

CIVIL PROCEDURE

COMMENTARY

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The Second Circuit during the 1977-78 term decided a number of significant cases comfortably contained within the conventional rubric of "civil procedure." I had intended to comment on one or more in depth in this commentary, but found myself preempted by the student comments that follow. Moreover, in reading over the court's work for a term in search of an overlooked judicial gem upon which I might hope to add a little polish, and dipping lightly into the court's statistics in search of inspiration, I became a born-again convert to the relatively new discipline unhappily labelled "judicial administration."¹ Since all civil cases involve "civil procedure," and criminal cases have a strong impact upon the process of deciding civil cases, I doubt that I have gone too far astray from the assigned topic in making a few comments on that subject.

Many of us have become inured to the constant cries of court congestion, litigation explosions, and the need to process appeals efficiently and expeditiously. I never found my libertarian impulses strongly aroused by the specter of delay, but there is near unanimity that delay in getting to trial and delay in the appellate process are unmitigated evils.² The only legitimate question is which is worse.³ Stern measures have been taken to reduce such delay, with remarkable success, especially in the Second Circuit, which

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¹ I was also influenced by Feinberg, *Foreword: Judicial Administration: Stepchild of the Law*, 52 ST. JOHNS L. REV. 187 (1978). "Judicial Administration" is an unhappy label since it suggests a close relationship with business administration, conjuring up preoccupation with markets, efficiency, production, output and the like. It has been contended, however, that many of the concerns of judicial administration are not only different, but also are necessitated by the refusal of courts to submit to market forces. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 332-56 (1972). In any event, it is clear that problems of judicial administration overlap in only limited ways those of running a business.

² See H. ZEISEL, H. KALVEN & B. BUCHOLZ, *DELAY IN THE COURT* xxii (1959).

³ But see R. POSNER, *supra* note 1, at 354-55.

has been formally applauded by the New York, Connecticut, and Vermont Bar Associations and the deans of the law schools located in those states, for its admirable record, "unique in the annals of the federal appellate system" of having disposed of all its business for five successive years.⁴ The Second Circuit's achievements in that regard do not end there. The median time for disposition of appeals in the Second Circuit, 5.5 months, is the "best in the nation."⁵ Several innovations originating in the Second Circuit have been adopted elsewhere.⁶ Regarded by many as the second most prestigious court in the nation, and by most as the next in importance, the Second Circuit, under the leadership of Chief Judge Kaufman, has maintained that eminence in matters of prompt and efficient disposition of cases.

These gains, however, have not been won without costs, and it is those costs that have largely been ignored or underplayed by the law reviews, by scholars, and by the court itself. The observations that follow are made in the hope of stimulating the application of creative energies to assessing those costs and to assisting the court in making the trade-offs that the constantly climbing inflation of cases requires.

The Second Circuit, like the other circuits, is, in all but a miniscule number of cases, the appellate court of first and last resort.⁷ It bears a heavy burden to assure the public that the first level decisions it has jurisdiction to review are not unconnected, isolated, individual, lawless acts of a judge or a bureaucrat; to persuade disappointed litigants that they have been dealt with justly and according to law. Appellate review is also essential to uniformity and harmony among lower level decision-makers. Without an appellate court announcing, clarifying, and harmonizing the applicable legal principles within its jurisdiction, primary level decision-making would be chaotic; the public would be subjected to con-

⁴ *Remarks of Harold R. Tyler, Jr.*, SPECIAL SESSION OF THE SECOND CIRCUIT, 578 F.2d 1, 5 (June 26, 1978).

⁵ Kaufman, *State of the Judicial Business in the Second Circuit*, SECOND CIRCUIT JUDICIAL CONFERENCE, Sept. 8, 1978, at 15.

⁶ *Remarks of Justice Winslow Christian*, SPECIAL SESSION OF THE SECOND CIRCUIT, *supra* note 4, at 10, 12; Streich, *Job Enrichment for Court Clerks*, 59 JUDICATURE 390, 394 (1976); Streich, *Speeding Criminal Appeals in the Second Circuit*, 58 JUDICATURE 286, 292 (1975).

