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ESSAY

The Roles of a Federal District Court Judge

Jack B. Weinstein[†]

These views orient new law clerks to some of my principles and practices.¹ They may also be useful to those who appear before me.

I. GENERAL CONSIDERATIONS

Courts provide a public service paid for mainly through taxes. Under Article III of the United States Constitution, the federal *nisi prius* judge's primary responsibility is to end disputes that can be decided using legal criteria, within the trial court's jurisdiction as set by Congress and the Constitution, through litigation commenced by a person with standing. A trial judge is, for most people, the human face of the law. He or she deals with people in the courtroom.

Our court is as inviting and welcoming as possible to every litigant, witness, juror, observer, and lawyer before it. Judge, staff, and court personnel treat every person with dignity, listening respectfully and being as helpful as possible. Everyone who wishes to be heard—whether as a party, an amicus, stakeholder, victim, or someone indirectly affected—receives a hearing on the record.

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¹ See generally Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For The People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1 (2008) (providing further elucidation of author's views on the judicial system). A thirty-seven page document marked "Orientation for Incoming Clerks" contains details and personal information for my clerks' eyes only; it is updated each year. See also FED. JUDICIAL CTR., LAW CLERK HANDBOOK (Sylvan A. Sobel ed., 2d ed. 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/LawCIHbk.pdf/\\$file/LawCIHbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/LawCIHbk.pdf/$file/LawCIHbk.pdf).

The judge and a magistrate judge are assigned to each case at the outset by random selection. Related criminal and civil cases may be transferred to one judge to achieve more effective administration. Assignment by type of case is not desirable because it ignores the Article III judge's strength as a generalist in the law. Fixed routines are useful for handling discovery and dividing responsibility for preparation of the case between the judge and magistrate judge. When a case is assigned to me, I review the complaint and mark it for "routine" or "special" treatment, including expedited control by the magistrate judge. Electronic filing aids the judge in closely monitoring each case.

Oral and written decisions and orders are more likely to be accepted as fair if they are handed down with reasons that can be understood by laymen as well as lawyers. These explanations may also serve to educate the public about its legal responsibilities. A short oral ruling from the bench, or a slightly more detailed opinion made available on electronic research services, is often more valuable to the parties than a delayed, polished decision designed for print. The judge's obligation to educate can also be satisfied—to the extent personal and family obligations permit—by lectures to lay and professional groups, teaching, and participation in philanthropic activities.

All parties before the court are treated equally. Because of differences among litigants in their understanding of the legal process and in their economic situation, all practicable steps are taken to keep the litigation field level. Appropriate action includes appointment of pro bono counsel; shifting of costs where authorized; limitation on fees; help in filing papers and responding to motions; explanation of the court's requirements and decisions; payment of counsel and expenses under the Criminal Justice Act;² and help from the pro se staff of the clerk's office.³

Sympathy for the poor or well-to-do must not affect substantive results. But empathy is not forbidden: it allows the court to better understand the positions of the parties. In some instances, as in civil rights and criminal cases, the Constitution or a statute compels positive steps to ensure that the court is

² 18 U.S.C. § 3006A(d)(1) (2006).

³ See, e.g., *Tracy v. Freshwater*, No. 08-1769, 2010 WL 4008747, at *10 (2d Cir. Oct. 14, 2010) ("The solicitude afforded to pro se litigants takes a variety of forms. It most often consists of liberal construction of pleadings, motion papers, and appellate briefs.").

equally available to all—procedurally and substantively. These policies are enforced by legal fees in civil rights cases.

II. LITIGATION

A. *Speed and Efficiency*

Speed in adjudication and reduction in transactional costs are essential. But time required to gather evidence, to permit factual clarification, or to encourage settlement may justify a reasonable delay, which will be afforded. Every effort is made by the court, acting with or without a jury, to get the facts as accurate as possible, given the limitations of the Constitution on admissibility, time, and cost constraints; appropriate efficiency; and the need to reduce prejudice.⁴

B. *Attorneys*

The court attempts to obtain the assistance it requires to reach a sound result on the merits. Its main resource is the attorneys in the case, who are expected to fully brief and argue any issues on which the judge requires advice, and to be fully prepared for arguments on such matters as motions, proposed charges, and rulings on prospective evidentiary problems. In advance of argument, it is appropriate and often beneficial for the judge to formally order counsel to brief and discuss specific difficulties. This practice is particularly beneficial where an intricate legal or factual issue must be decided.

