judge does not accept the idea that unconscious influences shape judicial decisions) excluded from the body of the opinion in an effort to maintain the facade that "the decision [was] a result solely of playing the game of law-in-discourse."[31] The myth that judges are impartial arbiters, making their decisions based upon fact and law alone is, thus, perpetuated. Further, some Realists regard the written opinion as "little more than a special plea made in defense of impulses which are largely unconscious ... so far as concerns their origin or the immediate power of the past experiences."[32] Therefore, the written opinion is perceived as being little more than the "mere intellectualization or justification of the judge's desires."[33] This argument forwards the idea that the opinion is composed with a predetermined result and purposefully crafted to ignore conflicting precedent.

Since judicial opinions are merely afterthoughts of preconceived notions already instilled in the jurists' minds, Realists claim that opinions are often unfounded and frequently distorted. Opinions often exclude "all mention of many of the factors which induced the judge to decide the case . . . even to the extent that the judge is aware of them . . . [because] those factors are taboo, unmentionables."[34] Therefore written opinions disclose little pertinent insight concerning how judges arrive at their conclusions or the actual process by which they decide.

The importance, say the Realists, of recognizing that judicial decisions are little more than the judge's idea of what is right, based on his or her life experiences, is fundamental in recognizing that the administration of the law "will vary with the personality of the judge who happens to pass upon any given case."[35] Accordingly, the law is subject to variance in relation to the personal traits and disposition of the presiding judge.

III. PRECEDING THEORIES

As stated, the Realist perspective on judicial decision is based in large part on the perceived inadequacies of earlier theories on this same topic. Many of the earlier theories have been characterized as simple-minded, superficial or nonsensical. The following section traces the evolution of these earlier theories, and outlines the Realist viewpoint concerning many of these ideologies.

Sir William Blackstone

One of the earliest theories of the judicial decision-making process was espoused by Sir William Blackstone. According to Blackstone, anything that is properly regarded as human law is in consonance with the law of nature, which is ordained by God and "is binding over all the globe, in all countries, and at all times."[36] Judges find and apply the law, but they in no sense *make* the law. According to Blackstone, the duty of a judge is simply to ascertain the law in the situation before the bench and to apply that law to the case.[37] Although laws are binding on all human beings, human beings do not create these laws. Instead, the law originates from God; it is perpetual, flawless and eternal.[38] When judges decide controversies, they are simply finding or discovering the law that God has already pre-ordained. Therefore, the law ascertained by a judge carries with it the weight and force of a divine mandate.

On balance, Realists regard Blackstone's theory as "transcendental nonsense."[39] "[L]aws, they say, are products of human creation, and not ideal entities

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[31] *Id.*

[32] Schroeder, *supra* note 16, at 90.

[33] *Id.*

[34] Frank, *supra* note 10, at 652.

[35] *Id.* at 633.

[36] 1 BLACKSTONE, COMMENTARIES 41(16th ed. 1825).

[37] *See id.*

[38] *See id.* at 44.

[39] THEODORE M. BENDITT, LAW AS RULE AND PRINCIPLE 2 (Stanford University Press 1978).

drawn up in heaven."[40] Further, the lack of judicial unity on virtually identical legal issues distorts the idealistic notion that law is eternal and flawless. The notion that judges merely apply a divine law is "simple-minded . . . and does violence to the actual workings of the judicial system."[41] Realists maintain that candid discussions with judges eradicates the notion that judge-made law is of divine origin.[42] Moreover, judges do not discover and apply the law but, rather, judges *make* the law.[43] The Realists find the idea that a judge is privy to divine knowledge repulsive; indeed, it is in contradiction to empirical data and common sense. Accordingly, the Realists argue that the inconsistencies in judicial decisions are the product of differing personalities, and not the changing manifestations of God's law.

The Formalist Theory

Unlike the Realists, the Formalists maintain that every judicial opinion is capable of being broken down into a three-part equation. This equation consists of: the rules of law, "R"; the facts of the case, "F"; and the decision of the judge, "D."[44] This is represented by the formula R x F = D.[45] As indicated by this formula, the Formalists' equation relies exclusively on the existence of the law.[46] The rule of law, as established by precedent or statutory authority, is the uniform portion of this equation which guides the judge's decision. Once ascertained, the rule is then scrupulously applied to the case after the judge has examined and determined the relevant facts.[47] The Formalist theory, therefore, places great faith in the comprehensive coverage of both common and statutory law, as well as the ability of a judge to pinpoint the applicable rule of law in developing a conclusion. Since the conclusion is one manifested through the application of a mathematical formula, the conclusion should be reached by any other jurist using the same formula under similar circumstances.

