HOW JUDGES DECIDE CASES: MYTHS AND REALITY

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I. Introduction

A. During the appointment and confirmation processes for all of our recent U.S. Supreme Court Justices, we heard a lot of commentary regarding how judges decide (or should decide) cases.

1. When he appointed Justice Sotomayor, President Obama said that he wanted judges who have the capacity for “empathy.”

2. Opponents responded that “empathy” suggests “activist judges.”

3. And Justice Sotomayor emphasized that her guiding judicial philosophy is “fidelity to the law,” and she said, in an oft-repeated refrain, that “judges must apply the law and not make the law.”

B. Although words and phrases like these get thrown around a lot, it is not clear that anyone knows what they mean in the context of how judges actually decide cases.

C. So, at the risk of being somewhat presumptuous, I’d like to spend our time today trying to separate the myths from the realities regarding how judges decide cases, based on my own experience, in the hope of fostering a better understanding of judicial decision-making in the real world.

II. Judges are not computers

A. The concept of judges applying the law in a dispassionate and mechanical way is very simple and very powerful. We all like certainty, and we like the notion that you can feed data into a computer and have the computer spit out a totally objective and irrefutable answer that is divorced from any and all subjective and emotional factors.
B. The problem is that judges are not computers, and facts and evidence in a given case are often not irrefutable. There are two sides to every story.

C. Judges are human beings. We react to facts and data just like everyone else.

D. Whenever any of us makes a decision, we are guided by innumerable factors and considerations, many of which operate subconsciously.

1. We, of course, rely on what our senses objectively tell us, and reason and intellect guide us. I know based on objective facts that touching a stove burner that is red hot is likely to hurt me.

2. But we are also guided by our life experiences and inherent emotional make up.

3. Not everyone laughs at the same jokes. This is because what each of us finds funny depends on our backgrounds, experiences, and the like.

4. And we all know that when people see the same exact event, they frequently perceive it differently because, based on subjective and emotional factors that are ingrained, different facts that they observe have different meanings and importance to them.

E. The point here is that anyone making a decision, whether a judge or not, is guided by both objective facts and inherent subjective and emotional factors that derive from experience. Human decision-making is not data in a computer, and judicial decision-making is not like solving a mathematical equation or calling balls and strikes. If it were, we wouldn’t need judges at all.
F. A good judge must be able to recognize that all of these different factors are at play and to assess them objectively, including the subjective and inherent emotional factors and implicit biases that might impact a decision. It is not uncommon for a judge’s sympathies to lean one way but to have the law dictate the opposite result. *Every judge that I know will follow the law in that case.* And if a personal emotional factor may prevent the judge from rendering a fair and impartial decision in a given case, then the judge has an ethical obligation not to participate in that case.

III. Empathy

A. When the process of judicial decision-making is looked at in this real-world way, I think the concept of empathy takes on a different meaning.

B. Webster’s dictionary defines empathy, in pertinent part, as the capacity for participating in or a vicarious experiencing of another’s feelings, volitions, or ideas. At root, empathy refers to understanding.

C. In my mind, judges who are able fully to understand all sides of an argument and to understand where the parties are coming from and what is motivating them are better judges. Indeed, in my view, only when they do this can judges factor in everything that is relevant to allow them to come to a decision that fits all of the often-conflicting facts and evidence together in a coherent way.

D. Now, because we judges are human beings, how one judge fits all of the pieces together is not always the same as how another judge does so. This is why judges sometimes disagree and why you see dissenting opinions.

1. A cynic might say that it is all just politics. The liberal judges come out one way, and the conservative judges come out the other way.
2. That is not what I have seen on either of the two courts on which I have had the privilege to serve. From time to time, we do have respectful disagreements as to how a particular case should be decided, but the disagreements derive from reasonable people perceiving the facts and the meaning of applicable legal principles in a different way.

IV. Applying the Law

A. This brings me back to the concept of judges applying and not making the law.

B. As I have said, the law is not a set of mathematical formulae in which a judge merely plugs in data and gets an objective and irrefutable result. Such a system does not exist in the real world. And it doesn’t because our justice system and judicial decision-making involves human beings: the judge is human, jurors are human, the lawyers are human, and the parties whose actions are at issue are human, and all of them independently perceive events based on objective data and inherent subjective and emotional factors and implicit biases.

C. So, what does it really mean to say that judges should apply and not make the law? How does a judge do this?

1. As a judge, I start with basic principles of law. For example, I am bound to follow the U.S. and Colorado constitutions, statutory law, rules of procedure and evidence, and binding precedent of higher courts.

2. The problem is that the black letter rules that I start with do not always answer the question that I have to decide. In fact, that is often precisely why my court granted certiorari. We frequently deal with cases of first impression.
3. Every case starts with its own facts, and it sometimes isn’t so clear whether a given legal principle applies to a particular set of facts. It is a given that to have a contract, we must have, among other things, an offer that was accepted. Well, it might not be so clear if there was an offer or not (e.g., parties negotiating a deal, and another party sends an email with preliminary calculations that says, “Take a look and call me”; is that an offer?).

