8-15-2022

What Do Good Lawyers Know That the Rest of Us Don't? Introducing First-Year Law Students to "Legal Realism" (White Paper)

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WHAT DO GOOD LAWYERS KNOW THAT THE REST OF US DON'T? INTRODUCING FIRST–YEAR LAW STUDENTS TO "LEGAL REALISM" (White Paper)

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I set forth below the general outline of a short lecture that I usually give to my first–year contract law students, at about the end of their first week of classes, in order to get them started thinking about the process of judicial decision-making, and especially about the "legal realist" perspective on that process.

"As you all start your study of the law, let me ask you a very basic question that cuts across all of the different fields of law that you will study this year. How do judges decide cases? What factors influence them in making their rulings? In particular, how important is "the law"—that is, the formal structure of legal rules that applies to a given set of facts—in shaping judicial decisions, as opposed to other social and psychological factors that may influence judges?

Do judges really follow the law in their rulings, wherever this may lead, or do they just say in their opinions (and confirmation hearings) that they faithfully follow the law, but do not really mean it, and instead just rule in whatever way pleases them in any particular case? Does what the law is really make a major difference in how

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[1] Homer R. Mitchell Professor of Law, Dedman School of Law, Southern Methodist University. J.D., Yale Law School, Ph.D., University of Iowa.

judges decide a particular case, or do other factors matter more to them? This as an important question that you should think a lot about during your legal education.

If you are going to become a good lawyer you are going to have to develop several skills. First of all, you will need to exercise counseling and planning skills. You will need to develop the ability to helpfully counsel clients, to help them plan their affairs so as to avoid legal trouble, by being able to accurately predict how the courts and other regulators will respond if your client takes certain actions and are challenged as to their legality.

That counseling and planning can be as simple and routine as answering a straightforward legal question in a phone call or by a later email. Or it could involve a little more effort in helping a client draft an ordinary will or standard real estate conveyance documents. Or, at the other extreme, it could be as complex as spending hundreds of hours planning and providing the documentation for a major corporate merger or acquisition transaction. In each instance, to be helpful your advice and assistance will need to be guided by an accurate assessment of what will happen in court or before regulatory bodies if your client's actions are later challenged.

Second, you will need to develop advocacy skills, the ability to convince judges and other decision-makers to decide close cases that do end up in litigation or in regulatory review in favor of your clients. And third, you will need to develop political skills, the ability to accurately predict which law reform measures and

political efforts will be effective in bringing about the results that your clients favor, and the ability to effectively engage in efforts to persuade others in positions of influence to embrace your clients' point of view.

To do any of these things effectively you will need to have in mind a reasonably accurate idea of how judges and other legal decision-makers decide cases; how the law is actually applied in practice in concrete instances. There is general agreement that a good lawyer can do all of these things. They can accurately predict how the courts will rule on a particular matter if a dispute arises so that they can give good advice on how to avoid legal problems, they can sway a judge to their client's side in a close case, and they can effectively promote legal and social change. So there must be something that good lawyers know that enables them to both accurately predict and effectively influence judicial decisions, and to be effective law reform advocates.

There is disagreement, however, on exactly why judicial rulings are fairly predictable to skilled lawyers, and why some lawyers more than others are able to give good legal advice, and to win close cases, and to effectively promote law reforms. <u>What do good lawyers know about judicial decision-making that the rest of us do not?</u>

The debate here among legal scholars as to how judges reach their decisions usually focuses on two competing models of the adjudication process. I will here

call these the "formalist" and the "legal realist" models. Let me briefly contrast the major features of these competing models of adjudication in a simplified and somewhat exaggerated form in order to make their core principles clear. Most legal theorists actually take some kind of intermediate position between these two polar extremes on the question of how court cases are actually decided.

The "Formalist" Model

This model of adjudication reflects the simple "Government of Laws" view of the world and of judicial decision-making that students usually first learn about in their junior high school civics classes. The overall body of law is characterized as being relatively clear, consistent and comprehensive, essentially providing a definitive social rule book. Judicial discretion in any particular case is therefore quite limited. The judge first makes the difficult factual determinations as best she can—deciding what happened, who to believe, and who did what—and then just rather mechanically applies the applicable law from that social rule book to those facts in a straightforward fashion to reach the result.

Under this model judicial decisions are determined primarily by the facts and the law, not by the personal views of the judge, and consequently these judicial decisions are relatively predictable by anyone who knows both the facts of the case

and the applicable body of law. One might call this the "baseball umpire" model of adjudication.

