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Deliberation, Deference, and Discretion: Reflections on Decision Making at the Trial, Appellate, and Supreme Court

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Deliberation, Deference, and Discretion: Reflections on Decision Making at the Trial, Appellate, and Supreme Court

Remarks of Justice Rita B. Garman*

I find that an invitation to speak is often an invitation to study. As I considered my message for today, I turned to a shelf of books I have been meaning to finish reading, printed out the requisite three-inch-high stack of law review articles on judicial decision making, and began to read. I began with Judge Richard Posner's recent book, *How Judges Think*,[1] which—in the very first chapter—identifies nine separate theories of judicial behavior. These theories are descriptive and necessarily *post hoc*. Almost immediately, it became clear to me that while it may be useful for scholars to look back at a generation of judges and reflect on the influences that shaped their approach to judging, these descriptive and academically-defined schools of thought have little relevance to the day-to-day act of judging.

Frankly, I don't know a single attorney who, when called to the bench by appointment or election, made a conscious decision to approach the work of judging as a legal formalist, a legal realist, a

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1. RICHARD A. POSNER, HOW JUDGES THINK (Harv. Univ. Press 2008).

critical legal theorist, or any other "ist." On the other hand, every judge I have known has made a conscious effort to be aware of the way in which his or her personal belief system, life experiences, religious faith, moral values, and other factors might properly or improperly influence judicial decision making.

As I reflected back on my thirty-five years as a judge and the many decisions I have made, three themes emerged. At every level of my judicial experience—the circuit court, the appellate court, and now the Illinois Supreme Court—the act of judging has been shaped by the interaction of three things: deliberation, deference, and discretion.

To be deliberate is to be thoughtful, careful, and thorough in decision making. As a verb, "to deliberate" means to consult with others to reach a decision.[2] As a circuit court judge in Vermilion County, Illinois, I made dozens of decisions every day. In the course of a single trial, I might have made hundreds of decisions, most of which were entirely routine. However, many of the individual decisions that are made during a trial have the potential to alter the outcome. These include motions to suppress evidence, motions *in limine*, rulings on discovery issues, evidentiary rulings, jury instructions, and many more. I had little time to deliberate because, at the trial court level, judging is done in "real time," with the attorneys and the parties they represent waiting for an answer.

With the exception of dispositive motions, such as motions to dismiss or motions for summary judgment, the trial judge generally does not have the luxury of taking a matter under advisement or doing extensive research. And, unlike a typical federal district court judge, most trial court judges in state courts do not have the assistance of a law clerk. The state court trial judge, therefore, must rely on the attorneys not only to frame the individual issues for decision, but to provide relevant authority and well-reasoned argument. The lesson for the future litigators in the audience is clear—if you want the trial judge to make a deliberate decision, you must provide the necessary foundation.

"Deference" is defined in the dictionary as "courteous respect for or submission to another's opinion, wishes, or judgment."[3] "Discretion" is the "freedom or power to act on one's own."[4] These two concepts appear to be opposites. The more deference one must give to others, the less discretion one has.

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2. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 364 (3d ed. 1997).
3. *Id.* at 361.
4. *Id.* at 392.

Paradoxically, while the trial judge is the most limited by the requirement of deference, he or she also has more discretion than judges on reviewing courts. The trial judge must defer to the legislature by enforcing the law as written. The trial judge must also defer to the factual findings of administrative agencies and to an agency's legislatively-authorized rule making. And, of course, the trial judge must defer to the decisions of higher courts.