⁷ During fiscal 1978, the Second Circuit terminated 1888 cases. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 44 (1978) [hereinafter cited as 1978 ANNUAL REPORT]. During the same period, 11 writs of certiorari were granted by the Supreme Court. *Id.* at A-6 (Table B-2).

flicting legal commands and predictability would disappear. With it would go the respect for legal institutions and the principles they espouse.⁸ These essential functions of appellate review are in grave danger, in the Second Circuit and elsewhere. "The federal intermediate appellate system is on the verge of ceasing to function as an effective administrator of justice."⁹

A few statistics may suggest the dimensions of the problem. In 1966, ninety-seven cases were filed, terminated or pending per active judge in the Second Circuit;¹⁰ in 1977, the caseload per judge more than doubled, to 229.¹¹ There were 448 appeals decided in 1968,¹² 1108 in 1977.¹³ The number of judges deciding them remained virtually the same. Judge Mansfield, in his 1975 foreword to the *Second Circuit Review*, made even more startling comparisons of the court's workload with what it was in 1951, the last year of Chief Judge Learned Hand's tenure.¹⁴

The expanding caseload of the court reflects, of course, the glut of cases in the district courts, which is the result of the proliferation of federal regulatory and welfare measures, civil rights legislation, the creation of new administrative agencies, the expansion

⁸ See generally K. LLEWELYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* (1960); R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1940).

⁹ Haworth, *Screening and Summary Procedures in the United States Court of Appeals*, 1973 WASH. U. L.Q. 257.

¹⁰ ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT 168 (1977) [hereinafter cited as 1977 ANNUAL REPORT.].

¹¹ *Id.* In fiscal 1978, the Court terminated 211 cases per judgeship. See Kaufman, *supra* note 5, at 15.

¹² ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 103 (1968) [hereinafter cited as 1968 ANNUAL REPORT.].

¹³ 1977 ANNUAL REPORT, *supra* note 10, at 301.

¹⁴ Judge Mansfield unearthed the following statistics:

	1951	1974	Increase
Authorized Judgeships	6	9	+50%
Appeals Filed			
(1) Total	361	1802	+399%
(2) Per Active Judge	60	200	+233%
Appeals Terminated			
(1) Total	319	1819	+470%
(2) Per Active Judge	53	202	+281%
Appeals Decided After Hearing or Submission			
(1) Total	268	816	+204%
(2) Per Active Judge	45	91	+103%

Mansfield, *Foreword: The Second Circuit Review, 1973-74 Term*, 41 BROOKLYN L. REV. 757, 759-60 (1975).

of federal criminal jurisdiction, and the increased availability of legal services.¹⁵ Judge Friendly has brilliantly, if not always persuasively, argued that the principle answer to the congestion of federal courts lies in the elimination of diversity jurisdiction, the creation of specialized appellate tribunals, and similar measures,¹⁶ but much movement in that direction seems politically unfeasible.¹⁷

Although the problem has not received the attention it deserves from the law reviews, it could not have escaped the judges, who have been proposing and attempting solutions for decades.

Among the most disturbing responses is the elimination of oral argument in large numbers of cases. This has not as yet happened in the Second Circuit, which is the only circuit preserving a routine right of litigants to present oral argument.¹⁸ Even in the Second Circuit, however, the norm for argument is fifteen minutes per side, hardly enough time to get one's bearings.¹⁹

Only a few decades ago, it would have been branded absurd to suggest that a federal circuit court, which is in all but form the only appellate court, could perform its essential functions without delivering a reasoned opinion explaining its decision.²⁰ Yet a written opinion is now the exception rather than the rule in the Second Circuit (and many others). Of the 1026 decisions of the court in 1977, 554 were without written opinion.²¹

It has now become commonplace for a defendant, sentenced to five or ten years in prison, to be packed away without so much

¹⁵ For a discussion of the rapid expansion of federal jurisdiction, see Judd, *Expanding Jurisdiction of the Federal Courts*, 60 A.B.A. J. 938 (1974); Comment, *Federal Intervention on State Criminal Proceedings: Inadequate Remedies in Adequate Forums*, 63 GEO. L.J. 1143 (1975).

