Judges on Judging

The Decision Making Process in Federal Courts of Appeals

GILBERT S. MERRITT*

One hundred years after the creation of the United States Circuit Courts of Appeals, lawyers and judges are now engaged in a rising debate about the process of decision making in those courts. Surging case loads for the past 25 years mean that these courts have more judges, more decisions to work on, and less time to spend on each case. The recent well-publicized report of the Federal Courts Study Committee—a distinguished group composed of senators, congressmen, judges and lawyers—calls the present situation in the Courts of Appeals a "crisis"—one "that has transformed them from the institutions they were a generation ago."[1] This study suggests the demise of the old Cardozo and Hand model of appellate decision making. This model of analytically careful and lucidly written opinions issued after full oral argument and profound consideration of all issues is the benchmark of judicial performance.[2] Lamenting the present and predicting a further decline in judicial performance, the Committee asks: "[W]ill oral argument and reasoned opinions simply fade away . . .?"[3] The Committee suggests that we may have to bureaucratize further the appellate process with a new four-tiered system or national subject-matter courts of appeals, or consolidated "jumbo" circuits.

The Committee's voice in the wilderness is not the only one. In a recent paper delivered at a symposium on the federal courts, Professor Lauren Robel expressed a similar critical view, reflecting what appears to be the beginning of a consensus among a number of knowledgeable judges and academics.[4] Supporters of the consensus often cite as primary authority the second chapter, entitled "Consequences," of Judge Posner's recent study, *Federal Courts: Crisis and Reform*, in which Posner compiled many distressing statistics about federal courts and their work load.[5]

Critics usually cite three trends as evidence of the decline in the quality of judicial decision making: first, that the judges allow elbow and staff law clerks

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* Chief Judge, United States Court of Appeals for the Sixth Circuit.

1. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990).

2. For full descriptions of this model, see K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 430-45 (1960); B. CARDOZO, THE GROWTH OF THE LAW (1924); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

3. FEDERAL COURTS STUDY COMMITTEE, *supra* note 2, at 109.

4. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3. *See generally* Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469, 1471 n.6 (1983).

5. R. POSNER, FEDERAL COURTS: CRISIS AND REFORM 94-129 (1985).

to write too many of their opinions; second, that the courts of appeals decide too many cases without oral argument and reasoned opinions; and finally, that the courts of appeals are publishing too few of their opinions. The critics conclude from these changes that the courts have reduced the public nature and visibility of their proceedings, and have thus reduced the accountability of the judges for their decisions. Liberal critics also argue that in the process of taking short cuts, the courts of appeals are giving short shrift to poor litigants by giving too little time to their cases, preferring instead to spend time on the "more interesting" questions in business and other litigation involving established institutions. Implicit in this criticism is that the courts of appeals favor the representatives of commercial classes in American society and corporate and government institutions.

Though proximity to the problem may cloud my vision, the insight of one who sees the problems from the inside may cast a different light on the situation. Some of the symptoms cited by the critics do not reflect the downfall of the judicial process but reflect only natural steps taken to respond to the increased case load. However, some of the criticisms do hit their mark and must be recognized by judges.

In reviewing the criticisms and the evidence against the backdrop of the national appellate system, I intend to draw primarily upon the experience of the Sixth Circuit with some occasional comparisons to other courts of appeals. Readers should not underestimate the differences in the courts of appeals, differences that add complexity to the problem. Keep firmly in mind that the judges of the several courts of appeals have adopted significantly different policies and procedures in response to their different geographical settings, population characteristics, case load mix, leadership, and personal preferences. As we shall see, the courts have widely different policies regarding oral argument and publication of opinions. In addition, they differ in the number of days they sit each year,[6] the number of cases they decide per three-judge panel,[7] and their attitudes toward en banc hearings and decision from the bench.[8]

I. LAW CLERKS AND ORAL ARGUMENT

In our modern federal practice, lawyers and litigants should fear law clerks without oral argument just as they should fear judges without law clerks. The use of law clerks and oral argument complement each other.

