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Appellate Review of Trial Court Discretion

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APPELLATE REVIEW OF TRIAL COURT DISCRETION

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All appellate Gaul, the trial judge would say, is divided into three parts: review of facts, review of law, and review of discretion. Of these, you're going to hear at other sessions about review of facts and review of law. At this one, you will hear something about the review of discretion.

Discretion is a pervasive yet elusive concept in this context. Despite its pervasiveness, it is hard to grasp hold of just what it means in day-to-day practice. Its pervasiveness can be illustrated quickly. Discretion arises in substantive matters such as custody of children. The question of which party will receive custody is often said to be committed to the discretion of the court. It also is much talked about in sentencing, where the duration of the sentence, or none, is committed to the discretion of the court. Then, there are such things as the Alaska fee schedule statute, which declares that unless the court "in its discretion" otherwise directs, fee schedules in cases seeking up to $10,000 in damage will be specified amounts--25 percent of the first $2,000 in a contested case; a lower percentage if uncontested; and so on. The statute runs

through the levels of damage claims up to $10,000, setting forth at various stops the percentage permitted by the schedule--but provides that the court in its discretion may set the fee at a different level. I suppose that a lot of lawyers regard fees as of the essence essential and of the substance substantial. Thus, the Alaska fee schedule is an example of a substantive area of the law in which discretion has a role. In matters governed by procedural rules, discretion is very often at large.

Let me give you four examples, each chosen because of the source in law, or the place where the bestowal of discretion is embedded or implied. First, so far as federal appellate judges' work is concerned, under §§ 1292(b), after a certification is made by the district judge that the three necessary conditions for interlocutory review are satisfied, the statute goes on to say that the court of appeals may thereupon "in its discretion," permit an appeal. Presumably there are standards and guidelines which the appellate court invokes in exercising its discretion to allow an appeal under §§ 1292(b), once the three necessary matters have been certified by the district judge. At all events,

the point I want to underscore is that discretion can be accorded at times in the "secondary" or procedural sense by statutory provision.

At other times it occurs as an express provision of a rule rather than in a statute. There are many examples of this. One of them is furnished by Rule 39(b) of the Federal Rules of Civil Procedure, which allows a party, who has missed the boat by failing to make a timely demand for trial by a jury, to catch the next boat by making a tardy request for a jury. The rule says that despite "the failure of a party to demand a jury in an action in which such a demand might have been made as a matter of right, the court 'in its discretion' upon motion may order a trial by jury of any or all issues." Please concentrate on the phrase, "in its discretion." When appellate judges find themselves reviewing an order of the district court granting or denying a trial by jury under Rule 39(b), does it make any difference that the rule specifically uses the words "in its discretion," instead of reading, as it might: "Despite the failure of a party to demand jury trial in an action in which such a demand might have been made as a matter of right, the court upon motion for good cause

shall allow the trial by jury"? Would the substitution of the words "for good cause," or "in the interest of justice," or some similar phrase, change the mode of reviewing the district court's order; in short, is there magic in the word "discretion"?

A third way to raise the issue of review of discretion is to find a procedural rule in which appellate decisions have interpolated the idea of discretion. I once searched the Federal Rules of Civil Procedure from start to finish to discover how many times the word "discretion" occurs. It turned up only ten times. Yet if one reads the decisions of the United States Courts of Appeals and reviews the major treatises, one finds at least forty procedural situations in which the courts of appeals have construed a rule to grant discretion to the district court. The decisions have recognized discretion in the ten rules in which it explicitly appears and additionally in at least three times as many rules in which there is no reference to the word. That would lead you to think that it is not important whether discretion is expressly written into the rule or not. Rather, it depends on whether the appellate courts think it should have been there.

Finally, there are situations in which there is no formulary rule governing the situation or the issue, and yet judicial decisions have established that discretion over the matter is lodged in the trial judge. A prime example of this is raised by the issue of whether jurors may take notes during the course of the trial. A recent survey by a Columbia student publication found that, legally speaking, there are three settings for juror notetaking. A dozen states allow it expressly; two states, Pennsylvania, and apparently, Louisiana, say it is prohibited; and, the survey goes on, in the federal courts it is up to the discretion of the trial judge whether the jurors may take notes. Cases are cited and quoted copiously for that proposition.