In Illinois, this means that a circuit judge in Cook County must not only follow the precedents established by the Illinois Supreme Court, but also the precedents of the Illinois Appellate Court. Although our appellate court is divided into five geographic districts, it is a "unitary" appellate court. That is, a Cook County circuit judge, when faced with a question that has not yet been decided by the Illinois Supreme Court, looks first to the decisions of the First Appellate District. If that district has not yet decided the issue, the Cook County judge must defer to the precedent set by any other appellate court district in the state. The trial judge may make his own decision on a matter of law only if no appellate district has ruled on the issue or if the other districts are split.[5]

But even with all of these limits, the trial judge still has the widest discretion at any level of the judiciary. Many of the individual decisions that are made during a trial are essentially unreviewable on appeal, and many of the decisions that are reviewable are subject to the abuse of discretion standard. These include evidentiary rulings, granting or denying a continuance, selection of jury instructions, imposing a sentence, orders granting or denying a preliminary injunction, and many others. In addition, the trial court is where equity resides. The trial judge has the ability to weigh equitable considerations to a greater degree than judges of reviewing courts. Thus, when I reached the appellate court in 1995, I found that I had the luxury of being more deliberate in my decision making and the opportunity to deliberate with the other justices on the panel. But I had less discretion.

For example, a criminal defendant who is convicted and sentenced may take an appeal as a matter of right, so long as certain procedural requirements are met. Similarly, the non-prevailing party in a civil lawsuit has the right to an appeal. Thus, the appellate court must decide every case that comes before it. Oral argument is not a matter of right, however, so this is one area in which the members of the appellate court

5. *See* ILL. CONST. 1970 art. VI, § 1 (vesting the judicial power in a supreme court, "an" appellate court, and circuit courts); *see also* People v. Ortiz, 752 N.E.2d 410, 423 (Ill. 2001) ("Although the appellate court is divided into five districts for purposes of election, Illinois has but one unitary appellate court.").

do exercise discretion by deciding whether the issues in the case are such that the court's ability to reach a correct decision would be aided by granting leave for oral argument.

Another area of discretion in the appellate court is the ability to decide whether to dispose of a case by means of a published opinion or a non-published order. The use of non-published orders has been controversial. It serves the goal of reducing the volume of needlessly repetitive published opinions, but it is criticized because it gives the appearance that some opinions might be shielded from public scrutiny. In my years on the appellate court, I carefully considered whether a particular opinion added anything at all to the existing body of case law before designating it to be non-published.

Decision making in the circuit court is an individual endeavor, even though an older judge might mentor a younger judge or colleagues might use each other as sounding boards. In the appellate court, however, decisions are made by panels of three justices. In such a situation, if you cannot reach agreement with at least one other judge, you cannot produce an opinion.

The process of reaching agreement is the product of equal parts of careful legal analysis and collegiality. Collegiality is a form of deference to one's professional peers and a necessary part of group deliberation. Fifteen years ago, Frank M. Coffin, the now-retired chief judge of the United States Court of Appeals for the First Circuit, defined collegiality as follows:

> The deliberately cultivated attitude among judges of equal status and sometimes widely differing views working in intimate, continuing, open, and noncompetitive relationship with each other, which manifests respect for the strengths of others, restrains one's pride of authorship, while respecting one's own deepest convictions, values patience in understanding and compromise in nonessentials, and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit.[6]

Collegiality is not an automatic by-product of three individuals working together—particularly when the three are intelligent, experienced, confident, and professionally successful individuals who find themselves together on an appellate court panel. As Judge Coffin noted, collegiality must be sought and, once achieved, must be nurtured with patience, respect, and openness.

An appellate justice, like a circuit court judge, is also limited by the requirement of deference. On questions of constitutional interpretation,

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6. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994).

the appellate court defers to the United States and Illinois Supreme Courts. On questions of statutory interpretation, appellate justices defer not only to the interpretations of higher courts, but also to the intent of the legislature under the doctrine of separation of powers. It has often been noted that the doctrine depends not only on judges guarding against violations by the other co-equal branches of government, but on their following the doctrine themselves.

