



Predictability *in the Law,* PRIZED Yet *Not* **PROMOTED**

A STUDY IN JUDICIAL PRIORITIES

by Kem Thompson Frost

PREDICTABILITY IN THE LAW IS TREASURED AS A CORE VALUE in American jurisprudence, yet in some cases judges make decisions that they know will diminish predictability. This study examines how and why judges make this choice. Two Texas appellate courts that share jurisdiction serve as an ideal laboratory to examine the question. The findings, however, have a broad application because virtually all judges face the “predictability choice.” The dual-survey study shines a light on the judicial preferences and priorities that shape this value choice, revealing a curious gap between what is prized in principle and what is promoted in practice. ▶

INTRODUCTION¹

Predictability is a defining feature of the rule of law. Achieving predictability of outcomes within a jurisdiction and uniformity in the law across jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes. In this way, predictability lends strength and legitimacy to a rule-of-law system. Because American courts zealously endorse predictability in judicial decisions as a stabilizing force in our justice system, achieving predictability in the law is presumed to be an essential factor in judicial decision making. But, is this presumption valid?

How does the need for predictability in the law, or the potential loss of it, influence judicial decision making? Courts praise the virtues of predictability in the law, but do judges actually make judicial decisions that would promote it? If not, why not? These are the questions at the heart of this study in judicial priorities.

Despite the high value courts place on attaining predictability in the law, in deciding cases, judges sometimes subordinate predictability to other goals. In particular, a judge not bound by precedent might vote to adopt a legal or procedural rule that the judge believes to be better than the one that would promote predictability in the law. Though both objectives — promoting predictability as one option and choosing the better rule to apply as another — are recognized as beneficial to our justice system, at times, judges must choose between the two. Each option would advance one judicial objective while compromising the other. How judges choose between these competing values tells us much about the weight and influence of achieving predictability in the law as a consideration in judicial decision making.

THE “PREDICTABILITY CHOICE”

Why judges choose the course that would promote predictability in a particular case is sometimes revealed in the text of judicial opinions. Though, more often, it is difficult to discern unless the issue is isolated in a way that presents a clear choice between achieving predictability in the law on one hand and selecting what is perceived to be the better legal or procedural rule on the other. Finding a body of judicial opinions that would lend itself to empirical study of this focused inquiry would be a challenging task but for a pair of Texas appellate courts whose peculiar jurisdictional structure regularly places the two courts’ collective 18 members at this precise decision point.

The Texas court system is a multi-tiered model with intermediate courts of appeals that function much like the circuit courts of appeals in the federal system. But, the Texas model has a distinguishing feature: intermediate appellate courts with coterminous (shared) jurisdiction. For some of the state’s 14 appellate districts, the overlapping of jurisdictions is partial. For two districts — the First and the Fourteenth — the geographic jurisdictions completely overlap.

The curious layering of one jurisdiction on top of the other results in the sharing of judicial power between two equal and independent courts. The coterminous-jurisdiction element of the Texas system has proved to be problematic for Texas,² but it makes these shared-jurisdiction courts the ideal laboratory to examine the “predictability choice.”

The jurisdictional districts for the First Court of Appeals and the Fourteenth Court of Appeals, both based in Houston, are composed of the same 10 counties. As a result of these courts’ shared jurisdiction, trial courts in this region are bound by the precedents of both appellate courts. But, neither appellate court is bound

by the other. Though each court is free to reject or embrace the other court’s precedent, and each is free to revisit and change its own precedent, neither court can preempt or override the other. Sometimes the two courts decide issues the same way; sometimes they do not. When the two appellate courts come down on opposite sides of a legal issue, people and trial courts ostensibly must comply with two equally binding yet opposite rules. Justice in these cases is unpredictable because the binding precedent in the shared jurisdiction does not command a single result.

Appellate judges in these shared-jurisdiction courts find themselves on the horns of a dilemma in adjudicating cases in which the Houston sister court already has set precedent. If panel members of one court choose what they believe to be the better of two possible legal rules and the other court has gone the other way, they will create a split of authority in the region, effectively ensuring unpredictability in the law for some, often significant, period of time. Yet, to achieve uniformity in the case law and thus foster predictability in the law within the shared jurisdiction, they instead must choose to adopt what they may believe to be an inferior legal or procedural rule. The choice often determines not only the outcome of the case under review but also whether there will be one or two rules going forward.

