

Judges on Judging

Grace Notes on “Grace Under Pressure”

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I. INTRODUCTION

Frank Coffin perceptively identified nine areas of stress for judges which he thought needed discussion by other judges.¹ I identify with Frank Coffin’s views, with his work methods and thinking as set forth in his masterful little book, *The Ways of a Judge*,² and with the areas of stress that he identifies. Here we are almost at 1990 and appellate judges are working harder, with bigger staffs, than they probably ever have in the almost one hundred years of Courts of Appeals. I can speak with a little authority because I served two separate years as a law clerk to Judge Harrie B. Chase, my predecessor on my court once removed, from Vermont.³

How times have changed! One usually hears of the numbers of cases that come to the courts and, of course, the numbers speak for themselves: on our court, the caseload has quintupled in the last forty years. The size of the court has increased from six to thirteen judges; the number of active judges’ secretaries has increased from one per judge to two; and the number of law clerks has increased from one per judge to three. Computer-assisted legal research is gradually taking over. Word processors or other office automation devices have replaced the old L.C. Smith typewriters with which we were able to get along. The number of cases heard in a sitting week has gone from fifteen to almost double that number. Summary orders, instead of full opinions, are used to decide sixty percent of the cases. Withal, judges’ stresses have increased, I think, a great deal.

Is this true because, as has in fact occurred, the complexity of the cases heard has become greater? I do not think so, though I do think that the one hundred or so statutes that Congress has enacted which create litigation, coupled with developments in constitutional law, environmental law, and criminal law, have made the judge’s judicial life much more complicated than it once was. Some of the stress is no doubt caused by some of the actions or inactions of the Congress—the omission to raise pay so that the judge’s hourly pay rate approximates a plumber’s and the requirement of filing financial disclosure statements that are available to the public and are written about by enterprising newspaper reporters, to name two examples.

But I firmly believe that federal judges are coping with their problems and that the job remains one of the most challenging and interesting of all jobs, with consistently new learning experiences every single day, though an insufficient

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1. See Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399 (1989).

2. F. COFFIN, *THE WAYS OF A JUDGE* (1980).

3. The “old” Second Circuit was written about affectionately by Harold Medina in 1979. See Medina, *Foreword: The “Old” Second Circuit in 1951*, 53 ST. JOHN’S L. REV. 199 (1979).

amount of time in which to perform top-quality work. We are merely coping, however, because there is very little travel or intercourse among the judges except for those who have senior status, those who are chief judges, or those who serve on Judicial Conference committees; there are no sabbaticals, and vacations are limited to two or three weeks a year; and there is too little communication among the judges in an age of communication and too little time for meditation in an age of stress. Thus, I think that this series of writings by judges on judging does give us a timely opportunity to engage in some “badly needed self-help,” to quote Frank Coffin.⁴

Rather than confine myself to one of Frank Coffin’s nine areas of stress, I will refer to each of them in turn. Those were in connection with trials, appeals, collegiality, working with law clerks, management and governance, technology, consistency and predictability, private time, and the lawmakers.⁵ My comments follow.

II. TRIALS

I believe all trial judges can learn by following role models. I think of three truly outstanding trial judges who have served in the Southern District of New York in recent years as being ideal. The first, the late Edward Weinfeld, was truly a saint of the law, an intellectual ascetic, a worker with a capacity not just for working long hours but for getting into the depths of every case from every point of view—facts, law, and human understanding. But he also could after due deliberation make his mind up and proceed to bring a case to a conclusion, to write it up, sometimes perhaps even to write more than was necessary, but with no feeling that he was being rushed. Ed Weinfeld would be an incredibly difficult model for most of us since his dedication was truly of his whole life—arriving at the courthouse at the crack of dawn, leaving only at or after dusk.

Milton Pollack, a senior judge, is another model difficult to emulate; he somehow manages to carry on the full caseload of an active district judge in Manhattan while hearing a number of cases in Houston, Texas and serving on the Multi-District Panel; he is also generally a troubleshooter, helping out other judges who have fallen behind in their work or advising the younger judges on how to solve their problems in dealing with jury selection, discovery, or the like. He does this all while nevertheless leading a full and rich life. The secret of Milton Pollack’s success, I have no doubt, lies in his incisive mind, which enables him to get to the heart of every matter, the nub of every case, the critical question that is at stake without wasting time; his directness, his forthrightness, and his ability to come to the point are the very essence of efficiency in action. A complaint is filed, a motion is made, or an injunction is sought, and what does Judge Pollack do? He immediately calls in counsel from opposing sides; he asks the plaintiff or the moving party what it is they really want from the litigation, the motion, or the injunction. He then asks the opposing side what it is that they can give and why they should not afford the relief sought. He limits the discovery to the issues really in dispute; he manages his case

4. Coffin, *supra* note 1, at 399.

5. *Id.* at 401–03.

from start to finish, without delegation of the management function to magistrates or law clerks. He requires the parties to report back; he establishes definite time limits within which they must act. Nor is he averse to requiring counsel to bring the parties before him. When he sets a date for trial, he is firm in respect to that date. He runs his courtroom as he runs his office. Lawyers know what to expect. They know how far they can go and where the lines will be drawn. Justice is served because it is not delayed.