At its core, the adversary process is oral argument. The presence of live human beings in verbal combat engages the attention of judges and makes them think, question, discuss, and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points. It focuses thought and

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6. For example, the judges of the Third Circuit currently sit 18 to 20 days a year, the Sixth Circuit 50 days. The Supreme Court now sits 40 days a year.

7. For example, the judges of the Eleventh Circuit currently decide 519 cases per three-judge panel, the D.C. Circuit only 154. The Sixth Circuit figure is 479. ADMINISTRATIVE OFFICE, U.S. COURTS, 1990 FEDERAL COURT MANAGEMENT STATISTICS 3, 14, 25.

8. So far as I am aware, the Sixth Circuit is now the only circuit which decides some cases from the bench. In 1989, there were 114 such bench decisions.

reflection more than discussion and debate with law clerks in chambers even when the law clerks are better lawyers than the lawyers in the case. It is the right to be heard made concrete, or, in biblical language, the "word made flesh."

The oral tradition runs deep in Anglo-American jurisprudence for good reason.[9] It is a safeguard against inattentiveness and unreflection. Oral argument, as Karl Llewellyn observed, is one of the "major steadying factors" which produce "reckonability" in "[o]ur institution of law-government":[10]

> In oral argument lies counsel's one hedge against misdiagnosis and misperformance in the brief, the one last chance of locating a postern missed in the advance survey. In oral argument lies the opportunity to catch attention and rouse interest among men [and women] who must be got to read—or to reread—*this* brief not as a routine duty nor under the undiscriminating press of other business, but with the pointed concentration *this* cause merits.[11]

What may be equally important today is that oral argument keeps judges from acting like officials so busy that they speak the words and reflect the thoughts of their youthful staff rather than themselves. Oral argument keeps judges from unreflectively adopting their law clerks' view rather than developing their own view through reflection. Judges in conference after oral argument are much more likely to follow their own assessment of the arguments, as influenced by their colleagues' questions and opinions, than their law clerks' bench memos. The Socratic dialogue prompted by oral argument is more likely to continue in chambers among judges and law clerks than in cases decided without oral argument. Instead of a bureaucratic workplace, the chambers are more likely to become a small laboratory for reflection and research.[12]

These reasons are not the only reasons for retaining oral argument. It is much easier to separate the wheat from the chaff after oral argument than before. This effect works in both easy and hard cases. In cases that turn out after oral argument to be easy, fifteen minutes worth of questions to counsel

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9. The civil law system assigns great importance to "orality" in the fact-finding process in both civil and criminal matters, but adversarial oral argument in appellate matters is deemphasized even in countries like Germany that are heavily influenced by the prestige of American constitutional institutions. *See* J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 67-68 (1977) (criminal "orality"); A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 159-76 (2d ed. 1977) (civil "orality"); Lawson, *Comparative Judicial Style*, 25 AM. J. COMP. L. 364, 367-68 (1977) (appellate review in France); Milgramm, *Comparative Law: The Federal Constitutional Court of Germany and the Supreme Court of the United States*, 1985 Y.B. SUP. CT. HIST. SOC'Y 146, 150 (Federal Constitutional Court grants oral argument about ten times a year).

10. K. LLEWELLYN, *supra* note 2, at 18, 19.

11. *Id.* at 240 (emphasis in original).

12. In *The Nature of the Judicial Process*, Justice Cardozo, quoting Munroe Smith, explains the process by which the law is developed:

> In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 2, at 23.

familiar with the record can save hours of judicial or law clerk time scouring the record in search of uncertain discrete facts and uncertain fact patterns that emerge clearly only after combining facts in disparate parts of the record. Conversely, sometimes a case that seemed easy on first reading before argument will turn out to be hard. In cases that turn out to be hard, oral argument can be extended informally until the confidence or level of understanding of the panel rises to an acceptable point. The panel may then know what additional points the parties need to brief and what parts of the appendix need to be supplemented.