Oral argument is useful in avoiding hasty, improper conclusions, and in arriving at a fuller understanding of the case; it is encouraged. For somewhat the same reason, motions for summary judgment, as compared to those directed at the pleadings, are preferred, since, after even limited discovery, the case's potential can be more adequately appreciated. Successive

⁴ See, e.g., FED. R. CIV. P. 1 (The Rules are to be “construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.”); FED. R. CRIM. P. 50 (titled “Prompt Disposition”); FED. R. CRIM. P. 52 (titled “Harmless and Plain Error”); FED. R. EVID. 102 (mandating that the Rules be “construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined”); FED. R. EVID. 403 (Relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

waves of amended pleadings and motions directed at the pleadings are often useless in obtaining an appropriate decision on the merits.

C. The Court and Law Clerks

Elbow law clerks are invaluable. Their presence, youth, learning, and integrity are one of the many benefits of serving on the federal bench. Since most federal judges' law clerks (and student externs) serve for only a short period, and the position constitutes a valuable post-graduate internship, it is helpful for the judges to discuss with them in detail the nuances of the cases and courtroom proceedings. This practice will help clarify the judge's thinking and elicit more useful contributions from the clerks. They are subject to the same ethical restraints as the judge, and, accordingly, they should not reveal chambers' discussions before or after the decision.

Law clerks are expected to disagree with the judge and to suggest improvements if they believe errors are being made. Ours is a joint effort to produce the best result we can.

The court will seek additional temporary law clerk personnel and the assistance of other judges where a particularly complex case requires it; the priority is sound results, not pride. Magistrate judges, special masters, experts, and the like can be helpful in expanding the judge's resources.

Cooperation between state and federal judges in adjudicating related cases is desirable. Where complex cases arising from the same event are pending in both federal and state courts—as in asbestos, securities, or pharmaceuticals litigation—it is useful for the trial judges of both systems to work together to reduce costs, speed decisions, and agree on a uniform approach to applicable law, appointment of special masters, discovery, damages, scheduling of trials, and the like. Collaboration with other federal judges is strongly encouraged.

Research by the court itself on background facts and law is often necessary. The court should make the parties aware of its independent investigations—and the sources utilized in any such investigation—so that the parties can correct misconceptions. Limitations on formal judicial notice in the Federal Rules of Evidence do not apply to this research.

Discussing pending cases informally over morning coffee with magistrate judges and other judges is helpful. Law clerks may not, however, discuss matters *sub judice* with anyone outside of chambers.

In difficult sentencing matters, a formal panel of judges is useful. Such discussions are helpful in gaining a broader and more diverse perspective when making sentencing decisions. All of the relevant sentencing papers are made available to each participating judge to ensure an informed interchange. The chief judge may wish to select the panel and sit in on the deliberation. Ultimately, though, it is for the sentencing judge to decide this most serious of matters after a full sentencing hearing, with experts and witnesses as needed.

The class action, and other devices such as consolidation of related cases, are often useful and appropriate for aggregating and administering mass cases, but they require close supervision by the judge.⁵ Reduction of transactional costs and fairness to all must be stressed in complex litigations. Particularly in cases where there is little or no personal relationship between plaintiffs' counsel and many clients—the usual situation in mass cases—the court has an obligation to insist that clients are kept informed, that their wishes are given appropriate weight, and that limits on fees take account of the reduced per capita costs of representation.

The Internet has great promise as a means of improving the ability of individual litigants in mass cases to receive information, view and participate in proceedings, and communicate with their attorneys, each other, and the court. Experiments with blogs and social media technologies—e.g., Facebook and Twitter—to disseminate case information and improve communications are encouraged. Online videos can provide information and instruction to litigants, attorneys, and others in a readily digestible and accessible format. In using these technologies, however, the court should consider privacy issues⁶ and make an effort to minimize interference with control of the case by a cacophony of voices.

At the very least, the court can facilitate easy access to case files for litigants through the federal courts' Electronic Case Filing system. Restricted televising of live court

⁵ See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010); KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (PublicAffairs 2005); JAY TIDMARCH & ROGER H. TRANSGRUD, MODERN COMPLEX LITIGATION (2d ed. 2010); JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (Nw. Univ. Press 1995).