Though the Texas model is a one-of-a-kind design, the predictability problem it produces also arises in states whose regional appellate courts issue decisions that have statewide jurisprudential force. In Arizona and in Washington, for example, the holdings of regional divisions of an intermediate court have equal precedential weight throughout the state.³ When the opinions of two divisions conflict, the split of authority creates a statewide predictability problem that persists until the state’s highest court resolves the conflict.⁴ Thus, the loss of predictability in the law due to the sharing of

judicial power is not unique to Texas. Nor is the “predictability choice” unique to courts with this distinguishing feature.

The dilemma of choosing between the dueling goals of achieving predictability in the law and making what is perceived to be the better jurisprudential decision is a universal one that judges in all sectors face at one time or another. But, unlike many courts that only face the “predictability choice” in the larger context of the aim of increasing uniformity across jurisdictions, courts like Texas’s First and Fourteenth Courts of Appeals face a much starker choice in that a failure to choose uniformity would not just mean appellate outcomes in their shared jurisdiction might not be in uniformity with those of other jurisdictions, but that there necessarily would be a lack of uniformity — and hence a lack of predictability — within their own jurisdiction.

In making the “predictability choice” judges weigh the costs and benefits of a decision that would result in greater uniformity and certainty in the law against various other considerations. Part of this function is considering the consequences of the decision. Because Texas’s shared-jurisdiction construct makes those consequences especially acute in the state’s First and Fourteenth Courts of Appeals, the factors that influence this value choice are more pronounced, and hence more detectable, in the decisions of these courts. Simply stated, the “predictability stakes” are higher in Houston’s shared-jurisdiction courts, and that is precisely what makes them the perfect laboratory for the study.

Despite the heightened judicial incentive to achieve alignment in the Houston sister courts and a jurisprudence that professes the value of predictability in the law, judges on these courts regularly choose the course that would diminish rather than foster predictability within the shared jurisdiction.

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A THEORY OF JUDICIAL PRIORITIES

It seems that predictability in the law, though praised in court opinions and legal literature, is not promoted in fact, even in a locale where achieving predictability is extremely important. This study posits that judges value something even more than they value predictability in the law and that is a preferred rule. The theory is that, as a matter of judicial priorities, judges tend to rank the adoption or application of a preferred rule of law or procedure higher than achieving predictability in appellate outcomes, even when the loss of predictability has severe consequences. To test this theory, the study utilizes a simple strategic model of judicial decision making designed to identify and then measure judicial preferences that drive (or at least impact) a judge’s decision to promote predictability in the law over a preferred rule or to tolerate unpredictability for the sake of one.

A STRATEGIC MODEL FOR ASSESSING JUDICIAL PREFERENCES

In considering judicial value choices that impact predictability in the law, the decision point is easier to concep-

tualize by classifying the judicial decision makers as being in one of two categories: (1) those having a preference for the adoption or application of a given legal or procedural rule that is perceived to be better than the one that would promote predictability in the law; and (2) those having a preference for achieving alignment with the precedent of the sister court as a means of fostering uniformity and certainty, and hence predictability, in the law within the jurisdiction.

Correctness Preference. For purposes of illustration, assume that a judge in the second court to decide the issue concludes that the first court did not make a sound legal judgment by selecting the best rule of law or procedure and that judge is unwilling to follow the first court’s precedent even though doing so would foster uniformity and certainty, thereby enhancing predictability in appellate outcomes within the jurisdiction. This judge, who would forsake alignment for correctness, would fall under the first category and can be said to have a “correctness preference.” Note that “correctness” in this context refers to the judge’s perception of correctness rather than actual correctness. When a judge exercises a correctness preference, the judge is choosing the rule the judge believes to be the superior choice.

Alignment Preference. Another judge faced with this value choice instead might opt to follow or apply the precedent of the sister court for the sake of achieving consistency and uniformity in a given legal or procedural rule even though that judge might believe the sister court adopted or applied an inferior rule. A judge who would forgo adoption or application of the better rule to achieve alignment with the sister court’s precedent would fall into the second category and can be said to have an “alignment preference.”

Assessing Judicial Preferences for Alignment and Correctness. This strategic model offers a basis on which

to evaluate the role of predictability as a value choice in judicial decision making by assessing judicial preferences for correctness or alignment in two ways: (1) examining decisions in split-of-authority cases issued by the two Houston sister courts of appeals; and (2) surveying former members of those courts to determine their preferences, using a range of variables. We can thus evaluate judicial choices using both an empirical component (a survey of cases) and a qualitative component (a survey of judges).