4. I have also had cases where two legal principles arguably could apply to my facts but that lead to contradictory results. Which principle do I follow?

5. It is in these gray areas where judges have to make difficult decisions.

6. And it tends to be in these gray areas where judges who make these decisions get called “activists.”

7. When the judge decides such a case, has the judge made law? Well, by applying the law to the facts, the judge has created a new precedent that is binding on lower courts. Is that making law? Interpreting law? Applying law?

8. The “law” did not clearly decide the issue, and the judge had to make the call. Viewed in this light, it is perhaps understandable why some have defined “activist judge” as a judge who issued a decision that someone didn’t agree with.

V. Judging in the real world

A. So, what does judicial decision-making really look like in practice? Again, at the risk of being presumptuous, I will first describe my own process for deciding cases as an appellate court judge, and I will conclude by discussing what tends to persuade me and what I tend to find unpersuasive.

B. Procedure.

1. I am ever mindful of the fact that the trial courts decide the facts. That is where the “record” is made, and as an appeals court judge, I am bound by what is in the record.
2. My task is to determine if a legal error was committed in the trial court that impacted the outcome of the case (not every error does; there are no perfect trials).

3. So, I start with what the parties provide me. I firmly believe that I need to let the parties define the issues (this is called the “party presentation principle”). I am not an advocate in any case.

4. I then review the parties’ briefs in detail, I read the key cases that they cite, and I review the key portions of the record that they cite. After reviewing the parties’ submissions, I will generally have a working hypothesis as to what seems to be the right result (or I at least know the issues that I need to research and review more closely).

5. Then, with the help of my law clerks, I review the law and the record independently, so that I can understand the rules that govern and the evidence that is pertinent to those rules. This is not a matter of not trusting the parties. They are advocates for their positions. I, however, need to look at the law and facts objectively.

6. Then, my court will generally hear oral arguments (as an aside, I am surprised at how often parties waive orals in the court of appeals; why wouldn’t a lawyer want the chance to figure out what is bothering the judge?). In advance of orals, I make notes as to the questions that I have for the parties.

7. Then, I need to decide how I will vote in the case. This process is sometimes pretty straightforward (e.g., if a statute is clear, unambiguous, and fits undisputed facts, I am required to apply the statute).

8. Other times, however, and frequently on the supreme court, the facts may be in dispute, the law is unclear (e.g., conflicting legal principles that could apply but that lead to differing results), or a statute might be ambiguous. How then am I to apply the law, when it is not clear what the “law” is (legislators are human, too)?
a) Let’s take a case in which a constitutional provision or a statute that I have to apply is ambiguous (e.g., term not defined). My job is to figure out what the framers intended (e.g., by looking at the voter blue book, legislative history, court decisions). In doing so, I am not making policy determinations. Rather, I am trying to figure out what policy the framers of the provision at issue were trying to advance. Advancing that policy would be applying the law in this context.

b) And there are settled legal principles that help me deal with constitutional provisions or statutes that are ambiguous (e.g., don’t interpret a constitutional provision or a statute in a way that leads to absurd results, that reads out other provisions of the law, that creates conflicts with other provisions).

c) Not surprisingly, however, when a statute is ambiguous, the parties often present perfectly rational and persuasive arguments in support of their respective positions.

9. But I still have to decide. In making this decision, I keep several things in mind:

a) It is my job to decide the case in front of me and only that case. I am not there to make grand pronouncements of law, even on the supreme court. Hence, I will try to make the decision on the narrowest possible grounds, without addressing extraneous issues that need not be decided. Many times, cases get decided based on one issue raised by the parties, and we as judges need not address the remaining issues. This is not intellectual laziness on our part. Rather, this approach, which is known as judicial restraint, is part and parcel of deciding the case and not “making law.” It is not appropriate for me to give an advisory opinion (i.e., an opinion on an issue that is not before me).
b) Am I being true to the precedents, constitutional provisions, and statutes that exist to guide me (i.e., am I applying the law that governs)?

c) Am I considering all of the relevant facts and evidence presented (i.e., am I applying the law to the facts of this case)?

d) What are the ramifications of my ruling? Are there unintended consequences for cases down the road? I am very conscious of the fact that my ruling creates a precedent that is binding on the trial courts. I care that the ruling is clear and that judges, lawyers, and parties down the road will understand what I held and why, because clarity of the rule of law allows people to make decisions as to how they will act.

e) Conversely, I try to write my decision in a narrow enough way so that I have not unintentionally determined a case involving different facts. Every case should be decided on its own facts, after careful review of those facts, the record, and the law. It is not my job to prejudge future cases.

f) As an aside, I note that this is a frequent source of debate among my colleagues and me. Parties have come to us because they want us to decide an unsettled issue that they deem significant. But what if we don’t have to decide that issue to resolve the case? Although my colleagues and I have sometimes disagreed on this point, my personal view is that in these circumstances, we should not decide the issue.

g) In this regard, I am fond of quoting a comment that now-Chief Justice Roberts made in a concurring opinion when he was on the D.C. Circuit. He said, referring to “the cardinal principle of judicial restraint,” “if it is not necessary to decide more, it is necessary not to decide more.” *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).
h) This is consistent with the doctrine of constitutional avoidance, and it strikes me as a wise practice, too.

i) As former Court of Appeals Chief Judge Janice Davidson was wont to point out, “You can’t get in trouble for what you didn’t say.”

