

# LAW AND DELIBERATION

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## I. INTRODUCTION TO LAW AND DELIBERATION

Every day, billions of people make innumerable decisions with respect to almost every facet of their lives.<sup>1</sup> Most of these decisions are made with little or no conscious thought, and thus have been described by many psychologists as *intuitive*.<sup>2</sup> And it

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1. See, e.g., Kathleen D. Vohs et al., *Making Choices Impairs Subsequent Self-Control: A Limited-Resource Account of Decision Making, Self-Regulation, and Active Initiative*, 94 J. PERSONALITY & SOC. PSYCHOL. 883, 883 (2008) (“The rich complexity of human social life is partly attributable to choice. Each day millions of people make multiple decisions. These range from momentous and far-reaching decisions, such as what career to pursue and whether to order the troops into battle, to relatively fleeting and inconsequential choices, such as whether to take another cup of tea or to floss that night.

Moreover, choices have proliferated, increasing the number of decisions people can (and must) make. . . . The coffee shop chain Starbucks, boasted in 2003 that it offered each customer 19,000 beverage possibilities at every store. Similar proliferations of alternatives have occurred with television channels, dating partners, investment options, and in countless other spheres.”).

2. See, e.g., Larry Wright, *Argument and Deliberation: A Plea for Understanding*, 92 J. PHIL. 565, 567 (1995) (“Most of the judgments we make in the course of our lives we reach without deliberating on them at all.”). See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

could hardly be otherwise, lest we be locked in a perpetual state of contemplation with respect to a seemingly endless series of trivial matters.<sup>3</sup>

But some decisions—typically those we regard as most important, if not also the most complex—are the products of *deliberation*, or a careful, conscious consideration and weighing of those factors deemed most relevant.<sup>4</sup> Indeed, most momentous decisions in our lives, including the decision of what we should do with our lives, almost instinctively and intuitively seems to call

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Incidentally, for a review (mostly negative) of Gladwell's book from something of a legal perspective, see Richard A. Posner, *Blinkered*, THE NEW REPUBLIC (Jan. 24, 2005).

3. See Wright, *supra* note 2, at 568 (“So when we do deliberate about a particular judgment, that is, stop and think before accepting or deciding something, the occasion must be exceptional. Too much deliberation is incapacitating, pathological: going over the options in greater and greater detail until the patient dies. The possible objects of deliberation are inexhaustible, so if we are ever to do anything else, or even deliberate productively, we must be very selective.”). See also Vohs et al., *supra* note 1, at 884 (“By some analyses, human life is full of constant choices, insofar as almost every time one acts, one could probably have done something different. . . . [M]uch of the time people proceed by routine, habit, and automatic processes.”).

4. *Webster's Third New International Dictionary* defines “deliberation” as “the act of weighing and examining the reasons for and against a choice or measure: careful consideration: mature reflection.” *Deliberation*, WEBSTER'S THIRD NEW INT'L DICTIONARY (1993). Thus, to “deliberate” is “to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion,” and a “deliberate” act or decision is one “characterized by or resulting from slow careful thorough calculation and consideration of effects and consequences: not hasty, rash, or thoughtless.” *Deliberate*, WEBSTER'S THIRD NEW INT'L DICTIONARY (1993). Accord David Owens, *Deliberation and the First Person*, in SELF-KNOWLEDGE 261 (Anthony Hatzimoysis ed., 2011) (defining “deliberation” as “a conscious, intentional activity whose aim is to resolve a certain question”). See also Wen-Jui Kuo et al., *Intuition and Deliberation: Two Systems for Strategizing in the Brain*, SCIENCE, Apr. 24, 2009 at 519 (“In general, intuition and deliberative reasoning are mental processes with very different properties. Intuition is fast, automatic, emotional, and effortless. Reasoning is slow, rule-governed, controlled, and effortful.”). For a more cynical perspective, see *Deliberation*, THE DEVIL'S DICTIONARY, <http://www.thedevilsdictionary.com/> (defining “deliberation” as “[t]he act of examining one's bread to determine which side it is buttered on.”). Incidentally, though the concept known as “deliberative democracy” shares some things in common with the issues discussed here, this study is primarily concerned with deliberation more generally, whether conducted by individuals or by groups.

for deliberation.<sup>5</sup> Deliberation in such contexts is so pervasive that it appears to be a basic human trait.<sup>6</sup> There seems to be some innate sense that deliberation helps, or can help, lead to better decision-making.<sup>7</sup> These reasons alone make deliberation an interesting and important concept worthy of further study.

