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ACCEPTANCE REMARKS FOR THE 2024 DISTINGUISHED SERVICE AWARD FOR LIFETIME ACHIEVEMENT

DELIVERED AT THE E Morty Bankruptcy Development Journal’S TWENTY-FOURTH ANNUAL BANQUET

Thomas L. Ambro

“Thank you for the honor of allowing me to follow those who have so deserved this singular recognition. Until now you have chosen wisely. I say that because I am not in the same league as Harvey Miller, Rich Levin, Elizabeth Warren, and Keith Shapiro, among others. In this context, it is especially an honor to be introduced by Keith. You have my sincere thanks. I express my appreciation as well to the Editorial Board of the Emory Bankruptcy Developments Journal. The work you do, and the way you do it, make us appreciate the great good bankruptcy and reorganization can achieve.

“I often disdain the conferring of awards by repeating a deceased friend’s pejorative description of them as ‘social backscratching,’ especially in the case of judges who receive awards so often because of their position. But this recognition is special, for I share with you a deep respect for, and an abiding interest in, bankruptcy matters.

“That interest came by chance, and I suspect it did so for many of you as well. Indeed, much of my career has played out under the macro-theme of serendipity.

“In early July 1976, Norm Veasey, managing partner of the firm in Delaware I was going to join as an associate—Richards, Layton & Finger—called and asked if I could start earlier than my expected date. I said yes. When I showed up the following Monday, Norm asked if I knew anything about bankruptcy. I replied quickly (like too quickly), ‘Yeah, if a guy can’t pay his debts, he goes bankrupt.’ I laughed, and he didn’t. All Norm said was ‘you’ll learn.’ Awkward!

“So off I went. As noted, this was 1976. The Bankruptcy Act still applied, as the Bankruptcy Code was not yet in play and would not be effective until 1979. In any event, I liked bankruptcy far more than I thought I would. It was a puzzle. In learning it, I was to meet the same frustration one has in starting to play a musical instrument. Little by little, chords were learned, themes of construction became somewhat understood, and a rhythm surfaced through.
“But was I assigned to bankruptcy permanently? I thought I was hired to be a litigator, and bankruptcy did involve litigation. The answer, however, was no. Just two months after I started, I found out my long-term associate assignment was to a partner some thought should have had a sign over his door that read, ‘Abandon all hope ye who enter here.’ It was even worse: I was to do transactional work, not litigation.

“So back I went to Norm Veasey. I began by saying ‘Mr. Veasey.’ He replied, ‘Call me Norm.’ My instinct was to blurt out, ‘Alright, Mr. Norm.’ But for once I resisted the urge to be cute. I told him that I thought I was hired to do litigation but saw that I was assigned to a partner who worked exclusively on transactional matters. I mentioned that I took a UCC course in law school pass-fail, and I dropped it for lack of interest. (As an aside, that was the only course I remember that had even a snippet of bankruptcy, and reading some of the Bankruptcy Act’s sections seemed more abstruse than Jean Paul Sartre’s *Search for a Method.*) In any event, Norm’s response was, ‘Give it a shot.’

“Once again, off I went. Yet I didn’t lose the desire to get into court. And I also didn’t lose the yearning to get back into bankruptcy. Despite the major revisions set to become the Bankruptcy Code, I realized that no one at Richards Layton was concentrating on those changes. So why not me? I began to participate in, even chair, CLE programs that included bankruptcy. I also attended in early February 1982 a bankruptcy CLE program in New Orleans that featured so many people I admired, including George Treister, Ron Trost, and Ken Klee (the last, along with Rich Levin, being the persons primarily responsible for drafting the Code).

“That said, my practice was still primarily transactional, and it became increasingly national, especially for legal opinions in commercial deals. They often require, however, a significant inquiry into the normally off-limits realm of bankruptcy and its effect on obligations undertaken outside of bankruptcy.

“There was another problem, a practical one: Delaware was a bankruptcy backwater. So anything to be done would be on the periphery.

