A COMMON SAYING AMONG LAWYERS

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A common saying among lawyers is that the law is whatever the judge says it is in court that day. Indeed, according to certain "realists," the law actually has no meaning until it is interpreted by any lower judge or by the Supreme Court and even that can change over time with new judges. There is no "fact of the matter" about the law being independent of judicial interpretation.

Do attorneys shop for a judge who might be sympathetic to their case? In high-stakes civil cases, this is a fact of life, but its more "venue-shopping" than "judge-shopping". What makes a good venue for a civil litigant? Sometimes, it's just a matter of statistics. Certain court districts just seem to favor plaintiffs or defendants in certain types of actions, such as patent disputes.

How do lawyers know what the judge thinks when fighting a case in court? The answer is experience and a sense of measuring other people. Plus, it helps if you know the judge on a personal level. There's an old saying, "A good lawyer knows the law; a great lawyer knows the judge."

If you don't personally know the judge, or if you don't have experience before the bench, then you must rely on the same skills that it takes to read a client, another attorney, or just about anyone else. Judges are human; thus, they are subject to the same oddities as the rest of us.

It is our opinion based on our court experience that the following saying is true: "The law is whatever the judge says it is in court that day." The following are some examples of court cases but are not all inclusive to our court room experience and/or opinion. A good starting point starts with a question. Is there a difference between liberal justices and conservative justices?

Both kinds of justices take into account whether they're sympathetic to the plaintiff, not just what the Constitution demands. But we have found and a new study shows "in-group bias

Liberals have for some time believed that all of conservatives talk about "original intent" and judges who will "interpret the Constitution, not make laws" is just a crock. Rather, what they want is judges'

who will give them the results they want whatever the Constitution may happen to say. “Original intent” is a particularly flexible, and therefore fundamentally bogus, rationale, since it’s usually impossible to apply 18th century ideals to 21st century legal questions and arrive at a judgment based solely on your impression of what was in James Madison’s mind, and therefore no matter what your preferred outcome is, you can justify it on the basis of original intent.

But conservatives respond that liberals do the same thing, pretending to believe in abstract principles when they really just want the people, they like to prevail in every case that comes before the courts. Resolving the dispute over who’s right, or at least who is more right than the other side, isn’t easy.

The New York Times did a study that attempted to find out, at least in the area of free speech cases if there was a bias. The researchers looked at hundreds of such cases to see if they could locate “in-group bias”-that is, were conservative justices more likely to decide in favor of conservative plaintiffs than liberal plaintiffs, and were liberal justices more likely to find in favor of liberal plaintiffs?

What jumped out is how different the conservative justices are from the liberal justices. The differences ranged from large to enormous. The headline on the Times story reads, “In Justices’ Votes, Free Speech Often Means Speech I Agree With.”

Based on our court experience this pattern also holds in other kinds of cases as well. The liberal justices were likely to strike down a conservative regulation, while the conservative justices were likely to strike down a liberal regulation and this kind of pattern has analogues in many different areas of politics.

For instance, we all know that Washington has become more “polarized” in recent years, and if you listened to the way the media talk about it, you’d think that Democrats and Republicans have moved away from the center at warp speed with each becoming equally opposed to compromise and intransigent.

If the Supreme Court were to say that a person cannot own or have weapons, then that is correct [it is as true as anything can be because the Judge’s said so] changing the fact that the words on the actual Constitution say you can own or have a weapon, is irrelevant.

If this is not the case and the law stands as written then why are there split decisions on the Supreme Court? Also why is a decision by one judge based on the same circumstances and laws of that state in a lower court different from a different judge presiding

over the same circumstances in the same state? If the law is not subject to a judge's opinion of what is admissible in court, then why the need for an appeals court where a decision of one judge can be overturned by a higher court?

Some believe that it is literally impossible for a majority of the Supreme Court to be wrong about what the Constitution or the law of the land means, at the time that they issue a decision. Later on, the Court might change its mind, but at the time that it issues a decision, the majority must, as a matter of logic, be correct.

So, Plessy v. Ferguson was correct, and Dred Scott was correct, when these decisions were issued. But in Lawrence v. Texas, we find the following sentence: "Bowers [v. Hardwick] was not correct when it was decided, is not correct today, and is hereby overruled." But it is not possible for Bowers to have been wrong when it was decided, since it was the decision of a Supreme Court majority, and therefore was all that the law could mean.

So, the Lawrence majority must be wrong when it says that Bowers was "not correct when it was decided." And yet the Lawrence decision is a decision of the majority and therefore cannot be wrong about the fact that Bowers was wrong. This is just the classic Cretan Paradox—it is not logically possible for both Lawrence and Bowers to be right, and yet both must be right if, in fact, the law means only what the judges say it means. The Supreme Court itself admits that it is capable of being wrong about what the law means; so even those who think the law means only what the Supreme Court says it means must concede the point that, according to the Supreme Court majority, the law has a meaning other than what the Supreme Court majority says.

Let's go farther. If the law only means what the judges say it means because they are written documents and must be given life by the Court's interpretation, then why is the same not true of Supreme Court decisions themselves? They, too, are just words on a page, and can have no meaning until the lower courts implement that decision and, again, the lower courts cannot be wrong about their implementation of the decision, since a written court decision means only what the reader says it means. So, if the Supreme Court says "segregation is unconstitutional," that decision means only what lower courts say it means, and if lower courts interpret that as meaning "segregation is just fine," then the lower courts must be right, because the text means only what the reader says it means.

You might push this even more. If there is no fact of the matter until a court pronounces on it, then a murderer cannot be guilty or not guilty until a jury decides on guilt or innocence—and the jury cannot be wrong, because there is no fact of the matter. On this premise—that the law is only what the judicial agent says it is—it is not logically possible for there to be a wrongful conviction or a wrongful acquittal. This argument might be a little weaker, since the "realist" only claims that there's no meaning to a written text prior to interpretation, not no meaning to physical reality. But the concept of "guilt" is attributed—it doesn't exist in nature. And one could just as easily change the

hypothetical to say that in a contract case, a contract means nothing until the jury decides whether the defendant breached the contract or not.

I think these objections are convincing. It can't be the case that the written law means nothing until the judges tell us its meaning. On the contrary, wherever the meaning of a text comes from, it doesn't come solely from the reader. The logic of writing itself inescapably implies that it is possible to read that text correctly or incorrectly. And if that is the case, then there must be a "fact of the matter" about what the law means, other than what the Supreme Court or Judge says it means.