What all this amounts to is that one can support the existence of discretion in the procedural review sense by referring to express language in statutes and rules, by judicial interpretation of rules that are silent on the matter, and by decisions in common law areas that are not subject to formal rules. Now all that is by way of saying that this is an important subject to keep an eye on. It is important to try to think about the concept systematically even though discretion is

an elusive idea, and is hard for the mind to embrace or apply in a coherent way. It is therefore difficult to state systematically what is being done about review of trial court discretion or what ought to be done about it, but my job is to try to speak to both subjects.

The basic idea that discretion conveys is choice. That is the core meaning of the term. Borrowing from H. L. A. Hart and some others, I think it is helpful to view discretion as having two dimensions: one is the primary sense--what I'll call "decision-liberating" discretion. The other is the secondary use. This is the one I shall be focusing on particularly during this discussion: it is the "review-limiting" use of discretion. To repeat, there is decision-liberating discretion and there is review-limiting discretion. I have intimated what types of situations are covered by each. If a jury is not given any standards to follow in deciding whether to recommend life imprisonment instead of the death penalty in a capital case, it is to that extent liberated from rules that constrain its decision. Whenever the rules of substantive law do not constrain decision, we have discretion in its primary sense. This is what has been called "umpire's discretion." The

official can make up the rules as he goes along. Children playing games do this. They sometimes make up the substantive rules of the game as they play or try to. In the law, we are not used to leaving matters as fluid as that; yet, as has been pointed out, in sentencing and several very other important areas of the law, including the award of custody of children, there are no fixed and firm standards for the substantive decision.

An Alabama court once said that a judicial act is said to lie in discretion "when there are no fixed principles by which its correctness may be determined." That's a reference to primary discretion--the absence of any fixed principles by which to decide. But it is the other type of discretion--the review-limiting kind--that provides the main theme of these remarks and I now address myself to that matter.

In 1923 the Delaware Supreme Court said that an exercise of discretion by a trial judge may be erroneous but still be legal. Now, think about that and think of trying to convey that idea to a layman. A lay person would think that erroneous means wrong, that is, illegal. On the other hand, "legal" means lawful,

that is, right. A nonlawyer might wonder, "How can an illegal exercise of discretion be legal, or a wrong exercise be right?"

Apparently, the Delaware court was speaking from a loftier plane, with its eye turned to the question of the proper hierarchical relationship between an appellate court and a trial court. In that sense--the secondary or procedural use of the term--to be invested with discretion means that the trial judge has what might be termed a limited right to be wrong in the view of the appellate court, without incurring reversal. This is entirely distinct from the question of harmless error. Discretion, in this sense, applies in many circumstances where no one would contend the objectionable ruling was harmless. Nevertheless, the trial judge who makes an order that is protected by the cloak of discretion will not be reversed or modified. In those instances, the appellate courts will allow the trial judge wide scope for decision, free from the normal restraints that apply to legal determinations. The trial judge acting in discretion is granted a limited right to be wrong, by appellate court standards, without being reversed. There are wide variations in the degree of

"wrongness" which will be tolerated. It will be helpful to identify and illustrate these degrees.

Grade A discretion is a type that is virtually impervious to appellate overturn--it is unreviewable and unreversible. The well-known case of Skidmore v. Baltimore & Ohio Railway Co. in the United States Court of Appeals for the Second Circuit in 1948 contains explicit recognition of Grade A discretion. Buzzy Skidmore sued for damages on account of injuries he received while working for the railroad. The defendant asked the judge presiding at the jury trial to submit five special verdicts to the jury, but he refused. After a $30,000 verdict for Skidmore, the railway appealed, complaining of the court's failure to submit special verdicts.

Judge Jerome Frank, for the court, delivered a blistering opinion denouncing the general verdict as a travesty, for "shedding darkness" and giving the jury a chance to disregard the law and practice "juriesprudence" [sic]. He urged that special verdicts should be taken whenever possible. But then he concluded by affirming, because, as he put it, "the federal district judge, under the Rule, has full, uncontrolled discretion in the matter. He may still require merely the old-fashioned general verdict." "Accordingly," he continued,

"we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict...."

We have here a case in which the entire panel of the court of appeals agreed it would have been wise for the trial judge to require special verdicts of the jury. Judge Learned Hand, in a separate concurrence, took pains to say: "I am not one who extols the passional element in our nature, such as a general verdict gives rein to." Thus, although all three appellate judges thought that special verdicts should have been ordered, they subordinated their better judgment and upheld the district judge's refusal to order a special verdict. That is surely an example of Grade A discretion--the kind that gives full, uncontrolled choice to the trial judge who may act, as Judge Frank put it, "for any reason or no reason whatever" in exercising choice.