I think those courts that have severely restricted oral argument—limiting it just to the big cases—have made a serious mistake. One arguably valid measure of the health of the decision making process in a court of appeals is the percentage of cases orally argued. Unfortunately, the statistics offered by the Administrative Office of the United States Courts are not helpful because they do not distinguish between cases that the courts forced off the oral argument calendar even though the lawyers wanted oral argument and cases in which the parties waived oral argument. No one should criticize courts for not having oral argument in cases in which the parties do not see the need for it and do not want to bear the expense of it. Nor do the statistics tell us how many of the unargued cases are *pro se* cases or jurisdictional defect cases. These are cases in which the litigant represents himself or in which the litigant makes a procedural error that divests the court of jurisdiction. One should exclude from the court cases involving routine appellate jurisdictional defects, *i.e.*, whether the notice of appeal was filed on time and similar questions. These cases are seldom argued in any circuit. Likewise, *pro se* cases are seldom argued in any circuit because argument usually is not helpful and most of the litigants, *e.g.*, prisoners, cannot easily come to court. Thus relevant empirical information on oral argument in the federal courts of appeals is not readily available. One must call or visit the clerks' offices of the various courts of appeals to get it.

My informal telephone survey of circuits indicates that, leaving aside jurisdictional defect cases, *pro se* cases, and cases in which the parties have waived argument, oral argument was allowed in the following percentage of cases in each circuit in 1989: 1st—85%; 2d—100%; 3d—30%; 4th—75%; 5th—40%; 6th—100%; 7th—75%; 8th—70%; 9th—66%; 10th—60%; 11th—50%; D.C.—62%; and Fed.—100%. Thus, there are many unargued cases in which the lawyers seek oral argument. Readers can speculate on their own about how well each court of appeals is doing in complying with the presumption favoring oral argument found in Rule 34 of the Federal Rules of Appellate Procedure,[13] and whether the performance of each is consistent with the appropriate standards of visibility, accountability and care.

My own view is that many circuits have unwisely devalued oral argument and left themselves open to valid criticism. The trend away from oral argument began in response to rising case loads when the Fifth Circuit began eliminating

13. Under the Rules, "[o]ral argument shall be allowed . . . unless" the issues are "frivolous," "recently authoritatively decided," or "adequately presented in the briefs." The Rules assure each party the right to advise the court "why oral argument should be heard." FED. R. APP. P. 34.

cases from its oral argument calendar through a screening process in the 1970s. Other circuits have gradually adopted the practice. The Third Circuit has extended the practice so that only slightly more than a quarter of its cases are actually heard, and most of the unargued cases are decided with a one-line order without further comment.[14] The justification usually given is that the judges want to spend their time crafting careful and creative opinions in important areas of the law rather than on mundane issues of little import. Such practices eliminate the public nature and visibility of the appellate process entirely in most cases and make it impossible for the parties to learn the reasoning process or who decided their case. The judges are no longer publicly accountable for what they do.

Like oral argument, law clerks help focus a judge's attention on the cases and help the judge render reasoned opinions in them. The federal appellate courts now employ two types of law clerks: those who serve in each judge's chambers, referred to as "elbow clerks," and staff attorneys, who are like law clerks at-large. Federal appellate judges justify their extensive use of elbow and staff law clerks on the basis of the number of cases they must analyze and the number of opinions they must write. There are now 21 staff attorneys for the Sixth Circuit and 3 elbow clerks for each active judge. A three-judge panel of the Sixth Circuit in an average year will participate in researching, writing, editing, criticizing, and modifying approximately 450 written opinions, a total volume of a half million to a million words, depending on the penchant of the individual judges for brevity or prolixity. Leaving aside any comparison based on quality, this productive effort compares in length to a 2,000 page annual volume of the *Harvard Law Review*, which is written and edited by almost 150 people according to its masthead. It is a volume not dissimilar in size to an annual *Supreme Court Reporter*, which is written by nine justices with the aid of more than thirty law clerks. Without the aid of elbow clerks and staff attorneys, federal appellate judges simply could not perform their jobs. Without law clerks, opinions could not be well-researched either on the law or the facts.[15] There would be many more mistakes of all kinds. The law would be even less stable and predictable than it is today, and delays would be intolerable.

