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Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts

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FUNDAMENTALS OF JURISPRUDENCE: AN ETHNOGRAPHY OF JUDICIAL DECISION MAKING IN INFORMAL COURTS†

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"Informal justice"—the justice dispensed by small claims, magistrates', and similar courts—is the subject of this Article. Professors Conley and O'Barr, having observed the behavior of litigants and decision makers in this setting, describe the variation in the administration of justice in informal courts. They present a typology of judicial behavior based on five principal approaches to decision making. The Article concludes with a discussion of the theoretical and practical implications of the presence of such variations within our judicial system.

I. INTRODUCTION

Few questions are as central to the study of the legal process as that of how legal decisions are made. It is of transcendent practical significance, because a favorable decision is the presumed goal of every litigant. The question also is an essential jurisprudential one, because any theory of the nature of law necessarily embodies a judgment about how law is made.

In this Article we present the results of an ethnographic investigation of legal decision making as it occurs in informal courts. We chose these courts—often referred to as small claims or magistrates' courts—because they offer a unique window on the decision making process. Since informal court judges typically pronounce judgment in the presence of the parties immediately following the presentation of evidence, the gap between the making and the explaining of the decision is far narrower than in almost any other legal context. All pronouncements of judgment are a blend of reasoning and justification, but informal court judgments, because their immediacy constrains the process of justification, are likely to contain far more evidence of the reasoning process than their carefully crafted formal court counterparts.

Our most striking finding is that even in these courts, which stand at the

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lowest level of the civil justice system, judges exhibit divergent orientation toward the nature of law. These orientations show a striking correspondence to positions taken by major jurisprudential schools. Moreover, these differences in orientation are of great practical significance, as they affect both the decisions reached and the information about the law communicated to the litigants.

In fact, judges vary so much with respect to their views of the law, their manner of dispensing justice, and the remedies they provide that it becomes difficult to appreciate that they are operating within the same legal system. These divergences appear not only across different cities and states, but even within single court systems. When seen from this perspective, justice at this level does not comprise a single process that can be described and evaluated, but rather consists of a broad range of variable processes whose specifics seem to reflect the differing outlooks and practices of individual judges.

II. SOME THEORETICAL CONCERNS

The fundamental jurisprudential debate over the nature of law is in large part a debate over the nature of legal decision making. Every theory of law presupposes that legal decision makers think and act in certain ways. For example, the formalist contention that law is a set of discoverable neutral principles has as its corollary the belief that judges find facts, and then identify and apply the relevant legal principles.[1] Similarly, the legal realists' view that law derives from the complex interaction of legal principles with social considerations, commercial reality, and even the personal whims of the decision makers is in effect a statement about the behavior of judges.[2] Relatedly, critical legal theorists define law by reference to the behavior of a legal elite who manipulate indeterminate legal postulates in furtherance of their economic and ideological objectives.[3]

Logically, any such theory has descriptive and predictive validity only if it rests on an accurate understanding of the behavior of legal decision makers.[4] For example, if it is not true that the outcomes of cases depend largely on the unbiased application of neutral principles, then formalism is empirically invalid and of limited utility in explaining or predicting developments in judge-made law. In view of this, an important but rarely asked question is, what evidence exists for the assumptions held by proponents of the competing theories concerning the nature of legal decision making?

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1. *See* Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 442 (1986).

2. *See* J. FRANK, LAW AND THE MODERN MIND 137-38 (1930); K. LLEWELLYN, JURISPRUDENCE 21-41 (1962); Golding, *supra* note 1, at 452.

3. *See* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 702-05 (1985); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 469 (1987). The points made in the text are oversimplified, of course. The realist, and even the critic, may think like a formalist in analyzing an easy case, whereas even a formalist (if one could be found) may acknowledge a degree of indeterminacy in applying the law to a hard case. We offer these examples simply to make the point that theories of law cannot be separated entirely from the empirical question of how judges tend to behave.

4. A theory, of course, can have normative utility even if its assumptions about how decision makers currently are behaving are empirically invalid.

As the use of the case method in legal education demonstrates, formalism—and traditional legal theory generally—assumes that written judicial decisions provide sufficient evidence about legal decision making to permit the understanding of how legal decisions are made, as well as to predict the outcomes of future cases.[5] To rely on reported decisions as a primary teaching tool is to suggest to students that judges in fact make decisions as they say they do, by applying neutral principles to facts, and that other influences are either trivial or random and thus beyond analysis. The result of this assumption is a closed system which has an appealing internal consistency. Much of the law can indeed be explained in terms of the application of principle to fact; when a new case yields an unexpected result, one can argue that a principle has been misapplied, or, in exceptional cases, that a new principle has been invented. What is absent is any empirical assessment of the possible roles played by factors not evident in reported decisions.

By contrast, empiricism was the hallmark of the legal realism movement which flourished in the 1930s. Such diverse enterprises as law and economics,[6] the effort to apply mathematical models to evidentiary problems,[7] and the current interest in juror psychology[8] all owe their existence, at least in part, to the legal realists' belief that both the theory and practice of lawmaking are amenable to scientific study.[9] Despite this empirical tradition, however, legal realism's central assumptions about the behavior of judges—as opposed to jurors—have received relatively little attention. As discussed below, this shortcoming is due not so much to the inattention of legal realists and their intellectual descendants, but to the extraordinary difficulty of studying judicial decision making. As two Dutch scholars have put it, "A decision-making model which takes account of all factors may be too complicated to handle."[10]

Critical legal scholars, while acknowledging their indirect descent from legal realism,[11] have eschewed its empiricism, sometimes criticizing an empirical approach to law and public policy as the substitution of a technocratic elite for one based on wealth and social power.[12] Nonetheless, many scholars sympathetic to the critical legal studies movement have brought empirical techniques to bear on such issues as the ideological conflicts between lawyers and clients,

5. In law school courses, at least in the first year, cases are the students's primary (and in some courses, the only) source of information about the law, suggesting that teachers believe that they are a sufficient source. The originator of the case method, Christopher Columbus Langdell, has been described as holding the view that "the law preexists the case, and the principle of legal growth is that of logical development out of fundamental doctrines and concepts." Golding, *supra* note 1, at 443.

6. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

7. *See, e.g.*, Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

8. *See, e.g.*, Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375.

9. *See* Boyle, *supra* note 3, at 697-702; Golding, *supra* note 1, at 453-55.

10. Van Koppen & Ten Kate, *Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-Making*, 18 L. & SOC'Y REV. 225, 227 (1984).

11. *See* Boyle, *supra* note 3, at 691.

12. *See* Boyle, *supra* note 3, at 699-700.

and between litigants and court personnel.[13] However, the fundamental tenets of critical legal studies—that law is indeterminate, and that lawmaking is a tool of class hegemony—are validated only by anecdote and philosophical argument. Our position is that any theory of the nature of law only can be enhanced by being tested against an empirical understanding of the actual operation of judicial decision making.[14]

III. REVIEW OF PRIOR RESEARCH

Although the literature on judicial decision making contains few references to questions of legal theory, most of the reported studies can be fairly categorized as oriented toward the agenda of legal realism. A number of researchers have investigated the influence on decisions of the personal characteristics of judges, including attitudes,[15] role orientation,[16] social background,[17] and such aspects of personality as self-esteem.[18] Others have tried to relate decisions to the sociopolitical environment in which they are made by investigating, for example, whether the sentencing decisions of circuit-riding judges vary from venue to venue.[19] Collectively, these studies have cast doubt on "the traditional view of courts as somehow distinctive and insulated from the remainder of the political system,"[20] and have demonstrated a number of specific links between judicial decisions and factors extrinsic to the normative law as it is recited in statutes and cases.[21] These studies, however, fall short of providing empirical support for any particular comprehensive theory of decision making, largely because of the enormous methodological task that such research presents.

Most of the published studies of judicial decision making rely on one or more of three types of data: information furnished by the judges themselves, in response to interview questions or written questionnaires, or in formal written opinions; results reached in actual cases; and experimental results.

A few studies have relied entirely on self-reported data. For example, Ungs and Baas collected published statements by well-known judges who the re-

13. *See, e.g.*, Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 LEGAL STUD. F. 59 (1985).

14. It was not our intent to test a specific theory, but rather to conduct an open-ended examination of the decision making process. As is clear from the judicial typology we have developed, our research tends to validate several theories, in the sense that individual decision makers behave in accordance with the predictions of a number of different theories.

15. *See, e.g.*, G. SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963 (1965); Atkins, Alpert & Ziller, *Personality Theory and Judging*, 2 L. & POL'Y Q. 189 (1980).

16. *See, e.g.*, Howard, *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916 (1977).

17. *See, e.g.*, Gryski & Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 W. POL. Q. 528 (1986).

18. *See, e.g.*, Atkins, Alpert & Ziller, *supra* note 15.

19. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 L. & SOC'Y REV. 343 (1980).

20. *Id.* at 343.

21. Anthropologists have long distinguished between normative rules, "which express . . . ultimate and publicly acceptable values," and pragmatic rules, which are "practical instructions about how to win." F. BAILEY, STRATEGEMS AND SPOILS 4 (1969).

searchers thought were representative of several distinct judicial philosophies.[22] The researchers then solicited written evaluations of the statements from a group of state court judges, using the evaluations to create a mathematical model of the state judges' conception of their role. In the same vein, other researchers have used written questionnaires to measure judges' personality traits and their outlooks on the judicial role, ultimately seeking correlations between the two.[23]

Such data offer the obvious advantage of directness. In structuring an interview or designing a questionnaire, the researcher can inquire specifically about the decision making process, thereby minimizing the role of interpretation and inference in the analysis of the data. This advantage is sometimes outweighed, however, by two potentially serious disadvantages. First, although the task of the researcher may be simplified in the analysis stage, the quality of the data will depend largely on the researcher's ability to identify and frame the pertinent questions. The more the researcher tries to focus the data by narrowing the questions, the more dependent the research becomes on *a priori* judgments about the process being investigated.

Second, such data often are suspect because of bias that can be imparted by the subjects. Interview techniques, for example, require the subjects to describe their decision making behavior at some degree of removal from the events described. The data they generate are thus reliable only insofar as the subjects are able to observe their own behavior accurately and choose to do so in a straightforward fashion. The first of these assumptions never has been validated in a judicial context.[24] With respect to the second, the anthropologist Malinowski observed more than sixty years ago that "[w]hen a man acts as an informant to a field anthropologist, it costs him nothing to retain the Ideal of the law. His sentiments, his propensities, his bias, his self-indulgences as well as his tolerance of others' lapses, he reserves for his behavior in real life."[25] Without casting aspersions on their integrity, it seems obvious that there is potential for significant deviation between the way in which judges make decisions under fire and the way they describe that process to a researcher after some opportunity for reflection.[26] A researcher can, of course, attempt to control these effects by tightening the structure of the interview or by using a questionnaire whose purpose is not immediately apparent, but these approaches may result in exchanging one form of potential bias for another.

A number of researchers have used the results in actual cases as a dependent variable. The object of such studies is to determine whether changes in

22. Ungs & Baas, *Judicial Role Perceptions: A Q-Technique Study of Ohio Judges*, 6 L. & SOC'Y REV. 343 (1977).

23. *See* Alpert, Atkins & Ziller, *supra* note 15.

24. *See* W. O'BARR, LINGUISTIC EVIDENCE 12 (1982).

25. B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 120-21 (1926).

26. The legal realists emphasized the distinction between the way judges actually decide cases and the way they explain those decisions. *See* Golding, *supra* note 1, at 459 (distinguishing judicial decisions from judicial rationalizations); Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928) (distinguishing stare decisis from *stare dictis*).

various factors thought to influence the decision making process, called independent variables,[27] correlate with changes in the outcomes of cases. A straightforward illustration of this approach is the research of Gruhl, Spohn, and Welch on the relationship between the gender of judges and their decision making, as measured by conviction rates and sentencing practices in felony cases.[28] After examining more than thirty thousand felony cases, they found few significant differences in the conviction rates of male and female judges.[29] Their most interesting positive finding was that female judges are significantly more likely to sentence female defendants to prison than are male judges.[30] In a somewhat more complex application of this method, Glick and Vines attempted to correlate judges' perceptions of their role, as measured in interviews, with their decision making behavior.[31] They found that judges who saw themselves as active "law-makers" were more willing to disregard precedent than their "law-interpreter" counterparts,[32] but found no significant correlation between role perception and "liberal" or "conservative" positions in decided cases.[33] Other researchers have investigated the impact on case outcomes of such factors as the social background of judges, as measured by age, sex, education, experience, and political affiliation;[34] and local political environment, by analyzing the sentences handed out in comparable cases by "circuit-riding" state court judges as they move from county to county.[35] A final variation on the theme is represented by the work of Segal,[36] who analyzed the fact patterns in reported United States Supreme Court search and seizure decisions, and found that the voting behavior of the four "centrist justices" on the Burger court[37] could be predicted on the basis of the presence or absence of a limited number of facts.