¹⁶ H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

¹⁷ A quarter century ago, Professor Hart asserted that, "[t]he time has long been overdue for a full dress reexamination by Congress of the use to which these [federal] courts are being put." Hart, *Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 541 (1954).

¹⁸ See Haworth, *supra* note 9, at 265.

¹⁹ The practical norm is not the technical mandate of Second Circuit procedural rules. 2ND CIR. R. 34(d) provides:

The judge scheduled to preside over the panel will pass on requests for time for argument additional to the 30 minutes generally allowed by Rule 34(b). Upon the basis of a review of the briefs, he may also fix a time for argument less than 30 minutes if he concludes that a smaller amount of time will be adequate. The clerk will notify counsel of all such rulings.

²⁰ See R. POUND, *supra* note 8 at 4; but see *id.* at 36.

²¹ ANNUAL REPORT OF THE CIRCUIT EXECUTIVE, UNITED STATES COURTS, SECOND CIRCUIT 20 (1977).

as the stroke of an appellate judge's pen.²² A civil litigant who was bankrupted by a judgment in the district court can find that judgment affirmed without written explanation of the legitimacy of the district judge's findings. This practice threatens the integrity of the process not merely because it provides an opportunity to cloak blatant illegality with silence but also because it deprives disappointed litigants of assurance that their briefs have been read and seriously considered and that the appellate function has been performed.²³

Few, I think, would contend that there has been any corresponding improvement in the full opinions written by the court. Seldom do they purport to bring fresh insights to vexing problems; rarely do they reach beyond pirouettes around or claimed adherence to precedents, into the realm of social science or economics, or even, beyond obvious adornments, to the law reviews. The prevailing tone is one of pronouncement, not reasoned exegesis.

Appellate court congestion creates even more serious threats to appellate function than the elimination of opinions or the proliferation of unsatisfactory ones. It inevitably produces excessive reliance upon the primary decision-makers, gravely weakening the corrective function. It also tends strongly to encourage sub silentio reliance upon the personal values and predilections of the individual judges, undermining the main object of institutional procedures of collective, deliberate decisionmaking: to lift the judge out of the mold of his own tastes and values:

Appellate judges are expected to deliberate and then to arrive at a collegial decision based on the matured thought of each judge

²² See, e.g., *United States v. Bruschi*, 582 F.2d 1271 (2d Cir. 1978); *United States v. Fernandez*, 582 F.2d 1271 (2d Cir. 1978); *United States v. Garcia*, 582 F.2d 1272 (2d Cir. 1978); *United States v. Grant*, 582 F.2d 1272 (2d Cir. 1978); *United States v. Kelly*, 582 F.2d 1272 (2d Cir. 1978); *United States v. Weinstein*, 582 F.2d 1272 (2d Cir. 1978).

²³ One reason why oral argument has been retained in the Second Circuit is "because it gives parties their day in court, assuring them that their case has received careful and complete judicial scrutiny." Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094, 1095 (1974). That is surely an exaggeration of the potential of a 15 minute argument. Moreover, in my experience, the oral argument has occasionally revealed precisely the opposite, i.e., that at least one or two members of the panel had given the case virtually no study in advance of the argument. I do not mean to denigrate the value of oral argument, however brief, but I do not think it generally affords any assurance that the case has received "careful and complete judicial scrutiny." Nor do I mean to suggest that the judges of the Second Circuit normally come to the oral arguments totally unprepared. They rarely do. But they plainly do not have time to give every case anything approaching "careful and complete judicial scrutiny."

participating . . . [T]he decision is expected to be explained in terms that will withstand public inspection. These techniques for controlling the personal factor require a considerable investment of time and intellectual energy; as congestion makes these commodities scarce, we must expect that judgments will become more impulsive, less reflective and less impersonal.²⁴

As the judges come more and more to rely on their own personal values, the utility of opinions is diminished: they reflect rationalizations, rather than reasons. The second essential appellate function, unifying and harmonizing the law governing lower tribunals, is damaged. Predictability suffers, divergent expectations of litigants are fostered, and more and more appeals are pressed to conclusion. Congestion begets more congestion.