In baseball, a clear and consistent set of rules exists covering all possibilities that can arise during a game. A baseball umpire has a very limited, essentially fact-finding role. A good umpire is sort of invisible, and simply applies the rules of the game to what takes place on the field. One good umpire will usually make the same calls as another, given the rules. The pitch is either a ball or a strike, the runner is either safe or out at first base, the ball is hit either fair or foul, and so on.

If that is how judges work, just like baseball umpires, a good lawyer can pretty easily predict how a judge will rule in a given case, given a particular set of facts, and given a knowledge of the applicable rules. A lawyer should try to win their case by convincing the judge that the facts demonstrate that their client should win under the applicable rules.

To change how baseball is played, you would have to change the rules. Changing the umpires, if the rules remain unchanged, would have little if any effect on how the game is played. For example, if you wanted to change baseball to have teams score more runs, you could change the rules to allow the batter 4 strikes instead of just 3, or move the pitching mound back 10 feet, or something else like that. Changing the umpires without changing the rules would not have much if any effect on the game. In similar fashion, under this theory of adjudication legal and

political reform efforts should focus on changing the laws in the way you favor, and not on changing who the judges are, which will not make much if any difference in case outcomes.

The Legal Realist Model

Let me now set forth the general outlines of the contrasting "legal realist" model of how cases are decided. This conception of how judicial decisions are actually reached is based instead on a somewhat more complex "Government of People" model of the decision-making process.

The law is here regarded as incomplete, with lots of gaps that leave many situations uncovered, and is in many ways vague, ambiguous, and inconsistent. There are conflicting rules potentially applicable to most situations, and conflicting policies behind these rules, with no coherent and comprehensive overall framework available to determine which of the many conflicting rules and policies should apply in a given situation. The body of legal authority is not an internally consistent rule book but is instead more of a confusing and contradictory and inconclusive jumble.

Under this model there is very broad judicial discretion as to which rules to apply to a given case, and how to apply them, and consequently a judge has broad discretion as to the decisions she reaches in many if not most cases, even without considering possible uncertainty as to the case facts which would confer even more

judicial discretion. Judicial decisions are still largely predictable by a good lawyer, all would agree, but those decisions are not determined primarily by "the law" but instead are based upon the broader sociological and psychological factors that influence judges' exercise of their considerable discretion, and which operate in a relatively predictable fashion to someone who understands those factors.

The legal realists argue that it is the social and economic background of judges that primarily shapes their world views and their legal decisions, not what the law is, since the directives provided by the body of law are ambiguous and often contradictory, and the law that can be applied in any particular case is therefore extremely malleable. For example, legal realists might argue that since judges in America have until very recently have been predominantly 50-ish white males from upper-class or upper middle-class social and economic backgrounds, and are disproportionately conservative, heterosexual, country club member, law-and-order types of people, there is obviously going to be a consistency among them in how they resolve particular cases, a consistency that probably would not exist were the judges drawn from a more diverse social group, even under the exact same set of laws.

The legal realists argue that the predictability of judicial decisions that almost all observers would agree exists, at least to a significant extent, is not because the law is generally clear and consistent and points all judges to the same results in a

given case, as the formalists would argue, but instead is because judges who come from similar social and economic backgrounds will tend to bring the same moral and political views to bear, or to put this another way, share the same biases, when choosing which of the many possible legal rationales to adopt to decide a given case.

<u>Who has it right here, the formalists or the legal realists</u>? In my opinion the legal realists make some very good points that you need to understand. As you will soon see from your studies, judicial opinions are usually written in a formalist style denying or at least minimizing the extent to which the judges have exercised discretion in imposing their own personal views in deciding the case, and emphasizing the constraining effect of the applicable legal rules. However, the arguments and legal justifications presented in judges' opinions may often not be the real basis upon which they have decided the cases.

While judicial opinions overwhelmingly conform to a formalist model of adjudication, and thereby suggest that the judges generally have no real choice in making their decisions given the case facts and the law, I think that this rhetoric of constraint is misleading and that judges tend to conceal somewhat—perhaps even from themselves—the extent to which they have exercised choice in the moral and political premises and legal authority that they have reasoned from to resolve legal questions. Judges tend to mask the extent to which they have consciously (or unconsciously) worked backwards, so to speak, from their basic attitudes and biases

to reach a legal result and rationale that confirms and supports their preconceptions, rather than simply applying clear legal rules to the facts before them, whatever the result may be.

