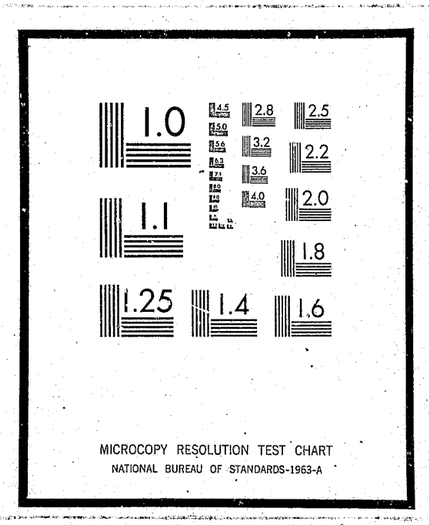

Volume I: Summary and Background

This Conference has been planned by the Advisory Council for Appellate Justice, a 33-member group which jointly advises the National Center for State Courts and the Federal Judicial Center on the work of appellate courts. The Council is comprised of state and federal judges, practicing lawyers and law teachers in roughly equal numbers. Financial support has been provided by grants from the Law Enforcement Assistance Administration and the Council on Law-Related Studies.

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APPELLATE JUSTICE, 1975

Materials for a National Conference

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VOLUME I

SUMMARY AND BACKGROUND

edited by

Paul D. Carrington
Winslow Christian
Wilfred Feinberg
Jerold Israel
Delmar Karlen
Bernard E. Witkin

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PREFACE

The work of preparing these materials was supported by indispensable grants from the Council for Law-Related Studies, led by David F. Cavers; from West Publishing Company; and from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration, U. S. Department of Justice.

Effective action, which the Conference hopes to stimulate, will require consensus. This is so because the political base for judicial law reform is always so slender that even a little opposition is almost always effective. Hence, the hope for reform is dependent on the flexibility of proponents and the modesty of opponents.

A real difficulty lies in the fact that most of the issues to be debated at the Conference are jurisprudential, involving what are, or may be, the basic characteristics of our legal process. Jurisprudential debates, like religious ones, must take place on a vast plain which provides few shelters of certainty for any adversary. He who yields an article of faith does not know where, if at all, he will be able to re-group and defend himself. Accordingly, each of us tends to defend each bit of terrain far more passionately than its worth would justify. So, the common tendency to reassure one's self-doubts by emphatic assertions will be manifest in many of the writings contained in these volumes, including several of my own. Because this tendency is so destructive of the chances for political accommodation so essential to reform, it seems wise to place the familiar risk in view at the outset.

Readers are therefore cautioned not to become so enamored of their own opinions as seem to be the persons who are responsible for the assembly of these materials. As the principal editor, I blush at the frequency with which the ideas of members of the Advisory Council for Appellate Justice, and especially my own, are advanced here. In defense of this immodesty of opinion, it can only be said that, at the moment, these were the best ideas we knew. I wish the conferees more luck than I have enjoyed in controlling pride of opinion.

Paul D. Carrington
Ann Arbor, Michigan
November 1, 1974

INTRODUCTION: A PREVIEW OF THE CONFERENCE

The reading material provided for those attending the National Conference on Appellate Justice bulks large. Each conferee will receive copies of Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974) and Leflar, Appellate Judicial Opinions (1974), as well as these four volumes of materials. Together, these materials comprise a small library on the subject of the conference, which may prove useful for purposes other than preparation for the conference itself. They should suffice to equip a conferee who is not informed on any one of the questions to be discussed with the means of becoming fully informed. Thus, while it is expected that each conferee will have his own distinct need for material, it is hoped that all needs will be met.

This introduction will provide a very brief summary of the literature so abundantly supplied and a list of questions raised. It is intended to help each conferee choose topics for further study and to provide a flexible agenda for the group discussions on Friday and Saturday, January 24 and 25.

The first volume of the reproduced materials contains, in addition to this introduction, a first chapter which seeks to place the subject of the conference in perspective. The second volume is keyed to the Friday discussion and illuminates the stress between the demands for quality and quantity of appellate justice. The third volume is keyed to the Saturday discussion and presents the contemporary issues of criminal justice on appeal. The fourth volume is keyed to the presentations of Saturday evening and Sunday morning and explores the possible revision of the federal court appellate system.

A. PREVIEW OF CHAPTER 1: A PERSPECTIVE ON APPELLATE JUSTICE

The Data of Congestion. The situation which calls for a National Conference on Appellate Justice is the staggering inflation in caseload which besets the appellate courts in the United States. PartA of Chapter portrays the present exigency. The American Judicature Society reviews the situation in the state appellate courts, many of which are experiencing very substantial pressures. The Study Group of the Federal Judicial Center describes a serious situation in the Supreme Court of the United States. A review of the Annual Reports of the Administrative Office of the United States Courts reveals an extremely grave situation in the United States Courts of Appeals, whose workload has quadrupled in the last dozen years.

The problem of appellate congestion is not novel. It is endemic as well as ubiquitous. Growing caseloads have been overcome by many appellate courts in the past. The novel characteristic of the present situation is the rapidity of its development. The data set forth reveal some very steep curves of growth.

Interpreting the data is more difficult than might be supposed. Gerhard Casper and Richard Posner examine the data on the docket of the Supreme Court and present a strikingly different perception of the situation of that Court. Especially elusive are solid confirmations of hypotheses bearing on causes of caseload increases. Thus, the severity of caseload increases tends to disprove a close relationship between caseload and population or between caseload and economic activity. Paul Carrington's analysis of the Administrative Office data tends to disprove a relationship between appeal rates and reversal rates. Jerry Goldman's analysis of similar federal data tends to confirm the obvious relationship between litigation levels in appellate courts with activity in trial courts, but it does not explain why an increasing percentage of litigation in federal courts ends in the entry of appealable judgments and in appellate litigation.

The data do seem to lend considerable strength to the assumption that the recognition of the right to counsel in criminal litigation has made a substantial contribution to the growth of appellate dockets. But, on the civil side, explanations are limited to a few unconfirmed hypotheses. One is a shift in social attitudes toward litigation as a tool for social change and for righting wrongs and indignities of many kinds. A second is the reduction in the relative cost of taking an appeal. A third is a possible increase in the availability of legal services.

Whatever the mix of causes, future predictions of caseloads are risky. It is unlikely that the present rate of increase will continue indefinitely. Indeed, it is imaginable that the long-term increasing curve could be reversed if legislators took pains to pursue their political goals by means of programs which are designed to generate less dispute or, at least, less litigation. In the alternative, more controversies might be diverted to administrative agencies or competing systems yet unknown.

The Limited Options: A Distasteful Choice. Whatever the future may hold, the present levels of appellate litigation pose serious issues for many appellate court systems. There is no doubt that rising workloads have forced significant changes and will force more. The subject of the National Conference is: what form shall these changes take?

The inevitability of change, if not reform, is decreed by the mathematically inexorable relationship that judicial decisions are the result of the individual efforts of a limited number of judges working on a finite number of decisions. It seems reasonable to assume that our appellate judges have not been under-employed.

Hence, if the number of decisions to be made is increased, the number of judges must increase, or the portion of their efforts devoted to some or all cases must decrease. There are only these three dimensions of the problem: the number of appeals, the number of judges deciding them, and the proportion of their efforts devoted to each decision.

Thus, none of the options for dealing with increased caseload is likely to be attractive. Increasing the number of judgeships will threaten the quality of the process by diminishing the status of the judges and by increasing the difficulties of harmonious and uniform administration of the law. Spreading the efforts of a limited number of judges over a growing number of cases will threaten the quality of the process by making the work of the judges less open and visible, and hence less subject to account, or by increasing a tendency toward delegation of more aspects of judicial work and toward an appellate process that is less humane and more bureaucratic in character. Limiting the flow of appeals would protect the appellate process at the expense of the rights of litigants: if the limitation is applied at the appellate level, the rights affected would be procedural, as the power and discretion of trial judges would be enhanced; and if the limitation is applied to prevent cases from entering the system altogether, substantive rights must be abrogated or left to non-judicial means of protection. Yet if none of these alternatives is embraced, a backlog of untended business must accumulate; and backlog at the appellate level is especially distasteful because it stimulates dilatory litigation and impairs the effectiveness of the legal system at all levels. An important point of beginning, therefore, is that there is no wholly benign solution. The price can be paid in one or more of several currencies, but pay we must.

Several of the alternative general strategies are on the agenda of the Conference for discussion on Friday, January 24; these involve, for the most part, the problems of increasing the number of appellate judges or of decreasing the amount of judicial energy expended in making appellate decisions. Chapters 2, 3, and 4, which constitute Volume II of these materials are devoted to the tension between quality and quantity in the appellate process. The possible strategy of accumulating backlog is thought to require no discussion. The possible strategy of limiting the intake of cases at the trial court level is presented only in Chapter 5 in connection with the situation of the federal courts. While this general strategy may be wisely deemed by many conferees to be very important, it is not on the Conference agenda because it would present too diffuse an array of issues, many of which would be largely substantive in nature; it seems prudent to limit the workload of the Conference by omitting consideration of this dimension of the problem. The readings present the argument of John Frank that congestion is an occasion for change of jurisprudential proportions. The entire body of the law, he contends, should be revised to reduce the occasions for disputes that can require legal decisions.

For similar reasons, the strategy of controlling the intake of cases at the appellate level is not on the agenda. But the issues raised by this approach are largely procedural and may be touched on in the course of discussion. Hence, Part B of Chapter 1 is devoted to a brief presentation of those issues. Few readers will disagree with Geoffrey Hazard's assertion, made a decade ago, that there are too many appeals. But acceptable remedies for that situation are very difficult to identify. The American Bar Association Standards on Criminal Justice are largely supportive of the rights of the accused to pursue unpromising criminal appeals. Robert Hermann surveys the problem from the perspective of a defense lawyer and concludes that very little can be done to stem the tide. On the civil side, Paul Carrington is not sanguine about the prospects for controlling frivolous appeals. But Richard Posner argues strongly that a market mechanism should be established to assure that a suitable price is charged for consumption of a scarce public resource, judicial energy.

Purposes of Appellate Litigation. The choice among the various alternatives to be considered will depend in some measure on the decision-maker's basic assumptions about the appellate process. Why should any appeal be allowed? The question is nowhere on our agenda, but differences with regard to its answer will sometimes surface and will often underlie more specific differences. It may therefore enhance understanding to consider a range of disagreement on basic values, which is presented in Part C of Chapter 1.

Thus, Roscoe Pound asserts that the primary function is to assure objective and impartial determinations of the facts in controversy, and applications of law to fact. He describes law-making as a secondary function of appellate courts. The intricacy of the task of assuring correct results in individual cases is illuminated by Roger Traynor. Irving Wilner argues that appellate courts cannot fairly and efficiently perform the function identified by Pound as primary; indeed he argues for the abolition of most civil appeals. Maurice Rosenberg raises the question debated by Wilner, and concludes that an effort must be made to control the discretion of trial judges, but balanced by a concern for the diseconomies of appellate litigation. Charles Wright considers the issue and concludes that appellate courts have tended to lose the appropriate balance; he asserts that appellate courts are too often usurping the fact-finding and individualizing tasks of trial courts, and should restrict the scope of appellate review to the consideration of general legal questions of general interest. Paul Carrington, responding to Wright, expresses the conflicting view that increased concern by appellate judges for the justice of individual results is appropriate, desirable, and consistent with contemporary expectations of justice. These questions are further explored in Chapter 1 of Robert Leflar's book.

B. PREVIEW OF CHAPTER 2: VISIBILITY OF DECISIONS

Appellate litigants have, at best, little contact with the judges who decide their rights. If the appearance of appellate justice is, indeed, as important as the just result itself, there is but limited opportunity to create that appearance. Moreover, there is substantial human experience which links the appearance with the reality: many adhere to the traditional belief that openness and visibility of process are important safeguards against carelessness and other human frailties which beset judges. For these reasons, some insist that the primary strength of the judicial system, the very basis for its claim to acceptance by those who are subjected to its decisions, is that it is characteristically open to the view of all. At the same time, the features of the process which assure its openness and visibility are costly in judicial time and effort. As these resources become more scarce, the quality of the process is threatened by marked reductions in openness and hence, it may be contended, in quality.

Limiting Oral Argument. Typically, the only person-to-person contact in the appellate process occurs at oral argument. This is the only opportunity for intercourse between the parties and the judges. Over the years, the orality of American procedure has tended to diminish, in contrast to the highly oral procedures characteristic of English courts. Delmar Karlen contrasted the two systems a decade ago. Frederick Wiener, a student and practitioner of American appellate advocacy, contemplated the more oral English system and found it too wasteful. But Daniel Meador, in a very recent survey, concludes that there may be indirect efficiencies in a more oral proceeding, especially if it features relatively little written communication. A question not explored in the material is the extent to which further economies may be secured by technological means such as the conference telephone call or closed-circuit television.

The consensus view of appellate judges, as manifested in their rules of court, seems to be that oral arguments are not very useful in reaching correct results. It is common to decry the quality of arguments heard; some even find the poor quality so severe that higher standards for professional certification are in order. On the other hand, it may be contended that the quality of oral argument on appeal is a reflection of the low expectations of judges, their disinterest and/or unpreparedness, or perhaps the shortness of time allowed for argument. The latter contentions have been overridden and there is a manifest tendency, especially in federal appellate courts, to dispense with oral argument, or to severely abbreviate it. Charles Haworth reviews the various rules of court designed to limit oral argument and considers possible objections to such rules. At its most recent annual meeting, the American Bar Association protested this tendency and proclaimed the right of counsel to be heard.

Decisions Without Reasons and Oral Opinions. A second device for exhibiting the integrity of the appellate process is the opinion. Robert Leflar considers the functions of opinions in his Chapter 4 and offers much valuable advice on writing opinions that serve their purposes in his Chapter 7. In these materials, Delmar Karlen, contrasts the formality of American opinions with the informality and orality of English opinions. Charles Haworth describes the extent to which hard-pressed federal appellate courts have dispensed with opinions in many cases. As the Third Circuit Time Study of the Federal Judicial Center clearly reveals, this is potentially a very effective means of reducing the amount of judicial energy invested in each disposition. But it also cuts deeply against the grain of tradition. As Kenneth Davis describes the state of federal administrative law, it seems arguable that the federal appellate courts are engaged in a practice which they would be obliged to condemn if indulged by a federal administrative agency. Daniel Meador strongly commends the English method of oral disposition as economic of time and effective in serving the purpose of exhibiting the integrity of the decision. Moreover, he reports on an experiment conducted with state court judges which tends to demonstrate that oral dispositions may be much more feasible than most Americans are prone to believe.

Publication of Opinions. Quite a different matter from the giving of reasons for decisions is the question of their publication. Few would challenge the observation that the availability of published opinions has passed the point of diminishing returns; there are so many judicial utterances that their value is depreciated. The Advisory Council for Appellate Justice has concluded that selectivity is in order and has advanced standards for publication. These standards are comparable to the pioneering California Rules of Court on the same subject. A serious problem which non-publication poses is the precedential value of the unpublished opinion: a decision of the Second Circuit holds that such an opinion may not be cited. Gideon Kanner reviews the California experience and expresses the opinion that this is undesirable, if not unworkable; he would favor publication of all appellate opinions.

Questions. In regard to this general topic, the following questions may be regarded as worthy of discussion:

(1) Are appellate courts obliged to provide opportunity for oral argument on all appeals?

(2) If so, what kind of preparation by the court or its staff is necessary or desirable in order to assure that the oral argument serve its intended purpose?

(3) Thus, if pre-argument memoranda are to be prepared by members of the court or staff of the court, would it be desirable to make such papers available to counsel for comment and critique?

(4) What kind of preparation by counsel is necessary or desirable in order to assure that oral argument serves its purpose? Are written briefs necessary in all cases?

(5) Can an adequate argument be conducted by conference call or closed-circuit television?

(6) How can the courts best assure adequate effort by counsel?

(7) Is an appellate court obliged to state its reasons for every final action, or only when it reverses a decision below?

(8) Can such reasons as may be required be adequately stated orally at the time of argument in many cases?

(9) If so, is this a means to efficiency?

(10) Must all reasoned decisions be reported in published form?

(11) If not, what is the effect or value of unpublished decisions?

C. PREVIEW OF CHAPTER 3: RESPONSIBILITY FOR DECISIONS

Appellate judges can and do delegate many tasks to subordinates. It is tempting to ease the pains of congestion by delegating more. Judges can then concentrate on the more difficult problems presented to them, take greater care with their work, give closer attention to the contentions of the adversaries, coordinate more effectively with one another and make wiser pronouncements of the law. All of these purposes are served by delegating the non-essential tasks. But a difficulty may lie in identifying the tasks which are not so integral to the judicial function that they may be wisely delegated. A common expression of concern is that courts may become "more like administrative agencies". The fear thus expressed is that decisions may become so bureaucratic that the traditional element of personal responsibility of the judges is lost or impaired, threatening the moral authority of decisions. Justice Brandeis is said to have attributed the prestige of the Supreme Court to the fact that "We do our own work".

How much delegation is too much is a question about which reasonable minds may differ widely. It would seem to depend in part on the considerations identified in the preceding chapter: the more open and visible the process of decision, the less acute is the concern about delegation. It may depend in part, also, on the identity and roles of the staff members to whom the delegation is made: what are their qualifications and to whom are they accountable? And it may depend in large part on the precise nature of the tasks assigned to staff.

Dramatis Personnae. The reading material of Chapter 3 is supplementary to Daniel Meador's book, APPELLATE COURTS (1974), which is the definitive work on the subject. The first chapter of his book concludes with a brief identification of the forms of assistance which have been used by appellate judges. The first part of Chapter 3 is supplementary to that first Chapter of Professor Meador.

Thus, the most common form of assistance is provided by law clerks, chosen by and serving individual judges rather than the court as a whole. Most frequently, these are recent law school graduates of high academic standing who are employed for only a year or two. Their functions vary widely according to the tastes of the individual judges for whom they work. The institution is described more fully by one judge, Eugene Wright.

A different form of staff assistance is the theme of the Meador book. This is the staff attorney chosen by and serving the court as a whole. Frequently he is a more mature lawyer serving an indefinite tenure. His tasks are determined by the court and are frequently shared by peers acting under a supervisor. Pioneering in the use of this kind of staff was the Michigan Court of Appeals; its experience and practice is fully reported by T. John Lesinski and N.O. Stockmeyer. Daniel Meador reports on somewhat different uses of such staff in Illinois, Nebraska, New Jersey, and Virginia in the setting of experiments supervised by him. His conclusions are reported in Chapter 11 and his recommendations in Chapter 12; thus, a hasty view of the book can be obtained by perusal of pages 163-186.

Central staff should be contrasted with commissioners of the type widely used at the turn of the century. These officials were, in substance, second-class judges. The rise and fall of this concept is chronicled by E.M. Curran and Edson Sunderland.

Staff Functions. The functions which might be assigned to a central staff are reviewed by Professor Meador in Chapters 3 and 4 of his book, pages 31-76. The readings suggest two additional uses of central staff presently being tried by the Second Circuit. Marianne Stecich describes the use of staff to expedite criminal appeals, a topic which will be dealt with more fully as an aspect of criminal justice on appeal, in Chapter 5 of these materials. Irving Kaufman describes the use of staff to conduct pre-hearing conferences intended to serve purposes similar to those of pre-trial conferences.

Limits of Delegability. The third part of Chapter 3 briefly explores the question of whether there are legal limits to the delegability of appellate tasks. What little law there is on delegation of judicial function has been made in the setting of delegations by trial judges. Thus, although the use of special masters is well established in the equity practice, most appellate courts, including the Supreme Court of the United States, have

found occasion to reprimand excessive use of such officers. Recent federal legislation creating the office of magistrate has invited further consideration of the issue. The constitutional concern, and the limits on the use of magistrates in civil matters has been considered by the Seventh Circuit in TPO, Inc. v. McMillan. Their role post-conviction litigation is questioned in the older case, Holiday v. Johnson, which involved the predecessor office of United States Commissioner, and in the very recent decision in Wingo v. Wedding. These decisions are not particularly helpful in defining the limits of appellate delegation, and are abstracted briefly. They do serve, however, to confirm that there may be a point at which judicial delegations may violate constitutional or legislative provisions governing those who exercise the judicial power.

Questions. The topic may be explored by considering which of the following tasks may properly and efficiently be assigned, either to a judge's law clerk, to the staff attorneys, or to more independent officers such as commissioners or magistrates:

(1) preparing a summary of the facts;

(2) preparing a summary of the legal arguments of the adversaries;

(3) preparing an independent legal analysis;

(4) doing ad hoc limited research;

(5) evaluating the importance of the issues presented with a view to deciding whether permission to appeal should be granted;

(6) screening cases for no oral argument or for abbreviated oral argument;

(7) screening cases for disposition without opinion, for disposition by brief per curiam opinion or for disposition by oral or unpublished opinion;

(8) suggesting questions to be explored at oral argument;

(9) conducting pre-hearing conferences designed to encourage parties to settle or to abandon marginal issues;

(10) preparing opinions for judicial approval;

(11) criticizing and suggesting revisions in drafts of opinions made by judges;

(12) making dispositions with regard to the calendar;

(13) participating in post-argument conferences of judges;

(14) enforcing timely and adequate performance by lawyers.

D. PREVIEW OF CHAPTER 4: UNIFORMITY OF DECISIONS

The Appellate Process and The Rule of Law. There is perhaps universal agreement that legal systems should aspire to treat like cases the same and to constrain the influence of personal idiosyncracies of judges on decisions. The principal tool for pursuing these objectives is appellate review. The ways in which appellate courts serve these objectives are explored in portions of Robert Leflar's book, especially Chapters 1, 2, 4, 6, 8, and 9. More briefly, in these readings, Karl Llewellyn identifies the features of appellate procedure which serve to assure that appellate decisions are collegial and institutional, not "one-man" decisions of the kind decried by Arthur Vanderbilt. And Marvin Schick describes how the Learned Hand court attempted to assure institutional harmony in its decisions. Some of the techniques used to pursue the goal, such as collegial deliberation and multiple opinions, are time-consuming; accordingly, they are threatened by time pressures caused by congestion. And the more numerous the appellate judges in the system, the more vital it is to have means of harmonizing their efforts.

In searching for solutions to the problems of growth, one may begin with the Tentative Draft of the American Bar Association Standards Relating to Court Administration. That draft takes a position generally favoring the creation of intermediate courts of appeals and the use of panels as small as three, and opposing the use of specialized courts. Although the reasoning in support of these positions is somewhat sparsely stated, the Draft may serve as a focus of the conference discussion of this topic: is the Draft sound?

The Intermediate Level of Review: Problems of Hierarchical Growth. The purpose of an intermediate level of review is presumably to shield the highest court from routine business so that it can concentrate its efforts on those cases most requiring its attention. In a rare example of empiricism, Roger Groot has undertaken to demonstrate that the new intermediate court in North Carolina is serving this intended purpose.

Nevertheless, doubt about the efficacy and wisdom of this device persists. Edson Sunderland was a lifelong opponent of the intermediate court solution; he emphasized the cost to litigants of double appeals and the difficulty, if not the impossibility, of making an appropriate distinction between the roles of the highest and intermediate courts. Graham Lilly and Antonin Scalia, in planning an intermediate court for Virginia, sought to meet this challenge by designing an intermediate court that would be terminal for most litigation. But the Florida experience raises doubts about this resolution of the problem. It exhibits a tendency of the highest court to assert its prerogatives with only limited regard for the jurisdictional design.

Roscoe Pound was among the first to favor the establishment of appellate terms in trial courts, in lieu of new intermediate institutions. In form, his approach is exemplified by the Appellate Division of the New York Supreme Court. But the substance of his idea may be reflected more by the proposal advanced for discussion by a committee of State Bar of California for a "Court of Review". Essentially, the idea is to make most of the appellate work an integral part of the trial process, resembling a motion for new trial, but presented to different judges. All "review for correctness", involving the sufficiency of the evidence, the admissibility of the evidence, or other issues involving only the particular dispute between the present parties, would be conducted at that level. This would leave only the "institutional review" for uniformity to be conducted at the higher levels of the structure. A crucial question is whether these functions can be sharply distinguished in the manner proposed. Mary Schroeder reports on an experiment with this approach now being conducted in the courts of Arizona.

Whatever form such changes might take, all such systems seem to contemplate that the judges at the apex of the system should devote their energies to issues of general concern, leaving to the lower courts the responsibility for individual justice. One question this raises, as illustrated by the practice of the Traynor court in California in taking cases for review sua sponte, is the fate of the adversary tradition in an institution which is removed from concern for individual justice. More broadly, one may question whether this transformation of the highest court does not have even more substantial jurisprudential implications in blurring the distinction between judicial and legislative functions: when the court is selecting its cases for the purpose of making law, judicial law-making is no longer incidental, but becomes the central function of the institution. The significance of this change is not easily demonstrated, and may be regarded as benign, but it should not be unnoticed.

Panels and Divisions: Problems of Lateral Growth. Sunderland favored the enlargement of a single court sitting in divisions, in preference to the creation of intermediate courts. Pound agreed that three or five judges sufficed for the conduct of appellate business and that cases requiring the attention of all members of a court are rare. Llewellyn points up the need for appropriate teamwork by judges serving in a divided court. Conflict between panels and, more importantly, the threat or possibility of conflict, can undermine the harmonizing function of the appellate system and dramatize the "luck of the draw" as a determinant of outcome. Graham Lilly and Antonin Scalia, planning for Virginia, and Charles Wolfram, planning for Minnesota, both urge the use of panels or divisions as a means to efficiency, but both are mindful of the threat to uniformity and cautious about the size of panels or divisions in relation to the size of the court. Presumably, there is a minimum fraction of the personnel of a court which can presume to speak with the authority of the court; and, the smaller the segment of the court, the greater the risk of "minority decisions" and disharmony.

A conventional wisdom holds that the risks of disharmony can be reduced and controlled by means of en banc proceedings. The English experience casts doubt on the efficacy of this device. And the federal experience, reported by Lamar Alexander, suggests that en banc procedure is also inordinately consumptive of judicial energy, for several reasons. One is the violence done to the routine of the divided court. Another is the fact that cases selected for such treatment tend to reach the Supreme Court, which renders the efforts of the Court of Appeals moot. The en banc procedure may tend to become yet another level of review. And it is not certain to what extent en banc decisions are effective to prevent the differences which they reflect from recurring in subsequent panel decisions.

Stabilized Assignments and Specialization: Problems of Cellular Growth. Rarely utilized in the United States is a third approach to growth which divides the judicial business on substantive lines and minimizes the overlap between the responsibilities of different groups of judges. The familiar objection to this approach is that it leads to narrow specialization of the judges, but it is not clear that a few modest steps in this direction would be harmful to the appellate process. Pound was opposed to specialized courts, but not to specialized judges. Llewellyn suggests, indeed, that a moderate use of expertise in an appellate court is desirable. And the fact is that some use of expertise has been made by the best American courts for years; the Hand court experience with assigning cases by subject-matter, is reported by Schick. Moreover, there is much experience in other legal systems which may support such solutions. Indeed, the French institution of a separate system of administrative courts has, in recent years, been adopted in Florida and Pennsylvania with no seriously adverse consequences yet reported.

In approaching the problem of overloaded federal circuits, the American Bar Foundation Study suggested the possibility of organizing larger circuits with substantive divisions. As reported by Paul Carrington, the proposal bears some resemblance to the highest German court, which is divided into a number of senates, each dealing with a different substantive class of cases. The A.B.F. proposal suggested the rotation of judges over a period of years to prevent excessive routinization; but the identity of the appellate panel for any case would be predictable. Henry Friendly found this suggestion to be threatening to the judicial office and unworkable.

Questions. From the materials in Chapter 3, the following questions may be drawn:

(1) Should an intermediate court be the terminal court for some classes of appeals?

(2) If so, how can a terminal jurisdiction be successfully defined?

(3) If "review for correctness" is a separable function to be performed completely below the level of the highest court, should that function be integrated more closely with the trial?

(4) Does the minimum size of an appellate panel or division vary with the appellate function to be performed?

(5) Does the minimum size of an appellate panel or division vary with the overall size of the court of which the sitting unit is a part?

(6) Under what, if any, circumstances, should a divided court sit en banc?

(7) Should the assignment of judges and cases in a divided court be stabilized so that the identity of the judges who would be called upon to decide a particular appeal or class of appeals can be fairly predicted in advance of litigation?

E. PREVIEW OF CHAPTER 5: EXPEDITING REVIEW OF FELONY CONVICTIONS

Dispatch as a Goal of the Criminal Appellate Process. The right to a speedy trial of a criminal case is constitutionally guaranteed and is the object of a variety of remedial measures, such as the requirement of Federal Rule of Criminal Procedure 50(b) that each federal district court establish a plan for speedy disposition of criminal cases. In fact, the case can be made that speediness is even more appropriate to the appellate process. To delay punishment and supervision of a convicted offender by admitting him to bail is even more risky than leaving those who are accused of crime at their liberty. Thus, many offenders are not released. But this leaves the no less grave risk that detention may be unjustly imposed on one who has been unlawfully convicted. Nowhere is justice delayed more surely denied than in the criminal appellate process. As Macklin Fleming urges, a system which awaits the convenience of judges, lawyers, and court reporters may secure a quality of service from the professionals which is optimal, but at the expense of injustice to the public and to offenders which can far outweigh the incremental benefit of the additional quality so secured.

It is such thinking which leads Chief Justice Warren Burger to decry the "glacial pace" of criminal appeals. It is echoed as well in the writing of other eminent jurists, including James Hopkins, Albert Bryan, Edward Tamm, and Griffin Bell. And in the recommendations of a variety of groups, including the National Advisory Commission on Criminal Justice Standards and Goals, the American Bar Association, and the Advisory Council for Appellate Justice.

How quickly can criminal appeals be decided? Judge Bryan suggests a goal of 25 days from joinder of issue; Judge Tamm, 60 days overall; Judge Bell, six months; the National Advisory Commission, 60 to 90 days; and the Advisory Council for Appellate Justice, 90 days. Daniel Meador reports that the median time lapse for a criminal appeal in England is now 77 days, which is considerably longer than was customary a decade ago. He urges an array of suggestions which might serve to accelerate the process of criminal appeals in this country to a rate which might rival the English. A number of these suggestions are voiced as well by the Advisory Council for Appellate Justice. The specific proposals, and some others, are given fuller attention in the materials which follow in this chapter.

Meanwhile, David Bazelon offers an important cautionary word. The judicial process is, to some extent, inherently inefficient. If justice long delayed is not so very just, instant justice may be even less so, if, indeed, it is not altogether impossible.

The Record on Appeal. A major cause of appellate delay has been the preparation of the record on appeal. For one court, at least, this is fully documented by Winslow Christian in his empirical study. There can be little doubt, as others assert, that his data fairly reflect the situation elsewhere.

One suggestion voiced by Judge Christian is that the appellate courts should exercise more control over court reporters, supervising them to assure prompt production of transcripts. Favorable experience in Oregon with this technique is reported by Herbert Schwab and Robert Geddes. And in the United States Court of Appeals for the Fifth Circuit by Judge Bell.

Another suggestion advanced by the Advisory Council for Appellate Justice is that the transcript should be ordered promptly in almost every case without awaiting the order of defense counsel. An experiment with this approach is now being conducted in the federal courts in New York City. Wilfred Feinberg reports his estimates of the real cost of this technique, which is surprisingly low.

A third approach, advanced by Judge Schwab and Mr. Geddes, and also embodied in a recommendation of the National Commission on Criminal Justice Standards and Goals, is the exploration of newer, faster, and cheaper methods of recordation. Delmar Karlen reports on the Alaska experience with electronic methods of recording trials; that experience suggests that such methods have multiple advantages over manual court reporting, only one of which is increased speed. To be sure, electronic methods receive stiff opposition from court reporters.

A fourth approach is to reduce the compass of the transcript. Judge Hopkins expresses a widely shared view that much of what is transcribed for appellate records is useless. For this reason, of course, the new Federal Rules of Appellate Procedure promote the use of abridged transcripts; and the American Bar Association, by its Standards, urges more general use of abridgements. Indeed, Judge Bryan goes so far as to suggest elimination of the transcript in most cases. But again it is Judge Bazelon who offers the cautionary word about excessive editing of the factual information.

Delay of Counsel. As Judge Christian observes, the possibilities for rapid preparation of the record are substantially dependent on the effective performance of appellate counsel. And, as he further observes, the process of appointment of counsel can itself be a major cause of delay.