I join with Judge Feinberg in his recent plea that law reviews focus more of their efforts in solving these potentially calamitous problems.²⁵ The courts need more help than they are getting.

THE DISTRICT COURT CASELOAD

The basic source of the problems, heavy caseloads in the districts courts, seems intractable. Even if diversity jurisdiction were eliminated, this would reduce caseloads by only about 9%.²⁶ Much of the congestion is caused, moreover, by the increasing invocation of federal criminal laws.²⁷ One method of containing this increase, or perhaps cutting back on it, is to limit the number of prosecutors and ancillary personnel. Another less obvious method is to set aside on appeal a substantially higher proportion of convictions.²⁸ If the circuit courts reversed their present trends and tightened up on the government's burdens of proof and were more protective of defendant's rights, fewer prosecutions would be brought, and there would be fewer appeals. In most circuits, most notably the Second, the flimsiest of prosecution cases will survive and almost any

²⁴ Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and National Law*, 82 HARV. L. REV. 542, 555 (1969).

²⁵ Feinberg, *supra* note 1, at 194-95.

²⁶ See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 194 (1976).

²⁷ In fiscal 1977, 41,020 criminal cases were filed in the district courts of the United States. 1977 ANNUAL REPORT, *supra* note 10, at 249. This was an increase of a third over 1968, when there were 30,714. 1968 ANNUAL REPORT, *supra* note 12, at 117.

²⁸ The average reversal rate in all circuits in criminal cases during 1978 was 10.7%. The Second Circuit was lowest, with 6.3%. 1978 ANNUAL REPORT, *supra* note 7, at A-3 (Table B-1).

prosecutorial short-cut or rule deviation will be buried under the "harmless error" doctrine.²⁹

On the civil side, current hopes rest mainly on settlement procedures, although from time to time courts attempt to preclude litigation by restrictive readings of jurisdictional statutes or by imposing, where possible, heavy costs.³⁰ A recent experiment, pursuant to local rule in the districts of Connecticut,³¹ Eastern Pennsylvania,³² and Northern California,³³ is compulsory arbitration, followed by a trial de novo if the arbitration award is unsatisfactory.³⁴ The returns are not yet in on those experiments.

MEASURES AT THE APPELLATE LEVEL

At the appellate level, partial solutions are more promising. Among the less drastic but most successful measures is the Second Circuit's "Civil Appeals Management Plan," an important element of which is a conference presided over by the court's staff counsel with an eye to producing a settlement.³⁵ As a result of this plan, 329 appeals, more than one-fourth of the civil filings, were settled last year.³⁶

A number of suggestions are made from time to time about providing disincentives to appeal. A common one is to reduce an appellant's chances of success by modification of rules concerning the scope of review,³⁷ but this is a pro tanto abdication of the appellate function. And it has virtually no prospect of curbing the flow of criminal appeals, since defendants who are indigent have little, if anything, to lose, and for those with money the cost of an appeal is dwarfed by the magnitude of the stakes. As noted, restricting the scope of review in criminal cases probably *increases* the criminal caseload in both the district and the circuit courts.

²⁹ See generally R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970); Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121 (1976); Comment, *People v. Crimmins: The New Prejudice Rule*, 40 ALB. L. REV. 405 (1976).

³⁰ See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

³¹ CONN. R. 28.

³² E.D. PA. R. 49.

³³ N.D. CAL. R. 500.

³⁴ There is also a "Voluntary Masters Project" underway in the Southern District of New York, wherein the "Master," a highly qualified trial lawyer, will "assist the parties in clarifying and narrowing the issues presented by a dispute." Kaufman, *supra* note 5, at 9.

³⁵ See Kaufman, *supra* note 23, at 1098.

³⁶ ANNUAL REPORT OF THE CIRCUIT EXECUTIVE, UNITED STATES COURTS, SECOND CIRCUIT 19 (1977).

³⁷ P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 26, at 129.