In the Sixth Circuit, the functions of the different clerks divide roughly according to whether the case is on the oral argument calendar or the non-argument calendar. Staff attorneys prepare the first draft in almost all non-orally-argued appeals by *pro se* litigants—usually state prisoners—which amounted to some 900 opinions last year. In addition, they prepare first drafts in dismissals of cases for jurisdictional defects, which last year totalled some 500 cases. Depending on the individual judge, elbow clerks write the first draft of many of the opinions prepared after oral argument. With staff attorneys working on the non-oral argument calendar, and elbow clerks working on the oral argument calendar, the court completes its work.

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14. ADMINISTRATIVE OFFICE, U.S. COURTS, *supra* note 7, at 8.

15. In England, appellate judges have no law clerks, which may explain their penchant for oral opinions. The use of law clerks has been suggested as one way to secure better judging. *See* S. LEE, JUDGING JUDGES 206-07 (1988).

Nevertheless, using elbow clerks and staff attorneys creates a risk. Critics often voice a fear that clerks will end up deciding cases for the judges. The Sixth Circuit uses two strategies to ensure that the judges, not the clerks, make the decisions, depending on the type of calendar a case is on. For jurisdictional defect cases, the judges have individual conversations with the staff attorney who worked on the case in an effort to search out problems with the proposed disposition. The chance that the staff attorney will become the decision maker is limited. This docket consists largely of heavily rule-bound areas of law—for example, cases in which the issue is the failure to file the notice of appeal on time or other similar jurisdictional and procedural defect cases. A judge should easily spot an error in the staff attorney's reasoning. In addition, an entire panel discusses the cases before issuing the opinion. With these checks on the staff attorney's real decision-making power, plus the availability of a petition to rehear to correct errors, experience suggests that there is little harm in delegating the job in the first instance to a staff attorney well-trained in the rules. The clerk's office already has the responsibility to see that lawyers and litigants comply with the procedural rules (*e.g.*, the size of briefs, the content of appendices, and the deadlines for filing). The practice of delegating procedural defect cases to staff attorneys is a defensible extension of this principle and has produced no untoward results. Built-in safeguards reduce the chance that the staff attorney will decide for the judges.

The use of staff attorneys in *pro se* cases raises somewhat different problems. The points of law usually raised are in the fields of habeas corpus law and civil rights law. The areas are broad and often not rule-bound or clear, and the *pro se* pleadings may present an argument too obtusely or imprecisely to persuade a staff attorney. In addition to the two safeguards mentioned above—discussions with the staff attorneys and panel conferences—the Sixth Circuit also follows a rule that any single judge can place a *pro se* case on the oral argument docket for appointment of counsel and further consideration.[16] This transfer occurs in seven to eight percent of the cases. Assigning this group of cases to staff attorneys raises questions, even though most of the cases are insubstantial and even though all circuits follow a similar practice of assignment.

In the Sixth Circuit, four-fifths of the *pro se* cases filed are prisoner *pro se* cases, equaling approximately 1200 cases a year, or 30% of our total docket. Prisons are frustrating and degrading places. The current overcrowding has only made the environment worse. To meet the constitutional rights of the inmates, prisons and some prisoners ("jailhouse lawyers") keep case filing forms on hand. When prisoners are angered or frustrated by some event, as frequently must be the case in the prison environment, they take the form, write down the complaint, and send the form to the clerk of a federal district court. The overcrowding has not only resulted in worse conditions that lead to more complaints, but also, with recreation time and facilities cut back, given inmates have nothing

16. *See* FED. R. APP. P. 34(a) (oral argument "shall be allowed" unless panel "shall be unanimously of the opinion that oral argument is not needed."); 6TH CIR. INT. OPERATING P. 21 (case set for oral argument unless hearing panel judges unanimous).

but time on their hands to spend drafting complaints. The high volume of prisoner *pro se* complaints is a troubling problem. I occasionally—in about 1 out of 100 instances—see a *pro se* case on petition for rehearing, or suggestion for rehearing en banc, that gives me pause. Sometimes I can assuage my concern or solve the problem with a letter or telephone call to the panel. Because of swollen dockets and the low proportion of genuine constitutional claims in this group of cases, no one has offered a viable alternative to the present practice of sending these cases to staff attorneys. Because proposals for more effective intra-prison grievance procedures and for requiring the presentation of claims first to state courts have not been successfully implemented, the number of federal prisoner cases continues to rise.