Deliberation also holds a special place in the law. The paradigmatic example, of course, is the deliberation performed by a jury (precisely so-called) at the conclusion of a trial to decide

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5. Thus, as summarized by Posner,

There are two types of thinking, to oversimplify grossly. We may call them intuitive and articulate. The first is the domain of hunches, snap judgments, emotional reactions, and first impressions—in short, instant responses to sensations. Obviously, there is a cognitive process involved in such mental processes; one is responding to information. But there is no conscious thought, because there is no time for it. The second type of thinking is the domain of logic, deliberation, reasoned discussion, and scientific method. Here thinking is conscious: it occurs in words or sentences or symbols or concepts or formulas, and so it takes time.

Posner, *supra* note 2 (reviewing MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005)). A more formal (and more sophisticated) discussion of these two types of thinking can be found in Daniel Kahneman's brilliant book, *Thinking, Fast and Slow*, wherein they are described as "System 1" and "System 2." See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 19-105 (2011).

6. Whether deliberation is a *uniquely* human trait, though, while an interesting question, is one that is beyond the scope of this Article. At least one scholar, though, has intimated that it is. See Vohs et al., *supra* note 1, at 897 ("The human self is quite remarkably different from what is found in most other species. . . . [S]elf-control and decision making are central, vital skills for functioning in human culture.").

7. Some have actually gone further in this regard, and have separated the act of deliberation from the other parts of the decision-making process. As one group of scholars explained:

In line with the Rubicon model of action, we conceptualized the process of choice as involving three key phases: deliberation among options, deciding on a plan of action (i.e., making a choice), and implementing the chosen option. Deliberating among the options involves weighing their pros and cons and comparing them and, perhaps crucially, forming an ad hoc preference where none existed. Making the choice requires actually selecting one option and committing oneself to behave in that way. Implementing the choice involves behaviors that execute the previously chosen option.

Vohs et al., *supra* note 1, at 892 (citation omitted). Though perhaps not essential to the discussion here, this Article will nonetheless presume that deliberation typically includes choice-making and implementation, with the caveat that deliberation sometimes will result in no decision whatsoever.

questions of guilt or liability.<sup>8</sup> But this concept also arises in a number of other contexts. For example, some courts have held that in order to get the benefit of the “business judgment rule” (indemnity from liability), corporate directors must deliberate prior to making important decisions on behalf of the company.<sup>9</sup> And a conviction for the crime of first-degree murder often requires that the killing be “premeditated”—i.e., that the defendant had deliberated (however briefly) prior to engaging in the “actus reas” (or relevant criminal act).<sup>10</sup>

Although pervasive in life and law, a decision (conscious or unconscious) to engage in deliberation often leads to further questions: What can we realistically hope to achieve? Does deliberation in fact lead to better decision-making? In all situations? At what cost? And is there a point at which further deliberation may actually be counterproductive?<sup>11</sup> Such questions that behavioral economists and others are beginning to question the utility of deliberation, particularly in situations where time and relevant information are limited (which they almost always are).<sup>12</sup> Cognitive biases and the limits of human understanding also raise significant concerns. It is simply not possible to consider all potentially relevant factors.

This study will therefore include not only a discussion of the possible benefits of deliberation, but also the problems with, or limitations, or costs of deliberation. What can we realistically hope to achieve? Are there times when a decision without deliberation might be superior? This Article will then consider

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8. See discussion *infra* Part II.C.

9. See discussion *infra* Part II.B.

10. See discussion *infra* Part II.A.

Of course, in life, the concept of deliberation is not at all limited to law. For example, Albert Einstein famously constructed his own thought experiments involving trains travelling close to the speed of light to help him formulate his theories of relativity. See JEREMY BERNSTEIN, ALBERT EINSTEIN AND THE FRONTIERS OF PHYSICS 58-60 (1996). But as the title of this Article suggests, for various reasons, the inquiry here will be limited to deliberation in a legal sense.

11. To simplify the analysis, this Article will mostly consider deliberation only at the individual level. Though group dynamics undoubtedly have some interesting effects on deliberation, such effects generally are beyond the scope of this Article.