To the extent such studies rely on self-reported or questionnaire data as independent variables, they are subject to the potential weaknesses already discussed. The introduction of actual case results may introduce new problems. As the psychologists Van Koppen and Ten Kate have stated, "The problem in working with actual decisions is to ensure that the different cases heard by differ-

27. For a discussion of independent and dependent variables, see D. BARNES & J. CONLEY, STATISTICAL EVIDENCE IN LITIGATION 100 (1986).

28. Gruhl, Spohn & Welch, *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308 (1981).

29. *Id.* at 314-15. For a discussion of statistical significance, see D. BARNES & J. CONLEY, *supra* note 27, at 32-34.

30. Gruhl, Spohn & Welch, *supra* note 28, at 318.

31. Glick & Vines, *Law-making in the State Judiciary*, 2 POLITY 142 (1969).

32. *Id.* at 150-54.

33. *Id.* at 154-58. Glick and Vines defined "liberal" decisions as (1) for the defendant in criminal cases; (2) for finding violations of constitutional rights in criminal cases; (3) for the government in tax cases; (4) for the employee in workers' compensation cases; and (5) for the plaintiff in accident cases. *Id.* at 157.

34. Gryski & Main, *supra* note 17, at 536 (finding "modest support for the notion that background theory is a viable means by which to analyze judicial behavior").

35. Gibson, *supra* note 19, at 367-69 (finding moderately strong but complex linkage between decisions and environment).

36. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938 (1986).

37. *Id.* at 938. Segal identified the centrists as Justices Stewart, White, Powell, and Stevens.

ent judges are comparable on all relevant dimensions."[38] Although techniques exist to improve comparability,[39] "they fall short of perfection, and substantial error variance due to difference among cases remains."[40] Thus, to take a simple example, one who seeks to account for different outcomes in a number of Supreme Court cases can never be certain that any two such cases are truly comparable. Moreover, a researcher who tries to solve the comparability problem by taking account of every idiosyncracy in every case soon ends up with a model of decision making that is too complicated to have any explanatory utility.[41]

Another problem is that the results of studies of actual decisions usually are presented in the form of mathematical models, which have their own inherent limitations. Employing a variety of statistical techniques, researchers attempt to quantify the extent to which changes in particular independent variables are associated with changes in the dependent variable, in this instance case outcomes. A critical statistic in any such study is the amount of variance in the data that the model explains.[42] To say, for example, that a particular model explains sixty-eight percent of the observed variance in Justice Stevens' decision making in search and seizure cases[43] is to say that sixty- eight percent of the variation in the dependent variable—case outcomes—can be attributed to variation in the independent, explanatory variables that have been included in the model—in the example given, the presence or absence of particular categories of facts. However, even a model powerful enough to explain sixty-eight percent of the variance in a given variable—a very powerful model, by statistical standards—still leaves thirty-two percent of the variance unexplained.

Moreover, statistical models do not answer the question of what caused the result in a particular case. Models can describe the degree of association between changes in independent and dependent variables, and statisticians can calculate the probability that a given level of association would occur as a matter of chance.[44] It still requires human judgment, however, to move from the statistical finding that, for example, gender of judge correlates with length of sentence far too strongly to attribute the relationship to chance, to the conclusion that female judges impose shorter sentences because they are female. Simply put, mathematical models often are suggestive, and sometimes highly so, but never conclusive.

The third category of research, comprising studies that employ experimental simulation of decision making, is exemplified by the work of the Dutch psychologists Van Koppen and Ten Kate.[45] Using several questionnaires, they assessed the personalities, role expectations, and biographical characteristics of

38. Van Koppen & Ten Kate, *supra* note 10, at 226.
39. *See, e.g.*, Gibson, *supra* note 19, at 351-57.
40. Van Koppen & Ten Kate, *supra* note 10, at 226.
41. Van Koppen & Ten Kate, *supra* note 10, at 226-27.
42. *See* D. BARNES & J. CONLEY, *supra* note 27, at 127.
43. *See* Segal, *supra* note 36, at 951.
44. *See* D. BARNES & J. CONLEY, *supra* note 27, at 29-35.
45. Van Koppen & Ten Kate, *supra* note 10.

114 Dutch judges. The judges were then given written accounts of nine civil cases and were asked to decide them. The researchers tabulated the frequency with which each judge decided in favor of the party they identified as the "underdog," as well as the party they believed to have the stronger legal position, and also measured each judge's tendency to agree with the majority of the other subjects. After analyzing the relationship between the judges' personal characteristics and the "decisional dimensions"[46] included in the experiment, Van Koppen and Ten Kate found that although "[j]udges are influenced more by their own conception of their role than by other personality characteristics," their data did not support the conclusion "that a judge's personality characteristics largely determine support for the underdog, tendencies toward legalism [that is, responsiveness to strong legal arguments], or the likelihood of agreement with other judges."[47]

Experimental studies such as this one avoid some of the problems endemic to the other categories of research, but create difficulties of their own. On the positive side, all subjects can be asked to decide the same cases, thereby eliminating the problem of comparability. Additionally, the researcher can assess the impact of particular variables with considerable precision by adding them to or subtracting them from the experimental condition. This is an obvious improvement over relying on subjects' own assessments of the importance of such variables, or the difficult process of deciding whether a particular factor is present in actual cases, and then modeling its impact. Finally, experimental studies offer flexibility. If, for example, the researcher deems self-reported data to be useful, such data can be elicited as the decision is being made, because in an experimental setting neither researcher nor respondent need address ethical or practical concerns about disrupting the administration of justice.

These advantages are counterbalanced by three significant problems. First, as with the studies that employ actual case results as the independent variable, experimental research typically produces a mathematical model of the experimental decision. Although, as noted above, the controlled experimental environment is conducive to accurate assessment of the relationship between particular variables, a mathematical model inevitably falls short of a comprehensive account of how a given decision was actually made. Moreover, negative experimental results prove little. According to the canons of experimentation, the failure to find a relationship between an independent and a dependent variable does not permit one to infer there is no such relationship; rather, the researcher is limited to concluding that the experiment as designed did not reveal one.[48]

The second problem is that experiments involve simulation. One can never claim with certainty to have captured all the elements of a real case, nor can one

46. Van Koppen & Ten Kate, *supra* note 10, at 234.

47. Van Koppen & Ten Kate, *supra* note 10, at 238.

48. Note, for example, that Van Koppen and Ten Kate did not conclude that personal characteristics of judges do not influence decisions, but only that their experimental data did not evidence such influence. Van Koppen & Ten Kate, *supra* note 10, at 240.

be sure that subjects will respond to stimuli in the same way as they would in the courtroom. The third problem is subtle yet highly significant. It derives from the fact that the experimental method is not open-ended. Rather, the researcher must select for assessment a limited number of potential influences on decision making, while trying to hold all other factors constant. Thus, the researcher's *a priori* judgments about how the decision making process works are a critical determinant of the practical significance of the experiment, particularly in view of the limited utility of negative evidence. For example, when Van Koppen and Ten Kate report little association between personal characteristics of judges and decision making tendencies, an obvious question is whether their negative results are attributable to a failure to identify and investigate the pertinent personal characteristics.[49]

The picture that emerges from the current research is intriguing yet incomplete. The statistical case for the importance of a number of individual influences, from gender to personality to the facts of cases, is persuasive, and it is clear that the reality of decision making is far from the formalist ideal of the judge as a conduit for the application of principle to fact. However, we are still far from a comprehensive, empirically based theory of how judicial decisions actually are made. Every methodology has inherent limitations, and much of the research employs data of questionable reliability. It is therefore difficult to make comparisons across the body of reported research in an effort to develop a cumulative model that draws on the positive findings of each study.

In the remainder of this Article, we describe a new approach to the problem of decision making, and report some of the results this approach has yielded. Although our method has its own set of limitations, the data it generates are uniquely real and immediate, and therefore reliable. Moreover, although the method draws heavily on the interpretive abilities of the researchers, the collection of data is not biased by *a priori* judgments about relevant categories and pertinent questions. We present our findings as both a substantive contribution to the study of decision making and a stimulus to thinking about new approaches to a problem that has proven to be as intractable as it is fundamental.

IV. THE METHOD

The goal of these methods of studying judicial decision making is to discern the mental processes of judges as they decide actual cases. Given the present impossibility of achieving this ideal, all current methods make compromises. Some approaches focus on written decisions and must attempt to reconstruct the mental processes of the decision makers, whereas others study the decision making process in greater detail by substituting controlled simulations for real decisions.

49. Van Koppen & Ten Kate, *supra* note 10, at 238. Their article also illustrates other ways in which *a priori* judgments by the researchers tend to permeate experimental studies. In defining their independent variables, for example, Van Koppen and Ten Kate identified the "underdog party" in each case, as well as the party with the "strongest legal construction" (better legal argument), *id.* at 235, and characterized agreement with that latter party's position as a "tendenc[y] toward legalism," *id.* at 238.

A major difficulty in studying actual cases is that the decision maker rarely leaves a contemporaneous record. Judges rule on the spot on evidentiary questions and some other interlocutory matters,[50] reasoning as they go, but judges in courts of record almost invariably issue written opinions some time after the trial.[51] As noted in the preceding section, inferences about decision making drawn from written opinions are inherently suspect because of the judge's inevitable, and quite proper, concern about how the decision will be perceived.

This difficulty led us to consider the possibility of studying decision making in lower-level, informal courts in which judges evaluate cases as they hear them and usually render decisions at the conclusion of the evidence and in the presence of the parties.[52] Most states now offer such courts as an option for plaintiffs pursuing civil claims below a certain dollar amount. Terminology varies by jurisdiction, but these courts are most frequently termed "small claims courts," "magistrates' courts," or "justice of the peace courts." Such courts vary widely with respect to jurisdictional limits, the use of lawyers, and the qualifications demanded of judges.[53] All, however, are "real" courts in the sense that they receive and evaluate evidence, apply the law, and issue final, binding judgments.[54] The oral judgments that the judges of these courts render impressed us as offering an unusual opportunity for studying a contemporaneous record of actual judicial decision making.

After an initial survey of informal courts in more than thirty states, we selected as sites for our study the small claims courts in several Colorado and North Carolina cities. Our selection criteria were both practical and theoretical. On the practical side, these courts are easily accessible, offer substantial volumes of cases, and adhere to regular schedules. From a theoretical perspective, the demographic diversity of these cities is significant. They include a major metropolis, three medium-sized cities (population one hundred thousand to two hundred thousand), and a city of less than ten thousand people. The populations within the jurisdiction of the five courts vary substantially with respect to ethnicity, economic status, and educational attainment.

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50. Examples of interlocutory matters are motions for directed verdict and judgment notwithstanding the verdict, although even in these instances judges often call a recess after hearing arguments so that they can reflect and do research.

51. Indeed, under the Federal Rules of Civil Procedure and cognate state rules, trial judges are required to write opinions that set forth the facts and apply the relevant legal principles. FED. R. CIV. P. 52(a). One might argue that Rule 52(a) requires the judge to impose a formalist model on every jury-waived case, irrespective of the way in which the decision actually was reached.

52. In all the informal courts we observed, the judges also filled out written judgment forms on which they checked off the prevailing party and entered the amount of any money judgment. *See, e.g.*, N.C. GEN. STAT. § 7A-224 (1986) (requiring judgment in small claims action to be rendered in writing and signed by magistrate).

53. *See generally* J. RUHNKA & S. WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (1978) (study of procedures followed in 15 small claims courts).

54. *See, e.g.*, N.C. GEN. STAT. §§ 7A-222, -224 (1986) (describing practice and procedure in North Carolina small claims court). The finality of judgments in these courts is, of course, subject to appellate rights. *See id.* § 7A-228 (outlining procedure for appeal of judgment rendered in small claims court). We describe these courts as "real" to distinguish them from the arbitration and mediation programs operating in many jurisdictions, often under court supervision, which do not issue final judicial orders. *See, e.g.*, PHILADELPHIA MUNICIPAL COURT, 1986 ANNUAL REPORT 70 (describing programs offered in conjunction with Philadelphia small claims court).