RESEARCH DESIGN AND METHODOLOGY

The study uses two data sets. The first consists of 48 pairs of conflicting judicial opinions in split-of-authority cases from the First and Fourteenth Courts of Appeals (“Split-of-Authority Pairs”) from a 46-year period that begins in 1968, months after the creation of the Fourteenth Court of Appeals in September 1967, and runs through the first quarter of 2014. The second data set consists of survey questionnaire responses from individuals who once served as judges on one or both of the Houston sister courts (“Judicial Survey Responses”).⁵ Only 36 of the former members of the two Houston-based courts of appeals were still alive at the time of the survey and, of them, 32 elected to participate.⁶ Participants responded to a series of specific questions designed to determine not only how they believed judges make (and should make) the “predictability choice” but also to self-report factors they considered in making these choices during their time on Houston’s appellate bench.

The empirical evidence (survey of cases) tells us what judges do in split-of-authority cases, where the courts tend to clash on the law, and when and under what circumstances the splits of authority tend to occur. But, the empirical research does not always reveal the “how” and “why” of the “predictability choice.” Going to

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the source (the judicial decision makers) helps explain the rationale for these choices and also provides a measure of cross-validation.

By probing the results of the two surveys, it is possible to illuminate when and why judges choose to subordinate the goal of achieving predictability in the law in favor of exercising a correctness preference. The strength of these competing values (correctness and alignment), of course, varies according to the circumstances of a particular case. Thus, in a real sense they cannot be evaluated without taking into account the circumstances of the individual cases. Still, by examining when and under what circumstances judges place a higher or lower value on achieving predictability in the law, we can better understand judicial priorities and the role of predictability as a value choice in judicial decision making.

SUMMARY OF FINDINGS

The results of the study validate the stated theory of judicial priorities: judges generally value preferred rules more than they value predictability in the law. When survey participants were asked how they generally chose between correctness and alignment, most (84 percent) responded that choosing the best legal or procedural rule is the most important consideration in most cases. Yet, these same judges also give robust recognition

to the importance of uniformity and certainty of outcomes in the shared jurisdiction. Clear judicial acknowledgement of the need for predictability in the law and fervent adherence to correctness over alignment are dual themes that emerged in many parts of the study.

Clear Judicial Priority for Correctness Over Alignment. A key hypothesis was that the surveys would show alignment preferences in some scenarios and correctness preferences in others among the judges on the second court to decide the issue. While the responses revealed an alignment preference among some judges in some circumstances, they showed a pronounced and widely-held correctness preference among most judges in nearly all circumstances.

A second key hypothesis was that even though an individual judge might demonstrate a correctness preference in one case and an alignment preference in another, judges would bend toward one approach or the other as a matter of judicial philosophy. They did.

A third key hypothesis was that most judges would demonstrate a dominant philosophical approach favoring correctness. They did.

When asked to identify their individual preferences, only a tiny percentage of survey participants self-identified as having a dominant alignment approach. An astounding 97 percent self-identified as having a dominant correctness approach. Nearly as many (88 percent) reported that based on their observations and experiences on the Houston appellate bench, most other judges also had a general preference for correctness. Thus, the survey results do not just show that judicial decision makers on the shared-jurisdiction courts tend to exercise a correctness preference but that they also tend to share a dominant approach that favors correctness.

Findings from the survey of cases support what the survey participants reported. The Split-of-Authority Pairs

reveal a high level of fracturing in the precedents of the two sister courts, with disparate appellate outcomes in a wide array of fields in both civil and criminal cases. The Judicial Survey Responses reveal an intensity for the correctness preference and a strong normative belief favoring it that are not reflected in the empirical research alone. On the whole, the study showed that although judges acknowledge the salutary benefits of achieving predictability in the law within the shared jurisdiction, they generally do not choose the path that would promote it unless they believe that path is also the one that will lead to the “best rule.”

Correctness and Alignment Preferences in Particular Scenarios. Individual summaries follow for each of the five factor-specific hypotheses identified at the outset of the study.

1. *Correctness Preference When Options Differ Substantially and Alignment Preference When the Choices are Close.* One hypothesis was that when the issue being decided presents significant differences in the possible legal rules to apply or in the policy underlying those rules, most judges would be more likely to exercise a correctness preference. Inversely, in cases in which there is little difference in the potential legal rules to be applied, the hypothesis was that most judges would be more likely to exercise an alignment preference. Both hypotheses were confirmed.

Survey participants identified very few circumstances in which they would exercise an alignment preference. The only one identified by a majority of participants was when one rule is not materially better than the other(s). More than three-quarters of the survey participants (77 percent) agreed that in this scenario it is more important to achieve alignment with the sister court than to adopt a rule that would create a split of authority in the shared jurisdiction. These results represent the strongest support for exercising an alignment preference.

