

# Journal of Civil Rights and Economic Development

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Volume 12  
Issue 1 *Volume 12, Fall 1996, Issue 1*

Article 8

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## Not Even Dicta

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# NOT EVEN DICTA

HONORABLE STEPHEN J. McEWEN, JR.\*

## I. FOREWORD

“Big Steve,” my dear father, had enjoyed nearly fifty years of life before his admittance to the Bar . . . without a high school diploma, let alone a college or law school degree. My Dad was an adjuster for an insurance company and often served as the bag carrier for “House” lawyers—those attorneys employed by the insurance companies to serve as trial counsel for the company and its insureds. He was eligible for Bar admission because the State Board of Law Examiners in the first half of this century allowed those employed by lawyers for a prescribed period to take the Bar Examination.<sup>1</sup>

Eligibility for admission to the Bar was merely a first step. Gaining admission was a daunting challenge requiring strength and determination. But get there Dad did—at about the same age as I was when in 1981 I took the Oath of Judge of the Superior Court.<sup>2</sup>

\* President Judge Superior Court of Pennsylvania. J.D., University of Pennsylvania Law School; LL.M., University of Virginia Law School. Judge McEwen has served on the Superior Court since 1981 and was elected President Judge by the members of that Court in 1996. He has served on the Pennsylvania Board of Judicial Inquiry and Review and the Pennsylvania Court of Judicial Discipline. Judge McEwen served as District Attorney of Delaware County from 1967 through 1976, was a Professor of Trial Advocacy at Villanova University Law School, and has lectured at Tulane Law School, Widener School of Law, the Bryn Mawr Graduate School of Social Research, as well as the Universities of Bloomsburg, Bucknell, Franklin & Marshall, Penn State and St. Joseph’s.

<sup>1</sup> See PA. BUS. OF COURTS, Rule 200(c)(1). In Pennsylvania, under the old rule, an applicant was required to advertise his intention to apply for admission, pay the necessary fees, and intend to practice in the Commonwealth. *Id.*; PA. B.A.R., Rule 203(a)(1) - (a)(2)(i) (West’s Pennsylvania Rules of Court Pennsylvania Bar Admission Rules Subchapter B). Under the new rule, an applicant must possess an undergraduate degree or have an education comparable to an undergraduate degree subject to the discretion of the board of examiners. *Id.* The applicant also must have received a Bachelor of Law or Juris Doctor degree. *Id.* See generally AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR & NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENT 1996-97 at 16-17 Chart III. Five jurisdictions (Alabama, California, the District of Columbia, Georgia, and Maine) do not mandate graduation from an ABA accredited law school to sit for the bar exam. *Id.*

<sup>2</sup> Judge McEwen was 48 years old when he commenced service on the Superior Court in 1981 after appointment by then Governor Dick Thornburgh.

My Dad relied upon instinct, intuition and wits every bit as much as knowledge of the law. He believed that once you hit the courtroom, there were two factors: the facts and the judge; let the big firms rely on the law. The facts were usually an obstacle despite his remarkable skills at adjusting the facts through pre-trial witness interviews (especially of police officers). The important question for him was: *Who's the Judge?* Implicit in this consuming concern are the questions: *What kind of person is the Judge? How does the Judge think?* The answer, of course, controlled the intensity of the subsequent "judge shopping" effort.<sup>3</sup>

Thus it is that, with a wink toward Heaven in gratitude for a thousand lessons, we present a set of expressions so that one may know the notions that guide, when possible, the musing of this appellate jurist during the reflection that precedes ruling, and thereby gain an impression of what kind of person the judge is and how that judge thinks.

