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The Use of the Term "Result-oriented" to Characterize Appellate Decisions

John E. Simonett

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THE USE OF THE TERM "RESULT-ORIENTED" TO CHARACTERIZE APPELLATE DECISIONS

JOHN E. SIMONETT†

An attorney who has not at one time or another concluded that a court's decision is "result-oriented" must be a rare one. Indeed, it seems unlikely that one could escape law school without having used or at least heard the term used to criticize a court's decision. Justice Simonett explores the meaning of "result-oriented" as it is used by courts themselves and in the broader context of our legal system.

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I. INTRODUCTION

"[T]he Court appears to be using summary dispositions in a result-oriented fashion."

Justice Thurgood Marshall
Remarks to Second Circuit Judicial Conference
September 9, 1982

Those disappointed with an appellate court's performance sometimes express their chagrin or ire by accusing the court of being "result-oriented." Rarely does anyone express surprise when the aspersion is made; indeed, some court observers assert that appellate courts are always result-oriented and, indeed, cannot be otherwise.

This Article explores the meaning of the term "result-oriented,"

† Associate Justice of the Minnesota Supreme Court.
particularly when used in the pejorative sense. Despite the slipperiness of the term, an attempt is made here to fashion some kind of measure for determining what is a "bad" result-oriented performance. Attention is also focused on the role played by "summary affirmances" in giving credence to the charge of result-oriented decisions. Finally, the Article identifies some of the institutional forces restraining an appellate court from being result-oriented.

The notion that courts do not always seek a result to which the "law" would lead is not new. Around the turn of the century, Mr. Dooley observed that "th' supreme court follows th' iliction returns." This Article cites cases in which the dissent suggests the majority is result-oriented and, less frequently, cases in which the majority claims the same of the dissent. Because the heart has its reasons that the mind knows not of, and because result orientation tends to lie in the eye of the beholder, unlike Mr. Dooley, this author will not attempt to discern the courts' intentions when they decided these particular cases. Instead, the focus is on the term itself, on the notion it is intended to convey, and why the term has a pejorative connotation.

II. USE OF THE TERM "RESULT-ORIENTED"

The trial lawyer is, of course, unabashedly result-oriented. He or she wants to win, to obtain a certain result; and under our adversary system, where opposing sides urge their respective positions on the court, this approach is generally deemed admirable. The appellate court is also necessarily oriented toward a result; it exists for the very purpose of deciding between contending positions. In the end, no matter how evenly balanced or uncertain the merits of a case might be, the court must, preferably with a show of confidence, announce a result.

Though agreed on the need to reach a result, and though the court and counsel, at least counsel for one of the parties, may even agree on the result to be reached, the court and the lawyers obviously have different roles to perform. The court, like counsel, can

1. MR. DOOLEY ON THE CHOICE OF LAW 52 (Bandor ed. 1963).
2. While this Article does not attempt to identify specific court decisions that reason in result-oriented fashion, one delightful example of such reasoning comes to mind. Henry VI's minister, a fellow by the name of Morton, needing money for the King, "extorted gifts to the exchequer from men who lived handsomely on the grounds that their wealth was manifest, and from those who lived plainly on the plea that economy made them wealthy." 2 J. GREEN, HISTORY OF THE ENGLISH PEOPLE 70 (n.d.). These result-oriented decisions have come to be known as an application of "Morton's fork."
advocate a particular policy or point of view, but there is a difference in the type of advocacy undertaken by the court and that undertaken by counsel. The difference is real, not merely one of degree. In determining whether an appellate court's performance is result-oriented, consideration must be given to the appellate court's proper advocacy role and to the public's expectations of how the court is to reach a result. To begin, it may help to view the term "result-oriented" in its natural setting, as used by judges themselves in their appellate opinions.

A. A Survey of Cases

The term "result-oriented" as it is used pejoratively, seems to be increasing in popularity as a description of some decisionmaking. A computer search of federal and state court decisions for the last several decades reveals that the precise term was used in ninety-eight cases. In twenty-eight of these cases, the term appears in the dissenting opinion as a critical characterization of the majority's decision. Less frequently, the majority used the term to characterize the dissenting or concurring opinion. In twenty-six cases, the minority characterizes the majority as being "result-oriented" are: Syneseal v. Ling, 691 F.2d 1213, 1218 (7th Cir. 1982) (Decker, J., dissenting); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1113 n.92, 1114 (D.C. Cir. 1981) (Wilkey, J., dissenting); Switkes v. United States, 480 F.2d 844, 853 (Ct. Cl. 1973) (Nichols, J., dissenting); Ex parte Nice, 407 So. 2d 874, 884 n.3 (Ala. 1981) (Jones, J., dissenting) ("This unfortunate prejudgment of the ultimate outcome of the case provides an erroneous result oriented holding."); Game & Fresh Water Fish Comm'n v. Lake Islands, 407 So. 2d 189, 196 (Fla. 1982) (Sundberg, J., dissenting) ("The majority opinion in this case has given substance to the view, widely held in trial court circles, that result oriented reviewing courts have an unfortunate habit of retrying the facts of cases on appeal."); Ramsey v. Ramsey, 535 P.2d 53, 64 (Idaho 1975) (Bakes, J., dissenting) ("As is often the case, result-oriented decisions do the further disservice of making bad law."); Collins v. Grabler, 263 N.E.2d 201, 215 (Ind. App. 1970) (Sullivan, J., dissenting) ("We cannot tailor a logical doctrine to suit a result oriented decision. We must achieve justice through the law, not in spite of it."); D'Ambrav. United States, 338 A.2d 524, 535 (R.I. 1975) (Joslin, J., dissenting) ("In a result-oriented response the majority adopts a new rule of liability."); Tigrett v. Pointer, 580 S.W.2d 375, 391 (Tex. Civ. App. 1979); State v. Spence, 506 P.2d 293, 303 (Wash. 1973) (Finley, J., dissenting); Farley v. Zapata Coal Corp., 281 S.E.2d 238, 244 (W. Va. 1981) (Miller, J., dissenting).

In addition to various federal court opinions, the phrase "result-oriented" appears in the appellate opinions of 25 different states: Alabama, Alaska, California, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, West Virginia, Wisconsin, and Wyoming.