2. *Correctness Preference in Rapidly Developing Areas of the Law.* An addi-

tional hypothesis was that judges in the second-to-decide court would be more likely to exercise a correctness preference in rapidly developing areas of the law. The empirical research from the survey of cases showed that nearly half of the conflicts were created in rapidly developing areas⁷ by judges exercising a correctness preference. The Judicial Survey Responses validated this finding, with a substantial majority (94 percent) agreeing that when deciding an issue in a rapidly developing area of the law, it is more important to cultivate and develop good rules than to achieve alignment with the Houston sister court (*i.e.*, exercise a correctness preference).

3. *Preferences When One Court Has Firmly Established Precedent and the Other Has None.* Another expectation was that judges would be more likely to exercise an alignment preference when the first court to decide the issue already had firmly established precedent. Of the sample pairs, only 2 percent revealed intervals between the conflicting opinions greater than 17 years (the period used as a proxy for firmly-established precedent), meaning that the second-to-decide court exercised a correctness preference only very rarely when the law in the sister court was well settled. The Judicial Survey Responses ratified this finding, with 11 percent indicating an alignment preference in this circumstance. Though it is a low percentage in absolute terms, the response represents a greater likelihood of exercising an alignment preference than exists in most other contexts.

4. *Correctness Preference for Most Judges Whether Issue Perceived as Important or Minor.* Nearly the entire field (96 percent) of participants indicated that if the precedent of the Houston sister court concerned an important issue they would exercise a correctness preference because of the significance of the matter. But, even when the issue being decided is a matter the judge deems relatively unimportant, a large majority (81 percent) still would exercise a correctness preference. A quarter of the survey participants

believed that in deciding a relatively insignificant issue it is more important to exercise an alignment preference. Yet, a sizeable majority (78 percent) believed the best approach even in cases involving relatively insignificant issues is to adopt the best rule even if that choice creates a split of authority.

5. *Preferences When Issue Being Decided is Likely to Be a Frequently Recurring One.* Conflicts in statutory interpretation, jurisdictional issues, and legal standards tend to be particularly problematic because these issues tend to arise frequently. The survey of cases revealed that 58 percent of the conflicts involved statutory interpretation, 69 percent involved jurisdiction, and 27 percent involved legal standards, an indication that these splits in authority are likely to be frequently recurring issues. The Judicial Survey Responses confirmed the strong tendency of judges to select correctness over alignment in deciding these kinds of matters. Specifically, no participants indicated an alignment preference for the resolution of frequently recurring issues and a large majority of the survey participants (65 percent) agreed that if the issue is likely to be a frequently recurring one, then it is more important to exercise a correctness preference.

Other Factors That Impact the “Predictability Choice.” In answering various application questions, the judicial survey participants identified a number of factors that would “significantly influence” the “predictability choice.”⁸ Choosing the best legal or procedural rule (correctness) topped the list at 97 percent, followed by the importance of the issue to the jurisprudence of the state (55 percent). Roughly a fifth of the survey participants responded that a strong preference to avoid a split-of-authority in the shared jurisdiction (alignment) would have little, if any, impact on their decision. Other factors that would impact the “predictability choice” registered at varying levels, as summarized in the table above.⁹

JUDICIAL SURVEY: SOME OTHER FACTORS THAT IMPACT THE “PREDICTABILITY CHOICE”

FACTOR	SIGNIFICANT INFLUENCE	LITTLE, IF ANY, IMPACT
Concerns about public perception when two courts with coterminous jurisdiction issue equally binding yet opposite rules.	7%	43%
Strong preference for choosing path that would avoid a conflict or split of authority in shared jurisdiction.	10%	20%
Concerns that a higher court would reverse decision.	13%	57%
Concerns of unfairness for trial courts and litigants who would have to comply with two conflicting rules.	16%	23%
Likelihood that if court issued persuasive opinion, sister court might change its precedent.	45%	40%

Though 43 percent indicated that concerns about public perception when the two courts issued opposite rules would have little, if any, impact on the “predictability choice,” when questioned specifically about this factor, nearly a third of the survey participants (32 percent) responded that the most compelling reason for exercising an alignment preference is to avoid the appearance of unfairness in our legal system that can arise when two courts with coterminous jurisdiction have equally binding yet opposite rules.

A third of the participants indicated that all of the listed factors — potential for reversal, unfairness for trial courts and litigants, potential for persuading the sister court to change its precedent, and public perception — would have “some impact” on the “predictability choice.” Additional variables also could influence the decision for some judges, as indicated in the graph on the following page.

Judges seem to believe that by exercising a correctness preference, they gain a larger measure of protection from these potential problems, at the cost of alignment. As demonstrated in various survey responses, it is a price they are willing to pay.