12. See, e.g., KAHNEMAN, *supra* note 5, at 409 (“The central fact of our existence is that time is the ultimate finite resource . . .”).

the use of deliberation in the legal contexts identified above (juror deliberation, deliberation by corporate officers and directors, and deliberation with respect to the crime of murder), and consider whether and to what extent a deliberation requirement in those contexts makes sense.

Unfortunately, as intimated earlier, there are indeed numerous problems or limitations potentially associated with deliberation or obstacles that inhibit deliberation. One major limitation relates broadly to the concept of “bounded rationality,” which itself relates to at least four separate problems: information, tractability, cognitive limitations, and time.

The first such problem relates to the fact that the relevant *information* needed to effectively engage in deliberation might be limited, incomplete, or in a state of flux. The ability to conduct further research might also be limited.

Second, there is the *tractability* of the problem. Some problems are simply not well suited for deliberation.

Third, there are the *cognitive limitations* of the human mind (not to mention the fact that some people are better deliberators than others).

And fourth, there is (again) the problem of *time*, and its extraordinarily limited nature.

And there are at least three other problems that potentially can prevent one from obtaining the full benefits that might otherwise be obtained through deliberation: experimentation, rumination, and rationalization.

The first is that one is often unable to engage in *experimentation* to test the tentative conclusion reached.

Second, the would-be deliberator might not be able to reach a decision, and instead engage only in *rumination* (which is itself a decision, albeit one that could be reached without deliberation).<sup>13</sup>

And last, deliberation sometimes can result in nothing more than *rationalization*.<sup>14</sup> A person might decide that one’s initial

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13. “Rumination” (which more literally refers to “the act or process of regurgitating and rechewing previously swallowed food.”) in this context, means an “obsessive or abnormal reflection upon an idea or deliberation over a choice.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1987 (1993).

14. “Rationalization” may be defined here as “the provision of plausible

hunch is in fact correct simply as a result of having thought about the matter further.<sup>15</sup> Or, rather than resolving the issue, some will reach a decision just for the sake of reaching a decision.

Though some might regard these constraints as unrealistic, the typical American jury trial provides a fairly good example of this scenario. Once deliberations begin, a jury—after having considered the evidence admitted and having been instructed as to the relevant law by the presiding judge—is asked to render a decision (verdict) in the case (guilty or not guilty, liable or not liable, etc.) without consulting any external source. Moreover, once the trial has concluded, that same jury will probably not be able to verify whether the conclusion reached was correct (at least not in any way that has legally recognizable consequences). It is (again) this turning the matter over in one's mind, and nothing more, that is meant here by deliberation.

Of course, even when constrained in this manner, deliberation can achieve positive results, in that even when there is no opportunity for further research or experimentation, deliberators often reach correct conclusions. Recall (again) Einstein and his ability to formulate paradigm-shifting theories of relativity simply by imagining trains travelling close to and at the speed of light. Moreover, deliberation often will at least result in a decision, which sometimes is better than no decision. There can also be collateral benefits—for example, the deliberator might at least feel as though the matter was well-considered, that he or she gave it his or her best shot, etc. Indeed, if deliberation ceased to produce accurate conclusions, and/or if the benefit of having reached those conclusions was continually outweighed by the cost of deliberating, rational people would stop deliberating.

In many other situations though, it seems unclear whether deliberation in fact results in better decision-making. Some people simply do not do it very well. Sometimes more time does

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reasons to explain to oneself or others behavior for which one's real motives are different and unknown or unconscious." WEBSTER'S THIRD NEW INT'L DICTIONARY 1885 (1993).

15. For some, it seems possible that deliberation sometimes might actually result in a *worse* decision than one might have reached had one not deliberated at all.

not necessarily help. For example, a customer at Starbucks probably makes as good a decision with respect to their choice of beverage in five seconds as that same customer would make if given five hours. And sometimes, even important decisions are just as simple and can be accomplished just as quickly.