My Mother, the cherished Helen Dorothy Maloney of Bethlehem, Pennsylvania, would have preferred a more astute and profound jurisprudential undertaking, but this appellate jurist, fearful that the intellectual pickings of his own writings would be too lean, undertook instead, in honor of his father, to reveal, (however irreverent or politically incorrect) through these excerpts of

<sup>3</sup> See *Jones v. City of Buffalo*, 867 F. Supp. 1155, 1163 (W.D.N.Y. 1994). The court expressed disdain for various methods used to judge shop, warning that it allows the litigants to subordinate the legal process for their best interest. *Id.*; *Cheeseman v. Carey*, 485 F. Supp. 203, 215 (S.D.N.Y.), *remanded*, 623 F.2d 1387 (2d Cir. 1980). Shopping for a more favorable judge the way one searches for a better forum is discouraged by rules and decisions as much as possible. *Id.*; see also J. Stratton Shartel, *Legal Experts Divided on Impact of Judicial Disqualification Decision*, 7 No. 1 INSIDE LITIG. 1, 27 (1993). Judge shopping has existed in a variety of forms, the most common of which is to file in specific courts known to be favorable to the position being argued. *Id.*; Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1099 n.119 (1996). If an attorney may change judges on demand, it invites forum shopping which will bring inequity to the judicial process. *Id.* The Federal Rules regarding recusal of a judge reflect the concern regarding judge and forum shopping. *Id.*; Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 618 (1987). Judge shopping is a major force behind the strict adherence to case law doctrine. *Id.* See generally *Hanna v. Plummer*, 380 U.S. 460, 468 (1965). The *Hanna* court was faced with a situation where the Federal Rules of Civil Procedure did not apply in a diversity case. *Id.* The Supreme Court utilized the "twin aims" of *Erie*—the discouragement of forum shopping and the avoidance of inequitable administration of the laws. *Id.*; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 73-74 (1938). The purpose behind diversity jurisdiction was for the equitable administration of justice but when "federal common law" was applied, inequality between citizens and non-citizens took root, leading to forum shopping. *Id.*

published and record expressions, what this particular Judge thinks. . . and feels. . . and favors . . . and even abhors.

Thus, what follows is *not even dicta*.<sup>4</sup>

## II. THE BILL OF RIGHTS

### A. Search and the Citizen

The precious balance.<sup>5</sup>

Judicial examination of a challenge to a police search requires the court to balance the competing needs of society. On the one hand, the need of every society, including our free society, to provide for enforcement of its laws and thereby enable the preservation of the common weal is intrinsic to the existence of any society. That need in our society is, of course, described in constitutional parlance as the "police power". On the other hand, the quite decisive restrictions upon the "police power" imposed by the founders and framers in the Bill of Rights bespeaks their keen awareness of the awesome nature of the "police power". The specific role of the courts then is to balance the right of society to implement its police power against the right of a citizen to be free of police intrusion. This challenging task requires the courts to balance those competing rights and then to discern: what is "reasonable" - a term which, with its kin "fairness" and "due process", defies definition, but demands determination.<sup>6</sup>

<sup>4</sup> Editor's Note: This condensed article contains excerpts from opinions by Judge McEwen concerning solely the Bill of Rights and judicial deference. The complete article, containing expressions by Judge McEwen on the subjects of: vested interests, retribution, the FBI, informers, the Post Conviction Relief Act, the federal bench, punitive damages, the press, pragmatism, and judicial expression, is on file with the author.

<sup>5</sup> See U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.* See generally *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). In the context of Fourth Amendment jurisprudence, the actions of law enforcement officials are evaluated based on the extent of the intrusion on the individual's interest compared to the promotion of government interests. *Id.*; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). A law enforcement practice is evaluated based on "the individual's Fourth Amendment interest against its promotion of legitimate government interests." *Id.*; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). The thrust behind the Fourth Amendment analysis is that the procedures are objectively reasonable. *Id.*; *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 528 (1967). The review of law enforcement activity is "to safeguard the primacy and security of individuals against arbitrary invasions. . . ." *Id.*

<sup>6</sup> *Commonwealth v. Martinson*, 533 A.2d 750, 755 (Pa. Super. 1987), *appeal denied*, 557 A.2d 340 (1989).