3. To cite all the cases using the phrase "result-oriented" would be proof, I suppose, of industriousness but little else. A representative sampling of the 28 cases where the minority characterizes the majority as being "result-oriented" are: Syneseal v. Ling, 691 F.2d 1213, 1218 (7th Cir. 1982) (Decker, J., dissenting); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1113 n.92, 1114 (D.C. Cir. 1981) (Wilkey, J., dissenting); Switkes v. United States, 480 F.2d 844, 853 (Ct. Cl. 1973) (Nichols, J., dissenting); Ex parte Nice, 407 So. 2d 874, 884 n.3 (Ala. 1981) (Jones, J., dissenting) ("This unfortunate prejudgment of the ultimate outcome of the case provides an erroneous result oriented holding."); Game & Fresh Water Fish Comm'n v. Lake Islands, 407 So. 2d 189, 196 (Fla. 1982) (Sundberg, J., dissenting) ("The majority opinion in this case has given substance to the view, widely held in trial court circles, that result oriented reviewing courts have an unfortunate habit of retrying the facts of cases on appeal."); Ramsey v. Ramsey, 535 P.2d 53, 64 (Idaho 1975) (Bakes, J., dissenting) ("As is often the case, result-oriented decisions do the further disservice of making bad law."); Collins v. Grabler, 263 N.E.2d 201, 215 (Ind. App. 1970) (Sullivan, J., dissenting) ("We cannot tailor a logical doctrine to suit a result oriented decision. We must achieve justice through the law, not in spite of it."); D'Ambrav. United States, 338 A.2d 524, 535 (R.I. 1975) (Joslin, J., dissenting) ("In a result-oriented response the majority adopts a new rule of liability."); Tigrett v. Pointer, 580 S.W.2d 375, 391 (Tex. Civ. App. 1979); State v. Spence, 506 P.2d 293, 303 (Wash. 1973) (Finley, J., dissenting); Farley v. Zapata Coal Corp., 281 S.E.2d 238, 244 (W. Va. 1981) (Miller, J., dissenting).

the term was used by appellate courts to characterize a doctrine or line of cases of other appellate courts as being result-oriented.\(^5\)

The term has also surfaced several times in opinions of our highest court. In *Lewis v. City of New Orleans*,\(^6\) Justice Blackmun stated in his dissent, that in the area of free speech, the doctrines of overbreadth and vagueness have become "result oriented rubber stamps."\(^7\) In *Plyler v. Doe*,\(^8\) a decision striking down a Texas statute denying illegal aliens admission to public schools, Chief Justice Burger commented in his dissent that, "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example."\(^9\) In *Craig v. Boren*,\(^10\) Justice Powell, in a concurrence, observed that many commentators viewed the "two tier" equal protection analysis as "a result-oriented substitute for more critical analysis."\(^11\) Finally, in *Engle v. Isaac*,\(^12\) Justice Brennan, dissenting, stated that the majority opinion, holding that the petitioner's state claims had not been exhausted, used an analysis which was "completely result-oriented."\(^13\)

The term is also used in other contexts. Thus it may be used to reject a proposed or postulated rule\(^14\) or to characterize counsel's argument,\(^15\) the approach taken by an administrative agency,\(^16\) or

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Nyquist, 57 N.Y.2d 27, 49 n.9, 439 N.E.2d 359, 369 n.9, 453 N.Y.S.2d 643, 654 n.9 (1982) ("The dissent illustrates the very great, and perhaps understandable, temptation to yield to a result-oriented resolution of this litigation.").

5. See, e.g., Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252, 1259 n.13 (2d Cir. 1975); State v. Erickson, 574 P.2d 1, 12 (Alaska 1978); Roberson v. Florida Parole & Probation Comm'n, 407 So. 2d 1044, 1046 (Fla. Dist. Ct. App. 1981); Succession of Waldron, 323 So. 2d 434, 440 (La. 1975) (Dixon, J., dissenting); Kammerer v. Western Gear Corp., 635 P.2d 708, 719 (Wash. 1981) (Stafford, J., dissenting); Remilong v. Crolla, 576 P.2d 461, 463 (Wyo. 1978) ("However, in our view, and after examining such authorities, it appears that these opinions are 'result-oriented' and that the logic upon which they are based is at least questionable.").


7. Id. at 140. Furthermore, in Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), Justice Blackmun concurring in the result, wrote to say that the phrases "compelling state interest" and "least drastic means" are "too convenient and result oriented, and I must endeavor to disassociate myself from them." Id. at 188-89.


9. Id. at 244.


11. Id. at 210 n.6.


13. Id. at 144.

14. See, e.g., In re Penn Cent. Transp. Co., 486 F.2d 519, 527 (3d Cir. 1973); People v. Moreland, 81 Cal. App. 3d 1, 15, 146 Cal. Rptr. 118, 120 (1978); State v. Reeves, 427 So. 2d 403, 417 (La. 1982) ("Such theoretical line drawing is result oriented").

15. See Vaccaro v. United States, 461 F.2d 626, 629 (5th Cir. 1972) (application of doctrine of retroactivity is "essentially a pragmatic, case-by-case, result oriented process");
an expert witness’ testimony. On a few occasions, a court will acknowledge that its decision may be result-oriented, but use the term in a positive, if somewhat apologetic sense. On the other hand, one court has gone so far as to say that “the legal reasoning process of courts is inherently result-oriented”; indeed, the opinion writer, Justice Neely, has commented elsewhere that “in my experience judges are usually result-oriented politicians,” and then added, “when they see a bad statute they get rid of it and let the future take care of itself.”

Notwithstanding the prevalent use of the term, rarely do judges elaborate on just what they mean when they condemn legal conclusions as result-oriented. Presumably the condemnation is self-evident and it is for those on the defensive to explain. “How do we decide to use one decision and reject another?” asks Justice Craven of the Illinois Appellate Court. In answering his own question, Justice Craven states:

At this point commentators and disgruntled litigants may object that the courts are result-oriented, that we decide a case a


16. See NLRB v. Porta Sys. Corp., 625 F.2d 399, 405 (2d Cir. 1980) (dissent characterizing NLRB decision) (Van Graafeiland, J., dissenting in part); NLRB v. Gotham Shoe Mfg., 359 F.2d 684, 698 (2d Cir. 1966) (“At best, the [NLRB] rule is a device for imposing a result-oriented viewpoint . . . .”).


18. Thus, one court has stated: “Conceding that the imposition of a duty upon defendant flows from policy considerations which are somewhat result-oriented, it is supported by sound legal principles and our understanding of developing case law.” Samson v. Saginaw Prof. Bldg., Inc., 44 Mich. App. 658, 660-61, 205 N.W.2d 833, 835 (1973) (footnote omitted); see also Confederation of Police v. City of Chicago, 481 F. Supp. 566, 569 (N.D. Ill. 1974) (noting that neither side cited a case on point, nor could court find any). The Confederation court said, “[O]ur analysis is result oriented, and we think that is appropriate in these circumstances.” Id. at 569; see also Ovaitt v. Ovaitt, 43 Mich. App. 628, 636, 204 N.W.2d 753, 757 (1973).

19. Board of Church Extension v. Eads, 230 S.E.2d 911, 917 (W. Va. 1976) (Neely, J.). Jurors may also be result-oriented. See Commonwealth v. Mutina, 366 Mass. 810, 817, 323 N.E.2d 294, 298 (1975) (“To inform jurors of the consequences of their verdicts is apparently seen, and in most cases with good cause, as inviting result-oriented verdicts and possible deviation from basic issues of a defendant’s guilt or innocence.”).

certain way because we like a certain result. Decisions are result-oriented and rebellious only in a few instances. I would reserve ‘result-oriented’ as a term of opprobrium applicable only when a court decides a case contrary to a living and well established body of law and when no sound policy justifies the departure from the established rule. But in the absence of these two conditions courts must compare competing results and determine which better effectuates public policy. 21

If this description has merit, and I think it does, we need to inquire more closely wherein lies the “rebelliousness” of appellate court decisions.