Even with respect to more important decisions, deliberation might not be of much assistance. Perhaps one already possesses so much information that the correct choice in that situation is obvious. Perhaps some people, at least in some contexts, simply have good intuition and similarly have little need for deliberation. And a decision that is the product of deliberation that is no better than a decision reached without deliberation is, for that reason alone, a worse decision.<sup>16</sup>

Moreover, other problems can arise. Perhaps the information required to reach an accurate decision is hopelessly incomplete, is practically unavailable, or is changing during the course of deliberation. Perhaps the sophistication of the analysis needed to reach the correct result is beyond the ken of the deliberator. Obviously, some people are better deliberators than others (and even that can depend on the issue and countless other factors). And of course, to deliberate one issue is not to deliberate an almost limitless number of other issues, some of which might be equally (or more) important. And sometimes, the mere passage of time solves the problem.<sup>17</sup>

Sometimes deliberation leads to better decision-making, but other times it does not. Sometimes the deliberator completes the process of deliberation having gained no new insights of any consequence. And the reason this occurs, of course, is because in many situations, it is difficult (if not impossible) to predict *in advance* whether and when deliberations will yield positive

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16. See also KAHNEMAN, *supra* note 5, at 419 (“Many decisions are based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, the guilt of a defendant, or the future value of the dollar. . . . This article shows that people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and prediction values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors.”).

17. Ironically (or paradoxically), the author of this Article, prior to writing the same, engaged in deliberation about this topic (deliberation), and can only hope that this endeavor was marginally worthwhile.

results. Without the ability to engage in experimentation, it might be difficult for the deliberator to know whether and when an accurate conclusion has been reached. For similar reasons, it can also be difficult to know when to *stop* deliberating; when one has reached the point at which further deliberation either will not or is unlikely to yield positive results, becomes no more than rumination, something that can also cause emotional distress. Indeed, one can even deliberate about deliberation, or whether and when we should deliberate, though at some point that is likely to be unproductive.<sup>18</sup>

Thus: “The question we must address is not ‘How do we know when to deliberate?’, but rather, ‘How is it supposed to help when we do?’ How does reflection improve our thought? How can deliberation secure a judgment?”<sup>19</sup> And according to Wright, “the answer must be: ‘In the same way any experience does.’”

[D]eliberating about it can tell me which way to turn the wrench in loosening a threaded connection, if I am unsure *and* I know what to think about. . . .

But reflection cannot always bestow such benefit. Sometimes there is no uncertainty to redress, and, frequently, we would have no idea what to think about if we were to reflect. Many people turn the wrench properly without an instant’s thought, and have no idea how to help somebody like me think the matter through. (I suppose it to be like asking me how I remember which color is red, or where the brake pedal is.) Reflection may even damage judgment, as many discover when they go back over quiz answers and change right ones to wrong. All we can say in general is that sometimes, in special

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18. See Wright, *supra* note 2, at 568:

[A]lthough we may of course deliberate about deliberation (whether to, about what, how to go about it), if we ever manage to deliberate about something, we shall at some levels do so without deliberating about it beforehand (as it were: blindly). So we must avoid going down that path. Other choices we make in the smooth flow of our actions offer a helpful parallel: we simply become, with experience, competent to tell when to look for a light switch, when to start braking for a stop sign, when to pause and deliberate.

See also *id.* (“This does not mean we are always right in any one of these cases. But functionality, and often even survival, does depend on a certain level of competence.”)

19. *Id.* at 569.



circumstances, pausing to reflect will improve our judgment and the time and effort will have been worthwhile. And if we pay attention, we gradually improve our ability to identify these circumstances and discover what to do in them.<sup>20</sup>

To put the matter another way: One should deliberate with respect to some decision (D) only when the expected marginal benefits (MB) exceed the expected marginal costs (MC), or  $B > MC$ .<sup>21</sup> Unfortunately, ascertaining (or even estimating) these figures can be exceedingly difficult. Thus, it seems clear that deliberation is best reserved for the following situations:

- the stakes are relatively high;
- there is a relatively high probability that deliberation will result in better decision-making; and
- the costs associated with deliberation are relatively low.

The unfortunate reality, though, is that such situations are difficult to identify in the real world. Deliberation is about problem-solving, but to be successful, one needs (a) access to the relevant facts, (b) sufficient analytical ability, and (c) time. Very often, one or more of these components is lacking.<sup>22</sup>

Thus, some deliberation seems justified with respect to certain important matters, in many situations it does not. In particular, one might suspect that it is difficult to ascertain the point at which the net cost of further deliberation exceeds the expected net benefits, absent additional research, in many situations. The same seems true of the correctness of the products of deliberation, absent a meaningful opportunity for experimentation to test the soundness of the decisions reached. Again, this is not to say that one should not engage in deliberation, as there are certainly times when deliberation leads to better decision-making, but it might help less than is imagined.<sup>23</sup>

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20. *Id.*

21. This is the algebraic formula suggested to address the standard of care in determining liability. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (L. Hand, J.).