Elbow clerks provide research and writing assistance to individual judges for cases on the oral argument calendar. In most chambers, one elbow clerk works on each case from the time the judge receives it to the time an opinion issues. The work of an elbow clerk varies according to the individual tastes of the judge, but in most cases the clerk's involvement with a case consists of reading the briefs, performing extra research beyond the briefs, writing a bench memorandum to summarize the research, discussing the case with the judge, attending oral argument, and, in many cases, writing a first draft of the opinion. Law clerks also review opinions in from other chambers, draft dissents, and review petitions for rehearing and suggestions for rehearing en banc. To the eyes of a critic, the role of the clerk seems to be that of a shadow judge, and the complaint arises that the clerk, not the judge, makes the decision.

With oral argument as a safeguard, law clerks, far from being an institution to be feared, actually provide a very useful service to the judge. Law clerks provide an extra set of eyes for each case because each clerk has only one-third of the judge's case load. Clerks develop an attachment to the cases on which they work. A clerk sees each case as "his" or "her" case, and a good clerk will not permit the judge to stray into error without something of a fight. Although some judges may be hesitant to admit it, all of us have lost arguments with our clerks because our initial reaction to a case arose out of haste and not careful consideration. Even if the case load were not mounting, the law clerk would serve a useful function. As recent graduates of law school coming to their first legal job, clerks often infuse enthusiasm and fresh ideas into an otherwise remote and necessarily isolated judiciary.

Clerks buttress the authority of this traditional institution with their expertise in legal research and their attention to detail, and they demystify the judicial function by carrying their experience of a year or two into private practice and public service. Law clerks enhance public accountability in a way unintended by the Founders or those constitutional scholars concerned about a counter-majoritarian judiciary appointed for life. Law clerks are not the proto-judges that are characteristic of a civil law magistracy. Instead, they arrive determined to learn law and gain and trade experience, just as their eighteenth century counterparts "read law" with George Wythe and other lawyers. We should not fear but welcome these interchanges.

Preserving the Socratic method in the courtroom through oral argument and encouraging it in chambers discourages the tendency toward bureaucratic

habits and unreflective decision making. By decreasing oral argument, we upset the balance, unconsciously increase the authority of our staff, and risk hasty decisions directed by the judgments of others.

II. PUBLICATION VERSUS NONPUBLICATION

The selective publication of opinions is also a major focus of scholarly criticism.[17] The criticism is made because published opinions have come to represent the core of appellate judicial responsibility. The image of unelected, life-tenured judges making unknown decisions in secret has overtones of the Inquisition for some. Courts should remain open tribunals whose work is easily accessible. The law as announced by courts must remain open and available to all so that none are held to a standard of conduct without adequate notice.

Originally courts issued their opinions orally from the bench, and students and judicial reporters jotted down notes to describe the outcome of the case and the reasoning of the decision if the decision was memorable. Eventually private publishers got in the business of reporting written opinions. They would note or reprint only the most interesting or important opinions, and thus preserve them. Private publishers entered the realm of comprehensive reporting comparatively recently with the advent of the West Publishing Company's National Reporter System in the late nineteenth century.[18]

The critics have assumed against the weight of this history that all of the written opinions of judges form a public good—namely law to which future litigants may refer. To the extent that the law is published, it is available to all; to the extent it is unpublished, it supplies only a private good. While this theory is true in some cases, many cases do not result in a change of law or even of a nuance of law. Instead, the main result of these cases is the judicial settlement of a dispute, and the main public good produced is that the dispute is settled. In such cases, the use of a published decision or even a written decision is minimal. That is why the reporters originally were selective.