The third role model is Morris Lasker, also now a senior judge, a man with the ultimate in sophisticated sensitivity to people and to issues. Widely experienced, widely read, fully aware of the day's events in the world around him, Judge Lasker brings to each case the wisdom distilled through decades of aging in the finest cask. Through the years he has had, for example, much to do with the operation of the New York City correctional system by way of structural and consent decrees. Here, too, he takes a hands-on approach, visiting the institutions to determine what is really going on and talking to the people who really know: inmates and correctional officers, as well as experts in the field.

What do these three role models share in common? The hands-on approach, I suggest. In the hands-on approach, in the words of the old Vermont saying, if you have a hundred things to do, you do them one at a time, but you do them, you do not shuffle papers. You get the job done. The more difficult the job, the higher priority it has on your scale. If something can be solved by picking up a telephone instead of writing a letter, you pick up the phone. If jotting a note would serve the purpose of dictating a memorandum, you jot the note. If a direct visit is needed, you make it. You write the same way that you act—quickly and to the point. And you do it all with style, with grace, with flair. You take nothing personally. If you are reversed by an appellate court, you are reversed; the appellate court may be the one that is wrong. You have what could be called judicial courage. You are willing to stand up for what you have done, regardless of its effect upon the public. And you are never too busy to see others and to visit with them, never too busy to learn, never too busy to enjoy.

III. APPEALS

This subject has been so well covered in terms of Second Circuit practices by my colleague Bill Feinberg⁶ that there is very little that I can say. Instead of screening out appeals before oral argument, we hear oral argument and write summary orders of two to four pages stating the reasons for affirmance in appeals that in other courts might be screened out in advance of oral argument. Although it takes a certain amount of time to listen to oral argument, we believe that this method of handling the matters before us is to be preferred; it gives litigants a better feeling, and it helps to make sure that a case does not slip through the net. While summary orders are thought by many lawyers to be unfortunate since they would rather have full, citable opinions, we would soon run out of library shelf space; I note that since I have been a Court

6. Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297 (1986).

of Appeals judge, we have gone from 425 to 868 F.2d. The proliferation of opinions many times reasserting the same issues and answers to those issues is unnecessary. At the same time, summary orders must not be used as a means of burying or avoiding a difficult issue or concealing the closeness of a problem. Since we do not have the luxury of *certiorari* jurisdiction, we do not have discretion not to decide cases as being prematurely brought. This means sometimes that we have to face very difficult issues that we would prefer to avoid. We must not permit ourselves to accomplish through the back door of summary orders what we cannot do through the front door of discretionary jurisdiction of appeals. By calling attention to this problem, I mean simply to alert us to the possibility of abuse in this regard. Forewarned is forearmed.

The other practice of this court which was commented on so favorably by Harold Medina in his note,⁷ and by Bill Feinberg in his,⁸ is the use of voting memoranda. The circulation of memoranda after argument, particularly in difficult cases, is extremely helpful in terms of coming to agreement, keeping an agreement which has been reached, and writing an opinion for the opinion writer who has the views of his colleagues before him when he takes up the writing perhaps a few weeks after argument. Voting memoranda are desirable in almost all cases in which a full-scale opinion is going to be written. Nevertheless, because of the workload, with visiting judges often coming to New York without a secretary or district judges interrupting busy trial schedules to sit on the Court of Appeals, and because of panels changing from day to day, rather than from week to week, voting memoranda are often simply overlooked and their value lost. Ideally, one would sit with two of one's fellow judges a week at a time, with exchanges of memoranda to be followed by a voting conference a week later, much the way it was done in the "old" Second Circuit when I was a law clerk. Today it is impossible to do this. The distances that have to be traveled, the workload, and the other factors mentioned above mean for the most part that conferences are held during a sitting week and that voting memoranda for Thursday and Friday are apt to be few and far between or, where visiting judges are concerned, nonexistent. This is an unfortunate loss, in my view.