22. Cf. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 19 (2007) (“Brilliant people asking the wrong questions are unlikely to get the right answers.”).

23. See KAHNEMAN, *supra* note 5, at 79 (“Jumping to conclusions is efficient

## II. DELIBERATION IN PRACTICE: THREE CASE STUDIES

As discussed previously, deliberation features prominently in life as well as law. Now turning to the three examples of deliberation mentioned in the Introduction that also implicate legal principles: premeditated murder, corporate decision-making, and jury deliberation. I chose these three particular examples for several reasons. All are readily understandable, even by non-lawyers. All occur with relative frequency in the real world, and thus, are supported by a large amount of related doctrine. Lastly, all are today well-established and well-known. However, we will also find that, upon closer inspection, each of these examples of deliberation might not make as much sense as most now believe. As suggested below, there are many instances in which deliberation, or further deliberation, in these contexts should yield to other considerations.

### A. Premeditated (deliberate) murder

Deliberation has long played a role in defining at least one type of first-degree murder in the United States.<sup>24</sup> According to Professor Wayne LaFave: “Almost all American jurisdictions that divide murder into degrees include the following . . . in the

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if the conclusions are likely to be correct and the costs of an occasional mistake acceptable, and if the jump saves much time and effort. Jumping to conclusions is risky when the situation is unfamiliar, the stakes are high, and there is no time to collect more information. These are the circumstances in which intuitive errors are probable, which may be prevented by a deliberate intervention of System 2.”); *see also* RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* 324 (2015) (“[I]n our increasingly complicated world people cannot be expected to make close to optimal decisions in all the domains in which they are forced to choose.”). *See generally* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1 (2007) (for an explanation of these concepts from more of a legal perspective).

24. Without getting into a lot of unnecessary detail (the real world is much more complicated), suffice to say that in the United States, most substantive criminal law is state law and most (today, anyway), is statutory law, and though every jurisdiction is generally free (within constitutional limits) to define crimes as they like, they tend to follow similar patterns. But one is cautioned not to make assumptions here (or in any area of the law); when in doubt, one should always conduct the relevant research. *See* WAYNE R. LAFAVE, *CRIMINAL LAW* § 14.7, at 809 (5th ed. 2010).

category of first degree murder: (1) intent-to-kill murder where there exists (in addition to the intent to kill) the elements of premeditation *and deliberation* . . .”<sup>25</sup> Thus, in jurisdictions that provide for this type of murder, “the defendant must not only intend to kill but in addition he must premeditate the killing *and deliberate about it*.”<sup>26</sup>

Why does the law require proof of deliberation in this context? The primary reason undoubtedly is that proof of deliberation is evidence of purpose (as well as an absence of accident or lack of planning), coupled with the idea that a purposeful killing, that is the product of deliberation, seemingly ought to be regarded as a more serious offense than an intentional killing that is the result of a more spontaneous act.<sup>27</sup>

Another, perhaps unintended, benefit of this deliberation requirement is that it thereby forces a potential perpetrator to think about his or her actions and contemplate the consequences. In other words, perhaps this can be thought of as an example of the notion that deliberation generally leads to better decision-making, which tends to be a good thing (or so it seems). This seems particularly true here, for hopefully the potential perpetrator, upon reflection, would change his or her mind and decide *not* to kill. The act of deliberating also might have the collateral benefit of slowing the defendant down, at least

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25. *Id.* (emphasis supplied). See, e.g., CAL. PENAL CODE § 188 (West 2016) (defining “malice aforethought” for purposes of murder as (inter alia) “a deliberate intention unlawfully to take away the life of a fellow creature”); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 2016) (“Murder committed with deliberately premeditated malice aforethought . . .”); 18 PA. STAT. ANN. § 2502 (West 2016) (defining “intentional killing” for purposes of murder in the first degree as a “[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing”).