My colleague Geoffrey Hazard has put forth as "worth considering," the proposal that a criminal defendant be given a disincentive in the form of an increase in his sentence for an unsuccessful, or perhaps a frivolous, appeal.³⁸ Assuming, *arguendo*, that this could pass constitutional muster, it would make a mockery of the sentencing process and threaten what little respect is left for the criminal justice system. A similar but slightly less offensive idea is to provide a sentence discount for those defendants who forego an appeal.³⁹ This proposal would require careful meshing with the plea bargaining system wherein a defendant already gets a discount but retains a limited right of appeal. An appropriate "no appeal" discount for one who pleads guilty might be inappropriate for one convicted after trial.⁴⁰

If and when courts become desperate enough to consider adjusting a sentence to deter criminal appeals, they should be ready to adapt plea bargaining procedures to the appellate process. It seems anomalous that the courts have put their imprimatur on plea bargaining, even sentence bargaining, in the district court,⁴¹ but will not even consider employing it at the post-conviction, appellate stage. Why shouldn't there be a "Criminal Appeals Management Plan"?

Another provocative proposal, applicable only to criminal defendants, is to encourage them to sell their right of appeal.⁴² A fund would be set up by Congress to offer to the indigent defendant convicted of crime an option: he could accept a sum of money approximating the cost of taking an appeal in lieu of a publicly supported appeal and collateral attack. This could perhaps be rationalized on rehabilitational principles.⁴³ It would encourage the criminal defendant, like the civil litigant, seriously to evaluate his prospects of success. Under one variant of the proposal, a defendant who accepted the money would not be denied an appeal, he would merely be denied a free one. He could use the award to

³⁸ Hazard, *After the Trial Court—The Realities of Appellate Review*, in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 60, 84 (1965).

³⁹ See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 26, at 95.

⁴⁰ A somewhat similar problem has been noted regarding pending proposals to make federal sentences more uniform. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

⁴¹ See FED. R. CRIM. P. 11(e).

⁴² P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 26, at 93-94.

⁴³ It could also be justified, perhaps, as welfare, on the theory that the defendant's family is needy, especially if he is on his way to prison.

hire his own lawyer and pay for the appeal.⁴⁴ This seems a desirable way of equalizing the choices of the indigent and the nonindigent criminal defendant, but it seems unlikely to curtail many appeals, given the severe sentences commonly meted out in federal courts. Even to a pauper, a few thousand dollars is a paltry sum compared to a lengthy prison sentence. Moreover, the right of appeal is too fundamental to be merchandised like butter and eggs; the probability of an intelligent, informed decision to sell a right of appeal would be slight, the bargains would be unenforceable, and further delay and congestion might be created.

Other ideas for controlling the appellate caseload focus on penalizing the lawyers. Judge Kaufman would impose ethical obligations on attorneys to be "more responsible [and] more protective . . . towards the courts and its business."⁴⁵ Judge Friendly thinks that "the courts should not hesitate to refuse or reduce compensation under the Criminal Justice Act in cases of flagrant abuse," *i.e.*, where a lawyer "seeks a reversal to which he knows his client is not entitled."⁴⁶ Presumably, Judge Friendly would support similar economic sanctions against lawyers on the civil side. Fortunately, these proposals, despite the eminence of their sponsors, have gathered little support. It is and should remain the client's decision, not his lawyer's, to pursue an appeal.⁴⁷ Moreover, given the deterioration in the appellate process already sketched, together with the virtual elimination of rehearings and en banc proceedings,⁴⁸ almost all appeals have at least some slight chance of success. Much depends on the luck of the draw—the makeup of the panel chosen to hear the case. An appeal which might seem meritorious to one or two judges on one panel could appear wholly frivolous to another. It is bad enough to have substantial rights turn on such fortuities; the evils should not be compounded by encouraging judges to punish lawyers whose hopes of success seem in retrospect to have been unrealistic.

⁴⁴ P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 26, at 93-94.

⁴⁵ Kaufman, *Introduction: The Second Circuit Review, 1971-72 Term*, 39 BROOKLYN L. REV. (1973).

⁴⁶ H. FRIENDLY, *supra* note 16, at 42.

⁴⁷ Carrington, *supra* note 24, at 574-75. For other proposals to penalize lawyers or litigants for taking frivolous appeals, most of which would seem frivolous were they not so dangerous, see Note, *Disincentives to Frivolous Appeals: An Evaluation of an ABA Task Force Proposal*, 64 VA. L. REV. 605 (1978).