Finally, the uncertainty of whether and when a conflict might be resolved

plays some role in the “predictability choice.” Yet, for a sizeable percentage of the survey participants, concerns about lack of conflict resolution would not deter the exercise of a correctness preference. These findings suggest that the preference for correctness over alignment among intermediate appellate court judges is not exclusively dependent on their awareness that the state’s highest court might ultimately resolve any conflict they create. Some observers may suppose that these judges do not view themselves (or the intermediate courts on which they serve) as the judicial institutions best suited to promote predictability. So, one possible explanation for judges preferring correctness to alignment is that their concerns about unpredictability in the law are allayed by their anticipation that the state’s high courts will resolve the conflicts the intermediate courts create.

Though resolution of splits in authority is a defining role of the state’s high courts, high-court review is discretionary, sometimes not even sought by the parties,¹⁰ and often not granted even in the face of a split of authority.¹¹ Intermediate-court judges are keenly aware that many conflicts go unresolved, frequently for significant periods of time. This reality is reflected

in the survey of cases, which shows that nearly half of the conflicts in civil cases and more than half of the conflicts in criminal cases remained unresolved at the end of the survey period. And, even when conflicts are settled by higher courts or through legislative action, often there are substantial periods of unpredictability in the interim between conflict creation and conflict resolution.¹² The Judicial Survey Responses show that intermediate-court judges take account of these possibilities in exercising their preferences. Thus, while the hope or expectation that a conflict will be resolved or at least short-lived might assuage concerns about lack of predictability to some degree, these judges understand that often the conflict will continue. This reality is part of their calculus in making the “predictability choice.”

OBSERVATIONS AND REFLECTIONS

Even in a place where predictability in the law is crucial and the loss of predictability is problematic, on almost every index of inquiry, judges place greater importance on correctness than alignment.

How should litigants and the legal community respond to this judicial priority? This question is best answered in the context of three objectives identified at the outset of the study.

Enhancing the Development of the Law in Areas in Which Predictability Is Especially Valued. Given that choosing the best rule is the most important consideration for most judges in most cases, scholars and academicians may wish to consider whether the aspects of existing multi-factor tests, such as the one contained in the Restatement (Second) of Conflict of Laws that emphasize predictability in the law, adequately reflect this judicial priority.¹³ If, as this study shows, judicial decision makers tend to share a dominant philosophical approach that favors correctness over alignment, are factors

that stress the need for predictability in the law accurate reflections of judicial concern and focus? Or, should these factors be given greater attention and emphasis in an effort to provoke a shift in judicial priorities?

Anytime a judge considers the “predictability choice,” the decision will be an accommodation of conflicting values, but, in most scenarios, the judge is apt to exercise a correctness preference. Should the Restatement factors or the relative weight assigned to them be modified to take better account of the reality that most judges give correctness a significantly higher priority than alignment?

The academic community performs a watchdog function for the legal community as a whole. Given this study’s findings, perhaps watchdogs will be prompted to initiate new dialogues about which philosophical approach — correctness or alignment — is more likely to lead to just outcomes when those approaches come in conflict. Because in such cases one goal comes at the cost of the other, all should ask what steps, if any, can be taken to improve the delivery of justice when courts must choose between those competing values.

Increasing Effectiveness of Lawyers and Litigants in Appellate Courts. When lawyers and litigants better understand the judicial priority of choosing the “best rule,” they will be more effective

in presenting arguments before appellate courts. For example, by taking account of the judicial preference for correctness, lawyers and litigants will be better equipped to prioritize their issues and appellate points. Knowing that, for most judges, alignment has a lower judicial priority than correctness can help lawyers develop strategies for presenting arguments in the two categories of cases most likely to be impacted in favor of an alignment preference: (1) cases in which the difference in possible legal rules to be applied is relatively insignificant; and, to a lesser extent, (2) cases in which the issue is a relatively minor one. A winning combination in the first category might be to stress the similarities and minimize the differences in the possible choices while also emphasizing the benefits of promoting uniformity in the law.

When only minor differences exist between the relevant components of the rules under consideration, lawyers may want to urge judges to consider whether alignment would achieve the better outcome. Likewise, when the issue is a minor one, the best course may be to stress the importance of achieving uniformity and to explain why this consideration should prevail given the relative insignificance of the particular issue being decided.