Incidentally, the precise distinction between “premeditation” and “deliberation” in this context is somewhat difficult to ascertain. In fact, according to *Webster’s*, “premeditated” and “deliberate” are synonyms. See WEBSTER’S, *supra* note 4, at 596, 1789. “Perhaps the best that can be said of “deliberation” is that it requires a cool mind that is capable of reflection, and of “premeditation” that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.” LAFAVE, *supra* note 24, at 809-10 (footnote omitted).

26. LAFAVE, *supra* note 24, § 14.7(a), at 809 (emphasis supplied and footnote omitted).

27. *Id.*

momentarily, perhaps allowing the potential victim to escape, engage in self-defense, or allowing for the possibility of some form of intervention by an outside agent.

But if the foregoing is true, then we are presented with something of a paradox. For there is no obvious reason why the law—particularly criminal law—would want to punish deliberation per se. To the contrary, it seems much more likely that deliberation ought to be *encouraged*, at least over impulsive behavior. For a rational person, upon reflection, seemingly would choose *not* to kill in most contexts.<sup>28</sup> And yet, when it comes to murder, proof of deliberation generally results in a greater punishment.<sup>29</sup>

What could justify or even explain such a result? The answer is unclear, but perhaps one explanation might be that while we generally want to encourage deliberation prior to the commission of crimes, those who choose poorly are deserving of greater punishment than those who fail to deliberate at all.<sup>30</sup> Whether and to what extent this is a valid argument seems open to debate, but if not valid, there seems to be little else justifying this distinction.<sup>31</sup>

#### B. Corporate decision-making and the “business judgment” rule

Law, of course, is not limited to criminal law. There is also a vast amount of civil law, at both the federal and state levels.<sup>32</sup> Business law, particularly corporate law, provides numerous examples. In this area, Delaware often leads the way.<sup>33</sup>

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28. Presumably the victim also would usually choose deliberation, which (again) might slow the defendant down.

29. LAFAVE, *supra* note 24, § 14.7.

30. *Id.*

31. It might be observed that the *Model Penal Code* abandoned the use of “deliberation” both in its definition of the crime of murder and in its list of aggravating circumstances that might warrant the death penalty. See MODEL PENAL CODE §§ 210.2 (“Murder”), 210.6(3) (“Aggravating Circumstances”) (1980).

32. Here also, though, most of the action is at the state level, prominent decisions of the Supreme Court of the United States notwithstanding.

33. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM L. REV., no. 7, 2006, at 1749–92.

One of the most significant and influential corporate law cases in recent history was a Delaware Supreme Court case, *Smith v. Van Gorkum*.<sup>34</sup> *Van Gorkum* involved a Delaware class action brought by shareholders of the defendant, Trans Union Corporation.<sup>35</sup> Following trial, the court granted judgment in favor of the defendant directors.<sup>36</sup> The trial court based its judgment on two findings:

(1) that the Board of Directors had acted in an informed manner so as to be entitled to protection of the business judgment rule in approving the cash-out merger; and (2) that the shareholder vote approving the merger should not be set aside because the shareholders had been “fairly informed” by the Board of Directors before voting thereon.<sup>37</sup>

On appeal though, the Delaware Supreme Court held that both of the findings of the chancery court were clearly erroneous and therefore reversed and directed that judgment be entered in favor of the plaintiffs and against the defendant directors for the fair value of the plaintiff’s stockholdings in Trans Union.<sup>38</sup> More specifically, the Delaware Supreme Court held:

(1) that the Board’s decision . . . to approve the proposed cash-out merger was not the product of an informed business judgment; (2) that the Board’s subsequent efforts to amend the Merger Agreement and take other curative action were ineffectual, legally and factually; and (3) that the Board did not deal with complete candor with the stockholders by failing to disclose all material facts, which they knew or should have known, before securing the stockholders’ approval of the merger.<sup>39</sup>

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34. 488 A.2d 858 (Del. 1985).

35. *Id.* at 863. For this reason, *Van Gorkum* is probably better known today as the “Trans Union” case. Given the stakes and the players (and the fact that the various opinions spanned almost 50 pages) it was obvious upon delivery that *Van Gorkom* was destined to become a significant corporate law decision.

36. *Id.* at 864.

