



UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TENNESSEE

Joel W. Solomon United States Courthouse
900 Georgia Avenue
Chattanooga, Tennessee 37402

WHY DON'T ALL FEDERAL JUDGES RULE THE SAME WAY?

A common question raised about the federal courts, especially the Supreme Court, is why judges rule differently in the same or similar cases. Federal judges take an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all [their] duties.” If judges are intelligent and well trained in the law, why do they look at the same facts yet reach different conclusions?

This is a valid question. There are academic studies suggesting federal judges appointed by Democratic presidents differ in rulings from those appointed by Republican presidents in certain types of cases. Other studies suggest male judges differ in their rulings from female judges in certain cases. And although not as many, some studies suggest differences in rulings between judges of different races, between judges from rural or urban areas, and between judges from defense backgrounds or plaintiffs’ backgrounds.

We believe there are two answers to the question of why judges reach different results from similar facts. First, law is not math. Second, the judges of our federal courts are human beings—which is a good thing.

Law Is Not Math

Oliver Wendell Holmes, Jr., famously wrote in *The Common Law* in 1881 that “[t]he life of the law has not been logic: it has been experience.” In math and in logic, there is one correct answer to a problem. But law does not deal just with numbers. It deals with human actions, human words, and human intentions. There are also often gradations in law. For a plaintiff to win a civil case, for example, he or she must prove a case by a preponderance of the evidence. One person might take this to mean proof by 51 percent, while another might take it to mean 50.1 percent. Both interpretations are reasonable.

Courts Are Populated by Human Beings

Both the people who make the law—legislators—and those who interpret and apply the law—judges—bring their lived experiences to their tasks. This is an unavoidable reality. Varying lived experiences create different viewpoints and decision-making processes. And that leads to our second answer to the question: judges are human beings, not machines.

If perfect consistency were the most important goal in court rulings, then having machines serve as judges would be ideal. In fact, there are ongoing experiments with algorithmic decision-making tools, actuarial tools, and other emerging technology to test their ability to do the job of judges without the influence of judges' lived experiences. Even if a satisfactory tool could be developed, though, few of us would wish to have our cases decided by a machine. Such technology might remove the possibility of individual variations from the courts, but it would also remove the human heart.

When we present a case to a judge, we bring all of our lived human experience with us. We want our judge to understand, share, and consider our individual human experience. To do this requires a human heart, not a machine's mathematical calculation.

This is the reason our laws at their root are based on lived human experience. Legislators use their experience to make laws. Judges use their experience to reach their decisions. As a society, we do not want to delegate those important responsibilities to calculators. But as a consequence, reasonable people will have honest disagreements when viewing the same set of facts and applying the same law.

Differences Are Not as Deep as Portrayed

It is important to keep in mind that even the studies mentioned above indicate that judges' individual differences operate only at the margins. For the vast majority of cases, differences in judges' experiences play no role in court decisions. Using the example of the preponderance of the evidence, while judges might disagree on whether the proof must be 50.1 percent or 51 percent, if the proof were 52 percent, there would be no disagreement.

The same is true of the Supreme Court. Despite the perception that the Supreme Court is incessantly split, the reality is quite different. According to an article in the Washington Post on June 28, 2018,¹ "justices agree far more often than they disagree." The article explains:

According to the Supreme Court Database, since 2000 a unanimous decision has been more likely than any other result—averaging 36 percent of all decisions. Even when the court did not reach a unanimous judgment, the justices often secured overwhelming majorities, with 7-to-2 or 8-to-1 judgments making up about 15 percent of decisions. The 5-to-4 decisions, by comparison, occurred in 19 percent of cases.

Protections from Individual Judges' Differences

Finally, our legal system contains structural limits on judges' exercise of individual differences based on their backgrounds and experiences.

One of the most important constraints on judges is the jury. In the vast majority of civil and criminal cases, the parties have the right to have a jury to decide the case. With a jury, the judge's

¹ Available at <https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/>.

background and experiences have a limited effect. A jury of ordinary citizens decides the outcome, not the judge.

Another constraint is the appeal process. A faulty decision by a trial judge can be reviewed and corrected by an appellate court. And on the appellate courts, any individual judge's background and experiences will be tempered, because each panel is composed of multiple judges, most often three. With multiple judges on each panel, no one judge's individual tendencies will prevail.

We as citizens can know that while judges are human beings and retain all the experiences and characteristics of human beings, human beings in the end make better judges than would machines. We can also be assured that our legal system contains systemic protections to guard against the possible excessive effects of judges' individual backgrounds and experiences.

Curtis L. Collier
United States District Judge
Chair, Eastern District of Tennessee
Civics and Outreach Committee

Carrie Brown Stefaniak
Law Clerk to the Honorable Curtis L. Collier
Immediate Past President, Chattanooga Chapter of the Federal Bar Association

Eliza L. Taylor
Law Clerk to the Honorable Curtis L. Collier