B. A Working Hypothesis

A working hypothesis is needed of what a result-oriented appellate decision is and why the term is used disparagingly. The term applies not so much to the result, however unpalatable, but to how the result is obtained. The term seems to suggest that a court is result-oriented when it proceeds to do what it wants to do; that it reasons backwards from a desired result without regard for the merits, logic, established law, or sound policy applicable to the case. This is a relatively straightforward statement, but, when analyzed, it fails to withstand numerous qualifications and proves to be somewhat elusive.

To reason backwards from a desired result is not necessarily bad. Arguably, no result is bad if the reasons subsequently marshalled to support it are sound. For that matter, it is surely possible for a decision to be right for wrong reasons that are honestly held. As for logic, it was Holmes who observed that the life of law has not been logic but experience. 22

On the other hand, to say a court is result-oriented may suggest that the court approaches a particular appeal with a closed mind.


22. O. HOLMES, THE COMMON LAW (1881). There is, however, a close connection between the logical fallacy of begging the question and the charge of result orientation.

In California, if a losing party before an intermediate court of appeals petitions the California Supreme Court for a hearing, the supreme court may deny the petition. If it concludes that the court of appeals opinion contains “an erroneous statement of the law,” however, it may order the intermediate court’s opinion not to be published. Thus if the appellate opinion is right for the wrong reasons, it is “de-published.” There are now about 100 of these decertification orders each year. For a discussion of this practice, see Gerstein, “Law by elimination”: depublication in the California Supreme Court, 67 JUDICATURE, Jan. 1984, at 293.
In one of his essays Bacon said, "If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties." A result-oriented court presumably begins and ends with the same certainties with little in the way of doubts in between. Yet, the problem with claiming that a court is result-oriented on the basis of the court's thought process or apparent lack thereof is that the only evidence of the court's thought process is its published opinion. While the published opinion is the best evidence and normally the only evidence available of the court's thinking, it may not truly be revealing of what influenced the court. The typical appellate opinion in its published form marches along in an orderly fashion, but it should come as no surprise that the court, consciously or unconsciously, may not be setting out all the factors that entered into its decision. In their written opinions, judges are not necessarily expected to state the reasons for deciding as they did, but only to justify their decision with reasoning that is respectable and authorities that are appropriate.

The published opinion may march inexorably forward step-by-step toward a conclusion, but it is unlikely that the judge's mental processes proceeded in that manner. Rather than to march forward, it is likely that the human mind (to switch metaphors) tends to hover, until finally, it alights on a conclusion. "General propositions do not decide concrete cases," said Justice Oliver Wendell Holmes, adding, "[t]he decision will depend on a judgment or intuition more subtle than any articulate major premise." The key notion here is that of inarticulateness. What may seem to be reasoning backwards from a desired result may be a normal process of reasoning from an inarticulate premise intui-

23. There are different styles of opinion writing. Some opinions state the result at the beginning and then go on, by way of anticlimax, to explain the result. Other opinions begin with the issue; the various arguments then contend back and forth with the conclusion in doubt, until, as the end of the opinion comes near, denouement occurs and suspense is relieved with the announced ruling.

A distant cousin to the suspense style of decision writing is the "slippery slope" technique. Dean Acheson, in his book, Morning and Noon, gives an example of this device as used by Chief Justice Edward White:

He would start with a reasonably fair statement of a litigant's position, followed by restatement progressively more disadvantageous for the side about to lose—each preceded by 'or to put it another way,' or 'in other words'—until the position was palpably absurd. Then the guillotine would fall. 'To state this proposition,' he would conclude, 'is to decide it,' as, indeed, it was.


tively felt but nevertheless real and meritorious. Even if one could go behind a written opinion to see how the result was reached, there is no certainty that one would be any the wiser. So, a result-oriented decision cannot fairly be cast in a pejorative light merely on surmise about that which the court "really had in mind."

Nor is it enough to say that the reprehensible aspect of a decision lies in ignoring the merits of the case. Who is to say? If two appellate courts reach different results on a policy issue, neither opinion need be deemed improperly result-oriented; each court is simply persuaded by a policy consideration that the other court discarded. A skeptic might say that the court was biased in its choice of policy values. Probably so, but again it does not necessarily follow that this kind of result orientation is to be characterized disparagingly. When a dissent differs with a majority opinion, it need not mean that one side ignored the merits; it may mean no more than that both sides were persuaded differently by those merits. Viewed in this light, the accusation of being result-oriented is nothing more than an argument about the merits—whether one's reasons for affirmance are better than another's for reversal—an entirely normal and unobjectionable state of judicial affairs.

In addition to making law through its policymaking, precedential decisions, an appellate court also corrects error. The pejorative charge of being result-oriented may attain more credibility when an appellate court is performing this function. In correcting an error the appellate court favors either a legal rule over the facts or the facts over a legal rule. Yet, this too may be a normal state of judicial affairs. Error correction involves value judgments and there may be legitimate reasons for the court's preference of either the rule or the facts in a particular case.

25. Judge Joseph C. Hutcheson, Jr. thought that decisionmaking begins with a "hunch" and then supportive legal reasons:

[In feeling or 'hunching' out his decisions, the judge acts not differently from, but precisely as the lawyers do in working on their cases, with only this exception; that the lawyer, having a predetermined destination in view,—to win his law suit for his client—looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him . . . .]


26. The author is reminded of Mr. Irving Younger's story about the origin of the "double hearsay" rule. As you may recall, an elderly, destitute widow was appealing an
Rather than continuing to match debating points, it is helpful at this point to consider what is expected of an appellate court in its exercise of the decisionmaking process. In other words, rather than trying to determine the wrong way of deciding cases, it may be more profitable to look at the right way. Briefly, as already mentioned, the appellate court’s role is twofold: to make new law and to correct error. As to the latter, the appellate court plays a limited role as a court of review and is expected to give due deference to the trial court’s findings of fact and conclusions of law. As to the former, the lawmaking role, the appellate court is expected to decide new issues in a reasoned manner, with respect for precedent and the judiciary’s role in a government of separated power, and, if established law is to be overruled, to do so candidly, sparingly, and for good cause.

For example, if judges are neither required nor necessarily expected to state all their reasons for deciding as they did, at a minimum, they are expected to justify their result with scrupulous handling of the facts, honest reasoning, and pertinent precedent. Legitimate reasons for the result must be ar-

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27. [An appellate court should determine whether the court below relied on properly applicable and correctly interpreted rules of law, conducted proceedings fairly and deliberately so that there was no substantial prejudice to the parties, and rested its determination on factual conclusions reasonably supported by the evidence.


28. See K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960). For someone who holds the view that law is discovered, not made, there is frequently the belief that for any legal problem there is only one single right answer and that the judge’s task is only to find it, preferably, in precedent. According to Llewellyn, however, this is the nub of the problem—there may be more than one right answer. Id. at 24.
ticated even if they are not all the reasons and even if the true motivation for the result is only intuitively felt.

If the foregoing description sets out, albeit loosely, the expected norm for appellate review, it seems that the pejorative use of the term result-oriented may be defined as a deviation from this norm. A decision’s result may or may not be admirable, but it is only “result-oriented” when the appellate court ignores its limited scope of review or disregards (whether by ignoring or by unfairly characterizing) its own precedent.\(^{29}\) Thus, a result-oriented decision is bad when it gives the impression of being ad hoc justice, unprincipled, and dependent on the personal predilections of the judges. This definition is admittedly amorphous, and the degree of deviation from the norm will vary. Indeed, the norm itself may vary.\(^{30}\) Nevertheless, this definition captures the basic gist of a “bad” result-oriented decision and will suffice here as a working hypothesis.