37. *Id.*

38. *Id.*

39. *Id.* at 872 (“The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware

The court then concluded: “In the specific context of a proposed merger of domestic corporations, a director has a duty under [Delaware law], along with his fellow directors, to act in an informed *and deliberate* manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders.”<sup>40</sup> The court later found that “[t]he directors’ unfounded reliance on both the premium and the market test as the basis for accepting the Pritzker proposal undermines the defendants’ remaining contention that the Board’s collective experience and sophistication was a sufficient basis for finding that it reached its September 20 decision with informed, reasonable *deliberation*,”<sup>41</sup> and eventually concluded “that Trans Union’s Board was grossly negligent in that it failed to act with informed reasonable *deliberation* in agreeing to the Pritzker merger proposal.”<sup>42</sup>

The board of directors example seems to be an example of deliberation in reverse—i.e., the board initially reached its conclusion based on the facts, but then was forced to deliberate to ensure its conclusion was correct (as opposed to going from indecision to decision). In other words, the underlying purpose of the business judgment rule is presumably to encourage and ensure that those in charge of business associations make the best decisions possible, and this apparently means that there must be some evidence of deliberation. At least with respect to major corporate decisions, one wants to know that all relevant factors were considered, etc.

Again, sometimes corporate officers and directors already possess sufficient information and experience to make even the most important decisions, and in such situations, deliberation adds nothing.<sup>43</sup> Whether because of intuition or expertise further

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directors. The rule itself “is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.” (citations omitted).

40. *Id.* at 873 (emphasis added).

41. *Id.* at 880 (emphasis added).

42. *Id.* at 881 (emphasis added). Incidentally, there were two dissenting opinions, and the dissent by Justice McNeilly is a classic and worth reading.

43. Actually, to the extent it takes away from more important matters, it may be detrimental.

thought on some matters is not particularly helpful. And again, at least with respect to some matters (such as determining the “correct” market price of corporate stock), rough estimates might be all that one can hope for even under the best of circumstances.

Perhaps more importantly, in many instances (whether in business or in life generally), time is of the essence. A suboptimal decision now might be much better than a slightly better decision made later. And who, other than the decisionmaker themselves, is better equipped to make this determination? And does this not include the very decision whether to deliberate, at least if there is evidence to this effect?

Moreover, are not even poor decisions sometimes the product of deliberation? If so, then why should those in charge escape responsibility from liability simply because they thought long and hard about the problem before acting?

At least for some of the most important decisions (corporate or otherwise), a more sophisticated deliberation analysis seems to be in order. Deliberation might increase the likelihood that *some* decision will be reached, but not necessarily a better decision. Much more is involved.

### C. Jury deliberation, hung juries, and the *Allen* charge

Jury deliberations—whether civil or criminal, federal or state—raise all sorts of interesting, though often troubling, issues. The relevant facts are almost always limited. There is often little or no opportunity for factual research or experimentation. And forcing jurors having difficulty reaching a verdict to nonetheless proceed, seems unlikely to produce a better (let alone reliable) decision.

Nonetheless, logic would seem to suggest that compelling further deliberation in this context does usually result in a decision. Are there times this might be superior to no decision? If the alternative is a retrial, the answer would seem to be yes.<sup>44</sup> Hung juries certainly are not without “cost.”<sup>45</sup>

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44. This might be one advantage of nonjury (“bench”) trials where available.

45. See, e.g., ARMEN ALCHIAN, ECONOMIC FORCES AT WORK 301 (1977) (“In economics, the cost of an event is the highest-valued opportunity necessarily

But how long should courts allow—or compel—jurors to engage in deliberation? And is there anything that can be done to push jurors toward a verdict without compromising accuracy?

Before getting to those questions, a brief word about federal civil jury trials and the law relating thereto.<sup>46</sup> Though the Federal Rules of Civil Procedure are probably the primary authority in this area, those rules say little about the law that is to govern in this context. Rule 48(a) does say that a jury “must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).”<sup>47</sup> And Rule 48(b) says that “[u]less the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.”<sup>48</sup> Although the Rules suggest that a new trial may be ordered in the event of an impasse,<sup>49</sup> they offer little guidance as to how to determine when that point has been reached. As a result, it seems that there might be a risk that a jury could “decide” a case too quickly, by reaching a “decision” just for the sake of reaching a decision, or too slowly (or even not at all), which would eventually result in a new trial.

Considering human nature, it would be naïve to think that there has never been a case where jurors failed to take their obligations in this regard as seriously as they should. But based on personal experience as both a juror and a trial lawyer, such cases are exceedingly rare. The much bigger problem, it seems, is that jury trials take too long (i.e., could be resolved more quickly) and/or fail to result in a definitive determination.