Appellate judges must also defer to precedent under the doctrine of *stare decisis*, and, unless the standard of review for a particular issue is *de novo*, to the findings of the trial judge or the jury. In this environment, the role of the appellate court is essentially that of error correction. The appellate court makes precedent, of course, but only as a by-product of addressing the claims of error raised by the parties. The challenge for the appellate court is that statutory language and existing precedents narrow the range of possible outcomes, but do not dictate a single permissible answer in every case. The legal system must constantly adapt to new kinds of issues and to unanticipated facts. For example, who imagined a generation ago that courts would have to deal with questions of law related to surrogate parents or cyber-crime? The appellate court is where these decisions are first made.

One of the joys of appellate decision making is the opportunity for both solitary and collegial deliberation. If oral argument is allowed, the justices of the appellate court sit in panels of three members to hear oral argument, then to deliberate in conference, and eventually to decide each case. If the case is to be decided "on the briefs"—that is, without oral argument—deliberations take place via memoranda, phone calls, and circulation of proposed and revised opinions. In addition, each justice has two clerks to do independent research, assist in the drafting of opinions, and serve as a deliberative partner.

I remember one of my early cases on the appellate court that involved a dispute over the ownership of an abandoned railroad right-of-way.[7] The State of Illinois Department of Natural Resources wanted to make the disputed property into a bicycle path. The farmers whose land adjoined the right-of way wanted to farm the land. The entire dispute turned on the interpretation of deeds that were over 100 years old to determine whether the original land owners had conveyed a mere

7. AG Farms, Inc. v. Am. Premier Underwriters, Inc., 695 N.E.2d 882, 890, 892 (Ill. App. Ct. 1998) (holding that circuit court improperly withdrew certification of plaintiff class of landowners who sought only a declaration that, under the original conveyances, the defendant railroad had no interest to convey after its abandonment of the railroad line; as a result, plaintiffs' claim was a proper matter for declaratory judgment and the availability of the declaratory remedy for all class members would avoid piecemeal litigation).

easement to the now-defunct railroad or had conveyed the land in fee simple absolute. My clerk and I had the luxury of spending several days in the library, bringing ourselves up to speed on this narrow aspect of railroad law. Much of what we learned did not make it into the written opinion, but did enable me to draft a thoughtful, careful, and thorough—that is, a deliberate—opinion.

In sum, the appellate court is a place where the justices have limited discretion, owe a great amount of deference to others, but have both the ability and the obligation to be deliberate in decision making.

Since 2001, I have had the privilege of serving on the Illinois Supreme Court. Here, we have the discretion to choose which cases we will hear in addition to several categories of cases in which appeal to the state's highest court is a matter of right. Cases are selected, not because of the need for mere error correction, but because they present questions of law in need of resolution.

We owe deference to the constitutions of the United States and the State of Illinois, to relevant decisions of the United States Supreme Court, and—to a lesser degree—to our own prior decisions under the doctrine of *stare decisis*. On questions of statutory interpretation, we owe deference to the clearly expressed intent of the legislature. Otherwise, state supreme court justices are not limited by the need to defer to the logic, analysis, or conclusions of others.

The state supreme court is the most deliberative judicial body. Because there are seven justices who must decide every case and because we work together for a long time (we serve ten-year terms), collegiality is crucial.

I am occasionally asked by non-lawyers whether appellate justices "trade" votes—that is, whether we bargain with each other, swapping one person's vote for the proposed opinion in *Smith v. Jones* for the other person's vote on *People v. John Doe*. I suppose this impression comes from movies or television, or the sense that group decision making by its very nature must involve some degree of "you scratch my back and I'll scratch yours." They seem surprised when I tell them that I have never been asked to trade my vote for another justice's vote and that I have never seen or heard of this happening among my colleagues.