The American Bar Association Standards favors continuity of counsel, and this is echoed in the publication of the Advisory Council for Appellate Justice, and by the remarks of Chief Justice Burger. As the National Advisory Commission on Criminal Justice Standards and Goals recognizes, a policy of continuity has important implications for the manner and method of delivery of legal services. And, as Judge Bazelon again warns, a change in counsel can be an assurance of quality and an important control on misfeasance by trial attorneys.

Whether counsel is newly appointed to present the appeal only or not, there is a question as to the proper time within which to expect a submission of a brief. Schwab and Geddes suggest that the time limits may be too long and may be enforced with too little rigor. Judges Bryan and Fleming agree. The problem of dilatory extensions is also emphasized in the study of Judge Christian.

A Role for Appellate Court Staff. Chief Justice Burger, among others, urges that the appellate courts should be less passive, and should assume responsibility for supervising the speedy presentation of criminal appeals. Judge Hopkins observes that appellate courts are largely uninformed as to the progress of pending appeals. The American Bar Association Standards urge that expedition is an appropriate function for judicial administrators. A similar view is expressed by the Advisory Council for Appellate Justice and by the National Advisory Commission on Criminal Justice Standards and Goals, both of the latter groups being substantially influenced by the report of Professor Meador on the successful role of appellate court staff in England. Consideration of this topic should draw on the materials of Chapter 3 as well.

Accelerated Decisions: A Reprise. Chapter 2 of these materials was devoted to the problem of preserving the openness and visibility of the appellate process. It deserves emphasis that the dilemma there raised is especially poignant in the administration of criminal justice. Because of the importance of criminal dispositions to the individuals affected, it is especially important that the decisions be open and accountable. On the other hand, the heightened need for dispatch suggests less oral argument and fewer signed or published opinions. Indeed, the Standards of the American Bar Association and the Recommendations of the National Advisory Commission on Criminal Justice Standards and Goals contemplate more frequent resort to abbreviated or accelerated modes of disposition in criminal cases. And, to be sure, as the published data confirm, one important source of delay in the criminal process can be the process of scheduling oral arguments and preparing decisions for publication. While these aspects of the problem are not raised by the materials within this chapter, they should be kept in mind as an additional dimension of delay.

Questions. Discussion of these materials may thus focus on any of the following questions:

(1) Should appellate courts not now exercising control over court reporters and the preparation of transcripts exercise such control?

(2) If so, is this a function that can be delegated to appellate court staff?

(3) Should the process of record preparation be commenced during or immediately after the trial?

(4) Should electronic methods of recording be utilized?

(5) Should courts not now using the appendix method or some variation of it adopt that method?

(6) If so, can appellate court staff play a role in the abridgement process?

(7) Should trial counsel be required to continue their representation of indigent criminal appellants?

(8) Should prosecutors and public defenders be required or encouraged to organize their offices so as to promote continuity of representation?

(9) Are the time limits for briefing too long?

(10) Are reply briefs and motions for rehearing dispensable?

F. PREVIEW OF CHAPTER 6: TERMINATING CRIMINAL LITIGATION

This chapter deals primarily with the availability of federal habeas corpus for state prisoners and the bearing that that remedy should have upon the appellate process. To a large extent, similar considerations are presented by the availability of 28 U.S.C. §2255, permitting collateral attack upon federal convictions, and the materials at points deal with §2255 as the federal habeas remedy.

The Governing Law. The first part of the chapter seeks to set forth major elements in the current scope of the habeas corpus remedy. The excerpts from Fay v. Noia, present the Supreme Court's reasons for holding that all constitutional objections are cognizable in a habeas corpus application. Justice Powell's opinion in Schneckloth v. Bustamonte challenges that position, and suggests that the court should at least exclude Fourth Amendment claims. Justice Powell's opinion particularly emphasizes the "costs" of expanding the habeas corpus remedy, and the notes following Schneckloth contain conflicting views and statistics on these costs.

Another major element in the scope of the habeas remedy is the treatment of the petitioner's failure to present properly his constitutional claim at the state level. The excerpts from Fay v. Noia set forth the current standard in this area. The excerpts from Henry v. Mississippi offer further explanation of the "deliberate bypass" standard of Noia, as does a series of notes following Henry. These notes suggest various points of difficulty in applying the deliberate bypass standard--i.e., the relation of a "deliberate bypass" to a waiver, the degree of knowledge required for a "knowing relinquishment", those circumstances that might render the bypass decision "involuntary", the requisite degree of personal participation by the defendant in the bypass decision. Exhaustion of state remedies, another important element in the scope of the current law, is explored in an excerpt from Professor Shapiro's study of federal habeas corpus in Massachusetts. Still other elements--the limited significance of a prior state adjudication on the merits and the expanding scope of "custody" prerequisite--are discussed in other notes.

Proposed Solutions Not Directly Related to The Appellate Process. The first section of this part B discusses proposals that are not directly related to the appellate process. Proponents of the current law urge that states take on a bigger share of the burden by expanding state collateral remedies. They also urge certain procedural reforms in habeas corpus procedures to assist in more efficient consideration of cases. Those less convinced of the soundness of the current law urge changes that will either restrict the scope of the issues that may be considered or place time limitations on claims that may be presented.

Solutions Relating to The Appellate Process. Excerpts from Modern Criminal Procedure and an article by Judge Lay discuss the possibility of appellate court consideration of constitutional issues not raised below (including remand for trial court determination where the defendant may have deliberately bypassed state procedure). The National Advisory Commission suggests adoption of a unified review procedure, with an expanded court staff directed to develop all possible issues in the case, and collateral remedies accordingly limited to exceptional circumstances (e.g., newly discovered evidence, claims that undermine the integrity of the entire trial). A dissenting position by Stanley Van Ness questions whether a unified review process is an adequate substitute for collateral review. Clement Haynsworth questions the scope of the limitation that the Commission proposal would place on "federal review of federal claims" by restricting habeas corpus. Paul Robinson suggests that a unitary system should allocate primary responsibility for development of issues to counsel, and the use of a post-judgment hearing at the trial level.

Another suggestion advanced is that state criminal cases be appealed to some court in the federal system that can provide more readily available review than the Supreme Court. Judge Haynsworth suggests a National Court of Appeals. Justice Holman suggests an appeal to the current Courts of Appeals. Judge Friendly suggests that direct limitation in the scope of habeas corpus would be preferable.

Questions. While the possible availability of other approaches to the problem must be kept in mind, conference discussion should give primary attention to the solutions which relate to the appellate process. In doing so, it is necessary to keep in mind issues raised and discussed in other chapters. The questions which seem most appropriate to discussion at the conference are:

(1) Should post-conviction litigation be regarded as particularly burdensome or non-economic, so that special handling of such cases is justified on grounds of judicial administration? [See also the materials for Chapter 1 bearing on the relative number of post-conviction cases and on frivolous litigation]

(2) Is post-conviction litigation presently given too much or too little attention by appellate courts? In other words, should the features of the appellate process which make it open and visible, viz. oral arguments and opinions, be preserved at their present levels in post-conviction cases? [See also the materials of Chapter 2 bearing on the roles of arguments and opinions]

(3) Should appellate courts attempt to forestall or anticipate post-conviction litigation by searching beyond the record made below in criminal appeals in order to hear and decide questions which may otherwise be left to post-conviction litigation?

(4) If so, is the search for such issues a proper function for delegation to appellate court staff? [See also the materials of Chapter 3 bearing on the use of staff]

(5) Or should the need for such a search be the occasion for requiring that new counsel be appointed to represent the convict on appeal? [See also the materials of Chapter 5 bearing on continuity of counsel as a factor in expediting review of felony convictions]

(6) Should appellate courts require that such a search be conducted at the trial court level?

(7) Should the federal government encourage or require state systems to provide for searching unitary methods of review?

(8) Should federal review of state criminal proceedings be channeled through the United States Courts of Appeals?

(9) Should a new federal court be created for the purpose of reviewing state convictions and post-conviction judgments?

(10) If a new national court is to be created to serve other purposes as well, should it be assigned the task of providing federal review of state criminal proceedings? [See also the materials of Chapter 8 suggesting other roles for a new national court.]

G. PREVIEW OF CHAPTER 7: EQUALIZING PUNISHMENT

Purposes of Sentencing Review. Some American appellate courts review sentences, but most do not. Legislation conferring general authority to review convictions has more often been interpreted to authorize review only of the determination of guilt, and not the appropriateness of the punishment.

This has been a cause of concern for some decades. Congress has given repeated consideration to legislation providing for review of sentences, but such legislation has not yet been enacted. Most recently, Marvin Frankel has made a passionate and powerful argument for change. He describes the present federal system as

a "regime of arbitrary fiat" which yeilds results which are irrational, unjust, and sometimes self-defeating. Judge Frankel's conclusions follow, in general, those of the American Bar Association, adopted in 1968. The A.B.A. Standards Relating to Appellate Review of Sentences state the purposes of sentencing review to be to secure more effective punishment and rehabilitation, to promote respect for the law, and to promote the development of rational and just criteria. These reasons bear a close relation to the issues considered in Chapter 4 of these materials.

Anthony Partridge and William Eldridge have recently undertaken to provide data for the evaluation of the need for sentencing review. Their study of the Second Circuit tends to demonstrate that there is substantial disparity in the sentences imposed by federal judges in New York on identical records. While the data suggests that there may be some difference between federal districts, the disparities are largely personal to the judges. There was little consistency in leniency or severity among the judges; all were to some degree severe or lenient in some cases and moderate in others. In only four of the twenty cases studied was there agreement among the judges as to whether imprisonment was appropriate.

Alternative Forums for Equalizing Punishment. Those resisting sentencing review have often favored deflection of the pressure to non-appellate forums for equalizing punishment. The Commentary to the A.B.A. Standards, prepared by Peter Low, reviews some of the alternatives tried in several states. Two alternatives presently being advanced for use within the federal system are considered here. One proposed approach is to improve the capacity of the Board Parole to equalize punishment. The second is to provide for a panel of trial judges to consider motions for the correction or reduction of sentences in trial court proceedings.

None of the alternatives seem likely to serve all the purposes of sentencing review as stated by the American Bar Association and Judge Frankel. One reason advanced for the effort to explore them has been the fear of appellate congestion resulting from sentencing appeals. In a recent article, Robert Kutak and Michael Gottschalk respond to these fears, suggesting that they may be exaggerated and contending that they do not, in any case, justify a refusal to pursue the goal of equal treatment of offenders.

Procedure in Sentencing Appeals. The A.B.A. Standards undertake to resolve a number of troubling issues which must be resolved if sentencing review is to be undertaken.

Thus, the Standards conclude that the sentence appeal should be of right, and not by discretion. They propose that review should be available for sentences imposed after guilty pleas on the same basis as after conviction. With regard to guilty plea appeals, they conclude that the sentencing appeal should normally be handled by the attorney who represented the defendant at sentencing; and that the defendant should normally commence service of a prison term upon imposition of the sentence. They conclude that sentencing appeals

should be based on the record made in the trial court and that the presentencing report should be subject to examination of the parties only to the extent that such examination was permitted in the trial court. They conclude that the sentencing judge should be required to state his reasons for the sentence. All of these conclusions are explored more fully in the Commentary to the Standards.

Scope of Sentencing Review. The A.B.A. Standards propose a more penetrating review of sentences than is customary in most states in which review is available. It is proposed that the appeals court make its own examination of the record to assure that the sentence is consistent with the stated goals of rehabilitation, equal punishment, rationality, and respect for law. It is explicitly provided that the reviewing court should articulate its reason for any modification of a sentence. Thus, the A.B.A. Standards would seek to develop a jurisprudence of sentencing comparable to the British development described by Daniel Meador. The issue of visibility in sentencing review is related to the issues presented in Chapter 2 of these materials and is explored more fully in the Commentary to the Standards.

Only one issue concerning appellate review of sentences divided the A.B.A. This issue is the question of the power of the appellate court to increase as well as reduce sentences. As first advanced by the Special Committee which drafted the Standards Relating to Appellate Review of Sentences, it was proposed that review be restricted to excessiveness of sentences. The original Commentary explains the reasons for this proposal; in short, they are that a possible upward revision of a sentence is too strong a deterrent to review and impinges on the principle of double jeopardy. The problem of deterring appeals is explored more broadly in Chapter 1 of these materials. The view which ultimately prevailed in the A.B.A. is that some inhibition on sentencing appeals is necessary and that a rule which permits the reviewing court to revise a sentence upward in the interest of equality and justice is not inconsistent with the concept of double jeopardy. The vote favoring this latter view in the House of Delegates was 95 to 75. It is explained more fully in a brief Commentary to the amendments prepared by the Special Committee on Minimum Standards for the Administration of Criminal Justice, the larger project of which the sentencing review project was a part.

Questions. Among the issues raised which merit debate are the following:

(1) Is disparity in sentencing sufficiently serious that remedial action should be taken at this time?

(2) Can equality in punishment be adequately secured by means of sentencing councils?

(3) By means of review by a panel of trial judges?

(4) By administrative action of parole boards?

(5) If sentences in contested cases are to be subject to appellate review, must or should review also be extended to sentences after guilty pleas?

(6) Can a simpler appellate procedure be devised for use in cases in which the propriety of the sentence is the only issue?

(7) What kind of record must be made in the trial court in order to sustain appellate review of the sentence?

(8) Should the appellate court have the power to revise the appellant's sentence upward for the purpose of assuring equality?

(9) Should the state be permitted to appeal from an insufficient sentence?

H. PREVIEW OF CHAPTER 8: REVISION OF THE FEDERAL COURT STRUCTURE

The final chapter is not intended for group discussion at the Conference. It serves as background for presentations concerning the work of the Commission on the Revision of the Federal Appellate Court System which will be made during the final evening and morning of the Conference. It may also serve to bring together all of the preceding materials, because almost every issue considered by the Conference will bear in some respect on the problem faced by the Commission.

Possible Limitations on Federal Jurisdiction. Because the federal courts are limited in jurisdiction, it is more feasible to consider possible revisions of the jurisdictional limits of the trial courts as a means of reducing appellate congestion. Henry Friendly is the staunchest advocate of this approach. He suggests drastic reduction in the diversity jurisdiction and substantial reduction in the federal criminal jurisdiction, as well as a number of other lesser revisions. Presumably, most of the business thus diverted from the federal system would find its way into state courts. John Frank contends that transferring business from one system to another that is equally congested is not a satisfactory response to the problem of congestion. Paul Carrington expresses doubt that proposed reductions would be sufficiently great to materially alter the situation and raises questions about the political feasibility and desirability of the approach.

In any event, this approach may be outside the contemplation of the Commission on the Revision of the Federal Appellate Court System. The other ideas advanced in this chapter are plainly within the ambit of the Commission's concern.

Circuit Realignment and The Law of The Circuit. In accordance with the mandate of Congress, the Commission has already filed an interim report proposing a division of the Fifth and Ninth Circuits. The Commission acknowledges that these interim proposals are mild palliatives. As the earlier report of the American Bar Foundation notes, division of the circuits increases the pressure on the system's ability to unify and harmonize the decisions of the circuits. Thus, Judge Friendly observes that there is a sphere of operation in which the regional court serves as a regional court of last resort. This is a growing sphere which includes those cases presenting legal issues deemed to be of too limited importance to merit the attention of the Supreme Court, but not involving direct and irreconcilable conflicts among the circuits.

Paul Carrington and Shirley Hufstedler comment adversely on the uncertainty which regional making of national principles imparts to the federal legal process. But few efforts have been made to measure the significance of the phenomenon. Carrington's own study of the Justice Department suggests that the issues which are left unsettled are, with few exceptions, fairly prosaic.

Special Problems and Special Solutions. Quite different perspectives on the problem are mounted by those who view it from the perspective of special substantive areas. Several decades ago, Erwin Griswold (enlarging on an earlier analysis by Roger Traynor) made a strong case for correcting the uncertainty imparted to the national tax laws by reason of the tradition of regionally autonomous interpretation; he proposed a court for tax appeals. The Ash Council in 1971 expressed similar concerns about administrative litigation and renewed proposals for an administrative court of appeals, perhaps comparable to the French system. In 1972, Congress expressed interest in an environmental court for similar reasons which were fully explored and advanced by Scott Whitney. In 1973, Judge Friendly endorsed the earlier Griswold proposal and also the concept of a court of appeals for patents. All of these proposals raise questions about specialized courts which are explored by Nathan Nathanson in the light of the history of specialized federal courts.

The Limits of the Supreme Court. If there is a general problem of endemic uncertainty caused by regional autonomy, or if there are special problems in particular fields, these problems are, in a sense, owing to the failure of the Supreme Court to perform all the functions which it, in theory, might perform. Thus, if a substantial, or even a significant, percentage of federal appeals were reviewed on the merits by the Supreme Court, the concerns expressed would be alleviated. Perhaps it would be possible, especially with the benefit of hindsight, to improve on the use which the Supreme Court has made of its limited time and attention. But few observers would suggest that the Court can do much more than it has; and, at some point, there is a biological limit to the ability of any one group of Justices to control and harmonize a vast number of subordinate groups.

The limits of the Supreme Court have recently been the subject of much discussion centered on the proposals of the Freund Committee. That committee expressed its dismay at the effects of a perceived case overload on the process of the Supreme Court; they suggested a new national court primarily for the purpose of shielding the Supreme Court from a madding crowd of litigants. Professor Freund has very recently restated the committee's position and joined issue with some of its many critics. The views of the critics have been ably summarized and analyzed by William Alsup.

Multi-Purpose Revision. Proposals to correct for the instability of regionally administered national law and for the overburden on the process of the Supreme Court share a common ground with the proposal advanced by Clement Haynsworth and considered in Chapter 6. It is at least possible that some observers who are not persuaded by any one of the three proposals for a new national court would be satisfied if a plan met more than one perceived need.

Thus, the resolution of the American Bar Association favoring a new court rests on the purposes of providing some relief for the Supreme Court docket and some increased stability for the national law. The resolution of the Advisory Council for Appellate Justice emphasizes the purposes of providing a terminus for state criminal litigation and of increasing the stability of the national law. Maurice Rosenberg has advocated appropriate rules-enabling legislation as a means of permitting the Supreme Court to perform a role in shaping a new institution to its perception of the needs. This flexible approach is favored by both the American Bar Association and the Advisory Council for Appellate Justice.

Paul Carrington has reviewed the data on filings and caseloads to provide a basis for estimating manpower needs for a new forum performing any or all of the suggested functions. In a joint statement to the Commission, Maurice Rosenberg and Paul Carrington submitted an intricate and fully fleshed plan which would attempt to serve all suggested functions. More modest contrasts are presented by Harold Leventhal and by a committee of the Advisory Council for Appellate Justice chaired by Albert Tate.

CHAPTER 1 · A PERSPECTIVE ON APPELLATE JUSTICE

A. THE DATA OF CONGESTION

(1) State Appellate Courts

CONGESTION AND DELAY IN STATE APPELLATE COURTS

American Judicature Society

This report was not complete at the time of assembly of this volume. It will be separately distributed.

(2) The Supreme Court of the United States

THE CASE LOAD OF THE SUPREME COURT*

The bare figures of the Court's workload present the problem most vividly. Approximately three times as many cases were filed in the 1971 Term as in the 1951 Term. The growth between 1935 and 1951 was gradual and sporadic, from 983 new filings to 1,234. But by 1961 the number was 2,185, an increase of 951, and by 1971, 3,643[1] new cases were filed, an increase of 1,458 in ten years. See Table II, Appendix. Since the Court endeavors to keep abreast of its docket, the number of cases disposed of at each Term conformed closely to the number filed, not dropping below 95% of that number in any of the last ten Terms. Indeed, in the 1971 Term, the Court disposed of 3,651 cases, which was eight more than the number of new filings. Nevertheless the carryover or backlog has been growing gradually from 146 in 1951 to 428 in 1961 and 864 in 1971. See Table I, Appendix.

The most dramatic growth has been in the number of cases filed *in forma pauperis* (ifp) by persons unable to pay the cost of litigation, mostly defendants in criminal cases. The following table shows what has happened (see Table II, Appendix):

Term	Ifp Cases Filed
1941	178
1946	528
1951	517
1956	825
1961	1,295
1966	1,545
1971	1,930

This tremendous increase results both from a substantive enlargement of defendants' rights in the field of criminal justice and from the greater availability since *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), of counsel to indigent criminal defendants. In the 1971 Term, provision of counsel was extended to misdemeanor cases in

*Reproduced from the Report of the Study Group on the Case load of the Supreme Court (Paul A. Freuad, Chairman), published by the Federal Judicial Center in 1972.

[1] These figures do not include the few but increasing number of original docket cases.

which the defendant could be imprisoned. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). There is no reason to believe that this number will decline; since it has remained about the same since the 1969 Term, we cannot be sure as to the future trend. The *in forma pauperis* cases now constitute over half of the cases filed.

The regular appellate filings (the non-ifp cases) have also steadily increased, only a little less explosively. The number was almost 2½ times as many in the 1971 Term as in 1951. (See Table II, Appendix.)

Term	Non-ifp Filings
1951	713
1956	977
1961	890
1966	1,207
1971	1,713

A number of factors have contributed to this trend. The population of the nation will have grown from 132 million in 1940 to 210.2 million at the end of 1972. More and more subjects are committed to the courts as the fields covered by legislation expand. Civil rights, environmental, safety, consumer, and other social and economic legislation are recent illustrations. And lawyers are now provided to a markedly increasing extent for persons who cannot afford litigation. Changes in constitutional doctrines have also contributed, as the reapportionment and school desegregation cases, as well as the criminal cases, attest.

Of course, no one can foresee how future events, laws or cases will affect the Supreme Court's docket. The lesson of history teaches that, independent of other factors, the number of cases will continue to increase as population grows and the economy expands.

With no substantial difference in the number of cases argued, the percentage of petitions for certiorari granted has sharply dropped as the filings have increased, as appears from Table III, Appendix. In 1971, 5.8% were

granted,[2] in contrast to 17.5%, 11.1% and 7.4% in 1941, 1951 and 1961 respectively.

This diminution is in part attributable to the fact that a much larger proportion of the ifp cases (only 3.3% of which were granted in 1971 [2]) lacks any merit. But the decline also in the percentage of paid petitions granted (19.4%, 15.4%, 13.4% and 8.9% for 1941, 1951, 1961 and 1971) would seem to reflect, not a lessening of the proportion of cases worthy of review, but rather the need to keep the number of cases argued and decided on the merits within manageable limits as the docket increases. One result is that a conflict between circuits is not as likely to be resolved, at least as speedily, by the Supreme Court as when the docket was much smaller.

The number of appeals to the Court has also substantially increased. The appeals, most of which come from three-judge federal district courts or state appellate courts, comprise less than 10% of the cases on the Court's docket (see Table VII–a), but they constitute about one third of the cases decided with opinion after argument. The appeals from district courts, in particular, impose a substantially heavier burden on the Court than their proportion of its case load would suggest. See Part III, *infra*.

The significance of these figures for the workload of the Justices appears even more clearly from a breakdown showing the Court's weekly burden. The number of filings during the 1971 Term, on a 52-week basis, averaged almost exactly 70 per week. The conference list for March 17, 1972, after a three-week recess, showed that the Court planned to consider and presumably took action on 17 jurisdictional statements on appeal, 193 petitions for certiorari and 55 miscellaneous motions, or a total of 265 different matters, in most of which at least two documents were filed, and in some as many as six.

[2] The figures for 1971 are adjusted to exclude an exceptional group of 133 cases in which petitions were granted and the cases remanded following the Court's controlling decision in the death-penalty case.

And this does not include the consideration given to deciding argued cases on the merits.

Many of these matters are necessarily disposed of without oral discussion at the Court's conferences. If all Justices agree that a petition for certiorari is without merit, it is not placed on the "discuss list"; it is denied without more. Otherwise the conferences would become hopelessly bogged down. But all matters must be considered by each Justice in preparation for the conference.

The actual time spent in hearing cases in which review has been granted has declined since the Court reduced the standard time for oral arguments from one hour to 30 minutes per side.

The number of cases argued and decided by opinion has not changed significantly despite the rising flood of petitions and appeals. Since 1948 the number of arguments has ranged between 105 in 1954 and 180 in 1967. In recent years the number of arguments rose from 144 in the 1969 Term to 177 in 1971, but in some still earlier years, when the total case load was less than one-third of what it is now, there were more oral arguments. The number of cases decided by full opinion has ranged from 84 in 1953 to 199 in 1944. At the 1971 Term 143 cases were so disposed of, with 129 opinions of the Court; during the preceding 15 years the average was 120 cases, with 100 opinions. (See Table IV.)

The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.

Over the past thirty-five years, as has been seen, the number of cases filed has grown about fourfold, while the number of cases in which the Court has heard oral

argument before decision has remained subtantially constant. Two consequences can be inferred. Issues that would have been decided on the merits a generation ago are passed over by the Court today; and second, the consideration given to the cases actually decided on the merits is compromised by the pressures of "processing" the inflated docket of petitions and appeals.

Statistics, to be sure, do not reveal in a qualitative way the difficulty of the cases on the docket; and in fact the character of the cases filed, and particularly of those granted review, has changed within the past generation. But the change has hardly mitigated the demands on a Justice's time and intellectual energy. The *in forma pauperis* category does yield a relatively small percentage of cases appropriate for review. And there are fewer cases involving patents, utility rates, and corporate reorganizations, which typically presented large and complex records. But there are very many more cases involving the most sensitive issues of human conflict, arising as problems of equal protection, public assembly, freedom of the press, church and state relations, and the administration of the criminal law, which surely are no less demanding of a judge and of the collegial process than the mastery of technical data. There has been a proliferation of federal regulatory and welfare legislation in recent years, legislation that requires interpretation, that produces conflicting judicial decisions, and that frequently raises constitutional problems. There is no basis to foresee anything but an intensification of this trend in the period ahead, and with a larger and active bar, increasing legal assistance, and the possibility of an increase in the number of federal judicial circuits, the prospects of a still further increase in the number of review-worthy cases reaching the Court cannot be gainsaid.

TABLE I

Overall Case Load

(a)	(b)	(c)	(d)	(e)
Term	Cases on Docket	I. F. P. Certiorari Cases on Docket	Cases Disposed Of	Cases Carried Over
1935	1,092	—	990	102
1936	1,052	—	942	110
1937	1,091	—	1,013	78
1938	1,020	—	923	97
1939	1,078	—	946	132
1940	1,109	120	985	124
1941	1,302	178	1,168	134
1942	1,118	147	997	121
1943	1,118	214	962	156
1944	1,393	339	1,249	144
1945	1,460	393	1,292	168
1946	1,678	528	1,520	158
1947	1,453	426	1,322	131
1948	1,596	456	1,425	171
1949	1,441	454	1,301	140
1950	1,321	533	1,202	119
1951	1,353	529	1,207	146
1952	1,429	559	1,278	151
1953	1,453	632	1,293	160
1954	1,557	709	1,352	205
1955	1,849	811	1,630	219
1956	2,021	875	1,670	351
1957	1,990	878	1,765	225
1958	2,044	995	1,763	281
1959	2,143	1,102	1,787	356
1960	2,296	1,085	1,911	385
1961	2,570	1,330	2,142	428
1962	2,801	1,412	2,327	474
1963	2,768	1,307	2,401	367
1964	2,655	1,170	2,173	482
1965	3,256	1,610	2,665	591
1966	3,343	1,615	2,890	453
1967	3,559	1,798	2,946	613
1968	3,884	2,121	3,117	767
1969	4,172	2,228	3,379	793
1970	4,192	2,289	3,315	877
1971	4,515	2,445	3,651	864

Sources: 1935–1939 terms: Annual Rep., Director of the Administrative Office of U. S. Courts (Table A)
1970–1971 terms: Supreme Court of the United States, Office of the Clerk

TABLE II [1]

New Cases Filed

(a)	(b)	(c)	(d)
Term	Cases Filed	In Forma Pauperis Cases (Miscellaneous Docket) [2]	Paid Cases Filed [3]
1935	983	59	924
1936	950	60	890
1937	981	97	884
1938	942	85	857
1939	981	117	864
1940	977	120	857
1941	1,178	178	1,000
1942	984	147	837
1943	997	214	783
1944	1,237	339	898
1945	1,316	393	923
1946	1,510	528	982
1947	1,295	426	869
1948	1,465	447	1,018
1949	1,270	441	829
1950	1,181	522	659
1951	1,234	517	717
1952	1,283	539	744
1953	1,302	618	684
1954	1,397	684	713
1955	1,644	749	895
1956	1,802	825	977
1957	1,639	811	828
1958	1,819	930	889
1959	1,862	1,005	857
1960	1,940	1,098	842
1961	2,185	1,295	890
1962	2,373	1,414	959
1963	2,294	1,276	1,018
1964	2,288	1,246	1,042
1965	2,774	1,578	1,196
1966	2,752	1,545	1,207
1967	3,106	1,828	1,278
1968	3,271	1,947	1,324
1969	3,405	1,942	1,463
1970	3,419	1,831	1,588
1971	3,643	1,930	1,713

[1] Figures presented in this table are subject to the qualifications noted in footnotes 2 and 3. The impact of these qualifications on the overall distribution of filings between paid and unpaid classification, however, is considered negligible.

[2] At various times in the period from 1935-1971 the method of transferring cases between the appellate and miscellaneous dockets has changed, resulting in some variations in the precise makeup of the miscellaneous docket. Footnotes to Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1945, 1950, 1959, and 1969 detail these changes. The miscellaneous docket was abolished beginning with the 1970 term and the clerk's office began reporting, as a category, the number of *in forma pauperis* cases docketed during a term.

[3] Paid cases from 1935 1969 have been calculated by subtracting column (c) from column (b). However, a small number of paid cases, *e. g.*, petitions for writs of mandamus, prohibition and habeas corpus were also carried on the miscellaneous docket; thus, the number of paid cases may be slightly understated for some terms.

Sources: 1935–1969 terms: Annual Report, Director of the Administrative Office of U. S. Courts (Table A1)
1970–1971 terms: Supreme Court of the United States, Office of the Clerk, Statistical Sheets (Final).

TABLE III

Certiorari Cases

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
Year	All Cert. Petitions Acted On	Cert. Petitions Granted	Percent Granted	Paid Petitions Acted On	Paid Petitions Granted	Percent Paid Pet. Granted	Ifp Petitions Acted On	Ifp Petitions Granted	Percent Ifp Pet. Granted
1941	951	166	17.5%	773	150	19.4%	178	16	9.0%
1951	1,017	113	11.1%	612	94	15.4%	405	19	4.7%
1956	1,425	177	12.4%	664	139	20.9%	622	38	6.1%
1961	1,899	141	7.4%	768	103	13.4%	1,131	38	3.4%
1966	2,470	177	7.2%	1,043	121	11.6%	1,427	56	3.9%
1971	3,286	317	9.6%	1,433	128	8.9%	1,853	189	10.2%
	*[3,153]	[184]	[5.8%]				[1,720]	[56]	[3.3%]

*At the 1971 Term 133 petitions *in forma pauperis*, many of them filed at previous Terms, were granted in cases challenging the validity of the death penalty, after the controlling decision of the Court was handed down. The figures in brackets, which exclude these 133 petitions, are therefore more reflective of the normal certiorari practice.

A STUDY OF THE SUPREME COURT'S CASELOAD

Gerhard Casper* and Richard A. Posner**

A direct attempt to measure the Supreme Court's workload was made in 1959 by Professor Hart. The results of his analysis are summarized in Table 1.

TABLE 1

HART'S TIME CHART

Work Category	Number of hours	Percentage
Initial review of 1400 petitions and appeals[a]	242	14
Oral argument (125 cases)	240	14
24 conferences	132	8
Study of briefs and records in 125 argued cases	250	14
Opinion-writing (22 for each Justice)	528	31
Studying opinions of colleagues (176 opinions)	140	8
Miscellaneous judicial work	196	11
	1728[b]	100%

[a]This number was arrived at after adjusting for an arithmetical error made by Hart and after deducting cases that Hart allotted to the summer recess (see note b, infra).

[b]The total of 1728 available hours assumes a term of 36 weeks, each comprising six eight-hour days. Hart treated the 16 weeks of summer recess separately. Assumptions about caseload are based on averages derived from the 1953-1957 terms.

Source: Henry M. Hart, Jr., The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959).

*Professor of Law and Political Science, University of Chicago.

**Professor of Law, University of Chicago; Research Associate, National Bureau of Economic Research.

The study raises many questions. Were Hart's assumptions about the availability and allocation of time realistic? Is such an allocation of time realistic? Should more time be allocated to initial review? Or to opinion writing? If more time were available for opinion writing, would it actually be used for that purpose? While Hart found the overall caseload formidable, his own remedy was not to reduce the inflow of cases; rather, he urged the Court to accept, and decide, fewer cases. "Regretfully and with deference, it has to be said that too many of the Court's opinions are about what one would expect would be written in twenty-four hours." He warned "with all possible gravity" that the Court's qualitative failure threatened to undermine professional respect.