The third matter I would call attention to with respect to appeals is something not referred to by either Judge Medina or by Chief Judge Feinberg: the number of cases heard per week. On the old Second Circuit that number was generally fifteen, an average of three cases per day. When I first came on the Court of Appeals, with the exception of the summer months when we heard twenty-seven or twenty-eight cases per week in the one sitting week in July and in August, we heard nineteen or twenty cases per week. That number has gradually crept up until we are hearing twenty-six or twenty-seven. It is simply too many cases to hear in one week. Yet, in order to keep current with our calendar, we must either hear them or sit so often as not to have sufficient time to write opinions. It is not so much the hearing of the cases that I am referring to, because oral argument is very often only five or ten minutes per side in

7. See Medina, *supra* note 3, at 200-01.

8. See Feinberg, *supra* note 6, at 298-303.

the less complicated cases. Rather, it is the matter of reading the briefs and keeping them in mind when so many cases are being heard at one sitting. To be sure, presumably the law clerks have prepared bench memoranda which serve as a helpful guide and reminder of what the issues are and what points each side has made with respect to those issues. But as the year goes along, the law clerks themselves are sometimes unable to get the memoranda completed. Furthermore, the memoranda themselves are just so much more reading matter. Harried lawyers do not find the time to write their briefs tersely, they repeat themselves. Harried law clerks likewise do not find the time to write their bench memoranda tersely. New law clerks always have to adjust by shortening their bench memoranda from the ten or twelve pages they want to write to a manageable three or four.

The whole problem is caused by the caseload, and yet the alternative to hearing twenty-seven cases per week, eight weeks a year, is having more sittings, which many of the judges do not like since coming to New York City from upstate New York, Connecticut, or Vermont is not the most desirable way of life, especially if one is unaccompanied by a spouse. And the more sittings one has, the less time there is between sittings, by definition. Nor would changing the number of pages permitted in briefs be of assistance. The Federal Rules of Appellate Procedure prescribe that principal briefs be no more than fifty pages and reply briefs no more than twenty-five pages, except where provided for otherwise by local rule or upon application to the court.⁹ To reduce the size of the briefs would probably result only in more motions to file longer briefs, thereby creating more paperwork, or in pressure to change the local rule.

Another solution, of course, is to have fewer appeals, but I look upon appeals almost as a matter of civil right; indeed, I always thought that the *Texaco-Pennzoil* case¹⁰ should have been argued by Texaco on the basis that an appeal from a \$10 billion judgment was a matter of legal right, a part of due process of law in the 1980s. The only way to have fewer appeals would be to make our jurisdiction discretionary, something which would take away from this civil right. As it is now, the threat of sanctions may deter some appeals of a frivolous nature. But to avoid malpractice, or incompetent counsel claims, almost every criminal case is automatically appealed, as are many civil cases. We can manage only because we have a Civil Appeals Management Plan, with staff settling about twenty-five percent of our appellate caseload before argument. And still the caseload grows, with no solution lying in increasing the number of judges, in my view, because of its effects on collegiality, governance, and consistency, matters which are discussed below.¹¹ Alternative dispute resolution, or ADR as it is affectionately called, is another possible way out, but litigation lawyers generally will rightfully regard it as interfering with their livelihood and being more time-consuming and expensive than the old tried and true method of doing battle in the courtroom. There is in short no simple, easy answer to

9. FED. R. APP. P. 28(g).

10. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987).

11. See *infra* Parts IV, VI & VIII.

the caseload problem, and yet it is at the center of our stress. What appellate judges need are trial judges who can get the parties to settle the cases before they come to final judgment. Unfortunately, this cannot be done, except by a few magicians like Milton Pollack.

IV. COLLEGIALLY

I think it important that Frank Coffin called attention to the problem of collegiality, which is a burgeoning problem area by virtue of courts becoming larger. So far, our court at least has been able to avoid any problems as a result of political divisions among the judges. There may be different value judgments in operation, but ninety-five percent or more of our caseload does not call for value judgments in the moral or political sense. But even with thirteen judgeships on the Second Circuit Court of Appeals (only twelve currently filled), and twenty-seven judgeships in the Southern District of New York, there are problems of collegiality. One of the best places to get the judges together outside the courtroom is the judges' lunchroom, but of course many of the judges do not come to the lunchroom either for breakfast or for lunch. Some simply dislike the food, which is of rather a pedestrian variety. Some may find that it interferes with their workday. Some may just like to eat alone, with law clerks, or with others.

I think collegiality can be promoted both inside and outside the courtroom. Inside, by conferences, by the exchange of memoranda, and by telephone calls. Outside, by events commemorating the history of the court or a milestone in a judge's career, by judicial conferences, by socialization, by retreats, by swearing-in ceremonies, and by memorial services.

Where a court has as rich a history as we do,¹² it has been easy to have a History Committee which functions with the Bar and to celebrate or commemorate events. Such events have included the opening of a series of exhibits,¹³ open to the public, generally on the first floor of the Foley Square courthouse. With the cooperation of the Federal Bar Council, a large group of litigation lawyers, many of whom have worked in the United States Attorney's Office for the Southern and Eastern Districts of New York, we have also had an annual history lecture; we have celebrated the bicentennial events; we have had a marvelous exhibit in 1976 at the Museum of the City of New York; and our history has been given recognition in the courtroom itself

12. See J. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT* (1987) (a work that was several years in the making but which has uniformly received warm reviews from around the country).