## B. Human Rights

An especially precious balance.<sup>7</sup>

The Bill of Rights in the Sixth Amendment to the United States Constitution mandates "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The Constitution of the Commonwealth of Pennsylvania proclaims in Article 1, Section IX: "In all criminal prosecutions the accused hath a right . . . to meet the witness face to face . . . . There is no more scarlet "A" than that branded upon the abuser. An accusation of incest, or other sexual abuse upon a child, hurls the accused into the deepest, darkest abyss where the lash of shame and scorn is matched only by the cries of the furies for vengeance. It is, therefore, of no consequence that the accused confronts these charges in the family forum and not the criminal court. Thus, the constitutional right of appellant to confrontation is firm and certain.

Every bit as firm and certain, on the other hand, is the human right of the child to be free of the trauma of appearance in court and exposure to the torment of savage cross-examination. Human rights are inherent elements of the moral order, and while philosophers may differ as to a precise definition of human rights, and legal scholars do not always agree as to what may be designated a human right, they are of one mind that the advent of mankind and of the moral order were simultaneous. That moral order is manifested in and by the laws of humanity. Those laws of humanity confer human rights upon each individual simply because he or she is a human, and not by reason of any legislative enactment, executive decision, or court decree - nor even by constitutional mandate or decisions of the majority. Constitutions are to be

<sup>7</sup> See *California v. Green*, 399 U.S. 149, 158 (1970). Three purposes of the Confrontation Clause are to ensure that witnesses testify under oath, that witnesses be subject to cross examination, and that a jury can view the witness to weigh the witness' credibility. *Id.*; Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 71 (1992). The approach taken by the Supreme Court in *California v. Green* serves as the standard for issues related to the Confrontation Clause. *Id.*; cf. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980). A jurisdiction's interest in law enforcement can compromise the right of an accused to be face-to-face with witnesses. *Id.*; *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The right to cross-examine witnesses in face-to-face confrontation is not an absolute one but rather is weighed against competing governmental interests. *Id.*; *Mattox v. U.S.*, 156 U.S. 237, 243 (1895). The right to confront witnesses according to the Sixth Amendment is not an absolute right and could give way to strong public policies and the necessities of a particular case. *Id.*

revered, and enacted laws deserve respect, provided, of course, that their provisions do not clash with human rights.

The founders of our nation considered such human rights so critical that they proclaimed at the outset of the Declaration of Independence:

When in the Course of human events it becomes necessary for one people . . . to assume . . . the separate and equal station to which the *Laws of Nature and of Nature's God* entitle them, . . . they should declare the causes which impel them to the separation. We hold these truths to be self evident, that *all* men are created equal, that they are endowed by their Creator *with certain unalienable Rights* . . . (emphasis supplied).

The Bill of Rights extended explicit guarantees of certain human rights, and declared in the Ninth Amendment that the Constitution was not to be considered a delineation of all human rights, because certain rights of "the people" are inherent and, while worthy of constitutional protection, require not expression there. Surely the human right of a child to be free of the trauma of the circumstances attendant a court appearance is such a human right and is as firm and certain as any of the rights guaranteed in the Bill of Rights.<sup>8</sup>

### C. Trial By Jury

The most precious right of all.<sup>9</sup>

The right to a trial by a jury is zealously guarded because the benefits of a trial by jury are not simply theoretical but have through the centuries proven so real as to become self-evident. As a result, our trust in the value of the jury verdict in resolving the type of factual issue here presented—as distinguished from a verdict upon a complex question of medical or product liability—should be near absolute. The founders concluded that a band of the citizenry—peers, says the Magna

<sup>8</sup> *In Re Tina K.*, 568 A.2d 210, 213-14 n.2 (Pa. Super. 1989).