Justice Douglas answered Professor Hart with his own statistics. These emphasized the steep increase in petitions for certiorari in forma pauperis (i.e., by indigents) which, he asserted, while increasing the caseload did not substantially increase the Court's workload because the indigent claims were for the most part frivolous.

TABLE 2

INCREASE IN IN FORMA PAUPERIS (INDIGENT) PETITIONS AS COMPARED WITH PAID (APPELLATE-DOCKET) PETITIONS: 1938-1958

Term	IFP Petitions	Appellate-Docket Filings
1938	85	857
1948	447	773
1958	772	886

Source: William O. Douglas, The Supreme Court and Its Case Load, 45 Cornell L.Q. 401 (1960).

The Justice contended that most of the things Hart had asked for were already being done: "We have fewer oral arguments than we once had, fewer opinions to write, and shorter weeks to work. I do not recall any time in my twenty years or more of service on the Court when we had more time for research, deliberation, debate and meditation."

The Supreme Court's caseload is now almost twice what it was when Justice Douglas responded to Professor Hart. The fact that the number of cases that the Court decides with full opinion has remained approximately constant over this period--with the result that the percentage of certiorari petitions granted has declined by about a half--has turned Hart's question whether the Court was deciding too many cases into the question whether the Court is deciding too few.

With this difference, the Freund Study Group reached conclusions similar to those of Hart. . . .

In analyzing the debate that has followed the release of the Freund Study Group's report, one is not always certain whether critics of the report disagree with its diagnosis, or with its proposed cure (a National Court of Appeals, mainly to screen out meritless certiorari petitions), or with both. Justice Brennan, who among the Justices responded in greatest detail, criticized the diagnosis in a revealing paper not very different from Justice Douglas' response to Hart.[1] He also disagreed with the Freund Group's suggested remedy. Some sitting and former Justices are on record as agreeing with Justice Brennan, while others are known to share Chief Justice Burger's desire for measures to reduce the Court's workload.

What has become a perennial debate over the implications of a rising Supreme Court caseload is, we believe, unlike to be resolved until the caseload problem is subjected to a more searching theoretical and empirical scrutiny than heretofore attempted.

Why do judicial caseloads change over time? Many lawyers and students of judicial administration apparently regard such change as a process of mysterious but inexorable growth akin to and perhaps caused by the growth of population. The process is more complex. A number of factors can be expected to influence the demand for a court's services and they do not all work in the same direction. We seek here to identify those factors and to discuss in a preliminary way their interaction.[2]

First, it seems reasonable to expect a positive relationship between the volume of an activity--crime, or highway accidents, or retail sales, or marriages, or whatever--and the number of cases arising out of that activity. Other things being equal--a very important qualification--an increase over time in the volume of an activity should give rise to an increase in the number of legal disputes, including the number of those disputes that are litigated, arising from the activity.

Second, the number of litigated disputes can be expected to vary inversely with the certainty (predictability) of the law. The more certain the law, the fewer will be the number of legal disputes and the smaller will be the fraction of those disputes that are litigated, especially at the appellate level where legal rather than factual issues predominate. And, other things being equal, legal certainty within a given subject area should increase over time, at least up to a point, as precedents accumulate.

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[1] William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473 (1973).

[2] The analysis that follows draws in part on the economic analysis of the legal dispute resolution process. See, e.g., Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Leg. Studies 399, 422-26 (1973).

Thus our first and second factors will often work in opposite directions. The volume of an activity will often be growing over time but the effect on the number of cases may be offset by an increase over time in the number of precedents, which, by increasing the certainty of the law, reduces the amount of litigation.

One might therefore expect the time pattern of cases in a particular area of law to be roughly as shown in Figure 2. The initial level of litigation is high due to the uncertainty likely to be found in a new area of law and rises rapidly due to the increase in the level of the underlying activity. But by increasing the number of precedents produced the increase in litigation eventually reinforces the effect of time on the accumulation of precedents and the consequent reduction of uncertainty, leading to a decline in the volume of litigation.

Third, the creation of new or the expansion of existing substantive legal rights should produce an increase in the number of cases. The effect is analogous to that of the growth of an activity. The creation of a new legal right--the right to privacy, or the right to exclude illegally obtained evidence from a criminal trial, or the right to be free from pollution--is tantamount to bringing a new activity within the reach of the law and thereby creating a new class of legal disputes. The extinction of a right would have the opposite effect.

Changes in legal procedure can have similar consequences. A relaxation of the standing requirement, or a change in the law of damages that makes it easier for a claimant to obtain a substantial recovery, increases the value of the underlying substantive legal right and thereby makes it more likely that the right will be asserted. This means an increase in the number of legal disputes, some fraction of which are litigated.

Fourth, the availability or cost of legal services may change over time and these changes may affect the number of cases brought. For example, a decision to subsidize legal services for a particular class of claimants will, by reducing the costs of litigation to those claimants, increase their demand for litigation.

Fifth, we may expect secular caseload changes to be self-limiting to some extent. Changes in caseload affect the value of a court to the litigants and hence their demand for its services. If the caseload of a court increases faster than its ability to process its cases, the court will respond either by increasing the waiting period for litigants or by reducing the fraction of cases that it accepts for review. The former has been the usual response of courts--most courts are not empowered to refuse to review cases within their jurisdiction. The Supreme Court has the power to refuse review and has used it, rather than delay, to prevent an imbalance between the demand for and the supply of its services. Whether delay or refusal to review is used as the method of rationing access to the court, the value of the court's services to the applicant for review is reduced. Other things being equal, this should reduce the number of applications filed. Conversely, if over time a court shortens

the queue or accepts an increasing fraction of cases for review, the value of review will rise and this should induce an increase in the number of cases filed.

* * *

Let us now examine caseload changes in finer subject-matter or issue categories. Table 3 lists the major categories of cases in which there was no substantial increase, or an actual decline, in the number of cases over the period covered by the study. In several categories the explanation for the lack of growth appears to lie in the decline or stagnation of the underlying activity. The railroad and maritime industries were declining during our period so it is not surprising to find the number of FELA, Jones Act, ICC and other Interstate Commerce Act, and Railway Labor Act cases declining (or not increasing significantly), especially given the absence of other factors, such as major changes in substantive or procedural rights in these areas, that might have offset the effect of the decline in the underlying activity on the number of cases. Similarly, since the number of cases brought by the FTC and the number of antitrust cases brought by the Department of Justice did not increase significantly during our period, it is not surprising that the number of cases in these areas on the Supreme Court's docket did not increase substantially either.

In several of the areas analyzed in Table 3, such as federal government personnel and public (federal) contracts, the underlying activity was growing--the federal government expanded very rapidly over the period covered by the study--but there were no significant legal or other changes, besides the growth in the activity, operating to increase the number of cases. In these circumstances, a decline over time in the number of cases is quite possible, since the effect of the growth of the underlying activity in increasing the number of cases could be dominated by the effect of time in reducing legal uncertainty (and hence litigation) through the accumulation of precedents. An important example is federal taxation. The last major revision of federal tax law prior to the Tax Reform Act of 1969 (the effects of which are too recent to influence our statistics) was the Internal Revenue Code of 1954. The accumulation of precedents under the 1954 Code, coupled with the activity of the Treasury in issuing rulings and regulations designed to clarify and particularize the application of the Code, would operate to reduce uncertainty about federal tax law during the period embraced by the study. This effect might well offset the effect on the number of cases of the increase over time in the number of taxpayers and the amount of taxes (corrected for inflation) collected.

TABLE 3

AREAS WHERE APPELLATE-DOCKET CASELOAD EITHER DID NOT INCREASE SUBSTANTIALLY OR DECLINED

Area	Terms of Court and Numbers of Cases	
	1957&58 Terms	1971&72 Terms
Civil	735	617
Civil action from lower federal court	674	577
Taxation	147	99
FPC	21	17
FTC	18	9
ICC	34	25
Immigration & Nationalization Service	21	8
Antitrust (Department of Justice)	13	19
Eminent domain	17	8
Federal tort claims	11	12
Priority of government liens	13	8
Federal government personnel	16	21
Public (federal) contracts	24	10
FELA	15	12
Interstate Commerce Act (private)	18	8
Jones Act	29	23
Patents, copyrights & trademarks	68	72
Railway Labor Act	14	15
Diversity cases	195	211
Civil action from state courts	61	40
Taxation of interstate commerce	23	21
FELA	16	8
Labor relations	22	11
Federal criminal cases	11	13
Contempt	11	13
Total	746	629

The major areas of growth in the appellate docket are presented in Tables 4 (civil) and 5 (criminal). Table 4 accounts for most of the growth in the civil cases on the appellate docket between 1957-1958 and 1971-1972. The aggregate growth shown in Table 4--682 cases--is 79 per cent of the total (although not of the net) increase in civil cases on the appellate docket. This suggests that docket growth, at least on the civil side, is highly concentrated in particular subject-matter areas.

Some of the increases shown in Table 4 seem explicable in terms of the creation of new substantive rights--in particular the enactment of civil rights statutes and the expansive interpretation of the equal protection clause adopted by the Court during this period with respect to legislative apportionment and other matters. The increases in the number of private antitrust and private securities cases reflect the removal of various procedural obstacles to the maintenance of such actions. Consistently with our theoretical analysis of caseload change, the most dramatic growth is found in areas, notably military activities (including induction) and civil rights, where rapid increases during the period in the underlying activities (due to the Vietnam War and the civil rights movement, respectively), themselves rather novel, coincided with an expansion in the relevant legal rights.

Table 5 presents the major growth areas on the criminal side of the appellate docket. This table contains double counting because the major categories in the table are issue categories and criminal defendants typically raise more than one issue in their applications for review. The statistics provide reliable indications of the trends within categories but do not enable an estimate of how much of the growth in the number of cases can be ascribed to the increases shown in Table 5.

The major areas of growth in Table 5 are ones where an expansion in substantive rights occurred during the relevant period. Good examples are the speedy-trial and right-to-confrontation categories in the federal cases and the right-to-counsel, search-and-seizure, and obscenity categories in the state cases. However, it is unlikely that expansion in substantive rights can explain the whole or even a large part of the growth in the number of criminal cases. For example, the rule excluding illegally seized evidence from admission in a federal criminal proceeding long predates our period yet the number of cases raising that issue rose fourfold during it. This increase is much larger than could be predicted on the basis of the increase in the number of federal criminal convictions during the period.[3] It is consistent with our analysis that state criminal cases involving illegally seized evidence rose at a much faster rate since it was during this period that a federal right to exclude such evidence was first recognized. But we have not yet explained the growth in the federal cases.

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[3]The number of federal criminal convictions increased from 28,000 in 1957 to about 40,000 in 1972. Computed from Federal Offenders in United States District Courts 146-47 (Adm. Off. U.S. Cts., Oct. 5, 1973).

TABLE 4

MAJOR GROWTH AREAS, CIVIL CASES ON APPELLATE DOCKET

Area	Terms of Court, and Number of Cases: 1957&58 Terms	1971&72 Terms
Military	14	68
NLRB	30	89
Civil rights acts	8	111
Racial discrimination (not elsewhere classified)	27	67
Education	1	40
Reapportionment	0	29
Elections	2	63
Health/welfare	10	49
Private antitrust	19	72
Private SEC	3	33
Government personnel (state)	26	90
Regulation of attorneys	12	32
State liquor control	4	16
Domestic relations	16	34
Zoning	10	22
Property	7	26
Torts	11	39
Total	198	880

TABLE 5

MAJOR GROWTH AREAS, CRIMINAL CASES ON APPELLATE DOCKET

Issue	Terms of Court and Number of Times Issue Was Raised[a]: 1957&58 Terms	1971&72 Terms
Federal cases	186 (221)	825 (705)
Due process	27	135
Evidence	53	193
Judicial administration	8	46
Procedure	38	141
Right to counsel	6	42
Search and seizure	38	143
Self-incrimination and immunity	12	54
Speedy trial	4	32
Right to confrontation	0	39
State cases	63 (117)	432 (496)
Evidence	11	59
Jury	10	49
Procedure	22	99
Right to counsel	8	47
Search and seizure	10	115
Obscenity	2	63
Total	249 (338)	1257 (1201)

[a]Numbers in parenthesis are total number of cases in category (from Table 6).

To summarize, it would appear that the increase in the Court's caseload since 1957 has been a consequence in major part of the Court's substantive and procedural rulings, and to a lesser extent of new legislation. In addition, the provision of legal services to indigent defendants has probably played a major role in the growth of the caseload, but this factor is not completely independent of the first--it is partly a consequence of the Supreme Court's expansive interpretation of the constitutional right to counsel. There is no evidence at all that the caseload increase is the inexorable result of increases in population, national income, or other indices of social activity. Had there been no expansion of the rights and court access of litigants, the Court's caseload might not have increased.

The Freund Study Group stated: "The lesson of history teaches that, independent of other factors, the number of cases will continue to increase as population grows and the economy expands." It should be clear from the previous part of this article that we disagree with this assessment (we put to one side the question whether the population will in fact continue to grow significantly). If other factors affecting the demand for Supreme Court review were not present, the Court's caseload might remain constant or decline over time despite increases in population and in economic (and other forms of) activity.

(3) The United States Courts of Appeals

A STATISTICAL ANALYSIS OF THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS

Paul D. Carrington*

The tables which follow are compiled from the data published in the Annual Reports of the Director of the Administrative Office of the United States Courts. They present efforts to illuminate in different ways the growth in the caseload of the United States Courts of Appeals which has been experienced in the last decade and a half.

Table 1 reveals precipitate growth, and also demonstrates that the growth is shared, albeit in varying measures, by all the federal appellate courts. Table 2 is a detailed breakdown of appellate filings in 1973 by subject matter. Tables 3 and 4 demonstrate that the growth in caseload has been general with regard to both jurisdictional basis and subject matter. Every large category of cases shows substantial growth except the category of tax litigation. Table 5 reveals that the growth pattern has produced a significant change in the composition of the dockets of the courts of appeals; in numbers of filings, the criminal justice portion of the docket has increased from 33% to 46% in eight years.

The remaining tables seek to illuminate possible causes of the growth in caseload. Table 6 reveals that the growth in activity in civil cases in the district courts is a substantial contributing cause. Even more substantial is the growth in district court dispositions in criminal matters, as revealed in Table 7. But Table 8 tends to demonstrate that the growth in the district court dispositions is not the whole story for the courts of appeals. Particularly on the criminal side (where appellate counsel has been more frequently available to indigents), the ratio of appellate filings to district court dispositions has also increased. Federal litigation seems to be more durable than it was eight years ago.

Tables 9-11 are efforts to study the reversal rates. Table 9 reveals a surprising difference in the appeal rate between the different circuits, ranging from 12% in the Fifth Circuit to 19% in the Fourth, the "appeal rate" being the ratio of appellate filings to district court dispositions. There is a similar disparity in reversal rates. 1.4% of the district court dispositions in the First Circuit result in reversals, compared to 2.9% in the Second Circuit. Or, to make a slightly different comparison, reversals are 21% of civil appellate filings in the Second Circuit, and only 9% of civil appellate filings in the Fourth Circuit. There seems to be no relationship between reversal rates and the propensity of litigants to appeal.

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*Professor of Law, University of Michigan. Memorandum not previously published.

This null hypothesis tends to be further confirmed by Table 10 which compares appeal rates, submission rates, and reversal rates for two triennia, 1962-64 and 1970-72. The most surprising datum revealed in that table is that the percentage of appellate filings which result in submissions for decision has dropped from 63% to 53%. Meanwhile, the reversal rate has maintained a fairly steady overall relationship to dispositions, appellate filings and appellate submissions. But this overall steadiness conceals a significant drop in reversals in private cases in which the United States is a party, matched against a substantial increase in reversals in private cases; a substantial difference between United States cases and private cases has leveled off.

Table 11 compares appellate filing, submission and reversal rates by circuits. Again, there is substantial variety. Criminal appeals are 45% of contested convictions in the Fourth Circuit, and 111% of contested convictions in the District of Columbia Circuit. Reversals are 4% of convictions in the Second Circuit and 9% of convictions in the Seventh Circuit. It is a paradox that the Second Circuit has the highest reversal rates in civil cases and the lowest reversal rates in criminal cases.

The conclusion to be drawn from an examination of Tables 6-11 is that causation is elusive. The aggressiveness of litigants and lawyers in seeking appellate remedies does not seem to be very closely related to their prospects for success.

Table 1 — Appellate Filings by Circuits

	DC	1	2	3	4	5	6	7	8	9	10	Total
1962	653	165	582	437	300	715	412	394	297	580	278	4813
1963	791	143	695	410	357	874	411	434	290	719	313	5437
1964	735	204	717	457	467	1033	558	464	349	621	418	6023
1965	685	210	860	497	610	1065	685	514	333	840	467	6766
1966	797	199	876	559	612	1093	651	545	403	877	571	7183
1967	798	193	979	693	803	1173	717	554	458	935	600	7903
1968	945	213	1072	658	1025	1178	793	691	453	1182	706	9116
1969	1094	221	1263	671	1098	1763	868	712	440	1494	624	10248
1970	1127	277	1343	1053	1166	2014	911	854	589	1585	743	11622
1971	1055	383	1423	1100	1211	2316	1015	902	713	1936	734	12788
1972	1168	421	1317	1179	1399	2864	1248	999	798	2258	884	14535
1973	1360	401	1709	1197	1573	2964	1261	1117	821	2316	910	15629

Table 2 — Appellate Filings in Fiscal 1973: A Detailed Breakdown

		Total	Pct.
Criminal		4453	28.4
Narcotics	1273		
Bank Robbery	307		
Firearms	215		
Selective Service	214		
Auto theft	178		
Other robbery	172		
Racketeering	165		
Gambling	146		
Counterfeiting	110		
Tax Fraud	107		
Interstate Shipment	106		
Postal Fraud	106		
Forgery	100		
Prisoners		2834	18.1
State Post-Conviction	1350		
US Post-Conviction	953		
Prison Civil Rights	531		
Individual Rights		1410	9.0
Civil Rights	975		
Social Security	193		
Immigration and Naturalization	228		
Selective Service Preinduction	14		
Private Commercial		1307	8.3
Diversity Contract	586		
Diversity Insurance	193		
Bankruptcy	338		
Marine Contract	71		
Other Contract (Fed. & Local)	119		
Business Regulation		1121	7.2
Securities and Exchanges	272		
Power	128		
Antitrust	190		
Patent	144		
Communications	75		
Aviation	58		
Personal Injury		1193	7.5
Diversity Non-Motor Vehicle	375		
Diversity Motor Vehicle	198		
Tort Claims Act	165		
Marine Injury	241		
FELA	43		
Government Operations		975	6.2
Government Contracts	163		
Eminent Domain	54		
Land Disputes	63		
Government Subcontracts	42		
Labor Relations		947	6.1
Labor Relations Board	612		
Labor Management Relations	272		
Fair Labor Standards	63		
Taxation		510	3.3
Tax Court Review	241		
Tax Refunds	269		
Original Proceedings		346	2.1
Unclassified		200	
Total		15,629	100.0

Table 3 — Appellate Filings by Jurisdictions

	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973
Criminal	965	1043	1223	1458	1665	2098	2508	2660	3197	3980	4453
US Civil	1054	1309	1387	1388	1372	1500	1823	2167	2367	2604	2704
Federal Question			1560	1666	1843	2284	2750	3379	3697	4053	4483
Diversity	2030	2306	948	939	1065	1085	1215	1233	1286	1499	1468
Local			169	204	193	200	232	222	251	243	221
Bankruptcy	144	229	217	174	199	229	200	205	259	299	338
Administrative	1141	983	1106	1254	1385	1545	1345	1522	1383	1509	1616
Original	99	151	148	137	158	162	153	241	330	348	346
Total	5437	6023	6766	7183	7903	9116	10248	11662	12788	14535	15629

Table 4 — Appellate Filings by General Subject Matter

	1965	1966	1967	1968	1969	1970	1971	1972	1973	Pct. Change 1965-73
Criminal	1223	1458	1665	2098	2508	2660	3197	3980	4453	+264
Prisoners	1027	1106	1335	1733	2093	2461	2535	2621	2834	+176
Individual Rights	418	427	613	669	718	1214	1314	1502	1410	+237
Private Commercial	801	737	852	893	972	948	1062	1223	1307	+ 63
Business Regulation	621	712	659	764	811	884	1018	1138	1121	+ 80
Personal Injury	652	704	637	847	839	879	866	1032	1193	+ 83
Government Operations	448	459	541	512	652	727	776	868	975	+ 95
Labor Relations	631	778	777	873	831	858	922	1049	947	+ 50
Taxation	561	474	410	430	416	506	543	496	510	- 10
Original	148	137	158	162	153	241	330	348	346	+135
Unclassified	236	189	215	173	255	284	235	278	200	
Total	6766	7183	7903	9116	10248	11662	12788	14535	15629	+131

Table 5 — Appellate Docket Composition: Subject Matter Percentages

	1965	1966	1967	1968	1969	1970	1971	1972	1973
Criminal	18	20	21	23	24	23	23	27	28
Prisoners	15	15	17	19	20	22	20	18	18
Individual Rights	6	6	8	7	7	10	10	10	9
Private Commercial	12	10	11	10	10	8	8	8	8
Business Regulation	9	10	8	8	8	8	8	8	7
Personal Injury	10	10	8	9	8	8	7	7	7
Government Operations	7	6	7	6	6	6	9	6	6
Labor Relations	9	11	10	10	8	7	7	7	6
Taxation	8	7	5	5	4	4	4	3	3
Original	2	2	2	2	2	2	3	2	2
Unclassified	3	3	3	2	3	2	2	2	1

Table 6 — Dispositions by District Courts: Civil Matters*

	1965	1966	1967	1968	1969	1970	1971	1972	1973	Pct. Change 1965-73
US Civil	5586	5711	6052	6321	7757	9706	10323	10812	10655	+91%
Neg. Inst.	270	324	363	342	439	419	345	459	474	
Other Contract	490	526	497	528	598	611	987	869	904	
Real Property	233	457	678	747	595	473	598	518	620	
Personal Injury	880	956	937	1067	1078	1068	1002	1105	962	
Civil Rights	85	73	112	88	101	192	239	352	445	
Labor Standards	256	204	245	294	351	359	384	440	407	
Social Security	1123	1021	1037	845	998	1186	1227	1652	2235	
Taxation	986	934	940	904	893	874	878	942	925	
Federal Question	7249	7316	7555	8029	8760	9584	11262	13313	13712	+86%
Marine Contract	642	613	862	853	1073	1041	949	1070	1117	
US Subcontr.	414	413	452	373	317	281	317	277	216	
FELA	733	648	702	647	707	793	843	985	811	
Marine Injury	1899	1862	2092	2371	2602	2487	2319	2698	2558	
Antitrust	641	827	295	243	283	339	793	629	556	
Patent	317	380	382	379	361	410	467	473	423	
Copyright-Trademark	260	250	243	273	290	324	362	428	354	
Civil Rights	608	642	647	805	959	1540	2373	3038	3797	
Labor Relations	442	416	489	571	571	632	803	1087	1136	
Diversity	11435	11345	12020	12357	12603	12316	12969	14555	14270	+25%
Insurance	1064	1169	1192	1218	1290	1296	1333	1540	1420	
Other Contract	1882	1919	2180	2460	2501	2581	3085	3850	3714	
Motor Vehicle	4789	4630	4684	4765	4724	4599	4439	4445	4164	
Other Injury	3123	3123	3400	3399	3486	3279	3418	3870	3884	
Local	2303	2284	2206	2840	2789	2479	2450	2412	2469	+ 7%
Total	26571	26656	27833	29547	31909	34085	37004	41092	41106	

*Prisoner petitions and eminent domain cases excluded.

Table 7 Dispositions by District Courts: Criminal Matters

	1965	1966	1967	1968	1969	1970	1971	1972	1973	% Change 1965-73
Contested Convictions	3037*	3187	3213	3619	3667	4067	4559	5506	5974	+98%
Prisoner Cases										
Post Conviction:										
US	2440	2208	2489	2631	3161	3838	3880	3843	3986	
State	4513	5283	6852	7291	8659	10308	8469	8690	8645	
DC	304	274	381	293	159	182	147	161	72	
Prisoner Rights										
US	-	-	-	-	-	-	180	223	334	
State	*	-	-	-	-	-	2160	2801	3481	
Prisoner Total	7257	7765	9722	10215	11979	14325	14836	15718	16418	+128%
Total Criminal Matters	10294	10952	12935	13834	15646	18392	19395	21224	22492	+118%

Table 8 Appellate Filings as Percentages of District Court Dispositions, By Subject Matter

	1965	1966	1967	1968	1969	1970	1971	1972	1973
Criminal	.40	.46	.52	.55	.68	.65	.70	.72	.74
Prisoner	.14	.14	.14	.17	.18	.17	.17	.17	.17
US Civil[1]	.16	.15	.13	.15	.14	.13	.14	.16	.16
Contracts[2]	.16	.18	.22	.19	.20	.21	.18	.19	.16
Personal Injury	.11	.14	.11	.16	.12	.14	.12	.15	.17
Civil Rights	14	.04	.05	.18	.38	.19	.14	.11	.05
Labor Standards	.08	.14	.05	.06	.09	.09	.11	.14	.15
Social Security	.12	.13	.12	.11	.13	.11	.11	.13	.09
Taxation	.26	.23	.21	.24	.23	.30	.29	.31	.29
Federal Question[3]	.13	.13	.12	.13	.16	.18	.18	.17	.19
FELA	.05	.03	.03	.03	.04	.03	.04	.03	.05
Antitrust	.10	.07	.29	.43	.30	.70	.28	.21	.34
Civil Rights	.32	.29	.27	.31	.38	.41	.34	.33	.26
Labor Relations	.30	.36	.27	.21	.28	.24	.29	.21	.25
Patents	.38	.30	.30	.35	.36	.30	.29	.25	.34
Diversity	.08	.08	.09	.09	.09	.10	.10	.10	.10
Insurance	.15	.17	.21	.14	.18	.15	.17	.15	.14
Contract (other)	.17	.14	.16	.14	.16	.15	.14	.14	.15
Motor Vehicle	.03	.14	.03	.04	.04	.05	.04	.05	.05
Local[3]	.06	.09	.08	.07	.08	.08	.10	.10	.09

*Estimated by extrapolation.
[1]Prisoner Petitions and Eminent Domain excluded.
[2]Negotiable Instruments excluded.
[3]Prison Petitions excluded.

Table 9 Civil Appeals and Reversal Rates by Circuits: Triennium 1970-72*

	Dist.Ct. Disp.	App. Filed	Pct.of. Disp.	Reversals	Pct. of DC Disp.	Pct. of. Appeals
DC	8041	1343	17	112	1.4	10
1	3847	660	18	114	2.9	21
2	12262	2144	18	213	1.7	10
3	15880	2071	13	246	1.6	12
4	14557	2836	19	244	1.7	9
5	39174	4791	12	845	2.2	17
6	16012	1969	12	266	1.6	14
7	11649	1645	14	224	1.9	14
8	9380	1325	14	146	1.6	11
9	18336	2678	15	363	2.0	13
10	8285	1548	19	150	1.9	10
Total	151,413	23,110	15	2923	1.9	13

Table 10 Civil Appeals and Reversal Rates--US and Private Civil: Two Triennia Compared

	Dist.Ct. Disp.	App. Filed	Pct. Disp.	App. Subm.	Pct. Disp.	Pct. Filed	Rev.	Pct. Disp.	Pct. Subm.
1962-64									
US Civil	20,609	3,429	17	2,024	10	59	515	2.5	25.
Priv. Civil	63,321	6,021	9	3,905	6	65	981	1.4	25.
All Civil	83,921	9,450	11	5,929	7	63	1496	1.8	25.
1970-72									
US Civil	42,772	7,138	16	3,979	9	56	874	2.0	22.
Priv. Civil	114,258	15,863	14	8,061	7	51	2055	1.8	25.
All Civil	157,030	23,001	15	12,040	8	53	2929	1.9	24.

*Prisoner Petitions included. Eminent Domain appeals, but not terminations included.

Table 11 Criminal Appeals and Reversal Rates by Circuits: Triennium 1970-72

	Contested Convictions	App. Filed	Pct. Conv.	App. Subm.	Pct. Conv.	Rev.	Pct. Conv.	Pct.App. Subm.
DC	1149	1279	111	770	67	76	7	10
1	343	242	71	140	41	20	6	14
2	1371	1155	84	826	60	60	4	7
3	738	586	80	331	45	50	7	15
4	1585	711	45	497	31	58	4	12
5	2662	1613	61	1157	44	182	7	16
6	1298	685	53	459	35	52	4	10
7	866	591	68	337	40	74	9	22
8	1056	506	48	356	34	55	5	15
9	3323	1935	58	1391	42	227	6	17
10	890	532	60	376	42	54	6	14
Total	14,282	9,835	69	6640	41	908	6	14

FEDERAL DISTRICT COURTS AND THE APPELLATE CRISIS

Jerry Goldman*

RATE OF APPEAL

By using unpublished data collected by the Administrative Office of the United States Courts and substituting the Administrative Office category known as contested judgments for appealable decisions, it is possible to compute a rate of civil appeal. However, this is not an absolutely accurate measure. First, the data collected by the Administrative Office are in aggregate form. Individual district court cases are not tracked to determine whether a case has been terminated by an appealable decision and whether an appeal has been filed from that decision. And, second, the assumption must be made that contested judgments (the operational category for appealable decisions) and appeals taken from those judgments will be entered and filed in the same fiscal year. Obviously, some final decisions in the district courts are reached in one fiscal year, while the appeals from those decisions are not filed until the following year. This overlap (or underlap) can be minimized by using data for consecutive years, as I have done.

Similarly, a rate of criminal appeal can be defined as the number of criminal appeals filed in the courts of appeals in proportion to the number of defendants found guilty after trial in each fiscal year.[6] In this situation, the isolation of relevant data is not problematic, although the same caveats apply to this measure

*Research Associate, Federal Judicial Center. Reproduced from 57 JUDICATURE 211 (1973)

TABLE I

Rates of Appeal from District Courts to Courts Of Appeals FY 1951-1960, & 1970

JURISDICTION	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1970
U.S. Cases	.16	.18	.19	.22	.21	.21	.23	.22	.22	.20	.19
Plaintiff	.09	.11	.11	.12	.13	.13	.14	.15	.17	.17	.08
Defendant	.25	.25	.27	.29	.27	.26	.29	.27	.26	.22	.27
Private Cases	.24	.26	.23	.22	.24	.22	.24	.23	.24	.25	.27
Federal Ques.	.24	.25	.27	.22	.28	.24	.28	.27	.28	.28	.26
Diversity	.24	.26	.22	.22	.21	.20	.21	.21	.22	.22	.30
Total Civil	.20	.22	.21	.22	.23	.21	.23	.23	.23	.23	.24
Criminal	.14	.15	.17	.18	.22	.18	.18	.19	.22	.21	.54
Grand Total	.19	.20	.20	.21	.23	.21	.22	.23	.23	.23	.28

These figures do not include District of Columbia, territorial, or land condemnation cases.

as to a rate of civil appeal.

In principle, the rate of appeal can fluctuate between the values 1 and 0. A rate of 1 would mean that an appeal was filed from every appealable district court decision. Likewise, a rate of .50 would mean that fifty appeals were filed for every 100 appealable decisions in one fiscal year. Since the measure has fixed boundaries, comparisons by geographical, jurisdictional or other categories are permissible.

Table I arrays rates of criminal and civil appeal (including breakdowns by jurisdiction) from 1951 through 1960. Rates for 1970 are appended to the last column. Two striking features are apparent. First, the change in the rate of criminal appeal is startling. In 1951, approximately 14 out of every 100 defendants found guilty after trial appealed their convictions. By 1970, more than half of all defendants found guilty after trial appealed their convictions. This spectacular growth can be traced, at least in part, to the passage of the Criminal Justice Act of 1964[7] which provides for free legal services to indigent defendants.

The second and most surprising feature of the table is the relatively low and fairly constant rate of civil appeal. The total civil rate ranged from a low of .20 in 1951 to a high of .24 in 1970, an increase of four appeals for every one hundred contested judgments during the twenty-year period. The largest growth in rate of civil appeal occurs in diversity cases. In 1956, twenty appeals were filed for every one hundred contested judgments. By 1970, the proportion of appeals in diversity cases had grown to thirty out of every one hundred contested judgments.