In all other cases, lawyers might make strategic choices to turn their

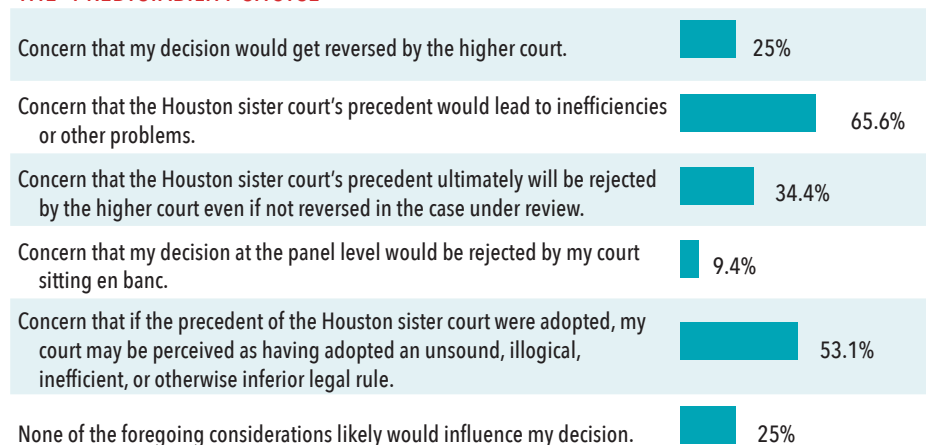
attention and energy to arguments that have a better chance for success, such as persuading the court of the superiority of the rule being advocated. Appellate briefing rules typically impose word or page limitations. To comply, lawyers often must eliminate or cut short some of their arguments. In making these necessary assessments, lawyers may want to rethink emphasis and placement of “alignment” arguments and adjust the briefing allocation accordingly. Most intermediate-court judges are more likely to be persuaded by the soundness of a legal rule or the greater efficiency of a procedural rule than by the need to achieve uniformity of outcomes.

Still, even in cases in which judges are more likely to exercise a correctness preference, the importance of fostering uniformity, certainty, and predictability in the law is worth mentioning because the findings show that these arguments resonate with all judges at some level. The findings also show that in cases in which the panel is divided and the majority of panel members has exercised a correctness preference, a dissenting or concurring judge sometimes makes the failure to reach alignment a basis for the separate writing or at least mentions the conflict. A higher court may be more persuaded by the need for predictability in the law, so the best strategy may be to adjust emphasis and briefing allocation for the “predictability” argument rather than eliminate it altogether.

Increasing Judicial Awareness and Effectiveness. Judges can become more effective by understanding the consequences of exercising their judicial preferences. Weighing the cost of choosing correctness over alignment is part of the judicial function. If judges believed the consequences of their choices to be greater, they might evaluate the cost of exercising a correctness preference differently.

On the whole, judges recognize the balancing of interests the “predictability choice” commands. They under-

ADDITIONAL VARIABLES THAT INFLUENCE THE “PREDICTABILITY CHOICE”



stand that the judicial role is not only to mete out justice in individual cases but also to meet the public's expectations by applying the law uniformly, so that the law will be predictable and the public will view the judicial process as fair.

Being consistent is part of being fair. Consistency produces predictability. Predictability fuels certainty. And, certainty inspires public confidence.

The public is confident in an umpire who calls pitches the same way for both teams. If the calls are predictable, the players and the fans see the game as fair. Because the public tends to measure fairness by predictability, the public expects the calls to be predictable. And, the public expects umpires to value predictability.

Judges value predictability. Yet, valuing predictability is not the same as promoting it. Competing values force hard choices. Even more than they value predictability, judges value the quality of the rules that define the law. It is a matter of priorities. One goal comes at the price of the other. When the best rules are not the ones that would promote predictability in the law, even judges who value predictability choose not to promote it.

What can and should judges do to avoid frustrating the public's legitimate expectations? What is the answer to the confusion, uncertainty, and loss of predictability that sometimes result from the exercise of a correctness preference? These questions bring the relationship between predictability and the rule of law into sharper focus. As we unpack the "predictability choice," we see more clearly both the value of predictability in a rule-of-law system and the cost of its loss.

Judges, whether in Texas or elsewhere, are not going to rule in a way that will eliminate all conflicts in the law. Because most intermediate-court judges are prone to exercise a correctness preference in most circumstances, the reality is that they tend to create rather than eliminate splits in author-

“In the final analysis, though judges prize predictability in the law, they share a widely held belief that in balancing these competing judicial priorities, the right choice is the “best rule.”

ity. Even so, these judges can take measures to help preserve and restore predictability in the law. Through the power of separate writing, intermediate-court judges can enhance the possibility of conflict resolution by a higher court.