“But all of that changed on December 3, 1990, when Continental Airlines and subsidiaries filed for bankruptcy reorganization in the District of Delaware, followed thereafter by numerous mega filings. I tried to get others in our firm interested in heading up a bankruptcy group, but no one seemed inclined to do so. The head of my Business Department said I should do so if I wanted such a group to exist. So I did. Though I continued my legal opinion practice, I assigned to others most of the transactional matters that came in. Our bankruptcy group
went from a couple of us to somewhere in the low teens by the time I left the firm in 2000 for my current work as an appellate judge. Those ten years were numbingly busy, but we were doing reorganization work, representing both debtors and creditors, at the highest level and with the best counsel throughout America. (I pause to mention two persons in particular who became dear friends: Harvey Miller and Jan Baker.)

“Despite the national attention accorded large chapter 11 reorganizations in Delaware and the financial reward to those involved, becoming a federal appellate judge was my dream. That dream went back to when I was twenty-five years old and argued twice before the United States Court of Appeals for the D.C. Circuit. The first argument was before two then-well known judges—Chief Judge David Bazelon and Judge J. Skelly Wright. The latter was at the forefront of judges who integrated public school systems in America (the first jurist to do so being Chancellor Collins Seitz of Delaware, who later went onto the Third Circuit and became its Chief Judge).

“So here I was, a new judge on a federal Circuit Court of Appeals. I thought I knew how to decide cases. After all, to give as an attorney an opinion to a non-client (such as a bank) on the enforceability of loan documents meant to know what was enforceable and what wasn’t. Moreover, on appeal, counsel write briefs containing their arguments; clerks and I analyze those arguments and the cases cited for support; and we just pick the arguments with the stronger support. That made sense, but only as a generalization. What, other than court opinions, were factors I should consider, and what priorities should I give those factors? I wasn’t sure.

“What follows are lessons I learned from others about the craft of judging. Much is repeated from earlier attempts to put in writing what I have learned, including an article I wrote for Delaware Lawyer magazine in 2018, Thoughts on Appellate Practice. I start with what is quite sound on its face, a book by one of our country’s greatest judicial intellects, former Judge Richard Posner, entitled How Judges Think. In it, Judge Posner sets out nine theories of judicial behavior (though a more apt word might be motivations).

1. “The Attitudinal Theory. Judicial decisions here are best explained by the political preferences that [judges] bring to their cases. The adjective ‘political’ is with a small ‘p,’ presumably

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1 Hon. Thomas L. Ambro, Thoughts on Appellate Practice, Del. Law., Summer 2018, at 8–11.
3 Id. at 20.
because judicial thinking spurred by political leanings is not necessarily the same as partisan political thinking.

2. “The Strategic Theory. This theory is ‘goal-oriented.’ My take is that it understands judicial rationales as means to a result. In other words, the judge starts with a desired result, and the decision process supplies the path to achieve it.

3. “The Sociological Theory. Judicial decisions are shaped by ‘small-group dynamics.’ Because ‘[a]ppellate judging is a cooperative enterprise,’ and judges who are collegial (most are) prefer consensus over dissent if possible, ‘panel composition[s] . . . influence[] outcomes.’ A united outcome may depend on a panelist’s ‘intensity of preference,’ or the tentative preference of a single panelist may meld into a result and rationale that would not occur were that panelist acting on her or his own. If you think this theory isn’t sound, think about another context—that of juries who reach a unanimous verdict despite initial splits in voting.

4. “The Psychological Theory. This theory ‘highlights the importance and the sources of preconceptions in shaping responses to uncertainty.’ Put another way, decisions flow from ‘non-rational drives and cognitive illusions.’

5. “The Economic Theory. In this instance, the judge becomes ‘a rational, self-interested utility maximizer.’ Behavior is ‘the product of hyperrational choice,’ such as wanting decisions to enhance the judge’s reputation, prestige or simply self-respect. Think no further than Justice Oliver Wendell Holmes, Jr., who, when nearly seventy, complained that he had achieved neither the greatness nor recognition he desired as a jurist.

6. “The Organizational Theory. Think of this as the culture of an institution influencing or constraining how in or out of lane a judge swims. She or he exercises independence and discretion

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4 Id. at 30.
5 Id. at 31.
6 Id. at 33.
7 Id. at 31.
8 Id. at 32.
9 Id. at 35.
10 Id.
11 Id.
12 Id.
13 Id. at 36.
within the parameters the institution tolerates. For example, does an appellate court have a dissent-averse culture?

7. “The Pragmatic Theory. Decisions have consequences. They affect not only the parties but also later cases. Judges thus often base decisions on their perceived effects. Being practical is the theme, and it is counterposed by Judge Posner against the blind following of legal authorities piled on each other in briefs and opinions.