We also were influenced by some interesting legal differences between the Colorado and North Carolina small claims courts. In North Carolina small claims courts have jurisdiction over civil matters in which the amount in controversy is less than fifteen hundred dollars.[55] The cases are heard by full-time magistrates who are appointed by the county clerks of court. The magistrates' duties include both hearing small claims cases and handling such criminal matters as setting bond and issuing search and arrest warrants.[56] These magistrates need not be lawyers;[57] five of eight in our sample were not. The magistrates may but need not follow the rules of evidence.[58] A recent survey indicates that most magistrates rarely do so, and our observations are consistent with this finding.[59] The North Carolina small claims courts allow lawyers, but counsel appeared in only six of the more than fifty cases we observed.[60] Because there is no record of the trial, appeal results in trial de novo in the district court.[61]

The jurisdiction of the small claims courts in Colorado is similar, although the limit is one thousand dollars.[62] The judges, or referees, are appointed by the chief judge of the local county court and must be members of the Colorado bar.[63] Lawyers are not allowed to appear.[64] The small claims courts do not observe the rules of evidence or procedure.[65] On appeal, the county court reviews an official tape recording of the small claims trial to determine whether reversible error has occurred.[66]

Working under confidentiality agreements with the respective courts,[67] we observed and collected tape recordings of more than thirty cases in Colorado and more than fifty cases in North Carolina.[68] The hearing rooms vary from small offices in Durham to larger courtrooms with elevated benches in the other four cities. In all of the jurisdictions cases are scheduled at short intervals, and the courtrooms thus are usually crowded with litigants and witnesses awaiting trial. At least one of us was present during all the cases, observing and making interpretive notes to facilitate the subsequent study of the tapes. During breaks in the trial calendar, we had many opportunities to ask questions of the judges

55. N.C. GEN. STAT. § 7A-210 (1986).

56. *Id.* §§ 7A-211, -273.

57. *See id.* § 7A-171.2.

58. *Id.* § 7A-222.

59. *See* Bashor, *Small Claims Procedure in North Carolina*, POPULAR GOV'T, Summer 1985, at 35, 37.

60. A lawyer was the defendant in a seventh case.

61. N.C. GEN. STAT. §§ 7A-228, -229 (1986).

62. COLO. REV. STAT. § 13-6-403 (Supp. 1986).

63. *Id.* §§ 13-6-405, -501.

64. *Id.* § 13-6-407.

65. *Id.* § 13-6-409.

66. *Id.* § 13-6-410.

67. In general, we agreed to seek consent from litigants, to control access to the tapes and transcripts, and to limit publication of our data to responsible legal and scientific books and journals.

68. We define a "case" as an adversary proceeding in which at least one party appears and which leads to a judgment, either after trial or by default. We observed several instances in which a single plaintiff, typically a landlord, obtained default judgments simultaneously against a number of absent defendants; we counted such an instance as a single case. In Colorado we obtained copies of the official tape recordings; in North Carolina, we set up our own recording system.

and engage in informal discussions. The judges informed the litigants at the start of each court session that we were observers conducting an academic study, but we believe that we were largely ignored by most litigants, who necessarily were more concerned with their own cases.

At the conclusion of the observation phase of the study, we prepared a transcript of each trial.[69] Our method for analyzing the trial data was inspired by the group workshop technique developed by a school of social scientists who identify themselves as conversation analysts.[70] The basic premise of the method is that the careful, qualitative study of unrehearsed speech can provide important clues to the goals, strategies, and thought processes of the speaker.[71] If the premise is correct, the analysis of judgments rendered immediately after the close of the evidence should shed considerable light on the decision making process. In our prior research this method has yielded useful insights into the way lay litigants reason through legal problems[72] and react to the legal system.[73] In particular, we have discovered pervasive lay notions of duty,[74] causation,[75] proof,[76] and remedies[77] that differ substantially from their legal counterparts. These discrepancies may contribute to the public's dissatisfaction with the legal system,[78] as well as the widespread popular misconceptions about such fundamental legal propositions as the distinction between civil and criminal justice and the adversarial nature of our legal system.[79] These findings have persuaded us of the utility of the method and the validity of its underlying premise.

In our analytic sessions, we joined with three or four other researchers trained in law, social science, or both, and focused our native-speaker intuition[80] and varied professional perspectives on the tape recordings and transcripts of informal court judgments. In a typical two-hour session we analyzed one or two longer judgments or several shorter ones, usually comprising no more than one to two pages of text. With the transcript in front of us, we listened to the recording of the judgment several times, then spent about twenty minutes writing notes

69. Our study transcripts differ somewhat from those prepared by professional court reporters in that we make no effort to "clean up" the testimony, but instead try to reflect verbatim everything that has gone on, including pauses, false starts, and nonverbal utterances.

70. For a fuller description of conversation analysis as applied in a legal context, see J. ATKINSON & P. DREW, ORDER IN COURT ch.1 (1979).

71. "[L]anguage patterns are unconscious and provide access to unconscious cultural patterning otherwise inaccessible to researchers." Sherzer, *A Discourse-Centered Approach to Language and Culture*, 89 AM. ANTHROPOLOGIST 295, 295 (1987) (citing the work of three of the founders of modern linguistics: Franz Boas, Edward Sapir, and Benjamin Whorf).

72. *See* Conley & O'Barr, *Rules Versus Relationships in Small Claims Disputes*, in CONFLICT TALK (A. Grimshaw ed., forthcoming) [hereinafter *Rules Versus Relationships*]; O'Barr & Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 L. & SOC'Y REV. 661 (1985) [hereinafter *Litigant Satisfaction*].

73. *See* O'Barr & Conley, *Lay Expectations of the Civil Justice System*, 22 L. & SOC'Y REV. 201 (1988) [hereinafter *Lay Expectations*].

74. *See Rules Versus Relationships*, *supra* note 72.

75. *See Litigant Satisfaction*, *supra* note 72, at 689.

76. *See Litigant Satisfaction*, *supra* note 72, at 684-88.

77. *See Lay Expectations*, *supra* note 73, at 224.

78. *See Lay Expectations*, *supra* note 73, at 219-220; *Litigant Satisfaction*, *supra* note 72, at 699.

79. *See Lay Expectations*, *supra* note 73, at 203.

80. *See* J. ATKINSON & P. DREW, *supra* note 70, at 6-7.

about those features that were of interest to us. The remainder of each session was devoted to a round-table discussion of our observations.

The only agenda for these sessions was to focus generally on the decision making process as it was reflected in the speech of the judges. The specific issues we discuss in this Article, such as the regularities in the form of judgment, the manner of addressing the litigants, and the judges' apparently diverse perceptions of their roles, were not identified beforehand, but rather emerged as significant issues after repeatedly attracting the attention of the analysts. Because the speech of the judges is our only data, it is important to note that every issue we discuss was drawn to our attention by the judges themselves in the course of performing their everyday judicial functions.[81]

A final methodological point concerns the qualitative nature of our data and analyses. As anthropologists, we are concerned primarily with describing the range of human behavior and less concerned with the task of quantitative analysis of the distribution of that behavior. Although our method does not yield simple, categorical, or readily quantifiable results, it is eminently well suited to the vital and logically prior task of identifying issues worthy of further study.[82] In the remainder of this Article, we present a number of findings discovered in analyzing the natural and unrehearsed speech of judicial decision makers. We have included large segments of the data on which we base our claims so that readers may judge for themselves the utility of the method and the validity of our conclusions.

V. THE LINGUISTIC STRUCTURE OF JUDGMENTS

As background to our more specific findings, it is appropriate to provide a brief description of the linguistic structure of judgments as they are typically rendered in informal courts. Text 1 illustrates the four structural components present in many judgments. Not every judgment contains all four of the components, and the order in which they appear may vary somewhat from judgment to judgment.

Text 1

> *Magistrate*: [NOTICE] Sir, [JUDGMENT] I'm gonna have to dismiss the case [EXPLANATION] as grounds are there. The contract ended unless he told you he wanted it renewed. You have no grounds to renew it on your own. [ADVICE] You have ten days. You may appeal it to district court.

First, the judge provides notice of the impending judgment. In formal courts, there are ritual means of giving notice of an impending verdict or judg-

81. Obviously, our preconceptions may influence what issues draw our attention. Nonetheless, we believe a significant difference exists between identifying issues at the start of a study and reacting to what judges actually say and do.

82. A social science cliché with much truth in it is that "you count things because they are important; things are not important because you count them."

ment—for example, the bailiff's announcement that the jury is coming in, followed by the entrance of the jurors. In the absence of such rituals, the judge must use a more conversational strategy to end the testimony and warn the litigants that the pivotal point of the trial is at hand.[83]

Second, the judge announces the terms of the judgment. This announcement might be viewed as a perfunctory task, but a detailed examination of the way in which judges perform it is revealing. Consider the question of how the judge addresses the litigants during the announcement and explanation phases of the judgment. The judge could (1) speak of both parties in the third person—for example, "The defendant will pay the plaintiff $50"; or (2) address one party in the second person, referring to the other in the third person—for example, "You will pay him $50." The first suggests neutrality, and might therefore be expected in this context. In our sample, however, the judge usually addressed one of the parties.[84] Moreover, in a substantial majority of those instances, the judge addressed the "loser," in the sense of the party whose expectations were most frustrated by the judgment.[85] Thus, if the plaintiff were recovering nothing or only a token portion of what was sought, the judge usually addressed the plaintiff; when judgment was in favor of the defendant, the judge almost always addressed the plaintiff.[86]

Two interesting exceptions help prove this rule. First, in one case discussed later in this Article,[87] a lay judge avoided deciding which party was more credible on the issue of liability by "splitting the judgment" and awarding the plaintiff exactly half of the $24.02 he sought. Under these circumstances, the judge—who otherwise followed the rule of addressing the losing party—referred to both parties in the third person. Second, a number of cases resulted in complex judgments, with findings and partial rulings in favor of each party. In such cases, the judges moved back and forth, directly addressing that party who was disadvantaged by the portion of the judgment being announced.

The striking aspect of this observation is that the judges, both lay and legally educated, are eschewing an opportunity to enhance the image of judicial neutrality, and are instead following a pattern found in everyday conversation. Students of natural conversation have noted that while one may give a perfunctory affirmative response to a request (a simple "yes, I can come" in response to

83. For a discussion of attention-getting devices in legal and oratorical contexts, see J. ATKINSON & P. DREW, *supra* note 70, at 87-91.

84. In a sample of judgments from eight judges, six from North Carolina and two from Colorado, we found 61 second-person references to the parties and 36 third-person references. Of those 36, 25 were made by judges in the "proceduralist" category. *See infra* notes 161-65 and accompanying text.

85. Of the 61 second-party references, 57 were directed toward the party whom we deemed to be disadvantaged by the ruling being delivered.

86. Neil Vidmar of the Duke University Private Adjudication Center has argued persuasively that in the calculation of success rates in litigation, it is important to evaluate a party's success with reference to what he sought. *See* Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 L. & SOC'Y REV. 515, 518-20 (1984). By this standard, a plaintiff who asked for $500, was willing to settle for $250, and was awarded a judgment for $50 would be considered unsuccessful. We have adopted Vidmar's reasoning in defining winners and losers.

87. *See infra* Text 5.

an invitation, for example), a denial of the request—the "dispreferred option"[88]—is almost always accompanied by an explanation and other forms of attention to the needs and feelings of the requesting party (consider, for example, the rejection letter that law firms direct to interviewing students). In deciding the case, the judge effectively is denying the request of one of the parties; in speaking directly to that party, the judge is attending to her needs in precisely the way that the dispreferred option rule of natural conversation would predict. It is interesting that under the pressure of face-to-face interaction with the litigants, without the luxury of reflection, even legally trained judges revert to ordinary behavioral processes.

Third, the judge provides an explanation of the factual and legal reasoning underlying the judgment. With the notable exception of one North Carolina lay magistrate, all the judges in our sample routinely offered a rationale for the judgment reached, even though neither North Carolina nor Colorado law requires them to do so.[89] Legally trained judges and knowledgeable lay judges may be influenced by the requirements that Federal Rule of Civil Procedure 52(a)[90] and cognate state provisions[91] impose on written, formal court judgments. All judges may feel a basic human need to justify their actions to the litigants, seated a few feet away, with whom they have shared a moment of relative intimacy.

A fourth component of the judgment is the rendering of advice. The advice may consist of a suggestion to the loser about satisfying the judgment and clearing his name,[92] information for a successful plaintiff about collecting the judgment,[93] or, more rarely, a personal comment.[94] We suspect, but are unable to confirm on the basis of our current evidence, that judges offer advice more often and in more detail to parties with whom they have some common social and cultural background.[95]

VI. A Typology of Judicial Reasoning

Our research has revealed five principal decision making types: 1) the strict adherent, who serves as a conduit for the application of neutral principles; 2) the lawmaker, for whom legal principles are tools rather than constraints; 3) the

88. *See* Pomerantz, *Agreeing and Disagreeing With Assessments: Some Features of Preferred/Dispreferred Turn Shapes*, in STRUCTURES OF SOCIAL ACTION: STUDIES IN CONVERSATION ANALYSIS 57 (J. Atkinson & J. Heritage eds. 1984).