At times, a separate writing can become a surrogate for a correctness preference, without creating a split of authority, so that a judge can meet “correctness” objectives while exercising an alignment preference. About half of the judges surveyed reported that a consideration likely to influence a correctness preference was concern that if they chose alignment instead, the judge or the court might be perceived as having adopted an inferior rule. One option for these judges would be to choose alignment, agreeing that the sister court's existing precedent should control the outcome, but also write separately to suggest why that precedent may be anchored in an inferior rule. The concurring judge could explain the benefits of a different, better rule, making the case for a change but not creating a conflict. The separate writing is more likely to spur the higher court to consider the issue. In some cases, this long-term approach could address judicial concerns about existing precedent while also preserving predictability in the law. Because this alternate path offers the potential to ultimately achieve the goals of

both alignment and correctness, some judges might find it more appealing than creating a conflict in the law.

Even judges who are unwilling to choose alignment can utilize separate writings to further the cause of predictability. For example, a judge on a panel whose members are opting for correctness might concur in the judgment, agreeing that the court is rightly adopting the better rule, yet write separately to explain the dilemma and to lament the loss of predictability in the law that will result from the court's decision not to follow existing precedent. A dissenter could make the same point advocating alignment. In these separate-writing scenarios, a concurring or dissenting opinion is apt to capture the attention of a higher court (or a legislative body) and lay the groundwork for it to consider the adoption of a new rule that would bring uniformity to the state's jurisprudence.

Whether writing separately or for the court, when parting with a sister court it is especially important for judges to write with clarity and precision. In opting for correctness over alignment, judges sometimes gingerly undertake to distinguish rather than outright reject another court's precedent. At times, diplomacy swallows lucidity, leaving the illusion that there is some semblance of alignment or acceptance despite the refusal to apply the sister court's precedent. Dubious conflicts can be even more problematic than clear-cut ones.

Legitimate distinctions push the development of the law. False or immaterial distinctions muddle the law and tend to mask splits in authority, often creating confusion and leaving the jurisprudence in a mangled mess. And, because today's empty distinctions are tomorrow's binding precedents, they make it harder for judges to grapple with the split of authority in future cases.

Fuzzy differences hinder conflict resolution. Clear disagreement invites

it. Thus, judicial acknowledgement of differences in the interpretation of the law is a crucial first step to settling clashes in the jurisprudence. For judges choosing correctness over alignment, the best course is to be transparent in rejecting the other court's precedent. By stating plainly that the court is choosing not to follow another court's precedent, judges can ensure that the conflict will be well-defined and ripe for resolution.

Finally, in facing the "predictability choice," appellate judges need to be especially mindful that if they exercise a correctness preference, the resulting doctrinal ambiguity will likely create interpretive problems for trial-court judges in jurisdictions that have yet to set precedent. Likewise, the lack of consistency and coherence in the law might make it harder for trial and appellate courts to meet the public's legitimate expectations, and public reliance on judicial opinions might suffer. The resulting lack of clarity in the law is also likely to vex practitioners and litigants alike and bring greater costs and uncertainty to a process that is already costly and uncertain. In a larger context, judges must acknowledge that the loss of predictability in the law weakens the judicial process. Still, the message is not that judges should change their preferences or priorities, only that they should count the costs in making their choices.

CONCLUSION

An overwhelming majority of judges who participated in the study concluded that correctness should not be set aside to further the goal of predictability in the law even though predictability is crucial to the justice system as a whole. Essentially, judges believe that if the price to be paid for predictability in the law is the adoption of an inferior legal or procedural rule, then that price is too high. For most judges, the only exception is when the difference in the

possible rules is slight or immaterial. Otherwise, when the path divides before a judge and the judge must choose between the one that promotes predictability in the law and the one that promotes better legal reasoning or greater efficiency, for most judges, predictability is the road not taken.

In the final analysis, though judges prize predictability in the law, they share a widely held belief that in balancing these competing judicial priorities, the right choice is the "best rule." It is not an easy or appealing choice for judges in shared-jurisdiction courts, where the consequences of forsaking alignment are troubling. These judges understand that by opting for correctness, they necessarily must sacrifice predictability, a value they prize and a loss they mourn. The judicial angst is palpable. If, in shared-jurisdiction courts, where the judicial incentive for alignment is the greatest, judges do not choose the path that would promote predictability in the law by bringing uniformity to the shared jurisdiction, what can we expect from judicial decision makers in other places, who would be far less incentivized to choose alignment? They are unlikely to make predictability in the law a higher judicial priority.

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LL.M. from Duke University School of Law, a J.D. from Texas Tech University School of Law, and a B.B.A. and a B.A. from The University of Texas. This piece is an adaptation of

the article with the same title published in the Winter 2015 edition of *Baylor Law Review*. See KEM THOMPSON FROST, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48 (2015).