It seems clear from the application of a rate of appeal that any assertion of a dramatically increasing rate of civil appeal is suspect, and that the combined effect of civil and criminal rates of appeal is less than spectacular. In 1951, the total rate of appeal was .19; by 1970, the rate was .28. How does one account for the phenomenal growth in the number of appeals in light of a lesser growth in the rate of appeal?

APPEALABLE DECISIONS

Table II compares appeals filed and appealable district court decisions for 1960 and 1970. The number of criminal appeals has increased substantially more than the number of defendants found guilty after trial from 1960 to 1970. The result is a higher rate of appeal. The number of civil appeals has also increased, but

7. 18 U.S.C. § 3006A (1964).

TABLE II

Comparison of Appealable District Court Decisions and Appeals Filed, 1960 and 1970

	1960	1970	Per cent increase
Civil appeals filed	2,034	6,533	221 %
Civil contested judgments	8,831	27,918	216 %
Criminal appeals filed	523	2,200	321 %
Criminal defendants found guilty after trial	2,483	4,559	84 %
Total appeals filed	2,557	8,733	242 %
Total appealable decisions	11,314	32,477	187 %

These figures do not include District of Columbia, territorial, or land condemnation cases.

there has been a nearly proportional increase in appealable decisions, producing only a slight rise in the rate of civil appeal. But, at the same time, the growth in appealable decisions in the district courts has been the source of the sizable growth in appeals. It is this geometric increase in contested district court judgments that forms the foundation for the growth in appellate caseload.

The changing pattern of civil decision-making in the district courts can be illustrated simply. In 1960, 18 per cent of all civil terminations were achieved by contested judgment. In 1970, 38 per cent of all civil terminations were achieved by contested judgment, an increase of over 100 per cent! It is upon this expanding pool of contests in the district courts that the tide of appellate litigation rises.

B. CONTROLLING THE CASELOADS

DECISION POINTS AND JURISDICTION

John P. Frank*

Demonstrably, the country's legal system is being called upon to carry more of a load than it is capable of carrying. One answer to the problem of court congestion is to increase and speed up productivity. But another answer that will also serve is to reduce the size of the job to be done. We have great national experience with this. Prior to the Certiorari Act of 1925, the United States Supreme Court was years behind in its work. By virtue of that statute, giving it a discretionary jurisdiction, the Court is now absolutely current. It maintains its currency by cutting the job down to a size it can manage. By the 1925 statute, the Congress of the United States decided that the people's desire or, if you will, right to take their case to the highest court in the land would have to be sacrificed to the goal of permitting that Court to get its work done. It is the theme of this chapter that in a country of more than 200 million people, this same principle must be extended, in appropriate ways, to the trial courts; the job to be performed must be cut down to size.[2]

To this end, the doctrine I advance is that the entire body of the law should be reviewed to reduce and simplify decision points.

Let me define my key term. A lawsuit is a unit of court time. That unit in turn is made up of a whole series of subunits, each of which is a decision point. Perhaps, for ease of conception, these subunits or decision points may be regarded as cells within any physical structure. The total time of the case is the time devoted to all of the decision points. Let me illustrate with a routine personal injury case. A complaint is filed. Assume that the state requires that process be served by a person over the age of twenty-one who has been a resident for a year. Arguably, the person who served this process was not properly qualified to do so, and the defendant moves to quash the service of process. The

* Member of the Arizona Bar. Reproduced from AMERICAN LAW: THE CASE FOR RADICAL REFORM 64-70 (McMillan Company (1969)).

court must then decide whether the service is good or bad. In a dollar sense, let us assume that each side puts $250 worth of time into preparation of a memorandum, affidavits, and oral presentation. The court listens for fifteen minutes, looks up a little law, and fifteen minutes later makes a ruling. At that point, two things have happened. The litigation has been loaded with a $500 cost, and thirty minutes of court time have been spent in making a decision. If the state had not had the requirement that the process server be a resident for one year and over the age of twenty-one, there would have been no issue. The $500 would not have been expended, the half hour not spent. In short, when the state created the particular requirement, it created a decision point and with it the attendant costs in time and dollars.

Let us next assume that service has been ruled good, and the defendant answers. He then files a motion for judgment on the pleadings, contending that it appears on the face of the complaint that there is no jurisdiction for want of an indispensable party. Again, memorandum, cost, time. If the state procedure had specified that the question of service and the question of parties had to come up at the same time, then there would only have been one decision point, and probably the aggregate time in disposing of the two questions, and the aggregate costs, would have been less than by the system of allowing the questions to be raised consecutively. Here it is the placing of the decision point that is controlling cost and time.

The matter continues. There is discovery by interrogatories, by depositions, and finally by requests for admissions. Let us assume that the parties are contentious, and issues arise as to each of these. If so, each of those issues will in turn be a decision point, with cost and time. If the state

had no discovery system, then these decision points would not arise, and those expenditures would not be made. I trust that I am not suggesting that these would be desirable economics; I am simply illustrating the time-cost factor of each decision. The matter then comes on for trial. The parties, continuing with their high degree of contentiousness, raise all sorts of evidentiary questions—each one is a decision point, and again, each has its consequences in time terms. Some of the rulings may shorten time, and others lengthen it.

But more to the core of the thing, there is the matter of what the case is about. Let us assume that the plaintiff wishes to show negligence and proximate cause, and that the defendant wishes to show contributory negligence or, in the alternative, assumption of risk. There will then have to be decisions, appropriate in each case to their respective functions, by the judge and the jury on each of these points, and because the decisions have to be made, time must be spent in gathering the facts—*i.e.*, presenting the evidence—necessary for their determination. If the jurisdiction did not have the doctrines of negligence or proximate cause as the basis of a claim for recovery, then two time elements would fall out of the case—no time would be spent in deciding these questions, and, more important, no time would be spent in proving them. If the state has abolished either the defense of contributory negligence or assumption of risk or both, then these same results will follow.

And then there is the matter of damages. If the jurisdiction is using the so-called split trial, letting the jury determine first whether there is any liability on the part of the defendant before passing on the question of damages, then the damages decision point is eliminated, with its attendant time and cost consequences in terms of proof, paying the

experts, putting on the case, and deciding the issue. Again, to suggest that time could be saved is not necessarily to suggest that the saving is desirable.

The next area of decision will involve what instructions to give the jury, and here the judge will be called on to make many decisions, for he must pass on each instruction. If the jurisdiction has instructions settled in advance by publication, then there is no real decision point—one simply gives the routine auto accident instructions. If the practice is to give instructions tailored to the particular case, then there is again the time and the cost of coming to a determination on each one. After the matter is over, there will be a motion for a new trial; again, if the state did not have a new trial practice, the decision would not be made and the costs would not be borne.

The case, then, is a unit of time, which in turn is a collection of subunits of decision points. If the state should take the extreme position that it is not going to have auto accident cases heard in its courts at all, then this whole spectrum of decision points will disappear from the court load. But short of such herculean remedies, every element of the substantive law and every element of procedure creates decision points that affect costs and affect time. It follows that a tightening, or reduction of the number or complexity of these decision points—and please note that the restriction could be of either number or complexity—will reduce the size of that particular cell, or extinguish it entirely, and that the effect of this reduction will be to reduce the whole time of the case. To the extent that there is a time reduction, other business can be done in the time thus saved.

What is happening in the course of the law is an almost endless increase in the number of decision points, usually without much regard to the consequences the increase will

have on the legal system. If I may use a fanciful illustration, think of the elephant in a circus, standing with feet close together upon a small supporting pedestal. Let the elephant be the collection of decision points, and the pedestal be the legal system that has to make the decisions. What happens is that the elephant grows and grows and grows as he absorbs more and more decision points. Occasionally some are taken away, as for example if my hypothetical state should eliminate the process server requirement we have discussed, but the general trend is to enlarge. The enlargement comes in two primary ways. First, the law itself grows. Second, there are more people presenting matters that need to be decided. The combined effect is that at some point, the weight of the elephant collapses the pedestal.

I am suggesting that this process must be reversed; that the elephant must grow smaller, that the volume of decision points, and hence of time, must be reduced. For convenience of discussion, let me analyze methods of doing this from three interrelated standpoints. Method number one is the reduction of jurisdiction, simply cutting out of the legal system whole areas of decision points. This is in effect what the United States Supreme Court has done with the aid of the Certiorari Act—it simply rejects nine tenths of the cases tendered to it. With due regard for the difference in structure, jurisdiction may be altered so that in effect trial courts will be doing the same thing. Second, in areas that are kept within the jurisdiction of courts, the substantive law can be altered so as to reduce the number of decision points that need to be passed upon to reach a result. For example, in the case just given, if the state eliminates the defense of assumption of risk as a matter of substantive law, whether for better or for worse, at least it will present no decision point; or if it requires that defects of process and

defects of parties be considered together, there will be one less decision point.

Related to this is a third method of eliminating decision points by changing the ways in which the law performs its services. Such changes, as will be developed in a moment, can be fairly radical, but to stay within the structure of the illustration given, the existing procedure on interrogatories is that if someone wishes to object to an interrogatory, he must go to court to present his objection, thus in every instance creating a decision point. It is now proposed to alter that method of procedure so that the objecting party will merely notify his adversary that he objects and give his reason. Then if his adversary wishes to compel him to answer, the adversary will go to court. Almost certainly, the adversary will wish to insist on some occasions, but not on all: in some instances he will not think the matter worth the bother or will be persuaded by the objection made. To the extent therefore that this private exchange reduces the volume of interrogatories that must be considered in court, there will have been a reduction in the number of decision points.

ELIMINATING "TOO MANY APPEALS"

Geoffrey C. Hazard*

The conclusion seems unavoidable that the greatest headway that can be made is in reducing the present volume of appeals, or at least leveling off their growth rate, by turning away some classes of cases which now reach the appellate courts. There appear to be three methods only by which this can be done: First, the categories of appealable cases can be narrowed. For example, appeal could be denied when the amount in controversy does not exceed, say, $3,000, or in a criminal case where only a fine but not imprisonment is imposed. For another example, appeal could be denied altogether in certain types of cases, such as automobile accident litigation. While these suggestions are more extreme than the limitations that exist under the rules obtaining in any state, limitations of logically similar structure do exist in most states and could be made to exist in all.

The principal difficulty of this approach is that the social and political significance of a legal issue may have, and often does have, no relation at all to the monetary or other intrinsic significance of the particular case in which it arises. This difficulty is so well understood that there is great reluctance to increase the rigor of existing formal limitations on appeal. Such additional limitations as have been imposed in recent years are of such minor significance as to have no material impact on the volume of appeals. Hence, this approach leads to a dead end.

A second method of limiting appeals is to require the approval of some member of the judiciary before a party is permitted to press an appeal. This may be done either by requiring that the trial judge certify that the case is of such significance that an appeal should be allowed, or by requiring that the would-be appellant submit a request to the appellate court for leave to appeal. The first method is characteristic English procedure, and it is a device of increasingly wide use in this country. So far, its use here has been limited largely to interlocutory appeals, but it is entirely possible and, I should think, desirable to extend it increasingly to appeals from final judgments.

The other device, requiring leave from the higher court before an appeal can be taken, is already in use between the middle and highest levels of most three-tier court systems in this country. In states without intermediate appellate courts, there is great resistance to this method of limiting appeals. The feeling at the bar is strongly that there ought to be one appeal as of right in every case, and this opinion is so widely shared by the general public that it can be taken as virtually a postulate of American legal procedure. Accordingly, we may not expect soon to see the development of discretionary appellate review in states with two-tier court systems. Some day, however--and not too long hence--the fact will have to be faced that, even in a three-tier system, there cannot be an appeal of right in all cases.

When this day comes, a third method of limiting appeals may find utility. This would be to alter the conditions of choice under which a litigant, dissatisfied in the trial court, exercises his initiative as to whether or not to appeal. The easiest and probably most effective way of altering these conditions is to make it more expensive to appeal *at the litigant's sole initiative*. In other words, one way to deter unmerited appeals is to raise the cost of taking an appeal. If it turns out that an appeal had real

*Professor of Law, Yale University. Reproduced from After the Trial Court--The Realities of Appellate Review, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60, 82-84 (H. Jones, ed., 1965).

merit, the appellate court could be empowered to remit to the appellant the cost imposed on him for his appeal.

That some such approach is necessary seems not at all fanciful. Examples spring to mind in connection with the recent burgeoning of legal services being made available to indigent accused persons as the result of the Supreme Court's decision in *Gideon v. Wainwright*. The indigent criminal defendant has practically nothing to lose by appealing; he puts up none of the money. There is no good reason why, in these circumstances, indigent accused persons should not choose to litigate indefinitely, and some have shown themselves prone to do just that. It might be worth considering whether a rule should not be adopted that a convicted criminal offender runs the risk of having his sentence revised upward if his appeal is found to be without significant merit. I do not think it far-fetched to justify such a rule upon the principles of criminal correction.

With regard to civil litigation, there is surely justification for discouraging unmerited appeals by manipulation of the cost consequences of taking an appeal in a civil case. Some special provision would have to be made to ameliorate the cost consequences for the poor and those of modest means. I do not think such a manipulation of civil litigation costs is class legislation, in any proper sense, or otherwise objectionable as imposing one standard of justice for the rich and another for the poor. Litigation—certainly appellate litigation—is in any event sufficiently expensive to be the prerogative of the at least moderately well-to-do, or well-organized. It seems unlikely that they would suffer unduly if confronted with financial inducements not to appeal cases of only routine significance.

STANDARDS RELATING TO CRIMINAL JUSTICE: CRIMINAL APPEALS

American Bar Association*

2.3 Unacceptable inducements and deterrents to taking appeals.

(a) Defendants should be neither induced to take appeals nor deterred from appealing by systematized factors unrelated to the probable outcome of their appeals.

(b) Examples of unacceptable inducements to taking appeals are:

(i) Automatic release pending appeal, on bail or recognizance, of defendants sentenced to confinement [without regard to the substantive character of their cases or appeals];

(ii) Automatic detention of convicted defendants, confined pending appeal, in facilities substantially different in quality and regime from those in which inmates serving sentence are held.

(c) Examples of unacceptable deterrents to taking appeals are:

(i) Denial of legal assistance at government expense to appellants who cannot afford adequate legal representation;

(ii) Denial of recovery of the costs of appeal to successful appellants who have not proceeded in forma pauperis;

(iii) The prospect of a more severe sentence or of conviction of an offense of higher degree upon reprosecution, if the appeal is well-grounded.

Commentary

An elective system of appellate review of criminal judgments should not have factors built in that encourage or discourage appeals to be taken without regard to the merits of the cases and the purposes for appellate review. Such factors would be dysfunctional and, unless independently justified, should not be a part of the system. In light of the deep and growing concern about the burgeoning volume of appeals, any artificial inducement for convicted defendants to appeal should be carefully scrutinized. Conversely, forces that discourage appellants with potentially meritorious cases should be checked even though the result may be an increase in the number of appeals.

a. Stay of executions and bail

There is wide variation among the states and the United States on the effect upon a sentence of imprisonment of taking an appeal. In some jurisdictions, institution of an appeal results automatically in a stay of the sentence and release upon bail or recognizance. Arkansas provides:

> Hereafter on appeals to the Supreme Court in criminal cases, the defendant shall be permitted to give bail pending the appeal in such amount as the court may think proper and safe, in all cases, except in appeals from a conviction of a capital offense.

ARK. STAT. ANN. § 43-2714 (1964). In Rhode Island, a convicted defendant may file notice of appeal and deposit with the clerk the estimated fees for transcribing the testimony required for the appeal. "The filing of such notice and making of such deposit shall stay judgment until further order of the court. . . . In case the procedure aforesaid has been taken judgment shall be stayed." R.I. GEN. LAWS ANN. §§ 9-24-17 and 9-24-18 (Supp. 1967). The recently enacted Pennsylvania criminal procedure rules provide that:

> When the sentence imposed by the trial judge is a fine or imprisonment not exceeding a term of two years, the defendant shall have an absolute right to bail, conditioned upon his perfecting an appeal within twenty days.

PA. R. CRIM. P. 4004(c).

Other states and the federal government have hedged with stated limitations the defendants' power to obtain a stay of execution by the mere indication of their intent to appeal. In Delaware, there is no stay of execution unless either the trial judge or one supreme court justice certifies that "there is reasonable ground to believe that there is error in the record which might require a reversal of the judgment below, or that the record presents an important question of substantive law which ought to be decided by the Supreme Court. . . ." DEL. CODE ANN. tit. 11, § 4502 (1953). Wisconsin provides:

> If a defendant appeals or procures a writ of error, the trial court may in its discretion, by order, stay execution of the judgment before the record is filed in the appellate court if a substantial question of law, other than the sufficiency of evidence, is presented by the record. After the record is filed in the appellate court, the circuit court judge or a justice of the supreme court may, by order, stay execution if upon the record there is a reasonable possibility that the judgment might be reversed. . . . If a stay is granted, the defendant shall give bail in such sum as the court, circuit court judge, or the justice of the supreme court ordering the stay requires, with sufficient sureties for his appearance in the appellate court at the current or next term thereof to prosecute his appeal or writ of error and to abide the sentence thereon.

WIS. STAT. ANN. § 958.14 (Supp. 1967). An Arizona sentence other than of death is stayed upon the certification by the trial judge or a judge of the supreme court that "there is probable cause for reversing

*These standards were approved by the House of Delegates in 1971. They were prepared by a committee led by Hon. Simon E. Sobeloff, with Professor Curtis R. Reitz, Reporter.

the judgment if the appeal is from the judgment, or for modifying the sentence if the appeal is from the sentence." ARIZ. R. CRIM. P. 354B.

These provisions are more explicit than, but not different in intent from, the commonly found provision that permits, but does not require, bail pending appeal. See, *e.g.*, FED. R. CRIM. P. 38(a) (2); Illinois Supreme Court Rule 27(16), ILL. STAT. ANN. ch. 110A, § 609 (Smith-Hurd 1968); PA. R. CRIM. P. 4004(b); GA. CODE ANN. § 6-1001 (Supp. 1967), as construed in Sellers v. State, 112 Ga. App. 607, 145 S.E.2d 827 (1965). The Georgia statute, adopted in 1965, superseded a provision for automatic stay and release. See *id.* § 6-1005 (1964).

The English are more strict in admitting defendants to bail than is true in this country. Trial courts cannot release a convicted defendant pending appeal; this must be done by the Court of Appeal, or a judge thereof, "if it seems fit." Criminal Appeal Act, 1907, § 14(2), 7 EDW. 7, ch. 23; Criminal Appeal Act 1966, § 1(4), 15 & 16 ELIZ. 2, ch. 31. Even where leave to appeal has been granted, which can be done only when the trial judge or a court of appeals judge certifies that "it is a fit case for appeal" under section 3(b) of the 1906 Act, bail may still be denied. In practice, appellants rarely get bail unless there is a strong likelihood that the appeal will succeed or unless there is a risk that otherwise the sentence will have been served by the time the appeal is heard and the appeal poses an arguable question. REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL, CMND. No. 2755, at ¶ 208 (1965). The Donovan Committee rejected a proposal to permit trial courts to admit to bail and to have more liberality in granting bail.

> While we are not unsympathetic to some amelioration of the position pending the determination of an appeal by the Court of Criminal Appeal there are, we fear, considerable objections to any substantial extension of the grant of bail. We do not think that the Court can validly be criticized because of its present approach to the matter. On the other hand there may be cases where the appellant does not seem to have any reasonable prospect of success in his appeal, but where, nevertheless, his conviction and sentence have had such exceptional consequences upon his domestic or business life that a period of bail to enable him to adjust to it, and perhaps keep hope alive, would "seem fit" on compassionate grounds alone, without any substantial risk that he might abscond.

Id. at ¶ 212. The 1966 Act contains no provision making any change in the previous statutory formulation on standards or practice with respect to bail.

b. Deferring imprisonment in penitentiary

Power to prevent the execution of sentence, particularly a prison sentence, is a strong invitation to a convicted defendant to appeal. So, too, is the possibility of deferring incarceration in the penitentiary, even if bail cannot be arranged. Sensitive to the desire of a defendant to remain in the locality of trial to facilitate conferences with his attorney, some jurisdictions have established interim arrangements for custody at the seat of the trial court. Until recently, in the federal system, a defendant could postpone transfer to the penitentiary by filing an election not to commence service of sentence. FED. R. CRIM. P. 38(a) (2), 327 U.S. 858 (1946). Now it is no longer necessary or possible to make such an election and the time spent will count toward service of sentence. 18 U.S.C. § 3568 (Supp. 1967). The incentive to appeal, simply to stay nearer home for some months or years, is thus made a realistic possibility. Oregon, by comparison, enacted a provision in 1963 permitting the defendant to remain 48 hours after judgment, with power in the trial court to order a defendant retained further or returned "if required for preparation of an appeal, at such times and for such periods as may be deemed necessary by the court." ORE. REV. STAT. § 138.145 (1965).

c. Monetary obstacles to appeal

It is a mistake to induce appeals to be taken for the wrong reasons. It is also a mistake to deter or discourage appeals by unacceptable means. Following egalitarian principles drawn from the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has reduced the disparity in access to appellate review caused by the financial costs of appeal. See Douglas v. California, 372 U.S. 353 (1963); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

While the matters of counsel and court fees are thus finally resolved there is still some uncertainty about an indigent's right to obtain a trial transcript. See Hardy v. United States, 375 U.S. 277 (1964). Some states are providing full transcripts now without the compulsion of a constitutional edict. See, *e.g.*, Ill. Sup. Ct. Rule 605, ILL. ANN. STAT. ch. 110A, § 605 (Smith-Hurd 1968); KAN. GEN. STAT. ANN. § 62-1304 (1964) (if defendant certifies that transcript is necessary); N.C. GEN. STAT. § 15-181 (1965) (available as of right only to defendants charged with capital offense); VA. CODE ANN. § 17-30.1 (Supp. 1966) (costs are taxable to defendant if appeal is unsuccessful); WYO. STAT. ANN. § 7-282.1 (Supp. 1967) (available as of right only to defendants sentenced to state penitentiary). Other states provide what the trial court believes necessary for proper presentation of the defendant's case. See, *e.g.*, ALA. CODE tit. 15, § 380(20) (Supp. 1967); ORE. REV. STAT. § 138.500 (1965); WASH. RULES ON APPEAL, Rule 46(c)(2)(i) (1967). After the Supreme Court of Ohio interpreted its code to permit transcripts without prepayment of the costs, State v. Frato, 168 Ohio St. 281, 154 N.E.2d 432 (1958), the legislature changed the code to permit indigent defendants to have transcripts only in the trial court's discretion. OHIO REV. CODE ANN. § 2301.24 (Supp. 1967). The validity of such provisions is questionable under Draper v. Washington, 372 U.S. 487 (1963). Some states attempt, where possible, to use alternatives to the transcript. See, *e.g.*, KY. R. CRIM. P. 12.63; MINN. STAT. ANN. § 611.07 (Supp. 1967).

d. Recovery of costs of appeal

Financial considerations are not only relevant to indigent appellants. A defendant who is not impecunious also has a monetary problem of serious dimension if, projecting that he appeals and succeeds in his appeal, he is still left with the costs of the proceeding. The customary rule is that the costs of a proceeding may not be recovered from a state in the absence of a particular provision authorizing such recovery. This certainly can dissuade some defendants from appealing. A study in New York nine years ago, based upon questionnaires sent to practicing lawyers, indicated that appeals were taken in less than

one-fourth of criminal cases in which the lawyer thought appeal was desirable. The costs of appeal were the factor deterring the appellants. Willcox, Karlen, & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U. L. REV. 934, 936 (1958). Moreover, our usual attitude toward assessment of costs points toward recovery by the prevailing party. Such statutes should exist in all jurisdictions. See, *e.g.*, FLA. STAT. ANN. § 939.12 (1944); MD. ANN. CODE art. 5, § 23 (1968); MASS. ANN. LAWS ch. 250, § 12 (1956); OHIO REV. CODE ANN. § 2953.07 (1954). Alternatively, the costs of preparation of the record might be borne by the state in every case, subject to assessment of costs against a losing defendant-appellant. See MO. ANN. STAT. §§ 547.110, 547.120 (1953).

e. Implicit dangers of being harmed by appealing

The possibility that an appellant, after a successful appeal, may receive a more severe sentence upon reprosecution is obviously a potential deterrent to taking appeals. The magnitude of the deterrent cannot be precisely measured; but its existence cannot be doubted.

In recent months, several federal courts have faced the constitutional questions raised when a heavier sentence is imposed after the initial conviction is upset on appeal or in post-conviction litigation. See United States v. White, 382 F.2d 445 (7th Cir. 1967); Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); United States *ex rel.* Russell v. Starner, 378 F.2d 808 (3d Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967); Rice v. Simpson, 271 F. Supp. 267 (D. Ala. 1967). The results in these cases are quite varied; and it is likely that the Supreme Court will resolve the conflicts.

State courts also have disagreed. The California Supreme Court has held that "a defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his right to appeal." People v. Naga-Parbet Ali, 57 Cal. Rptr. 348, 351, 424 P.2d 932, 935 (1967). The Maryland Court of Special Appeals disagrees. Moon v. State, 1 Md. App. 569, 232 A.2d 277 (1967).

Not only should original sentence serve as a ceiling for any subsequent sentence; but the defendant should receive credit toward the maximum and the minimum terms, if any, on the new sentence. De

nial of such credit can produce the same evil as imposition of a longer term. This Advisory Committee explored the problems of credit in detail in its ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.6 and commentary thereto (Tent. Draft, Dec. 1967).

The rule against any increase in sentence for one who invokes his right to appeal is a fundamental precept of criminal law in countries with a civil law tradition.

> The prohibition against disadvantageous change (prohibition against reformation "in peius") is a doctrine cherished by the Continentals. . . . It will be found in all civil law countries. In some (like Japan) it is even embedded in the Constitution. The only country temporarily to abolish prohibition was Germany during the Nazi regime. The prohibition was however reinstated in the West German procedural code in 1950. (See: Peters, Strafprozess, 1952, p. 60). . . . Defined very broadly it says that the defendant's position must not be worsened as a result of his filing a legal remedy. Thus, for instance, no heavier penalty than that pronounced in the original judgment can be entered if the defendant instituted an appeal. The scope of the prohibition differs from country to country. Sometimes it is limited to a ban on the increase of penalty only, other times it also prevents the application of penal provisions more severe than those utilized in the original judgment (even if there is no change in penalty). In some systems the prohibition is limited to the appellate courts, and does not bind the court of original jurisdiction on re-trial. In other systems (*e.g.* Yugoslavia) such a limitation would seem outrageous. The rationale of the prohibition is, however, always the same. It rests on the idea that the defendant should not fear that he may render a disservice to himself by exercising his right to appeal.
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> DAMASKA, SELECTED TOPICS OF CRIMINAL PROCEDURE A-174 to A-175 (unpublished mimeo. 1966) (available in Biddle Law Library, University of Pennsylvania, Philadelphia, Pa.).

In previous reports, this Advisory Committee has unqualifiedly recommended that the original sentence should be a firm ceiling for any future prosecutions brought on the same charges against a successful appellant or applicant for post-conviction relief. The Advisory Committee has further noted consistently that, to implement this principle, credit for time served under a judgment set aside must be applied to any new sentence. See ABA STANDARDS, POST-CONVICTION REMEDIES § 6.3(a) (Approved Draft, 1968); ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.6 (Approved Draft, 1968).

A distinguishable situation exists for appeals against sentence. This Advisory Committee urged the establishment of the right to appellate review of sentences and, as a corollary, recommended that such review be unencumbered by the possibility of the appellate court's increasing the sentences appealed as too harsh by defendants. See ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 3.4 (Tent. Draft, April 1967). The Special Committee on Minimum Standards for the Administration of Criminal Justice proposed that the power to correct an excessively low sentence be affirmed, largely on the ground that there may be a large number of frivolous appeals against sentence which could flood the courts. The House of Delegates of the American Bar Association, at its mid-winter meeting in February 1968, adopted this Advisory Committee's report as modified by the proposal of the Special Committee. See Supplement to ABA STANDARDS, *supra* (March 1968). At the same meeting, the House of Delegates adopted this Advisory Committee's Report on Post-Conviction Remedies, which contains a standard (§ 6.3(a)) to the effect that a sentencing court should not be empowered to impose on an applicant who successfully sought post-conviction relief a more severe penalty than had been originally imposed. It is clear, therefore, that the concern of the Special Committee centers on those defendants who are appealing from sentence. It does not alter the position taken here that, where the appeal goes to the conviction, the original sentence should operate as a ceiling upon sentence at any reprosecution.

2.4 Eliminating frivolous appeals; pre-appeal screening.

(a) Procedural devices for pre-appeal screening, designed to eliminate frivolous cases from appellate court dockets, are impractical and unsound in principle.

(i) A requirement of the trial court's certificate as a condition of appellate review is inconsistent with the right to appeal unless a decision to refuse the certificate is itself appealable. If such decision is appealable, the procedure for transition of cases to the

appellate court has been unnecessarily complicated and the burden upon the appellate court has been substantially increased.

(ii) Devices for screening out frivolous cases by the appellate court, such as a requirement for leave of the court to appeal at the first level of review, add a useless stage to most appeals at a considerable burden to the court. Flexibility of procedure so that any appeal terminates, by a decision on the merits, at the earliest practical stage of its consideration in the appellate forum is far preferable.

(b) There appear to be no acceptable penalties that can be imposed upon appellants who willfully prosecute frivolous appeals beyond the sanction of assessment of costs, which has no impact on those proceeding in forma pauperis.

Commentary

a. **Dimensions of the problem**

Considerable concern about frivolous appeals has been manifested in recent years. There are factors from which to infer that the concern has some basis. To a great extent, the concern has a financial dimension, centering particularly upon the developments in the providing of transcripts for indigent appellants at government expense. There is also a belief that the rising incidence of appeals is, in part, a product of frivolous appeals being taken, again by indigents. Related difficulties arise in the lawyer-client relationship between indigents and assigned counsel who feel that there is no merit in their clients' cases. There is thus a strong link between indigence and the frivolous appeal.[11]

Some persons have speculated that the rate of frivolous appeal must be increasing because a convicted indigent defendant risks nothing and spends nothing to pursue his appeal. Fees are waived. Counsel is provided at no cost to the appellant. A record, probably a full transcript, is provided at government expense. With all this available for nothing, and with the possibility of reversal as the stimulus, it is reasoned that there are bound to be a large number of groundless appeals. The presiding justice of a California court of appeal recently said:

> I don't know what proportion of criminal convictions are appealed today but I am sure that the proportion is rising and will continue to rise, because under existing law a defendant has absolutely nothing to lose except the inconvenience of a new trial, if he considers that an inconvenience, and he has much to gain. He has no cost and no risk, so it is quite likely that any judgment of the court will be appealed. . . . The second thing that any trial judge ought to have in his mind is that most appeals are speculative appeals. That is, the defendant just files a notice of appeal without having any particular error in mind. Then, because he's an indigent, the court appoints an attorney for him. The appointed attorney doesn't know the defendant, he doesn't know anything about the trial. He takes the cold record, he analyzes it and he argues an appeal anything and everything that the record shows or doesn't show which might constitute grounds for reversal.

Proceedings of the 1966 Sentencing Institute for Superior Court Judges, 52 CAL. RPTR., APPENDIX 75-76 (1966).

The logic has a certain persuasiveness; but solid supporting data is not available. The virtual non-existence of reported federal cases in which a criminal appeal was dismissed as frivolous has been noted. Ehrenhaft, *Are the Paupers Pampered? Indigent Appellants in the Federal Courts*, 46 A.B.A. J. 646, 647 (1960). The Annual Reports of the Administrative Office of the United States Courts, Table B-1, show only a small number of criminal appeals disposed of by dismissal after hearing or submission.[12] In the United States Court of Appeals for the District of Columbia Circuit, notwithstanding a sharp increase in the number of cases commenced, the rate of reversal has remained relatively constant. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 312 (1966). This suggests that, qualitatively, the recent case increment is not very different from the kinds of cases appealed in prior years. On the other hand, the

11. Justice Clark has written: "We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous." Douglas v. California, 372 U.S. 353, 358 (1963) (dissenting opinion). To support this, the Justice cited the low percentage of indigent litigants who had successfully persuaded the Supreme Court to exercise its discretionary power to hear their cases, a set of figures that has only the most indirect relevance to the frivolousness of their appeals in the courts below or to the quality of the issues presented to the Supreme Court in the petition for certiorari.