13. John Jay, June 1981; The Remarkable Hands, October 1981; Why Judges Wear Robes, April 1982; The Trial of the Officers and Crew of the Confederate Privateer *Savannah*, October 1981; Slavery and the Federal Courts, April 1983; Maritime Law Exhibit (in conjunction with the Maritime Law Association), November 1983; Historic Federal Courts in New York City, April 1984; Charles Evans Hughes (in conjunction with the Curator of the Supreme Court), November 1984; The Federal Courthouses at Foley Square, April 1985; The Prosecution of the Book *Ulysses*, November 1985; The Fields and the Law (in conjunction with the United States District Court for the Northern District of California Historical Society), April 1986; The United States Attorney's Office for the Southern District of New York: The First Hundred Years (1789-1889), January 1987; Egbert Benson, First Chief Judge of the Second Circuit (1801-02), June 1987; Patent Law Exhibit, December 1987; Debating the Constitution 1787-1788, June 1988; United States Marshal's Exhibit (in conjunction with the United States Marshal's Service), December 1988; The First Federal Congress (in conjunction with the First Federal Congress Project), April 1989.

by the installation twenty-five years ago of a bust of Learned Hand on the one side and just this year the addition of the bust of Henry J. Friendly on the other side of the courtroom.

Judicial conferences have become occasions for collegial association. We have seldom made the use of retreats, with just the judges and their spouses getting together for two or three days away from the place of sitting court and discussing problems of mutual interest. However, we are going to attempt one this year, as is regularly done in some of the other circuits. Numerous affairs in New York City, generally sponsored by different bar associations, such as the New York State Bar, the New York County Lawyer's Association, the Association of the Bar of the City of New York, the Federal Bar Council, the Women's Bar Association, the Patent, Trademark & Copyright bar, the Maritime Bar Association, and others too numerous to mention, give the judges a chance to socialize with each other as well as with the sponsoring lawyers' group. These are helpful, as are university affairs or law school affairs at one of the seventeen or so law schools or the many universities in the City and in the Circuit. There is still nothing like one-to-one communication, lunches, dinners, and the like to further collegiality. But such communication is usually done by those who do not need to be more collegial with the other person, that is to say, they are friends already, and friends seek out friends.

Swearing-in ceremonies are important to the person being sworn in and, knowing this, I have made it a practice to try to be present at every one of those. It is one day in the life of a judge that he or she never forgets. And, of course, a memorial service for a deceased judge is another event that brings judges together; even with the sadness and sympathy that accompany such an event, one has occasion to reflect upon not only the contributions made by the deceased but how sorely that person will be missed.

It is my firm belief that a Chief Judge should be the leader in terms of promoting collegiality. Luncheons before court meetings or Judicial Council meetings are important, I think. Other get-togethers are significant.

Civility among judges is not difficult to cultivate, but there are some traps that should be avoided. One of these is delegating the task of commenting on another judge's opinion to a law clerk who proceeds to point out every little detail from grammar to word usage, from punctuation to substantive thought that comes into his or her mind. When in receipt of such a memorandum, which has obviously not been edited by the judge, one is tempted to plot revenge; usually a similar memorandum on the opinion of the other judge accomplishes the desired result. But better that the whole thing be avoided in the first place; each of us has his or her own style, and I always have felt that there was a certain author's license—not affecting the substance of what is said or such matters as what is holding and what is dicta—as to the peripheral phraseology. Of course, if the opinion is breaking new ground, where every word has significance, I do not hesitate to suggest modifications of language, always being careful, however, to point out how I think a phrase should be changed rather than merely to criticize the phrase as written. Interrupting another judge's question in court with a question or interrupting the lawyer's answer to the other

judge's question is not going to create good will even when it is done inadvertently; similarly, using the whole of a lawyer's time along one line favored by the interrogating judge can be counter-productive. These are just a few of the traps.

V. WORKING WITH LAW CLERKS

In my chambers, law clerks, in addition to writing bench memoranda, have always done the drafting of both summary orders and the post-sitting circulatory memoranda that our court has instituted, entitled "Significant Issues, Week of [Date]," a bit of a misnomer. Since becoming Chief Judge, with the added administrative duties that office involves, I have requested my clerks to draft certain opinions, just as I did in the past with most law clerks towards the end of their one-year term. Thus, they really have a good substantive input, which helps to make up for the dirty work of filing pocket parts in *United States Code Annotated* or *Mertens on Taxation* and a few of the other detail jobs that law clerks are expected to do.

My law clerks have always attended oral arguments because I think it is a principal part of the law clerk experience. When law clerks see as many arguments as they do, they will feel, as I know I felt when I argued my first case on appeal, perfectly confident in knowing that the purpose of oral argument is to help the court out by explaining the difficult points in your case. The clerks also get a better sense of what the judge is about so that they can better know how to handle the next case that comes along and can pick up points that may be useful when it comes to writing an opinion or commenting on another judge's opinion. Thus, I was disturbed by the Gramm-Rudman restrictions on the travel of law clerks since hearing oral arguments is a major part of the entire process, just as is discussing the oral arguments following the morning's sitting. With such discussion, law clerks can learn not only what their own judge is thinking, but possibly what the other judges are thinking.