The same latitude applies to the decision whether to order a pretrial conference under Rule 16. The matter is committed to the trial judge's discretion, and neither ordering nor failing to order a pretrial conference will in itself ever result in a reversal by the court of appeals,

however much the appellate judges think the lower court was wrong not to hold the conference. Now, Rule 16 expressly uses the phrase "in its discretion" in granting power to the district court. But the rule involved in the Skidmore case with regard to special verdicts says nothing explicit about discretion. That did not, however, prevent the trial judge's being accorded Grade A discretion to determine whether or not to order special verdicts, "for any reason or no reason whatever."

Discretion at the Grade B level is illustrated in an Ohio case involving a head-on automobile collision. The defendant offered evidence that the plaintiff's lights were not on as they ought to have been, seemingly persuading the jury of that fact. On the written verdict form the jury returned, this statement by the jurors was added: "We believe that there was negligence on the part of both parties to the accident." Despite that, the trial judge granted the plaintiff's motion for a new trial, saying he believed that the defendant had been at fault and that the plaintiff had not been contributorily negligent. The intermediate court reversed and reinstated the verdict, but the Supreme Court in turn reversed it, declaring that the question

of a new trial was addressed to the trial court's sound discretion: hence, the intermediate court should not have disturbed the trial judge's order merely because it disagreed with the action taken. This type of discretion, which I would label Grade B, comes into play very often: whenever the trial judge rules on a motion for a new trial, whether he grants the motion or denies it. The trial judge often detects something in the course of the trial that leads him to exercise his power as the "thirteenth juror." He may weigh the evidence differently from the jury, or see some other reason for setting the verdict aside. Of course, in the federal courts and other final judgment jurisdictions, a ruling in favor of a new trial is difficult to review. It may not come up on appeal until after the second trial is over; or not at all.

However, even if the trial court denies the motion for a new trial or an immediate appeal is allowed straightaway, the appellate courts usually defer to the trial judge's decision, ordinarily with the explanation that the matter rests in the lower court's discretion.

What grade discretion is involved in the following situation? The plaintiff, Fitzgerald, was suing

under the Federal Employers' Liability Act for the tortious loss of an eye. When the evidence was all in and final arguments were in progress, a blind man with a white cane, not otherwise identified on the record, tapped his way slowly into the courtroom, proceeded up to counsel's table, whispered something to plaintiff's counsel, turned, and tapped his way out of the courtroom. In his summation to the jury, the plaintiff's lawyer said: "The railroad has taken one eye from the plaintiff, Fitzgerald. If he loses the other eye, he will be totally blind." The jury had gotten a pretty good idea of what it means to be totally blind. The defendant moved for a mistrial, but the trial judge refused, saying the case could go to the jury. It did and the jury returned a verdict for the plaintiff.

That case illustrates the trial judge's exercise of discretion to deny a new trial, or a mistrial. Should the ruling be as reviewable as one made as a matter of law and reversible out-of-hand by an appellate court that disagrees with the trial judge regarding the probable impact of the episode on the jury?

In Fitzgerald's case, the appellate court did reverse, finding an abuse of discretion. Thus, the situation is not an example of Grade A discretion, but of some lesser brand.

Finally, as an example of Grade D, extremely dilute discretion, let me give you the scotch case. Before World War II, a firm called the New York Foreign Trade Zone Operators, Inc., was engaged in a very piquant enterprise in New York. It set up a small distillery on a boat in the New York harbor and proceeded to water imported scotch whiskey that was brought onboard. Then the whiskey was exported to benighted places where scotch of feeble proof apparently is consumed. Why the Scots themselves did not dampen their own spirits before they exported the brew the record does not tell, but they didn't.