89. The explanation usually precedes the announcement of the judgment, although judges occasionally announce the terms of the judgment, state their reasons, and then reiterate the judgment.

90. "[T]he court shall find the facts specially and state separately its conclusions of law thereon . . . ." FED. R. CIV. P. 52(a).

91. *See, e.g.*, N.C.R. CIV. P. 52(a).

92. *See infra* Text 4.

93. *See infra* Text 3 (advice to plaintiff is indirect, transmitted in the form of a warning to defendant about what plaintiff could do).

94. *See infra* Text 13.

95. We believe, for example, that Judge A, discussed in the next section, is more likely to offer meaningful advice to middle-class white women than to other types of litigants. In our observation of Judge D, we noted his outburst at a poor black woman, *see infra* Text 13, and contrasted it with the solicitude he showed in another case toward a middle-class black male student whose roommate had left him with an enormous telephone bill.

mediator, who constantly seeks to move litigants from confrontation to conciliation; 4) the authoritarian, who presumes a broad mandate to pass judgment on litigants, personally and socially as well as legally; and 5) the proceduralist, who is primarily if not obsessively concerned with the orderliness of the judicial process. In this section of the Article we present examples of each type of judge. Through the window of oral judgments, we examine each judge's attitude toward the decision making process and consider the impact that each type may have on litigants.

Judge A: The Strict Adherent to the Law

The judge we have chosen to illustrate the "strict adherent" decision maker presides over the small claims court in a North Carolina city. The court usually is in session only one morning per week due to the volume of cases and the manner in which they are handled. The scheduling of cases at five-minute intervals indicates the court's expectation that trials ordinarily will be of very short duration, and in fact the vast majority of cases are handled in a few minutes. Judge A had been in office for two years at the time we observed her, and like many North Carolina small claims judges, is not a lawyer.[96] Her formal training consisted of a week-long introductory magistrate's[97] course at the North Carolina Institute of Government.[98] In addition, she made a practice of sitting with her predecessor and observing cases for several years prior to her appointment, when she was working as a court clerk.

Two judgments shed considerable light on Judge A's conception of her role and the nature of law. In Text 2, she dismisses a suit for a deficiency judgment brought by a mobile home retailer. When the buyer fell behind in her payments, the seller foreclosed on the trailer and resold it. The seller is now suing for the portion of the debt not satisfied by the proceeds of the foreclosure sale. The defendant, represented by a lawyer, has argued that no deficiency may be recovered because the seller did not give her adequate notice of the foreclosure sale.[99]

Text 2

> *Judge*: Alright, case dismissed, ma'am. *I don't have any choice because that's the way of the statute.* You've got ten days. You may appeal it to district court (emphasis added).

96. In order to protect the anonymity of the judges, we have provided only that background information which is necessary to the discussion.

97. North Carolina magistrates adjudicate small claims cases and also perform a variety of functions on the criminal side, including issuing warrants and setting bond. *See* N.C. GEN. STAT. §§ 7A-211, -273 (1986).

98. The Institute, located on the campus of the University of North Carolina at Chapel Hill, presents training courses for State law enforcement personnel and prepares publications for their guidance. All new small claims judges must take the introductory course and may take refresher courses thereafter. *See id.* § 7A-177; Bashor, *supra* note 59, at 36. The basic legal reference for small claims judges is a manual prepared by the Institute. *See* Bashor, *supra* note 59, at 36.

99. The statute to which Judge A refers is apparently N.C. GEN. STAT. § 25-9-504(3) (1986), although neither the judge nor the defendant's lawyer cited it.

In Text 3, Judge A awards a landlord a judgment for back rent and possession of the premises.[100]

Text 3

> *Judge*: Sir, *I don't have any choice but to go ahead with the judgment* that you be removed from the property and the plaintiff be put in possession of the property described in the complaint, plus the plaintiff recover rent which is a total of $432.47 through today, plus costs and interest being at eight percent until the judgment is paid. Sir, you've got until June the tenth. If you are not out of there by then and paid her some money, she can come up here and go through the next legal phase and try to collect the money and try to have you moved out (emphasis added).

In both judgments, Judge A suggests that the outcome of the case is beyond her control. With the phrase "I don't have any choice,"[101] she disclaims responsibility for the decision, attributing it to a force external to herself: the law.[102] Indeed, one plausibly might interpret her remark as not merely a disclaimer of responsibility, but also an expression of regret about the judgment. The frequency of such assertions in her judgments[103] suggests that such commentary is not merely empty rhetoric, but rather a significant clue to her outlook on decision making.

Viewed from the judge's perspective, the disclaimer might be simply a statement of fact: she is indeed dismissing the case or evicting the tenant because the law requires her to do so. Moreover, the disclaimer may help to achieve two related ends that the judge likely would view as salutary. First, by calling attention to her lack of control over the outcome, the disclaimer may redirect any hostility the losing party may feel towards her.[104] The almost apologetic content and tone of the judgment, with its suggestion of the judge's powerlessness in the face of the law, may promote empathy between litigant and judge.[105] Second, the disclaimer may emphasize to both parties the power and neutrality of the law by reinforcing the notion of "a country of laws, not men."

From an external, analytical perspective, however, the disclaimer is far

100. Neither party was represented by a lawyer in this case.

101. Note that in each instance she addresses this remark to the losing party. *See supra* notes 84-86 and accompanying text.

102. The reference to the law is explicit in Text 2, and obvious although implicit in Text 3.

103. Judge A issued disclaimers in 5 of 11 cases we studied. In 4 of those 5 judgments, the disclaimer came first; the fifth is Text 2. For comparative purposes, we examined 46 judgments by 5 other North Carolina small claims magistrates and found 5 disclaimers.

104. We observed two instances of verbal expressions of hostility toward a judge, both involving the same judge. In posttrial interviews, several litigants expressed to us dissatisfaction with the judge that verged on hostility.

105. It is also possible that Judge A's approach may have precisely the opposite effect. Consider, for example, the common situation of a litigant who has come to small claims court as a last resort after a series of frustrating encounters with a corporate or governmental bureaucracy. Such a litigant may be all too familiar with the litany, "I'd like to help you, but . . . ." This individual may perceive Judge A's disclaimer as yet another example of the same callousness, provoking hostility toward the judge and contempt for the system.

more than a simple statement of fact. Instead, it expresses a view about the nature of law and the role of judges in the lawmaking process. To say "I don't have any choice" about the outcome of a case—any case—is to suggest to the litigants that the law is a set of immutable principles and the role of the judge is merely to select the principle applicable to the facts and then announce what result the process yields. Under this view the legal process is dispassionate and value-neutral, relatively immune from manipulation by astute litigants or strong judges.[106] By contrast, much contemporary jurisprudence views judicial decision making as a complex interaction among malleable legal principles; the effectiveness of the parties' advocacy; the ability, values, and predispositions of the decision maker; and a number of other factors. Thus, to the extent that Judge A's approach to rendering judgment succeeds in deflecting hostility and underscoring the solemnity of the law, it may do so at the cost of oversimplifying if not misrepresenting the legal process. Ultimately, whether a particular view of the law is right or wrong is irrelevant to the larger point we seek to make in this Article. Subtle differences in the content and tone of a judgment may significantly affect the ways in which litigants perceive the legal system and, ultimately, their attitudes toward it.

A second noteworthy aspect of Judge A's judgmental rhetoric is her tendency to offer advice. Her advice is of two sorts, legal and social. On the legal side, she often advises winners about executing judgments[107] and also advises losers about appellate rights and how to clear their record when they have satisfied the judgment.[108] Occasionally, she goes beyond such technical matters to offer advice on matters of personal and social concern to losing parties. In Text 4, for example, she urges a debtor to try to work out the debt and clear his name.

Text 4

> *Judge*: All right, Mr. M, I am gonna go ahead with the judgment. It is $131.56 total, plus the cost of interest to begin at eight percent from today until the judgment is paid. Sir, you owe it to yourself to go over there after court and try to talk to these people and try to set up some sort of payment schedule and get this thing paid out. Get your name clear.

In other cases, she advises tenants who are in arrears on their rent about the possibility of eviction and the need to find new housing.[109]

Judge A's advice giving has a striking self-contradictory quality. In tone it impresses the hearer as sympathetic, but in content it is perfunctory and of little

106. *See* Golding, *supra* note 1, at 442-43; Boyle, *supra* note 3, at 689.

107. As Text 3 illustrates, the judge sometimes presents this advice in the form of a warning to the loser.

108. For example, the judge told a defendant against whom she had entered judgment for an unpaid hospital bill: "As soon as you get it paid out to them, then they will clear your name. Unless you come up with the whole amount—then you can come up here and pay the clerk of court."

109. The advice offered in Text 3 falls into this category. The judgment in this case was preceded by a colloquy in which Judge A inquired about the defendants' financial circumstances. The defendants told her that they had no money to pay the rent and no prospects for alternative housing.

practical value.[110] In giving advice in this fashion, she manifests the same attitude toward her role as she does in disclaiming responsibility for judgments. In each instance, she appears concerned about minimizing personal conflict with losing litigants, but her mechanical conception of her role precludes her from exercising any discretion to assist the litigants with whom she purports to sympathize.[111] As we will demonstrate in the sections that follow, other magistrates with different conceptions of law and the legal process behave very differently in comparable circumstances.

Judge B: The Law Maker

At the other end of the decision making continuum is the judge who views substantive law not as a control, but as a resource. This type of judge renders judgments consistent with her sense of fairness and justice, even to the point of ignoring apparently applicable principles of law and inventing legal-sounding principles to fit the needs of particular cases. Such judges are not capricious in their attitude toward the law; indeed, the results they reach may be as predictable in their own way as those reached by strict adherents. What distinguishes them is an unabashed willingness to manipulate rules of law in pursuit of goals they value more highly than respect for legal precedent.[112]

Judge B, whom we choose to illustrate this type, sits in a small claims court in another North Carolina city. She has no legal education[113] but has served as a magistrate for many years. She prides herself on being especially diligent in attending continuing education courses to keep abreast of legal developments, and her colleagues view her as particularly astute.

The judgment set out in Text 5 typifies Judge B's approach to decision making. The case was brought by a tenant against a former landlord who had withheld $24.02 from her security deposit at the termination of the tenancy. The landlord claimed that this amount was compensation for a damaged refrigerator tray; the tenant denied the damage.

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110. The advice seldom amounts to anything more than telling destitute people they would be better off to pay debts they cannot pay. *See supra* note 108.

111. Judge A does not offer advice to all litigants, and the question of which litigants she takes particular interest in is a provocative one. Although we lack adequate background data on litigants to answer this question definitively, our impression is that she reserves her personal concern for those who are similar to her in social and cultural background. Conversely, her behavior in court and some of her out-of-court comments suggest a lack of interest in the personal plight of those with whom she has little in common. From the standpoint of evaluating the impact of her behavior on the court's clientele, our impressions as observers are probably more significant than any quantitative analysis we might develop.

112. To those familiar with the literature of legal anthropology, this judicial type will evoke memories of "tribal justice" as it has been described in a variety of non-Western societies. For example, in one of the classics of the genre, M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (ZAMBIA) (1955), the anthropologist Max Gluckman writes of judges in tribal courts who take an expansive view of jurisdiction, evidence, and their remedial authority, and are prepared to wink at supposedly binding precedent in pursuit of workable solutions to interpersonal and societal problems. *See id.* at 37-52 ("The Case of the Biassed [sic] Father").

113. We have juxtaposed Judges A and B to dispel the notion that either of the extreme types is merely an artifact of having no legal training.

Text 5

> *Judge*: Okay, Mr. Jenkins. The question before the court appears to be whether the refrigerator tray was damaged during Miss Dempsey's tenancy. She says that it was not. Um, Mr. Jenkins says that it was. He has charged her, um, the total sum of $24.02, has shown the court that actually the parts cost $17.06. The $10 labor would have made it $27.06, somewhat larger than what he actually deducted from the security deposit. Listening to the case, I have to weigh the credibility of the witnesses. I have listened very carefully. I have taken numerous notes. I would find that the crediblity is, um, as believable on one part as on the other. There are pros and cons in each testimony. Therefore, I am going to split the judgment and say that Mr. Jenkins should pay the defendant, um, the plaintiff, $12.01—that's exactly dividing the $24.02. That he should pay $12.01 plus the $19 for court costs. This is the judgment of the court.