12. The Reports do not differentiate among grounds for disposition before hearing or submission.

reversal rate in the other ten circuits has declined in the past few years. *Id.* at 310.

The conception of convicted defendants flooding appellate courts because they have nothing to lose overlooks a counter-view that the defendant who realizes that his claims are frivolous also knows that he has nothing to gain by appeal. Therefore, it is important to focus attention upon the quality and content of the legal information and counselling to which convicted defendants have access. There is much reason to believe that, to a substantial extent, there has been a lack of effective legal assistance at the critical point of the decision whether to appeal. Many defendants are completely without counsel at this point. Where defendants are receiving competent legal advice on the desirability of appeal from lawyers in whom they have confidence, it is not evident that any significant number act contrary to counsel's evaluation of the case.

Following this reasoning, it is clearly sound to seek to improve the lawyer-client relationship so that defendants will receive and, having received, will accept competent legal advice. This is the most effective point of attack upon frivolous appeals. There is no reason to reject the conclusion that the great majority of appellants sincerely believe that they have grounds for appeal. This sincere belief may be brought on by self-deception, by simple ignorance, by bad advice from fellow prisoners or "jail house lawyers." It can be dispelled only by patient and understanding counsel.

As indicated in an earlier section, there is reason for concern about a defendant's lack of appreciation of what transpires in the courtroom, especially at the time of sentencing. See § 2.2, *supra*. Time and effort expended at this point in explanation of the case and full exploration of the defendant's doubts and questions is worth much more than the time and effort later extracted from assigned counsel pursuing a groundless appeal that should never have been instituted. See § 3.2, *infra*.

b. Constitutionality of screening all appeals

Most efforts at eliminating or reducing frivolous appeals have been directed at appeals by indigent defendants. These have been struck

down by the Supreme Court of the United States as violations of the Fourteenth Amendment guarantee of equal protection of the laws. See Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington, 357 U.S. 214 (1958); Burns v. Ohio, 360 U.S. 252 (1959); Draper v. Washington, 372 U.S. 487 (1963); *cf.* Douglas v. California, 372 U.S. 353 (1963). In declaring unconstitutional restrictions upon access of indigents to appellate review, the Supreme Court has made it clear that a procedure for screening *all* appeals would not be barred by the Constitution.

> Moreover, since nothing we say today militates against a State's formulation and application of operatively nondiscriminatory rules to both indigents and nonindigents in order to guard against frivolous appeals, the affording of a "record of sufficient completeness" to indigents would ensure that, if the appeals of both indigents and nonindigents are to be tested for frivolity, they will be tested on the same basis by the reviewing court.
> Draper v. Washington, *supra*, at 499 (1963).

As yet, no jurisdiction has found a fully satisfactory solution to the formulation and application of rules for this purpose. The possibility that such procedures could be designed to withstand constitutional challenge does not establish that it would be wise to do so. As will be developed in the following comments, it is basically unsound to introduce a screening stage for the purpose of short-circuiting frivolous appeals.

c. Appeals by leave of the appellate court

A requirement that all defendants obtain from the appellate court leave to appeal, as the initial phase of the appeal, should be considered as a procedure to eliminate groundless appeals. This would not run afoul of the egalitarian principles that invalidate such threshold screening only for indigents. Four of the states in this country now have such a system. It imposes a heavy burden on the appellate court, however, and is not likely to be widely adopted.

In Virginia, review is by writ of error rather than appeal. A party for whom the writ of error lies may apply for it on a petition in which the errors are assigned. The petition may be presented to the Supreme Court of Appeals, or in vacation of the court, to any judge thereof.

The petition must be accompanied by the transcript of the record of so much of the case as will enable the court or judge properly to decide on such petition. VA. CODE ANN. §§ 19.1-284, 19.1-285 (1960).[13]

A very similar practice is followed in West Virginia, although the form of review is designated alternatively as appeal or writ of error. In either form, the party may present a petition to the supreme court of appeals, or to a judge thereof in vacation. The petition must assign errors. A record is compiled to permit proper decision of the petition. W. VA. CODE ANN. §§ 58-5-1, 58-5-3, 58-5-6 (1966).

In Arkansas, a variant of the modern British procedure is followed. A defendant convicted of a non-capital offense first applies for an appeal to the court in which he was convicted. That court may grant the appeal. If that court refuses to grant the appeal, a further application can be made to the Arkansas Supreme Court. ARK. STAT. ANN. §§ 43-2708, 43-2709 (1964). "The appeal shall be allowed by a judge of the Supreme Court, after an examination of a certified transcript of the complete record, unless he is thereupon satisfied that there are no reasonable grounds for believing that any error to the prejudice of the defendant has been committed for which the judgment should be reversed, and that the appeal is prayed for delay merely." *Id.* at § 43-2710. In cases of capital offenses, appeal is a matter of right. *Id.* at § 43-2723.

Most appeals in Kentucky are as a matter of right. Where a sentence of less than a year of imprisonment is imposed, however, appeal may be had only if granted by the appellate court. KY. REV. STAT. § 21.140 (1963).

While the provisions in these states seem to be a continuation of older practices that most states have rejected in moving from the writ of error to the appeal as the basic mode of appellate review, the pressure of litigation business on overburdened courts might lead to consideration of the desirability of setting up a system of discretionary appeals as a means of controlling the docket. See Hazard, *After the Trial Court—the Realities of Appellate Review*, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 60, 83 (Jones ed. 1965): "Some day, however—and not too long hence—the fact will have to be faced that, even in a three-tier system, there cannot be an appeal of right in all cases."

13. Virginia is one of the largest states yet to create a three-tiered court system. See § 1.2, comment d, *supra*. Calendar control may require the court of appeals to exercise strict discretion in selecting cases for review.

The grave difficulty of screening mechanisms such as these, however, is the necessity that the case be prepared for decision on the question of leave to appeal in almost the same manner as if the appeal were being heard on the merits. A preliminary determination by the appellate court of the probable merit of every case in an effort to screen out frivolous appeals, administered in a way that does not prejudice all appeals, seems to be undesirable on the simple, pragmatic ground of the added burden on the courts overriding any savings effected.

To the extent that a single judge of the appellate court rather than a full court acts upon petitions for leave to appeal, some saving in judicial man-hours may be obtained. But it is obviously at serious cost to the quality of review. A basic attribute of an appellate court is the collegial nature of its decision-making process.

d. Appeals by leave of the trial court

A system of discretionary appeal can be created and the discretion vested in the trial judge. The trial judge presumably is already familiar with the record in the case and with the questions that could be presented on appeal. It would not be a substantial additional burden upon trial courts to make them arbiters of petitions for leave to appeal. The risks inherent in this device are obvious.

Several examples of such a system can be found, in the United States and in England.

1. Recently, California adopted a statute making appeals discretionary with the trial court where the conviction rests upon plea of guilty or *nolo contendere:*

> No appeal shall be taken by defendant from a judgment of conviction upon a plea of guilty or *nolo contendere*, except where:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

CALIF. PENAL CODE § 1237.5 (Supp. 1967). The circumstances that gave rise to this novel provision are not clear. Possibly it is a protective measure to reduce a large volume of cases seeking retroactive application of the decision of the Supreme Court of the United States holding that there exists a right to counsel on appeal under the Constitution. Douglas v. California, 372 U.S. 353 (1963).

2. Another type of trial court control is found in the federal system under a statute that provides: "An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a). A parallel provision in the same section states that the trial court "may authorize . . . [an] appeal . . . without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the . . . appeal and affiant's belief that he is entitled to redress." Under the language of this statute, a convicted indigent defendant must seek trial court permission to appeal. The trial court must make a finding of indigence. In addition, the statute directs the trial court to pass upon the "nature" of the appeal and, if not satisfied, the court presumably issues its certificate that the appeal "is not taken in good faith."

3. Also used within the federal system is the certificate of probable cause, required in appeals from judgments in certain habeas corpus litigation:

> An appeal may not be taken to the court of appeals from the final court in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. § 2253.

4. In England, a person convicted may appeal "with the leave of the criminal division of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact

alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal." Criminal Appeal Act, 1907, § 3,7 EDW. 7, ch. 23; Criminal Appeal Act, 1966, § 6(a), 15 & 16 ELIZ. 2, ch. 31.

5. Among the American states utilizing a leave to appeal procedure, as noted in comment c above, Arkansas utilizes the trial court in non-capital cases as agency with power to grant access to appellate review.

In none of these systems is a trial court decision denying the necessary permission to appeal unreviewable. Either by statute or by practice, the appellate court exercises de novo review of such determinations. That is most clear in the statutes of England and Arkansas. It has developed by interpretation of the federal statutes. See Coppedge v. United States, 369 U.S. 438 (1962); Ellis v. United States, 356 U.S. 674 (1958); Farley v. United States, 354 U.S. 521 (1957); Johnson v. United States, 352 U.S. 565 (1957), FitzSimmons v. Yeager, 391 F.2d 849 (3d Cir. 1968). The recent California statute describes only the trial court's power; but a report on the probable construction of the statute suggests that a negative decision will not be final. A report issued by the California Continuing Education of the Bar notes that, while the procedure is new and the course it will take is difficult to predict, analogy will probably be made to the California procedure for stay of execution of a judgment pending appeal, where the appellate courts have found inherent power to review trial court decisions. REVIEW OF SELECTED 1965 CODE LEGISLATION 190-91 (1965).

Where trial courts participate in screening appeals, it can be foreseen that strong resistance would emerge to any practice that made decisions of those courts unreviewable. The undesirable aspects of lodging final authority on appeals in the trial courts are reasonably clear. The judge whose rulings at trial are in dispute should not have absolute power to deny appellate review. Beyond the few actual potential abuses of power that might occur, there is an appearance of injustice, affecting many more cases, that must be avoided. The inherent vices of this allocation of power and responsibility underlie the strong affirmation of a right to appeal in section 1.1 of these standards.

Whether trial courts can usefully participate in screening appeals, subject to further review of negative determinations by the higher court, is not clear, but the prospects appear dim. It can be doubted whether the savings effected by the elimination of frivolous appeals would outweigh the effort expended in isolating them. Particularly is that true if the minimal standards of procedural rigor and fairness are employed in making a ruling on the threshold question. A record is necessary. Counsel must actively address themselves to the matter. The judicial process must be invoked, twice where the trial judge's denial is appealed. A danger lurks that such litigation would turn into a truncated and wholly unsatisfactory substitute for an appeal, without adequate briefs, without any oral argument, and without the normal care given internal court handling of decisions on the merits.

Justice Stewart saw this danger in the federal litigation of 28 U.S.C. § 1915 (a). He concluded that such threshold litigation is at best a waste of time and that federal courts of appeal might well consider granting leave to appeal in forma pauperis as a matter of course, subject to possible prosecution motion to dismiss. Coppedge v. United States, 369 U.S. 438, 458 (1962) (concurring opinion).

e. Pre-appeal screening by non-judicial agencies

A truly startling idea, pre-appeal screening by persons other than judges, was advocated recently by Viscount Dilhorne, formerly Lord High Chancellor of Great Britain. In the course of debate on the Criminal Appeal Act of 1966, Viscount Dilhorne proposed that frivolous appeals might be weeded out by members of the administrative staff of the Court of Appeal: ". . . [S]urely any barrister or solicitor of experience, on looking through and reading the applications and the notices of appeal, would not find it difficult to say that these ones are clearly frivolous, these ones have some merits, and these are obviously substantial points." 274 PARL. DEB., H.L. (5th ser.) 833. Questioned particularly about the finality of the decision of these Assistant Registrars, Viscount Dilhorne maintained that there need be no judicial review at all. *Ibid.* This proposal was not incorporated into the 1966 English revision of the system of criminal appeal. The system remains, as it has been since its inception, basically appeal by leave of a judge

of the Court of Appeal, or upon the certificate of the trial judge. Criminal Appeal Act, 1907, 7 EDW. 7, ch. 23, § 3.

f. Penalizing frivolous appeals after decision

A state might consider a set of "punishments" for criminal defendants who appeal on frivolous ground; after reaching its decision on the merits, the appellate court could make a further judgment in some cases that the appeal was so lacking in substance that the appellant should suffer a penalty. Although a system of this kind has existed in theory in England it has not worked well and its introduction in the United States cannot be recommended.

Any system of punishments necessarily is premised on deterrence. It is yet to be demonstrated, and it may seriously be doubted, that any significant number of criminal defendants appeal with foreknowledge that their cases are frivolous. Only those who have that knowledge should be deterred. However, the threat of a penalty can deter from appealing defendants who do *not* view their cases as frivolous. To the extent it does so, the fundamental purposes of all criminal appeals are disserved.

Further, it is not evident that any satisfactory penalty can be found. In England, prior to 1966, the penalty was denial of six, sometimes nine weeks of credit toward service of a prison sentence. Such a penalty strikes only those who have received prison sentences and have not been able to obtain release on bail pending appeal. The discriminatory impact of such a penalty in this country would raise serious constitutional doubts under the Equal Protection Clause of the Fourteenth Amendment.

The English Criminal Appeal Act provides:

> The time during which an appellant is in custody pending the determination of his appeal shall, subject to any direction which the Court of Appeal may give to the contrary, be reckoned as part of the term of any sentence to which he is for the time being subject . . . .

Criminal Appeal Act, 1966, 15 & 16 ELIZ. 2, ch. 31, § 6(1). No standard is provided in the statute for the guidance of the court in giving the "direction"; but section 6(2) requires that the Court of

Appeal shall state their reasons for giving any direction. Since the English system is essentially one of appeal by leave of the court, the impact of this provision really concerns the time involved in processing an application for leave to appeal. If leave is denied and the court believes the application was frivolous, it may deny the defendant credit for the period of the pendency of the application.

Prior to the 1966 Act, every unsuccessful applicant for leave to appeal automatically lost six, or sometimes nine weeks of credit if the Court of Criminal Appeals failed to direct that he should receive such credit. The court seldom issued such directions, so that a convicted defendant faced the realistic prospect of serving that much additional prison time if leave to appeal was denied. The Donovan Committee described the rationale of the earlier provisions:

> The primary justification for the present law remains the need to impose some restraint upon hopeless applications to the Court. The machinery of the Court can at present be set in motion with no more formality than the submission of an application for leave to appeal or of a notice of appeal on an ostensible point of law, and there is not, as in civil cases, the risk of incurring substantial costs to act as a deterrent. . . . In order to discourage unjustified appeals some additional deterrent was considered to be necessary and this takes the form of the discount of part of the prisoner's time spent in prison.

REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL, CMND. NO. 2755, ¶ 172 (1965). After relating the many criticisms of the practice on its arbitrariness and lack of justice, the Committee concluded:

> In our opinion it can be defended only as being in practice necessary as a barrier against a possible flood of hopeless appeals. No one can demonstrate that those who fear such a flood if the rule were abrogated are being unduly apprehensive. There are large numbers of persons convicted on indictment who to-day, recognising that an appeal on their part would be without merit, make no attempt to appeal. They might well do so, however, if there were nothing to lose.

Id., ¶ 181. The Committee concluded that, even with the dangers of weakening the barriers against unmerited appeals, credit should be denied only if the court took affirmative action to direct this result:

> The Court will thus retain power to penalise an appellant whose appeal is totally devoid of merit, but it will be required to bring its mind to the problem instead of operating an almost automatic rule. In any case where the Court orders forfeiture of time we think it should give its reason, and that this should be communicated to the appellant if he has not been present.

Id., ¶ 184.

FRIVOLOUS CRIMINAL APPEALS

Robert Hermann*

I

INTRODUCTION

The volume of appeals in criminal cases has grown markedly in recent years.[1] It is likely that a large part of this growth in volume is attributable to an increased percentage of poor defendants appealing their convictions, an opportunity now afforded them as a result of Supreme Court decisions which place the indigent appellant on a more nearly equal footing with his wealthier counterpart.[2] Even if it is questionable to say that "[w]e all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous,"[3] both common sense and experience do indicate that the unlikelihood of success on appeal is little or no deterrent to a person who is offered free of cost the chance to overturn his criminal conviction. Most efforts at eliminating or reducing frivolous appeals, according to the American Bar Association (ABA), have therefore been directed at appeals by indigent defendants,[4] and these consequently raise difficult problems of equal protection.

The fact that many a poor person appeals his conviction simply because he has nothing to lose by doing so[5] means in turn that appellate courts, to their great annoyance, are being called upon increasingly to hear and decide cases in which the legal issues raised are clearly without merit. These frivolous appeals create problems not only for the courts but also for counsel and, less obviously, even for criminal defendants as a class. The question of how frivolous appeals should be handled raises difficult issues concerning the responsibilities of appointed counsel and the supervisory function of the appellate courts in the criminal justice system. This article will attempt to describe the problems which are created by frivolous appeals,[6] with the focus being primarily on practices in the federal courts of appeals. Some suggestions for ameliorating the problems will appear at the conclusion.

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*Member of New York Bar, Reproduced from 47 N.Y.U.L. Rev. 701 (1972)

[3] Douglas v. California, 372 U.S. 353, 358 (1963) (Clark, J., dissenting). Contra, Coppedge v. United States, 369 U.S. 438, 449-50 n.16 (1962).

[4] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Criminal Appeals 63-64 (Approved Draft 1970) [hereinafter ABA Criminal Appeals Standards].

[5] This is especially true since North Carolina v. Pearce, 395 U.S. 711 (1969), held in effect that a person who is retried following an appeal may not be given a heavier sentence than that originally imposed, in the absence of information bearing on sentence which was not previously known to the court. Compare Colten v. Kentucky, 407 U.S. 104 (1972), distinguishing de novo retrials from the rationale of *Pearce*.

[6] It should be noted that the problem of frivolous appeals may be of a different order in states such as New York where the appellate courts have power to review both the adequacy of the evidence to support the verdict and the severity of the sentence imposed. N.Y. Crim. Pro. Law § 470.15 (McKinney 1971). See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences 67-85 (Approved Draft 1968), for a listing of such jurisdictions. If an appellate court has power to review such factual and judgmental questions, it is more difficult to state assuredly that an appeal is frivolous. Thus, in New York, counsel rarely seeks to withdraw from an appeal on grounds of frivolousness, and the courts discourage the attempt to do so. See People v. Perry, 33 App. Div. 2d 800, 307 N.Y.S.2d 236 (2d Dep't 1969). See generally text accompanying notes 83-85 infra.

II

The Nature of the Problem

A significant amount of appellate judges' time is spent in reading two or more briefs, exchanging memoranda and perhaps writing an opinion in criminal cases which plainly lack any basis for reversal.[8] Especially with regard to the federal appellate bench, it may fairly be said that most judges find the task at best bothersome and at worst infuriating.[9] Even though it is the regular business of judges to winnow from a mass of claims those which are substantial, the task becomes more bothersome and more routinized[10] as the volume of such work grows.[11] This in turn results in a judicial *Weltschmerz* which colors the courts' attitude toward all criminal appeals and has an indirect but perceptible effect on the chances of success on appeal of those defendants who may have meritorious grounds for obtaining a reversal.

Lawyers who regularly practice before appellate courts are rarely oblivious to these realities. For them, the question of how to deal with frivolous appeals is perhaps the most difficult, recurring ethical problem they face. Many lawyers regard as distasteful and unpleasant the task of presenting a clearly meritless claim to a court, a sensation which may not be mitigated even by the expectation of receiving a fee.[12] This personal reaction is important only because it is reflective of a professional concern as well, one epitomized by the ABA's assertion that "[l]awyers are deemed to owe a general duty to courts not to present frivolous claims."[13] As long as that is so, lawyers will be forced to make difficult and delicate judgments assessing the meaning of their clients' rights to the effective assistance of counsel and to the equal protection of the laws on appeal, while simultaneously reckoning with their own duties to the court and the importance of their continued credibility as professional advocates. Although it is true that a lawyer cannot ethically or realistically advise one client not to appeal so that another's more deserving case will fare better in the future, the issue cannot be resolved by blinking at it either. For a lawyer who regularly appears before the same appellate court in criminal cases to treat each case as equally meritorious is not only to ignore the ABA's view of his professional obligation; it is also to attempt without avail to solve the problem of his professional effectiveness on behalf of all his clients by pretending or assuming that it does not exist.[14]

III

Constitutional and Practical Considerations

In 1963, the Supreme Court held in *Douglas v. California*[15] that the Constitution guarantees an indigent the right to the assistance of counsel on a direct appeal from a felony conviction if such an appeal is available to others as a matter of right. Four years later, the Court held in *Anders v. California*[16] that the effective assistance of counsel on appeal means the right to have one's lawyer place before the reviewing court all points which might arguably support a reversal of the conviction. It is "the court—not counsel—" whose task it is "to decide whether the case is wholly frivolous,"[17] said the Court, although counsel may seek to withdraw from appeals which appear, after "conscientious examination," to be "wholly frivolous."[18]

It is possible to confine the import of *Anders* to that narrow holding: Since it is up to the court, not the lawyer, to decide whether the appeal is frivolous, counsel must give the court the legal and factual information with which to make that decision.[19] *Anders*, however, has not often been interpreted in such a straightforward manner; rather, it is seen as having established a rarefied distinction between appeals which are merely meritless and those which are wholly frivolous.[20] Under *Anders*, so interpreted, the constitutional guarantee of effective assistance of counsel[21] assures representation to criminal appellants for meritless but not for frivolous appeals.[22]

Distinguishing the frivolous from the merely meritless appeal is difficult, however. Frivolousness, like madness[23] and obscenity,[24] is more readily recognized than cogently defined.[25] The practical question posed is how counsel is to decide whether any given appeal—one which clearly is not destined for a summary reversal—is frivolous or only without merit. It is no answer

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15 372 U.S. 353 (1963).

16 386 U.S. 738 (1967).

17 Id. at 744. The practice which had grown up in some states after *Douglas* was that assigned counsel, after searching the record and finding no basis for appeal, wrote a letter to the defendant and the court stating that he would not pursue the appeal further because there was no merit to it. See In re Nash, 61 Cal. 2d 491, 393 P.2d 405, 39 Cal. Rptr. 205 (1964). This procedure, referred to as the "no-merit" letter, is what the Court specifically disapproved in *Anders*. In the federal courts, the practice had generally been otherwise, at least since Ellis v. United States, 356 U.S. 674 (1958) (per curiam). See, e.g., United States v. Camodeo, 367 F.2d 146 (2d Cir. 1966), vacated and remanded, 387 U.S. 575, aff'd on remand, 383 F.2d 770 (1967) (counsel must submit affidavit detailing the trial record and applicable legal issues and authorities). Formerly in the Second Circuit, the withdrawal requirements were deemed applicable even to petitions for certiorari. See United States v. Williams, 379 F.2d 319 (2d Cir.) (per curiam), cert. denied, 389 U.S. 991 (1967). Second Circuit Rule 4(b)(e) was then promulgated to declare that counsel who "does not desire" to petition the Supreme Court for review may simply write to his client and so inform him. In response to Doherty v. United States, 404 U.S. 28 (1971) (per curiam), and Schreiner v. United States, 404 U.S. 67 (1971) (per curiam), the Second Circuit recently reinstated its former motion requirement under a revised rule 4(b)(e) (effective January 1, 1972). See also § 4(c) of the Ninth Circuit Revised Provisions for the Representation on Appeal of Persons Financially Unable to Obtain Representation (effective March 1, 1972).

to say, as *Anders* did, that "the distinction in any given case is for this court to decide,"[26] for counsel must somehow determine in the first instance whether it is appropriate to seek to withdraw,[27] and the court must have some standard for deciding whether counsel's view is correct.

Frivolousness plainly imports more than just the fact that counsel is "subjectively unimpressed with the merits of the case."[28] It must also denote more than that counsel believes the conviction will be affirmed by the appellate court. For one thing, the reversal rate in criminal cases is too low to make this latter test meaningful;[29] for another, the test supplies no basis for distinguishing between appeals which will probably fail and those which must inevitably fail. In the District of Columbia, another test has been suggested: Counsel is advised not to seek leave to withdraw "unless in the same circumstances he would insist on withdrawal if he had been retained."[30] This admirably egalitarian pronouncement glosses over the possibility that the two situations may not be comparable.[31] It is likely that the need to pay a lawyer's fee and expenses is some deterrent to frivolous criminal appeals. Retained counsel also can withdraw more readily and informally—usually by substitution of other counsel—than can assigned counsel and further, can more readily avoid prejudicing the defendant by alerting the court, and in some circuits the Government, to the weakness of the case.

A frivolous criminal appeal can be concretely described even if it cannot be satisfactorily defined. It is an appeal with all or most of the following attributes: It is a loser, not just a probable loser, but a clearly hopeless loser, in the judgment of counsel who has read the record and researched the law. The record contains few, if any, motions or objections by defense counsel. No novel matter of constitutional law or statutory interpretation was raised

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26 Sanchez v. State, 85 Nev. 95, 98, 450 P.2d 793, 795 (1969). The ABA Code of Professional Responsibility, Ethical Consideration 2-29 n.68 (1970), also begs this question by observing:

> Dr. Johnson's reply to Boswell upon being asked what he thought of "supporting a cause which you know to be bad" was: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call thinking, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why, then, Sir, you are wrong, and he is right." 2 Boswell, The Life of Johnson 47-48 (Hill ed. 1887).

Dr. Johnson's response answered the lawyer's dilemma as helpfully as the apocryphal umpire's answer to the batter who professed that what had been called a strike was in fact a ball: "Sir," said the umpire, "they ain't balls, they ain't strikes, they ain't nothin' till I call 'em."

30 Suggs v. United States, 391 F.2d 971, 977 (D.C. Cir. 1968), aff'd on the merits, 407 F.2d 1272 (D.C. Cir. 1969).

below or is presented by the facts. The evidence of guilt is so overwhelming that most errors, even if clearly shown to be such, would have to be regarded as harmless ones.[33] There is no evidence on or outside the record of official misconduct or overreaching tactics by the police or prosecution. Nothing which might strike a sympathetic chord in a reasonable person, either with regard to the defendant's character or his involvement in the crime, is presented by the facts of the case. The only matters even tenuously assignable as error are evidentiary rulings which pertain to matters of small consequence, were not objected to in the trial court or can be faulted only by an abstruse exegesis of the law. During the trial, the judge did not conduct himself unseemingly or as an advocate for the prosecution; later, he delivered without objection a bland, technical charge to the jury, not attempting to marshal the evidence on either side.[34] Surprisingly, a fair number of cases in the federal courts have all or nearly all of the qualities just described.

The Supreme Court, however, did not crystallize the diffuse components of a frivolous appeal into a workable definition when it said in *Anders* that counsel could not be permitted to withdraw from an appeal on grounds of frivolity unless he first has submitted "a brief referring to anything in the record that might arguably support the appeal."[35] If these matters which "might arguably support the appeal" are in the reviewing court's opinion not "arguable on the merits," then the appeal is frivolous and the appellant is not entitled to other counsel to brief and argue his case.[36] *Mirabile dictu.*

IV

Procedure for Handling the Frivolous Appeal

A. The Role of Trial Counsel in Perfecting an Appeal

One thing a lawyer cannot do when confronted by a frivolous appeal is simply to walk away from it.[37] It is clear that trial counsel must advise the defendant when he is convicted that he has a right to appeal.[38] Likewise, it is also clear that if the defendant, upon being advised of his right to appeal, indicates a desire to do so, counsel may not fail to file a notice of appeal or simply abandon the appeal because he believes that the case lacks merit.[39]

Even in the federal courts,[39] however, it has taken some time for these fundamentals to sink in. In one case, for example, an American Indian with a seventh-grade education was tried and convicted of murder in a federal district court in 1968 and was sentenced to life in prison.[40] After a notice of appeal was filed, retained trial counsel wrote to the defendant and stated that since he believed there was no basis for the appeal he was not going to perfect it. The defendant, who had retained counsel at the cost of his entire lifetime savings, wrote to the trial judge requesting other counsel. In March 1969, the trial judge denied the request, writing to the defendant that trial counsel "is one of the fine lawyers in the state" and that he, the trial judge, had "no reason to believe that any appeal . . . would be anything more than frivolous."[41] The defendant's direct appeal was later dismissed for lack of prosecution.[42]

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[40] DeMarrias v. United States, 444 F.2d 162 (8th Cir. 1971), rev'd and remanded, 453 F.2d 211 (8th Cir. 1972).

One way to eliminate this sort of response to what counsel perceives as a frivolous appeal is to provide, as several circuits have done, that trial counsel appointed to represent an indigent in a criminal case in the district court is automatically continued as counsel on appeal unless upon motion he is relieved by the court of appeals.[43] However, some courts deem it desirable for different reasons of policy that new counsel routinely be appointed for the appeal,[44] and only the Second Circuit makes its rule of continued representation applicable to retained as well as to assigned counsel.[45] Another way of preventing the abandonment of appeals is for the court to provide that filing an appeal sets in motion a process for scheduling the hearing of the appeal.[46]

B. The Role of Counsel in Withdrawing from a Frivolous Appeal

Once the appellate court has acquired jurisdiction of the case and a lawyer has acknowledged responsibility for presenting the appeal, what is that lawyer required to do if he determines the appeal to be utterly frivolous? The Supreme Court addressed itself to this question in *Anders v. California:*

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.* The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses: the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. . . .
>
> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. . . .[47]

This statement of proper procedure raises for the practitioner and the lower courts as many questions as it answers. To the extent that the lower courts have answered these questions at all, they have done so inconsistently.

Perhaps the most difficult problem raised by the part of the *Anders* opinion quoted above is ascertaining exactly what counsel should submit to the court when he determines that a case is frivolous and he wishes to request permission to withdraw. Counsel, said the Court, is supposed to act "in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.*" His brief should refer to "anything in the record that might arguably support the appeal," with "references not only to the record, but also to the legal authorities." Counsel should not be in a position of "brief[ing] his case against his client."[48]

However high-minded may have been the Court's intentions, as evidenced in the quoted statements, in practice they cannot be fulfilled. A lawyer who truly believes a case to be frivolous cannot, while requesting leave to withdraw, simultaneously be an "active advocate" for reversal of the conviction; if in his view there were "anything in the record that might arguably support the appeal," presumably he would not have sought permission to withdraw.[49] On the other hand, if he is sincerely convinced that the case is frivolous, references to the record and to legal authorities can only amount to a "brief . . . against his client." Caught in such a dilemma, counsel seeking to withdraw from a case on the ground of frivolity have generally resorted to either of two approaches in the writing of an *Anders* brief, both of which were disapproved by the Court.[50] Some have written cursory and conclusory briefs which at least cannot be said to be advocacy against one's client, even though they are of little aid to the client or the court in reviewing arguable errors. Others have written briefs detailing at length both the facts and the legal issues and authorities. This, although most helpful to the court, usually is in effect a brief against the client.[51]

A second question left unanswered by the *Anders* opinion is whether counsel, prior to moving to withdraw on grounds that the appeal is frivolous, must first consult with the defendant to ascertain his views, and, if so, whether counsel is obligated to advance to the court arguments which the defendant wishes to be

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[43] 2d Cir. R. 4(b); 5th Cir. R. 7(2); plans for representation of indigents under the Criminal Justice Act, 18 U.S.C. § 3006A (1970), adopted in the Eighth and Ninth Circuits. (The Eighth Circuit plan is reprinted in 28 U.S.C.A. Fed. R. App. P. at 103 (Supp. 1972).) Contra, Turner v. North Carolina, 412 F.2d 486, 489 n.3 (4th Cir. 1969) (dictum).

[44] See Holmes v. United States, 383 F.2d 925, 930-31 (D.C. Cir. 1967). Judge (now Chief Justice) Burger expressed disagreement with this view. He pointed out that continuing trial counsel on appeal would speed the handling of appeals and save the Government money by allowing the case to proceed on an abbreviated record. He also questioned whether an indigent appellant was, as the majority had suggested, entitled to a "fresh approach" with new counsel on appeal while nonindigents lacked that luxury. Id. at 933-35. The Chief Justice recently reiterated these views in his address on The State of the Federal Judiciary—1971, delivered before the ABA in New York City on July 5, 1971, in 57 A.B.A.J. 855, 858-59 (1971). For an expression of similar views, see State v. Koser, 76 Wash. 2d 509, 458 P.2d 27 (1969).