I agree with what Frank Coffin said in *The Ways of a Judge* in his section on the law clerk relationships.¹⁴ Every word of it. When I am in Vermont, I eat lunch with my law clerks and my secretary of almost thirty years, not every day but usually. This not only helps keep my secretary interested in her job, which is full of a lot of boring detail, but it also serves to keep the law clerks from thinking that the whole world lies simply in a lawbook or two, because we make it a practice not to talk law at those lunches—everything but.

I prefer to reward rather than to punish. Consequently, I find it easier to praise someone's good work than to condemn their not-so-good; this is probably my biggest fault—passing over in silence something that is not up to snuff. While I have seldom had law clerks fall short in terms of ability, some obviously are capable of doing more work of a higher quality than are others. This becomes more important as we push the selection process ever earlier in the second year. When I first came on the court, that process used to start in the November following completion of the second year of law

14. See F. COFFIN, *supra* note 2, at 161–66.

school, and even then the judges were complaining as the time for selection gradually slipped back through the autumn months. Now it has slipped back through the summer months to spring, only this year to wind up with offers being made to some applicants in some parts of the country as early as January of the second year, before law review elections, even before first semester grades were in. I suspect that unless this practice is changed, the selection process will be more chaotic than ever. Ideally, in my view, we would have the results of the entire second year of law school and perhaps even reports from the second year summer association. We certainly would have letters from professors that read, "I have come to know X well," rather than letters that read, as they now do, "While I have not gotten to know X personally, his grade in my [huge] course was very fine," something the judge already knows from having read the transcript of grades.

I have taken to telling my law clerks to read, in addition to the Code of Ethics prepared by the Federal Judicial Center, three things: Karl Llewellyn's *The Bramble Bush*,¹⁵ because I still think *The Bramble Bush* tells one what law school is all about and quite a bit about what "law" is; Frank Coffin's *The Ways of a Judge*,¹⁶ especially the section having to do with law clerks; and Jim Freund's *Lawyering*,¹⁷ especially chapter five, which, by explaining what partners expect from junior partners and associates, well explains what judges want from their law clerks, especially by way of the exercise of good judgment.¹⁸ There is probably other reading matter that is more significant, but I would rather have my law clerks aware of these three works than have them particularly conversant with a given subject area.

VI. MANAGEMENT AND GOVERNANCE

We are over-bureaucratized. Circuit executives with assistant circuit executives, clerks' offices with elaborate organizational plans, district executives, a huge Administrative Office, procurement requirements, lease dealings with the General Services Administration, and the like. Steps to get away from this over-bureaucratization by way of a decentralized budget have to be helpful. But, of course, the problem with a decentralized budget is that it takes a certain amount of internal court management to run it. And how are the judges to exercise their time if they are supervising the bureaucracy?

There are different styles of chief-judging, varying from dictatorship to democracy, utilizing committees as our Circuit has done in the past as opposed to proctors (individual judges responsible for a given area, such as the clerk's office, the budget, or bankruptcy courts), which the Fifth Circuit under the wise leadership of Charles Clark utilizes. Whatever the method, in my view there must be some hands-on administration in order to encourage people to stay in the jobs that they are doing, often at less pay than is offered by private enterprise or by the state

15. K. LLEWELLYN, *THE BRAMBLE BUSH* (3d ed. 1960).

16. F. COFFIN, *supra* note 2.

17. J. FREUND, *LAWYERING* (1979).

18. *Id.* at 101-40.

governments of the bigger states. People in the bureaucracy have to be appreciated, and I do not know any way to do this other than by memoranda, telephone calls, visits, handshakes, award ceremonies, and the like.

The carrot-stick approach may be obvious, but it is still necessary, and the stick is, of course, the statistics. With all of the compilation of data that the bureaucracy gives us—in part because it has to give the Administrative Office the data so that the data machines can be utilized—it is small wonder that we become slaves to the statistics. By doing so, we keep from falling behind or we keep reasonably current. We have for every judges' meeting, and we could easily have them every month or every week if it did not cheapen the coin, so-called "60-Day Lists," which are lists of cases, accompanied by the initials of the judge responsible for writing the opinion, that have been held for over sixty days since oral argument or submission. At our judges' meetings, we go over the 60-Day List, and some sort of explanation or statement as to when the opinion might be expected is made, not always realistically, to be sure, but it is made nevertheless. And some judges can, in fact, be embarrassed at having too many cases on the 60-Day List. The statistics also enable us to keep track not only of the judges but of what the various parts of the clerk's office or the circuit executive's office or the Civil Appeals Management Plan staff or the *pro se* clerks or the motions clerks or other court personnel are doing. As I say, the statistics, if properly utilized and analyzed, are the stick, enabling us to uncover the cases that fall through the bureaucratic floorboards.