As you will surely come to see in the next few years as you read many close and difficult cases you can usually make a reasonably good legal argument for either party in most litigated cases (particularly if there is some uncertainty as to the facts), usually a good enough argument to provide a sufficient rationale for a judge that wants to rule your way, but who also wants to be able to write a respectable legal opinion supporting their ruling so that they won't be criticized and possibly even reversed on appeal for not following the law.

Now what makes a particular judge want to come out one way rather than another in a given case surely depends to some extent upon the law, but the legal realists would argue that while the body of law has some impact on these decisions they actually depend much more upon the many psychological and sociological factors that have influenced the judge's thinking. I personally tend more towards embracing the legal realist view of adjudication, rather than the formalist model, although I do not always agree with some of the legal realists' more extreme claims about how indeterminate the law is and how small a role the formal legal rules play in judicial decisions.

My long experience of over 30 years as a law school professor has been that most law students first come to law school as rather extreme formalists, looking to learn "the law," to learn the contours of the social rule book, just like an aspiring baseball umpire would want to do. Many students then change rather dramatically, after just a few weeks of law school, to embrace a rather extreme form of legal realism once they begin to appreciate from their case readings just how indeterminate and conflicting the law really is with regard to most contested questions that reach the appellate court level; just how much room there often is for judges to exercise their discretion.

Ultimately most law students eventually back off somewhat from this extreme legal realist view, recognizing it as being an overreaction to their being introduced to an important insight as to the very broad extent of judicial discretion. By the end of their law school studies they usually have come to embrace a more nuanced perspective regarding adjudication. They recognize, first of all, that the law really is incomplete and internally inconsistent enough that judges can as a practical matter do just about anything they want to in deciding most cases, but also recognize that what most judges want to do is not to exercise arbitrary authority, nor favor the litigants whom they personally like, nor to solicit bribes, but instead to reach legally and ethically correct decisions. But judges' individual attitudes as to what is the right thing to do are shaped in a complex manner by their social background and

training and many other things, including of course, as formalists note, their understanding of legal authority and precedent, of how other judges have applied the relevant legal provisions in the past.

In other words, viewed from this more sophisticated perspective, judges really can do just about whatever they want to in most cases, given the broad choices they usually have as to what laws to apply and how to apply them, and often also flexibility as to characterizing the case facts. But their rulings are nevertheless usually principled and relatively predictable by people who understand their thinking. But their rulings are not primarily determined by "the law," per se, but more by the social background and training of the kinds of people who become judges, although the rulings are definitely influenced in most instances by judicial understanding as to the nature of the applicable law.

So that is a brief comparison of the contrasting formalist and legal realist views of judicial decision-making, and a short discussion of how these insights might be usefully meshed. Let me now note the implications for your counseling and advocacy efforts on behalf of your future clients, and for your law reform and political efforts, and even for your law school studies, if you essentially embrace the formalist model of the adjudication process, or if you instead proceed more on the basis of the legal realist model of that process.

Counseling and Planning Implications

When advising clients, if you embrace the formalist perspective you may feel that you can give pretty definitive legal advice on most matters, once you have learned the applicable law, because it will then be pretty clear how most disputes will be resolved. From the legal realist perspective, however, there is quite a lot of judicial discretion as to how to resolve even seemingly straightforward matters under what at first facially appear to be clear rules. So from this perspective you should be a little more cautious in how you advise your clients as to what conduct they can safely engage in without fear of potential legal liability.

If a particular judge does not "like" your client, in the sense of determining that justice lies more with the interests of the other party, then even seemingly clear facts and law might not protect your client from some nasty consequences. There would be more reason then to think ahead about whom among the possible judges or regulators would likely be ruling upon any challenge to your client's conduct, and to attempt anticipate their most fundamental commitments and concerns. To the legal realist applied psychology and sociology with regard to the specific decision-maker are as important as traditional legal analysis in framing a persuasive argument.

Advocacy Implications

From the formalist perspective the legal rules governing any dispute are essentially a given—kind of like the rules of a baseball game—that cannot be effectively argued about. The rules are what they are, and you just have to accept them. Therefore your advocacy efforts for your client should instead be focused on convincing the judge that the facts of the dispute are such that your client should win under those rules. You should therefore emphasize putting the most favorable spin possible on the evidence as to what actually happened, and not so much on arguing about what the law is.