⁴⁸ Feinberg, *supra* note 1, at 188; Note, *En Banc hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. REV. 563, 564 (1965).

A related and, in the long run, more promising prospect for diminishing the flow of appeals is better education of appellate lawyers. Even though it is the client's decision to appeal, he should be heavily influenced in reaching that decision by his lawyer's predictions about the prospects of success. If a way can be found to improve the quality of those predictions, the divergent expectations of litigants can be narrowed and settlements or dismissals produced. As long as predictive skills remain in short supply, disincentives, dependent upon predictions, will be both ineffective and unjust.

Recent modifications of the court's rules for admission to practice, requiring some prior appellate experience,⁴⁹ may reduce the incidence of occasional gross incompetence in the presentation of a case, but they can have no impact on improving lawyers' predictive powers. It is difficult to imagine what kind of education or experience would have that potential.⁵⁰ Members of the court may know a "frivolous" appeal when they see it, but they have provided scant guidance to the bar in developing criteria for judgment. The paucity of information is exacerbated by the trend to decide without opinion or to write opinions that reveal virtually nothing about

⁴⁹ 2ND CIR. R. 46(a) requires an attorney seeking admission to the bar to have

(1) argued in either State or Federal appellate courts at least three appeals of a substantive nature. The argument of an appeal in a Moot Court program conducted by a law school recognized by the American Bar Association shall be deemed the equivalent of an argument in an appellate court;

(2) observed the argument of two appeals in this Court;

(3) read and [been] familiar with the Federal Rules of Appellate Procedure and the local rules of this Court; and

(4) in lieu of any of the arguments required by (1) *supra*, argued two motions of a substantive nature in which briefs or memoranda of law are submitted in State Courts, Federal Courts or before administrative tribunals.

⁵⁰ In a recent study, Thomas Marvel interviewed lawyers who had appeals pending in an unidentified court with discretionary jurisdiction. Apparently, all of the interviews took place after the briefs were filed; "several" followed the oral argument. Marvel asked these attorneys to predict whether they won or lost. Nearly a third had "no idea" how the case would be decided. Of those who did, 40% were wrong. In civil cases, only 60% would venture an opinion, and half of these were incorrect. T. MARVEL, APPELLATE COURTS AND LAWYERS 66-67 (1978). As the author astutely recognizes, cases before a tribunal with discretionary jurisdiction are likely to be closer to call than those before a court which cannot pick its cases. *Id.* at 67. Still, the data are disquieting.

Marvel also tried to find correlations between the backgrounds and experience of attorneys and the quality of their briefs. He found few. One finding that he did make was that inexperienced attorneys are "better" than experienced ones. *Id.* at 68. He concludes that "attempts by courts to improve advocacy by regulating the bar are almost surely doomed to failure." *Id.* at 69.

the dynamics of the process or the real reasons for decision. Serious progress in this realm cannot be expected until the tools for prediction are sharpened, relevant data are assembled, analyzed and disseminated,⁵¹ and until court congestion is relieved by other methods so that institutional pressures tending to produce predictability can reassert themselves.

INSTITUTIONAL MODIFICATIONS

If little can be done to curtail the caseload, changes can be made in the functions of the circuit courts to help them cope with their responsibilities. The most drastic, and most debated, proposal is the creation of a national court of appeals, which would take over some of the functions neglected by both the circuit courts of appeals and by the Supreme Court. The creation of such a court would downgrade the prestige and importance of the circuit courts. It would not lower the circuit courts' caseloads, but would reduce the importance of their decisions. The judges of the Second Circuit and, surely, most other circuit judges are opposed to it.⁵² With such a court, however, the circuits' resort to decision without opinions, the curtailment of oral arguments, and other shortcuts would become more palatable because the decisions would be less final.