We have had a process in the Second Circuit known as "clearing the calendar." It started, I believe, when Irving Kaufman was Chief Judge and was continued throughout Wilfred Feinberg's tenure. It means that we decide more cases each year than were filed. If this sounds like an anomaly, it is not; we have actually reduced our backlog of cases each year in this fashion for some years, so that it is desirable even if there would come a point at which the whole backlog was eaten away. I do not fear reaching that point because of the increased filings from year to year. There is a certain amount of statistical juggling sometimes necessary to clear the calendar, including the deciding of cases with numerous docket numbers in them, such as, multiple-defendant appeals. But all in all the process is a worthwhile one which, if it does not become the sole aim of the court, should nevertheless be a regular one.

VII. TECHNOLOGY

As a member of the Judicial Conference Committee on Judicial Improvements, I have become more acquainted than ever with automation, data processing, computer-assisted legal research, fax machines, modern courtrooms with electronic recording, videotaping conferencing of arraignments, and the like. Most of these modern technological inventions are improvements, and some of them (notably computer research) are fast becoming necessary since the space taken up by books is far too great. I have always been a great believer in the dictating machine as opposed to direct dictation. Though the latter is preferable from a personality point of view and for corrections, the dictating machine is simply more efficient. I use it for writing

most opinions as well as drafting an article such as this one. And a portable dictating machine can put travel time to good use. When one has finished reading the *United States Law Week* or the advance sheets, he can pick up a dictating machine and dictate.

I have never been able to understand how we managed having two offices without a fax machine. With something that is cheaper than Express Mail, you get instantaneous rather than overnight delivery service. I would assume that we will all be linked, as some circuits already are, by intercommunicating word processing and other database exchanges, as well as by fax machines for copying purposes. The next century, if not the next decade, will certainly bring video-conferencing closer to home. We already do telephone conferencing on important matters that have a time element built into them. Nothing, however, surpasses direct, head-to-head conversation.

While I believe that time, money, security, and other considerations will compel the use of video arraignments and video depositions in civil rights actions brought by prison inmates, and while I visualize television in all appellate courtrooms, for I have seen it used at the University of Illinois moot court without anyone even knowing that it was there, I do not believe we will have a videotape record because it would be too difficult and time-consuming for the appellate courts to review.¹⁹ I like our present system of having a real transcript available if necessary but primarily using a joint appendix prepared by the parties, with excerpts from that transcript that are thought to be relevant to the given appeal. I have my doubts about the televising of trials and its effect upon the posturing of lawyers and witnesses. But over forty states are testing this method, and if the states' tests prove out, as they appear to be doing, I think it will be only a question of time before the federal courts follow suit. Certainly we have the liveliest cases of the greatest public interest. In a 1944 ABA book review, reprinted in *The Practical Cogitator*, Justice Robert Jackson, in an otherwise totally perceptive essay, said that "[t]he lawsuit has declined in public interest before the tough competition of movie and radio."²⁰ Actually, the reverse has turned out to have been true. Television and radio have created more interest in the trials and appeals of cases. Our courthouse steps are regularly seen on TV screens in the northeast, sometimes nationwide. There is an intense public interest in what is going on in the courtroom that can only be satisfied by the careful recording of it for people who simply cannot come to the courtroom in modern day life as they were able to do in times of yore. But not only does the public have a right to know what is going on in the courtroom, it is educationally important to the public to know what is going on in the courtroom. This holds true with appeals courts and it especially holds true with the Supreme Court, since the law is an educative process. I have referred in my Madison Lecture to the dialogue between judges and the public in our democracy,²¹ an institution which is unique and which is one of our great strengths. If the

19. The Sixth Circuit agrees. See *Dorsey v. Parke*, 872 F.2d 163, 164-65 (6th Cir. 1989).

20. *THE PRACTICAL COGITATOR* 409, 410 (C. Curtis & F. Greenslet eds. 1945).

21. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 925-26.

deliberations of the Congress are televisable, so should be the proceedings in open court.

VIII. CONSISTENCY AND PREDICTABILITY

Emerson said that a foolish consistency is the hobgoblin of little minds, and I totally agree. Consistency and predictability are important but are not the end-all of justice. Indeed, there are areas where the law is changing or developing as a result of changed circumstances where some inconsistency may even be worthwhile. The pot simmers and the ultimate stew tastes better. I think of so-called affirmative action and how much better it is that the congeries of problems involved have been decided on an *ad hoc*, somewhat inconsistent basis over the years by a number of courts before the Supreme Court even took up the matter; that the subject matter seems to be continuing on its inconsistent way with the Supreme Court is merely an indication that there is no simplistic solution to the problems. Better that it be as it has been than to have had one consistent approach.