The sole contested issue was one of liability: did the tenant damage the tray? The only evidence on damages—neither impeached nor countered by the tenant—was that offered by the landlord. Thus, only two findings could be supported by the evidence: let the landlord keep all the money, or make him give it back.

In examining Text 5, note both the result that Judge B reaches and the way she expresses it. Finding the testimony of the parties on the liability issue to be squarely contradictory, she avoids choosing between them by deciding "to split the judgment" and make the landlord return half the money. This Solomonic result undoubtedly would strike most lay people as eminently fair, but it is extralegal, because it is clear error for a court to make a damage award totally unsupported by the evidence.[114]

The manner in which the judgment is presented is as interesting as the result. First, the language she employs reflects the activism and assertiveness one would expect from a judge willing to impose ad hoc compromises.[115] Unlike Judge A, she makes no effort to disclaim personal responsibility for the result. Instead, after stating the issue and recapitulating the parties' factual positions, she repeatedly emphasizes her responsibility for determining the facts[116] and identifying and applying the relevant law (note the frequent use of "I").[117] The impression she conveys is not that of a passive conduit for the law, but that of an individual bringing her own judgment to bear in shaping legal outcomes. As a corollary point, Judge B portrays the law itself not as a set of unyielding neutral

114. Of course, judges and juries routinely factor doubts about liability into their discretionary damage calculations. It is a fundamentally different matter to adjust an uncontroverted damage figure because of concerns about liability.

115. Text 5 is an exception that proves the rule described above concerning the tendency to address the judgment to the loser. Here, in a case in which the judge expressly declines to name a loser, she speaks in the third person, without addressing either party.

116. "I have to weigh . . . . I have listened . . . . I have taken . . . ."

117. "I would find . . . . I am going to split . . . ."

principles, but rather as a malleable raw material to be employed in the pursuit of objectives defined without reference to legal rules.

A second noteworthy aspect of Judge B's presentation is her treatment of the decision as a conventional legal judgment rather than an informal solution—which, of course, is what it is. For example, she begins and ends the judgment with ritual legal phrases.[118] Her vocabulary and syntax are highly formal throughout the judgment, which is devoid of colloquialisms and even contractions.[119] Perhaps most important, she states the compromise in terms that suggest derivation from a rule of law[120] and mask its extralegal origins. The decision making process is thus presented to these litigants as "the law"—and it is a different law from that experienced by litigants in Judge A's court.[121]

In a second judgment, Judge B exhibits a comparable but subtler assertiveness. In Text 6 she renders judgment in a case brought by a man against his former fiance. The plaintiff bought a suite of bedroom furniture and placed it in his fiance's home in anticipation of their marriage. When they broke off the engagement, he asked for the return of the furniture. The fiance refused, claiming that it was a gift.

Text 6

Judge: All right, I've heard the case and am ready to render a judgment at this point. As far as the findings of fact is concerned, we know that, um, the plaintiff and the defendant, Rena Silver, were engaged to be married. We know that the plaintiff put the bedroom suite in the mother's home, where his fiance was living—whether they were actually engaged at the time or not—but it was placed in there. The subsequent result was that they did become engaged. The bedroom suite was relinquished; the plaintiff took it back. So, at the onset, whether it was to be stored or whether it was a gift, it was removed and then replaced so whatever conversation took place on that replacement would have been significant. Now, in reality Ms. Silver has shown the court—I have evidence before me—the bedroom suite is not paid for. So, he's not free to give it to anyone, because it is not yet paid for. It was not his to give and still is not his to give. If he fails to make payments on this bedroom suite, they are going to sue him for nonpayment and for return of the bedroom suite, because it's still collateral. It was not his to give. In consideration of all these things and the testimony I have heard, I'm gonna render for the plaintiff return of the bedroom suite, $23 court costs. The judgment stands as rendered.

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118. "The question before the court . . . ."; "This is the judgment of the court."

119. On the general topic of the formality of legal language, see W. O'BARR, *supra* note 24, at 16-26, and sources cited therein.

120. "I am going to split the judgment . . . ."

121. This observation raises an interesting question for future research. Governments often protect rights by creating a process to control the behavior of those in a position to abuse those rights—the reading of the *Miranda* warnings, for example. This approach to the protection of rights presumes that the concept of "process" is meaningful in a pragmatic sense. Specifically, it presumes that each enactment of the process more or less replicates the normative model. The idiosyncratic variations we describe in this Article cause us to wonder about the regularity of process at other levels of the legal system.

Judge B's resolution of the case is ingenious. A conventional analysis would require her to decide the question of gift versus loan; this issue in turn would call for an evaluation of the relative credibility of the parties. Perhaps because she senses that such a judgment would exacerbate an already tense interpersonal situation,[122] she finds a way simultaneously to ratify the end of the engagement and to avoid commenting on the personal worth of the litigants. Her finding is essentially that because the man never acquired title to the furniture, he cannot transfer ownership to his fiance. The result is not extralegal, but it is clearly creative. The furniture might be covered by a security agreement prohibiting its transfer, but the only evidence on the record is that it was not fully paid for; the furniture might also have been bought with a credit card or some other type of unsecured credit.[123] Judge B is thus an active framer of the outcome at every level. She identifies a legal principle that will avoid a delicate issue, then shapes her hearing of the facts so that they articulate tolerably well the chosen principle.

Once again, the form of the judgment reflects the same activism as its content. At the outset, Judge B assumes personal control over and responsibility for the outcome.[124] In announcing the pivotal factual finding—that the furniture cannot be given away—she interjects a personal statement,[125] which highlights her role as interpreter of the facts.[126] She also concludes with a personal statement.[127] As in Text 5, she surrounds her decision with an unmistakably legal aura. Note, for example, the abundance of peculiarly legal usages[128] and the formality of her syntax,[129] as reflected in the frequency of passive voice and the relative absence of contractions.[130] Judge B's clear message is that the fruits of her creativity are "law" in the fullest sense.

Judge B shows similar activism and creativity in her approach to procedure. In several cases she raised the possibility of settlement during the testimony, and sometimes was able to mediate an agreement. She is quick to identify a problem that would benefit from a mediated solution. For example, in one case in which a homeowner allegedly dumped construction debris on his neigh-

122. The text of the case contains no direct evidence for this interpretation, but in interviews in her office Judge B expressed a desire to avoid blaming people in cases that arose out of personal disputes.

123. The plaintiff showed the judge a document connected with the sale. The judge glanced at it briefly, but did not refer to it as an exhibit or discuss its contents. We did not have an opportunity to examine it.

124. "I've heard the case and am ready to render a judgment . . . ."

125. "I have evidence before me . . . ."

126. This is a second exceptional case which proves the rule that the judge addresses the loser. As in Text 5, this judgment avoids a decision between the competing stories of the parties; its apparent purpose is to create the impression that there is no loser, at least on the issue of personal credibility. Delivering the judgment in the third person is consistent with this purpose.

127. "I'm gonna render . . . ."—not "I'm gonna have to render . . . ."

128. "Findings of fact"; "the mother's home"; the redundant "subsequent result" (Compare such legal standards as "give, devise and bequeath"); "has shown the court"; "evidence before me"; "in consideration of"; and "[t]he judgment stands."

129. For a review of the characteristics of written legal syntax, see D. MELLINKOFF, THE LANGUAGE OF THE LAW 11-29 (1963).

130. *E.g.*, "It was not his to give."

bor's lawn, she suggested, "Well, if I were you, I'd work awful hard on a good neighbor policy." She is equally adept at identifying the issues that stand in the way of a voluntary resolution. In the same case she asked the defendant, "Is it possible to replant the grass [and] repair what damage was done to his yard before the room addition [the source of the debris] is completed?" To avoid issuing an immediate judgment that may be both unenforceable and provocative, while still maintaining control over the dispute, she sometimes continues a case[131] until the parties have had time to comply with the terms of the mediated solution, and asks one of them to report the outcome to her.[132]

This flexible approach to procedure conveys the same impression as Judge B's handling of substantive legal questions. She seems to see herself as a problem solver with a broad mandate to do whatever is necessary to achieve results she deems fair. Although her language surrounds all of her actions with an aura of legalism, she treats the substance of the law and the legal process as tools rather than constraints.

Judge C: The Mediator

The law maker asserts authority primarily through her willingness to use the substantive law as a means to an end. Another type of judge pursues justice primarily through the manipulation of procedure. For judges in this category, mediated settlements are an overriding objective. In almost every case this type of judge seeks to identify and recommend to the parties settlement strategies that would avert judgments which, for the winner, might be difficult to enforce and, for the loser, might exacerbate an already difficult personal situation. Interestingly, such efforts to avoid rendering judgments do not seem to detract from the judge's authority. On the contrary, the striving for workable solutions conveys a subtle but powerful sense of authority and control.

Judge C, the paradigm for this type of judicial decision maker, sits in the small claims court in a North Carolina city. She is a lawyer who practiced for several years before becoming a magistrate.

Her mediational approach is well illustrated by a case in which one sister has sued another over an unpaid debt. In Text 7 the defendant acknowledges the debt and then describes a prior arrangement to pay it. Perceiving an opportunity, Judge C immediately pursues the possibility of ratifying the prior arrangement as a formal settlement.

131. We suggest that she maintains nominal jurisdiction over such cases not for practical reasons, but primarily to impress on the parties the solemnity of their agreement. Should they fail to comply, her only recourse would be to issue a judgment, an expedient that her active mediation implies she has already decided to be inappropriate. Viewed in this light the continuance is a device akin to the legal-sounding language she uses in Texts 5 and 6: it gives the appearance of legal authority to a seat-of-the-pants solution.

132. In the same construction case, she said, "I'm suggesting we put a little continuance on this case to give him a chance to do that." Note the first person pronoun, suggesting assumption of responsibility for the recommended procedure.

Text 7

Defendant: I told her I was gonna pay her, right, and I just. . . . No, my son kept getting sick and I din't have any other choice but to go to my son first. And I explained that deal and I told her that I was gonna pay her on dates, but she did tell the truth about it, that, you know, I kept promising her the dates and, you know, how they weren't excuses. They was the truth. But, um, I had made prior arrangement with my mother to, you know, um, since my car is finished paying for, to pay her, um, $58 every month, you know, but I can't afford . . . .

Judge: Have you got, have you got any money to pay your sister today?

Defendant: Well, I get paid today, and I get money out of the bank, and I pay my mother and my mother give it to her.

Judge: You'll pay her $58 today?

Defendant: Uh hum.

Judge: Have it paid off in three months?

Defendant: Uh hum.

Judge: Is that agreeable to you to let her pay it off in three months?

Plaintiff: Uh huh.

Judge: Okay, how about if I put down today that your sister is gonna make you a $58 payment today.

Plaintiff: Yeah.

Judge: And then I'll continue it again until sometime in July for her to make another payment . . .

Plaintiff: Uh huh.

Judge: . . . and if she makes that payment, you call me and I'll continue it again for the final payment. How's that?

The result of this negotiation is an agreement that will avoid the necessity for a judgment as long as the defendant makes the payments:

Text 8

Judge: Okay, now write this date down. Um, I'm gonna put down here that the defendant is going to pay $58 today and a second payment of $58 on the $131 balance by July 11th. All right, Ms. Williams—uh, this Ms. Williams [*indicating plaintiff*], the plaintiff. If your sister doesn't make the $58 payment today, you call down here next week, all right? This is the magistrate's number, and then we'll enter a judgment for $170 plus costs of court. All right, you'll have to make that payment today to keep her from having judgment rendered.

Defendant: Okay, it's gonna be made today.

Judge: Now, if July 11th rolls around and your sister hasn't made a second $58 payment, call down here and we'll give you a judgment then for the balance plus costs, okay?

Several aspects of this process of negotiation and ratification are noteworthy. First, Judge C obviously is alert for the possibility of assuming a mediating

role. Early in Text 7, she interrupts the defendant in mid-sentence to pursue the fifty-eight dollar per month proposal. Second, once she has seized the opportunity, she clearly identifies her activity as conciliatory rather than judgmental. In Text 7, her first three utterances are questions to the defendant, and her fourth is a question to the plaintiff, all seeking acquiescence in the proposed deal. Her final three utterances are in fact a single, extended recitation of the terms of the agreement, bounded by requests for assent.[133]

A third point is that in acting as a mediator, Judge C assumes an extraordinary burden. Because the defendant has admitted the debt, the judge simply could enter judgment for the plaintiff and leave her to her own devices in collecting it.[134] Instead, Judge C takes an active role in moving the parties toward an agreement, ensures that both of them have ratified it, and volunteers herself as collection agent. Clearly she perceives her role as identifying and finding a practical solution for the "real" problem between the parties.

