

April 01, 2007

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Recommended Citation

Subrin, Stephen, "Thoughts on misjudging misjudging" (2007). *School of Law Faculty Publications*. Paper 133. <http://hdl.handle.net/2047/d20002476>

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THOUGHTS ON MISJUDGING MISJUDGING

Stephen N. Subrin*

There is much to admire in Chris Guthrie's paper, *Misjudging*.¹ By summarizing research on how judges make mistakes, and providing categories for the analysis of the types of mistakes they make – through informational, cognitive, and attitudinal blinders² – he provides an intellectual prism through which to study what trial lawyers have always known: judges are human and possess the same foibles as the rest of us. Of course, those of us who have tried cases before them have often wondered whether their black robes and elevated bench, watching folks rise as they enter, and hearing themselves called “your honor” might exacerbate universal human failings by increasing the ingredient of self-importance.

Despite my admiration for Professor Guthrie's providing empirical and experimental backing for what the trial bar has largely assumed, I think the studies he cites and his conclusions are misleading in four different dimensions. Moreover, in my view, he does not show sufficient appreciation of the value of the traditional trial system to American democracy and to ADR, nor sufficient understanding of the American trial bar and why it eschews or embraces trials for certain cases. I will begin with the four dimensions in which I think Guthrie shortchanges reality, and then put in a plug – which I deeply believe – for our formal civil justice system.

LIMITS OF THE EMPIRICISM

The studies Guthrie depends on limit the operative variables and consequently do not capture what truly happens in civil litigation. Perhaps this is inherent in such empiricism, because limiting variables is how science operates. But such limitation leads to distortion. Consider, for instance, the studies under his category “Anchoring.”³ In some of these studies, groups are given plaintiffs' demands.⁴ A higher demand elevates what mock judges or jurors would award.⁵ But in real life, judges, if there is settlement talk in their presence, are usually told about two offers to settle, one by plaintiff's counsel and one by defendant's counsel. And they are given reasons by each counsel why the demand or offer by their opposition lacks credibility. If a plaintiff's demand is absurdly high, defendant's counsel is apt to counter with a non-offer or with a low offer as devoid of reality as the plaintiff's inflated demand. In short, there

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¹ Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420 (2007).

² *Id.*

³ *Id.* at 430-34.

⁴ *Id.*

⁵ *Id.*

is not just one anchor. Consequently, the impact of anchors on judges is apt to be less linear and more nuanced than the studies suggest.

Moreover, if there is a jury, it will normally decide damages, and, at least in Massachusetts, the jurors will not be told the damage amount in the complaint or summons. In no jurisdiction, to the best of my knowledge, are jurors told of demands, offers, or counter offers. When there is a jury, the judge might react to anchoring amounts, and maybe this will skew some decisions made along the way, but she ordinarily will not be making the decision on monetary damages.

More importantly, in most of Guthrie's examples of research, the studies have had to be done in a controlled environment of relatively little information. Judges normally are not presented with just one motion to decide or one bit of evidence that, at trial, would be excluded. In the course of litigation, they are picking up bits of information in pleadings, memoranda, oral argument, and conferences in chambers that cut in all kinds of conflicting directions. And they are subjected to arguments, often by very experienced and astute advocates, trying to dull the impact of prejudicial information, to focus the judge on important facets of the law or the factual story, or to show the judge the complexity of what might look like a straight-forward situation. And, again, there frequently are juries of six or twelve ordinary citizens, who are hearing the viewpoints of each other and of opposing lawyers, and who are also hearing instructions from a judge.

