

Labors Amiss

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Last June, I spent time in Beijing talking to judges and prosecutors. The people in charge of a school where prosecutors for the entire People's Republic of China are being trained explained the impossibility of there being enough qualified prosecutors and defense attorneys to implement their new criminal procedure law. While talking to judges at all levels, I kept hearing the same question: "How do you enforce your judgments?" I came to realize that, in cases where the state and security forces were not involved, the judges had no means of enforcing their orders or sanctioning violations. There were no marshals or sheriffs, no garnishments or writs of execution, and no lawyers overseeing a process by which judgments could be enforced.

I have had occasions to look at other nations with similar problems. Organized society must choose between authoritarian control and the rule of law. I have a new understanding that the rule of law is impossible without lawyers and legal processes. It has given me an entirely new appreciation of our profession and our administration of justice.

But then I look at the current unpopularity of the profession and justice system in America, and I must admit that I find reasons for that unpopularity. Lawsuits are much too slow and expensive, and are often frivolous. Legal advice is beyond the reach of most of the public. The law itself is cumbersome and, despite all of the rules and regulations, often unpredictable.

Lawyers and our institutions are not trusted because of instances of greed and because we have been content to countenance deception under the banner of zealous representation. While some may say that we suffer from the loss of respect for all institutions and professions, I suggest that a case can be made for the view that lawyers have led this deplorable parade.

I also suggest that an explanation for our failure, underlying the entire apparatus and legal profession (teachers, practitioners, and judges), is too much concentration upon our own lore and well-being along with too little consideration of the needs of the public. We are apparently unmindful that law should enable and not burden society. Even in America the rule of law should not be taken for granted.

The problem begins in law school where we are taught to look for all conceivable issues suggested by fact situations, then to apply a multitude of prior court decisions to each issue. Brevity and focus are not saluted. We are indoctrinated in "argument," *i.e.*, how to spin the record and precedent in our

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direction. The skill to be attained is argument—cookery—not how to explain to strangers the controlling facts and dispositive legal issues in a controversy.

Law school moot court arguments are distressing. The bright, articulate young people demonstrate that they are being taught to argue instead of explain. What a shame it is to leave advocates untrained for their calling.

But this Essay is about judges, and so I will aim my fire in the direction of federal judges on the courts of appeal. Many are lamenting the growth of their dockets and the burdens of their work. Law professors have joined the chorus of despair. We are told that justice is being denied, our jurisdiction should be reduced, many more judges are needed, and we have reached a crisis.¹

Judge Aldisert has sounded a call to re-examine the anatomy of appeals.² I agree and would have us look closely at how we handle appeals. We might as well, because Congress is not likely to change our jurisdiction or structure any time soon. Consider the possibility that our own obsolete customs and thinking snarl our performance.

We are wedded to the thinking that virtually every appeal is entitled to the same treatment: full briefing and oral argument, fulsome disposition of all arguments by written opinion with creative contributions to the “development of the law,” and publication in the printed reporters for edification of the profession. While we are so engaged, the law and dockets overwhelm us—to say nothing of society; and the parties must wait months, and even years, to receive our grandiose visions.

Study the cases that come before us on appeal. They are vastly different in merit and should accordingly be treated differently. During the twelve month period ending September 30, 1996, 51,991 appeals were filed in the federal circuit courts.³ Of the total number of appeals, 27,885 or 53.6%, were filed by prisoners.⁴ In the Fifth Circuit, 4674 of the 7546 appeals filed, or 61.9%, were filed by prisoners.⁵ Of these prisoner appeals in the Fifth Circuit, 21.8% were

¹ See generally THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS, 31–52, 172–73, 186–228, 289–92 (1994); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 55–86, 109–30 (1990); FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993); JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 14–15, 43–46, 129–40; RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

² Ruggero J. Aldisert, Remarks at the American Law Institute Luncheon Honoring New Life Members (May 18, 1994).

³ See Unpublished Report of the United States Court of Appeals, Fifth Circuit, September 30, 1996 (on file with the *Ohio State Law Journal*).