C. So, that is the procedure that I use. But what about the less objective part of my judicial decision-making, i.e., what persuades me? I’d like to finish by sharing what I, at least, tend to find persuasive. In no particular order, I offer the following:

1. The facts are critically important. In my experience as a trial lawyer, juries decided cases based on the facts, not the law. Judges are human, too, and the facts have persuasive force and drive the equities.

2. An honest and not exaggerated statement of the facts is persuasive. Overstatement, adjectives and adverbs, and personal attacks are singularly unpersuasive and undermine credibility (no table pounding!).

3. Mis-citations to the record undermine credibility.

4. It helps to have the law on your side. Binding precedent that is on point is obviously very persuasive. Absent binding precedent, persuasive precedent from other courts is helpful. I, for one, am somewhat conservative (small c) in my judicial decision-making. I’m not trying to be the first to say something creative (J. Friendly: “What is new is not always good, and what is good is not always new.”). I take comfort from the fact that another judge has seen it the way I do.

5. Citing the most cases and long string cites generally don’t impress me. If, however, the case is one of first impression and you are asking me to adopt the “majority view,” a string cite showing that you, indeed, are advocating the majority view is helpful.
6. Overstating or misstating a case or other authority undermines credibility. Again, intellectual honesty is key.

7. A clear argument in which one point logically follows the next is very persuasive. Briefs that meander, go off on tangents, and have no clear line of argument tend to be unpersuasive, especially if I am not clear on the point you are making.

8. Argue one point at a time and stay focused (Steve Rench’s block method).

9. Internal consistency of a party’s position is persuasive. If a party makes an argument in which the facts or the law don’t fit together coherently, it is not persuasive (e.g., that makes sense, but what about this point?). Trial lawyers know this when they are developing their trial theme. All facts must fit the theme.

10. Parties need to keep in mind that they are arguing this case and these facts, not some hypothetical. It is nice to be told grand principles of law. If they don’t apply to the facts of this case, however, the grand principles don’t matter.

11. I am persuaded by arguments that let me decide the case narrowly but fairly (i.e., intellectually honestly, considering all relevant law and facts).

12. Candor to the court helps, but not phony candor or obsequiousness. Conceding when you have to makes sense. It’s a credibility thing. Conceding to try to make yourself look credible tends to have the opposite effect.

13. Don’t ignore the white elephant in the room. He is jumping off the page at me anyway. You may as well deal with him. Ignoring a legal or factual issue that obviously presents difficulties for your side tends to suggest that you have no answer.
14. It is important that a party’s argument makes logical sense (i.e., the result is intuitive). If it isn’t, then the party must explain why a particular result is counterintuitive. Again, leaving an obvious question like that unanswered, particularly if it goes to the logic of one’s argument, is a bad idea.

15. Depth of a party’s argument persuades me: “I win for six different and equally persuasive reasons.”

16. In oral argument, answering the questions in a direct way that shows command of the law and facts is very persuasive. Ducking questions and unfamiliarity with the law and the facts tend to undermine my confidence in what you are arguing to me.

17. It helps if the result happens to be equitable. I, at least, question any argument that suggests what seems like an inequitable result. This does not mean that the argument is wrong. Sometimes, the law leads us to results that seem unfair. I expect, however, that most judges will resist such a result, unless they have no choice. So, if you are arguing for a result that may seem unfair, it is helpful to explain why we must reach this result (e.g., the law dictates that result or the result is, in fact, fair in the circumstances).

18. And simple as it may sound, the most persuasive argument to me is the one that leads me to conclude after hearing or reading it, “That makes perfect sense,” or “Of course, that’s right.”

VI. Conclusion

A. As I hope I have shown you, it is easy to say that judges must apply and not make the law, as if it were as easy as feeding data into a computer or just calling balls and strikes. The real world, however, is not so simple.
B. In reality, how judges apply the law to the facts of each case to reach the best the decision is a highly complex process involving both the analysis of objective data (including facts, evidence, and legal principles) and inherent subjective and emotional factors and implicit biases that every human being has and that differ from person to person based on genetics, upbringing, life experience, and the like.

C. What persuades some might not persuade all, but I have tried to identify some general principles that I think that most judges would likely agree with.

D. Is our system perfect? Until humans become perfect, the answer is surely no. Is it fundamentally flawed because human beings make the decisions? I think over two hundred years of history with a judicial system that has stood the test of time and a number of significant constitutional crises would suggest otherwise.

Thank you!