None of this is to argue that judges do not have blinders and do not have biases. Of course, they do. I do not understand why Guthrie thinks that the legal system does not take into account judicial blinders. Trial lawyers certainly do. One of the first lessons I learned from the senior trial lawyer in my own firm was how important it was to avoid some judges and to try to appear before others. And we know that in differing periods of American history plaintiffs or defendants have used many strategies to try to land either in federal court or to avoid the federal system. One important factor in deciding on the desired forum is bias.⁶

Moreover, the trial lawyers I learned from always assumed that what judges hear in chambers from the lawyers, such as settlement talk and discussion of the case without the filter of evidentiary objections sustained, could hurt or help their positions. In some cases, lawyers try vigorously to avoid any discussion with judges that is not on the record and try not to have the settlement judge preside over the trial, if settlement fails. Lawyers have ways of trying to counter bias and inadmissible evidence that has been exposed to judges, through argument, motions, presentation of other evidence, and the use of juries.

The full array of experience of a litigation setting is not captured in most of the research Guthrie relies upon; consequently, the conclusion that judicial blinders should play a material role in causing lawyers to avoid judges or trials needs refinement. Perhaps we should merely conclude that one of the myriad

⁶ See, e.g., Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (1992); EDWARD A. PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA (2000).

reasons a lawyer or client should choose or avoid trial or the appearance before a judge is that judges are human and prone to human distortions in appraising the strengths and weaknesses in evidence and in making other decisions. I recognize that Guthrie might well agree with this modest conclusion from his data, but such restraint in conclusion severely minimizes the importance of the paper and of the studies he summarizes.

A LIMITED CONCEPTUAL VIEW OF THE CIVIL LITIGATION PROCESS

But my quarrel with the limitations of the empiricism is not as important as what I think are three conceptual flaws in Guthrie's paper. Throughout his paper he asserts a lack of "accuracy"⁷ on the part of judges because of their blinders or a failure in their "adjudication on the merits" by which he says he means "application of governing law to the facts of the case."⁸ But in a similar manner as what I argued concerning the limits of the empiricism Guthrie relies upon, what goes on in an American civil litigation is considerably more nuanced, more multi-faceted, than what he suggests in his paper. True enough, what happened that gave rise to the litigation, the "facts," are important, and the law is important. But as he points out in his examples under the theme of "informational blinders," the law itself attempts to keep relevant facts from the fact finder, because of other values.⁹ His examples relating to the subsequent remedial activity doctrine,¹⁰ attorney-client privilege,¹¹ and prior criminal conviction¹² are all examples of what might be relevant information, but, because of other policies, are normally excluded (e.g. wanting defendants to make repairs, wanting clients to feel free to talk to their lawyers). Ironically, in Guthrie's own examples, the judges having heard relevant, but inadmissible, evidence, may be making more, not less, accurate decisions.

Lots of variables in the legal system make Guthrie's talk about accuracy and neutral application of law to fact seem simplistic. Clients choose lawyers they can afford; some are better than others. Witnesses (particularly parties) distort reality, some on purpose, some because of blinders similar to those Guthrie describes with respect to judges. Efficiency considerations limit discovery that might lead to more information. Cases settle because of court congestion or costs imposed by the system or the other side. Jury selection leads to bias as well as non-bias. Many, if not most, issues to be decided by judges or juries are not facts in the ordinary sense. Discriminatory intent, unreasonable care, unfair competition, material breach, proximate cause, and many other "facts" we ask judges or juries to find are really mixed questions of law and fact, upon which reasonable people can differ. His studies, and his conclusions from them, do not seem to take into account the complexity of the system.

Guthrie's use of appellate reversals of trial judges as evidence of the inaccuracy or lack of correct judging also displays a lack of sophistication about the

⁷ See, e.g., Guthrie, *supra* note 1, at 421, 429, 441, 449, and 450.

⁸ *Id.* at 420.

⁹ *Id.* at 422.

¹⁰ *Id.* at 423.

¹¹ *Id.* at 425.

¹² *Id.* at 427.

reality of adjudication.¹³ As the aphorism goes, appellate judges are not final because they are right, but right because they are final. Extremely talented, knowledgeable, brilliant, fair trial judges are reversed merely because the majority of an appellate court disagrees with them, not because of any objective failing on their part. A different composition on the appellate court would frequently lead to different conclusions.