⁴ See *id.*

⁵ See *id.*

direct appeals of criminal convictions, while 17% were habeas corpus proceedings and 22.4% were civil rights actions under 42 U.S.C. § 1983.⁶ The prisoner and non-prisoner civil rights appeals totaled 2530, or 33.4% of the total number of appeals in the Fifth Circuit.⁷ Excluding death sentence and other extraordinary writs, 72.2% of Fifth Circuit appeals last year presented claims within the law with which district and circuit judges are usually very familiar.⁸ Very few of those cases presented problems requiring more than a little consideration by a circuit judge.

From my experience sitting with most of the circuits, I estimate that almost half of the appeals are frivolous or close to it. Another forty to fifty percent of the appeals are easily decided after the record is understood. Therefore, only ten percent or less of all appeals leave room for argument after the record is understood.

As I write this Essay, I have just finished reading the briefs for a panel in New Orleans next week. We have nineteen cases on our docket. These are all appeals that have survived the summary calendar screening of this circuit, by which two-thirds of our appeals are disposed. I am wondering why ten of the nineteen on this docket were not summarily decided. Another five present somewhat novel questions. And the other four present tangled records I do not yet understand. Whatever enlightenment is obtainable, by questions to counsel in these nine cases, it will not justify a week in New Orleans for three judges.

I conclude that we must screen and discriminate between appeals, because some require and deserve different treatment than others. Frivolous appeals should be identified and promptly rejected. This can be done with little judicial time, usually by merely checking the work of staff.

Next come those cases that should not have reached the appellate stage. Precedent controls, but understanding of the record is necessary for that realization. It is in this area where my criticism of law school training relates to my appraisal of appellate practice. I would sound an alarm for appellate lawyers and instruct them to eliminate all the fussing in their briefs and to tell the judges exactly what information is needed to decide the appeal—that and no more. Lawyers have operated too long under a policy by which they throw every complaint at the court in the hope that some judge may pick up on some point. Let the judges stop searching and reject the brief that lacks a precise focus. The lawyers will get the message. If they do their job as it should be done, these appeals can be decided on the briefs.

Finally, there are appeals where the outcome is uncertain on preliminary study. These are the ones that deserve the most attention of the judge. Here,

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

again, we are entitled to insist that the lawyers tell us only what we need to know to decide the appeal. And perhaps we should hear oral argument, although I believe we waste too much time and money by present practice. (When teleconferencing becomes possible, most of this waste will be eliminated.) Personally, I see little value in oral argument, but others differ. And we all recognize the public relations factor and the appearance of legitimacy these public proceedings afford us with the parties and the profession.

It is in our opinions that we trumpet anachronism and vanity. An opinion should only demonstrate that dispositive arguments are understood and then state the reasons for the judgment. That is enough. Learned Hand had his duties, and we have ours. Most opinions should be no more than brief paragraphs explaining the decision, written to the parties who need no explanation of the background of the appeal. These should be available to the public, of course, but not printed in the reporters whose readers, strangers to the case, will not understand.

If more of the decisions were announced by this method, we would dispense with some of our unconscionable delay. By the time a controversy reaches a circuit judge's desk, the parties are weary and much poorer than when it began. They want the matter decided and put behind them. It takes a person lost in his own conceit to ignore the litigants awaiting his decision while he spends months pondering and piddling—or striving to achieve an appointment or fame by landmark writing.

Coming to the appeal where a full, published opinion is warranted, here I would only plead that we add no more to the law than is practical and necessary. When we can, we should leave discretion to administrators and peace officers, to contracting parties, and then to trial judges. Resist the urge to add rules for proper search and seizure or custodial interrogation, for guideline sentencing, expert testimony, environmental review, constitutional rights, and all the rest. Today's administrators, legislators, judges, and professors should be challenged to return the law to where the people can live with it.

Our profession needs to do a lot of rethinking, and the turn of the millennium is a good time to do it. Judges should lead the way.