9. “The Legalist Theory. Judicial behavior follows a body of ‘preexisting rules found stated in canonical legal materials, such as constitutional and statutory texts and previous decisions of the same or a higher court, or derivable from those materials by logical operations.’ The legalist slogan is ‘the rule of law.’ ‘The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of a case supply the minor one, and the decision is the conclusion.’ All of this might work in routine cases, but to pragmatists like Judge Posner, the theory offers cover for not thinking fully about an issue and ignoring consequences. To him, legalism ‘counts against’ traits aspirationally sought in judges—good judgment, wisdom, and the lessons gained from experience.

“To be sure, Judge Posner’s theories of how judges decide overlap, something he conceded readily. Conjuring ways they blend is easy: a judge’s attitudinal preferences may lead to a desired strategic result; court culture may fit a sociological model; being pragmatic may include the impulse for recognition; sources of preconceptions and blink responses to experiences may be indistinguishable; and applying precedents broadly may be the culture of a court. I could go on. As a lookback, however, the Posner theories are helpful.

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15 POSNER, supra note 2, at 40.
16 Id. (emphasis in original).
17 Id. at 41.
18 Id.
19 Id.
20 Id. at 42.
21 See, e.g., id. at 39.
“But are they as helpful for judges (and counsel for that matter) looking forward to constructing themes of analysis in an appellate case? The answer for me is sometimes, but not often enough.

“I jump off to set out another way to decide cases. It is not my creation. Indeed, as explained below, I no longer know whose creation it is.

“In July 2001, I attended a several-day symposium for new appellate judges at the New York University School of Law. It began on a Sunday evening, and the featured speaker (I believe it was to be the Solicitor General of the United States) was unable to appear. The co-director of the symposium, Professor Samuel Estreicher, by necessity stepped in. He spoke of an article (my guess is it was in draft form) he had recently read concerning the Supreme Court as then constituted. Neither Professor Estreicher nor I can find our notes, and neither of us recalls the author’s name. So all I note now is from recall, no doubt with holes.

“Most important is that what this person wrote has affected to this day the process I employ to decide cases. He (I think the author was a male) noted that newspaper accounts of Supreme Court decisions speak of votes cast by ‘liberal’ and ‘conservative’ justices. He suggested a different viewpoint—that of ‘camps’ of motivation at the Court that primarily affect its decisions—and posited that there were then 4 ½ camps.

1. “The Textualist Camp. The first camp was that of textualism. (As we would guess, it included Justices Scalia and Thomas.) Look at the words of statutes. Do not consult legislative history, as it is not the enacted will of Congress.

2. “The Structuralist Camp. The second is the structuralist camp. Consider the federal-state structure we call federalism. Does the federal government, usually via the Constitution’s Commerce Clause, have the power to legislate on matters states may perceive as within their province? It is the balancing of federal-state relations that underlies this camp. Examples of cases involving such relations are United States v. Lopez22 and United States v. Morrison.23 Though they dissented in these cases, the author placed Justices Souter and Breyer in the structuralist camp for reasons I do not know.

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22 514 U.S. 549 (1995) (Commerce Clause does not authorize creating a federal offense for possessing a gun in a school zone).
23 529 U.S. 598 (2000) (Commerce Clause does not confer the authority to enact the Violence Against Women Act, as gender-based violence is a local issue).
3. “The Pragmatist Camp. The third camp mirrors Judge Posner’s seventh theory of judicial behavior—look at the consequences of what we decide and how that decision will affect future litigants and cases. Above all, be pragmatic. This camp comprised Justices O’Connor and Kennedy (and should have added Justice Breyer if, as I recollect, he was misplaced in the structuralist camp).

4. “The Fairness Camp. The final camp is one we all understand intuitively from a young age—fairness. Is what we are deciding fair to the litigants? The quintessential case here is Brown v. Board of Education,24 outlawing racially segregated schools as violative of equal protection. Justices Stevens and Ginsburg made up this camp.

4½. “The author put Chief Justice Rehnquist outside any particular camp, as purportedly he would borrow from any of them to get to where he wanted. Under Judge Posner’s theories, my perception is that the author would have believed the Chief Justice followed the strategic theory.