Guthrie sees a multiplicity of values that one might achieve through ADR, but does not sufficiently recognize, if at all, the reality that the formal litigation process also has a multiplicity of goals, only one of which is accuracy, and some of which are to a greater or lesser degree enhanced or weakened by ADR mechanisms. Some years back I wrote an article in which I tried to list the goals of the procedures in a civil litigation system:

I can identify ten different values and goals in the United States [procedural system]. Others may identify more; the list is not exhaustive: (1) resolving and ending disputes peacefully; (2) efficiency; (3) fulfilling societal norms through law-application; (4) accurate ascertainment of facts; (5) predictability; (6) enhancing human dignity; (7) adding legitimacy and stability to government and society; (8) permitting citizens to partake in governance; (9) aiding the growth and improvement of law; (10) restraining or enhancing power.¹⁴

My listed goals “3,” “7,” “8,” and “9” are probably not enhanced by ADR; for that matter, “2,” “4,” “5,” “6,” and “10” may in many cases gain more effectuation through formal adjudication. I am not sure of any this, and have even argued elsewhere that mediation meets some of the goals (such as enhancing human dignity) much more than is obvious.¹⁵ I am sure, though, that civil adjudication in the United States is based on a multiplicity of goals and values that are not captured by an analysis that only looks to the application of law to facts. There are so many goals, often at odds with one another, not because the system is bad, but because it is trying to meet competing human needs.

So in this complex system which evolved over time, the fact that judges have blinders which may cause them to misjudge is significant, but a relatively small part of a very large, complicated picture. In the studies Guthrie cites, judges in the control group, even without the information that caused others to be blinded, often came up with materially different judgments. That is because the term “accuracy” and “neutral application of law to fact” do not come close to describing what is going on in litigation. Human beings are trying to make difficult judgments that frequently have no correct answer in a system that has conflicting goals with conflicting underlying values. The judicial distortions Guthrie cites are a small portion of the many variables that go into the strategic thinking of lawyers, and the impact of judicial blinders on potential results, given the multiple variables in most real cases, is quite hard to predict.

¹³ *Id.* at 448 n.160.

¹⁴ Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 *TUL. J. INT'L & COMP. L.* 139, 140 (1999).

¹⁵ Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 *NEV. L. J.* 196, 221-22 (2002-2003).

THE NEUTRALITY OF ARBITRATORS AND MEDIATORS

It is true, of course, that because of expense, time, the unpredictability of trial results, and other factors, lawyers should consider eliminating outside fact finders or outside adjudicators of any kind, and take more control of results by trying to negotiate a settlement, often the earlier the better. Lawyers have known the value of settlement for some time, if not always.¹⁶ In any event, so far as I can tell, about 65% to 70% of civil cases settle.¹⁷ There are many reasons that lawyers settle their cases, including the uncertainty of trial results, and in some cases, the near certainty of trial results.¹⁸ The lawyers I have known my entire life (I come from a family of lawyers) have cautioned that trials are crap shoots. I know of no trial lawyer or litigator who would find it a surprise that judges, like all humans, have blinders, although most lawyers probably would not be as precise as Guthrie in the specific types of blinders that interfere with decisional processes.

But I think Guthrie, although he mentions it, underestimates the impact of the exact same blinders on the part of mediators and arbitrators.¹⁹ Let us talk about mediators first. Lawyers, no surprise, take very seriously who the mediator will be and what prejudices or leanings the mediator might have. Some lawyers even tell me that in certain cases they want a mediator with a background similar to their opponent's, so that the opposing side will take what the mediator says more seriously.

What lawyers and clients tell mediators is not regulated by normal rules of evidence, or even the lay understanding of relevancy. If judges are "prejudiced" by what they should not hear, why do we not assume that mediators – like all humans – will be equally prejudiced, or more prejudiced, because they hear information not given under oath nor bound by relevancy or hearsay constraints? Mediators often, if not usually, go back and forth between the parties, suggesting weaknesses in each party's case (or strengths) without even the modifying influence of having the opponent there to hear what is said. And this is true even for facilitating mediators. Mediators' views on a case, influenced by information that judges often are not supposed to hear, and for sure what juries do not hear, will have to influence how hard they lean on each side or at least how they chose to explain weakness and strengths to each side.