The New York state liquor authority proceeded against the Operators, who went into court seeking a declaratory judgment that they were entitled to diminish the proof and increase the volume without having obtained a distiller's license as the liquor authority claimed they were bound to do. The lower court refused to grant a declaratory judgment either way, reasoning

that there was an adequate remedy at law. The court thought that if the Operators were sued for an injunction by the liquor authority or otherwise proceeded against, they could make a case by way of defense. The court of appeals of New York reversed and sent the matter back for the issuance of a declaratory judgment. The court conceded that whether or not to declare the rights of the parties was a matter that rested within the discretion of the lower court, but then went on to say, with no apparent embarrassment at all: "If the ground on which the court refuses to exercise discretion is untenable, the discretion has been improperly exercised." That statement seems to water the discretion almost as much as the whiskey: if the appellate court reverses merely because it disagrees with the lower court's ground as "untenable," the effect is to treat the exercise of discretion in the same way as a ruling on an issue of law. In my view, the fact that the higher court does not hold the same view as the trial judge is an insufficient basis for reversing an exercise of discretion, if by that term we mean an area of trial court choice that is shielded from the kind

of searching review that is given to a ruling on a question of law. The case illustrates the most dilute form of discretion conceivable, for the court of appeals approached the question as merely a matter of agreeing or disagreeing with the trial judge's determination.

So it seems there are gradations of discretion that run all the way from Grade A--the type that is said to be uncontrolled and uncontrollable, and the trial judge may select any reason or no reason whatever--down to the low grade, dilute form of discretion illustrated in the scotch case. And there are all sorts of in-between grades.

At times, the trial court's ruling is not accorded any deference at all. This means that whatever discretion once existed or was thought to exist in that area of the trial court's functioning, it has over time become nonexistent. The Lynch case from Iowa is an example. In an auto injury suit against Lynch, when the midday recess arrived on the first day of trial, one of the jurors approached Lynch and said, "I understand you are the Superintendent of the County Poor Farm." Lynch allowed that he was. The juror continued, "I have always wanted to see the County Poor Farm.

Do you think there's any chance I could?" "Sure," said Lynch, "I've got my car here. We can go up right now." They did. Lynch showed Juror Number Four around the poor farm and then invited him to have a bite of lunch. The juror accepted; they lunched together and then returned for the afternoon in court. After a verdict for Lynch, the plaintiff, having learned of the episode, moved for a new trial with a supporting affidavit that related Juror Number Four's adventures at the County Poor Farm. The trial judge made a careful review of the facts about the episode, and declared he was satisfied, from examining the persons involved and their affidavits and from discussions with other jurors, that Juror Number Four had not influenced his fellow jurors in any way by reason of his visit with Lynch. Exercising his discretion, the trial judge said he would allow the verdict to stand. The Iowa Supreme Court reversed on appeal. It recognized that the issue of granting a new trial was entrusted to the trial judge's discretion. Nevertheless, it ruled that a new trial must be had because the impartiality of the jury had to be above any suspicion. It made no difference, the supreme court said, that they were found to be uninfected or uninfluenced by Juror Number Four's visit with the defendant. It still looked bad.

From this case we get a picture of discretion that can be portrayed in rustic strokes. The area of discretion is a pasture in which the trial judge is free to graze. The appellate courts will not disturb the trial court's rulings--depending on the gradation of discretion that applies to the particular instance--but will defer to them. Every now and again, however, a case like Lynch's comes along, and even though it involves an area normally entrusted to trial court discretion, the appellate court calls a halt and cuts away a corner of the pasture. From that point on, it has become a rule of law that anytime a juror consorts with a litigant, pays a visit to his home and partakes of lunch, a verdict subsequently entered for the hospitable litigant cannot be allowed to stand. A new trial must be ordered because the proceeding has been tainted. The result is that a corner of the pasture has been fenced off and placed outside the trial judge's discretion. In other areas of the pasture, the trial judge remains free to exercise discretion.

The usual course is for the trial judge's discretion to be reversed for "abuse" rather than revoked. What are the standards or factors that lead to a finding

that there has been an abuse of discretion? The decided cases are not especially informative. Their idea content and occasion for utterance are at about the same level as the sounds made by my college roommate, who was a boxer. While practicing in the room--shadow boxing and sparring--he would explode with noises like, "ugh! ugh! ugh!" as he threw punches, hitting his shadow opponent. The term, "abuse of discretion," seems to me to be the same sort of phenomenon. It is the noise made by an appellate court while delivering a figurative blow to the trial judge's solar plexus. It is a way of saying to the trial judge, "This one's on you." The term has no meaning or idea content that I have ever been able to discern. It is just a way of recording the delivery of a punch to the judicial midriff. About this, more in a moment.