If, however, you accept the validity of the legal realist perspective on adjudication, it has a couple of important implications for your actions as an advocate. First of all, if the law is in most instances incomplete, ambiguous and contradictory, as the legal realists claim, then it is also important for you to offer arguments as to which of the possibly applicable laws should apply to your case, and why, and how they should apply. In other words, you need to argue about what the law is that should apply to the case, as well as what the facts are.

Second, when you are trying to convince a judge to rule in favor of your client, the most important thing is to somehow make the judge like your client more than she does the opposing party! Now I do not mean "like your client" in the personal, friendship sense, but in the sense that the judge is convinced that your client's side

of the case aligns better with truth, justice, and the moral principles most important to the judge than do your opponent's arguments.

In other words, do not limit yourself to making only technical, narrowly legal arguments, and arguments about the characterization of the case facts, but try to also invoke somehow, either in your briefs or other submissions, or perhaps more informally in your other communications with the judge and his clerks and other staff, the larger moral and political principles that favor your side and that you think might make the judge better empathize with you and your client, and thus be more inclined to rule your way.

You should offer both legal and factual arguments in your briefs, for sure, but recognize that from the legal realist perspective the real struggle to win a case is actually fought out on a different, more psychological level for the "soul" of the judge, so to speak. Once you win that struggle, and the judge is then predisposed to favor your client, then the judge will be much more inclined to accept your legal arguments and your characterization of the facts, and to base her formal opinion in favor of your client on those arguments and facts.

From the legal realist perspective, then, there really are no right or wrong answers to legal questions. The profession of law is about giving good practical advice, and winning cases, and achieving sought-after legal and political reforms. It is not about seeking abstract truth, whatever that may be. Legal practice is what you

might call an instrumental undertaking, focused on results rather than how you get there, of course within some obvious ethical constraints that you will be studying in some of your courses, like prohibitions on blatant lying, hiding evidence, bribery and other unseemly conduct.

From the legal realist perspective what may appear to be a correct and convincing legal argument to one decision-maker may well be regarded as incorrect by another, depending upon their different moral and political views and how they apply them to the case. Most legal arguments that you might offer in a case will work with some judges, and not with others.   What is the correct legal argument is what works to convince the judge to rule in your favor. If you win the case, then by definition you must have said the right things. If you lose the case, then you did not. From the legal realist perspective law is just a particular language and style of expression in which you can press claims and make rhetorical arguments, and definitely not a set of clear and consistent rules.

Like other languages, you can say almost anything you want in "legalese," in accordance with its vocabulary and grammatical structures, and it makes little sense to think of legal arguments in terms of being "right" or "wrong" in absolute, categorical terms. It's really a question of what works, of the usefulness of your arguments in a given context to persuade a particular decision maker, and not their abstract correctness. What ultimately counts is whether your legal arguments are

persuasive to the person you are trying to convince, which according to the legal realists depends more upon whether your arguments mesh with the psychological make-up and cultural background of that person you are speaking to than on the logic and supporting authority of your legal arguments. Know your audience before you frame your arguments.

Law Reform Implications

From the formalist perspective, simply changing the identity of the judges will probably have as little effect on the results of cases as changing the identity of the umpires in a baseball game, where the game will pretty much go on unchanged as before. To change the results of the legal system you need to change the laws, not the judges. From the legal realist perspective; however, changing the identity of the judges and other decision makers is probably more important than changing the law.

For example, if you were trying to change the legal system to more effectively combat, say, discrimination on the basis of race, or against persons with physical disabilities, a legal realist would argue that it would probably be more effective to get more judges appointed and legislators elected that have such minority racial backgrounds or disabilities, and who therefore can empathize more easily with such litigants, than it would be to change the law governing the treatment of racial distinctions or disabled persons.

The realists would argue that there is usually already enough law available pointing in every possible direction for a judge to find adequate legal support to justify doing what she wants to do. Hence the increasingly bitter and partisan political arguments we see about who will be appointed to senior judicial positions, especially on the US Supreme Court, make perfect sense despite the fact that every potential appointee, without fail, promises to faithfully follow the law in their rulings.

Law School Study Implications

From a formalist perspective, your main goals at law school should be to learn the law, and to learn how to find the applicable rules and their supporting authority, and to learn how to effectively present the facts of a case and the governing law. From a legal realist perspective, however, you should not approach this course or your other courses with the idea that you are just going to learn the law, period. We professors are not trying to hide the ball when we tell you that it is not so simple, it is just that from the legal realist perspective that we academics almost all embrace to some extent there simply is no such thing as "the law" in the sense of there being a clear social rule book that you can master and then use to just look up the answers to resolve disputes.