The Formalists also rely heavily on the existence and ascertainment of the *actual* facts of the controversy before the court. The implicit assumption is that the above process of factual and legal case analysis "is arrived at by a straightforward and airtight piece of deductive reasoning."[48] The Formalist does not anticipate or compensate for judicial imperfections or unique factual scenarios which may not be addressed by a particular rule of law. This process presumes that the facts and law are, indeed, capable of perfect dissection and not intertwined. The Formalist theory maintains that once the facts have been determined, the judge will find the appropriate rule of law and then make the correct decision.

As stated, Formalists recite that judicial decisions are the products of two fixed elements: the facts and the rule of law. A judge's decision is the result of the addition of these two elements; it is, thus, often predictable.[49] Opposite to this view, Realists argue that the Formalist theory is merely "a delightful, intellectual game"[50] that can only be played by one with knowledge of both the facts and the law applicable to a particular case. Realists regard Formalism as an attempt to objectively analyze that which is incapable of analysis.[51] Pursuant to the Formalists' mathematical formula, the decision is the product of the facts and the rule of law.[52] Realists reject this theory of judicial interpretation based upon their argument that neither component of this formula -- the facts nor the rule of law -- are the major factors of a judicial decision.[53]

The Realists first present that the actual facts of a lawsuit are unattainable until the case is tried. More

[40] *Id.* at 2.

[41] *Id.* at 3.

[42] *See* Frank, *supra* note 1, at 848.

[43] *See* Benditt, *supra* note 1, at 2.

[44] *See* Frank, *supra* note 10, at 648.

[45] *See id.*

[46] *See id.* at 648.

[47] *See id.* at 650-51.

[48] *Id.* at 649.

[49] *See id.*

[50] *Id.* at 648.

[51] *See id.*

[52] *See id.* at 649.

[53] *See id.*

importantly, "for judicial purposes, [the facts] are not what actually happened between the parties, but what the court thinks happened."[54] In order to predict the outcome of a decision (assuming that a fixed and applicable rule of law exists) the Realists argue that one must know "what the judge will guess from the conflicting evidence presented to him, long after the events, were the facts which gave rise to the lawsuit."[55] Realists believe that judges, like all human beings, have varying and often inaccurate assessments of how events actually transpired in a contested case.[56] The Formalists however, take for granted that the *actual* facts will emerge from the conflicting testimony of the parties and will be accurately reflected in a judge's independent interpretation. Realists argue that although a judge's perception of the facts may not be as skewed as that of a jury, judges, as human beings, are capable of faulty assessments of factual issues, as well as issues of character.[57] Accordingly, say Realists, the facts of a lawsuit are not fixed variables; rather, they are an unknown element, incapable of accurate prediction. As such, the facts of a particular case are not a major element of a judge's decision.

The second fatal flaw of the Formalist theory is that the rule of law dictates the outcome of a lawsuit. As proffered by the Realists, a rule of law (assuming it exists) can be ignored or preempted at a judge's discretion, and is, therefore, illusory. To the Realists, the judicial hunch is the primary basis of a jurist's decision, not legal precedent. The Realists suggest their own formula, S x P = D: the judicial hunch or *stimuli,* " S," multiplied by the judge's *personality,* "P," equals the *decision,* "D."[58] The Realist, therefore, argues that neither the facts nor the law are significant foundations for judicial decisions. Instead, the judge's personality combines with various external environmental factors and are ultimately responsible for legal decisions.

[54] *Id.*

[55] *Id.* at 650 (emphasis in original).

[56] *See* Frank, *supra* note 1, at 851.

[57] *See* Frank, *supra* note 10, at 650.

[58] *Id.* at 655.

IV. HOW JUDGES THINK THEY JUDGE

Recognizing that this analysis would be incomplete without answering the question of "how do judges *think* they judge," the author arranged two interviews: one with a circuit court judge ("Judge A") and one with a district court judge ("Judge B"). The selection of each jurist was based on recommendations from practicing attorneys who agreed that these judges were representative of their respective benches.