The next matter to discuss is the "why" of discretion. We know discretion exists and that it is rampant in the hierarchical or secondary sense I have been speaking about. Why should it be permitted in a rule-minded regime such as we like to think the judicial system represents? There are some good reasons and some bad reasons. Starting with the bad reasons, one that was

uttered by a Michigan appellate court some years ago is an excuse commonly heard for catering to trial court rulings. In effect, the appellate court says that it must sign off on a large proportion of the decisions a trial court makes, for otherwise it would never be able to get its work done. Now, that is true; it is correct that an appellate court cannot possibly review or monitor every ruling that a trial judge makes and still get its work done. But the trouble with that reason is that it is nondiscriminating. It could apply to any and every question. It does not offer any guidance as to which rulings should be reviewed and which should not. That leads me to reject it as a useful basis for appellate court deference to trial court determinations.

Another bad reason sometimes offered is that it would demoralize the trial judges if every one of their determinations were subjected to appellate review. In that connection, you may recall what Judge Magruder said. "Never," he urged, "unnecessarily make a monkey out of a trial judge. Remember he may be as good a lawyer as you are." The word, "unnecessarily" is intriguing, but passing that by, there is his sound observation that it is mighty important to the morale

of a trial judge to be free of the sense that three or so appellate judges are looking over his shoulder every time he makes a quick ruling during the course of trial. It surely must be unnerving to have the sense that every ruling one makes under pressure at trial will be subjected to microscopic dissection, with briefs, arguments and time for deliberation, followed by reversal. It does seem necessary that the trial judge have some latitude in making on-the-spot decisions, and one can sympathize with Judge Magruder's caution against demoralizing trial judges. But once again, the reason does not answer the problem, because once again it fails to offer discriminating guidance. That is, it does not link the purpose to the instances when discretion is accorded rather than withheld.

Let me come at this point to what I regard as two good reasons for appellate court deference to trial court rulings. One is the virtual impossibility of monitoring countless rulings that a trial judge makes. This is not because the appellate court lacks time, but because the facts and circumstances involved are so endlessly variable, it is not possible to devise a rule of law or a principle of decision to cover any group of situations.

The matter is analogous to the history of the hardening of principles of equity out of the once shapeless blob called the king's conscience. To see how the growth of discretion replicates the history of equity jurisprudence, consider the problem of Rule 39(b). You will recall that it applies to a litigant's too-tardy demand for a jury to sit in the case. The rule provides that whether the late demand is to be allowed or not rests in the discretion of the trial judge. Many federal appellate courts have reviewed decisions by trial judges, some of which granted, others of which disallowed, late jury demands. An analysis made ten years ago revealed that the trial judge was regularly upheld on appeal, whether he granted or denied the tardy demand. But over the years, in the course of sustaining the trial judge whatever his ruling was, the courts of appeals, bit by bit, identified reasons for ruling one way or the other. The principles that emerged from the constant affirmances on appeal were that a late jury demand will be honored when no prejudice results to the opponent and the moving party can show excusable neglect. The rule as written says nothing about these matters. Yet as time went by, in this area of discretion that

at first appeared wholly uncharted, open to choice, and formless as the chancellor's conscience in ancient times, the appellate courts gained experience with varying forms of the problem and were able to formulate principles that serve as guiding rules.

Similar development can occur in such areas of discretion as whether a witness may be called out of regular sequence or the permissible scope of cross-examination on some subjects. As experience grows, the appellate courts may be able to fashion criteria for discretion that ultimately harden into rules or, at least, into guiding principles.

The other sound reason for catering to the trial judges in areas called discretionary is one I will denominate the "you are there" reason. A classic example is Atchison, Topeka & Sante Fe Railway Co. v. Barrett. Barrett brought an action against the railway company for head injuries he received while working on the railroad. He claimed his injury was manifested by an unremitting sporadic jerk or twitching of his head--a spasmodic torticollis. This started three months after the accident, happened every few seconds, and was uncontrollable and permanent--so he claimed. Although he had not lost time from work and had not sought medical

care until a month after the accident, and although one of his doctors had an unhealthy reputation--he was convicted on multiple counts of false claiming, perjury, and forgery--the jury awarded Barrett $12,500.

After the trial, plaintiff was placed under surveillance by the railway's undercover operatives, who took movies showing the twitching had stopped for a two-hour period, at least. When Barrett learned he was being tailed, his twitching started again and continued until the railway's time to move for a new trial expired. Then, movies again showed he apparently had recovered.

The defendant moved to vacate the judgment for fraud and produced the movies and affidavits about the doctor. The trial judge agreed there were "some strange things" in the case, but denied the motion to vacate the judgment. The court of appeals affirmed, saying: "We are frank to state that had the able trial judge determined that fraud or other misconduct existed to grant appellant relief . . . we would not have disturbed that conclusion, on the record before us."