⁶ See Reena Raggi, *Opening Remarks at the Philip D. Reed Lecture Series: Conference on Privacy and Internet Access to Court Files*, 79 FORDHAM L. REV. 1 (2010).

proceedings can be another helpful way for the court to disseminate information.⁷

While ours is an adversarial system that relies upon the lawyers to shape a lawsuit, the judge should, when necessary, exercise an active role in controlling and guiding the case. It is appropriate for the judge to help in settlement of civil cases.⁸ When approved by counsel, off-the-record settlement discussions by the parties, alone or together, are encouraged. In a few sensitive cases, the court will have a court reporter present, sealing the record.

Special settlement masters, chosen by the parties from a short list approved by the court, are particularly useful in any complicated civil matter involving potentially large judgments and many claimants. Organizing the attorneys so that one of them or a committee can speak for all the lawyers enhances both settlement and efficient administration of a mass litigation.

In a nonjury case, the court does not discuss settlement, but the magistrate judge who is not trying the case may do so. The judge must not try to settle a criminal case.⁹

D. *The Jury*

The petit jury is a key element in federal practice. It is often constitutionally required, unless waived. Even in those cases where a bench trial is called for, an advisory jury may serve the court and parties by bringing to bear the wisdom of a

⁷ See *Judiciary Approves Pilot Project for Cameras in District Courts*, THE THIRD BRANCH (Sept. 2010), http://www.uscourts.gov/News/TheThirdBranch/10-09-01/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx (“The judicial conference . . . approved a pilot project to evaluate the effect of cameras in federal district courtrooms and the public release of digital video recordings of some civil proceedings. . . . Courts that participate in the pilot will, if necessary, amend their local rules (providing adequate public notice and opportunity to comment) to provide an exception for judges participating in the pilot project. Participation will be at the trial judge’s discretion.”); see also *In re Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La. Oct. 19, 2010), available at <http://vioxx.laed.uscourts.gov/Orders/o&r101910.pdf> (order granting in part counsel fees and reimbursement of expenses) (“Furthermore, to give transparency to this litigation, the Court created a web site accessible to all counsel and the public at large. All motions, Court orders, opinions, recent developments, a calendar of scheduled events, and various other matters were posted on this web site. Throughout the litigation monthly status conferences were held in open court. Notice of the meetings were posted on the web site and were open to all. Transcripts of these conferences were posted on the Court’s web site for those who could not attend.” (footnote omitted)).

⁸ See FED. R. CIV. P. 16(a)(5) (stating that facilitating settlement is one purpose of pretrial conferences with the judge).

⁹ See FED. R. CRIM. P. 11(c)(1) (The court “must not participate” in plea discussions.).

cross-section of the community. While witnesses and others can provide the judge with a window into our fascinating modern world, the jury, steeped in the details of daily life, often has a better feel for what is appropriate with respect to, for example, what constitutes invidious discrimination in the workplace. The judge is largely isolated from the life of the multitudes by age, class, and training. Even if he or she would have reached the same result as a jury, the jurors' verdict sometimes satisfies the public and litigants of impartiality and lack of influence. The participation of jurors also reduces some of the emotional and intellectual burdens on the judge.

A jury is chosen in a process that eliminates, so far as possible, those who will not be fair. Primary responsibility for winnowing out those who should not serve in a particular case is the judge's, with assistance from the attorneys suggesting questions and exercising peremptory challenges. In high-profile or complex cases, detailed written questionnaires are useful; an explicit waiver for the use of this technique should be obtained from the parties to avoid a contention that the public was excluded from the *voir dire*.

Jurors must be treated with great respect and common sense by being supplied with the following: pen and paper to take notes in the courtroom; the right (seldom utilized) to question witnesses through a writing presented to the judge; explanations of courtroom proceedings; clearly written instructions on the law; precisely and simply phrased verdict sheets; lists of witnesses and exhibits; and, when called for during deliberations, the evidence and such aids as calculators. Testimony requested by a deliberating jury can be read in court or sent into the jury room in redacted form (now available almost instantaneously from the court reporter). In the future, video recordings should be available in some cases.

Out of concern for jurors' time, trials should proceed in full workdays without delays for sidebars, which can be eliminated by requiring briefing and argument of all in limine matters each day before the jury arrives. Recesses should be frequent, but short. The court provides lunch and refreshments paid for by the government and brought to the jury room to reduce eating-time delays. A spacious, well-lit jury room and adequate toilet facilities are available. Current magazines and books, as well as colorful pictures on the walls, make for a pleasant working environment.