Now that we have the comprehensive federal reports issued by the West Publishing Company, it is true that fewer and fewer courts of appeals opinions find their way into the *Federal Reporter* as measured by a percentage of all opinions issued. This statement is based on the reports of the Administrative Office of the United States Courts: In 1989, only about 7,000 of the 19,300 "total cases terminated on the merits," *i.e.*, after a decision by judges, were "published."[19] If we total up the number of Court of Appeals opinions on Lexis for the same year, however, we will be given 20,023 cases to review for all of the Courts of Appeals in 1989. This different and higher figure from a private computer service raises two points about the figures regarding published and

17. *See* Robel, *supra* note 4, at 51-56.

18. The first debate about publication focused on how to reduce the number of published opinions. *See* Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 791-94 (1975).

19. ADMINISTRATIVE OFFICE, U.S. COURTS, *supra* note 7, at 2-25 (compilation of total termination on merits statistics for all circuits).

unpublished cases, one definitional and the other about the impact of the new practice.

First, there is the definitional problem of what is an opinion. Lexis publishes everything that the various courts of appeals permit it to publish. The 20,023 1989 Lexis opinions represent about 800 more cases than the Administrative Office figures show were decided on the merits. The Administrative Office does not count an opinion dismissing an appeal for lack of appellate jurisdiction or other similar procedural irregularity as a termination on the merits. Lexis published 2,803 opinions from the Sixth Circuit in 1989 even though the Administrative Office showed only 2,369 "merits terminations," from which came 650 "published opinions," *i.e.*, opinions published in the *Federal Reporter*. To complicate matters further, the circuits have different rules regarding publication of opinions on on-line services. Half of the twelve circuits, including the Sixth Circuit, permit Lexis and Westlaw to publish every opinion; the other six circuits allow them to publish only the opinions given West Publishing Company for publication in the *Federal Reporter*.

The second point regarding the effect of unpublished opinions arises from the statistical disparity between the Administrative Office and Lexis. Many of the unpublished opinions—all of them in the Sixth Circuit—are in fact available to academics and practitioners on the two computer data-base services. This situation does not apply to the half-dozen circuits that do not permit their unpublished opinions on-line, but it shows that the nonpublication problem is much less serious than one would think. Many law firms have the computer terminals in their offices, and small firms or solo practitioners can use the computers available at local bar libraries or county law libraries.

The computer services are expensive, hard to use, and may favor big users in their pricing structure, but it seems clear that publication of all opinions in the *Federal Reporter*—the only logical response to those who complain about unpublished opinions—would not serve the legal community any better. The amount of space required to house the over 900 volumes of the *Federal Reporter, Second Series* already imposes a great cost on small firms and solo practitioners to purchase the books and rent library space. Imagine the immense library one would need to house a complete set of all federal courts of appeals decisions in the last twenty years. It is doubtful that many would benefit from the full publication of every decision in the *Federal Reporter*, because most unpublished opinions are so fact-specific and precedent-bound that their major use would be simply to clutter briefs with longer string citations.

The accountability problem due to nonpublication is thus overstated. In the Sixth Circuit, where Lexis and Westlaw publish every opinion issued and where such opinions may be cited as authority,[20] the problem seems minimal. It is more serious in the First, Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits which, I am told, limit the on-line publication of opinions to those also published in the *Federal Reporter*. The argument in those circuits against pub-

20. *See* 6TH CIR. R. 24(c) (citation disfavored, but counsel may cite if court and opposing counsel served with copy of opinion).

lication of all opinions is that precedent, consistency, visibility, and accountability are undermined when so many opinions emanate from the court that no one—not even the judges on the panel deciding the case—can read these opinions with care and have time for other work. That reasoning seems somewhat paradoxical to me—a court must limit visibility and accountability in all but a third of its cases in order to preserve it—but the practice is consistent with the older practice of selective publication of all but the most important and interesting cases.

English courts today still follow the practice of appellate decisions from the bench, an ancient English practice followed at Westminster since the time of Henry II. Courts in the United States could make more use of this practice. In the Sixth Circuit today, as in the English courts, the judges sometimes render their decision from the bench with counsel present after oral argument. In the simpler cases, we give our reasons, recount particular facts, conceptualize the case, cite precedent, and refer directly to the points of argument we have just heard. Sometimes the bench decision is more responsive to the nuances of the argument than a written opinion rendered weeks later.