True enough, with a mediator, the parties still can control the final settlement. But lawyers and clients, without mediators, can also have the right to accept or reject settlements. In fact, up to and even after verdict, cases in formal litigation can also settle. Guthrie's point that a judge's misjudging at the

¹⁶ For instance, think about the frequently cited quote of Abraham Lincoln: "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln, *Notes for a Law Lecture* (July 1, 1850), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 81 (Roy B. Basler ed., 1953).

¹⁷ Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 *NOTRE DAME L. REV.* 1981, 2002, n.95 (2004).

¹⁸ For a description of the many reasons for settlement, see Subrin, *supra* note 3, at 202-07.

¹⁹ Guthrie, *supra* note 1, at 457.

motion stage can influence settlement makes sense.²⁰ But, again, what lawyer has not always known this? This is why one side or another historically, without any empirical datum behind it, but with great common sense and experience, may want to settle before motions, particularly summary judgment motions, are decided.

The illusion of neutrality or better decision-making by arbitrators is, at least to me, laughable, if not heart-wrenching, especially in the context of binding arbitration for consumers and others who lack power. First of all, parties, when they have a choice, go to great length to get arbitrators whom they think will be favorable to them. When there are three arbitrators, two will usually have quite distinct "blindness" which is why they were chosen, and the third arbitrator will have the same type of blindness as judges. Perhaps more knowledge of an industry moderates some of the types of blindness that Guthrie describes, but I do not understand why such knowledge would eliminate or even lessen bias or many of the other blindnesses he describes, such as informational or as a result of anchoring.

Second, arbitrators are notorious for frequently splitting the difference on cases. They want to be picked as arbitrators again, and do not want to make either side too unhappy. Guthrie recognizes this.²¹ So much for "accurate" judging. Third, many businesses insist on arbitration, and use binding arbitration agreements, exactly because they think they will be treated favorably by arbitrators, or at least more favorably than by courts. And they often force consumers into binding arbitration agreements, in which the arbitrators are picked from panels orchestrated by organizations of the businesses' choice.²² A recent *New York Times* article suggests that the allegedly neutral arbitrators are frequently not neutral, and that the arbitrators' connection with the business which is a party to the arbitration often has not been divulged.²³ Fourth, arbitration usually permits only limited appellate review, if any at all, so that this safeguard against unfair or unwise results is largely absent. Other safeguards or helpful procedures for consumers, employees, or those sustaining personal injuries, such as discovery, are often missing or diminished in arbitration.²⁴

²⁰ *Id.* at 452.

²¹ *Id.* at 458.

²² There is mounting criticism of the unfairness to consumers, employees, and others in binding arbitration clauses forced upon those with less power and with an absence of meaningful consent. See, e.g., Elizabeth G. Thornberg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 *LAW & CONTEMP. PROBS.* 253 (2004); Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer's Experience*, 67 *LAW & CONTEMP. PROBS.* 55 (2004); Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 *NEV. L. J.* 259, 281 (2002-2003).

²³ Gretchen Morgenson, *Is This Game Already Over?: Critics Say Arbitration Panels Often Have Hidden Conflicts*, *N.Y. TIMES*, June 18, 2006, Sec. 3, at 10-11.

²⁴ See, e.g., RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 151-52 (1997).

THE MISJUDGED IMPACT OF GUTHRIE'S FINDINGS ON MISJUDGING

Guthrie's paper ends with the suggestion that given what he has now taught about judicial blinders, lawyers should be more prone to avoid judges, or be quicker to use ADR mechanisms.²⁵ I do not see lawyers changing their behavior because of what Guthrie teaches about judicial blinders. In fact, in many of his studies the variance of results by those in the control group provide reason enough to avoid the uncertainty of judicial decision making without considering blinders that lead to judicial misjudging.