There is surprisingly little support for an alternative which, although contributing little to the felt need for more nationally binding decisions than the Supreme Court can produce, would enhance rather than denigrate the prestige and importance of the courts of appeals, *i.e.*, the introduction of an intermediate appellate court beneath the circuit courts, similar to the New York or the California models.⁵³

Splitting up circuits, often advocated for the Fifth and the Ninth, would be little help for the Second, since 90% of its business comes from New York.⁵⁴

Nor is increasing the numbers of judges an easy answer. It tends to diminish the visibility, dignity and prestige of the judges and thus encourages irresponsible decision-making. It also increases the number of panels and, in geometric proportion, the

⁵¹ See text accompanying notes 58-84 *infra*. See generally COUNSEL ON APPEAL (Charpentier, 1968).

⁵² See, *e.g.*, H. FRIENDLY, *supra* note 16, at 49-54; Feinberg, *Foreword: A National Court of Appeals?*, 42 BROOKLYN L. REV. 611 (1976).

⁵³ For an interesting nod in that general direction, see Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971).

⁵⁴ See H. FRIENDLY, *supra* note 16, at 41.

combinations of judges who make up the panels, compounding the difficulties of the judges themselves in understanding their own court's jurisprudence, diminishing predictability and accountability and, probably, encouraging more appeals. The collegial process so essential to effective appellate functioning can be virtually destroyed by too many judges.⁵⁵

A less drastic measure than any of the above, but equally troublesome, is the increased delegation of responsibilities to clerks, staff counsel, and law clerks.⁵⁶ I suspect that a good deal more delegation goes on than the public would like to hear about. The subject is to some extent shrouded in secrecy. It should not be. These personnel have grown in numbers roughly equivalent to the increase in caseloads.⁵⁷ They surely are kept busy doing something. If the law schools and the bar are to be helpful to the courts in making the difficult choices that must be made, more information is needed about what these people do and what they might be doing. I, for one, am not troubled by law clerks, or even staff counsel, drafting opinions or participating in deliberative processes. Law clerks especially are an invaluable source of new ideas, new perceptions, new challenges, and they ought to be used for this purpose. Still, there are limitations, and serious ones. Predictability and accountability both are threatened by delegation of decision-making input to nonjudicial, temporary employees. Surely there comes a point at which it would be preferable to add more judges than to delegate more to nonjudges. I have no idea whether that point has been reached.

SOME NEGLECTED INQUIRIES

There are some other matters not commonly considered "judicial administration" that are sorely neglected at the level of the circuit courts. Scholarly studies on these matters could make significant contributions not only to problems of caseload management, but also to the quality of the appellate court's decisions, to an un-

⁵⁵ See *id.* at 44-46; Hazard, *supra* note 39, at 80-81.

⁵⁶ See on staff attorneys, D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISES OF VOLUME 9, 231-39 (1974); on law clerks, *Judicial Clerkships: A Symposium on the Institution*, 26 VAND. L. REV. 1123 (1973). A related problem is the use of visiting judges, drawn, for the most part, from the district courts. In 1977, 18.4% of all case participations in the Second Circuit were by visiting judges. 1977 ANNUAL REPORT, *supra* note 10, at 177. The pros and cons of that practice alone deserve a small book.

⁵⁷ Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1133-36 (1973).

derstanding of the dynamics of the process, to increasing accountability.

We need books and articles, of which there is a plethora about the Supreme Court⁵⁸ and virtually none about the courts of appeals, describing the inner workings, the day to day operations of the circuit courts. Who does what? When? Why?

We need studies of the way the courts allocate their time. How much time do they spend on reading briefs, how much on opinion writing, how much on conferences? Until we know the answers, we can hardly suggest better allocations of time.⁵⁹

Scholars should do studies of the cases disposed of without opinion. What were the issues raised? How significant were they? How supported by authority? Until we have them, we can hardly make generalizations about the kinds of cases that the court deems meritorious or significant, nor can we make sound judgments about how well the court is doing its job.⁶⁰

Single case studies, contrasting the facts of record with those reported in opinions, would also make significant contributions toward the court's responsibility.⁶¹ It is common talk among practitioners in the Second Circuit (and perhaps every other appellate court) that the court "invents" facts or ignores others in its opinions. Disappointed lawyers, like losing litigants, are not very credible witnesses. Moreover, their stock in trade is hyperbole. But there are apparently no neutral monitors interested in checking out the stories.