“The exemplar for the ‘camp theory,’ either according to the unknown author or Professor Estreicher (I don’t recall), was Apprendi v. New Jersey.25 Mr. Apprendi shot several times into the home of an African-American family that he did not want in his neighborhood. He was charged with and pleaded guilty to, inter alia, possessing a firearm for an unlawful purpose, thus allowing a sentence of five to ten years. The sentencing judge, however, found by a preponderance of the evidence that Apprendi had committed a hate crime under New Jersey law, which allowed an enhanced sentence beyond the statutory maximum. A ten-year sentence thus became twelve.

“The Supreme Court, in a five-four ruling (Justices Stevens, Scalia, Souter, Thomas and Ginsburg for the majority, with Chief Justice Rehnquist, along with Justices O’Connor, Kennedy and Breyer, in dissent), held that the Constitution demands that any fact that enhances a sentence above the statutory maximum (but for a prior conviction not relevant in the case) must be submitted to a jury and proved beyond a reasonable doubt. The lead opinion for the majority was by Justice Stevens, who deemed the holding ‘simple justice,’26 a win for the fairness camp.

“Justice Scalia, the textualist, concurred. The principal reason was the Sixth Amendment’s textual ‘guarantee that [i]n all criminal prosecutions, the accused

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26 Id. at 476.
shall enjoy the right to . . . trial, by an impartial jury,” ‘has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.’  

“Justice O’Connor, the pragmatist, wrote the primary dissent, noting on several occasions how unsettling to sentencing would be the consequences of the Court’s ruling.  

“An example of how this decision framework played out in a bankruptcy case was In re Philadelphia Newspapers, LLC, in which I was on the panel. At issue was whether the cramdown provision in 11 U.S.C. § 1129(b)(2)(A)(ii) is applied literally as written to a forced sale of a debtor’s assets free of its lenders’ lien without permitting the lenders to credit toward their bid at the sale any or all of the debt owed to them. My colleagues on the panel held that the lenders could not credit toward their bid the amount they had already loaned; thus, they could only bid new cash for the assets being sold.  

“I dissented and, in setting out my reasoning, relied on each camp of the framework. I had a different textual reading than my colleagues, noted how other provisions in the Bankruptcy Code provided structural context that fit the cramdown provision ‘as . . . part of a coherent whole’ within the Code, pointed out the dire lending consequences that would result if credit bidding were not permitted, and briefly commented on the lack of fairness were that to occur.  

“I close with a comment to advocates. When seeking cogent themes of arguments, I suggest you consider the unknown author’s ‘camps’ of analysis. (As noted above, you need not confine yourself to one.) For example, in a statutory construction case, text is often paramount. And by analogy to the structure of federal-state relations, the ‘structure’ of a statute like the Bankruptcy Code may also be helpful. For example, if the same term is used in three places in the Code and it is understood the first two times to mean x, then arguably it

27 Id. at 499 (Scalia, J., concurring) (emphasis and alterations in text).
28 See, e.g., id at 550, 551 (O’Connor, J., dissenting) (noting ‘the apparent effect of the Court’s opinion today is to halt the current debate on sentencing reform in its tracks . . .’; ‘perhaps the most significant impact of the Court’s decision will be a practical one—it’s unsettling effect on sentencing conducted under current federal and state . . . sentencing schemes.’; and that ‘the Court’s decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court’s decision today.’).
29 599 F.3d 298 (3d Cir. 2010).
30 Id. at 322–31 (Ambro, J., dissenting).
31 Id. at 331–34.
32 Id. at 336–37.
33 Id. at 337–38.
was structured to mean x the third time as well. (In the canons of construction, this is known by the Latin phrase *noscitur a sociis*—to know by the company it keeps. In effect, you discern the meaning of a term by the context in which it appears.) The consequence of a contrary ruling may cause confusion or a precedent with unintended results in future cases, and to decide your way may comport most closely with fairness.

“What I have set out aids my thinking in deciding cases. I hope it is of some help to you in your legal analysis. I caution that none of what I say means that you should avoid citing key cases. To know the lay of the law is expected. But cite cases only when they are useful. Better time is spent on arguments that meld those cases into credible themes that invite us to consider all aspects of which side should win. If so, we, the appellate process, and the parties it affects, are much the better.

“Thank you once again to Keith Shapiro, to the Emory students who make this school’s work in the bankruptcy world singularly recognized, to the prior honorees, and to those of you who judge or practice in this all-important area of law. It is a privilege to be with you.”