Once the theories outlined in this paper were explained, Judge A immediately identified himself as a Formalist.[59] Judge A indicated that he consistently attempts to first ascertain the facts based on the credibility of the witnesses and the circumstances.[60] Thereafter, Judge A applies the necessary rule of law and arrives at a conclusion.[61] Judge A remarked that the Realist's theory seemed absurd since jurists make conscious efforts to focus on the facts and the law, ignoring their own internal conceptions of right and wrong.[62] After further inquiry, however, Judge A did concede that some external factors may influence a judge's decision.

Judge A identified the following extrinsic factors as principle to his decision-making process: (1) precedent; (2) logic; (3) legal experience; and (4) the preparation of the lawyer.[63] Interestingly, Judge A remarked that a prepared lawyer -- one who is fully able to answer the judge's concerns -- is highly persuasive.[64] This is due to the jurist's perception that the attorney has thoroughly completed the necessary research on the questionable topic, thereby instilling confidence in the judge that the conclusion advanced by the attorney's argument is correct.[65]

Minimal considerations which may sway a judge's decision addressed by Judge A include equity,

[59] *See Interview with Unnamed Judge A,* Circuit Court Associate Judge, Maryland (March 14, 1997).

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

political ideology, and possible biases toward (animosity or affection for) particular groups.[66] For example, Judge A indicated that in cases in which employees are charged with stealing from their employers, he feels a great deal of animosity.[67] In such a situation, Judge A may, based on the factual circumstances, increase the sentence of a defendant. Judge A emphasized, however, that under no circumstances does he ever presume the defendant is guilty.

Factors that Judge A stated do not influence his decision-making process are: (1) the fear of being reversed on appeal; (2) overall public opinion; (3) his mood; (4) the gestures or tone of the lawyers or witnesses; and (5) the desire to appear unbiased or neutral.[68] Although Judge A did admit that it is possible that unconscious factors shape the judicial process, he insisted that the law acts as a safeguard, helping a judge to focus on the proper path.[69]

Judge A admitted that it appears that some judges are concerned more with equity than the law, but felt that most of these judges were on the district court level.[70] Further, Judge A stated that even if these judges are "result-oriented" it would not necessarily imply that the legal analysis utilized was flawed.[71] Often, the judge remarked, jurists are looking for justice on a legal basis, regardless of how strong that basis is,[72] indicating that equity often plays a major part in how the law is perceived by a particular judge.

A second interview was conducted with a representative of the district court bench. Although Judge B classified himself, and most of his colleagues, as Formalists, at times Judge B strayed from the Formalist theory. Judge B conceded to being result-oriented in some circumstances.[73] For example, Judge B stated that when he presides over a docket in rent court, the majority of landlords are white and the tenants are primarily black.[74] In order to show those in attendance that the bench is impartial, Judge B finds that, early in the docket, he may decide a factually close case in favor of the tenant.[75] In defense of this tactic, Judge B indicated that the law in many circumstances is inequitable; therefore, in a court situation heavily weighted in a landlord's favor, in order to achieve an equitable result, judges might need to apply certain facts to fit cases into legal exceptions.[76] Thus, excessively harsh consequences for litigants are avoided. Similarly, if the facts of a particular case merit a derivation from the current state of the law, Judge B may present the facts in a light which would encourage the preservation of an equitable judicial system.[77]

Though Judge B admitted to being result-oriented periodically, he further stated that he follows the letter of the law and attempts to keep personal biases out of his decision-making process.[78] However, Judge B recognized that it may be difficult for any judge to control such prejudices.[79] Indeed, after a vehicle was stolen from Judge B's household, it was more difficult for Judge B to remain unbiased when an alleged automobile thief was brought on charges before the bench.[80] Similarly, Judge B found it difficult to be impartial towards a defendant charged with domestic violence who wore a "Free O.J." T-shirt into court.[81]

Judge B concluded that his paramount concern is that the litigants leave his courtroom believing they received a fair trial, thereby maintaining faith in the judicial system.[82] Additionally, Judge B stated that since he is aware of how his own biases, moods, and

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[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See Interview with Unnamed Judge B*, District Court Judge, Maryland (March 21, 1998).

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

predispositions may effect the judicial process, he is more careful to render a decision based on the law. [83]

The author's conversations with each judge certainly indicated their desire to follow the letter of the law. However, Judge B remarked that many judges feel pressured to depart from the letter of the law for the sake of equity, as well as to maintain the public perception of the judiciary as being fair and unbiased.[84] Thus, each interview supported both the Formalist and Realist theories to some extent.