Lawyers act instrumentally. Their goal is to win by motion, settle favorably, or on rare occasions, win a trial verdict. If they think they can win by motion, say a motion to dismiss for failure to state a claim, or a motion on the pleadings, or by summary judgment, nothing Guthrie has taught is apt to change their minds. In most cases, lawyers already think trial is too risky because of a myriad of reasons, only one of which is the failings of judges, and therefore already they choose negotiated settlement with or without the aid of a third party mediator.

Some cases lawyers choose to try. Here are some of the reasons: one side thinks it has a big edge on the facts or the law; one side thinks the particular judge or a jury will provide a better result than settlement; the sides have such different takes on the case that they cannot come close to a middle ground; one side (like an insurance company) wants to show that it is hardnosed and not prone to settlement in order to discourage others from suing; one side wants a trial result for publicity or to have a favorable precedent; the client wants to shoot for a 100% victory, regardless of the risk of loss; one side dislikes the other (or one lawyer dislikes the other) and wants to make the opponent endure a trial; one lawyer wants the joy or publicity or enlarged fee resulting from winning a full victory. None of these reasons changes in any material way the decision to go to trial as a result of learning there is empirical data that judges have blinders. Finally, if the blinders point in favor of one side, this is an added reason for that side to insist on trial.

JUDGES AND JURIES

I have a final comment I want to make because I have grown to have deep respect for our formal civil adjudication system as a result of being a trial lawyer, a juror, a civil procedure teacher and writer about civil procedure for over thirty-five years, and a teacher of lawyers and law professors from other countries. I suppose I have blinders on this issue. In any event, there are many values in our formal system not fulfilled by ADR, although I see many values in mediation.²⁶ Societies have laws. Though imperfectly, because they are mortal and have the blinders and other infirmities of all members of the human race, judges and juries try to effectuate the law, usually as best we mortals can. Assuming the laws are good, it is a good thing to have the laws enforced and not always compromised. Professor Owen Fiss has eloquently explained this.²⁷

²⁵ Guthrie, *supra* note 1, at 459-60.

²⁶ Subrin, *supra* note 3, at 209.

²⁷ Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

In our democracy, citizens do not have much opportunity to participate directly. They can vote. But they can also be jurors, a task that as far as empiricists can tell juries take very seriously. By serving on juries, citizens learn about the law and gain respect for it. And public trials, with or without juries, give the citizenry at large confidence in the legitimacy of the system.²⁸

In a country where fewer than 2% of terminated federal cases are evidently tried,²⁹ it is perhaps untimely, maybe even just a little unwise, to concentrate on urging lawyers to choose ADR more often.³⁰ This is particularly true when (1) lawyers already know all too well the risk of trial, including the limitations of judges; (2) lawyers also already know the foibles of all participants in a trial, for their calling in life insures that they see humans at their worst; (3) lawyers are already turning in huge numbers to mediators and other ADR methods; (4) arbitrators and arbitration, when forced upon consumers and others without anything close to informed consent, are justifiably under attack on grounds of unfairness; and (5) ADR needs formal adjudication. Without the realistic threat of trial, with the concomitant threat of imposed sanctions, not many defendants, if not most, would ever bargain at all. And without trials, mediators, lawyers, and litigants would know even less than they do now about the possible results of the failure to settle.

²⁸ For my more complete views on juries, see STEPHEN N. SUBRIN & MARGARET Y. K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 246-50, 255-57 (2006).

²⁹ *Id.* at 240. The “vanishing trial” phenomenon is apparently also taking place to some extent in state courts. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUDIES* 459, 509-10 (2004).

³⁰ Perhaps I have recently committed the same indiscretion in my article praising mediation, although I tried to moderate my praise and point out the attributes of the formal civil litigation system at the end of that article. Subrin, *supra* note 3.