And even where there is inconsistency, the very predictability of the inconsistency may lead to settlements that would otherwise not have taken place. I think that is true of the Longshoremen and Harbor Workers Compensation Act cases in our court where the court went off in different directions in terms of a shipowner's liability to the longshoremen injured while on board ship. When it finally became clear that there were two inconsistent and irreconcilable lines of cases,²² the cases started to settle, and we seldom see them anymore in court.

As Grant Gilmore concluded in *The Ages of American Law*,²³ "The beginning of wisdom" will lie in our "recognition that the body of the law, at any time or place, is an unstable mass in precarious equilibrium."²⁴ Starting with that premise, it is small wonder that there must be tolerance in the law for inconsistency and unpredictability. Which is not to say that the law instead should depend upon the state of the judge's digestion or upon which particular panel is apt to draw an appeal or upon which trial judge one has. But all judges that I know are constrained to follow precedent where that is possible, certainly to follow the decisions of the Supreme Court or of their own court that are controlling, to judge fairly without regard, as the oath of office requires, to whether the person is rich or poor, and otherwise to comport themselves within the bounds of decency, tradition, and human respect. These constraints work. I know they work on me when I read a Supreme Court decision with which I do not agree. I know they work on the district judges when they read one of our opinions with which they do not agree, because I hear them talk about the effect it is going to have on them. These constraints are the glue that holds our fragile structure together, the thing that creates the tension to which Gilmore referred.

22. Compare, e.g., *Giglio v. Farrell Lines Inc.*, 613 F.2d 429 (2d Cir. 1980) and *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 687 (2d Cir.) (Friendly, J., dissenting), cert. denied, 439 U.S. 929 (1978) with *Lopez v. A/S D/S Svendborg*, 581 F.2d 319 (2d Cir. 1978) and *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976).

23. G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

24. *Id.* at 110.

Since I place consistency and predictability at about a level of five on a scale of values of one to ten—possibly six or seven—I do not think that the courts have, as yet, overstepped the bounds of inconsistency and unpredictability. Certainly, I do not think that these factors have led to a lessening of grace or an enlargement of stress. Consistency and predictability are interesting to contemplate because symmetry is always pleasing to the eye. But the hard fact of life is that life itself is composed of inconsistencies and unpredictables—that the stuff of experience from which the life of the law derives is asymmetrical.

IX. PRIVATE TIME

This is the one area where I think the most steps could be taken to improve the judges' attitude and abilities. Not only can private time decrease pressures, but it can create the positive attitude that is needed for enlightened judging. There is never enough of it, of course, but still there is some. I will speak only of my own experience.

I enjoy both reading and writing, and they go together, because if I am writing something I very often will read a lot having to do with the subject on which I am writing. I use a commitment to write a book review, to write an article, or to deliver a speech as a vehicle for learning, and consequently I try to do the background reading on it so that I can write or speak with a little bit of authority. The same thing holds true with teaching. I have regularly taught a one-week course to first-year students at Duke University Law School on professional responsibility. The course could better be called an Introduction to Legal Ethics. I teach it in conjunction with Judge Alvin Rubin, a Duke professor, and a fourth person, possibly an attorney, each of us having a section of between forty and fifty students, with two hours of lectures to the section in the morning and a one-hour, sometimes joint effort in the afternoon to anyone who wants to come. The students do nothing else for a solid week except our assigned readings and lectures, preparing themselves for our two-hour examination, which is in part based upon the Model Rules of Professional Conduct. I find the teaching experience mind-liberating. It is something that I enjoy doing, although I do it better at some times than others, and I enjoy the preparation for it even if the blue-book marking is hard work, almost as hard as selecting law clerks.

I like working with law students because I remember how much it meant to me as a student to have older persons take an interest in me. Consequently, I have enjoyed speaking at law review dinners, judging moot courts, or occasionally teaching a class in free speech, copyright, property law, land use law, environmental law, or one of the other areas of interest to me at the time.

I especially enjoy reading about history and nature, including geological works. I try to read a certain amount of philosophy just because I seek to follow Learned Hand's advice, but I find it sometimes difficult going, because, I guess, I think that the philosophers are jousting with one another rather than solving real problems.

Ideally, meditation time should be available. Some people, I gather, can do this by closing their eyes, by sitting still, by looking into space. I simply cannot slow

myself to that sort of condition. I find on examination that what I have done over the years of judging is to mow grass. I mean this literally, because grass-mowing, whether one is pushing a mower or sitting on a riding mower, is essentially a mindless task, even in Vermont, where one has to watch out for occasional roots, rocks, fallen branches, or the like. Nevertheless, it is a task that accomplishes something even while it gives one time to think about a lot of other matters, and it also takes one outside, where—especially if one lives in Vermont—at least for six months of the year there are beautiful vistas everywhere.