### C. Summary Dispositions

Even if an appellate court opinion is not result-oriented, it may be perceived as such. To some degree, this perception may be gaining in acceptance because of current developments in appellate court structure and administration.\(^{31}\)

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29. When an appellate court is said to engage in “judicial legislation,” that is, exceeding the boundary of judicial action and transgressing on executive and legislative prerogatives, the concern is with the legitimacy of judicial review rather than its scope. See R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977). The doctrine of judicial restraint, as Justice Stevens has pointed out, is not a doctrine that relates to the merits of judicial decisions but to whether and when judges should decide the merits of an issue put to them. Stevens, Some Thoughts on Judicial Restraint, 66 JUDICATURE 177, 180 (1982). My use here of the term “result-oriented” assumes the legitimacy of judicial review; I am limiting it to the scope of review, that is, to how judicial review is exercised once involved.

30. See infra note 66 and accompanying text.

31. Perhaps a resurgence in judicial activism, particularly in the United States Supreme Court, has given impetus, if not validity, to the charge that courts are result-oriented. Judicial activism in the area of constitutional law involves a choice of policies or values made necessary by changing social circumstances, novel legal issues, and the attendant lack of precedent.

An impression of “unsettledness” in the law, brought about by the sheer volume of appeals, may give rise to “result-oriented” decisions. Judge Alvin B. Rubin, in a book review, points out that the “new” Fifth Circuit has fourteen judges and the Ninth Circuit twenty-three, and that the Fifth Circuit can be arranged into 364 different panels. Judge Rubin observes, “Thus the sheer number of judges and the volume of opinions in these larger circuits makes decisional uniformity within the circuit difficult, if not impossible, to achieve.” Rubin, Book Review, 130 U. PA. L. REV. 220, 222 (1981) (reviewing F. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1980) and J. Howard, Courts of Appeal in the Federal Judicial System: A Study of
Recent decades have seen a tremendous increase in the volume of appellate court business. To cope with this volume, the appellate courts have made increasing use of summary dispositions; that is, the court affirms or dismisses without a written opinion or with a short, unpublished memorandum. This procedure is ordinarily used to dispose of appeals for which a written opinion would add nothing to the law and in which no one but the litigants has an interest. Summary dispositions, so used, free the judges' time for more deserving appeals. They also have the benefit of decreasing the rate at which shelving is added to a lawyer's already overcrowded library.

The Second, Fifth and District of Columbia Circuits (1981). This lack of uniformity is compounded, Judge Rubin goes on to say, because of the large number of unpublished panel decisions and by the fact that the Supreme Court can take so few cases for final review. Id.

Rule 23 of the Illinois Supreme Court provides that cases disposed of by opinion shall be published but those disposed of by order will not be published. See Ill. Sup. Ct. R. 23. For a debate on whether this rule allowing summary unpublished dispositions should be repealed, see Seidenfeld, Should Rule 23 be repealed?, 24 Ill. Bar News, Sept. 1983, at 4, col. 4. Judge Glenn Seidenfeld of the Illinois Second District Appellate Court, arguing for retention of the rule, points out, "As many as 6,687 notices of appeal were filed in the Illinois Appellate Court in 1982 with a projected 10 percent increase in filings for 1983. This is more than three times the 1,211 filings in 1964, after the appellate court was first established with full time judges." Id. The judge argues that the appellate court simply cannot manage written opinions in every appeal and that Rule 23, effective April 1, 1982, "was proposed and adopted essentially to improve currency and to meet growing complaints of lawyers and judges that the volume of published opinions have become increasingly burdensome." Id. at 4, col. 1.

The caseload of the Minnesota Supreme Court increased from 686 filings in 1973 to 1207 filings in 1978. Although filings almost doubled in this five-year period, the number of written opinions issued remained relatively constant. By 1977, the delay in processing an appeal to a decision varied from 13.3 months in non-oral civil appeals to 22.1 months in cases decided en banc. See Harmon & Lang, A Needs Analysis of an Intermediate Appellate Court, 7 WM. MITCHELL L. REV. 51, 86-91 (1981) (Appendix containing statistics on workload and delay).

Filings in the Minnesota Supreme Court for 1982 were 1352. Of these, 155 received en banc oral argument, 433 were disposed of by summary affirmation order, 10 were summarily reversed, and 385 written opinions were issued. See Minnesota Supreme Court, Disposition Analysis, Cases Disposed in 1981 (on file with the Clerk of Court, Minnesota Supreme Court).


A cursory glance at the Illinois Appellate Court reports shows that in 1963 there were somewhat over 3,000 pages, by 1981 over 12,000 pages. Nearly 11 volumes were required to report the 1975 cases, compared to seven and one-half volumes in 1982, when the present rule [restricting publication] was in effect. Seidenfeld, supra note 32, at 4, cols. 1-2. Judge Seidenfeld also reports that with the ad-
Nevertheless, summary dispositions exact a price for their contribution to administrative efficiency. They leave the court vulnerable to a charge of result orientation. Thus, Justice Marshall in the quotation at the beginning of this Article states, "[T]he Court appears to be using summary dispositions in a result-oriented fashion."34 The same charge is made by the practicing bar, and not only by the lawyers whose clients wonder why their appeals have been so cryptically concluded. Even though an appellate court has carefully considered a case when it announces only its conclusion, it should not be surprising that the court, correctly or not, will be suspected of being result-oriented. Worse yet, the court is helpless to respond to the charge.35

In November 1982, the voters of Minnesota approved a state constitutional amendment authorizing a court of appeals to relieve the state supreme court of its burgeoning caseload. One reason for the state bar's support of the proposal was its dislike of summary affirmances and its hope that more written opinions would issue with a new appellate court.36

There are good arguments on either side of the summary dispo-

vent of the stricter rule on publication "there has been an approximate savings of 6,000 to 7,000 printed pages."

34. Justice Marshall continues, "[I]n a disproportionate number of cases, the Court has employed the [summary disposition] device to aid prosecutors, wardens, and school board officials. Last Term, for example, the Court issued 16 per curiam opinions summarily reversing lower courts. Of these, 13 involved prosecutors, wardens, or school board officials. In all but one of these cases, the state prevailed.

Remarks by Justice Thurgood Marshall, Second Circuit Judicial Conference (Sept. 9, 1982).

35. A court may try to respond, however. Writing for the court in Hoff v. Kempton, 317 N.W.2d 361, 365-66 (Minn. 1982), I said, "Because of the volume of appeals, not every case deserving an opinion can be given a written opinion; in the nature of things, a selective process is at work. . . . [S]ummary disposition should not be construed to mean the case has not been carefully considered." Id. Some might think this explanation has a plaintive ring to it.

36. The Advisory Committee on new rules for the appellate courts split on the issue of written opinions, the minority arguing that every decision, without exception, should have a written opinion. See Minn. R. Civ. App. P. 136.01 comment (Advisory Committee Report on Proposed Amendments 1983). As adopted, Rule 136.01, subdivision 1 provides:

(a) Each Court of Appeals disposition shall be in the form of a statement of the decision, accompanied by an opinion containing a summary of the case and the reasons for the decision; however, if the appeal is dismissed for failure to comply with these rules or if the court determines that the contents of the statement of the decision sufficiently explain the disposition made, no written opinion need be prepared.

