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COLUMN: FROM THE BENCH

A JUDGE **HANGS UP HER ROBES**

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TEXT:

[*60] I retired from the federal bench on August 31, 2011, to join the faculty at the Harvard Law School. I did so for many reasons. At 65, I wanted a new adventure. I had been a litigator for 24 years and a judge for 17, and, for the next phase of my life, I wanted different challenges. (The organization Civic Ventures refers to this as an "encore career.") I wanted to write--in particular, to write about the real experience of being a judge, an experience that looks nothing like the television parody or the tabloid's empty "activist" debate. I wanted to reflect on the extraordinary perch I have had for nearly two decades, especially for a lay audience. I also wanted to speak more freely than judges are permitted to do. I had just published a memoir about my years in law practice (*In Defense of Women*, Beacon Press, 2011); I had more books to complete and a publisher anxious to publish them. I had combined law school teaching and practice from the beginning of my career. Now I looked forward to full-time teaching and felt particularly welcomed to the Harvard Law School faculty.

But there was an additional motivation, which I describe with considerable reluctance; I also left the bench for financial reasons. In effect, my financial concerns were a necessary but not a sufficient reason for leaving. If the other factors had not been aligned, I may not have retired. I had children late in life; the period of my judging coincided with sending my two youngest (of three) to college. By the time my husband and I finished paying tuition, and watched as whatever we had left fell in the December 2008 financial crash, 17 years as a judge had taken a substantial financial toll on our family.

To be sure, our situation does not remotely compare to that of the many citizens who are suffering, jobless and without prospects. It does not compare to the situation of those who are barely surviving with multiple jobs, one paycheck away from bankruptcy. It also does not compare to the perilous situation of state judges whose already paltry salaries are frozen as they are forced to preside over courts in deteriorating buildings with little staff.

I was lucky enough to have career options, and so long as I did, I would exercise them. Indeed, that is the point of this essay.

Low Salaries Lead to Economic Uniformity

Judge Richard Posner wrote that it is not necessary to increase judicial salaries in order to preserve the quality of the bench. His conclusions were supported by the work of his son, Eric Posner, coauthor along with Stephen Choi and G.

Mitu Gulati, of "Are Judges Overpaid?" 1 *J. Legal Analysis* 47 (2009). Their conclusion was that the ranks of the judiciary will continue to be filled with capable individuals, even at current salary levels. There is, in effect, no need to spend more to keep judges from making the decision I have made. Perhaps that has been true until now. But keeping salaries at current levels would also mean a kind of uniformity on the bench rarely mentioned in salary debate--economic uniformity.

Unlike the spouses of other federal judges I know, my spouse did not run a successful business. Quite the contrary; he has spent his life as a public interest lawyer. Neither he nor I have inherited wealth. I spent the first eight years of my life in a tenement on the Lower East Side of Manhattan and then lived in a lower middle class community in Flushing, Queens. I had not amassed a fortune in my private law practice before becoming a judge. I had a successful practice, if measured by my reputation, the breadth of my experience, and the extraordinarily interesting cases I took (recounted in my memoir), but it was surely not lucrative enough to withstand the financial pressures of the past decade.

Economic diversity matters. The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), directs judges to consider whether the allegations in a complaint are plausible, not merely conceivable. This, according to the Court, [*61] is a "context-specific" enterprise that requires a court to draw on its "judicial experience and common sense." What is plausible to me, what my common sense indicates, coming from where I come from, may not be what is plausible to other judges, what comports with their common sense. The determination of when a statute of limitations began to run, as the First Circuit recently noted in *Donahue v. United States*, Nos. 09-1950, 09-1951, 09-1952, and 10-1766 (1st Cir. 2011), is when the plaintiff "knows or reasonably should have known the factual basis for his claim." What is reasonable to my working class relatives, who did not go to college, what information will reasonably alert them to their obligation to sue, may well be different from what is reasonable to a better informed, educated constituency. On another occasion, I spoke to a colleague who described the damages in a particular case as "de minimis." The damages were \$ 5,000. Where I came from, \$ 5,000 was not de minimis. To many in today's economy, that is not a de minimis amount of money.

My financial concerns were a necessary but not a sufficient reason for leaving the bench.

Social Backgrounds and Judging

This is not to say that our experiences prior to becoming judges should determine our decisions, that there is a one-to-one correlation between our social backgrounds and our judging. Obviously not. But these experiences surely shape where we start in our consideration of the issues, the perspective from which we begin the task of judging.

No more thoughtful a commentator than Justice Sandra Day O'Connor said as much when she wrote eloquently of the impact that Justice Thurgood Marshall had on the U.S Supreme Court by dint of his unique experiences of discrimination, of disadvantage, representing the dispossessed and reviled, experiences so different from her own. And I could go on.

But there is another reason why the salary issue raises serious concerns. Like it or not, what we pay judges is a measure of the value that we place on the job. Candidly, the recent debates about judicial pay were demeaning. A student of mine at Yale, a historian in his former life, wrote about the extraordinary antijudge animus of the 1980s, which, he hypothesized, contributed to the mandatory minimum sentencing explosion and a panoply of jurisdiction-stripping legislation. In 1981 and 1982 alone, after one party's platform criticized the "elitist and unresponsive federal judiciary," more than two dozen bills stripping or altering federal courts' jurisdiction were introduced. Several years ago, shortly after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), a high official in the Department of Justice at the time treated an audience of federal judges to a warning: We, federal judges, were like ex-offenders recently released from the jail of mandatory guidelines. If we strayed too far, we would wind up with a legislative "electronic bracelet," and if that didn't work, we would be back in the jail of mandatory minimum sentences. It was a disrespectful speech, however one views the merits of sentencing reform, to which no one in the audience objected.

It is not too much of a leap to suggest that the failure to have even considered judicial pay equity with the executive branch, or to even vote for cost-of-living raises, long before the 2008 financial crisis, continues to reflect fundamentally anti-judge attitudes.

The October 1, 2011, issue of the *Economist* called the judiciary "the Feeblest Branch," woefully underfunded on all levels and facing a crisis in securing meaningful access to the courts. The salaries of federal judges--although better than those of their state colleagues--have risen by only 39 percent since 1991, while the cost of living has increased 50 percent. "Many good judges," the magazine reports, "have simply returned to private practice."

So when I weighed the prospect of new adventures against continuing in the job I loved but in which I struggled financially, the outcome was clear. I suspect other judges will be making the same decision, in greater numbers than ever before. Sadly, life tenure for judges, a singular achievement of this democracy, may well come to mean a lifetime job only for those who can afford it.

GRAPHIC:

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