What actually exists, from the legal realist perspective, is just a variety of argumentative techniques and rhetorical moves of different sorts that you can offer in courts or elsewhere that have worked in the past to convince some judges, and which might or might not continue to work in the future with other judges. You just pick out and present the laws and supporting arguments that you think will be most effective in a particular context, before a particular judge or other decision-maker, and hope for the best.

As I have noted, the large majority of legal opinions are written in a formalist style that suggests that both the case facts and the applicable law were quite clear, and that the judge consequently had little if any discretion in deciding the case. Sometimes the opinions will concede that there is some factual or legal ambiguity and uncertainty, and that some judicial discretion is therefore being exercised, but not very often.

The legal realists, however, argue that you should be rather skeptical about these formalist claims, that you should require some convincing and not just accept them uncritically. They argue that there is often much more judicial discretion in decisions than is admitted in the opinions, that there is often a covert (or perhaps even unconscious) application of the judge's own moral principles and biases in choosing what law to apply to the case, or how to interpret that law, or even in characterizing the facts of the case.

As part of reading and briefing your cases in your classes you should therefore also give them the "legal realist critique," so to speak, in which you step back a bit from the logic and details of the opinion and consider whether the case is really as straightforward as the opinion's usually formalistic discussion suggests. Was it really that easy to decide, that straightforward, or was there some significant and perhaps covert application of the judge's own attitudes and biases in reaching the decision?

CONCLUSION

Let me end this brief discussion by calling your attention to an important 2007 study of the adjudication process carried out by Cass Sunstein, one of the most respected and cited law professors in the country, along with several other co-researchers.[2] This study focused narrowly upon the specific role played by the political affiliation of federal judges, Republican or Democrat or Independent, in shaping judicial decisions, within the currently (still) relatively homogeneous group of predominantly upper-middle class, predominantly white, predominantly male and predominantly heterosexual persons that are now serving as federal judges, as

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[2] CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2007).

compared to the roles played by "the law" and by other demographic factors in shaping those decisions.

From a legal realist perspective you would expect that diversity of gender, race, sexual preference, economic background, etc., among judges would lead to variation among their decisions even under identical factual and legal circumstances. What is particularly interesting about the Sunstein study, however, is that he found that even differences among judges only with regard to their Republican or Democratic political affiliation, differences in partisan political commitments among an otherwise demographically and economically and socially relatively homogenous group of people, has major importance for the results reached in many kinds of cases of great social significance. This was particularly true for those cases involving such hot-button social issues reflecting sharp partisan differences as, for example, decisions regarding abortion rights, campaign finance regulation, gay marriage, affirmative action, sexual discrimination, and environmental protection. If this was the situation in 2007 it is surely even more the case today given the dramatic increase in political polarization among all social groups over the past decade.

Sunstein's study suggests that the legal realists may have it right regarding the importance of judicial attitudes and predispositions, and particularly political orientation, relative to the lesser role played by the formal body of law in deciding

these kinds of particularly controversial cases. However, Sunstein also interestingly found that there are some other areas of law where both Democratic and Republican judges tend to reach the same results, despite their different ideological orientations and partisan commitments. This suggests that the formal body of law does constrain judges to some extent, providing some support for a formalist explanation of judicial decisions, at least for those areas where the law is unusually clear and is also not so politically controversial. However, in my opinion, his study overall provides more support for the legal realist assessment of the ultimate sources of judicial decisions than it does for the formalist model of adjudication. But that is just my opinion; you all should think about this a lot as you read many cases over the next few years, and draw your own conclusions.

Let me close by noting that Sunstein also makes the interesting point that multi-judge panels of judges that all have the same political affiliation tend to take more extreme, polarized partisan positions in their rulings than any of those judges would usually take individually, apparently reinforcing in their deliberations each other's more extreme partisan tendencies. This finding of a group dynamic tending toward more extreme results among groups of persons who are all generally in ideological agreement has broad implications in many contexts, and suggests that multi-judge judicial panels should perhaps be chosen so as to include at least one

person from a different political party than the others in order to counter this group polarization tendency.

With that brief introduction regarding competing views of the process of adjudication, it is now time for you all to go read those hundreds of cases that you will be assigned by your professors over the next three years, and try to figure out for yourselves what those judges are all about!"