We need historical studies, judicial biographies, other information with which to understand the biases of the judges and their relationships with one another and with district judges. There is, so far as I know, only one such work on the Second Circuit.⁶²

⁵⁸ See, e.g., J. FRANK, *MARBLE PALACE, THE SUPREME COURT IN AMERICAN LIFE* (1958); J.H. WILKINSON, *SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW* (1974).

⁵⁹ See Hart, *Foreword: The Time Chart of the Justices*, 73 *HARV. L. REV.* 84 (1959). See also Douglas, *The Supreme Court and Its Caseload*, 45 *CORNELL L.Q.* 401 (1960).

⁶⁰ See, e.g., Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 *U. PA. L. REV.* 439 (1953), and its predecessors.

⁶¹ I doubt that the Second Circuit would be as unfazed as the Supreme Court apparently was by a few analyses of its opinions such as was done in Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 *YALE L.J.* 1198 (1971).

⁶² M. SCHICK, *LEARNED HAND'S COURT* (1970). For an example of such a study at the Supreme Court level, see W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

Another important inquiry should be why the court writes full opinions in some cases but not in others. In the 1977-78 term, when more than half the cases were decided without opinion,⁶³ the court nonetheless treated us to full, signed opinions on such questions as whether a shipowner was liable to a longshoreman who slipped on some grease,⁶⁴ whether plaintiff was a "real estate broker" under Connecticut law,⁶⁵ whether New York's parol evidence rule precludes oral proof of fraud in defense of a breach of contract claim,⁶⁶ whether raising the level of a street abutting plaintiff's property was a "taking,"⁶⁷ the sufficiency of evidence in a medical malpractice case,⁶⁸ the sufficiency of evidence of insurance fraud and the measure of damages for a fire in a beauty shop,⁶⁹ whether a longshoreman could recover from the shipowner for injuries caused by a falling hatch cover,⁷⁰ whether an oral employment contract was unenforceable under New York's statute of frauds,⁷¹ whether HEW gave proper weight to a doctor's testimony concerning permanent disability of a social security claimant,⁷² whether the complaint of property owners over the grant of a multiple-dwelling variance in Queens stated a federal claim,⁷³ whether the shipowner or the stevedore was liable to a longshoreman who slipped while loading bales of rags,⁷⁴ whether the shipowner can recover over against the stevedore for improperly stowed cargo,⁷⁵ and the sufficiency of evidence under Georgia law to sustain a verdict that an airline caterer was negligent toward a stewardess in failing to lock down its buffet.⁷⁶

⁶³ See note 20 *supra*.

⁶⁴ *Lubrano v. Royal Netherlands S.S. Co.*, 572 F.2d 364 (2d Cir. 1978).

⁶⁵ *Marina Management Corp. v. Brewer*, 572 F.2d 43 (2d Cir.), *cert. denied*, 99 S. Ct. 104 (1978).

⁶⁶ *Centronics Financial Corp. v. El Conquistador Hotel Corp.*, 573 F.2d 779 (2d Cir. 1978).

⁶⁷ *O'Grady v. City of Montpelier*, 573 F.2d 747 (2d Cir. 1978).

⁶⁸ *Bevenino v. Saydjari*, 574 F.2d 676 (2d Cir. 1978).

⁶⁹ *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of America*, 574 F.2d 106 (2d Cir. 1978).

⁷⁰ *Cox v. Flota Mercante Grancolumbia, S.A.*, 577 F.2d 798 (2d Cir.), *cert. denied*, 99 St. Ct. 222 (1978).

⁷¹ *Weisse v. Engelhard Minerals Chemicals Corp.*, 571 F.2d 117 (2d Cir. 1978).

⁷² *Bastien v. Califano*, 572 F.2d 908 (2d Cir. 1978).

⁷³ *Ellentuck v. Klein*, 570 F.2d 414 (2d Cir. 1978).

⁷⁴ *Hickman v. Jugoslavenska Linijska Plovidba Rijeka Zvir*, 570 F.2d 449 (2d Cir. 1978).

⁷⁵ *Master Shipping Agency, