BLINKING ON THE BENCH:
HOW JUDGES DECIDE CASES

Presenter
PROFESSOR JEFFREY J. RACHLINSKI
Cornell Law School
122 Myron Taylor Hall
Ithaca, NY 14853-4901
Phone: (607) 255-5878

Co-Authors
CHRIS GUTHRIE
Dean
Vanderbilt University Law School
131 21st Ave. South
Nashville, TN 37203-1181

HON. ANDREW J. WISTRICH
Magistrate Judge
United States District Court for the Central District of California
312 North Spring Street
Los Angeles, CA 90012-2095

State Bar of Texas
27th ANNUAL
LITIGATION UPDATE INSTITUTE
January 20-21, 2011
San Antonio

CHAPTER 6
BLINKING ON THE BENCH: HOW JUDGES DECIDE CASES

Chris Guthrie†, Jeffrey J. Rachlinski‡‡ & Andrew J. Wistrich‡‡‡

How do judges judge? Do they apply law to facts in a mechanical and deliberative way, as the formalists suggest they do, or do they rely on hunches and gut feelings, as the realists maintain? Debate has raged for decades, but researchers have offered little hard evidence in support of either model. Relying on empirical studies of judicial reasoning and decision making, we propose an entirely new model of judging that provides a more accurate explanation of judicial behavior. Our model accounts for the tendency of the human brain to make automatic, snap judgments, which are surprisingly accurate, but which can also lead to erroneous decisions.1 Equipped with a better understanding of judging, we then propose several reforms that should lead to more just and accurate outcomes.

INTRODUCTION ...................................................... 2

I. THE INTUITIVE-OVERRIDE MODEL OF JUDGING .............. 6
   A. Dual-Process Models of Judgment ....................... 6
   B. The Cognitive Reflection Test ......................... 10

II. TESTING THE MODEL ........................................... 13
   A. The CRT and Trial Judges ............................... 13
   B. Studies of Judicial Decision Making ................. 19
      1. Intuitive Judging—Anchoring ....................... 19
      2. Intuitive Judging—Statistical Inferences ............. 22
      3. Intuitive Judging—Hindsight ......................... 24
      4. Summary of Intuitive Judging Studies ............... 27

III. IMPLICATIONS FOR THE JUSTICE SYSTEM .................. 29
   A. Intuitive Versus Deliberative Decision Making ...... 29
   B. Inducing Deliberation .................................... 33
      1. Time .................................................... 35
      2. Opinion Writing ...................................... 36
      3. Training and Feedback ............................... 38
      4. Scripts, Checklists, and Multifactor Tests .......... 40

† Associate Dean for Academic Affairs and Professor of Law, Vanderbilt Law School.
‡‡ Professor of Law, Cornell Law School.
‡‡‡ Magistrate Judge of the United States District Court for the Central District of California. The authors appreciate feedback from faculty participating in workshops at Cornell Law School, the University of California-Berkeley Law School, the University of Illinois College of Law, and the University of Iowa College of Law. For comments on earlier drafts, the authors thank Susan Bandes, Tracey George, John Goldberg, and Dan Kahan.

1 See generally MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005) (discussing the role of automatic decisions made “without thinking”).
"I fear the judge who is too sure of himself, who reaches his decision quickly, jumping immediately to conclusions without deliberation or repentance."2

INTRODUCTION

How do judges judge? The answer to this seemingly simple question has proved surprisingly elusive.

The two venerable models of judging—the formalist and realist models—offer contrasting responses. According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way.3 For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic."4 Legal realism, on the other hand, represents a sharp contrast. According to the realists, judges follow an intuitive process to reach conclusions which they only later rationalize with deliberative reasoning.5 For the realists, the judge "decides by feeling, and not by judgment; by ‘hunching’ and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster."6 Neither model has proved satisfactory. Judges surely rely on intuition, rendering a purely formalist

4 Id. For other depictions of the formalist approach to judging, see, for example, Brian Bix, Jurisprudence: Theory and Context 185 (Sweet & Maxwell Ltd. 4th ed. 2006) (1996) (describing formalist judicial decision making as "a nearly mechanical, nearly syllogistic move from basic premises to undeniable conclusion"); Brian Leiter, Positivism, Formalism, Realism, 99 Colum. L. Rev. 1138, 1145–46 (1999) (book review) (describing legal formalism as a "descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.").
6 Id.; see also Jerome Frank, Law and the Modern Mind 111–12 (Anchor Books, Peter Smith 1970) (1930) (characterizing Hutcheson’s depiction of judging “as an approximately correct description of how all judges do their thinking”); Hutcheson, supra note 5, at 278–79 (describing his decision-making process as a judge, Hutcheson writes, “I . . . give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding . . . .”). Note that scholars often distinguish between the Frank/Hutcheson approach to realism and the more moderate approach taken by other scholars in the legal realist movement. See Leiter, supra note 4, at 1148.