Despite her clear preference for alternatives to immediate judgment, she does render authoritative judgments when other efforts fail. For example, in a suit by a homeowner to recover a down payment from a contractor who failed to begin a construction project within a reasonable time, Judge C previously had continued the case in order to allow the plaintiff to bring an additional witness to testify about critical issues in the dispute. After hearing additional testimony and having the original testimony summarized again, she renders the judgment contained in Text 9.

Text 9

> *Judge*: Well, I'm gonna go ahead and rule on this matter. Mr. Trent, I'm gonna find that the plaintiff has proven to me by preponderance of the evidence that, um, he rescinded his contract before you had begun your performance. I think that's confirmed by the testimony of his neighbor and his wife that the timbers were not delivered until sometime late in November and not, as you testified, by November 13th. And since he told you and rescinded the contract prior to the time you took on work, because you told him there was gonna be a delay in your ability to get to the job, then I'm gonna find that he's entitled to a refund of this $280 plus the cost of court.

Note that this judgment reflects a view of the law closer to that of the law maker than of the strict adherent. Instead of trying to transfer responsibility to some external authority, Judge C makes it clear that the forthcoming judgment will be hers.[135] When she explains her factual findings, she introduces them with phrases which emphasize that purported facts achieve legal reality only through her intervention.[136] In the final sentence of Text 9 she summarizes her

133. "Okay, how about . . . ." at the beginning, and "How's that?" at the end.

134. Judge A, for example, seldom does more than advise successful plaintiffs to go to the clerk's office, in which they can "take the next legal step" in collecting the judgment.

135. "I'm gonna go ahead and rule on this matter."

136. "I'm gonna find . . . ."; "I think . . . ."

reasoning and then announces the details of the judgment, using yet another prefatory phrase that calls attention to her role.[137]

The manner in which Judge C expresses a rare nonnegotiated judgment tends to support our inference that she mediates not because of any lack of confidence in her authority, but precisely because she believes she has almost unfettered problem-solving authority. We find further support for this interpretation in a case in which Judge C combines mediation and authoritative decision making. In the case from which Text 10 is drawn, the plaintiff seeks a refund from an automobile paint shop because of allegedly shoddy workmanship. The case is a particularly difficult one because the paint did not begin to peel until months after the paint job, and because the plaintiff was recently involved in an automobile accident, which made the present condition of the paint irrelevant to the case. In Text 10 the parties have just completed their testimony, and Judge C begins to explore the possibilities for settlement. Her tactic is to preview what her judgment might be in the event the parties fail to compromise. The defendant has offered to repaint the car, and she warns the plaintiff that he may do no better if the case goes to judgment.[138]

Text 10

> *Judge*: Well, Mr. Haynes [*plaintiff*], I'd like to continue this case for sometime, for a couple of weeks, to give you an opportunity to decide whether or not you're gonna have the car repaired. . . . I'm inclined to, uh, allow City Body Shop to repaint the car and maybe give you some type of damages if I see fit for the time that you've had the car [before the problems with the paint job became apparent]. But, I think that in a warranty situation like this, when the other party is willing to fulfill their warranty, then I'm gonna give them the opportunity to do so. . . . [H]e's willing to go ahead and proceed on his warranty, then I don't think that's really a rejection. In the light of that, I'd like to give him an opportunity to try to correct the situation.

In response to the suggested settlement, the plaintiff continues to press his demand for an immediate judgment that reimburses him for the paint job and also recognizes the diminished value of his car. At the same time, the defendant reiterates his offer to repaint. Judge C finally gives up and enters a judgment which, she predicts, will please neither side. The clear message of the judgment is that parties who fail to reason with her do so at their peril.

Text 11

> *Judge*: I do not see where you are entitled to anything near what you're asking for of $791. For one thing, I find that the body work . . . amounted to $267.07. The paint job you got was $524.95. The, um, car you drove for about a year before you ever made a complaint, and the warranty essentially terminated because of the wreck in May. So,

137. "I'm gonna find . . . ."

138. Any experienced trial lawyer will have seen judges at all levels use the same tactic.

if you want to bring in more evidence of damages to go with the testimony of your insurance agent, I'll be glad to give you that opportunity and continue the case for a couple of weeks. But, on what I've heard today, I will not award you damages in any amount near $791.
Plaintiff: Well, your honor, I would like to put this matter to rest. I don't want it dr-, drag it on for another couple of weeks. Uh, will you make an award today for what you deem to be fair and reasonable?
Judge: I can make an award today. Okay. Sure, I can do that.
Defendant: Your honor, if I may . . .
Judge: Uh huh.
Defendant: I have indicated that we will repaint the car. Uh, I don't know we, why we should be held liable because the car supposedly is wrecked.
Judge: I'm gonna give him a diminished value for what I feel like the paint job is worth during the time he was driving the car, or when his daughter was driving the car, prior to the wreck. That's about all I can do. And I'll go ahead and do that today. And, um, I don't think either one of you are gonna be happy with it. But, um, if he wants a ruling today, I'll give it to him. I'm gonna find that, um, the paint job is guaranteed for approximately two years. And at the time of the wreck, it had approximately six months left on the warranty. But I'm not gonna find that you are responsible for any warranty from that date forward. I'm gonna find that, uh, the plaintiff drove the car for approximately a year, without any problems certified in his warranty. He took it in there the first time at about December, December through May. You, uh, did not, I think, I feel like under the warranty he was given, you should have repainted the car at that time and if you then decided in accordance with the warranty he was given and introduced his considerate fee, then, uh, this probably would not be here today and that would have solved the matter. I'm finding he's entitled therefore to about a fourth of the value of the warranty, which I would put at about one-third, $131 plus costs. And if you all are dissatisfied with that, you have a right to appeal it in District Court.

An interesting question is how the litigants perceive this sort of intervention by the judge. Judge C's behavior presumably inspires a different impression of the legal system than either the passive, "hands-off" approach of Judge A or the ad hoc, but still legalistic approach typified by Judge B. We have shown in previous research that litigants often come to informal courts seeking solutions to complex social problems,[139] and go away frustrated when they discover that the court is a limited-purpose institution that can deal only with certain kinds of grievances and generally can provide only monetary relief.[140] In Texts 7 and 8,

139. *See Rules Versus Relationships, supra* note 72.

140. *See Lay Expectations, supra* note 73. Judge B's lawmaking approach begins to address these litigant needs, because she shapes results to fit her perception of fairness to the litigants. Moreover, these results often reflect sensitivity to the social needs of the litigants; thus, the return of the bed in Text 6 completes the unraveling of the parties' relationship. However, these solutions are imposed, not induced—except, of course, in those cases in which she pursues settlements—and the solutions are delivered as legal judgments.

involving the unpaid debt between sisters, Judge C confronts a social problem thinly disguised as a contract case, and defers the legal resolution of the case in an effort to resolve the underlying social issue. Indeed, her only explicit reference to the law is a mild threat to enter judgment in the event of noncompliance with the agreement. She thus provides these litigants with the very sort of assistance that others seek but rarely receive and thereby brings the operation of her court into conformance with a widespread lay conception of civil justice.[141]

In meeting this pervasive lay expectation, Judge C may well contribute to the satisfaction of the litigants appearing before her. However, in stepping out of the formalist model of the judge as passive adjudicator, mediating judges may contribute to the public's misapprehension of civil justice and ultimate dissatisfaction with the way it works in the vast majority of cases. A critical legal theorist might carry the argument further and contend that these texts provide evidence that judicial officials use informal courts as an instrument of class control.[142]

Judge D: The Authoritarian

A fourth type of judge is the authoritarian decision maker. Like the law maker and the mediator, this type of judge emphasizes his personal responsibility for the decisions made. However, the authoritarian tends to go further than the other two types in emphasizing his power to shape the law, and sometimes expresses strong views about the parties' behavior that has led to the litigation. This style may impress the litigants as more than authoritative, indeed as peremptory or capricious, hence our choice of the label "authoritarian."

Judge D, whom we choose to illustrate this type, sits in a small claims court in a North Carolina city. He is a law school graduate and member of the bar, but has little or no experience in law practice. Text 12 is typical of Judge D's judgments. The plaintiff purchased a used refrigerator from the defendant, and alleges that the defendant failed to honor his warranty obligation to repair or replace it within thirty days. Although the plaintiff eventually found someone to fix the refrigerator for $50, he claims $209 in damages, including refund of the price and the value of spoiled food.

Text 12

> *Judge*: Okay, each of you can have your bills here. If you are not happy with the decision, you are welcome to appeal it. Uh, as far as I can tell, there's a breach of the warranty, uh, to, to repair it within thirty days and get it running right. Uh, you are not entitled to $209 though. You are entitled to your damages and those are what it cost to get it working right since he wouldn't get it right. And that's $50 if you got somebody else out there . . . .
> *Defendant*: I'm willing to pay it.

141. *See Lay Expectations, supra* note 73, at 224-25.

142. See 1 R. ABEL, THE POLITICS OF INFORMAL JUSTICE 6 (1982); *see infra* note 170 and accompanying text.

Judge: . . . and fix it.
Plaintiff: Your honor . . .
Judge: If you're not happy with the decision, you can appeal it. You have a $50 bill there, uh, to have it repaired. It is working now, according to your wife. She says it's working now. I'm gonna award you $50 plus the $19 cost of court. You've got your refrigerator working fine now. Uh, that's my decision.
Plaintiff: We've also lost $60 worth of food in there.
Judge: Uh, I'm not . . .
Plaintiff's Wife: We were never told that.
Judge: Okay. I'm not satisfied that that, uh, that that is something that he should be responsible for at this point. Um, you know I think he's got a right to try to come out and fix it and if something there is wrong. But when something goes wrong and you lose the food, that's not, I don't believe that's part of the guarantee. The guarantee is to come out and fix it. Your refrigerator can go wrong. A new one can go bad. Um, I'm gonna award you the $50 right here. I think you did the right thing by, by giving him a chance and then going on and getting somebody else to fix it, to fix it properly. So, he owes you $69.

Several aspects of this judgment are noteworthy. First, there is no suggestion that Judge D has any interest in mediating the conflict. On the contrary, he announces the impending judgment by stating that the parties can appeal if they are unhappy. When the defendant interjects an offer of compromise and the plaintiff tries to complain about the amount of the damages,[143] he cuts them off with the same remark.[144] Second, the judgment has an extraordinarily personal quality. For example, Judge D repeatedly uses the words "I" or "my," and thereby emphasizes his personal responsibility for interpreting the terms of the warranty and evaluating the credibility and sufficiency of the evidence. When the plaintiff and his wife twice raise specific arguments about the adequacy of the damages, the judge immediately responds in the first person,[145] thereby personalizing the dispute between the plaintiff and the court.[146] Finally, he concludes the judgment by commenting favorably on the conduct of the plaintiff.[147] This is a benign and noncontroversial example of a tendency that is almost unique to this type of judge.

This tendency is illustrated in more dramatic fashion by Text 13, Judge D's judgment in an eviction action brought by a public housing authority against a young mother who is separated from her husband.

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143. Note that the judge addresses the plaintiff, who is the nominal winner but who is receiving far less than he demanded and obviously is dissatisfied.

144. Contrast Judge D's reaction with Judge C's willingness to discuss the outcome with the parties.

145. "Uh, I'm not . . ."; "Okay, I'm not satisfied . . . ."

146. Rather than confronting the plaintiff's arguments in the first person, Judge D might have cut him off on procedural grounds (*e.g.*, "The evidence is closed."), or with an impersonal statement of the law of damages (*e.g.*, "The law does not permit you to recover more than the cost of repair under these circumstances.").

147. "I think you did the right thing . . . ."

Text 13

Defendant: Uh, the reason we have not paid the rent is because neither one of us is working. The apartment, uh, and we were not working. Uh, my husband found a job, um, about two and a half months ago at State Auto Sales. And they are paid—you know, car salesmen—they are paid straight commission. Lenny worked two months and, eh, and had, you know, he had deals but they were all turned down because the people's credit which meant he got no income. He got no pay. And he, you know, he was working nine in the morning to nine at night and trying to support me and two, and three children and, and two babies. The babies are both under two years of age. And so because he was not making any money and he wasn't getting any income, he felt like he needed to leave there, not to stay there for the purpose of saying he had a job, you know, but because he needed to provide for hisself and his family and he couldn't do it with no income. I was working just part time because of my baby—the baby's only five months old. And I was just working a little bit part time, you know, to try to help out. [*Baby cries at this point.*] But that wasn't working out too well with the babysitter. You know, we were having problems with the babysitter. So I needed to be home with my babies and so . . .