<sup>9</sup> See U.S. CONST. art. III, § 2, cl. 3. "The trial of all crimes, except in cases of impeachment, shall be by jury." *Id.*; U.S. CONST. amend. VI. All defendants in a criminal prosecution are entitled to a trial by jury. *Id.*; U.S. CONST. amend. VII. The right to a trial by jury is preserved for matters exceeding \$20. *Id.*; *Callan v. Wilson*, 127 U.S. 540, 555 (1888). The Supreme Court noted, in dicta, that petty offenses would not entitle the accused to the right of a jury trial. *Id.*; see also *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974). A dividing line where criminal trials necessitate juries are offenses carrying punishment of more than six months. *Id.*; *District of Columbia v. Clawans*, 300 U.S. 617, 628-29 (1937). The degree of severity of punishment needed to invoke the right of trial by jury is to be determined "by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." *Id.*

Carta—is naturally suited to the task of resolving factual disputes, whether the difference in testimony be innocent or influenced by personal interest; in addition, of course, it is an obvious and certain fact that the court room cause—whether it be of an accused or of a litigant—is, if not prudently never left to the sovereign, always more wisely entrusted to the people than to the government or any of its branches.

Once we acknowledge that the value of the jury system is not mere premise but fact, it naturally follows that the verdict of a jury should be considered to be controlling and final. While it is undisputed that a safety valve is necessary and that a trial judge should be able to reject a verdict, that safety valve should be triggered only when there is a gross disparity between the verdict and the evidence or there has been gross and harmful error. Neither of those tests are here met.<sup>10</sup>

. . . and how well the jury system works.<sup>11</sup>

Constitutional scholars have proclaimed that the right of a citizen to a trial by jury is the single, most indispensable device of the system of justice in a free society. The observation has been made that the jury system permits the *Goddess of Justice a glimpse from beneath her blindfold*. Certainly it is beyond dispute that a trial by jury is the purest method of resolving a factual dispute. It is most reassuring to witness how generally well juries carry out their appointed task. The duty of the jury in the instant case was to determine if the occurrence was the fault of appellant and/or the fault of appellee, or if it was an accident for which fault and responsibility should not be placed on either driver. And for whatever part such notions as negligence, contributory negligence, negligence per se, unavoidable accident and strict liability, as well as the distinctions among them, might have played in the deliberations and decision of the jury, our review of the record indicates that the issue was a classic question for a jury decision and that the jury performed its duty well.<sup>12</sup>

<sup>10</sup> Saylor v. Rose, 466 A.2d 686, 690 (Pa. Super. 1983) (McEwen, J., dissenting).

<sup>11</sup> See Jacob v. City of New York, 315 U.S. 752, 752-53 (1942) (noting right to jury trial is so important it must be "jealously guarded by the courts"); see also Palko v. Connecticut, 302 U.S. 319, 325 (1937) (observing that while they may not be indispensable, trial by jury has "value and importance"). See generally Duncan v. Louisiana, 391 U.S. 145 (explaining that history of protection given to right to jury trial is illustrative of fundamental nature of right), *reh'g denied*, 392 U.S. 947 (1968).

<sup>12</sup> Bumbarger v. Kaminsky, 457 A.2d 552, 555-56 (Pa. Super. 1983) (emphasis supplied).

#### D. *Balancing the Rights*

Totality of circumstances . . . the standard of common sense . . . an apt constitutional balance.<sup>13</sup>

I am obliged under the McCutchen Rule—the interested adult rule—pronounced by the Pennsylvania Supreme Court in *Commonwealth v. McCutchen*, 463 Pa. 90, 343 A.2d 669, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1147, 47 L. Ed.2d 341 (1975), to join in the very able majority Opinion but am nonetheless dismayed that we may not consider the totality of the circumstances in such cases and must instead employ a narrow, rigid per se rule of exclusion. *Commonwealth v. Henderson*, 496 Pa. 349, 437 A.2d 387 (1981). The United States Supreme Court has made clear that the Federal Constitution does not mandate so unyielding a requirement as the McCutchen Rule. See *Fare v. Michael C.*, 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed.2d 197 (1979). So rigorous an approach seems, in a word, unreasonable. Our society is far better served—while still adequately protected from the intrusion of government—by a criminal justice system that achieves the goal of fairness. Thus, while the citizens of this Commonwealth would be far better served by application of the totality of the circumstances rule in such cases as we here examine, this court has no alternative but to comply with the edict of our Supreme Court in *McCutchen*, *supra*.<sup>14</sup>

