

Reason Comes Before Decision

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The quality of judging generally depends upon three types of commitment: A commitment to the aim of justice, a commitment to professionalism, and, last but not least, a commitment to method.¹ The first two commitments cannot be fulfilled adequately unless the last commitment, a commitment to a method for reasoned decisionmaking, is understood and put into practice.

A commitment to justice involves more than a desire to be fair and impartial. Our system of justice requires a commitment to follow views with which we do not agree and to arrive at decisions that may in some measure offend our personal sense of justice. Judging based simply on what the judge believes to be right or wrong without reference to the guiding principles to which the judge is committed by oath of office may result in no justice at all and will inevitably lead to inconsistency. In the United States the powers of the government are separated into three departments: the executive branch, the legislative branch, and the judicial branch. The legislative branch of the government may enact laws which offend our personal sense of justice, but if those laws are not unconstitutional and the legislative intent is clear, the courts must follow those laws. The executive branch also has powers derived from the Constitution; the exercise of these powers is binding upon the judiciary. The judiciary interprets and enforces the law, and in doing so, may in the broad sense "make law." Judicial interpretation, however, should not be a substitute for the legislative and administrative decisionmaking processes, particularly where the legislative process has already taken place. A personal commitment to justice is important, but it cannot supplant logic and methodology. In arriving at decisions, one must never forget that the determination of what is just is frequently in the eyes of the beholder. *Justice under law* is the goal of our judicial system to which a judge owes fidelity.

The second commitment that a good judge must have is to professionalism. Professionalism requires an understanding of what role the judge is playing and a commitment not to exceed the bounds of that role, even if it is within the power of the judge to do so. A commitment to professionalism requires a

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¹ I highly recommend obtaining and studying the material in Robert E. Keeton's excellent book *Judging* (1990). The three commitments are those explained by Judge Keeton in his book in which he discusses reasoned decisionmaking. ROBERT E. KEETON, *JUDGING* 1-24 (1990).

willingness to set aside one's personal views for those contained in laws that the judge has agreed to follow.

As most judges in the United States come to the bench with a strong commitment to justice which, generally, is well-directed, they also, generally, come to the bench with a strong commitment to professionalism. The Code of Professional Responsibility is important to them during their practice as a lawyer, as is the Code of Judicial Conduct. Few judges, if any, expect to be anything other than a committed professional with a high commitment to the best aims and goals of justice. However, those commitments by themselves have often proved to be insufficient to cause the judge to be an excellent judge. What frequently is lacking through insufficiency of training is a commitment to a method for reasoned decisionmaking. In law school there is little, if any, training about methods for reasoned decisionmaking. In the practice of law much of the emphasis in the adversary system is result oriented. How the result is arrived at remains somewhat of a mystery, particularly because many judges do not articulate their methods for making decisions. In summary, judicial decisions are derived as frequently by reasoning backwards as by reasoning forward. Our legal system must not be based upon "the end justifies the means" reasoning.

There are other reasons why judges may almost unconsciously fall into result-based decisionmaking. Some of the principal reasons are as follows:

(1) Many people (including judges) are intellectually lazy; reasoning is hard work, deciding is not. There may be a tendency to come to a decision and almost resent the fact that it must be explained.

(2) Judges, like other people, make other decisions in their lives based upon emotions, first impressions, and deceptively attractive arguments. We buy things, choose spouses, and make investments often on the basis of impulsive choices and gut reactions. When an important decision is made that way, it is much more likely to be a poor choice than if the decision is carefully thought out before it is made. Why should judicial decisions be any different?

(3) There is a desire to be popular. No one likes to be the heavy. The "populist" judge is inclined to give undue consideration to the will of the majority even if it is different than that reflected in the authority which the judge is supposed to apply.

(4) In an elective system there may be a desire to please a political constituency. It is difficult, if not impossible, to completely set aside the known wishes of the constituency that helped elect the judge even if reason, properly applied, leads to a different result.

In summary, judges are human (believe it or not) and are subject to the same failings that other humans experience in making decisions. A commitment

to method in decisionmaking can help overcome many of these tendencies and will lead to decisions that are more frequently based upon the right reasons.

Few, if any, judges would characterize themselves as persons who reach decisions based upon result as opposed to reason. In order to determine whether an objective observer would find a judge to be result oriented, it would be wise for a judge to ask and honestly answer the following two questions:

(1) Does the same party or interest always, or almost always, prevail in your court in an important case? If a judge hears many capital punishment cases and never finds a case that fits the law which the judge has sworn to uphold, the probable conclusion is that the result has dictated the reasoning. Similarly, if a judge always, or almost always, finds a way to hold for management or for labor, it is probable that the reasoning is made to fit the result rather than that the result follows proper legal reasoning. My experience has been that the same party does not always win important cases. Labor is sometimes right and sometimes wrong; so is management. Judicial philosophy can account for part of the choices, but not to the extent that the same party almost always wins.

(2) Are gaps or problems glossed over in the reasoning process? When there is a leap from one choice to another without adequate explanation, it is an indication that the result was more important than the decision. If the gaps cannot adequately be explained under the law that the judge has sworn to follow, the reasoning is flawed. Proper reasoning may lead to a different result.

I believe that judges want their decisions to be reached by the use of an impartial reasoning process rather than by arriving at the result and then developing reasoning to support it. Following that assumption I suggest that there are some steps that can be used to avoid the result-oriented reasoning process.

