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Seymour Simon continues to be heard years after he left the bench

The late justice Antonin G. Scalia once said that the shelf life of a great law review article is about five years, while a great legal treatise was perhaps 25 years.

I do not know what the shelf life is of a solo dissent written by a state Supreme Court justice. Yet within the past few months, two separate Illinois Appellate Court cases have approvingly cited two solo dissenting opinions written by the same Illinois Supreme Court justice from 28 and 34 years ago, respectively.

I would wager that those of you who practiced law during the 1980s could probably guess who it was.

If you said justice Seymour Simon, you are correct.

If you are too young to remember him, you should definitely read Jack M. Beermann's article "Jewish Identity and Judging: Seymour Simon of Illinois" (free download at ssrn.com/abstract=2121768).

Simon served on the Illinois Appellate Court for six years before being elected to the Supreme Court in 1980. Beermann describes him as being an "outsider" throughout his career. This is because Simon's fierce sense of justice often put him at odds with colleagues.

Beermann argues that Simon's strong views resulted in his feeling isolated on the court and may have been the reason he retired after only eight years. He died in 2006 at the age of 91.

During his time on the Supreme Court, it was not uncommon for Simon to stand alone as the sole dissenter in a case. The two recent appellate court cases that cite him both deal with solo dissents that he wrote.

The first case concerned a sentencing issue. Levie Bryant was convicted of the Class X offense of being an armed habitual criminal. Bryant could have received a sentence anywhere between six and 30 years in prison. The judge sentenced him to 21 years in the penitentiary.

On appeal, Bryant argued that the sentencing judge did not sufficiently explain his reasons for choosing 21 years as the appropriate sentence. The appellate court, however, held that a sentencing judge had no duty to explain his reasons and thus affirmed the sentence. *People v. Bryant*, 55 N.E.3d 97 (Ill.App. 1 Dist. 2016).

Justice Michael B. Hyman specially concurred. Although agreeing that case precedent supported the judge's decision not to justify the sentence, he wrote separately to encourage judges "to go beyond the precedent" and to always explain their reasons to the defendant on the record.

Hyman begins by noting that that Illinois law already specifically provides that in pronouncing a felony sentence the judge "shall set forth his or her reasons for imposing the particular sentence he enters in the case." 730 ILCS 5/5-4.5-50(c) (West 2012).

But in 1982, the Illinois Supreme Court held that the legislature would violate the separation of powers if the statute were read as mandating how a judge must announce a sentence. Therefore, the Supreme Court interpreted "shall" as merely being directory, rather than mandatory. *People v. Davis*, 93 Ill.2d 155 (1982).

Hyman observes that, unsurprisingly, appellate courts immediately began to affirm sentences even though no reasons were given by the sentencing judge. And the problem is that sentences not supported by articulated reasons lack both "transparency and justification."

Hyman then quotes from Simon's solo dissent in *Davis*. Simon asserted that the problem with a judge not giving a reason for the sentence is that the sentence "may appear to be arbitrary and capricious. Numbers may seem to have been taken out of a hat ... The result will be the creation in the eyes of the public of an imperial judiciary."

Hyman praised Simon's foresight and asked the Illinois Supreme Court to vindicate Simon's position through a new court rule.

And just last month another Simon dissent attracted attention.

Cornelius Carter was charged with aggravated battery with a firearm. Over defense objection, the judge allowed the jury to consider evidence of Carter's attempted escape from a county jail while awaiting trial as evidence of guilt of the crime for which he had been charged.

The 3rd District affirmed the judge's decision, holding that for well over a century Illinois courts have held that evidence of escape is admissible for the purpose of showing a defendant's consciousness of guilt. *People v. Carter*, 2016 IL App(3d) 140196 (modified upon denial of rehearing Sept. 2).

Like Hyman, Justice Mary McDade filed a special concurrence. And like Hyman, she also cited a solo dissent from Seymour Simon in the 1980s to support her position.

McDade conceded that the "consciousness of guilt" concept has long been used to support the introduction of evidence of pretrial escape. But she makes a convincing case that the operation of the doctrine is "circular."

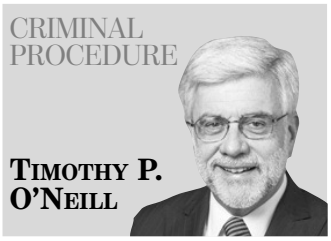
That is because in order to see evidence of pretrial escape as consciousness of guilt, you first have to presume that defendant is guilty of the crime for which this evidence is being introduced.

In other words, the jury has to presume guilt of the offense in order to use the evidence to reach a conclusion that the defendant is actually guilty of that offense beyond a reasonable doubt! As McDade rightly concludes, "That is a logical fallacy."

And Simon saw problems with this type of evidence decades ago. McDade notes Simon's solo dissent in *People v. Gacho*, 122 Ill. 2d 221 (1988). While incarcerated, Robert Gacho wrote to his girlfriend, "I still believe I can escape from here one way or the other."

The Supreme Court held that this was admissible as consciousness-of-guilt evidence. Simon, in solo dissent, noted the ambiguity of this statement: "He may have thought he would be found innocent ... or he may have been thinking of escaping because of harsh conditions in prison." But he could see no necessary connection between Gacho's hoping to leave and his actually being guilty of the underlying crime.

Hyman in his concurrence described Simon as "bold and brilliant." It is always hard to measure the impact any one judge has on the law throughout a career. But the fact that Simon's opinions continue to be cited decades after his leaving the court is an indication of the profound respect his work continues to command.



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