Neither theory addresses the possibility that some judges might make decisions as hypothesized by the Realists, while others utilize the formula set forth by the Formalists. Additionally, neither enunciate the idea that judges may consciously or unconsciously employ different theories at different times and for different reasons. To illustrate, a judge may arrive at his or her decision by ascertaining the facts and applying the law where equity and public policy are in accordance with that law. The same judge, nevertheless, may be result-oriented in a separate case in which a *legal* decision is not in accordance with public policy, equity, or compassion.

V. HOW ATTORNEYS THINK JUDGES JUDGE

Through an interview with a local practitioner with over 20 years of experience ("Attorney A"), a distinct, and at times disturbing, view of how judges make decisions was gained by this author. Attorney A divided all judges into three different groups: (1) constructionalist; (2) result-oriented; and (3) equitable.[85] The first group, similar to the Formalists, base their decisions on the facts and law and "let the chips fall where they may"[86] regardless of fairness or sympathy for either party.

The second group, closer in theory to the Realists, is result-oriented and bases decisions on consideration of equity, fairness and compassion. These jurists then attempt to apply a suitable legal rule to support their proposition.[87]

The third group of judges identified by Attorney A consisted of those judges who simply reason their way through a case based on their conceptions of what is equitable, reasonable and practical.[88] This group, opined Attorney A, does not found their legal conclusions on a preconceived notion of the result they are striving to meet.[89]

Attorney A remarked that there are many competent judges that are both fair and capable of arriving at uniform decisions based on the law.[90] This deduction, however, is not representative of all judges. According to Attorney A, there are some judges who are, without question, result-oriented and do not seem to base their decisions on applicable law.[91] Attorney A related that in many cases he has experienced completely diverse judicial opinions in instances where the presented fact patterns were essentially the same.[92] This degree of predictability is based upon Attorney A's knowledge of the individual jurist and may help Attorney A decide whether to try a case or enter into settlement negotiations, depending on the presiding judge.[93] Further, Attorney A illustrated that a judge had once held a case *sub curia* "until [the judge could] find a way around the case law"[94] that Attorney A had presented in his argument to the court.

In addition to receiving completely different results from different judges on the same set of facts, Attorney A indicated that sometimes he receives different results from the same judge on the same set of facts.[95] For example, Attorney A argued a case in front of a judge regarding the interpretation of a contract.[96] After careful consideration, the judge

[83] *See id.*

[84] *See id.*

[85] *See Interview with Unnamed Attorney A*, Towson, Maryland (April 10, 1997).

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See id.*

[94] *Id.*

[95] *See id.*

[96] *See id.*

agreed with Attorney A and entered judgment in favor of Attorney A's client. Two weeks later, Attorney A made the exact same argument, for the same client, concerning the interpretation of the same document, in front of the same judge.[97] In contrast to the first defendant, however, Attorney A's opposing party was a young, frail-looking female. The judge disregarded the same argument Attorney A made two weeks earlier, entering judgment for the defendant.[98]

In conclusion, Attorney A reiterated his belief that most judges follow the Formalist model and are, therefore, perceived by attorneys as being fair and impartial.[99] Nevertheless, those judges who are result-oriented and allow their decisions to be influenced by their mood, public opinion, internal predispositions, personal animosities, compassion, or desire to appear impartial, are not fulfilling their duty as a judicial duties and are abusing their station as a member of the bench.

VI. A PRACTICAL APPROACH TO HOW JUDGES JUDGE

Given the wide range of theories on the judicial decision-making process, it is not surprising that this article proposes a hybrid approach in order to justify the author's position on this issue. This approach is based on both the Realist and Formalist models, as well as on the practitioner's opinion illustrated in the interview conducted with Attorney A. The Formalists' premise that most judges decide cases by ascertaining the facts and applying the law is acceptable. Further, the idea that both the facts of a particular case and the law applicable to that case are the major components of a judge's decision, is persuasive to this author. Additionally, it has been argued that precedent and statutory law are the foremost legal elements in deciding a case for most judges. However, the Formalists' concept that the facts and the law are fixed elements does not appear rational. Instead, the Realists' presentation that both the facts and the law are subject to interpretation by the parties to litigation seems to be a more practical approach. The Formalists also ignore the fact that some judges may disregard the law and decide cases based primarily on equity or, perhaps, their instinctive reaction to the facts set forth during trial.