Id. The rule distinguishes between a "statement of decision" and the usual written opinion. The content of the "statement of decision" remains for the court of appeals to determine.
sition debate. To write an opinion in every appeal, even where the case is without any merit, tends to devalue the worth of opinions and to encourage meritless appeals to already overburdened courts.\textsuperscript{37} On the other hand, routine error correction is an appellate court responsibility and litigants are entitled to a review of their claims of error. While summary affirmances are permissible where an opinion will add nothing to the law, cases are rarely identical and it can be argued that a rule of law develops and gains certainty in the frequency and changing circumstances in which it is expressed and applied.\textsuperscript{38} On the other hand, it seems undeniable that there are appeals, in sizeable number, of so little merit or no merit,\textsuperscript{39} that, keeping in mind the time restraints on judges (and lawyers) and that library shelf space is finite, the law is best served if not by summary disposition, then by something closely akin to it, such as the unpublished memorandum opinion.

Since only the appellate court can decide which appeals will receive summary affirmation and which will not, the public's perception of result orientation may remain. This perception, even if incorrect, has a bearing on the quality of justice the public believes

\textsuperscript{37} Part of the problem, suggests Professor Llewellyn, is that lawyers lack understanding of the appellate process and the precedent system and "that misunderstanding leads to a plethora of footless appeals whose outcome is so predictable as to need no steadying effect of an opinion." K. LLEWELLYN, supra note 28, at 27.

\textsuperscript{38} If written opinions issue only when the law is being changed and few opinions issue when established law is being applied, the incorrect impression gained from the appellate court's limited published product is that the law lacks stability and, hence, is being "result-oriented."

A survey of state appellate court published opinions over a one hundred year period, 1870 to 1970, concludes that:

The SSCs [state supreme courts] have cited more and more cases in their opinions. Their opinions have grown larger and more elaborate. Since 1960, they have looked more often to 'change-oriented' legal writings such as law reviews, and less often to treatises that crystallize the teachings of the past. Dissents and separate concurrences more often mark their opinions, further undermining the classical facade of appellate law.


\textsuperscript{39} In Schuneman v. Tolman, 85 Minn. 130, 88 N.W. 1103 (1901) (per curiam), considered by some to be a landmark decision, the Minnesota Supreme Court's opinion, in its entirety, is as follows: "Defendant's appeal in this case is one of the most frivolous that has ever been presented to this court, and the questions raised are not entitled to any discussion whatever. The judgment appealed from stands affirmed." \textit{Id.}

Justice Cardozo put the matter more gently: "Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmation without opinion." B. CARDOZO, \textit{THE NATURE OF THE JUDICIAL PROCESS} 164 (1921).
it is getting. Though the caseload is heavy and some appeals may be frivolous, it is well that an appellate court keep this concern in mind.\textsuperscript{40}

\textbf{D. Summary}

We have come at least this far. The charge that an appellate court is result-oriented crops up from time to time. The term is usually employed in a pejorative sense. Just what is meant by the term, however, is less easy to describe.

For this Article's purposes, using "result-oriented" as a term lacking in endearment, the term is understood to refer to an appellate court that has departed from the expected norm of judicial decisionmaking. An appellate court departs from the norm when, to reach a result, it ignores its limited scope of review, especially in its error-correcting role, or when it disregards or unfairly characterizes precedent. The best evidence of whether the court has departed from the norm is its published opinion.

When a court uses summary affirmances, however, the public has no way to determine if the decisionmaking process in that case measures up to the expected norm. Here, pragmatic consideration must be weighed against maintenance of the integrity of the judicial decisionmaking process. Not every appeal warrants an opinion; many do not. Yet, a paucity or lack of written opinions where they are warranted tends to give credence to the pejorative use of the term result-oriented.

\textbf{III. RESTRAINTS ON "RESULT-ORIENTED" DECISIONS}

There are strong restraints on result-oriented decisionmaking by appellate courts. This Article suggests three deterrents to a court deviating from the expected performance norm: first, the procedural limitations of legal rules; second, the institutional limitations of collegiality; and third, the professional and ethical standards which are a part of judging.

\textsuperscript{40} Under Minnesota appellate procedure, if an appeal does not warrant a written opinion, the "statement of decision" will provide an explanation to the litigants, and this statement need not be published. \textit{Minn. R. Civ. App. P. 136.01(a)(b).} Rule 136.01 of the Minnesota Rules of Civil Appellate Procedure provides: "A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel." \textit{Id. 136.01(b).}
A. The Restraint of Legal Rules

An acquaintance had driven Justice Holmes to the Capitol and, as the Justice left the car and walked away, the friend said, "Well, sir, goodbye. Do justice!" The friend recounts what happened next: "He turned quite sharply and he said: 'Come here. Come here.' I answered: 'Oh, I know, I know.' He replied: 'That is not my job. My job is to play the game according to the rules.'" 41

Appellate courts find themselves hemmed in with a proliferation of legal rules, principles, and standards, which are used to analyze and resolve disputes, but also serve as restraints on capriciousness. These limitations are deliberate. "To avoid an arbitrary discretion in the courts," wrote Hamilton in The Federalist, No. 78, "it is indispensable that they should be bound down by strict rules and precedent, which serve to define and point out their duty in every particular case that comes before them . . . ." 42

Appellate courts are routinely confronted with hard cases: a defrauded widow fails to file her complaint in time; a testator disinherits a deserving child; a jury verdict is based more on sympathy than the facts; an accused is identified as the culprit in a dubious lineup. Here, where the appellate court is requested to perform its error-correcting role, applying settled law, there are legal rules of restraint. Stale claims are to be outlawed; the competent testator's right to name the objects of his bounty governs; and the findings of the trial bench or the jury, measured by the applicable burden of proof, 43 are to be accorded deference. The reported opinions frequently note that the court, though it would prefer a different result, is restrained from enforcing its preference. 44

43. Even such a supposedly technical subject as quantum of proof has its own powerful policy reasons behind it. As the United States Supreme Court said in Addington v. Texas, 441 U.S. 418 (1979), the standard of proof adopted "instructs the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular kind of adjudication." Id. at 442. Thus, the standard of "preponderance of the evidence" is an indication of society's "minimal concern with the outcome" and a judgment that the litigants should "share the risk of error in roughly equal fashion." Id.; see also Santosky v. Kramer, 455 U.S. 745 (1982).
44. "Were we writing on a clear slate, I would therefore vote to reverse." Runyon v. McCravy, 427 U.S. 160, 190 (1976) (Stevens, J. concurring). "This court . . . will and must affirm the decision made if it has an acceptable basis in fact and principle even though we might have made a different disposition of the problem." Bollenbach v. Boll enbach, 285 Minn. 418, 426-27, 175 N.W.2d 148, 154 (1970) (Sheran, J.). But see Switkes v. United States, 480 F.2d 844, 853 (1973) (Nichols, J. dissenting). In Switkes, Judge Nichols tactfully dissented:
Probably the most powerful constraint on judges doing as they please, particularly in an area of substantive law, is the doctrine of stare decisis. It is here that the charge of result orientation strikes the most responsive chord. The common law develops incrementally, limiting its decisions to the factual issues at hand, and waiting for advocates to probe the implication of an announced decision in another factual setting.\textsuperscript{45} Stare decisis, a due regard for precedent, is the antithesis of "ad hoc-ness" and is essential to the orderly development of the law. The doctrine enables lawyers to rely on published decisions as being what the law is and what it may be expected to be in counseling their clients. Only a small number of legal problems reach any court, and only a small number of them reach the appellate court; most legal questions are resolved in the law office, with the counselor relying on the relatively few reported appellate cases. If an appellate court does not follow its own decisions, the law lacks the consistency and moral stature essential for the public's confidence in the justice system.