[51] A third response of some lawyers has been to submit in support of the appeal a sketchy brief on a single, obviously meritless issue, rather than to move for permission to withdraw and thus be required to show by citation to authorities why numerous possible issues are frivolous. The former course takes much less time. However, the client is misled into believing that his case was subjected to appellate scrutiny, while the lawyer is spared the possible hostility of a client who feels his counsel is giving him less than the most vigorous representation.

made but which counsel regards as frivolous. The Supreme Court said only that counsel should furnish to the defendant a copy of his brief in support of the motion to be relieved, allowing the defendant time to raise any points he chooses,[52] and arguably this undercuts any obligation of advance consultation. However, the Fourth Circuit interprets *Anders* as requiring appointed counsel ordinarily to consult with the defendant at least once, and preferably in person, "because counsel has a duty to press arguments initiated by his client which may arguably be supported, even though counsel does not personally espouse them."[53] Most state and federal appellate courts, nonetheless, do not require such consultation before the motion is made. Instead, the practice is for counsel or the court, or both, to send a copy of the motion papers to the defendant well in advance of the return date, preferably with a letter explaining to him the various ways in which he may respond.[54] The defendant is then given an opportunity to file pro se a statement of whatever errors he thinks were made at his trial, and if the court believes that any of the points he raises are of arguable merit, new counsel may be appointed[55] or the motion to withdraw may be denied.[56]

The problem of frivolous appeals cannot be separated from the problem of the quality of the lawyer. If all lawyers were conscientious, capable and diligent with respect to appeals, presumably the *Anders* decision would have been of minimal significance. That, however, is not the case. There are some criminal lawyers (and not as few as one would wish) who conduct themselves, often despite explicit court policy to the contrary, as if their obligations to their clients end at the time of sentencing; they are lax about preserving issues for appeal, and, when faced with an appeal, resent and even shirk their appellate duties. On a different stratum of the bar, there are lawyers in commercial practices who, when assigned to do a criminal appeal, give the matter lowest priority in terms of time and attention. There are, too, numerous lawyers, both with defense organizations and in private practice, who lack the experience or the acumen, or both, to recognize a good appellate argument or to develop one that is thrust in front of them.[57] Indeed, a frivolous appeal can be functionally, if not very helpfully, defined as one in which a capable lawyer devoted to his client's best interests, after conscientiously searching the record and researching the law, can find nothing to argue with a straight face.[58]

Short of misrepresenting the facts or the law, counsel often responds to the near impossibility of distinguishing between a meritless case, from which one may not withdraw, and a frivolous case, from which one may withdraw, by pretermitting the issue. Rather than seek to withdraw, he may choose to prosecute the appeal but do so only halfheartedly. Counsel may write a sketchy digest of the testimony and simply state in conclusory fashion

[53] Smith v. Cox, 435 F.2d 453, 458 (4th Cir. 1970), vacated on other grounds sub nom. Slayton v. Smith, 404 U.S. 53 (1971) (per curiam).

that as a matter of law the evidence was insufficient to sustain the verdict. He may argue issues or objections that could have been raised in the trial court but were not, knowing full well that they are much too trivial to be regarded as plain error.[59] He may accurately state the law at present but argue without amplification that the court should reconsider the issue.[60] He may file a brief raising matters obviously lacking in merit and waive oral argument.[61] Any of these approaches may lull the client—who is often not sent a copy of the government's brief and rarely is able to come to oral argument—into believing that he is getting a meaningful appeal. The appellate court, which is more familiar with the behavior of counsel, knows better; and, as has previously been pointed out, the fiction is not entirely harmless. To the extent that *Anders* represents an attempt to police the appellate bar, it underestimates the ingenuity and even deviousness of the target population.

VI

Some Suggestions for Change

Little has been done about the problem of unqualified or indifferent counsel on appeal. Of course, a court cannot by fiat make Cardozos out of lesser mortals.[68] However, it is within the power of appellate courts to remove from the list of lawyers available for assignment on appeal—pursuant to the Criminal Justice Act[69] or some comparable statute authorizing compensation—those who have demonstrated a lack of competence or diligence in handling criminal appeals. This is not done at present.[70]

[59] It is of course part of counsel's duty to argue for a change in existing law when there is some basis for so doing. See ABA Criminal Appeals Standards, supra note 4, at 76. However, there are some issues—the right to a speedy trial is usually a good example—which the courts have ruled upon so recently and so often that arguing for a change can only be viewed as chimerical. The ABA suggests that a lawyer may make any legal argument "supported by the law or . . . supportable by a good faith argument for an extension, modification or reversal of the law," whether he believes the argument will ultimately fail or succeed. However, a lawyer may not assert a position "that is frivolous." ABA Code of Professional Responsibility, Ethical Consideration 7-4 (1970). See also id., Disciplinary Rule 2-110(C)(1)(a) (lawyer may properly request permission to withdraw from pending case if client "insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification or reversal of existing law").

[68] The obverse is that "[e]very defendant does not have the Constitutional right to be represented by Clarence Darrow." Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971). The California Supreme Court has, however, attempted to educate the errant lawyer. See In re Smith, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970), in which the court described in some detail the numerous nonfrivolous issues which might be raised. However, the court also ordered new counsel appointed on remand. Id. at 204, 474 P.2d at 976, 90 Cal. Rptr. at 8.

[69] 18 U.S.C. § 3006A (1970). The court can, however, make counsel pay for his derelictions. See Matter of Winsberg, 446 F.2d 641 (9th Cir. 1971) (per curiam) (lawyer penalized $200 for failure to file appellant's brief promptly).

[70] Unfortunately, given the many members of the commercial bar who are at best unenthusiastic about receiving assignments in criminal appeals, removal of incompetent lawyers would encourage practices which properly the court should want to discourage.

Another reason why this proposal would be only partly effective is that many, perhaps even most criminal appeals by indigents, are prosecuted by legal aid or public defender offices. Typically, the court assigns as counsel the office's attorney of record and it has no control over which attorney is subsequently designated to write the brief and argue the appeal. On the other hand, the attorneys in such offices frequently do not share the private bar's antipathy to indigent criminal appeals (even though they may share a lack of competence or diligence) and are for that reason less likely to be candidates for expunction from the court's assignment panel.

Preappeal screening for frivolous cases, whether done by the trial court, the appellate court or some nonjudicial agency, is undesirable as a policy matter and is probably also a denial of equal protection unless indigent and nonindigent appeals are screened on the same basis.[71] The same may be said of the idea, occasionally advanced in earnest,[72] of penalizing frivolous appeals after the inevitable affirmance by, for example, increasing the sentence.[73]

Several of the federal courts of appeals have adopted rules for expedited or summary handling of frivolous appeals.[74] Although such procedures may accelerate disposition of these cases, it is difficult to see that they change in any respect the issue of counsel's proper response to the meritless appeal or that they alter the nature of the decision which the appellate court must make about it.

Because the line between appeals which are frivolous and those which have no merit is very thin, if indeed it exists at all, the Supreme Court should attempt again (*i.e.*, assuming it did so once in *Anders*) to pinpoint the line of demarcation. The courts of appeals should also occasionally indicate in close cases why a particular case fell on one side of the line rather than the other. Instead of simply affirming from the bench or writing a one-word opinion—the usual fate of the frivolous appeal briefed and argued on the merits—the courts should write opinions indicating, however briefly, why the case was deemed to be frivolous. Similarly, selectively writing opinions to explain the courts' reasons for granting or denying a motion to be relieved would further guide the bar.[75] Although many appellate judges frequently decry what they perceive to be a growing volume of frivolous appeals, they have done little to instruct counsel on what is a frivolous issue and what is not. Certainly each of the courts of appeals could explain in an opinion what it wishes by way of substance in a brief in support of a motion to withdraw and when it believes such a brief should properly be filed.[76]

The various circuits ought also to exercise their rulemaking powers to specify the proper procedures to be followed in motions to be relieved. These rules should cover such questions as the time limit for making the motion;[77] the form and contents of

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[71] See Coppedge v. United States, 369 U.S. 438, 445-48 (1962); Miranda v. United States, 458 F.2d 1179 (2d Cir. 1972) (per curiam); United States v. Deaton, 349 F.2d 664, 666 (6th Cir. 1965); ABA Criminal Appeals Standards, supra note 4, at 60-70; Carrington, supra note 1, at 574-79.

[72] See, e.g., Hazard, After the Trial Court—The Realities of Appellate Review, in The Courts, The Public and the Law Explosion 60, 84 (1965).

[73] ABA Criminal Appeals Standards, supra note 4, at 70-72. North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969), would clearly conflict with this proposal.

the supporting brief; whether the motion is to be made ex parte or on notice; and, if the latter is the case, whether counsel's brief should be served on the Government; whether the Government, if permitted to respond to the motion, may rely on the appellant's counsel's papers or must submit its own analysis to support its motion for dismissal or affirmance; how the appellant is to be notified of the motion and how its significance is to be explained to him, along with the time and ways in which he may respond;[78] whether oral argument by either side will be heard; whether counsel or the court has the responsibility to notify the appellant if the motion is granted and the appeal is affirmed or dismissed; and what must be explained to the appellant in the latter event concerning his right to file pro se a petition for a writ of certiorari.[79]

As a check and a precaution, each member of the court of appeals panel which is to decide the motion should have one of his law clerks read the record to determine whether counsel's request to be relieved is a proper one. This is common practice in the federal courts but not in all state courts; it should be the rule if for no other reason than that *Anders* expressly requires the appellate court to conduct its own independent evaluation of the merits of the case.[80]

In the end, there is very little which can constitutionally be done to discourage the bringing of frivolous appeals. One area where there is room for improvement, however, is in attorney-client consultation. Certainly too few trial lawyers discuss helpfully with their clients the merits of an appeal and the likelihood of its success. Many lawyers simply do not know enough law to be of real service in this respect, while some regard their professional duties as completed with sentencing. Even where court rules provide for continuation of trial counsel on appeal, some lawyers routinely advise their clients that it is hopeless to appeal and some, intending to farm out the appeal to another lawyer, do not bother to discuss the matter with their clients at all. It may be true, as has been suggested, that the volume of frivolous appeals would decline if "defendants receiv[ed] competent legal advice on the desirability of appeal from lawyers in whom they have confidence."[81] That, however, is asking a great deal, given the current state of things.[82]

Permitting appellate courts to review the propriety of the defendant's sentence would probably reduce the number of appeals raising frivolous legal issues. "Many present appeals are taken for the sole reason that the defendant is dissatisfied with the sentence he has received,"[83] and it seems plausible that allowing a defendant to appeal the legal ruling which most troubles him will lessen the pressure to appeal on the merits of dubious legal issues.[84] This would obviate many of the problems created

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[79] In the Second Circuit, The Legal Aid Society of New York City, if it deems a petition for certiorari unwarranted, will move in the court of appeals to be relieved from filing a petition on the ground that it would be a frivolous one. See 2d Cir. R. 4(a). If the court grants the motion, it also directs counsel promptly to instruct the appellant on how to file a pro se certiorari petition. The Society then sends appellant a detailed memorandum on this subject, as well as a copy of the transcript.

for lawyers and judges by frivolous appeals, and it would assuredly benefit defendants as a class.[85] Whether the appellate courts, if given the choice, would be eager to trade the headache of frivolous appeals for perhaps the greater one of routine sentence review is open to question.

VII

Conclusion

Unless the Supreme Court reverses the trend to equalize indigent defendants' access to the appellate courts, frivolous appeals are here to stay. Consequently, it is important that the appellate courts clarify for counsel how to determine whether an appeal is frivolous and what counsel's responsibility is when he has such an appeal. It is also desirable that the courts promulgate rules setting forth the proper procedures for making a motion to be relieved on the grounds of frivolousness.

It may well be, as Justice Douglas appears to suggest,[86] that the vagaries of prediction are such that counsel ought never to be allowed to withdraw from a criminal appeal.[87] However, *Anders*, which is still the law, is to the contrary, and appellate courts and counsel still have not learned how to live with that decision.

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[86] Schreiner v. United States, 404 U.S. 67, 68 (1971) (per curiam) (concurring opinion).

Paul D. Carrington*

In light of the present congestion problem, there is no reason to tolerate litigants who appeal only in desperation. At present, the only deterrents systematically imposed are the risks of liability for costs and interest.[110] There is usually no risk that the unsuccessful appellant will be taxed for the appellee's attorneys' fees.[111] Although the English and some continental legal systems allow the taxation of modest attorneys' fees to the party prevailing on appeal,[112] this procedure seems too inconsistent with our ideals of equal treatment for poor litigants[113] and too likely to deter meritorious appeals to be acceptable.

A more selective approach, which would impose sanctions only against frivolous appeals, seems more attractive. Two approaches are suggested by present legislation. One old federal statute, which has never been used to effect, authorizes imposition of costs on the attorney who so "multiplies the proceedings in any case as to increase costs unreasonably and vexatiously."[114] Vigorous enforcement of this provision is surely unattainable[115] and undesirable. While counsel has a responsibility to prevent abuse of process,[116] he is already subject to considerable stress in serving conflicting loyalties to courts and clients; it would be most unfair and probably ineffective to attempt to make the risk of substantial personal economic loss a factor influencing his behavior. Inasmuch as the ultimate decision to appeal is the client's in any event, it seems much more reasonable to address the sanctions and the warnings to the pocketbook of the litigant.

There has been a statutory basis for sanctions against frivolous appellants since the original Judiciary Act of 1789,[87] but it is so poorly drafted that it is quite uncertain in its application, in the sanctions it provides, and in its administration. Sanctions,

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[110] 28 U.S.C. §§ 1920, 1961 (1964).

[111] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[112] *See* Clark, *The Evershed Report and English Procedural Reform*, 29 N.Y. U.L. Rev. 1046, 1056–57 (1954); Kaplan, *Civil Procedure — Reflections on the Comparison of Systems*, 9 Buffalo L. Rev. 409, 414 (1960).

[113] *See* Duniway, *The Poor Man in the Federal Courts*, 18 Stan. L. Rev. 1270 (1966).

[114] 28 U.S.C. § 1927 (1964).

[115] In no reported case has this statute ever been invoked by an appellate court to punish a frivolous appeal. The only reported case from any court is Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350 (6th Cir. 1915). The sin was excessive cross examination; the penalty, $75.24.

[116] ABA Canons of Professional Ethics No. 30. For a discussion of the efficacy of this restraint see Thode, *The Ethical Standard for the Advocate*, 39 Texas L. Rev. 575, 589–92 (1961).

*Professor of Law, University of Michigan. Reproduced from 82 HARV. L. REV. 542, 569-572 (1969).

including "damages for delay" and double costs, are authorized whenever a judgment is affirmed, and the sweep of the statute seems to embarrass the court invoking it. Despite occasional threats that the statute would be more stringently enforced in the future,[118] only about two dozen appellants have been assessed in the last seventy-five years.[119] On a few of these occasions, the court was willing to impose the sanction without discussion,[120] but more often it has been deemed necessary to give some reason for singling out a particular litigant.[121] Such reasons have not been easily supplied. In several cases, courts have perhaps unwisely withheld sanctions by applying a sentimental, subjective test which caused them to endorse the good intentions of appellant's counsel in urging an appeal without merit.[122] Reluctance to invoke the statute has also been exhibited in cases in which artificial limitations are imposed on the statutory discretion, such as the rule that no sanctions can be imposed against a frivolous challenge to jurisdiction.[123]

The spectacle of erratic application supports the belief that the present statute is worthless as a restraint on frivolous appeals. Yet it is unlikely that even an artistically drafted statute providing modest, reasonably proportioned sanctions would have an impact on the flow of appeals. Part of the problem lies in the fact that civil litigants who have invested heavily in time, money, and emotion are not likely to settle for disappointing results at trial if there is any prospect that the decision might be reversed with a slight additional investment in an appeal. Such expectations are confirmed by our experience with the zestless and ineffectual use of sanctions by district courts in their protection of the discovery process from frivolous abuse,[124] and also by the ineffectiveness of the use of costs as sanctions to deter plaintiffs from the use of federal courts in actions not actually involving the proper jurisdictional amount.[125] It is to be concluded that revision of the statute may be worthwhile for its own sake, but not as a significant remedy to the problem of congestion.

If we cannot rely on parties or their counsel to forbear from urging spurious appeals, we may find need to make the decision for restraint in their behalf. Such a procedure is contemplated, for example, in rule 5 of the Rules of the First Circuit, which provides that "[a]t any time . . . the court may dismiss the appeal or affirm the judgment below if the court lacks jurisdiction over the appeal or if it shall clearly appear that the appeal presents no substantial question." A program of more active use of this sort of rule might suggest itself as a solution to the congestion problem, but it would in fact be unwise to encourage

greater use simply for the purpose of conserving judicial energies.[126] This is so because of the energy required to consider whether an appeal is worthy of judicial consideration. Only very rarely will a case reveal on its face that it is motivated by delay or otherwise frivolous. Once the effort is made to think through the contentions of the parties and to make an earnest effort to evaluate them, the court is sufficiently committed that there is very little economy in avoiding plenary disposition. The time saved from oral argument could be quickly offset by the time spent in deliberation on the preliminary motion for summary affirmance. If the purpose is to save the writing of the opinion, this might be done, to the extent that it is advisable, without any prehearing screening. Thus, while the summary affirmance may be a useful device for giving calendar preference to easy cases which can be decided without delay, it is not a prospective source of significant economies of judicial time.

A comparable device which would be subject to the same objections, but which might be more effective to control congestion, would be the enlargement of the requirement of leave to appeal. This would differ from the summary affirmance in shifting the burden of persuasion; the appellant would be affirmatively required to justify his use of the appellate process. Such a requirement is presently a feature of interlocutory appeals and prisoner petitions within the federal system.[127] It is a general feature of appellate review in the courts of Virginia and West Virginia.[128]

The procedure may also be suggestive of the certiorari practice of the Supreme Court, but this comparison is inappropriate because of the different roles of the courts. The certiorari practice, inaugurated with the Evarts Act [129] and enlarged by the Act of 1925,[130] was made possible by the creation of the courts of appeals to perform the basic work of review. Thus, the courts of appeals remain responsible for reviewing the substantiality of the evidence and the propriety of the fact-finding process, while the Supreme Court is expected to decide only questions of great public importance.[131] It might be possible to identify a few classes of cases in which this distinction is less clear. In cases under the Social Security Act [132] and in cases arising under the Longshoremen's and Harbor Workers' Compensation Act,[133] for example, there has been an administrative finding reviewed by a district judge when the case reaches the court of appeals. Conceivably, some energy might be conserved if review in such cases were restricted to the more abstract considerations pertaining to the accuracy of the legal principles invoked in support of decisions. The effect, however, would be to place greater reliance on the administrator and district judge and deprive litigants in such cases of the kind of institutionalized, impersonal review of the evidence which they have come to expect. Such a deprivation does not seem justified by the limited saving that would be accomplished.

[126] Of course, where the appeal is patently frivolous an early dismissal or affirmance may represent a substantial saving for the parties. The First Circuit experience has been that the rule is successfully invoked only four or five times a year, out of about 275 appeals. Interview with Chief Judge Aldrich, in Boston, Mass., Nov. 26, 1968. *E.g.*, Magnesium Casting Co. v. Hoban, 401 F.2d 516 (1st Cir. 1968).

[127] 28 U.S.C. §§ 1292(b), 2253 (1964).

Alternatively, a similar restriction might be imposed on review in diversity litigation because of the relative unimportance of the role of the courts of appeals in such cases. It must be observed, however, that the role would be almost entirely eliminated if the only diversity cases which were reviewed were those which presented interesting legal issues on which the authoritative voice of the courts of appeals should be heard. The need in diversity cases is often a need for a review of the sufficiency of the evidence and the adequacy of the procedure; these questions are seldom disposable on the basis of cursory screening. Moreover, qualifying the right to review in diversity cases would create an unfavorable contrast with the practice in state courts.[184]

[184] In addition, there may be an argument that the right to review under state law is a substantive right which the federal courts must respect.

DELAY IN COURT

Richard A. Posner*

The perennial but apparently deepening problem of docket congestion has evoked a spate of suggested reforms and a new discipline — "judicial administration." The most frequent suggestions are for more judges and for greater use of computerized management techniques to smooth the judges' load and permit more cases to be disposed of in a given amount of judge time. As remedies, these suggestions are flawed by the fact that they ignore the role of pricing both in the creation of court delay and in the formulation of effective methods of relieving it.

Delay is not due to the fact that the demand for litigation is high and the amount of judge time limited. The demand for potatoes is also high and the capacity to expand production to meet new increments of demand also limited. People queue up to buy litigation but not to buy potatoes because judicial time is not rationed by price and potatoes are. If the demand for potatoes increased faster than the supply, the price of potatoes would rise until demand and supply were equated. An appropriately graduated system of surcharges for people desiring to have their cases heard promptly would have the same effect. If the prices necessary to clear the market (eliminate the queue) were very high, it would be a signal that an investment of resources in hiring more judges would probably be cost justified. The prices might not be high. Perhaps only a small fraction of litigants have sufficient interest in an early trial to pay a surcharge. That would be a signal not to add judges.

To add judges without changing the price of access to judicial time is questionable on two counts. As just mentioned, the additional judges may not in fact be needed. The demand for prompt trials may be weak. But we will never know in the absence of a price mechanism for measuring the intensity of demand. Second, the addition of judges may have little effect on delay other than in the very short run. By increasing the quality of legal redress, at least to those who value speedy trials, the expansion in the number of judges will induce some people to use the courts who previously had been deterred by the delay. The analogy is to the construction of a new freeway to relieve traffic congestion. Significant relief may not be produced. The new freeway may induce people who formerly used other methods of transportation due to dislike for congestion to substitute driving, until the freeway is almost as congested as the roads it replaced had been.

Thus far we have assumed, with the judicial administrators, that court delay is a bad thing and should be the focus of attention by court reformers. In fact delay is an omnipresent feature of social and economic life; in the judicial system as in the restaurant industry, it would be surprising indeed if the optimal amount of delay were zero. Since court delay does not involve the same time costs as waiting in line for a table at a restaurant (why not?), and since some interval is necessary to prepare a

*Professor of Law, University of Chicago. Reproduced from ECONOMIC ANALYSIS OF LAW (Little, Brown & Co., 1973).

case and a defense thereto, some delay must be optimal; on the other hand long delays may be highly inefficient since the decay of evidence would result in an increase in error costs. And of course the costs of delay must be balanced against the costs of shortening the court queue. The advantage of the pricing approach suggested above is that it would obviate the need for attempting to measure directly the costs and benefits of various amounts of court delay.

C. THE PURPOSES OF APPELLATE LITIGATION

THE SCOPE AND PURPOSE OF REVIEW IN CIVIL PROCEEDINGS

Roscoe Pound*

ULPIAN tells us that appeals are needful because they correct the unfairness or unskilfulness of those who adjudicate.[1] But review does more than correct unfairnesses and mistakes. That determinations may be reviewed is a preventive of unfairness and a stimulus not to make mistakes. The possibility of review by an independent tribunal, especially by a bench of judges as distinguished from a single administrative official, is not the least of the checks which the law imposes upon its tribunals of first instance. That hasty, unfair or erroneous action may be reversed by a court of review holds back the impulsive, impels caution, constrains fairness and moves tribunals to keep to the best of their ability in the straight path. With this double function of correction and prevention, the scope of appellate proceedings may be said to be: (1) review of the process of ascertaining the facts, (2) review of the finding of the applicable law, (3) review of the application of the law to the found facts, and (4) in the common-law system, authoritative ascertainment and declaration of a legal precept for such cases as the one in hand, where none has been clearly promulgated. Not all these things, however, are involved in every appeal.

It is of the first importance to assure so far as possible an objective and impartial determination of the facts involved in a controversy, and of the law to be applied to those facts. This involves assurance that each party interested in the outcome has been fully and fairly heard, has been sufficiently made aware in advance of the case he is to meet so as to be able to meet it fully and intelligently, and has been apprized of the grounds upon which the tribunal may determine adversely to him sufficiently to make such effective argument as he may be able with reference to

[1] Dig. xlix, 1, 1, pr.

*Late Dean of the Law School of Harvard University. Reproduced from APPELLATE PROCEDURE IN CIVIL CASES 1-2 (Little Brown & Co., 1940)

the validity and applicability of those grounds. It involves also assurance that the cause has been determined as to the facts upon evidence of rational probative force and that the judgment or order flows legally from the facts found. These are the features of review which concern the parties to the cause. The public interest that justice be done to every one makes these matters of public concern also. But there is special public concern in the remaining feature of review in a common-law jurisdiction. Especially under the conditions which obtain in the United States, the judgment pronounced or the written opinion filed in the ultimate court of review has two purposes. It serves as the basis of advice to clients and of decision by the courts in other cases according to the common-law technique of decision and doctrine of precedents. In addition, it serves as a check upon the judiciary under our system of checks and balances in a polity in which so many legal questions are political and so many political questions are legal. For this reason, it is generally regarded as highly important that the reasons of judicial decisions in our highest courts be set forth fully in written opinions accessible to the legal profession and to the public, and that the courts should pronounce definitely upon every point raised by counsel even if no more than to state it and pronounce it irrelevant. One of the problems of appellate courts in America today is how to perform this important function without unduly detracting from the functions of review which primarily concern the parties.

WHAT MAKES ERROR HARMLESS?

Roger J. Traynor*

TO ERR IS HUMAN, as a judge well knows, but to err is not always harmless. How does a judge determine whether an error is harmless or not?

There was a time in the law, extending into our own century, when no error was lightly forgiven. In that somber age of technicality the slightest error in a trial could spoil the judgment. The narrow bounds of propriety were entirely surrounded by booby traps.

Consider, among manifold examples, an appellate court's review in 1863 of a conviction for robbery. The indictment charged that the defendant had taken certain property from the victim by threats and force. Could error cast a shadow on such clear words? Yes, said the Supreme Court of California; there was an error of omission. It reversed the judgment on the ground that the indictment failed to specify that the property taken did not belong to the defendant and hence failed to give him adequate notice of the crime charged.[1]

In this appellate court there would be no forgiving an error of omission, even one that involved only spelling. The court scrutinized an indictment that charged the defendant with entry into a building with intent to commit larcey. The omission of the letter *n* in larceny left the meaning clear, but reduced the word to two syllables. In the law such a flaw was fatal. There was no such crime as the one charged, said the court; nor could larcey now be laced up with an *n*. The court would not invoke *idem sonans*, though anyone with larceny in his heart would be well-attuned to a charge of larcey. So there was a reversal, on the ground that the indictment failed to charge the defendant with the requisite specific felonious intent.[2]

Reversals for trivial errors occurred in many jurisdictions.[3] New trials were ordered at the drop of a hat or a consonant that was needed to split a hair. However minuscule the errors, there was heroic spraying for overkill.

When appellate courts retreated from their responsibility, becoming instead "impregnable citadels of technicality,"[4] lawyers played the game accordingly. "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."[5] At long last the legal profession itself sought reform,[6] which finally materialized in harmless-error statutes enacted by the federal government[7] and many states.[8]

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*Professor of Law, Hastings College of Law, formerly Chief Justice of California.
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Such statutes were designed to obviate reversals when an error did not deprive a party of rules or procedures essential to a fair trial. The statutes must operate in harmony with all the other rules imposed by constitutions, statutes, and court decisions to insure a fair trial. Their objective is to conserve not merely public funds, but the judicial process itself for legitimate disputes by guarding against needless reversals and new trials that would clog already burdened trial-court calendars.

* * * *

Does it follow that when a result is correct, it cannot be a "miscarriage of justice" or "inconsistent with substantial justice"? Can a correct result automatically be equated with justice?

There are advocates of such an equation. . . . They readily concede that in equating a correct result with justice, an appellate court necessarily envisages what result it would have reached as a trier of fact, thereby substituting itself for the actual trial court or jury. In their view an appellate court is bound to do so. They find the mandate in the words "appears to the court" in the federal rule [47] and "the court shall be of the opinion" in the California rule.[48] These words, they say, call for an independent decision by an appellate court on the justice of the result based upon its independent evaluation of the correctness of the result.

The *correct result* advocates add as makeweight that since an appellate judge necessarily exercises discretion in applying any test of harmless error, he cannot keep in limbo his subjective evaluation of the result below. In their view, despite the separation of appellate court and trial court functions, an ad hoc merging of functions in evaluating error is essential to the conservation of judicial resources.

The conservation of judicial resources, though itself a worthy objective, is a strange terminal point for an argument purportedly concerned with precluding miscarriages of justice. The argument goes off course because of its assumption at the outset that a correct result is necessarily a just one.

What could be more misleading than such an equation? It is one thing to tolerate as harmless the errors that involve only the "mere etiquette of trials" or the "formalities or minutiae of procedure." It is quite another also to tolerate as harmless the errors that do such violence to the substantial rights of litigants as to debase the judicial process itself, whose very purpose is to assure justice. Once such violence is tolerated, no one could enter a courtroom confident of a fair trial. Would that matter? Would justice

suffer? Yes. Concededly, not one of us can draw a picture of justice or state its dimensions in words. Nonetheless, we know from this country's long experience in giving substance to the concept of a fair trial that for us, at least, it is an essential element of justice.

We know also from experience the danger of mechanical formulas that tend to replace discriminating judgment. We no longer tolerate the dissipation of judicial resources by the crafty use of essentially harmless error to propel a reversal. We cannot now tolerate the debasement of the judicial process itself by a shortsighted preoccupation with correct results regardless of what violence may have been done to the substantial rights of litigants.[49]

A rational test of harmless error must operate to preserve such rights even as it serves to screen out innocuous errors. Since the right to a fair trial underlies all other rights, a litigant has a right to something more than a decision by a specified tribunal. He has a right to objective consideration of all proper evidence by triers of fact without violations of any substantial rights he may have as a litigant. He is entitled, not to a trial free of all possible error, but to a trial free of harmful error.[50]

The concept of fairness extends to reconsideration of the merits when a judgment has been or might have been influenced by error. In that event there should be a retrial in the trial court, time-consuming or costly though it may be. The short-cut alternative of reconsidering the merits in the appellate court, because it is familiar with the evidence and aware of the error, has the appeal of saving time and money. Unfortunately it does not measure up to accepted standards of fairness.

* * * *

What about the appellate court, when it is called upon to determine whether or not an error affected the judgment? How much of a true believer should it be? What degree of probability should it require that the judgment is contaminated? Should it affirm if it believes that it is more probable than not that the error did not affect the judgment? Highly probable that it did not? Almost certain that it did not?

* * * *

I should welcome a test of high probability for harmlessness. Given an error that affected a substantial right, the judgment below is suspect. Unless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse.

Any test less stringent entails too great a risk of affirming a judgment that was influenced by an error. Moreover, a less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding an error harmless whenever he equated the result with his own predilections.

* * * *

Unlike many a middling compromise that is no more than a diluted version of extremes, the *highly probable* test, compelling searching inquiry into the question of whether or not the judgment was actually affected by the error, has nothing in common with the extremes of all too easy affirmance of a judgment or all too ready reversal.

Those two lazy ways of review insidiously lower the standards of justice. Often all too easy affirmance is a tempting course of least resistance because many records laced with error appear at first glance to indicate that the correct result was reached below. The trouble with a first glance is that it tends also to be the last one. Hence no inquiry is ever directed at the crucial question: Did error affect the judgment?

The failure to make such an inquiry is particularly likely in criminal cases. Appellate judges, persuaded by the record that the defendant committed some crime, are often reluctant to open the way to a new trial, given not only the risk of draining judicial resources but also the risk that a guilty defendant may go free. The very reluctance of judges to confront such risks, however, serves to condone errors that may affect a judgment and thus engenders a still more serious risk, the risk of impairing the integrity of appellate review. Nothing is gained by running such a risk and much is lost. If appellate judges forthrightly opened the way to a new trial whenever a judgment was contaminated by error, there would be a cleansing effect on the trial process. A sharp appellate watch would in the long run deter error at the outset, thereby lessening the need of appeal and retrials.

Like all too easy affirmance, all too ready reversal is also inimical to the judicial process. Again, nothing is gained from such an extreme, and much is lost. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.[108]

The *highly probable* test avoids the evils of inadequate or excessive stringency by making affirmance conditional on high probability that error did not affect the judgment. The test compels a judge to go beyond a first glance for affirmance or a fleeting glimpse for reversal. It compels him to exercise his mind in the exercise of his discretion, to go beyond the appearances of the result to an examination of what causal links there may be between error and the judgment. It keeps judicial discretion within the ample bounds of reason. It can greatly improve the net worth of the judicial process as it thus holds down excesses either of affirmance that recklessly dampens assurance of a fair day in court or of reversal that needlessly calls for still another fair day at the expense of litigants who are still awaiting their first day in court.

CIVIL APPEALS: ARE THEY USEFUL IN THE ADMINISTRATION OF JUSTICE?

Irving Wilner*

With the exception of cases raising constitutional issues or involving primacy of administrative adjudication, judicial review in the area of civil appeals should be abolished.