The first step is to make factual determinations before legal determinations, regardless of how the law will eventually treat those facts. Factual findings are generally made by deciding which testimony is the more credible. A judge should use legal principles only in deciding which facts are relevant, not how the facts are found. Thus, a judge should not find that a defendant is able to differentiate right from wrong because the judge realizes that that finding will control the disposition which may be made in a way that is repugnant. If there is no legal liability for defendant's actions if defendant was only negligent, but there is legal liability if the defendant's conduct was wanton and willful, a judge who is result oriented may be tempted to find wanton and willful misconduct so that the plaintiff can receive damages. The judge should decide independently and initially what the defendant's conduct actually was and let

the chips fall as they may in the ultimate determination. There is no justification for finding the facts differently simply because the judge does not believe that binding authority (the legislature or a higher court) has justly determined the consequences of negligent conduct. If the findings of fact are not made first, independent of any consideration of the legal effect thereof, the desired result may control the judge's findings, at least subjectively. If findings of fact are first made and then changed when the judge realizes that those findings will not support the desired result, clearly the process is flawed and the judge has acted unprofessionally.

Appellate courts generally deal with facts in a different way. Ordinarily the facts are found by the trial court and the appellate court is required to make its decision contingent upon those factual findings so long as the findings are not against the manifest weight of the evidence. An appellate court should rigidly adhere to the standard of review required of it, be it manifest weight or otherwise, and not directly or indirectly find facts contrary to the trier of fact simply because a different result is desired. In reading some appellate decisions, it is apparent that the appellate court ignored its standard of review and relied upon facts that were rejected by the trial court, even though those facts were not against the manifest weight of the evidence. Our legal system is based upon a proposition that the fact finder who observes the demeanor of the witnesses is in a better position to determine the credibility of the witnesses. It is a perversion of the role of an appellate judge to preempt the function of the trial court. Thus, an appellate court should employ the method of deciding the law applicable to the facts found by the trial court, which may also lead to a result which the court does not prefer, except in that rare instance where the trial court findings are not supported by the evidence.

The next step is to select the law that is to be applied to the facts in order to arrive at the decision. The reason for selecting the law should be candidly explained in understandable language.

Judging involves a series of choices. The first set of choices results in the finding of facts. Without facts, law is only a set of abstract principles. It is the application of law to the facts of a particular case that gives the law life. A judge or a jury may find the facts, but the judge is the one who always chooses the law to be applied to those facts.

The selection of law applicable to a particular set of facts may be simple or it may be complex. In the simplest form it merely involves the discovery and selection of a binding principle of law and the mechanical application of that principle to the facts at hand. In that case the explanation is also simple, that is, the legislature or the Supreme Court has decided the issue. In complex cases the choices are more difficult. For example, if the judge encounters an initial interpretation of a statute that is ambiguous, the judge must make choices in

determining how to interpret the statute. The controlling principle is that the intent of the legislature will be given effect as it is ascertained by the application of appropriate principles of statutory interpretation. One of the problems that a judge regularly encounters is that some of the principles for statutory interpretation will support one result and others will support another result. There must be a choice or choices, with reasons therefor, why certain principles are more appropriate than others for discovering legislative intent. A preferable way to go about this process is to objectively apply statutory construction principles initially without reference to what result they may produce. After those choices are made leading to an apparent result, the judge should consider the result and thereby test the reasoning process involved in making the choices that he or she has made. One of the statutory provisions for determining legislative intent in Ohio is that the judge consider the "consequences of a particular construction."² This provision has been placed in the statutes by the legislature to indicate to the court that the legislature does not intend a bizarre or unjust result. It is my suggestion that this principle be applied at the end of the process, rather than at the start of the process, as there is a tendency otherwise to pay undue attention to the consequences of a particular construction at the expense of other statutory principles that will more directly assist in ascertaining the meaning of the actual language used. Obviously, the result is important, no matter what determination is being made or how it is made. Generally, if the result is bizarre, the reasoning in arriving at it was flawed. In any case when reasonable alternative choices are involved, the result of particular choices is an excellent testing place for determining whether proper choices were made. However, the point of this Article is that the result should not be the starting point around which all the reasoning revolves, but instead it should be used to test the choices made and the reasons for those choices.

A judge should candidly explain the choices that are made and the reasons for those choices. The reasons should be substantive ones, specifically described so that a reader can ascertain the real motives for the choice. If explained in that way, the values behind the choices can better be explored and evaluated. There is a disturbing tendency simply to use legal labels or conclusory statements as a substitute for reasoning and explanation. These types of "explanations" add little to the understanding of the choice or the motives behind the choice. There should never be hidden motives. A judge always should be willing to state the real reasons behind the choice. If a judge is in a position in which there is a reason that he or she is unwilling to state, the reason should be reexamined. I find no place in the aims of the commitment

² See OHIO REV. CODE ANN. § 1.49(E) (Anderson 1990).

to justice and to professionalism for a judge ever to have a hidden agenda. One type of a hidden agenda is that a certain result should be obtained in a particular case even though logic and reason, properly applied, will not support that result.

All choices are value laden. In the long run justice is much better served if the values behind a choice can be articulated and tested in the legal marketplace. Reasoned decisionmaking, candidly explained, will serve that process well.

This Article does not purport to discuss all of the proper ways in which judges can and do make reasoned decisions. The main emphasis of this Article is that judging should be reason oriented rather than result oriented, even though the result is the main object of the litigants. The result may not fit the judge's sense of justice because it may be dictated by choices that a higher court or legislative body has already made, which are binding on the court, or by the logical application of established legal principles.

Justice is often elusive because truth is elusive. Truth is how things really are rather than how we may think they are. Justice is elusive because self-interest plays so large a part in the formation of our laws. In the long run uniformity and development of better laws and principles of justice will be served by the willingness of a judge to apply a method of reasoned decisionmaking, rather than a personal sense of justice, to the decisions that the judge is called upon to make.