It is sufficient here to note that the doctrine of stare decisis is a strong inhibition on any temptation to succumb to result-oriented decisions. The cynic may say this begs the question, but not necessarily. If an appellate court should not wish to follow precedent, it must justify that decision to a critical public, especially to the practicing bar.\textsuperscript{46} Moreover, even in an area where the court is not

\textsuperscript{45} By way of illustration, in 1979, the Minnesota Supreme Court adopted the fireman's rule, holding that firefighters assume, in a primary sense, all risks reasonably apparent to them as part of their firefighting jobs. Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979). A year later, the court extended the rule to police officers. Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1980). In 1981, the court limited the application of the rule to police officers in a different factual setting. Griffiths v. Lovelette Transfer Co., 313 N.W.2d 602 (Minn. 1981). Finally, in its 1983 session, the Minnesota Legislature enacted a law prohibiting application of the fireman's rule to peace officers under certain circumstances. \textsc{Minn. Stat. § 604.06 (1982) as amended by Act of May 18, 1983, ch. 159, 1983 Minn. Sess. Law Serv. 410-11 (West)}.

\textsuperscript{46} Lord Bryce, writing towards the end of the last century, was an acute observer of American government. He wrote:

\begin{quote}
I return to notice other causes which have sustained the authority of the court by saving it from immersion in the turbid pool of politics. These are the strength of professional feeling among American lawyers, the relations of the bench to the bar, the power of the legal profession in the country. . . . I will only now remark that the keen interest which the profession takes in the law secures an unusually
\end{quote}
bound by precedent, an awareness by the court that the new decision will itself be precedent for future cases has a restraining influence.

Although, as this Article assumes, courts usually have a desired result in mind, the contrary is often the case. For whatever reasons, as Professor Freund has observed, judges may welcome the opportunity afforded them by stare decisis to avoid deciding a case solely in terms of a result they might personally favor:

The force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of limitation, rules of pleading and practice, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards.47

Legal rules are a powerful restraint on result-oriented decisions, but there must still be enough elasticity in the rules to allow for the law’s evolution. The rules are guides, not shackles. “I know of no phase of the law so misunderstood as our system of precedent,” says Karl Llewellyn.48 Because counsel has a good case based on available precedent, says Llewellyn, need not necessarily mean it is a winning case; it is not only in the case of “first impression” but in the ordinary routine appeal that the precedent system allows for the continual shaping of the case law. To predict what an appellate court will do, Llewellyn suggests that counsel shift his or her attention “from ‘what was held’ in a series of opinions to what those opinions suggest or show about what was bothering and what was helping the court as it decided.”49 After a study of state appellate court opinions, Llewellyn concluded in 1960:

For the fact is that the work of our appellate courts all over the country is reckonable... far beyond what any sane man has any business expecting from a machinery devoted to settling

large number of acute and competent critics of the interpretation put upon the law by the judges. Such men form a tribunal to whose opinions the judges are sensitive, and all the more sensitive because the judges, like those of England, but unlike those of continental Europe, have been themselves practicing counsel.

J. BRYCE, THE AMERICAN COMMONWEALTH 259 (1889).

47. P. FREUND, ON LAW AND JUSTICE 100 (1968).

48. K. LLEWELLYN, supra note 28, at 62. The author speaks of the “grand style” of the common law where the legal rules are related to experience and social needs, contrasting it with the “formal style,” where “opinions run in deductive form with an air or expression of single-line inevitability.” Id.

49. Id. at 178 (emphasis in original). In a sense, the search for the reported decision “in point” is unending if not quixotic, for each case has its own “point,” its own special twist. Isn’t the search rather for a rationale congenial to one’s view of the facts?
disputes self-selected for their toughness . . . and . . . quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods . . . .\textsuperscript{50}

In any event, whether or not one subscribes to Llewellyn's conclusion, the charge of result-oriented decisionmaking is a variation of the plea for "reckonability." Since development of the law is ongoing, so too will be the concern that appellate courts do not lose "reckonability" by departing from the expected norm for decisionmaking. The legal rules themselves address that concern with considerable force.

\textbf{B. The Institutional Restraints of a Collegial Court}

A basic premise of appellate review is that judges are not fungible. Consequently, there is merit to having more than one, say three to nine, sit together in judgment as an appellate court. These judges, however, do more than "sit together"; they are expected to sit as a collegial body, and the dynamics of collegiality act as a second limitation on result-oriented decisionmaking.\textsuperscript{51}

The traditional meaning of a "college" is a guild or fraternity invested with special powers and rights, performing certain duties or engaged in some common employment or pursuit. A medical clinic is a kind of college: a group of doctors practicing and consulting together, but usually each practicing a particular specialty and each on a different patient. A university faculty engages in a common enterprise to teach, but again, with each professor specializing, each in a different classroom. The college of cardinals sits frequently as a deliberative body but more in an advisory role to the papal head.

A college of judges is similar but different from all of these. Collegiality in an appellate court suggests a permanent, independent, institutional guild; its membership consisting of judges, odd in number but even in rights and duties; engaging in the common employment of decisionmaking; and acting not for themselves but for and in the name of the court. Judge Frank M. Coffin of the First Circuit has written engagingly about collegial decisionmak-

\textsuperscript{50} \textit{Id.} at 4.

\textsuperscript{51} In \textit{Ellis v. Minneapolis Commission on Civil Rights}, Justice Rogosheske wrote, "In the collegial decision making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to the collegial restraint should he be inclined to act on them . . . ." \textit{Ellis v. Minneapolis Comm'n on Civil Rights}, 295 N.W.2d 523, 525 (Minn. 1980) (quoting ABA \textsc{Standards} of \textsc{Judicial Administration}, \textsc{Standards Relating to Appellate Courts} § 3.42 (1977 Draft)).
ing. He writes of the exchange of values and views, of a collegial climate where competition and maneuvering are absent and persuasion depends on an objective presentation of the merits to one's colleagues rather than the usual forms of advocacy. He writes:

The whole reason for there being more than one judge on an appellate court is that the different perceptions, premises, logic, and values of three or more judges insures a better judgment. In these differences and in the process of criticism, response, and resolution lies the virtue of the appellate process. The heart of collegiality is unremitting criticism.52

Of course, there is nothing particularly profound about collegiality; it is nothing more than, as my mother would say, two (or more) heads are better than one.53

Collegial appellate decisionmaking has several strata. Initially, there is the independent study and reflection of the individual judge; next comes the dialogue of the judges and counsel at oral argument; next comes the interaction of the judges at conference behind closed doors; next is the writing of the opinion with the assigned author circulating a draft (or drafts) to the other judges for concurrence, modification, or dissent; and then finally, the last stratum surfaces in the written published opinion.