The courts are not the theatre of the absurd.<sup>15</sup>

<sup>13</sup> See *Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996). The “totality of the circumstances” test de-emphasizes strict rules and allows flexibility to scrutinize potentially relevant facts. *Id.* See also *Moorman v. Kentucky Higher Educ. Assistance Auth.*, 44 B.R. 135, 137-38 (Bankr. W.D. Ky. 1984). There are circumstances in which applying mathematical equations will not adequately answer questions and a circumstance test is needed to adequately serve the goals of equity. *Id.* See generally, *Harris v. Forklift Systems*, 510 U.S. 17, 23 (1993). When determining the overall atmosphere of the workplace, more accurate determinations can be made by observing all the relevant circumstances rather than applying a bright line rule. *Id.*; *Schnecko v. Bustamonte*, 412 U.S. 218, 227 (1973). In the context of determining whether a search was voluntary, a factual analysis, rather than any bright line formula, is more effective and therefore in these instances the “totality of the circumstances” test should apply. *Id.*

<sup>14</sup> *Commonwealth v. Carr*, 466 A.2d 1030, 1035 (Pa. Super. 1983) (McEwen, J., concurring), *reargument en banc denied*, 486 A.2d 1328 (1985).

<sup>15</sup> See Louis S. Muldrow & William D. Underwood, *Application of the Harmless Error Standard to Errors in the Charge*, 48 BAYLOR L. REV. 815, 823 (1996). Often for the sake of adhering to technicalities, a reversal for minor error leads to absurd results. *Id.*; see also Dick R. Schlegel, *The Evolution of Harmless Error in Iowa: Where Do We Go From Here?*, 43 DRAKE L. REV. 547, 550 (1995). Often the reversal based on error committed at the trial level was so trivial as to invite an absurd result. *Id.*; *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). The rule established in *Kotteakos* was that the error must be substantial to reverse a trial court determination. *Id.*

It is only when appellate scrutiny of the entire record results in the conclusion that prejudice has occurred, that such an omission can rise to a defect and the voidable should become void.

The division of appellate thought upon this issue is, perhaps, a reflection of the philosophic difference that distinguishes those devoted to revision from those committed to tradition. While we have, in recent decades, witnessed urgent, very necessary and beneficial changes in the criminal justice system, e.g., the right to counsel, the zeal of some revisionists has caused them to race to establish requirements that defy common sense as well as sound jurisprudence, as if to frantically expiate a sense of guilt for shortcomings that were too long present but have now been corrected. While the judiciary is not to be stampeded by public opinion, neither is it to be oblivious to currents flowing within the citizenry. Even the cloistered must hear the cry of the citizenry in distress over what is perceived to be unsound excesses. And however heartened they may be at the personal pronouncement of Chief Justice Eagen that he refuses "to join in any decision which reverses a plea of guilty solely on super-technical grounds", *Commonwealth v. Ward*, supra 483 Pa. at 59, 394 A.2d at 537, that declaration becomes mere solace since it was but an expression of a minority view.

It would approach absurdity for us to here rule that the failure of the trial judge to advise of the need for jury verdict unanimity rendered the colloquy inadequate, defective and void, thereby requiring this matter to now proceed through a trial.<sup>16</sup>

Ritual should never trump reality.