For the most part, appeals are regarded as meliorators of nisi prius decisions or, on a broader level, as the ordering force in the law—the guarantor of certainty and uniformity. Nevertheless, experience affords no basis for the conviction that the appellate process results in specific decisions which are particularly sure to be "just" or consonant with "law" (except in the tautological sense that the judgment of the reviewing court *is* the "law"). Neither is there any support for crediting appeals with achieving integrated guiding principles.

The "correctness" of the legal principle applied in a given case by an appellate court is no more objectively determinable than the claimed "error" of the court below. In the ultimate, the authority of the reviewing process rests on nothing but a formal, whether constitutional or statutory, fiat. Nothing essential would be withheld if, by the same formal process, final authority were to be bestowed upon the original judicial forum. This reasoning is reflected by the uniform trend of decisions holding that due process does not require the granting of judicial review.[100]

Neither do ideals of certainty and uniformity dictate the indispensability of an appellate process to insure freedom from errors of law in the administration of justice. Uniformity of decision is not a virtue in itself; it is meaningful only as fostering equality and is, essentially, an antithesis to arbitrary discrimination. Equal protection of the law has uniformly been recognized not to require uniformity of legal decisions. No statistical evidence is necessary to suggest that both uniformity and certainty are just as jeopardized by an erroneous finding of fact as by an incorrect application of a principle. Yet, despite our heightened awareness of the importance of fact determinations, neither equality nor certainty are urged as grounds for their regular reviewability in jury or non-jury cases.

From the viewpoint of uniformity and certainty, appeals are to some extent self-defeating. The clarification of a doubtful specific in an appellate decision necessarily involves the reification of multiple theoretical considerations, a process which potentially converts the thus clarified specific into a spectrum of totally new uncertainties.

Appeals are predicated upon a number of doubtful premises. Among these are: (1) that there is a clear distinction between fact and law; (2) that appellate review is an efficient method for assuring just results; (3) that legal principles enunciated by reviewing tribunals are scientific pronouncements, partaking of the qualities of determinism, objectivity, and causality; and (4) that there exists an identifiable line of demarcation between issues which are legal and those which are social, economic, or political.

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*Member of the D.C. Bar. Reproduced from 56 GEO.L.J. 417, 448-450 (1968).

Judicial review is internally contradictory. The process presupposes the independent existence of "correct" principles of law which are not, however, ascertainable until the exhaustion of laborious and involved procedures encompassing a hierarchy of tribunals. While review procedure assumes that trial judges are capable of "error," it generally does not permit an examination of their activity until the final judgment. When the judgment is reviewed, the guidance afforded is usually limited to that phase of the matter which is found to be affected with error, leaving the proceeding open to the possibility of further error upon remand. There is also the anomaly that while courts of appeal will at times utilize a case as an occasion for announcing a new doctrine, though not requested by either party to do so, they continue to insist that only an "actual case or controversy" is an acceptable instrument for generating legal principles.

Appellate procedures should likewise be scrutinized in the context of the current crisis of confidence in the administration of justice. Our unquestioning acceptance of judicial review in civil matters contributes to that crisis, for the resultant proliferation of pronouncements bewilders the legal profession and utterly baffles the public. Since many appellate opinions are by divided courts and constitute reversals of precedent, appellate courts themselves are a factor in engendering a sense of frustration in the public by conveying an impression of arbitrariness and factitiousness. A not insignificant by-product of the review process is a detraction from the authority of the trial court—the only judicial forum with which the public comes into personal contact and in which citizens may participate as litigants, jurors, experts, or witnesses.

The continued adherence to our review procedure is ineffective in meeting the overriding problem facing our system of administering justice—the making of readily *accessible* law in a truly *authoritative* manner, at a point of time when its normative function will be most truly felt. In place of appeals, which at best are mere ex post facto declarations of legal norms, methods should be devised for making authoritative legal information available as a guide to conduct. No administration of justice can rest on an assumed knowledge of law without making the means for obtaining such knowledge readily available. To the extent to which they are truly serviceable, legal rules should be authoritatively set forth by appropriately constituted public bodies unrelated to the making of decisions in actual court cases. Such formulations will have the advantages of continuity, orderliness, and expertise—qualities not found in the necessarily haphazard functioning of appellate courts. A reform of this magnitude will, however, make great demands upon the legal profession, for greater accessibility of the law and of legal processes will likewise require a rethinking of the function of the bar, a utilization of all its resources, and a thorough restructuring and reallocation of its administrative and adjudicative responsibilities.

JUDICIAL DISCRETION OF THE TRIAL COURT, VIEWED FROM ABOVE

Maurice Rosenberg*

. . . Statutes rarely make any attempt to enjoin the normal prerogative of upper courts to give rein to their birthright by indulging in *joie de revision*. The Supreme Court of Delaware many years ago put into words the effect of this remarkable doctrine when it said that "[a]n exercise of discretion by a trial court may be erroneous but still be legal."[15]

Laymen can be excused if they register bafflement at that concept. How can the attributes of being "erroneous" and "legal" co-exist in a judicial decision, considering that one word means *wrong* and the other supposedly means *right?* That sort of anomaly is all right for football commissioners—where absurdities are always in season—but how can judges indulge in such nonsense?

Unexpected it may be, but is it undesirable to bestow unreviewable decisional power on the trial judge? After all, some court has to have the last word. Why not the trial court, the one closest to the evidence, to the witnesses and the jury? Why prefer decisions that are made by distant, upper-court judges from a cold and lifeless printed record?

One argument for doing so is found in history rather than in reason. A right to appeal has been traditional in this country's judicial process, even though the Constitution does not spell out an obligation to grant appeals.[16] Even if constitutional, unreviewable discretion offends a deep sense of fitness in our view of the administration of justice. We are committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review of each significant ruling made at the trial-court level.

Besides, since most trial courts are manned by a single judge and appellate courts are collegial, our fondness for appellate review may also reflect a feeling that there is safety in numbers. The idea that incantations about discretion can invest a single judge with the final say in important cases makes many people restless.

Finally, and probably more important than either history or the safety-in-numbers reason, is a spillover of anxiety about entrusting power of decision without sufficient assurance that principles of the law will be faithfully followed. It is the same sort of disquiet that primary discretion at times produces. The thought that in some areas of law judges are liberated from legal rules and can take their choice in deciding goes down hard. Throughout history it has made discretion a four-letter word in many legal circles.

*Professor of Law, Columbia University. Reproduced from 22 Syra.L.Rev. 635, 641-643, 660-667 (1971).

15. Bringhurst v. Harkins, 32 Del. 324, 331, 122 A. 783, 787 (1923); Pitts v. White, 49 Del. 78, 82, 109 A.2d 786, 788 (1954).

16. The right of appeal has been described as "not essential to due process, provided that due process has already been accorded in the tribunal of first instance." Ohio *ex rel.* Bryant v. Akron Metrop. Park Dist., 281 U.S. 74, 80 (1930); McKane v. Durston, 153 U.S. 684 (1894).

Lord Camden called discretion the law of tyrants. He said that "in the best it is oftentimes caprice"; and in the worst, "every vice, folly and passion to which human nature can be liable."[17] Discretion has been said to promote a government of men, not laws. These and other strictures have been summed up in an acrid epigram which asserts: "That system of law is best which confides as little as possible to the discretion of the judge. . . ."[18]

Of course, nothing so roundly villified could be all bad. The element of flexibility and choice in the process of adjudicating is precisely what justice requires in many cases. Flexibility permits more compassionate and more sensitive responses to differences which ought to count in applying legal norms, but which get buried in the gross and rounded-off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows the individualization of law and permits justice at times to be hand-made instead of mass-produced.

In urging that discretion is the "effective individualizing agent of the law," Dean Pound pointed out that

> in proceedings for custody of children, where compelling consideration[s] cannot be reduced to rules, . . . determination must be left, to no small extent, to the disciplined but personal feeling of the judge for what justice demands.[19]

Of course, a judge's total freedom to follow his own desires in deciding issues would raise the risk of a government of men if he were not under any constraints at all. But he is under at least one bond that, struggle as he will, he cannot break. It is, as Lord Mansfield observed in John Wilkes' case, the constraint of consistency: "We must act alike in all cases of like nature."[20]

On this side of the ocean, the Supreme Court of Vermont stated the point very emphatically in 1904: "It is the essence of all law that when the facts are the same, the result is the same . . . ."[21]

That unwritten command binds the common law judge even in areas where the existence of discretionary power seemingly gives him choice. "Act in your considered judgment, with a resolve to decide in the same way if the issue arises again." That is the unspoken but inescapable silent command of our judicial system. To the extent that judges hear and obey this command, the potential for abuse of discretionary decisional power is tempered.

17. *Quoted in* State v. Cummings, 36 Mo. 263, 279 (1865), *rev'd*, 71 U.S. (4 Wall.) 277 (1866).

18. B. SHIENTAG, THE PERSONALITY OF THE JUDGE 94 (1944).

19. "The justification for discretion is often the need for individualized justice. . . ." K. DAVIS [DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)] at 17. "Looked at from a general science of law, the effective individualizing agency in the administration of justice is discretion." Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U.L.Rev. 925 (1960).

20. *Quoted in* Ward v. James, [1965] 2 W.L.R. 455, 465 (C.A.). Compare Cardozo's oft-quoted statement, "It will not do to decide the same question one way between one set of litigants and the opposite way between another." THE NATURE OF THE JUDICIAL PROCESS 33 (1921). *See also* H.L.A. HART, *supra* note 8, at 155-62.

21. Hubbard v. Hubbard, 77 Vt. 73, 77, 58 A. 969, 970 (1904).

It is clear that discretion has been widely feared and mistrusted in the common law. It flies in the face of deep principles, such as that announced rules, not unspoken fancies, should shape trial court decisions and that a disappointed litigant should be given a chance to present his claim to a multi-judge court at an appellate level. Why, then, is a sole judge on the lowest rung of the judicial ladder given unreviewable power? Five reasons can be identified from the decisions, three of which are not particularly impressive or substantial, and two of which make good sense. First, the lesser reasons.

One is the plain urge to economize on judicial energies. Appeal courts would be swamped to the point of capsizing if every ruling by a trial judge could be presented for appellate review. Nearly a century ago the Michigan Supreme Court said: "This Court would be utterly unable to perform its functions and clear its docket, if matters of practice at the circuits were subject to review here."[50] With the explosion of the caseload of many of the busiest courts, this understandable instinct for self-preservation becomes an even more potent argument for according the final word to trial courts on many questions within their purview. But which? The argument for economizing appellate energies does not help us identify the issues that should be committed to trial judges for final or presumptively final determination. It advances a persuasive reason for often making the first court effectively the court of last resort, but is undiscriminating in selecting the issues that are to be unreviewable. Is an order granting or denying a new trial in that category? Requiring special verdicts? Enlarging time? Allowing or refusing tardy applications for amendment, jury trial, discovery, etc.? Giving the *nisi prius* judge the last word would save time in all these areas of decision, yet obviously not all have an equal claim to restricted appellate review.

A second reason is maintaining morale. A trial judge might become dispirited if he had the sense that every rapid-fire ruling he makes at trial is to be fully reviewable by a clutch of appellate judges who can study, reflect, hear and read carefully assembled arguments, consult their law clerks, debate among themselves and, after close analysis, overturn his ruling. He would have an oppressive sense that appellate Big Brothers were ever watching, peering over the trial bench, waiting for the harried and hurried trial judge to lapse into mortal fallibility.

This realization led the late Judge Calvert Magruder of the United States Court of Appeals for the First Circuit to comment understandingly:

> As to the trial judges, we must always bear in mind that they may be as good lawyers as we are or better. They are under the disadvantage of often having to make rulings off the cuff . . . in the press and urgency of a trial . . . . Hence, we should approach our task of judicial review with a certain genuine humility. We should never unnecessarily try to make a monkey of the judge in the court below, or to trespass on his feelings or dignity and self-respect.[51]

50. Mann v. Tyler, 56 Mich. 564, 566, 23 N.W. 314, 315 (1885).

51. Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 3 (1958).

That reason, worthy and compassionate as it is, again falls short of telling which of the rapid-fire trial rulings are to be immune from review and which not. An issue of privileged communication may suddenly arise during testimony in a jury trial. Is the trial court's "wrong" ruling (in appellate eyes) to be unassailable or not? The Magruder call for charity toward trial brethren is fine as far as it goes, but, like the call for economy of appellate energies, it does not help discriminate among the innumerable situations it might apply to.

The third reason for hands-off review is finality. The more reverse-proof the trial judge's rulings, the less likely the losing attorney is to test them on appeal and the sooner the first adjudication becomes accepted and the dispute tranquilized. Delay would surely result, and injustice might result, if every trial court order could be dragged up the appellate ladder with some fair hope of reversal. Except where restrained by the final judgment principle, the party with the deeper pocket might try to wear down his adversary by challenging every uncongenial ruling, whether made in the pleading, discovery, trial or post-trial phases of the litigation. Conferring near-finality on trial court orders by restrictive review practices dampens the possibility of that sort of abuse. But once again, the reason is non-selective. It fails to offer criteria indicating which lower court rulings are shielded by discretion and which are not, and it also fails to indicate how firm the hands-off policy is in the particular instance. At best, we can say that to some indefinite extent it dampens the fires of hope through appeal for some lawyers who might otherwise try to keep their lost causes alive.

The common vice of the first three reasons—economy, morale uplift, and finality—is their failure to provide clear clues as to which trial court rulings are cloaked with discretionary immunity of some strength, and which are not. Remaining for consideration are two reasons that escape this criticism.

One of the "good" reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization—at least, for the time being. Whether a witness may be called out of regular sequence, the scope of cross-examination in many circumstances, enlarging time, ordering special hearings, requiring special memoranda, and a host of other trial administration issues, are obviously unamenable to hard and fast legal rules. When the ruling under attack is one that does not seem to admit of control by a rule that can be formulated or criteria that can be indicated, prudence and necessity agree it should be left in the control of the judge at the trial level. That is true when the circumstances which rationally deserve attention are so infinitely variable that it is hopeless to try to cover them by general propositions.

On occasion, the difficulty is the novelty of the situation rather than the multifarious minuteness of its circumstances. When the problem arises in a context so new and unsettled that the rule-makers do not yet know what factors should shape the result, the case may be a good one to leave to lower court discretion. Actually, this may be a form of primary or free-form discretion, but the point is that it permits experience to accumulate at the lowest court level before the appellate judges commit themselves to a prescribed rule. By according the trial judge discretionary power, the appeal courts have a chance to bide their time

until they see more clearly what factors are important to decision and how to take them into account. Their position might be put as follows: This is an area in which the trial judge must decide by guess and we accept his guess unless it is too wild.

The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate. The principle is directive, self-limiting and responsive to the accumulation of relevant experience. A useful analogue is the course of development under Rule 39(b) of the Federal Rules of Civil Procedure, providing that in spite of a litigant's tardiness (under Rule 38 which specifies a ten-day-from-last-pleading deadline) the trial court "in its discretion" may order a trial by jury of any or all issues. Over the years, appellate courts have consistently upheld the trial judges in allowing or refusing late-demanded jury trials, but in doing so have laid down two guidelines for exercise of the discretionary power. The products of cumulative experience, these guidelines relate to the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary. Time and experience have allowed the formless problem to take shape, and the contours of a guiding principle to emerge. If this seems a familiar process, it may be because it echoes the process by which equity slowly developed rules.

The final reason—and probably the most pointed and helpful one—for bestowing discretion on the trial judge as to many matters is, paradoxically, the superiority of his nether position. It is not that he knows more than his loftier brothers; rather, he sees more and senses more. In the dialogue between the appellate judges and the trial judge, the former often seem to be saying: "You were there. We do not think we would have done what you did, but we were not present and we may be unaware of significant matters, for the record does not adequately convey to us all that went on at the trial. Therefore, we defer to you."

* * * *

The "you are there" reasoning conveyed by that quotation is in my opinion the chief and most helpful reason for appellate court deference to trial court rulings. As one trial judge pungently phrased it, he "smells the smoke of battle" and can get a sense of the interpersonal dynamics between the lawyers and the jury. Not even the televised recordation of trial proceedings, now in use in Alaska and being tried in Illinois, can capture all the sensory perceptions that presence on the scene conveys. That is a sound and proper reason for conferring a substantial measure of respect to the trial judge's ruling *whenever it is based on facts or circumstances that are critical to decision and that the record imperfectly conveys.* This reason is a discriminating one, for it helps identify the subject matter as to which an appellate court should defer to the trial judge, and suggests the measure of finality or presumptive validity that should be accorded.

* * * *

Review-limiting discretion in its stronger forms confers upon the trial judge unusual power with regard to many issues and, as a corollary, grave responsibility. He becomes a court of last resort on these issues, not because appellate machinery is lacking, but because the matters are not susceptible to firm legal rules and because the trial judge is thought to be in a better position than appellate judges to decide the matters wisely and justly.

Of course, a trial judge wielding such extraordinary power is bound to play fair with the system. He would be false to his duty if he were to try to camouflage his rulings or to shield them from normal review by "dropping an 'iron curtain' " of discretion over them.[36] Thus, he may not order a new trial in the purported exercise of discretion in a general way when his true ground is an arguable belief that the jury misapplied the law or rendered a verdict he disapproves of for some private reason.

To play fair, a trial judge relying upon discretionary power should place on record the circumstances and factors that were crucial to his determination. He should spell out his reasons as well as he can so that counsel and the reviewing court will know and be in a position to evaluate the soundness of his decision. If the appellate court concludes that he considered inappropriate factors or that the range of his discretionary authority should be partially fenced by legal bounds, it will be in a position to do this intelligently.

Legislatures and rule-draftsmen who grant discretion also have serious responsibilities. They must be aware that conferring discretion is not a casual matter, since it insulates judicial rulings from ordinary appellate review and thus runs against the grain of our deep traditions. They will be aided in their allocation of discretion if they follow a few simple principles.

First, they should have in mind its legitimate purposes, and reserve it for matters as to which they believe that the trial judge is better situated than his appellate colleagues to pass final judgment. Second, they should be explicit in their bestowal of discretion and not employ vague terms or fuzzy phrases. Third, they should add guidelines as soon as experience makes these perceptible.

For their part, appellate courts should not invoke the abracadabra of either "discretion" or "abuse of discretion" to avoid close analysis of hard problems. They too should state reasons and offer guidelines whenever they perceive them. It is only from appellate opinions that the trial judge discovers the metes and bounds of his discretionary power. In the past these opinions have fallen far short of satisfactorily defining or refining the concept of abuse of discretion. This need not be true if the appellate courts will bring themselves to appreciate the need for guidelines. Perhaps they could be made more sensitive to the need by sitting as trial judges at regular intervals. At the very least, to do this would remind them that the record conveys only imperfectly some of the factors upon which decisions rightly turn.

Review-restraining discretion need not be a synonym for lawlessness and tyranny, as Lord Camden feared. It need not be evil and dangerous if those who confer it, those who wield it, and those who review its exercise are sensitive to the risks and responsibilities it involves; if they understand its proper uses; and if they play fair with the system of justice for which they are custodians.

For in the last analysis, the difference between a government of law and a government of men is not that rules decide the cases in the former and fools or tyrants in the latter. Men always decide cases. The difference lies in whether the men—the judges—are aware of their power, aware of their duties, and true to the common law tradition of administering justice under law.

THE DOUBTFUL OMNISCIENCE OF APPELLATE COURTS

Charles A. Wright*

For a good many years my colleague, Leon Green, has been pointing out that:

> Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system.[1]

In a recent statement of his views Dean Green has observed, with much justification:

> The trial judge is not much more than a trial examiner, while the jury simply satisfies the public and professional craving for ceremonial—the necessity for dealing with simple matters as though they were freighted with great significance.[2]

The principal means by which appellate courts have obtained such complete control of litigation has been the transmutation of specific circumstances into questions of law. Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.

Dean Green's analysis seems to me unanswerable. The purpose of the present article is to call attention to certain recent developments which add further support to his thesis. Within the last decade the appellate judges have become bolder. No longer do they hide their assumption of power beneath an elaborate doctrinal superstructure. Instead today's appellate courts are inventing new procedural devices by which their mastery of the litigation process can be made direct rather than devious.

I propose herein to discuss four such devices: review by the appellate court of the size of verdicts; orders for a new trial where the verdict is thought to be contrary to the clear weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence; and expanded use of the extraordi-

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*Professor of Law, University of Texas. Reproduced from 41 Minn.L.Rev. 751 (1957).

1. Green, Judge and Jury 330 (1930).
2. Green, *Jury Trial and Mr. Justice Black*, 65 Yale L. J. 482, 486 (1956).

nary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled. After these four devices have been discussed, some evaluation of the wisdom and significance of this recent development in judicial administration will be attempted.

Review of the Size of Verdicts

There was a time when the law as to appellate review of the size of verdicts might have been simply stated. Of course the appellate court could reverse for legal error, as when the verdict exceeded a maximum fixed in the statute,[6] or the jury was improperly instructed as to the measure of damages.[7] And if the verdict was the product of passion and prejudice, the appellate court could intervene.[8] But it was clearly established in federal court, and generally true also in state courts, that, in Holmes' phrase, "a case of mere excess upon the evidence is a matter to be dealt with by the trial court."[9]

The day when the law could have been so simply stated is not really very long past. As recently as 1945 Judge Goodrich, speaking for the Third Circuit, could say:

> The members of the Court think the verdict is too high. But they also feel very clear there is nothing the Court can do about it. . . . A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case.[10]

Very few scholars would have disagreed with that statement when it was made. But the law has changed so completely in the last twelve years that today Judge Goodrich's statement seems no more than a legal museum piece—to be studied with the same awe for the departed past as one might give to trial by battle, or to a nicely drawn replication *de injuria*.

In the twelve years since Judge Goodrich spoke ten of the eleven federal courts of appeals have announced that when a verdict seems excessive to the appellate judges, there is something they can do about it.[11] And even the Eighth Circuit, the only holdout to date, shows signs of wavering in its loyalty to the ancient faith.[12] Supreme Court decisions stating squarely that a verdict may not be reviewed on the ground that it is excessive have been blithely cast aside as "an old procedural impediment" which "no longer bars judicial review."[13] The Seventh Amendment might have been thought to give difficulty, for it provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the common law." And the Supreme Court long ago said that "motions for a new trial based on the ground that the damages allowed by the verdict are excessive" present "purely a question of fact, not determinable by any fixed and certain rule of law," and that such motions were submitted to the legal discretion of the trial court, which could not be reviewed.[14] But these difficulties were readily surmounted. As Professor Moore, who supports review of the size of verdicts, concedes:

> Recently, the courts of appeals faced with the question of review have generally ignored the Seventh Amendment issue.[15]

It may be worthwhile to note—since this paper is concerned with the methodology of appellate courts rather than with the specific question of whether the size of verdicts ought be reviewable—that eight of the ten courts of appeals which have recently discovered a hitherto-unknown power to review the size of verdicts have announced this discovery by way of dicta in cases where they found the verdict before them not excessive.[16] It is interesting to speculate why these courts did not defer resolution of this controversial and novel claim of appellate power until a case arose in which the point was necessary for decision.

Developments in state courts in the last decade have been less dramatic, perhaps because state appellate courts, not being confined by the Seventh Amendment, have always had more leeway to deal with verdicts that seemed to them "flagrantly outrageous."[17] The possibilities open to state courts are indicated by the practice in Missouri, where the appellate court overtly measures the verdict below, not against the evidence in the record as to the damages suffered, but against awards it has itself permitted in the past in what seem to it comparable cases.[18]

Setting Aside Verdicts as Against Weight of Evidence

In the recent case of *Eastern Air Lines v. Union Trust Co.*,[32] Eastern claimed it was entitled to a new trial on the ground, among others, that verdicts against it arising out of the disastrous 1949 crash over Washington's National Airport between an Eastern DC-4 and a P-38 owned by the Bolivian government were "against the clear weight of the evidence." After a review of the authorities (which will be analyzed later) the Court of Appeals for the District of Columbia, speaking through Judge Wilbur K. Miller, said:

> We conclude, on the authorities and on reason as well, that the trial judge had the power and duty to grant a new trial if the verdicts were against the clear weight of the evidence, or if for any reason or combination of reasons justice would miscarry if they were allowed to stand; and that *this court has the power and duty to reverse and order a new trial if the trial judge abused his discretion in denying the motion therefor.*[33]

7. Southern Railway–Carolina Division v. Bennett, 233 U.S. 80, 87 (1914).
8. Scott v. Baltimore & O. Ry., 151 F.2d 61, 64–65 (3d Cir. 1945).

32. 239 F.2d 25 (D.C. Cir. 1956), *cert. denied*, 77 S.Ct. 816 (1957).

Judge Miller argued in detail his reasons for believing that the trial judge had abused his discretion in denying the motion for a new trial. But Judges Edgerton and Fahy, though agreeing that they had power to reverse if there had been an abuse of discretion, did not find such an abuse on the record before them. Thus the verdicts were allowed to stand.

The result of the case is of no significance for our purpose. But the claim of power to reverse and order a new trial is sufficiently novel to justify the closest scrutiny.

As to the first half of the quoted passage from the opinion, there can be no quarrel. The right of the trial judge to set aside the verdict as contrary to the clear weight of the evidence is universally acknowledged in the United States, and is supported by clear precedent at common law.[34] And if the trial judge refuses to exercise his discretion at all on a motion for new trial, as where he mistakenly believes he lacks power to set aside a verdict, an appellate court will remand the case to him with instructions to exercise his discretion.[35]

Thus the only questionable statement in the passage quoted is the part which has been italicized, the claim that where the trial court has exercised its discretion and has determined not to set aside the verdict, the appellate court has power to reverse and order a new trial. In the portion of its opinion immediately preceding the passage quoted here, the court of appeals cites or quotes from eleven cases.[36] Many of these cases are completely silent as to appellate power, and are concerned exclusively with the power of the trial judge to set aside the verdict. In one case there is a dictum that the appellate court can reverse for abuse of discretion by a trial court in passing on a motion for a new trial on the ground that the verdict is against the clear weight of the evidence.[37] Three of the cases cited contain dicta that the power to set aside a verdict on this ground "belongs exclusively to the trial judge,"[38] that his action on such a motion "is not the subject of review,"[39] and that the appellate court is "without power" to order a new trial on this ground.[40] Among the eleven cases cited by the court of appeals, there is not even one in which an appellate court has reversed for abuse of discretion in denying such a motion for a new trial. From this review it may fairly be said that the statement of the court of appeals is not supported by the cases it chooses to cite.

There are other relevant authorities which the court of appeals did not cite. Thus as long ago as 1838 the Supreme Court had considered it

> a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error.[41]

And as recently as 1940 it had stated categorically:

> Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review.[42]

A number of decisions from the courts of appeals are to the same effect. In one of the most recent, Judge Learned Hand put the matter this way:

> . . . [T]here may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence. . . . [This rule] is too well established to justify discussion.[43]

It is true that there are casual phrases in some court of appeals decisions which imply a power to reverse for clear abuse of discretion. But it seems to me significant that, so far as I can find, there is not a single case in which a federal appellate court has ever reversed and ordered a new trial on the ground that the trial court did abuse its discretion in denying a motion of this type.[44]

The Court of Appeals for the District of Columbia has not made a clear demonstration that it has the power to set aside verdicts as contrary to the weight of the evidence. Its claim of such power is not supported by the authorities it cites, nor by the cases it does not cite. It does not attempt a reasoned analysis of the problem; and we have seen that such an analysis would leave its conclusion, at best, very doubtful. The court's statement is, of course, merely a dictum, but as was shown in the section on review of size of verdicts, today's dictum claiming extended power for appellate courts is frequently the prelude to tomorrow's holding to that effect.

The Seventh Amendment applies only to facts found by a jury. It has no application to facts found by the court, in cases where jury trial has been waived or where there is no right to a jury. The scope of review in this class of cases may be regulated by legislation or by court rule.

Rule 52(a) of the Federal Rules of Civil Procedure, and the similar rules in other modern pleading systems, say:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

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42. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940).
43. Portman v. American Home Products Corp., 201 F.2d 847, 848 (2d Cir. 1953).

Such a rule has been thought to leave a question, of considerable interest for our purposes, as to the scope of review of the trial court's findings in cases where the evidence was documentary, and where, therefore, the trial court had no special opportunity "to judge of the credibility of the witnesses." Some courts have said that in such a situation the appellate court, being in as good a position to judge the evidence as was the trial court, can more readily find the trial court's findings to be clearly erroneous.[54] Though such a gloss on Rule 52(a) may be regarded as unnecessary,[55] it has at least the merit of being a sound gloss. But then other courts, reasoning from the gloss on Rule 52 rather than from the rule itself, went on to say that the appellate court is not bound at all, and that review is de novo with no presumption in favor of the trial court's findings, where the evidence below was not oral.[56]

This process was carried to its ultimate in a famous opinion by Judge Jerome N. Frank in which he set out some seven narrowly-defined classes, turning on the kind of case and the proportion of testimony that was oral, and asserted that the freedom of review is dependent upon the class in which a particular case falls.[57] Judge Harrie B. Chase, dissenting, uttered a useful reminder in the course of explaining his unwillingness to reverse the trial court:

> This is a typical instance for the application of Civil Rule 52(a). Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.[58]

Though it is probably true that Judge Frank's view is the more popular among the federal courts of appeals, it has not won unanimous acceptance. There continues to be a substantial number of cases in which the courts hold that the "clearly erroneous" test applies to all nonjury cases, regardless of the nature of the evidence.[59]

It must, therefore, be reluctantly concluded that those appellate courts which have substituted their judgment for that of the trial court as to findings based on other than oral testimony have acted contrary to both the plain meaning and the stated intent of the governing rule. A cynic might say this is a tempest about mere words. After all, the "clearly erroneous" test "is not a measure of exact and uniform weight."[82] The courts which have disregarded Rule 52 in substituting their judgment for that of the trial court *could* accomplish the same purpose while complying with the rule merely by announcing that the finding with which they disagree is "clearly erroneous." But I think we can safely assume that appellate judges do make a conscientious attempt to confine their review to that authorized by law, and that, so far as human frailties permit, they do not regard a finding as clearly erroneous merely because it differs from the finding they might themselves have made.

57. Orvis v. Higgins, 180 F.2d 537, 539–40 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). The case is scathingly criticized in Comment, *Scope of Appellate Fact Review Widened*, 2 Stan. L. Rev. 784 (1950).

82. Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954). See also Learned Hand, in United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945): "It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This, is true to a considerable degree even when the judge has not seen the witnesses."

This issue about findings has seemed to me worth exploring at such length because in final analysis it presents a jurisprudential question of central importance to this entire paper. Even if we concede that in the situation we have been considering the appellate court is in just as good a position as the trial court to determine what the fact is, does it follow that the view of the appellate court must therefore prevail over that of the trial court? To Professor Moore it does. This is "a natural and proper concomitant of appellate power."[83] But others take a different view, eloquently expressed by the Eighth Circuit:

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.[84]

I leave for the Conclusion an expression of my own view on this issue.

Use of the Extraordinary Writs to Control Discretionary Action

In the spring of 1955 the Honorable Walter J. LaBuy, a judge of the United States District Court for the Northern District of Illinois, was confronted with a problem. High on his calendar were two large and complex antitrust cases, which had been pending for five years.[85] In one case eighty-seven operators of retail independent shoe repair shops were suing six manufacturers, wholesalers, retail mail order houses and chain operators, alleging a conspiracy to monopolize and fix the price of shoe repair supplies sold in the Chicago area in violation of the Sherman Act, and also alleging price discrimination in violation of the Robinson-Patman Act. The other case involved similar claims by six wholesalers of shoe repair supplies against six defendants. These cases had already occupied much of Judge LaBuy's time. In the first case alone the original complaint had been twice amended, fourteen defendants had been dismissed with prejudice, a motion for summary judgment had been heard and denied, over fifty depositions had been taken, and numerous hearings had been held in connection with discovery matters. Judge LaBuy commented that the case had taken a long time to get to issue and that he had heard more motions in connection with it than in any case he had ever sat on.

83. 5 Moore, Federal Practice 2642 (2d ed. 1951).

84. Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).

85. The facts as to the cases before Judge LaBuy, and his action thereon, are taken from LaBuy v. Howes Leather Co., 352 U.S. 249, 251-53 (1957).

When the first of these cases appeared on Judge LaBuy's calendar as ready for trial, the lawyers estimated it would take six weeks to try. The judge indicated that he did not know how he could try a case which would take so long, particularly since all parties were anxious for an early trial. When the parties refused to consent to referring the case to a master for trial, Judge LaBuy, on his own motion, ordered the case to a master.