Judge: Okay, um, if the rent's not paid, they're entitled to judgment for possession and the apartment and, uh, $236.

. . .

[*Defendant makes an appeal based on extenuating personal circumstances, the representative of the housing authority testifies, and the judge restates his original judgment only to have it challenged again by the defendant.*]

. . .

Judge: Judgment is for possession. $236 plus cost of court. You need to get some help fast.

Defendant: It's $221.

Judge: Plus $15 late fee. You need to get some help from social services or [County] Opportunity so that you can stay or move and find another place. Straighten out your employment situation.

Defendant: Well, I don't have any . . .

Judge: Straighten out the situation with your husband. Either stay together, split up. Do something . . .

Defendant: Mm hmm.

Judge: . . . and see if you can't stay there or move to somewhere else that you can afford.

Defendant: Okay, Your Honor . . .

Judge: And make . . .

Defendant: . . . but what am I supposed to do? I don't have any money.

Judge: I suggest you then go see someone at Social Services.

Defendant: But that's what I'm saying. They don't, they, they, Social Services doesn't pay your rent for you.

Judge: They have been known to. And some of these churches and charitable organizations . . .
Defendant: No, they'll pay lighting. They'll pay your utility, but they won't pay your rent. But if I don't have it, what am I supposed to do? If they want, they don't have it, if they don't have any . . . It's not, I ex-, I explained to her before the rent was even due that I didn't have any income. I was working only fifteen hours a week.
Judge: Well, do you want to know?
Defendant: And my children needed me at home.
Judge: Ma'am, do you want to know what you're supposed to do?
Defendant: Uh huh.
Judge: And you asked me, okay? Stop having kids, get out and find a job.
Defendant: I don't, I'm not having anymore. I . . .
Judge: Get somebody, get somebody that will take care of your kids for you and then talk to me.
Defendant: Do you know how much daycare costs a week?
Judge: You're not gonna sit in here and tell me and complain to me that you can't pay your rent because your husband who you can't get along with and you married, okay . . .
Defendant: Well, that has . . .
Judge: . . . is, is quit a job that was paying, that would support you. But you're not going to stay here for free.
Defendant: I don't want to stay there for free.
Judge: Well, then go to one of these organizations that I suggested.
Defendant: I just want my rent readjusted to my income. That's all.
Judge: Then go see them and get it adjusted.
Defendant: She said, she sent me a letter yesterday saying they were gonna . . .
Judge: Then go to her, go to her or your counselor. But that's all for today. It's a judgment for possession.
Defendant: God bless you!

This encounter is not an isolated instance for Judge D.[148] He frequently tells defendants who have failed to pay their rent to pay up or move. In other cases, he reprimanded a defendant who claimed to have sent cash through the mail as a payment for his rent;[149] he instructed losing parties to keep their comments or complaints to themselves and to appeal if they were unhappy with his decisions;[150] and he told unsuccessful claimants that they ought to keep better records of their contracts and transactions.[151]

148. Judge D can engage in this kind of outburst with little concern about review by a higher court. Out of the more than 50 cases heard during the two weeks we spent observing judges in his city, only one was appealed.

149. "I don't think I really need to say anything about mailing cash and not getting, not having any way of proving it."

150. "Well, I'll tell you what. When I give my judgment here and if you're not happy with it, you just keep your mouth shut and appeal it."

151. "Why don't you get your contract signed in the future and there would be no questions."

In evaluating the authoritarian judicial type, it is important to distinguish the individual we have presented as an illustration from the general orientation to legal decision making that he represents. The authoritarian and personalistic qualities of Judge D are not idiosyncratic, nor is he the most extreme example of the type in our sample. Although we have studied too few judges to delineate the frequency or distribution of the type, our data do indicate clearly that judges with this orientation present to litigants a different picture of the law and the legal process than judges in any of the other categories. Law making and mediating judges may take personal responsibility for their decisions—although rarely to the extent that Judge D does—but the authoritarian judge uses his personal authority to emphasize the finality of the decisions and to suppress dissent, not to pursue a compromise. Moreover, "judgment" as rendered by the authoritarian extends beyond the dispute being adjudicated to the personal problems, and sometimes the personal worth, of the litigants. As revealed to the litigants, the law is thus a more powerful, more arbitrary, and perhaps more threatening institution than it appears to be in the courts of other judicial types.

Judge E: The Proceduralist

A fifth type of judge is the proceduralist, who, in apparent disregard of the theory of informal justice,[152] seems to place a high priority on maintaining procedural regularity. Judges in this category invest substantial time in explaining procedure to the litigants, making lengthy prefatory remarks at the start of each court session, and pointing out procedural violations as they occur. Although they often emphasize that informality is the essence of the procedure in their courts, we observed litigants becoming confused and frustrated in attempting to follow their instructions. On substantive issues proceduralists strive for strict application of legal rules. Although they are explicit in claiming responsibility for their decisions, they rarely, if ever, interject themselves personally into cases by seeking to mediate or by forcing extra legal compromises on the parties.

To illustrate the proceduralist style, we have chosen Judge E from a Colorado small claims court. At the beginning of each three-hour court session, Judge E addresses the litigants whose cases will be called during the session.[153] In his introductory remarks, he discusses the purpose of small claims courts and describes the procedures that will be followed. These remarks, an example of which is contained in Text 14, vary little from session to session.

Text 14

> *Judge*: To begin with, I usually have some opening remarks about our court and its differences and our procedure and such as that. Much of what I might ordinarily say perhaps does not apply today. Uh, and then again some of you have been here before and you're already well

152. *See Litigant Satisfaction*, *supra* note 72, at 661.

153. In this court, all cases are set either for the morning or afternoon session, and all litigants are required to be present at the start of their session. In other courts, individual cases are scheduled for particular times.

familiar with those procedures. I might just briefly run by a few things though that may be of importance or of interest to you. We're not as formal as District Court and the procedural evidence and pleading rules do not apply here in a strict fashion, but they do in District Court. Decisions that are made here though are likewise enforceable, exactly the same as District Court. There is no difference. We do have lawyers once in a while as one of the parties. Otherwise presentations in this court are largely up to the litigants themselves be they plaintiffs or defendants. That process, of course, includes your testimony, perhaps witnesses, and also the use of possible exhibits. It's difficult to overemphasize the importance of exhibits. Sometimes, of course, one of those may control what happens in the case. Basically an exhibit speaks for itself, provides a lot of information that maybe we wouldn't otherwise learn. Also our experience is that an exhibit sometimes is more to the point and, uh, more specific than what people say about the exhibit or the controversy. So you're encouraged to make use of it. Action is sometimes taken when one or both of the parties are not here. That could be the case this morning. That could raise some questions. The absent party in small claims court does have a thirty-day period to come in if they choose to do so, that is if they want to . . . explain why they couldn't make it today and at the same time ask that whatever happened in their absence be turned around or set aside. If that is your case and the other party is not here today and does choose to file that request, the clerk of the court will let you know by mail so that you'll have an opportunity to be here at the time of the hearing. You can hear the reasons why the party couldn't make it and you can consent, you can object, that's all up to you. Usually it takes a rather substantial reason. There could be others of course—a death in the family or hospitalization the day without knowing it earlier today—something of that type would be considered as illustrations of possible basis for turning something around. There's no waiting period even though there is that thirty-day period for the other party. Any judgment can be immediately enforced when it's the result of a hearing or a judgment as a result of a default. Clerk's office can help you take action on those judgments through those doors and to your left. There's limits to the kinds of help you'll get, however. It will not be legal advice. It'll be procedural advice—steps that you can take, the things that you can do now that you do have a judgment. Anyone who is unhappy with what happens here today, if you disagree, certainly it doesn't have to stop here. There are ways that you can appeal and the clerk's office can explain all of those procedures to you as well. In contested matters we do not adopt or borrow what someone else may have already come up with as far as a solution is concerned. We are completely independent of what may have gone on elsewhere. Sometimes we're urged to adopt the thinking of the Better Business Bureau or the insurance company, labor department, police officer at an accident scene. There are lots of dispute-resolving agencies. However, we are not bound by their decisions. We must independently probe into the merits of the claim. While we do proceed informally, one qualification is that we're informal and at the same time orderly. We find that

> by doing so several things happen and they're all for the good. We get through a little sooner. By being informal and orderly, uh, each party has opportunity to hear what the other one has to say. I get to hear it, of course, and at the conclusion perhaps there's a better basis for understanding exactly what happened. Usually at the beginning first with the plaintiff over here on my right. I'll have a few beginning questions. After a little bit we'll switch to the defendant. Most of the time, not in every case, but most of the time we go back to each of the parties for a concluding statement. At that point, of course, you will have heard the other things from the other party, the statement of the other party. You may have thought of something else. There could be some things that you'd like to emphasize so you will have that opportunity more or less to rebut what's presented by the opposition. You may have other questions. If you do, don't hesitate to ask at any time. The procedural rules, the evidence rules do not apply in this court—as I stated—in a strict fashion but the rules of law do, same as District Court. There is no difference. With that we'll call the matters that we have before us at this session. The first being . . .

As each trial progresses, Judge E continues to remind litigants of the rules that apply to the presentation of their cases. In Text 15 he emphasizes one of these rules, namely, that the trial will follow a strictly adversarial model: each party must present his or her own case, and the judge will not call witnesses or otherwise assist.

Text 15

> *Judge*: The witnesses can be seated until you're called or you can stay there [*i.e., standing with the litigants after the swearing in*]. I don't care whichever way you want to do it, sir. I recognize, I do not call, witnesses. If you want them to testify, you call them at your time. Okay? Your case, sir.

Even such a basic and ostensibly simple principle can cause difficulties for litigants. As we have demonstrated elsewhere, many litigants come to court with serious misunderstandings about such fundamental matters as the adversarial nature of the civil justice system.[154] One litigant spoke for many others when he said, a few days before his trial, "I'll just . . . answer . . . the judge's questions or whatever."[155] As some of the texts in earlier sections of this Article illustrate, many judges do take an active role in structuring the presentation of evidence. The proceduralist, however, seeks to avoid such a role and, as Text 16 demonstrates, may become condescending or sarcastic when forced to come to the aid of a confused or unprepared litigant.

Text 16

> *Defendant*: Can I get a witn-?

154. *See Lay Expectations, supra* note 73, at 203.
155. *See Lay Expectations, supra* note 73, at 210.

Judge: Sir, you can call anybody you want. I don't call. Remember?
Witness: I don't know how this works.
Judge: Your name, that's fine. Your name. . . .
Witness: Excuse me?
Judge: Your name?
Witness: Carl Richardson.
Defendant: Do I ask him questions or what?
Judge: If you want or I can just say, "What happened? Tell me what happened the other day." It'll be a lot easier on you, right?
Defendant: Yeah, right.
Judge: Okay, tell me what happened.
[*Witness gives his account at this point.*]

The judgments rendered by Judge E and the other proceduralists tend to be more formulaic and less variable than those of judges in the other categories. As Text 17 illustrates, the key elements are: notice of impending judgment,[156] recitation of the facts as the judge finds them,[157] brief announcement of the terms of the judgment,[158] and a generally perfunctory statement about where to obtain help in executing the judgment.[159] Given the legal backgrounds of all of the proceduralists, the inclusion of these elements is predictable, because Rule 52(a) of both the Federal and Colorado Rules of Civil Procedure requires explicit findings of fact leading up to appropriate conclusions of law in the written judgments of formal courts.[160]

Text 17

Judge: Court has listened to the testimony and the parties and makes the following findings of fact. The plaintiff's vehicle was struck by the defendant's vehicle and that, uh, defendant's vehicle was negligent in the, uh, driving, and that the plaintiff has met the burden of proof necessary for the court to enter a judgment against the defendant and the amount of damages totalling $741.31. And the court is making that finding based upon the fact that from the description of the accident as set forth by the defendant and his witness that the, uh, door in the court's estimation, the, would not have been damaged. It all would have been at that stage of the game would have just been two bumpers and looking at the repair bill here, shows the effect that the left door was, uh, damaged in addition to the bumpers and that is the basis of the court's decision. Therefore, a judgment will enter in favor of the plaintiff againt the defendant for $741.31 and costs. If you'll step outside, the clerks will tell you what to do next.

156. "Court has listened . . . ."
157. "The plaintiff's vehicle . . . that is the basis of the court's decision."
158. "Therefore, a judgment will enter . . . ."
159. "If you'll step outside . . . ."
160. As noted earlier in the discussion of the linguistic structure of judgments, the announcement of impending judgment is a simple attention-getting device. *See supra* text accompanying note 83. Similarly, the perfunctory advice at the conclusion of the judgment can be seen as a device for getting the parties to leave the courtroom so that the next case can begin.