In the Sixth Circuit, no decision is rendered from the bench unless all three of the judges unanimously agree that there is no good precedential reason for a written opinion.[21] The oral argument, the decision, and the reasons given are recorded and are available to any party who may want to have the transcript typed. The practice preserves the public nature of the proceeding and the need to have judges directly confront the problems in the case in the face of critical participants, yet saves the time of judges in the preparation and the circulation of opinions. Although not now generally followed in other circuits, this practice is being considered in some other circuits.

III. HASTE AND DEFERENCE TO AUTHORITY

The final question is speculative and has no real answer. Is there any substance to the argument that courts of appeals have responded to increasing case loads by giving priority to commercial and government litigation and deemphasizing the cases of ordinary citizens?

The argument is that we learn from an early age to defer to the authority of parents and established institutions. In this way, as John Rawls suggests, we experience and internalize a tendency toward a "morality of authority."[22] We do not entirely lose that tendency when we grow up to be judges who decide cases between individuals and established institutions like governments, corporations, officials and other representatives of groups of higher social rank. The less time we have to decide a case between an individual and the representative of established authority the more pressure there is to decide quickly and we may be less likely to analyze and reflect on the condition and circumstances of the individual's case. In the Sixth Circuit, a governmental entity or official appears

21. 6TH CIR. R. 19.

22. J. RAWLS, A THEORY OF JUSTICE 462-67 (1971).

as a party in almost half of the cases.[23] Such cases can become a ritual in which the court searches quickly for a legal defense for the government or other representatives of established authority without seriously contemplating possible injustices to the individual party or other members of the community. The need for haste may make the court search for "safe" rather than just decisions and may push the process toward ritual rather than reflection.[24]

Empirical evidence that this process is occurring in the federal judiciary is not readily available.[25] Clerks and statisticians for courts are not likely to search for or record such evidence. Scholars do not conduct controlled experiments on courts, so the evidence that hasty justice favors established authority is anecdotal.

The statistics compiled from the administration of the new *United States Sentencing Commission Guidelines* in criminal cases in the district courts may provide some evidence for this thesis, however. The *Guidelines* are a 500-page calculus of interlocking mechanical rules that employs a grid that seeks to mete out exact punishments for different crimes. The code is complex and the penalties are severe, but a provision does exist allowing judges to depart from the *Guidelines* when they believe the mechanical rules impose an inappropriate sentence.[26]

More people are now going to jail for longer periods under the *Guidelines* than was previously the case under individualized sentencing. In 1984 and 1985, before the *Guidelines* came into effect, 50% of federal criminal defendants were sentenced to imprisonment and 50% received fines and probationary sentences. In 1989, judges sentenced 87% of defendants to a term of imprisonment under the *Guidelines* and the term imposed on those imprisoned was much longer. Although the *Guidelines* allow the judge liberally to depart from the rigid rules established in the code, such departures in favor of a less severe sentence have occurred in only 8% of the cases.[27]

District judges say privately that there are several reasons for their increased severity in sentencing. The number of drug cases has increased, and the code is highly specific, difficult, and time-consuming to apply, so its implementation has therefore been delegated to probation officers who gather sentencing information, make the calculations, and apply the code. Consequently, the judge bears less responsibility for the result than previously, and when pressed for time may engage in a sentencing ritual that defers to the Sentencing Commission, the probation officer, and the position of the government. Under the previ-

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23. *See* Merritt, *supra* note 4, at 1472.

24. There is some evidence for this tendency in the psychological literature. *See* S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

25. Limited empirical research has been undertaken regarding the process at the state supreme court level. *See, e.g.*, Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191 (1978). Marc Galanter has discussed the success of established institutions due to their status as "repeat players." *See generally* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

26. *See* 18 U.S.C. § 3553(b) (1988).

27. UNITED STATES SENTENCING COMMISSION, 1989 ANNUAL REPORT 42-43, 52, 63 (1990) (Tables V, VI, X and Figure VIII).

ous system of individualized sentences, the judge weighed the nuances of the case and gave deeper consideration to the circumstances of each defendant.