The esteemed author of the majority view quite aptly expresses the principles which presently prevail and require this Court to conclude that appellant must be permitted to withdraw his guilty plea. I write but to echo my conviction that a bald assertion of innocence should not by itself constitute fair and just reason for allowing appellant to withdraw a guilty plea prior to sentencing but, instead, that: "a pre-sentence assertion of innocence may compose the required "fair and just reason" provided that the totality of circumstances reflected by the record does not establish otherwise." Com-

<sup>16</sup> *Commonwealth v. Anthony*, 453 A.2d 600, 604 (Pa. Super. 1982), *aff'd*, 475 A.2d 1303 (1984).

monwealth v. Cole, 564 A.2d 203, 208 (Pa.Super. 1989) (concurring opinion by McEwen, J.). Such a standard would more wisely serve reason, not to mention the citizenry, without intruding upon the fundamental rights of those defendants who present a valid basis for withdrawal.<sup>17</sup>

### E. Equality

Government must rise above the biases of its people.<sup>18</sup>

Equal justice for all is not simply an expression of boast, it must be, as well, a *declaration of goal*. And so it is that this Court is here called upon to interpret and execute the mandate issued by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986). [The exclusion of potential jurors based solely on race is prohibited.]

\* \* \*

Only the uninitiated will deny that some proportion of prosecutors are disposed to preclude blacks from service as jurors. Those prosecutors argue that the practice of such bias by the prosecution is but an exercise in advocacy to which they are compelled because (1) blacks are less conviction minded than other discernible segments of the populace, and (2) there exists on the part of black jurors an inbred bias in favor of black defendants. Aside from the sociological repugnance of these assertions, such a rationale merits but summary rejection since it ignores the quite fundamental precept that a government of the people must not be permitted to display any of the failings of her people. And, of course, that explanation also overlooks the mother's knee adage that two wrongs do not make a right.<sup>19</sup>

<sup>17</sup> Commonwealth v. Rish, 606 A.2d 946, 948 (Pa. Super. 1992).

<sup>18</sup> See *McCrary v. New York*, 461 U.S. 961, 968-69 (1983) (Marshall, J., dissenting to denial of *cert.*). Peremptory challenges are protected so long as the power granted by them is not utilized in an unconstitutional manner. *Id.* These challenges cannot be used so as to give rise to discriminatory practices in the courts, otherwise the judicial process would be giving effect to such biases. *Id.*; *Ballard v. United States*, 329 U.S. 187, 195 (1946). The exclusion of a specified class of potential jurors raises concerns about how effective our system of jury trials can operate. *Id.* Preventing women and minorities from serving on juries effectively prevents democracy as it was envisioned by the Framers of the Constitution and therefore should not be given effect. *Id.*; *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). Singling out minorities for the purpose of their exclusion to sit on juries would be using the law to effectuate the prejudices of those who seek to withhold this right. *Id.*

<sup>19</sup> Commonwealth v. Jackson, 562 A.2d 338, 359 (Pa. Super. 1989) (McEwen, J., dissenting), *appeal denied*, 578 A.2d 926 (1990).

## III. DEFERENCE: THE VERBAL BOUQUET

A feature of interest to many who have been witness to congressional proceedings, both in the Senate and in the House, is the custom of using terms of respect and phrases of admiration whenever one member of either chamber refers to another member.<sup>20</sup> That custom calls for use of terms of respect and esteem even when there is, in fact, a far less than cordial relationship between the two members.<sup>21</sup> Such courtliness is admirable because it imposes an atmosphere of civility upon the proceedings, and, as well, enhances the dignity of the institution of the Congress.<sup>22</sup>

Thus, when I commenced upon the career of judging, I borrowed the custom of the Congress and commenced upon the practice of deference when referring to a judicial colleague, whether upon the trial or appellate bench.