E. The Courtroom

Nothing in court should be off-the-record. Trial judges owe an obligation to preserve the public character both of disputes before them and of the resolution of those disputes. Use of a good loudspeaker system allows everyone in the courtroom to know what is happening. Every aspect of the case should be available for public observation and review unless a narrowly tailored exception—explicitly justified and usually agreed to by the parties—outweighs the policy favoring open proceedings.

It is important that the visage of the witness be visible to the judge as well as to the jury. The distance and sight lines from the witness to the jury box and judge in our federal courtrooms are poorly designed; it is difficult for the jury and judge to see the witness's demeanor and body language. The situation can be improved by rearranging courtroom furniture.

Conferences and motions conducted around a table in open court by judge and counsel permit calm, businesslike, and rational discussions, discouraging posturing and contentiousness. Consultation between an incarcerated petitioner—appearing from prison by telephone or video connection—and his counsel can be accomplished by clearing the courtroom.

Neither robe nor gavel is required. Everyone in the courtroom knows who the judge is and needs no reminder of the court's authority. Since I, when a jury is not present, sit at a table with litigants and counsel—and when a jury is present will, from time to time, sit in or near the jury box to observe what the jury is seeing—robe and gavel are incongruous.

F. Criminal Sentencing

At sentencing, the defendant will be apprehensive, but can be calmed by the presence of relatives or a friend alongside; they can answer the court's questions about the defendant and better help the accused address his problems. It is useful to have the judge at the table facing the defendant to encourage more relaxed communication among those present. While "therapeutic jurisprudence" has not been recognized as an aspect of the judge's duty, many cases require giving directions to the probation department and defendant with respect to details of jobs, family, relationships, drug and psychiatric treatment, education, and the like.

Since so many defendants and their families have serious financial, mental, and other problems, the judge must

consider utilizing the presentence and probation departments, as well as outside available social agencies. Providing legal aid and social work agencies in both civil and criminal matters is desirable. Our court has a foundation that pays for private social services when government money is not available.

Nonincarceratory sentences and early termination of supervised release or probation, where warranted, need more serious consideration. This is particularly true in a district such as ours, where large proportions of young males in some communities are cut off by long incarceration far away from their loved ones, who cannot afford to travel.

Our criminal justice system remains the harshest in the Western world.¹⁰ We must constantly ask ourselves, “Is this sentence unnecessarily cruel?”¹¹

Sentencing hearings are videotaped for purposes of appeal unless a party objects. The appellate court may better understand why the trial court found the sentence reasonable if it “sees” the proceeding and also reads the stenographic record and documents. Body language of participants and observers is often significant.

¹⁰ See, e.g., Glenn C. Loury & Bruce Western, *The Challenge of Mass Incarceration in America*, DAEDALUS, Summer 2010, at 5, 6 (“With roughly 5 percent of the world’s population, the United States currently confines about 25 percent of the world’s prison inmates. The American prison system has grown into a leviathan unmatched in human history. . . . The financial costs entailed are staggering, and the extent of human suffering endured boggles the mind.”); see also Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 73 (2010) (discussing retributivism and utilitarianism as justifications for criminal punishment and criticizing victimization as a basis for increasing sentence harshness, stating that “[a]lthough touting victim-centered reforms serves prosecutors’ and policymakers’ interests, it is another question altogether whether such reforms actually improve victims’ lives”).

¹¹ See, e.g., Cecelia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 984 (“[A] trial judge can begin inside the courtroom, ensuring that any sentence she imposes ‘does no harm’—that is, that the sentence itself is a plausible response to the crime that has been committed, the offender who committed it, and the context in which the crime took place. When judges understand the larger social context within which a crime has occurred, they will be able to more accurately assess the deterrent or rehabilitative value of any sentence imposed and to adjust their dispositions accordingly. Of course, in order to impose such sentences, judges need contextual, problem-oriented information about crime and about the full range of sentencing options available—both in the community and in the jail or prison system. When counsel fail to provide such information, judges should not hesitate to request it.”).

III. LAW MAKING

Adjudication involves interpreting, applying, and modifying the law.