The court of appeals wrote that the decision on the motion was "peculiarly" in the trial judge's discretion:

> The trial judge saw and heard the plaintiff; saw his twitchings, what they were and what they were not, as did the jury. He saw or heard the other matters relied on by appellant; he felt the 'climate' of the trial. The trial judge found no fraud nor misrepresentation. . . . The Court of Appeals should not and will not substitute its judgment for that of the trial court, nor reverse the lower court's determination save for an abuse of discretion.

The "you are there" reasoning conveyed by that quotation is in my opinion the chief and most helpful reason for appellate court deference to trial court rulings. As one trial judge pungently phrased it, he "smells the smoke of battle" and can get a sense of the interpersonal dynamics between the lawyers and the jury. That is a sound and proper reason for conferring a substantial measure of respect to the trial judge's ruling whenever it is based on facts or circumstances that are critical to decision and that the record imperfectly conveys. This reason is a discriminating one, for it helps identify the subject matter as to which an appellate court should defer to the trial judge, and suggests the measure of finality or presumptive validity that should be accorded.

If the time comes when video taped transcripts of trials provide appellate courts almost as good a

vantage point as trial courts on the proceedings appellate judges review, there may have to be a different attunement to these "you are there" situations.

Some years ago, I offered a seminar entitled, "Judging and the Judicial Process." It was intended for students who were to become judges' law clerks and it featured a parade of eminent judges as guest instructors of the week. Judge Henry J. Friendly was the guest one week when the subject under discussion was appellate review of trial court discretion. He handled--and I do mean handled--the subject in the superb fashion you would expect. Apparently, he found the experience useful not many months after, when a case came before his court involving review of the trial court's discretionary ruling on a plaintiff's motion to dismiss voluntarily his own suit. In Noonan v. Cunard Steamship Co. [375 F. 2d 69, 71 (2d Cir. 1967)], Judge Friendly analyzed with characteristic perceptiveness and stated with remarkable succinctness the criteria comprising the appropriate tests for reviewing discretionary orders:

> [T]he fact that dismissal under Rule 41(a)(2) [at the plaintiff's own insistence] usually rests on the judge's discretion does not mean that this is always so. Several of the most important reasons for deferring

> to the trial judge's exercise of discretion--his observation of the witnesses, his superior opportunity to get 'the feel of the case,' see Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216, 67 S.Ct. 752, 91 L.Ed. 849 (1947), and the impracticability of framing a rule of decision where many disparate factors must be weighed, see Atchison, T. & S. R Ry. v. Barrett, 246 F.2d 846 (9 Cir. 1957)--are inapposite when a question arising in advance of trial can be stated in a form susceptible of a yes-or-no answer applicable to all cases. . . .

To conclude. It runs strongly against the grain of our traditions to grant uncontrollable and unreviewable power to a single judge. Accordingly, appellate courts must be most discriminating in according all-out deference to the trial court's discretion. In short, a ruling should be viewed as lying in the area of the lower court's discretion only in the rare situations where the underlying reasons for bestowing it there warrant appellate court deference. A compelling showing should certainly be required before Grade A discretion is bestowed.

My general sense of the matter is that too much discretion in too many areas is now being accorded to trial judges by appellate courts. Whether that estimate is correct or not, I firmly believe that too often, discretion is strewn about quite casually, with no clear

sense as to why it is conferred in the particular situation. The most common example of promiscuous deference by appellate courts is the case in which the reviewing tribunal has before it all the material upon which decision hinges, and still it bows to what it perceives as the trial court's discretion in the matter. Why? When the appellate court has as much before it as the trial judge did, and when the matter is not one of those issues in which the circumstances are so diffuse that no rule or standard can be fashioned, the appellate court should not defer to the trial judge's choice in the absence of some particular and cogent reason for doing so. If any such reason exists, the appellate judges are duty-bound to state it explicitly. By the same token, when claims for discretionary power of a trial judge are seriously pressed on appeal and are rejected, the appellate court ought to explain the denial.

Discretion is an unruly concept in a judicial system dedicated to the rule of law, but it can be useful if it is domesticated, understood, and explained. To tame the concept requires no less than to force ourselves to say <u>why</u> it is accorded or withheld, and to say so in a manner that provides assurance for today's case and some guidance for tomorrow's.

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