I have mowed with every kind of instrument that has been invented by mankind, including scythes and sickles, hand-driven lawnmowers, gasoline-driven mowers that are pushed or pulled by hand, gasoline mowers that contain self-drive capability, power sickle bars, little riding tractors with either reels or rotary mowers located underneath the seat, and an old Ford tractor with either a large rotary-driven mower in the rear or a farm cutter bar on the side. I do not have all of these instruments available at this time, since a couple of the bigger instruments were left behind when we built a house in the woods which I vowed would have only enough grass that it could be mowed easily by hand. My family has laughed as that little patch of grass has expanded, first to about one acre and now to about four. They did not know, nor did I myself realize, that the mowing is genuinely satisfying, even though the growing grass is a constant reminder that one should not spend too much time playing golf. Accordingly, it is only when the mowing slows down because the grass has slowed down in August and September that my golf game gets sufficient attention, and this helps explain why my handicap has managed to double since becoming a judge. Of course, twenty years of aging may have had its impact. But the mowing is a delight!

Travel has been something of which I do a lot on business matters, but seldom for purposes of enjoyment. There simply is not time. I would like to travel regularly to England, and there are a whole lot of other places in the world that I haven't seen, but there are some in the United States that must come first. I always look at taking senior status as furnishing the time to travel, and so I intend to do that at a convenient opportunity before I become too old to enjoy the travelling. Besides, my wife is great fun to travel with. She is very efficient and she is a good organizer. She plans ahead and gets the appropriate books, maps, sightseeing guides, and historical and other information, so that if we go to east England, we go to Constable country; or if we go to Phoenix, we go to Tallieisin West; to Wilmington, Delaware, it's Longwood Gardens or Winterthur. The only trouble is that if I'm driving, she likes to read so much that I have no one to talk to until she finishes the New York Times by completing the crossword puzzle.

X. THE LAWMAKERS

I completely agree with Frank Coffin that we judges should report to appropriate legislative decisionmakers' "observed maladroitness, inconsistencies, and gaps in enacted statutes"; work toward "a common set of 'legislative history' signals to cover all feasible issues of legislative intent and to indicate which are primary and

which are not”); and continue the quest for “judicial input on the prospective impact on judicial resources of proposed legislation.”²⁵ To that end I have stated my support and enlisted the support of certain New York legal associations for a bill that almost passed Congress, Title III of which would have put into effect a judicial impact checklist—covering issues such as the statute of limitations and whether or not a private cause of action exists—before a statute is enacted.²⁶ I do not see how anybody could be against such a bill other than lawyers who have time on their hands and want to spend their clients’ money by litigating. Fortunately, I think, those are few and far between. What else we should do, I do not know. I am hopeful, but not optimistic, that the commission to study the federal judicial system, composed of important legislators, judges, and others, will, in the brief period of time allotted to it, be able to come up with some overall suggestions that do more good than harm. I say “hopeful” because our situation could be much improved. I say “not optimistic” because I have the feeling that the commission may be the recipient of, if not the vehicle for, a lot of suggestions that will only make the situation worse. But it is much too early to speculate on what the commission may do, and so I will not engage in such speculation.

XI. CONCLUSION

I hope the views expressed above have not been too personal to be of use. They are generally optimistic even though the judges’ morale is, because of the salary fiasco, at an all-time low. It is not only demeaning to be begging the Congress or the public for more pay; it is the recognition that society holds us in such low esteem that is hurtful. The last thing that one expects to do when becoming a federal judge is to have to be concerned from day to day about making ends meet. Even when one has capital, it is annoying, even scary, always to be invading it to live in the style or fashion to which one is accustomed. And for those of us who are past the age of college or graduate-school tuitions, there are grandchildren who need educations, too.

The federal court caseload I have identified above is the stress-causer. But we can wrestle with that in a variety of ways; we can at least cope. Some of us will forego the challenges involved, however, if we feel financially insecure. This, I fear, is a very crucial time in the history of the judiciary, and it is not at all aided by a press or by individual self-styled reformers who proclaim against a few senior judges whose workload has dropped who might obtain the benefits of a pay raise long overdue. I feel those judges with few exceptions have more than earned their stripes by contributing more than was due by way of dedicated work after taking senior status.

I have repeatedly said that being a federal judge is the most exciting of jobs because it presents a new challenge every day. I would be less than candid, however, if I did not remind the reader of John Marshall’s comments at the Virginia Constitutional Convention:

25. Coffin, *supra* note 1, at 403.

26. H.R. 3152, 100th Cong., 1st Sess. (1987).

The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or controul him but God and his conscience?²⁷

Judicial independence must be maintained. I find it threatened in many places.

27. RAGBAG OF LEGAL QUOTATIONS 151 (M.F. McNamara ed. 1960) (quoting J. Marshall, Va. Const. Convention, 1829-30, *Debates* 616).