The extensive findings of fact underscore the importance of the judge's perception of the evidence to the outcome of the case. In this respect, the proceduralist's judgment is comparable to that of Judges B, C, and D. Several stylistic features of Text 17 contradict this suggestion of personal responsibility, however, by creating an impression of distance between the judge and the litigants.

Note first that the judge speaks not in the first person, but as "the court." Second, he addresses neither party, but refers to both in the third person.[161] In attributing fault, he carries the distancing process even further by finding that "defendant's vehicle was negligent," omitting any personal reference to the defendant himself. Third, he makes frequent use of the passive, which has the effect of attenuating the relationship between actors and actions.[162] Finally, in announcing the judgment, he does not say that he is entering judgment, or even that the court is entering judgment, but merely that "a judgment will enter."

We believe that the proceduralist conveys to the litigants an impression of law and legal process unlike that conveyed by any of the other judicial types. He presents the substance of the law as flexible, with outcomes dependent on discretionary determinations by the court. The source of this discretionary authority is remote and inaccessible, however: an impersonal "court" insulated by a wall of procedure and unwilling to interact directly with the parties.[163]

In observing and studying the proceduralists, our strong sense was that their insistence on procedural regularity was a source of great frustration to litigants, to the point that they sometimes lost sight of their substantive objectives. Often, the problem is that the judge's procedural instructions and admonitions are incomprehensible without an understanding of such basic concepts as the adversarial nature of the civil justice system and the limited remedial power of the civil courts.[164] The proceduralist assumes this understanding to be part of basic cultural literacy, but it is not, even among the educated and business-wise.[165]

Text 18 provides a forceful illustration of this problem. The litigant is a graphic artist with considerable business experience. Judge E has just granted her a default judgment against a nonpaying customer who did not appear for trial. Text 18 contains her comments in an interview we conducted as she left the courtroom.

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161. In contrast to the judges in the other four categories, the proceduralist judges routinely made third-party references. *See supra* note 84.

162. *E.g.*, "The plaintiff's vehicle was struck . . . ."; "the, uh, door . . . would not have been damaged . . . ."; "the left door was, uh, damaged . . . ."

163. Contrast Judge A, the law interpreter, whose language suggests that she sees herself as personally accessible but powerless in administering the law.

164. Subject to a few exceptions, such as ejectment, the informal courts we observed could only issue money judgments. Litigants sometimes expressed frustration when the court could not compel better social behavior, or punish a miscreant. *See Lay Expectations*, *supra* note 73, at 224.

165. *See Lay Expectations*, *supra* note 73, at 210.

Text 18[166]

Interviewer: [*Asks plaintiff to describe her view of the legal process as a result of what has just transpired in the courtroom.*]
Plaintiff: I feel like I am furious I don't get to tell that. I spent, you know, a good part of my night last night preparing that—to have the judge not give a damn basically—is how I felt. I felt he was very short. I felt that he was not, um—let me put it—a little less than professional in the way that he was dealing with that court today. Personally, um . . .
Interviewer: Could you say what you mean by "a little less than professional"?
Plaintiff: Yeah, he wasn't giving me information. He was jumbling things for me so that I didn't understand it. And, he was expecting me to understand what was going on there like I am a lawyer. I am not a lawyer. He failed to listen to what I had to say.
Interviewer: When did you start feeling the way you now feel about the court? I mean at what point. 'Cause you were in and out of the courtroom several times and like, you know, you stood up and he asked you some questions . . .
Plaintiff: Probably when I first started with him today and he was jumbling things up for me. You know he was making them more confusing for me in that, you know, I fully realize he can't give legal advice in that courtroom. I fully realize that. He wasn't making things clear for me. He was making things very unclear so that he could confuse me. And, I didn't know which end was up. And, I didn't know what decision to make. I of course do not want to make a decision in that courtroom that's gonna jeopardize anything that I do in the future. And, I ended up, I didn't know if I was or I wasn't.

The litigant is outraged, even though she has just received a judgment for everything she demanded. Her problem is twofold: the judge did not listen to her carefully prepared presentation, and he refused to advise her on whether to take the default judgment against this defendant or amend her complaint to add another.[167] From a legal viewpoint Judge E's conduct is unremarkable. He did not hear her evidence against the absent defendant because there was no reason to make other litigants wait while he did so, and he declined to resolve her legal dilemma because that is not properly the function of a judge. The litigant is dissatisfied not because the judge is wrong in a legal sense, but because she does not share his normative assumptions about the legal process. Of all of the judicial types we observed, the proceduralist seems to confound litigants' assumptions and frustrate their expectations most often and most severely, perhaps because those aspects of legal culture that are the most self-evident to insiders are sometimes the most elusive to outsiders. The larger point that Text 18

166. This text is extracted from an interview conducted with a small claims litigant immediately following the conclusion of her trial.

167. At Judge E's suggestion, she left the courtroom to call her lawyer and then returned to take the default judgment.

makes is a recurrent theme, namely, that relatively subtle differences in the orientation of judges can have a profound impact on the way litigants perceive the process.

VII. CONCLUSION

In attempting to synthesize our findings, our attention has been drawn to several issues. First, the extent of the variation in the decision making process in informal courts has greatly exceeded our *a priori* expectations. Judges applying the same substantive and procedural law—and sometimes sitting in adjacent courtrooms—dispense justice in radically different ways. Depending on the judge a litigant draws, informal justice may mean mediation, enforced compromise, apologetic application of legal norms, authoritative decision making spiced with social commentary, or constant attention to points of procedure.

Our examination of what judges say in rendering on-the-spot judgments suggests that this behavioral variation derives from divergent conceptions of the judge's role and the nature of legal decision making. Thus, the law interpreter (Judge A), who rarely deviates from the straightforward application of legal rules, speaks of a process in which she is at the mercy of unyielding principles, even when she is disturbed by the results they produce. The law maker (Judge B), who adapts or even invents rules of law in pursuit of justice as she sees it, expresses herself in terms which suggest that the law is there to serve her ends, and not vice versa. The mediator (Judge C), who treats the adjudicative process as simply an opportunity to work out a compromise, puts similar emphasis on her central and highly discretionary role in the system. The authoritarian (Judge D), who renders definitive legal judgments and often involves himself in the personal affairs of the litigants, speaks in extraordinarily personal terms in exercising his authority. Finally, the proceduralist (Judge E), defined by his close, sometimes obsessive attention to procedural details, paints a verbal picture of a legal decision maker who is armed with discretionary power, yet protected from direct interaction with the litigants by several layers of legal formality. In each instance, there is a clear parallel between the judge's attitude as revealed in his unrehearsed speech and the individual's behavior on the bench.

A second issue is the correspondence between this variation and the views expressed by major jurisprudential schools. Indeed, some of our judicial types can be seen as acting out one of these views. Thus, the strict adherent to the law reflects a formalist notion of law and law making,[168] while the law maker displays an attitude toward law that would be congenial to the legal realist school in its more extreme rule-denying manifestation.[169] Critical legal scholars have written extensively about both the mediator and the authoritarian. They have criticized the former for effectively denying to the powerless the right to use the legal process to effect change through confrontation.[170] The outlook and behav-

168. *See supra* notes 1-5 and accompanying text.

169. *See* Golding, *supra* note 1, at 458.

170. *See, e.g.*, 1 R. ABEL, *supra* note 142, at 307-10; Merry, *supra* note 13, at 21-27.

ior of the latter seem to confirm the critical scholars' worst fears about judges whose decisions are influenced by political views and class bias.[171] The larger point—a point to which we return at the end of this discussion—is that the jurisprudential debate over the nature of law is not a purely intellectual exercise, but reflects an underlying reality, even at the lowest levels of the judicial system.

Third, we ask what effect this variation may have on individual litigants and what implications it may have for the legal system as a whole. Although it is difficult to determine how individual litigants respond to the different judicial types, it is clear that they receive different information about law and the legal process from each of the judges we have studied. Some litigants, for example, might reasonably conclude that informal justice is a maze of procedural traps for the uninitiated, whereas others might come to view the system as a pragmatic and highly personal problem-solving institution.

It is equally clear that the approaches of the different judicial types are likely to produce different degrees of immediate litigant satisfaction. The proceduralist, for example, may antagonize even those litigants who are "winners" in the substantive sense. Conversely, the law maker and the mediator may, by enforced or negotiated compromise, succeed in assuaging those who are denied what they sought at the outset of the case. However, this enhancement of the litigants' sense of well-being may come at the expense of their opportunity to achieve tangible ends. Thus, the disputing sisters who come to Judge C's court leave with a negotiated settlement designed to minimize conflict.[172] However, the sister who filed the case already had determined that the problem was beyond negotiation and serious enough to merit a judicial resolution. In mediating a settlement, Judge C effectively tells this litigant that the law is not for her. The specifics may vary from case to case, but the point is always the same: by diverting a case from the formal process of adjudication in order to defuse conflict, a judge may override a litigant's determination that courtroom confrontation is the appropriate way to deal with a particular problem. A judge acting in this way may substitute her own culturally based definition of "seriousness" for that of the litigants, at once denigrating their cultural background and denying them access to the creative potential of the law.[173]

With respect to the implications of our findings for the law as a whole, the variation we observe has interesting connotations for the law's traditional reliance on process as a defense against the abuse of rights. In response to many claimed abuses of individual rights, courts and legislatures have constructed processes intended to be followed at lower, sometimes unreviewable levels of the judicial system. Thus, police officers are directed to read suspects their *Miranda* warnings, and warrant-issuing magistrates are called upon to tailor the scope of warrants to the probable cause demonstrated by the officer. Both processes are largely beyond review, however, since neither a *Miranda* recitation nor testimony in support of a warrant is a matter of record. Here, as elsewhere, the law

171. *See* Boyle, *supra* note 3, at 689-90; Solum, *supra* note 3, at 469.

172. *See supra* Texts 7-8 and accompanying text.

173. *See* Merry, *supra* note 13, at 21-27.

must assume that the process it has defined will be more or less replicated over a large number of individual performances.

Informal justice is also a process created to protect individual rights. Small claims courts were conceived in part to enable consumers, tenants, and others with limited power to assert rights inexpensively and expeditiously. As our data demonstrate, however, there is no such thing as *the* process of informal justice. It is, rather, a broad range of different processes, with the differences deriving in significant part from the role perceptions of those who administer it. We suggest that these data provide grounds for similar doubts about whether there can be any such thing as *the* process of reading a suspect his rights, or *the* process of determining that a search warrant is supported by probable cause and properly particularized. Indeed, we now entertain grave doubts about the whole practice of protecting rights by designing processes without adequate consideration of the pragmatic question of how they will be administered.

A fourth major issue is the normative question of how judicial decision making should work. Simply put, which type of decision maker best advances the interests of justice? The short answer is that we do not know for sure. We take some comfort from the notion that social critics can perform a useful function, even if they cannot fix the things that they point out are broken. We can only reiterate our concern about the discrepancy between the ideal of a system of informal justice designed to help certain types of litigants and the reality of many systems, each of which meets some needs but may ignore others. We are troubled that this variation is effectively concealed from litigants and beyond their control. Thus, a litigant seeking a formal legal remedy has no way of knowing whether he will be diverted to ad hoc mediation, and will be able to resist the diversion only by standing up to a judge who may already have warned him of the consequences of doing so.[174] Finally, we are concerned that this unchecked discretion is concentrated at the lowest levels of the judicial system, and suspect that it would not long be tolerated at levels where parties have the wherewithal to assert their own rights vigorously, or benefit from the efforts of organized advocacy groups.[175]

We conclude by returning to our title phrase, the "fundamentals of jurisprudence." Traditionally, jurisprudence has worked from the top down by imposing theoretical constructs on the law and arguing their merits on an abstract level. This approach to questions about the nature of law has promoted a false and counterproductive dichotomy, in evidence throughout legal scholarship, between theorizing and empirical research. We suggest that our findings are literally fundamental to jurisprudence in that they demonstrate the utility of studying the nature of law from the ground up. We have attempted to show that observing behavior at the lowest levels of the judicial system can yield insights

174. *See, e.g.*, Text 10, in which Judge C warns the plaintiff about what will happen if he refuses a mediated solution.

175. As should be evident from the Texts, the parties we observed were rarely pursuing the kinds of consumer or civil rights claims that attract the attention of public interest advocacy groups. In the entire course of our study, we saw a legal aid or public interest lawyer appear on behalf of a litigant only once.

into the most important theoretical questions. In our view, the study of the nature of law is a continuum, with observation benefitting from theoretical perspective, and theorizing benefitting equally from an occasional glance at reality.