A. *Procedural and Substantive Law*

When deciding procedural matters, the court has considerable discretion in construing the rules. Aside from some statutory requirements and constitutional standards, such as those for jury trials, all federal courts are given procedural rule-making authority, with considerable flexibility in application. This does not include power to directly affect substantive law.

Nevertheless, the substantive balance between parties—what benefits they can expect from litigation—may be affected by applicable procedure, making it easier or harder to prosecute or defend, or to delay or expedite, an action. In modifying procedure, the court considers how it may be affecting the practical rights of the parties and justifies in writing any changes made. Our advisory committee of lawyers practicing before the court is helpful in commenting on, and recommending changes to, local practice and rules.

B. *Diversity Jurisdiction*

Federalism's exotica supplies some of the pleasurable intellectual stimulation that goes with the judge's job. Under the rule of *Erie*,¹² state substantive law governs in diversity cases. A

¹² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Increasingly there are "intersystemic adjudication" issues requiring federal courts to rely on state criminal law and vice versa. See, e.g., Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243 (2010). For an example of the importance of characterizing the issue as substantive or procedural for *Erie* and other purposes, see *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (applying federal rules to allow the class action rather than state law, which is less permissive of class actions). But see *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 463 (E.D.N.Y. 2009) (*contra Shady Grove*); John C. Coffee, Jr. & Max Heuer, *Class Certification: Developments Over the Last Five Years 2005-2010*, CLASS ACTION LITIG. REP. (BNA) NO. 11, at S-3 (2010) (expressing uncertainty about the impact of *Shady Grove*). The mix is enriched by issues of preemption, raising the question of applicability of federal or state tort law (see, e.g., Julie A. Steinberg, *Justices Voice Concern over Immunity, Address Legislative Intent in Vaccine Act Case*, 38 PROD. SAFETY & LIAB. REP. (BNA) 1064 (2010)); federal due process limits on state tort and punitive damages (see, e.g., *Scalia Stays \$241 Million Tobacco Judgment; Reliance Issue Raises Due Process Concerns*, 38 PROD. SAFETY & LIAB. REP. (BNA) 1018 (2010)); and status of controlling federal or state law in removals (see, e.g., *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V.*, No. 06-CV-3532,

federal court's power to modify state substantive law to meet new problems is, as a matter of comity, more limited than that of the state's judges. But rulings on relevant state law cannot be avoided by district judges; we do not have the power to certify questions of state law to the highest state court—a process often available to the circuits' courts of appeals.¹³ The federal trial court cannot evade decision using the excuse that applicable state law is unclear, thereby foregoing statutory and constitutional duties to adjudicate the case or controversy before it. The *nisi prius* federal court is, as a practical matter, restricted to taking small steps in modifying state law.

C. Federal Question Jurisdiction

In the absence of a precedential, statutory, or constitutional limitation, federal trial judges necessarily have the same constitutional and statutory power to construe federal substantive law as any other Article III judge.¹⁴ Almost all constitutional and other legal issues funneled up to the Supreme Court will have been first passed on by a federal district court.

In ruling on an issue subject to precedent or statutory interpretation, the trial court must apply the same interpretative devices used by appellate courts—textual meaning, design in context, and grammatical parsing, among others. Some flexibility is afforded by limited application of doctrines such as lenity or absurdity. A restrained approach to lawmaking by the *nisi prius* judge is warranted. Sudden changes in law may unfairly impact those who have acted on reasonable evaluations of what the courts are likely to do. An effort should be made to avoid frustrating those expectations except in unusual situations. When we depart, or extrapolate,

2010 WL 3928910, at *5 (2d Cir. Oct. 8, 2010) (“[I]f federal courts could not determine the state-law issues intertwined with a copyright suit, then the plaintiff would be forced to litigate exclusively in state court and would be deprived of the remedies Congress provided in the Copyright Act.”).

¹³ See, e.g., *Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 153 (2d Cir. 2001) (“Where an unsettled and significant question of state law . . . will control the outcome of [the] case, we may certify that question to the New York Court of Appeals.” (internal quotation marks and citation omitted)).

¹⁴ For a statute requiring the Supreme Court to find applicable law, which must not be changed by lower courts, thereby, perhaps, implicitly recognizing a federal trial judge's power to construe federal law in other contexts, see 28 U.S.C. § 2254(d)(1) (2006) (“unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States” required for some habeas corpus grants (emphasis added)).

from precedent, there is a special need to justify the rule change in a coherent and comprehensive publishable opinion.