The administration of the new sentencing code in federal court bears out the thesis, at least in part. The same judges now give much greater punishments in similar cases than before. They believe the *Guidelines* process requires them to be less concerned about the circumstances of the individual defendant and his or her psychological, family and community circumstances, potential for rehabilitation, and other myriad factors previously considered. The change has been accomplished by reducing the involvement of the judges in the process and increasing the pressures on them to defer to other officials. Indeed, one district judge has resigned from the bench giving as his reason the bureaucratic nature of the *Guidelines* he was required to administer.[28]

Deference to authority of this sort is not confined entirely to district courts. District courts must defer to the court of appeals that sits in review, so one cannot criticize district courts for imposing increasing sentences under the *Guidelines* if the courts of appeals have made it clear that they will reverse a district judge who strays from the authority of the *Guidelines*. It is with the courts of appeals that the deference to authority is most apparent. American courts of appeals did not hear appeals of sentences before the *Guidelines* came on the scene. The courts of appeals in this country had no opportunity to develop a jurisprudence to deal with the onslaught of sentencing cases. One might expect two trends from an unfettered appellate bench with more time for reflection: the development of principles of sentencing, rather than the manipulation of narrow rules which lack underlying themes of coherence, and close attention to insure that the rules to not transgress principles of due process.

The reason that this has not happened may be the tendency of busy people to go along with the system and to follow bureaucratic authority. In this case, the authorities are the *Guidelines* and the people who promulgated them. Developing coherent principles and determining whether a sentence comports with due process now that we have a sentencing code is difficult and time consuming. If one puts faith in the Sentencing Commission, one can simply apply the *Guidelines* in bureaucratic fashion. A less overworked bench would not let this happen.

The process of appeals under the Social Security Act provides another example of a large case load causing deference to authority. Much has been written about this area, and I defer to more thorough works for their descriptions of the system.[29] These cases often do not receive full attention from the courts of appeals. The reasons are fairly straightforward. The issues involved are technical, and few judges, if any, have sufficient medical knowledge to understand fully what the alleged condition is, let alone to determine whether that condition is disabling. The number of cases presented is large. These cases have been reviewed already by an Administrative Law Judge, the Appeals Council, and a district court (often preceded by a magistrate) before they arrive for further

28. N.Y. Times, Sept. 30, 1990, at A22, col. 1.

29. *See, e.g.*, J. MASHAW, BUREAUCRATIC JUSTICE (1983).

review. It is easier for a court of appeals to defer to all of these other authorities and affirm denials of benefits than to take the time to consider the case fully. This effect is perhaps somewhat justifiable because Congress has limited the standard of review.[30]

The causes and effects of deferring to authority are nebulous. The examples of the application of the sentencing guidelines and the treatment of social security cases offer two large bodies of law where large case loads and time constraints may produce an unhealthy deference to authority. *Pro se* cases may be another. If case loads and time pressures on appellate judges should continue to increase, we should probably expect consequences such as a tendency towards deference to the interests of established authority and a tendency towards giving the cases of individuals, particularly those of ordinary citizens and the poor, less attention. Less experienced lawyers, underpaid lawyers or the absence of any lawyers at all characterize the cases in which this effect most often occurs. Delegation of decision-making authority to others, the elimination of oral argument and reasoned decisions, quick decisions based upon defenses which avoid the merits, and decisions which rely on discretion rather than specific legal principles may be some of the effects of a judicial process driven by haste.

Thus, as in the administration of the sentencing code, the judicial process will turn from reflection to ritual, from deliberation to delegation if case loads continue to increase. The apparent consequences of the sentencing code should be seen as a warning, a sign of the future to be avoided. The consequence of swollen dockets is a more alarming prospect than the other effects pointed to by critics of appellate courts. Unlike the use of law clerks, the lack of oral argument, or the percentage of unpublished opinions, consistent deference to authority by the courts undermines the very notion of the rule of law.

30. *See* 42 U.S.C. § 405(g) (1988); *see also*, Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U.L. REV. 1 (1987).