This process, with its checks and balances, its momentum to reach a consensus, can serve as a strong restraint against result-oriented decisions. The effectiveness of this restraint depends, of course, on how faithfully the process is implemented. An unwieldy caseload clogs the system and tempts the court to take shortcuts, such as the elimination of oral argument.54 While the decision is


53. The argument has been made to me that collegiality frees persons from the biases and restrictions of their upbringing and experience by removing responsibility for their actions and transferring it to the group, much as one member of a firing squad, chosen at random, is supposedly given a blank cartridge. Responsibility is probably not so much transferred as shared and the comfort of sharing, at times, is indistinguishable from the collegial need to have a consensus. In any event, unlike the members of a firing squad, every member of the court does have the responsibility of a live cartridge to fire, whether to concur or to dissent. As examination has revealed, it is the dissenters who raise the issue of a decision being result-oriented.

54. Beginning in 1980, the Minnesota Supreme Court limited oral argument to 150 appeals per year, heard en banc, out of 1200 appeal matters filed. Thus, another reason for establishing an intermediate court of appeals was to make oral argument generally more available. Oral argument is an important part of the appellate review. It adds visibility to the decisionmaking process, and counsel have an opportunity to directly engage the judges in a discussion of the issues. The spoken word can be given inflections that the written word cannot. In oral argument, counsel may use speech, body language, and
made by the group, the writing of that decision is left to one judge, with perhaps little or no criticism by the others. Still, the process, fallible though it is, has its built-in safeguards against deviations from the decisionmaking norm.

Finally, the discipline imposed by the "writtenness" of an appellate court's pronouncements is salutary. An opinion is written, as we have seen, for a knowledgeable, critical audience, beginning with the author's colleagues. It is a common phenomenon experienced by appellate judges to discover in the course of writing an opinion for a proposed result that the opinion "will not write." The law has a mind of its own; the facts of a case, the legal rules, and the precedent all conspire to require the proposed opinion to be rewritten with a different result. This, says Judge Coffin, "is something that happens quite often in an appellate judge's chambers," and Judge Rubin concludes, "In short, the discipline of opinion writing does affect the result." These comments assume that, while the judge has the assistance of a legal staff, it is the judge who is writing the opinion or at least is intimately involved in its writing.

55. There are advantages for appellate judges to chamber together. If the judges convene in a central place only for oral argument and conference and then disperse to their respective chambers located elsewhere, each judge having his or her writing assignments, the opportunity for critical review of a proposed opinion draft by the non-authors is lessened. On the other hand, Judge James L. Oakes of the Second Circuit has a different view. While he concedes common chambers may inspire collegiality, he says, "But I think it would tend to narrow one's perspective to live and work constantly in one metropolitan area with its media and atmosphere. To me, there is a healthy regional mix of viewpoints that occurs when some of the judges come from other, sometimes distant places." Oakes, On the Craft and Philosophy of Judging, 80 MICH. L. REV. 579, 581 n.4 (1982).

The legislation for Minnesota's new Intermediate Court of Appeals requires one judge to be appointed initially from each of the eight congressional districts in the state, the remaining four judges to be "at large." All judges must run for election statewide. Nevertheless, as successor judges are appointed or elected, the requirement of congressional district representation remains, which helps assure a healthy regional mix. See MINN. STAT. § 480A.02 (1982).

56. See supra note 46 (quoting Lord Bryce).

57. F. COFFIN, supra note 52, at 147.


59. There is space here for only brief comment on the role of law clerks in the decisionmaking process. Law clerks are as essential to a judge as they are to a partner in a law office; yet just as a client wants the partner's thinking, so, too, does the public want the judge's thinking. Overreliance on law clerks would be harmful to the appellate collegial process. John G. Kester, himself a former law clerk, writes, "At their best, law clerks can
C. Professional and Ethical Limitations

The traditions and ethical standards of the judiciary are a third limitation on result-oriented decisions. This tradition is formidable, and a judge who becomes part of the continuum of that tradition is inevitably conditioned by it.

There is a large variety of labels for judges: liberal or conservative, innovator or traditionalist, strict or loose constructionist, pragmatist or idealist, activist or nonactivist. But labels are little more than that and, though gummed on, in a particular case they tend to lose their adhesiveness. "Everyone," wrote Jefferson to John Adams, "takes his side in favor of the many or the few, according to his constitution and the circumstances in which he is placed." In deciding a case, a court measures the result not only against precedent and the state and federal constitutions, but

keep judges intellectually honest; they bring with them from their law schools the current legal thinking and the attitudes of the newest generation of the bar; and they relieve the judge of preliminary research and routine tasks." Kester, The Law Clerk Explosion, 9 ABA SEC. LIT. 20 (1983). The clerk is "an assistant in a decisional process that is truly the judge's." Id. Mr. Kester then warns, "If the decisional process is delegated to a faceless law clerk, unanswerable to anyone, then the human quality is gone. The process becomes another bureaucratic drill, covered up by words that mask a predetermined result." Id. at 21; see also Oakley & Thompson, Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges, 67 CALIF. L. REV. 1286 (1979). Having said this, I think I should acknowledge the help of my law clerks, all six of them in the past three years, in my thinking about the subject of this article. Three who should not remain faceless, all now members of the Chicago bar, are Penny Parker and Reid Mandel for their editorial criticism and Douglas Newkirk for collecting the cases using the phrase "result-oriented."

60. The literature on a judge's role is also formidable. For a good common sense statement as to the qualities of a judge, see Devitt, Ten Commandments for the New Judge, 65 A.B.A.J. 574 (1979). For a discussion on the appellate judge's collegial role, see What Makes a Good Judge, 14 INST. OF JUD. AD. 3 (1982). In this discussion, Judge Ruggero J. Aldisert of the Third Circuit Court of Appeals, noted the qualities of "institutional fidelity" and "political responsibility." As to the former, an appellate opinion is not the personal statement of the author but a reflection of collegial input; findings of fact are to be respected, review of discretion is limited, while review of controlling legal precepts is plenary. As to "political responsibility," the judge is primarily a settler of disputes not a political scientist and must have a due regard for the separate responsibilities of the legislative and executive branches. See generally K. Llewellyn, supra note 28.

61. Former Chief Justice Earl Warren is a prime example. Also, Justice Frankfurter tells how Chief Justice Edward D. White had been a Confederate drummer boy while Justice Holmes had been a Union combat veteran. Both men were deeply influenced by their experiences; one would expect Chief Justice White to stress state's rights and Justice Holmes to favor centralized government. Yet White, perhaps because impressed by the dangers of divisiveness, tended to vote for the national interest while Holmes tended to favor "state's rights." See F. Frankfurter, Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution 481 (P. Karland ed. 1970).
against the personal "constitutions" of the members of the court, using that term in its old-fashioned, nonlegal meaning.