Taking Aim at the Realists

The Realist viewpoint offers many accurate and helpful insights into the judicial decision-making process. Among these insights is the Realists' ability to portray a judge as a human being, rather than as an individual devoid of all emotions. Additionally, the Realists, in accord with Judge B and Attorney A above, are correct in their contention that many jurists do, in fact, craft legal arguments once they have determined how a case will be decided. The Realists' idea that the facts and law are not fixed variables, but are subject to layers of interpretation by individuals is also intuitive. Finally, the recognition that similar cases often procure diverse results depending on the presiding judge is, certainly, accurate.

However, the Realists tend to speak in the extreme and have, consequently, dismissed the notion that some judges may decide cases in one fashion, while others may do so in an entirely different manner. Moreover, Realists do not account for the judge who may apply both methods of decision-making. Realists also minimize the role of the rule of law. The fact that legal rules do not always dictate the decisions of cases does not imply that those rules do not have significant, often controlling, influence during the decision-making process. Realists who minimize this influence are often portrayed as reactionaries who feel betrayed when they learn that the traditional theory of legal determinism is often false. This group then "react[s] into an opposite extreme of naive unwillingness to recognize the less absolute."[100]

It is not only befitting to know the various environmental and psychological pressures operating

[97] *See id.*

[98] *See id.*

[99] *See id.*

[100] John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 PENN. L. REV. 833, 835 (1931).

unconsciously on a judge, but also the rule of law which exists in a particular controversy. If the rule is known on an issue, the possibility of accurately predicting the outcome is substantially increased. Realists ignore the fact that with many cases, the result is directly dictated by a legal rule without the intervention of judicial discretion. For example, in a jurisdiction which requires the signature of two witnesses to validate a will, but the will in question only bears the signature of one witness, there is little chance that the document will stand,[101] if the black-letter law is to be applied. Realists tend to disregard these types of cases, in part because where a rule leaves no doubt as to the outcome of a case, it is not often litigated.[102]

The Realists maintain that judges arrive at their decisions through a judicial hunch. Thereafter, the judge constructs an argument to support their decision. It is possible -- albeit not probable -- that a judge with a significant amount of legal experience may be able to anticipate the outcome of a case based upon personal knowledge of the law without consciously applying a particular rule.[103] Realists then state that diverse results of factually similar cases proves that judges do not base their decisions on the law alone. This concept does not imply that one of the results is incorrect; it only implies that one of the jurists may not have reached the best possible result.[104]

The Realists contend that judges are not bound by rules of law, but have absolute discretion when determining the outcome of a lawsuit. Nevertheless, remarks Dworkin, "discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[105] In other words, judicial discretion is constrained by an infinite number of authoritative precedents and statutory laws which are seldom ignored, even by the most result-oriented judge. The fact that judges utilize their discretion when deciding a controversy does not inherently taint the decision-making process, nor does it mean that decisions are not in accordance with the rule of law.

Theoretical Proposal

While acknowledging that both the Realists and Formalists correctly set forth significant propositions which aid in determining how judges reach their decisions, these theories are incomplete. The actual experiences of practicing attorneys cannot be ignored, nor pigeonholed into one of these theories. Courtroom experience and personal familiarity with individual jurists are the only effective means to predict how and why judges decide certain cases. Accordingly, it must be recognized that separate judges employ different methods of analyzation, at different times and for different reasons. Predictability may be achieved by learning, over time, the personality traits of a given judge. From a theoretical perspective, knowing that Judge X will decide a certain case one way, while Judge Y would decide that same case in another way, may not be advantageous. Practically speaking, such knowledge allows an attorney to make beneficial decisions for his or her clients. Moreover, accepting the fact that a wide range of judicial personalities exist, and that different arguments may influence different judges in different ways, are the first steps in mastering the predispositions of the bench. Ignorance of this reality is detrimental to both the attorney and his or her clientele.

VII. CONCLUSION

The preceding section is a practical approach in determining how judges reach decisions. The theory stipulated is a combination of the strongest portions of the primary theories on this issue, in combination with practical knowledge on this topic. This approach attempts to enhance what the prevalent theories on judicial determinism seem to gloss -- that judges, like the cases they decide, are unique.

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[101] *See id.* at 847.

[102] *See id.*

[103] *See* Benditt, *supra* note 37, at 26.

[104] *See id.* at 27.

[105] Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 (1967).

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