Federal Rule 53(b) provides, in part:

> A reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury . . . a reference shall be made only upon a showing that some exceptional condition requires it.

Judge LaBuy believed that such an exceptional condition was presented because the cases were very complicated and complex, they would take a considerable time to try, and his calendar was congested.

It can well be agreed that reference to a master contains many possibilities of evil, and that this device should be sparingly used.[88] The rule indicates as much on its face. And it is no part of our concern to evaluate Judge LaBuy's decision that conditions in the cases before him were so "exceptional" as to justify a reference. What is of interest to us is that the Court of Appeals for the Seventh Circuit felt that it could and should substitute its judgment that exceptional conditions did not exist for Judge LaBuy's decision that they did, and that it could use the ancient writ of mandamus to compel him to vacate his order referring the cases to a master.[89] And even more important, the United States Supreme Court, by a vote of five to four, upheld this action of the court of appeals.[89]

The significant feature of the case is not that the upper courts disagreed with Judge LaBuy, but that they held they could consider his order at all. The historic federal policy has been that only final judgments can be reviewed, save for a few narrow statutory exceptions.[89] It is true that the concept of finality is not always easy to apply, but on no interpretation could Judge LaBuy's order be regarded as a final judgment. It was a purely interlocutory order, regulating the procedure to be followed in a particular case, of a sort that every trial judge makes many times in the course of every case.

There have been times when the extraordinary writs of mandamus and prohibition have been used to review interlocutory orders, but, as the Supreme Court said in 1947:

> We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.[90]

Again in 1956 the Court summarized the usual federal doctrine:

> Such writs may go only in aid of appellate jurisdiction. 28 U.S.C. § 1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. Maryland v. Soper, 270 U.S. 9, 29-30. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals.[91]

Tested by those principles the attempt to secure review, by writ of mandamus, of Judge LaBuy's order must have seemed doomed to defeat, for, just as in the case last quoted, apparently the most that could be claimed was that he had erred in ruling on a matter within his jurisdiction. The Seventh Circuit analyzed the matter differently. To that court:

> . . . obviously the trial court here was not "acting within its jurisdiction as a federal court to decide issues properly brought before it," for here the court was not deciding issues presented but was, over the objection of both parties to the suit, refusing to be bound by the rule.[92]

What was "obvious" to a majority of the Seventh Circuit seemed doubtful to others. The rule authorizes a judge to refer a case to a master if he finds some "exceptional condition" which requires this course. Judge LaBuy, expressly grounding his action on the rule, made a finding that there was such an "exceptional condition." Perhaps he was wrong in believing that the circumstances before him were an "exceptional condition" within the meaning of the rule, but surely for a judge to apply a rule mistakenly is not the same thing as "refusing to be bound by the rule."[93] Judge Major, dissenting, stated the matter succinctly:

> No criteria are supplied either by statute or rule for determining the "exceptional condition" referred to in Rule 53(b). Therefore, Judges might well disagree as to the circumstances which would justify a reference. Respondent in the exercise of his judgment concluded that the circumstances were sufficient and ruled accordingly. A judge with authority to make a correct ruling has the same authority to make an erroneous ruling.[94]

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90. *Ex parte* Fahey, 332 U.S. 258, 260 (1947).
91. Parr v. United States, 351 U.S. 513, 520 (1956).
92. Howes Leather Co. v. LaBuy, 226 F.2d 703, 710 (7th Cir. 1955).
93. Thus instances where the judges of a district have agreed to refer all patent cases, or all admiralty cases, to a master, without regard to the circumstances of the particular case, are clearly distinguishable. Mandamus has been issued, quite properly, in such cases. Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927); United States v. Kirkpatrick, 186 F.2d 393 (3d Cir. 1951); *cf.* McCullough v. Cosgrave, 309 U.S. 634 (1940).
94. Howes Leather Co. v. LaBuy, 226 F.2d 703, 712 (7th Cir. 1955).

Nor was the Seventh Circuit on any sounder ground in finding the irreparable injury which, on the precedents, justifies use of the extraordinary writs. It referred to "the necessity and great expense of protracted trials which conceivably may eventually lead nowhere but to a complete retrial of the causes before a competent tribunal."[98] But Supreme Court decisions had been explicit that the inconvenience and expense of a useless trial "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."[99]

The opinion of the Supreme Court, affirming the Seventh Circuit, is unenlightening. The Court discusses at some length the evils of reference to masters and the advantages in having Judge LaBuy try the cases himself. All of this discussion might well have been appropriate on review of a final judgment in the case. But the Court never specifies what "exceptional circumstances here warrant the use of the extraordinary remedy of mandamus"[100] to correct Judge LaBuy's error. The Court cautions that its holding in the case before it is not intended "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders."[101] Unfortunately it draws no line to distinguish proper use from "indiscriminate use." And its conclusion that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system"[102] is not likely to be read as a caution of restraint by appellate judges who believe that one of their trial judges has erred in some interlocutory order.

The potential consequences of the *LaBuy* decision are truly breathtaking. The central feature of modern procedural reform is that trial courts are given discretion to decide details of procedure which in the past have been governed by rigid statutes.[103] Thus joinder of claims and parties is now virtually unlimited while power is given the trial judge to order separate trials as to particular claims or parties where this seems necessary.[104] The relevant rule provides that the court may order such a separate trial "in furtherance of convenience or to avoid prejudice."[105] Are orders under this rule now reviewable by mandamus? It is hard to see how the trial court's findings as to "convenience" and "prejudice" under this rule differ from his findings as to the existence of an "exceptional condition" justifying reference to a master under Rule 53(b). Will a judge who finds that there is a genuine issue as to some material fact, and thus denies a motion for summary judgment, be told, by an appellate court that disagrees with him, that he was "refusing to be bound by the rule" and that mandamus must issue to correct his determination?

Evaluation and Conclusion

It is easier to summarize what we have seen than it is to evaluate it. The four specific examples considered in this paper should be enough to persuade anyone that appellate power is rapidly on the increase. The appraisal by trial judge and jury of the damages suffered by an injured person is now subject to review by appellate courts; a decade ago it could not have been reviewed. The determination by the trial judge that the verdict is not contrary to the clear weight of the evidence is now said, by at least one appellate court, to be within its power to reverse; heretofore the precedents have been uniform that such a determination was not subject to reversal. Many appellate courts now believe that they need not give any weight to findings of fact of a trial judge sitting without a jury where these findings are based on documentary evidence; both the language and intent of Federal Rule 52(a), adopted by the Supreme Court only 19 years ago, are explicit that such findings can only be set aside when clearly erroneous. Finally discretionary decisions by the trial judge on interlocutory procedural matters may now be vacated in the exercise of a supervisory power of appellate courts, contrary to what the Supreme Court said as recently as 1956. Thus the centralization of legal power in the appellate courts, which Dean Green detected more than a quarter century ago, proceeds at an accelerating pace.

But now we must venture some views as to whether this development is good or bad for the cause of justice to which all are devoted. It would be irresponsible even to suggest that these changes have taken place merely because appellate courts are power-mad. The obvious truth, which must be readily admitted by anyone familiar with appellate judges, is that these recent developments in the law, these departures from what had seemed fairly clear lines of precedent, have come only because the judges who have voted for them sincerely believe that they are needed and justified by the highest public interests.

This leads us to the philosophical question which underlies all these specific issues: what is the proper function of an appellate court? Everyone agrees, so far as I know, that one function of an appellate court is to discover and declare — or to make — the law. From the earliest times appellate courts have been empowered to reverse for errors of law, to announce the rules which are to be applied, and to ensure uniformity in the rules applied by various inferior tribunals.

The controversial question is whether appellate courts have a second function, that of ensuring that justice is done in a particular case. In each of the situations considered the motivating force in the appellate court's mind has been the desire to "do justice." Thus the appellate court is unwilling to let an award of damages stand which seems to it so excessive as to be unjust, it refuses to put its approval on a verdict which it deems contrary to the clear weight of the evidence, it will not affirm a judgment based on findings it thinks wrong when it is as well able to interpret documentary evidence and make the finding in question as was the trial court, and it will not let a trial judge's mistaken conception of what is an "exceptional condition" result in exposing parties to the delay and expense of reference to a master.

If it is the function of appellate courts to do justice in individual cases, then each of the developments we have canvassed was sound and desirable, since each has made it easier for the appellate court to enforce its concept of justice in a particular case. The notion that appellate courts should undertake to "do justice" is so attractive on its face that it is difficult to disagree with it. And it enjoys the weighty support of such famous students of the judicial process as Roscoe Pound, Edson Sunderland, Wirt Blume and James Wm. Moore. Nevertheless, with deference to these great men, I think we should refrain from agreeing that appellate courts are to do justice until we have seen the price we must pay for this concept.

The principal consequences of broadening appellate review are two. Such a course impairs the confidence of litigants and the public in the decisions of the trial courts, and it multiplies the number of appeals.[117] Until recently if a defendant thought an award of damages was excessive, he nevertheless had no choice but to pay it, for no appellate court would listen to his attack on it. Now, in similar circumstances, he will appeal. Until recently if a lawyer was dissatisfied when his case was referred to a master, he appeared before the master nevertheless, for an attempted appeal from the order of reference would have been dismissed out of hand. Now he files a petition for a writ of mandamus. We may be sure that the broadened scope of appellate review we have seen will mean an increase in the number of appeals.[118] Is this desirable? We need not worry too much that an increase in appeals will mean overwork for appellate judges; they, after all, have invited the increase. But we should worry about the consequences of more numerous appeals for the litigants and the public. Appeals are always expensive and time-consuming. When they are successful, and lead to a new trial, they add to the burden on already-crowded trial courts. Interlocutory review, as by writ of mandamus, delays the case interminably while the lawyers go off to the appellate court to argue the propriety of the challenged order by the trial judge. It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should set on a course which inevitably must increase congestion and delay.

But we have courts in order to do justice. If better justice can be obtained by broadening the scope of appellate review, then even congestion, delay and expense are not too high a price to pay. Do we really get better justice by augmenting the power of the appellate courts? In some fairly obvious senses I feel quite sure that we do not. If in two similar cases the person rich enough to afford an appeal gets a reversal, however just, while the person of insufficient means to risk an appeal is forced to live with the judgment of the trial court, has justice really been improved? And what of the injured person who settles his claim for less than the amount awarded him by the jury and approved by the trial court rather than wait a year or more until an appellate court has agreed that the verdict is not excessive? Broader appellate review has led to injustice for him.

117. See the observation of the Eighth Circuit, in Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950), quoted p. 771 above.

Further, it may well be, as Blackstone says, that "next to doing right, the great object in the administration of public justice should be to give public satisfaction."[119] It is hard to believe that there has been any great public dissatisfaction with the restricted appellate review which was traditional in this country. Very early in our history Chief Justice Ellsworth observed:

> But, surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over.[120]

Yet increased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired. Under any feasible or conceivable system, our trial courts must always have the last word in the great bulk of cases. I doubt whether there will be much satisfaction with the judgments of trial courts among a public which is educated to believe that only appellate judges are trustworthy ministers of justice.

Finally, to come to the very heart of the issue, is there any reason to suppose that the result an appellate court reaches on the kinds of issues discussed is more likely to be "just" than was the opposite result reached by the trial court? Judge Chase's observation, quoted earlier, is in point here:

> Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.[121]

Most of our examples have come from the federal courts, and federal district judges are generally believed to be men of much ability, rightly entitled to the greatest respect. In some of the states, it is true, trial judges are not so highly regarded. But this is wrong, regardless of the scope of appellate review. I think there is wide agreement that trial judges should be picked with the same care as appellate judges, and that it probably would be desirable to give them the same conditions of salary and tenure as are given appellate judges.[122]

If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges. Where the question is whether an award of damages is excessive or a verdict against the clear weight of the evidence, the trial judge has the vast advantage of having been present in the courtroom and heard the witnesses. Where the question is as to the procedure to be followed in a pending case, the trial judge has the advantage of having lived with the case, and thus should be better able than the appellate judges to gauge its

120. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 320, 329 (1796).
121. Orvis v. Higgins, 180 F.2d 537, 542 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950).
122. Sunderland, *Improvement of Appellate Procedure*, 26 Iowa L. Rev. 3 (1940). And see Pound, Appellate Procedure in Civil Cases 380-81 (1941); Calamandrei, Procedure and Democracy 42-44 (1956).

complexity and its procedural needs. And even where the question is what finding of fact should be made on the basis of documentary evidence, the trial judge has the advantage of having made the initial sifting of the entire record and of having put it into logical sequence, while the appellate court has lawyers before it picking out bits and pieces of the record to attack or defend a particular finding.

There is no way to know for sure whether trial courts or appellate courts are more often right. But in the absence of a clear showing that broadened appellate review leads to better justice, a showing which I think has not been made and probably cannot be made, the cost of increased appellate review, in terms of time and expense to the parties, in terms of lessened confidence in the trial judge, and in terms of positive injustice to those who cannot appeal, seems to me clearly exorbitant.

I do not wish to speak critically of the appellate courts which have recently announced broader powers of appellate review. Only the most insensitive observer could fail to sympathize with their problem. When a judge upholds the constitutionality of a statute he believes unwise, he has at least all the tradition of deference to a coordinate and popularly responsible branch of government to sustain him in his self-restraint. But there is no such tradition to bolster self-restraint when he is passing on the work of his constitutional inferiors within the judiciary. It must be hard, indeed, for a judge to approve a judgment below he considers to be unjust when he knows that he has the power to set it aside and achieve justice as he sees it. Our hope must be that in those hard moments the judge will remember Justice Jackson's caution that "we are not final because we are infallible, but we are infallible only because we are final,"[123] and that, remembering, he may believe that the best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts.

123. Brown v. Allen, 344 U.S. 443, 540 (1953) (concurring opinion).

THE POWER OF DISTRICT JUDGES AND THE RESPONSIBILITY OF COURTS OF APPEALS

Paul D. Carrington*

FOR some years, the most prestigious commentator on federal practice, Charles A. Wright, has been expressing concern about the apparent evolution of the relation between trial and appellate courts, particularly in the federal judicial system. With his distinguished colleague, Leon Green, he has deplored the fact that "the appellate courts have drawn unto themselves practically all the power of the judicial system." Although sympathetic with the desires of appellate judges to achieve right results in cases coming before them, Professor Wright urges that this desire has too often been permitted to predominate, that our appellate judges have too often failed to recognize the limits of their own capacities and wisdom.

Professor Wright has conceded that the evaluation he makes is difficult, and perhaps dubious. It is, therefore, probably unnecessary and perhaps gratuitous to join issue with him. Nevertheless, I do not share some of Professor Wright's reactions and there may be some advantage in giving expression to my disagreement. I cannot demonstrate that his view is erroneous. The most that can be said is that his evaluation rests upon basic assumptions about the costs and values of review that are not subject to proof or disproof, that we are hence free to reject it. This is possibly too obvious to bear demonstration, but it may be the kind of obvious fact which is too easily and regrettably forgotten. Most discourse about judicial institutions, their evolution and reform, is conducted at a level at least once removed from the basic assumptions which discussants often erroneously presume to share. This results in the frustration of much communication and may produce unnecessarily intense feelings. Thus, if Professor Wright and I were forced to share decisions, we could best succeed by recognizing the different points of departure from which each of us begins. Failing to do so, we are quite likely to talk past one another in increasingly shrill tones. These remarks are written in the hope of advancing the kind of understanding which will enable appellate court reform, which is now needed, to proceed with dispatch and a minimum of rancor.

Professor Wright's concern is directed at somewhat different, but related, developments. Primarily, he protests "[t]he esoteric theories by which appellate courts pretend that questions of fact have somehow become questions of law, and thus can be decided anew by the appellate judges. . . ." In particular, he is troubled by appellate regulation of the size of verdicts, by appellate regulation of the power to grant new trials because of judicial disagreement with a verdict, and by appellate willingness to re-evaluate undisputed evidence. Very closely related is his objection to the practice of reversing judgments rendered on

*Professor of Law, University of Michigan. Reproduced from 3 Ga.L.Rev. 507, 508-513, 517-519, 521, 527-529 (1969).

the basis of unchallenged instructions which are later found by the appellate court to contain "plain error."[6] Finally, he objects to the growing use of the writ of mandamus to review trial court rulings which might at an earlier time have been immunized from review by force of the requirement that courts of appeals review only "final decisions" of district courts.[7] Almost all of these trends, if not all of the resulting decisions, can be defended as expressions of a general design which subordinates the power of individual officials, such as trial judges, to the discipline of the institutional machinery of democratic law.

I. Mandamus and the Final Decision Requirement

For the federal courts, the final decision requirement is expressed in the basic statutory provision pertaining to the jurisdiction of the courts of appeals.[8] The principle has antique origins, however.[9] The reasons which prompted its development are now somewhat murky and may have been largely conceptual.[10] But it can be explained as a device for preventing the disruption of the work of trial courts, and the delay and expense inflicted on unwilling litigants if cases are bounced around between trial and appellate courts. The work of the appellate court in formulating principles and assuring minimal compliance with legal standards will often be best served by awaiting the full development of the facts in controversy. The vitality of the finality principle may also be partly explained as an expression of the interest of appellate judges in avoiding the pain of making decisions which may later be demonstrated to be unnecessary.

The final decisions requirement was not a universal characteristic of historic English practice; it was not recognized by the Chancellor as a feature of review in equity.[11] Perhaps, again, the historic basis for this distinction was conceptual. But the difference might be thought justified by the nature of the power exercised by the master or judge sitting in equity: the more personal aspect of the equitable mandate and the greater compass of the equitable power might be deemed to require freer access to review. Open interlocutory review was one feature of the equity practice which tended to make it so prolix that it was necessary to make radical reform.[12] In any event the equity practice has been partly preserved in the federal judicial code, which authorizes appeals from orders granting or denying injunctions, and certain other orders which are characteristically equitable.[13] These statutory exceptions to the final decision requirement might have been liberally construed to consume most of the rule,[14] but such a development has not occurred.[15]

In applying this principle there is an inevitable necessity to define the kinds of trial court rulings which may be regarded as suitably final.[16] Thus, the Federal Rules of Civil Procedure, for example, were required to reconcile the principle to needs created by the practice of composite litigation, so favored by the Rules.[17] In permitting and encouraging multiplication of claims and parties, the Rules created a situation in which the final decision requirement could be applied with dilatory effect. Some claims may be terminated, or some parties excluded, prior to trial; if appeals from such terminal orders cannot be heard until after trial,[18] great waste and delay may result. Accordingly, Rule 54(b) provides for "entry of a final judgment as to one or more but fewer than all of the claims or parties . . .", but "only upon an express determination that there is no just reason for delay. . . ."

The final decision requirement has been more recently compromised with respect to the problem of the substantive uncertainty which makes it difficult for a trial court to proceed to trial with confidence in its understanding of the controlling law. If the substantive law controlling the rights of the parties is so uncertain that there is a good chance that a long trial will later be set at nought because of an error in the instructions, or because of some other error resulting from a substantive misconception, efficient administration requires that there be an attempt to provide an authoritative basis for the trial by means of an interlocutory appeal. Accordingly, in 1958, the code was amended to authorize appeals from orders involving "a controlling question of law as to which there is [a] substantial . . . difference of opinion . . . [where] an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ."[19] Such an appeal is authorized, however, only where the district judge certifies and the court of appeals permits. This device for the double exercise of discretion is said to be justified by the need for the trial judge to gauge the genuineness of the uncertainty and the extent of the resulting delay, and by the need for the appellate court to assess the likelihood of error and the availability of its time to resolve the doubt.[20] The total number of appeals pursued under this statute has remained small.[21]

These exceptions or qualifications of the final decision requirement have not exhausted the competing pressures on the rule. There remains a variety of rulings made by trial judges which are not reviewable at the terminal stage of the proceeding because they become moot, or because they are so tangential to the merits of the cause that they can hardly be regarded as prejudicial enough to justify reversal even though the impact on the litigants may have been considerable. Where important rights are threatened by possible error in such rulings, there is a growing reluctance to permit the final decision requirement to stand in the way of review.[22] One judge-made principle which can be

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[6] Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Texas L. Rev. 949, 967 (1964).

[21] In 1967, 80 applications for interlocutory appeal were considered and 41 were allowed. 1967 Dir. Admin. Office U.S. Courts Ann. Rep. 191 [hereinafter cited as 1967 Ann. Rep.].

said to have respectable lineage is the "collateral order" doctrine, most clearly expressed in *Cohen v. Beneficial Industrial Loan Corp.*[23] The Supreme Court there held that the court of appeals might entertain an appeal from a denial of a motion to require the plaintiff to post security for costs as required by a state statute. It was explained that the order did not "make any step toward final disposition of the merits of the case and [would] not be merged in final judgment."[24] When that time came, it would be too late to review the order because it would be moot; hence it was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[25] This principle has seen limited application,[26] but its progeny may have a larger role to play in the future.

Against this background emerges the development of increased use of extraordinary writs which is deplored by Professor Wright. As with the other exceptions and qualifications, the frequency of use of extraordinary writs to challenge the actions of trial judges is not great.[27] Tradition has it that these writs are available only to confine the district judge, or any official, to his proper jurisdiction, or to require him to perform his clear, "ministerial" duty.[28] For example, a clearly appropriate use of extraordinary relief is the prohibition of an erroneous removal of a state criminal prosecution to a federal court.[29] Because an acquittal is nonreviewable, the state can obtain review only by the extraordinary means of an original proceeding in the court of appeals. The use of mandamus and prohibition has been gradually extended to other situations not involving jurisdictional excesses, but other kinds of abuses.[30]

The particular case which inspired Professor Wright's reaction was *La Buy v. Howes Leather Co.*[31] The Supreme Court there affirmed a mandamus directing the district judge to hear a case himself rather than refer it to a master. In accordance with a routine fairly common in his district, the judge proposed to refer the case on his own motion because the trial would be long and his docket was congested. The Court termed this practice "little less than an abdication of the judicial function,"[32] requiring the exercise of supervisory control by the courts of appeals.

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23 337 U.S. 541 (1949). *See generally* Underwood, *Appeals in the Federal Practice from Collateral Orders*, 36 VA. L. REV. 731 (1950).

27 There were 158 original proceedings in all of the courts of appeals in 1967. 1967 ANN. REP. 186.

In my view, the decision is correct. It would be difficult, and perhaps impossible to demonstrate after trial that either party had been prejudiced by the use of the master to receive the evidence, in the sense that the outcome of the case would be affected by it. But the Constitution guarantees life tenure judges in federal courts; this guarantee is not adequately fulfilled by delegation of judicial duties to part-time officials appointed for special purposes. Moreover, the fee of the master may be taxed against the losing party. Special masters have a useful role to play in the federal practice, but it should be a very limited one,[33] and the parties have a substantial interest in insisting that this is so. Therefore, it seems to me to be a useful assurance, not only to litigants but also to trial judges, that the appellate courts are willing to exercise some supervisory responsibility in such matters. The fact that the court of appeals is open to review an abuse of discretion in the appointment of a special master assures the litigants that the order of reference stands not as the personal fiat of the district judge, but also as an expression of institutional policy which is expected to withstand at least minimal inspection by a group of judges who are more detached from the immediate dispute and who are collectively responsible for institutional integrity.[34] Moreover, the availability of mandamus or prohibition in such cases assures the trial judge that his relation with his constituent litigants is built on something more firm than his own personal force; the moral integrity of the federal judicial enterprise stands behind his rulings. Only a venal or unduly timid judge should fear or regret review, insofar as the esteem of his office is concerned. For those reasons, we may approve not only the holding in *La Buy v. Howes Leather Co.*, but also a later holding in the Fifth Circuit which invoked the power of the extraordinary writ to prevent a reference which was "palpably improper" despite the absence of any general pattern of improper references in the district court under review.[35]

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34 For fuller development of this idea in a somewhat different setting, see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-27 (1965).

35 *In re* Watkins, 271 F.2d 771 (5th Cir. 1959).

There is always the threat of opening the floodgates, and it has been voiced in connection with this development.[62] This is a serious matter in light of the present state of the dockets of the courts of appeals,[63] but there is no evidence that any of the spurt in the number of federal appeals filed in recent years is attributable to lower standards of ripeness for appeal. There is a more particular threat, perhaps, to individual litigants who may be harmed by delay resulting from appeals from orders which are "practically final," but this is a threat that results from any exercise of appellate jurisdiction and must be borne if important rulings are to be supported by the authority of the whole process rather than by the authority of a single judge. Delay is not a universal consequence of interlocutory review; often the appeal can be disposed of before the trial calendar makes its turn. And the motive of delay can often be taken into account on the issue of a requested stay of trial court proceedings.

Finally, there is the insistence of Professor Wright that this development undermines the prestige of the district judge. For me, as I have suggested, this consideration cuts quite the other way; his amenability to review makes the trial judge more respectable and not less. There should be access to the court of appeals to gain timely and effective review of any ruling which is of vital importance to a litigant; review of consequential rulings should be prevented only when there exists a specific urgency for dispatch which overrides the general need to institutionalize the responsibility for important decisions.

II. Appeals and the Fact Finding Process

It is complained that the courts of appeals are not only intruding more quickly into the work of the trial courts, but also that the scope of review is penetrating more deeply into the process of making particular decisions. The soundness of the general principle that fact finding should be done in the court of first instance can hardly be disputed. It has generally been assumed that the appellate process is deemed to be adequately fulfilled if the reviewing court can be satisfied that the decision is consistent with a valid and applicable general principle of law which can be said to serve as the major premise to the syllogism invoked to form that decision. The general principle or major premise reflects, of course, the varied mix of value judgments about conflicting social policies and procedural practices and is the objective of the deliberative and creative aspect of review.[64] The reviewing court can perform this role of appraising the legal premise without concern for the accuracy of the trial court's discernment of the particular circumstances to which the general principle is applied. The precise accuracy of the fact-finding may be of the utmost concern to the litigants, but it is of little general concern to others than the parties if an isolated mistake occurs in the judicial

[62] Frank, *Requiem for the Final Judgment Rule*, 45 Texas L. Rev. 292, 319-20 (1966); Wright, *supra* note 4, at 748.

re-creation of events in dispute. Since the economics of the process require that the reviewing court not get as close to the evidence as the trial forum, the reviewing court is poorly equipped to know when such an isolated mistake has, in fact, been made. It can only assure that an adequate, valid premise is invoked to sustain the decision.

The distinction between the narrow question of fact and the broad question of law is, however, much less crisp than this verbalization might indicate. Like all useful principles of substance or procedure, it must be fitted to the situations in which it is employed. To paraphrase a doubting remark of Jabez Fox,[65] findings of fact may be defined as the class of decisions we choose to leave to the trier of fact subject only to limited review, while conclusions of law are the class of decisions which reviewers chose to make for themselves without deference to the judgment of the trial forum. This skepticism about the circularity of the distinction is borne out by many cases involving review of administrative decisions.[66] The distinction there is especially obscure because the administrative agency has its own role in formulating general federal policy and is therefore entitled to some deference with respect to its conclusions of law.[67] Some courts, unwilling to recognize this function of the agency, but nevertheless willing to uphold administrative activity, have been attracted to a subterfuge of characterizing agency decisions as fact-finding even though they seem to express substantive value judgments rather than perceptions of individual circumstance. This muddled use of terminology is unnecessary, and is falling into disuse.[68] There is an analytical difference between the two types of decisions: the line of distinction represents the point at which reasoned judgment fails to supply an answer to the dispute.[69] When the reviewer's skills of formulation and application of substantive policy have been expended without producing a solution, there is no alternative but to rely on instinct, and the instinct of the trier of fact serves as well or better than any.[70]

Even the purest findings of fact, however, cannot be entirely immunized from review. Otherwise, the process of decision being what it is, the general principles and the policies they reflect could be quickly subverted by hostile findings. By taking a discolored view of the facts in every case in which a principle is invoked, the trier of fact could frustrate its application. The reviewing court must, therefore, examine the record closely enough to assure that the law is not being flouted.[71] Furthermore, some marginal check on the "unfairness and unskillfulness"[72] of the judge in conducting the trial ought to be supplied, in the interest of the litigants, and in the public interest in providing them with reasonable satisfaction in the process.

[64] Professor Wright seems at times to regard this as the only legitimate role of appellate courts. *E.g.*, Wright, *supra* note 3, at 751.

[65] Fox, *Law and Fact*, 12 Harv. L. Rev. 545, 551 (1899), states:

> That part of the case which is left to the jury is fact, as it seems to me, because it is left to the jury; and that part which is decided by the judge is law because he chooses to decide it, and to decide it in such a way that it shall be used as a precedent for future cases.

Compare L. Green, *supra* note 2, at 279 and Wright, *supra* note 3, at 770.

[66] 4 K. Davis, Administrative Law Treatise §§ 30.03-.08 (1958).

[67] *See* L. Jaffe, *supra* note 34, 546-92.

Because of the nature of the principles involved, it is very difficult to perceive any trends in their use. Examples prove nothing about trends and a series of evaluations of disputable examples would reveal little more than the biases of the evaluator. Nevertheless, as a regular reader of the Federal Reporter, I am prepared to share the sense of Professor Wright's observation that the sphere of fact-finding is shrinking gradually over quite a long historic curve.

I suspect that findings need not be so erroneous, as once may have been necessary to merit condemnation as "clearly erroneous". And as an observer of federal judicial statistics, I am prepared to concede that this development may have contributed somewhat to the burgeoning of the dockets of the courts of appeals, although this, too, is nondemonstrable. But even if some congestion is the result, I would find the evolution benign.

Conclusion

I view the various trends adverted to as aspects of a single development of a tighter institutional framework to bind or channel the power of trial judges. This development may be regarded as benign or not, according to one's assumption about the trial judge as an individual. If the basis for one's opinion is an assumption that the trial judge is wise and good, that he is likely to rise above the melee and render a detached and impersonal decision which will accurately reflect the public welfare in the manner that a fully informed public would desire, then the aggressive intrusions of appellate courts can be regarded as usurpations. If the basis for opinion is a contrary assumption that trial judges are equipped with an abundance of human failings, that they are likely to become emotionally involved in their work, and to lack the time, energy, or support to make sound reflective judgments about the application of public policy in disputed situations, then appellate activism can be regarded as benign growth. This does not assume that circuit judges are wiser than district judges; that I very much doubt. But three heads are better than one, and the tempo of the work of appellate courts allows for reflection and instruction that is not available to trial judges.

Of course, it is an oversimplification to portray Professor Wright as an adherent of Plato, or myself as an adherent of Aristotle. One need not choose between trusting individual judges or distrusting them; one can take a position at any point on a long spectrum. And the valuation is complicated by other factors, especially the cost and delay of appellate litigation, whose consequences may be appraised variously.[104] But this very basic value judgment cannot be eliminated

[104] Thus, Professor Wright asserts the relevance of Chief Justice Ellsworth's dictum that "a man [should] not be permitted to try his case two or three times over." Wright, *supra* note 4, at 748; Wright, *supra* note 3, at 751. All would agree with the dictum; at some point, it surely becomes relevant to the process of converting trial court decisions into issues to be resolved at the appellate level; but I perceive that point to be yet some distance away.

from the mix of factors that are to be taken into account in drawing the perimeter of the proper appellate role.

These observations are not made merely for the purpose of supporting the assertion that we have not learned very much that is new about judicial institutions in recent millennia, however true that assertion may be. The conclusion can also be tendered that the problem of defining the proper role of appellate courts will not soon yield to the techniques of modern science. Better data accumulation and retrieval methods do ease the task of assessing the cost and delay of appeals. But we are yet quite a long way from being able to test empirically any of the competing assumptions that may be made about the need for greater institutionalization of decisions at trial. Perhaps the best we can do is to measure the public acceptability of the existing role of appellate courts, or of any proposed changes, but such measurements tend to reflect only a compound ignorance: if none of us has a sound scientific basis for his own assumptions, a survey that compiles these assumptions can be no more scientific than its informational input. While the acceptability of judicial practice is a relevant measure of its success, it cannot serve as a sufficient explanation to the inquiring mind, nor as a terminus of concern for those responsible for the judicial institutions and practices of a rapidly-changing society.

If it is correct to assert that science is not ready with a quick answer to the basic issue that divides Professor Wright's view from my own, it may also be useful to suggest the wisdom of avoiding too strong an attachment to one's own assumptions. Here, I share Professor Wright's willingness to concede the difficulty of maintaining any assertion. After millennia of inconclusive debate, none of us is entitled to be a zealot. On the other hand, decisions must be made; courts must carry on; their practices will evolve and will be changed from time to time. Inevitably, decisions and practices must rest on some shaky assumptions. Decisions will surely be better and practices will be sounder if their creators are mindful of the frail underpinning.

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