Substantive due process, to an even greater extent than other areas of law, requires relative stability. As Justice Holmes reminds us, the law is a prediction of what courts will do.¹⁵ Appellate courts, and particularly the Supreme Court, can take longer steps in providing “new” substantive law, in part because they provide the broader geographic uniformity required for a national rule, and in part because of hierarchical considerations.

Conflicts between the United States Constitution and statutes or precedent must be resolved in favor of our basic legal document. Interpretations of the Constitution by courts below the Supreme Court present conceptual and practical difficulties. On critical issues the Supreme Court is often divided. It is hard to predict what approach will govern in any particular dispute—whether, for example, the majority will rely on a restrictive textual and historical approach (like that sometimes used by Justice Scalia), or on an approach with more flexibility in meeting sociological, technological, political, and economic changes (like that sometimes used by Justice Breyer).¹⁶ It is also difficult to predict how much the Court will be affected by its evaluation of what appear to be major changes in the public’s view of such matters as gender or racial discrimination, abortion, or homosexuality.

When it comes to interpreting the Constitution, trial judges’ decisions, perhaps even more than those of other judges, tend to be affected by changes in the country’s fundamental circumstances. They observe today’s life in the courtroom and elsewhere. All judges recognize the central need to protect against the possible tyranny of the majority by enforcing the fundamental protections built into the Constitution. In doing so, judges reduce inequalities of opportunity among our people so far as is practicable in a free society.¹⁷

In grey areas, trial judges’ individual backgrounds, experience, and legal training will count. While these differences require each judge to follow his or her own legal analysis, a trial court decision can be overruled by the court of appeals or the

¹⁵ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

¹⁶ For an analysis of the variety of approaches to statutory and constitutional interpretation used selectively by the Supreme Court, see, for example, STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 75-156 (2010).

¹⁷ See Samuel Freeman, *A New Theory of Justice*, N.Y. REV. BOOKS, Oct. 14, 2010, at 58.

Supreme Court, mitigating the potential harm of a deviant *nisi prius* opinion to the symmetry of our rich legal fabric. Accordingly, the trial judge is freed of some inhibitions against making what appear to be necessary changes in the law.

It is natural, on the one hand, for a *nisi prius* judge to be disappointed when the court of appeals or Supreme Court comes to a different conclusion from that reached by the district court. But, on the other hand, there is some comfort in knowing that at least three serious judges will be available to correct errors and injustices. In short, the *nisi prius* judge should do the best job she or he is capable of, and then try to forget about the case.

Where the law seems due for a modification, it is desirable to provide a comprehensive evidentiary hearing and rulings on the facts. To ensure that an important issue is thoroughly considered, the trial court may find it useful, as already noted, to issue a preliminary order informing the lawyers of the nature of the proceeding it envisages, with specific questions of law and fact and the kinds of experts and other witnesses it requires. In some instances, the court may issue a judgment with a “preliminary” opinion, subject to further expansion and development; this device can speed appeals.

A direct precedent on point is binding unless clearly undermined or eroded.¹⁸ The trial judge’s prediction of what the appellate court’s views will be is an important consideration in any decision, but it is fraught with the usual difficulties in understanding any Delphic Oracle.

While the trial court is obliged to follow a ruling decision, its position observing people and situations may, as already suggested, provide a useful understanding of developing problems and the need for change. The trial judge physically observes the people who are affected by the law and may sense their problems through direct interactions, rather than through the indirect medium of the record or abstract analysis. This was true, for example, of federal trial judges’ general view that Sentencing Commission guidelines were often unnecessarily harsh; this consensus probably had an impact on appellate liberalizing of the sentencing process. It is the responsibility of a trial judge to highlight where and how

¹⁸ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (cancelling sixty years of increasingly shaky precedent).

the law is going astray and to suggest that the appellate court, legislature, or other law-making authority revisit the issue.