A judge's "constitution" undoubtedly influences what he or she views as a desirable result; it influences that judge's approach to stare decisis and to a choice between alternative applicable legal rules. But the judge is also influenced, to return to Jefferson's phrase, by "the circumstances in which he is placed." Professor J. Woodford Howard, Jr., a political scientist, in a study of how appellate judges decide, found that judges tend to cast their votes more along the lines of their perceptions of their role as judges rather than along the lines of their pre-judge "liberal or conservative" political attitudes. In other words, how a judge believes he or she should behave as a judge acts as an inhibition on that judge's desire to reach a particular result.

One recalls Lord Mansfield's advice to the merchant who was appointed judge, that he should announce his conclusions but not give his reasons, for his judgment would probably be correct but his reasons certainly wrong. The judge, however, who is "learned in the law," does not have the merchant's license; the judge is expected to justify his or her conclusions. Acting within an institutional system, the judge, as Holmes put it, must play the game according to the rules.

62. "Time, place, architecture and interior arrangement, supporting officials, garb, ritual," all combine, says Llewellyn, to impress the judge with the need to be just and impartial. K. LLEWELLYN, supra note 28, at 46. As for interior arrangements, Somerset Maugham makes a suggestion: "I have wished that beside his bunch of flowers at the Old Bailey, his lordship had a packet of toilet paper. It would remind him that he was a man like any other." W.S. MAUGHAM, THE SUMMING UP 39 (Penguin Books ed.).


64. Nor does the merchant retain his license once he becomes a judge, although currently there is a debate whether arbitrators, who are a kind of lay judge, must explain their award or if they may, as in the past, simply announce it. Cf. Hilltop Constr., Inc. v. Lou Park Apts., 324 N.W.2d 236, 239-40 (Minn. 1982) (arbitrators need not explain their reasons for an award on the merits).

65. Holmes, of course, understood the need for fair and just court decisions. His remark about playing the game according to the rules was to express his impatience with those who too often use "justice" in a vapid sense.

On July 24, 1983, George Brett's two-run, two-out homer in the top of the ninth gave Kansas City the go-ahead run against the Yankees. The umpires disallowed the home run because there was too much pine tar on Brett's bat. While George Steinbrenner argued, "We can't start to talk about philosophy and intent and spirit of the rules if it's there in black and white," Commissioner MacPhail, on appeal, nevertheless overruled the umpires. St. Paul Dispatch, July 29, 1983, at 2B, col. 1, 5B, col. 1. It seems to me the commissioner's ruling was a correct and proper decision, well within the decisionmaking
"Result-oriented" is an elusive concept. Each time judges seek to find a way to attain a certain result that to them seems just under the circumstances, they are, of course, being result-minded. Nor need there be anything wrong in this. "Result-oriented" becomes reprehensible, and is used pejoratively, only when the way in which the desired result is reached is "unjudicial," that is, when there has been a departure from the decisionmaking norm. Even here, however, the evidence of departure may be inconclusive, the perception at odds with the fact, and the one making the accusation of result orientation may be as vulnerable to the charge as the accused.

Elusiveness is further compounded by the difficulty in establishing the norm from which the result-oriented decision departs. There is a tension inherent in the judicial process between ad hoc decisionmaking which seeks justice in the individual case and the establishment of a general rule to govern behavior in future cases. Since the turn of the century, as Professor P.S. Atiyah has noted, for various reasons the judicial norm has been changing to stress individualized justice over application of general principles. Thus, rules have become more flexible, more subject to exceptions, the exercise of discretion has widened, and a greater emphasis has been placed on factfinding, so that cases tend to turn more on their facts than on the law.


67. Thus we see adoption of the “totality of the circumstances” test for probable cause determination in issuance of a warrant, Illinois v. Gates, 103 S. Ct. 2317 (1983), and for the admissibility of identification testimony, Manson v. Braithwaite, 432 U.S. 98 (1977). Furthermore, the standard of “reasonableness,” of course, permeates tort law. This stress on the detailed facts of a case accounts, in part, for the increase in the length of appellate opinions in the last 40 years. The increased citation to law review writings in appellate opinions also suggests an attempt to bring in empirical data that otherwise would be outside the record.

As rules have become more flexible, a phenomenon has arisen of legal rules, standards, and tests sprouting “prongs.” Two and three-prong tests are common. Less common is the “six prong” test, one of which was used in Atlee v. Laird, 347 F. Supp. 689, 699 (E.D. Pa. 1972) (determines whether an issue constitutes a political question). The prize for the legal test with the greatest number of prongs goes to the Fifth Circuit, where, in
In any event, it seems safe to say that no appellate court, at least in its majority opinion, will admit to a “result-oriented” decision in the sense that the term is used here, as an ad hoc, unprincipled decision. There are, however, many reasons why such an admission would be seldom, if ever, warranted. Legal rules and precedent act as a curb, as do collegiality and the ethical demands of the judge’s office. These forces act synergistically. Thus, the tradition and rules of the guild serve to orient the courts to results that are, in the time-honored phrase, “according to law.”

This is not to say that we live in a perfect world. Notwithstanding the difficulty of its proof, its ad hominem gloss, and what this author believes to be the rarity of its application, the term “result-oriented” may have a useful purpose. It is a reminder to appellate courts that their position imposes a discipline which is to be ignored only at the peril of the legal system they serve. Such a reminder—used, if one might say judicially—is not without value.


68. In a speech at an arbitration seminar, Chief Judge Donald P. Lay of the Eighth Circuit noted that the bench is trained to be generalists, not specialists, and that “[a]s a generalist it can avoid being ‘result-oriented’ as it approaches the legal problems . . . .” Lay, The Courts, The Boards, The Arbitrators—The Need for Consistency in Adjudicating Labor Disputes (Arbitration Seminar, Minneapolis, Minnesota) (November 17, 1983).
MINNESOTA PUBLIC EMPLOYMENT

We have deviated from the normal organization of the Law Review to present a “Mini-Symposium” on Minnesota public employment law. The Symposium consists of a lead article on the scope of bargaining by Professor Deborah A. Schmedemann, a student note on union support by nonunion bargaining unit members, and a case note on Christensen v. Minneapolis Municipal Employees’ Retirement Board.

A comprehensive public employment law was overdue when the 1971 Minnesota Legislature enacted the Minnesota Public Employment Act (PELRA). PELRA was a major step to reform the law governing public labor relations. Since its enactment, the comprehensive scheme has been tested and retested, revealing its deficiencies. Today, thirteen years after Minnesota’s first major step, several authors recommend further revision of the law.

Professor Schmedemann takes a critical look at the current state of the law on the scope of bargaining in Minnesota. In her review of this especially active area of the law, she reveals internal contradictions and inconsistent theory. Professor Schmedemann concludes her discussion with several recommendations to make the law more cogent and reflective of Minnesota’s policy on the scope of bargaining. The student note following Professor Schmedemann’s article sets out the argument that the Minnesota Public Employment Labor Relations Act nonunion member fee provisions are unfair to nonunion employees. A discussion of the issue as it has been treated by the United States, Minnesota, Michigan, and Wisconsin Supreme Courts precedes suggested changes in Minnesota law. The Symposium concludes with the Christensen Case Note. The Case Note reviews the various analytical approaches applied in employee challenges to legislative changes in benefits and analyzes the approach chosen by the Christensen court.