The *distinguished* [trial judge] was without the benefit of these recent holdings which compel us to conclude that utilization of the statement at issue resulted in more than mere *de minimis* prejudice and, indeed, as [the trial judge] notes in his

<sup>20</sup> The members of Congress often refer to their "distinguished" colleagues as such and often give deference to the "gentleman" or "gentlewoman." See, e.g., 143 CONG. REC. H1189-07, H1189 (daily ed. March 20, 1997) (statement of Rep. Pelosi). The first words spoken in hearings by a speaker are often to thank a gentleman for yielding the floor by referring to them as distinguished followed by their title and state of origin. *Id.*; 143 CONG. REC. H1192-01, H1193 (daily ed. March 20, 1997) (statement of Rep. Armey). Rep. Armey, was referred to by the prior speaker as "the gentleman" for yielding the floor even in a debate on abortion rights. *Id.*; 143 CONG. REC. H989-01, H997 (daily ed. March 13, 1997) (statement by Rep. McCarthy). Rep. McCarthy concluded her remarks by allowing "the gentleman from New York, the distinguished ranking member of the Committee" the time needed by her to speak. *Id.*

<sup>21</sup> See PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 1 (1995). The members of the court before hearing arguments ritually shake hands, despite being known to "shake fists." *Id.*; see also Ruth Bader Ginsberg, *Speaking in a Judicial Voice, in SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* 211 (Susan Low Block & Thomas G. Krattenmaker eds., 1994). In writing an opinion separate from the majority, the tone should be sensitive to the attitudes and beliefs of the other members of the bench. *Id.*

<sup>22</sup> See ABA CODE OF JUDICIAL CONDUCT Canon 3(B)(3) (1990). One role a judge has is to ensure "order and decorum" in proceedings before the court. *Id.*; cf. Ronald J. Gilson and Robert M. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 545 (1993). Many lawyers turn away clients they believe are interested in their services merely to be adversarial to the opposing side. *Id.* But cf. Byron C. Keeling, *A Prescription For Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 31-32 (1993). Rather than cooperate in accordance with the rules, attorneys often engage in practices to stall litigation and "beat their opponents into submission" using the guise that this course of action advances the best interests of their clients. *Id.*

able opinion, the statement was the “chief evidence” of appellant’s guilt.<sup>23</sup>

The expression of position by the author of the majority view is, as her colleagues have come to expect, most perceptive and, as well, persuasive. Thus it is that I rush to concur in the decision of the majority to affirm the judgment entered by the trial court in favor of appellee. I differ, however, with the declaration of the majority that . . . .<sup>24</sup>

The author of the lead opinion has, in his usual manner, provided an insightful analysis of the arguments presented in this appeal, and has as well, expressed his view in a most persuasive fashion. Thus it is that I am most reluctant to differ. Nonetheless, I am compelled to this dissent because . . . .<sup>25</sup>

The issues which confront this Court in this appeal are of such importance and difficulty that unanimity of view is understandably impossible. I can, however, afford to be succinct since my *esteemed* colleagues have so carefully and thoughtfully analyzed these complex and urgent issues. I am compelled to an expression, nonetheless, since I share the view of Judge Cavanaugh that judgment n.o.v. should have been entered on the promissory estoppel claim, while joining the opinion of President Judge Cirillo on all other issues.<sup>26</sup>

The *esteemed* author of the majority view has, in his usual fashion, very thoroughly analyzed the assertions of appellant and quite persuasively expressed the reasons why this appeal must be rejected. I join in the rulings of the majority in every respect save one, namely, I share the concurring thought of our *learned* colleague, Judge Donald E. Wieand, that the offense of aggravated assault followed and was thereby separate and distinct from the crime of robbery.<sup>27</sup>

<sup>23</sup> Commonwealth v. Brady, 487 A.2d 891, 893 (Pa. Super. 1985), *rev'd*, 507 A.2d 66 (1986).

<sup>24</sup> Russell v. Hubicz, 624 A.2d 175, 182 (Pa. Super. 1993) (McEwen, J., concurring), *appeal denied*, 634 A.2d 1117 (1993).

<sup>25</sup> Johnson v. Beane, 616 A.2d 648, 654 (Pa. Super. 1992) (McEwen, J., dissenting), *aff'd*, 664 A.2d 96 (1995).