What does happen is that we choose our battles. We learn, in Judge Coffin's words, to "compromise in nonessentials."[8] The author of an opinion may be willing to revise a particular passage, or to omit a particular statement, if it is important to a colleague. My colleagues

8. *See* COFFIN, *supra* note 6, at 215.

know, for example, that I am a bit "picky" when it comes to the use of the term "jurisdiction." In my writing, I try to use the term only to refer to subject matter or personal jurisdiction. I think it is confusing to the bench and bar when the term is used in its more general sense to mean a court's mere authority or ability to act. I may ask a colleague to rephrase a passage that uses the word "jurisdiction" in this more general sense. Similarly, I am aware of my colleagues' preferences and I try to accommodate them when drafting a proposed opinion. I have learned, for example, to use the terms "waiver" and "forfeiture" with precision, because if I do not, I will be reminded of the distinction.

When an opinion is not unanimously adopted, collegiality also requires that each of the seven members of the court consider whether he or she might be wrong. When a vote is taken and I find myself in the minority, I ask myself whether I might be mistaken. When I am the author of an opinion and one of my colleagues finds it necessary to write separately, I consider whether he or she is making points in concurrence that I should incorporate into the opinion or raising questions in dissent that should cause me to reconsider my conclusions.

I began my remarks today by suggesting that in the day-to-day work of judging in the Illinois courts, the judges are not likely to subscribe to a particular school of judicial thought or to embrace a particular philosophy of judging. Here I will depart from that broad statement. At the state supreme court level, the justices are quite aware that—in the words of Professor Cass Sunstein—we decide "one case at a time."[9] We judge incrementally, making a conscious effort to leave for another day those questions that need not and should not be answered in the present case.

I do not expect the students in the audience to be familiar with many decisions of the Illinois Supreme Court, so I will give an example of incremental decision making from the United States Supreme Court. In 2004, Justice Scalia wrote the majority opinion in *Crawford v. Washington*, which held that the admission of a testimonial out-of-court statement against a criminal defendant violates the Confrontation Clause of the Sixth Amendment unless the defendant has the opportunity to cross-examine the declarant at trial or has had that opportunity in a prior proceeding.[10] The opinion did not define the term "testimonial," except to conclude that Sylvia Crawford's formal written statement, made while she was in custody and being interrogated by the

9. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (Harv. Univ. Press 1999).

10. Crawford v. Washington, 541 U.S. 36, 68 (2004).

police after receiving *Miranda* warnings, was indeed testimonial. A footnote acknowledged that the Court's "refusal to articulate a comprehensive definition [of the term] in this case will cause interim uncertainty."[11]

And it did! It took only until 2006 for the question to reach the Court again in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*.[12] The Court determined in those combined cases that statements made during a 9-1-1 call for emergency assistance were not testimonial, but that statements made to a police officer investigating a possible crime were testimonial.[13]

Davis and *Hammon* will not be the final word on the definition of "testimonial" in the context of Confrontation Clause claims. It is the nature of our legal system that no single case is ever the final word on anything. Indeed, *Crawford* itself overturned the 1980 decision in *Ohio v. Roberts*,[14] which appeared, at the time, to be the definitive guide to applying the Confrontation Clause.

The *Roberts*, *Crawford*, *Davis*, and *Hammon* decisions illustrate the fundamental difference between the legislature's enactment of a statute and a court's announcement of a judge-made rule. The legislature attempts—with mixed success—to write a law that accounts for all of the variables and contingencies that may exist with regard to the subject matter. Judicial decisions, in contrast, are most legitimate and effective when they decide the precise issues raised by the facts and the law in the individual case before the court and leave for another day the questions that have not yet been, and may never be, squarely presented.

In conclusion, I hope that my account of one working judge's thoughts on judicial decision making have been informative and interesting. I approach the day-to-day work of judging one case at a time—mindful of the deference I owe to others, the duty to be deliberate and collegial, and the responsibility to exercise discretion with care.

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11. *Id.* at 68 n.10.

12. Davis v. Washington, 547 U.S. 813 (2006).

13. *Id.* at 826–27.

14. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (finding that hearsay evidence is not barred by the Confrontation Clause if it demonstrates adequate indicia of reliability).