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forsaken.”).

46. Once again, for purposes of this discussion, the choices of civil over criminal law and of federal over state law should be largely inconsequential. The choices here were driven primarily by the fact that the rules at issue here were revised relatively recently and were quite well done.

47. FED. R. CIV. P. 48(a).

48. FED. R. CIV. P. 48(b). It might be observed that the Supreme Court very recently held that “the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1391 (2020). But that case does not appear to have any impact on the discussion here.

49. See FED. R. CIV. P. 48(c) (“Polling”); FED. R. CIV. P. 49(b)(3)(C), (4) (“General Verdict With Answers to Written Questions”).



Should a jury appear to be deadlocked, courts often turn to some form of an “*Allen* charge.”<sup>50</sup> An *Allen* charge is the popular name for a jury instruction that, in effect, encourages a jury to reach a verdict so as to avoid a mistrial, first used in the case, *Allen v. United States*, in which the Supreme Court approved of a supplemental instruction of this nature.<sup>51</sup>

Obviously, there are potential dangers associated with an *Allen* charge. It has a coercive element that might push a juror toward a conviction or finding of liability because that juror feels pressure from the court to reach a verdict.<sup>52</sup> At some point, such a push could violate a defendant’s due process rights and the right to an impartial jury trial and proper verdict.<sup>53</sup> Nonetheless, “the *Allen* charge is alive and well today, having persisted in the majority of American jurisdictions despite significant concerns about its coerciveness and even its constitutionality.”<sup>54</sup>

Is there a way out of this dilemma? Perhaps, in part. What if courts were permitted to at least attempt to persuade the parties to stipulate, *at commencement*,<sup>55</sup> to a *nonjury* trial in the event the jury is unable to reach a verdict? Such a trial seemingly could be conducted relatively quickly and would be sufficiently fair, at least from a constitutional perspective to all parties. A procedure of this nature might result in slightly more work for the trial judge, and certainly that judge would have to be apprised of this possibility prior to trial, but that seems to be a small price to pay for avoiding a new trial. Would all parties stipulate to such a procedure? Unlikely—but some would, and that would at least be

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50. *Allen v. United States*, 164 U.S. 492 (1896) (upholding the use of a supplemental instruction to a deadlocked jury encouraging it to continue deliberations in an effort to reach a verdict).

51. *Id.* For more on the *Allen* (or “dynamite”) charge, see Laurie L. Levenson, *The Dynamite Charge*, NAT’L L.J. 15 (Nov. 3, 2003). Again, the fact that *Allen* was a criminal case does not affect the analysis here.

52. *Deadlocked Juries-The “Allen Charge” Is Defuse*, 6 U. RICH. L. REV. 370, 373-374 (1972).

53. Laurie L. Levenson, *The Dynamite Charge*, NAT’L L.J. 15 (Nov. 3, 2003).

54. Samantha P. Bateman, *Blast It All: Allen Charges and the Dangers of Playing With Dynamite*, 32 U. HAW. L. REV. 323 (2010).

55. The court may presumably make such a suggestion at any stage in the proceedings, but it would probably be much more likely to succeed if done sooner rather than later, before any “cards” are turned “face up.”

a start.

### III. SOME CONCLUSIONS

What conclusions (if any) may be drawn from this study? Three main thoughts:

1. Virtually everyone, at some point, presumably engages in some degree of both intuitive and deliberative decision-making. Most people also seem to have at least a rough sense of when to engage in one or the other (or neither), and most people, if given enough time, are probably reasonably adept at both (though some undoubtedly are better than others). The bigger and more important challenges may lie in identifying those situations in which deliberation will make a material difference. If so, how much?

2. Although the concept of deliberation pervades human society, it seems to be particularly important in law. Such pervasiveness would seem to call for a heightened need for education and training along this line.

3. Though law often plays a role in deliberation, it does not appear to be particularly well-equipped to answer all the questions that might be raised during such deliberations. For example, while law might be a good resource for determining what the elements of premeditated murder are or ought to be, or what a corporate board of directors should consider when making decisions on behalf of the company, or what is the permissible size of a federal civil jury, it does not seem to play much of a role (nor should it) in deciding which party should ultimately prevail in any particular case.