¹ For citations to sources and authorities, survey excerpts, additional graphics, illustrations, and other supporting references, see KEM THOMPSON FROST, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48 (2015).

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² See *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 139, and 137 n.3 (Tex. 1995)(noting the "manifest" problems created by overlaps in the state's appellate districts. observing that "[b]oth the bench and bar in counties served by multiple courts are subjected to uncertainty from conflicting legal authority," and adhering to the view that "overlaps in appellate districts are disfavored.").

³ *Scappaticci v. SW. Sav. and Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983) ("A decision by the Arizona Court of Appeals has statewide application."); MARK DEFORREST, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455, 488 (2013)("Decisions of a division of the [Washington] court of appeals are binding on all state trial courts, but not on the other divisions of the court of appeals.")

⁴ See *State v. Patterson*, 222 Ariz. 574, 218 P.3d 1031 (App. 2009)(detailing history of the two divisions of Arizona Court of Appeals and case law governing the authority of both divisions); DEFORREST, 48 GONZ. L. REV. at 88 (explaining that state's unitary court structure has multiple divisions within the intermediate court that "births conflicts between the divisions of the single court of appeals, with trial courts often left to deal with those conflicted authorities as best they can.").

⁵ Neither the questions nor the answers in the survey of judges were tied to any specific case or decision, and no sitting member of either court was asked to participate in the study.

⁶ For a population of 36, a sample of 32 would be necessary to be 95 percent certain that the findings were within ± 2.55 percent.

With this study's sample size of 32, there is a strong likelihood that the results reflect the views of the former members of these courts. However, the sample fields for various subgroups within this 32-participant sample may raise concerns that the sample size is too small. Though a larger sample for these subgroups would have yielded greater power and provided greater confidence levels, the survey results nonetheless may be of interest and thus were included in Appendix 2 to the unabridged version. FROST, *supra* note 1.

- ⁷ The intervals between the two courts' conflicting decisions ranged from the longest, at nearly 19 years, to zero, for two conflicting opinions the respective sister courts issued the same day. In nearly half (46 percent) of the Split-of-Authority Pairs, the conflicts were created within two years of the issuance of the first-to-decide court's opinion, meaning the first-to-decide court's precedent was newly minted at the time the second-to-decide court exercised a correctness preference. Cases falling into this category are classified as being in a rapidly developing area of the law.
- ⁸ Note that the margin of error varies across specific inquiries and increases for subgroups. Textual references to subgroup measures

necessarily indicate a higher margin of error. The values, mean, variance, and standard deviation for each of the inquiries is included in the unabridged version. FROST, *supra* note 1.

- ⁹ This table was created using data combined from two tables in the unabridged version. See FROST, *supra* note 1; Survey of Judges Question 16, appendix 2, at 170-171; Survey of Judges Question 17, appendix 2, at 172-173.
- ¹⁰ See RAY BLACKWOOD, *Overlapping Jurisdiction in the Houston-based Courts of Appeals – Could a Special En Banc Procedure Alleviate Problems?*, HOUS. LAW., July/August 2013, at 23 (observing that in 19 cases involving one split in authority the parties petitioned for review in only two of them and, in those, the high court would not have been able to address the issue; thus the Supreme Court of Texas was powerless to resolve the split of authority for many years despite the prevalence of conflicting cases on the issue).
- ¹¹ See *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3D 347, 348 (Tex.2001)(Hecht, J., dissenting)(noting infrequency of high court's acceptance of conflicts jurisdiction over interlocutory appeals and stating, "This Court's exercise of conflicts jurisdiction is

thus more rare than a blue moon (5 in the last 10 years), a total eclipse of the sun (6 in the past decade), or the birth of a Giant Panda in captivity (18 in 1999 alone, 15 of which survived)."

- ¹² See BLACKWOOD, at 23.
- ¹³ See, e.g., *Restatement (Second) of Conflict of Laws*, § 6(2)(f) (1971) (listing "certainty, predictability, and uniformity of result" as a factor relevant to the choice of applicable rule of law when there is no statutory directive of a court's own state on choice of law). The Comments to the *Restatement (Second) of Conflict of Laws* note that predictability and uniformity "are important values in all fields of law." See *Restatement (Second) of Conflict of Laws*, § 6(2)(f) cmt. i (1971). The same is true for the protection of justified expectations, a closely related concept. *Restatement (Second) of Conflict of Laws*, § 6(2)(g) cmt. g (1971) (explaining rationale of factor relevant to the choice of applicable rule of law when there is no statutory directive of a court's own state on choice of law and stating that it would be unfair to hold a person liable under the law of one jurisdiction when he had justifiably conformed his conduct to the law of another jurisdiction).



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