<sup>26</sup> Paul v. Lankenau Hospital, 543 A.2d 1148, 1165 (Pa. Super. 1988) (McEwen, J., concurring and dissenting), *rev'd*, 569 A.2d 346 (1990).

<sup>27</sup> Commonwealth v. Adams, 504 A.2d 1264, 1273 (Pa. Super. 1986) (McEwen, J., concurring).

I share the view that the statements under discussion were not admissible and that, therefore, a new trial must be granted. I write simply to observe that, as much as I envy the persuasive skills of my *eminent* colleagues who would revise the vicarious admission rule, I would retain the rule in its present form for all of the reasons that have made it traditional.<sup>28</sup>

The standard of review most commonly employed by the appellate courts is to determine whether the decision of the trial court composes an "abuse of discretion" . . . .

. . . . Since this appellate tribunal is a constant witness to the intense and careful study provided by the trial judges of this Commonwealth to the issues which confront them, it seems somewhat inappropriate, when a disagreement with the trial court, even though deep, is but a difference of opinion, to label that difference of opinion "an abuse of discretion."

Thus, the appellate courts might better serve to rely for reversal, in such cases, upon a different label, such as, for example, the phrase—"carefully considered difference of opinion." Such a term does not lose the restriction that we refrain from substitution of our opinion for that of the hearing court. Rather, it simply substitutes a label which more aptly, and, perhaps more sensitively, describes the basis for appellate reversal of the hearing tribunal.<sup>29</sup>

As the foregoing examples reveal, deference once begun, moves rather naturally to practice and even custom. Nonetheless, courtliness is not nearly so uniform a practice in the judiciary as it is in the Congress, as I quickly learned.

It seems that a venerable judge was my colleague upon a three-member panel during my early months as I launched upon the practice of labeling as *distinguished* the trial judge whose ruling was the subject of consideration of our panel. When my veteran colleague, who was held in wide and deep admiration and affection, only concurred in my opinion, instead of joining, I inquired as to whether I could provide such an adjustment to the rationale or the text as would enable him to join fully and not simply concur in

<sup>28</sup> DeFrancesco v. Western Pennsylvania Water Co., 478 A.2d 1295, 1317 (Pa. Super. 1984) (McEwen, J., concurring).

<sup>29</sup> Hanna v. Key Computer Systems, Inc., 562 A.2d 327, 329 (Pa. Super. 1989), *appeal denied*, 574 A.2d 69 (1990).

the result. He quickly counseled that a quite simple adjustment of but one word would do it: "You refer to that trial judge as *distinguished*. He is not. He is a judge in this county and I can assure you there is no redeeming adjective you can lay on him." Well, my colleague was tried and true, and I was brand new, so I deleted the adjective of bouquet.

A few months later, however, the same situation arose. I again contacted my veteran colleague as to whether an adjustment was possible and once again he advised that the trial judge in this case was not eligible for the "distinguished" label. When I called his attention to the fact that this time the undistinguished judge was not from his county, he responded that he's from the county next over, that he knew all of his mates, and that they tell me that he is far from distinguished.

I was concerned that even though my practice of deference was just underway, it was already imperiled. However, that venerable colleague and I soon reached an accommodation: Whenever I used the label *distinguished* or *learned* or *eminent* or the like, but he perceived the judge as otherwise, he would ask me to delete the bouquet only when the judge was from his very own county, and when the undistinguished judge was from another county, he would join in the label *distinguished*, however actually undistinguished the jurist. And, happily, may I tell you that during the several years we served together thereafter, he never again objected.

#### IV. CONCLUSION

The display of deference to colleagues is so prudent as to be urgent. It reflects quite favorably upon the Court as an institution, promotes the collegiality which so nicely conditions the work place climate, and, as importantly, encourages meaningful jurisprudential discussion. While virtue is its own reward, deference in dissent can also be a device to encourage a more open-minded consideration of the rationale of the dissent and to soften criticism when a reviewer is disturbed by the notions of the dissent.

And so it is that . . . I defer!