The characterization of the matter as governed by federal substance or procedure raises intellectually challenging issues. In construing state statutes, the methods of interpretation used by the state courts rather than those used by federal courts should be employed. For example, the New York Court of Appeals appears to some to be utilizing a “result-oriented” method in domestic relations cases.¹⁹ In federal practice, there is some lack of consistency. Different courts recognize disparate approaches as valid, ranging from a “strict constructionist” technique, based almost wholly on the supposed meaning of the language of the statute or constitutional provision at the time of drafting, to a modified textual form, which relies in part on legislative history²⁰ and on changing meanings and current needs. The famous statement of Judge Cardozo is particularly appealing: “Our concern is to define the meaning [of a term] for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.”²¹

Complexities of the American legal system and a lack of consensus on statutory interpretation rules—although in some states the legislature is attempting to impose interpretation principles by statute²²—make for a fascinating series of problems for federal judges and law clerks.

As partners in the administration of government, judges are mindful of the ancient philosophical and religious questions underlying their work: what is the good life and the good

¹⁹ See Timothy M. Tippins, *Decisions Continue Pattern of Result-Oriented Jurisprudence*, N.Y. L.J., Aug. 30, 2010, at S8 (citing numerous cases for the proposition that the New York Court of Appeals has an “outcome orientation” when deciding domestic relations cases).

²⁰ See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1829-42 (2010).

²¹ *Warner v. Goltra*, 293 U.S. 155, 158 (1934); see also *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (“The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision’s clarity and its fidelity to Fourth Amendment principles. We therefore granted the State’s petition for certiorari.”); *id.* at 1722 (“The doctrine of *stare decisis* is of course essential to the respect accorded to the judgments of the Court and to the stability of the law, but it does not compel us to follow a past decision when its rationale no longer withstands careful analysis.” (quotation marks and citation omitted)); cf. *Abbot v. United States*, Nos. 09-479, 09-7073, 2010 WL 4569898 (U.S. Nov. 15, 2010) (relying on congressional intent to interpret “except” clause in 18 U.S.C. § 924(c)).

²² See Gluck, *supra* note 20, at 1785-1803.

society; what are the utilitarian, consequential choices; and what are applicable moral, deontological rules such as those embodied in our Declaration of Independence and Constitution. Do the latter support rules for individual autonomy, fair procedures, and equitable division of the country's opportunities and wealth?²³ Federal judges are fortunate to have available post-graduate seminars and conferences on history, philosophy, science, and economics that keep their minds open to the details as well as the purposes of the law.

There should be no inhibition on using foreign state and international law as authority, either as a model, or, as is more often occurring, as dispositive authority on a substantive law issue.²⁴ Rejecting this rich source of knowledge is a form of xenophobia unworthy of our creative American legal system. Care must be taken by seeking assistance from the lawyers and their experts before incorporating this information into a decision. There is danger in transplanting foreign norms and principles into a subtly different American context, given its uniquely diverse population and distinctive legal tradition. Much of the same sense of humility is required before we rely on scientific or other special fields of knowledge.²⁵

IV. CONCLUSION

We reenact each day in the courthouse the ancient struggle to impose both justice and its antagonist, mercy. The trial court is always concerned with the conflict between strict law and flexible equity. Analytical purity in chambers favors the former; empathy in the courtroom for individuals living in an imperfect world leans toward the latter.

A candid statement of the reasoning supporting the trial court's decision is always required. Mendacity in twisting the

²³ See, e.g., Freeman, *supra* note 17.

²⁴ See, e.g., Lawrence v. Texas, 539 U.S. 558, 573 (2003) (noting a decision of the European Court on Human Rights and its authority in all countries that are members of the Council of Europe in determining the legal status of consensual sodomy); Justice Ruth Bader Ginsburg, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006), available at http://www.supremecourt.gov/public/info/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html (discussing the value of "comparative dialogue" when interpreting the Constitution); Justice Stephen G. Breyer, Making the Constitution Work: A Supreme Court Justice's View, Address at the American Law Institute 87th Annual Meeting (May 17, 2010) (discussing the difficulty and necessity of understanding the laws of other nations).

²⁵ See, e.g., Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095 (2010).

facts, evidence, history, or legal background to arrive at a conclusion is not acceptable. As Learned Hand put the matter, describing the practice of Justice Cardozo, “[h]e never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table”²⁶

Ultimately, it is the trial judge’s conscience, exercised under the constraints of our rule of law, that guides the pen writing an opinion justifying a judgment. We lack the capacity to adequately satisfy our position’s daunting demands. But we must keep trying to rise to the occasion.

²⁶ Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 362 (1939); see also *id.* at 361 (“[A judge] must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time—at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery.”).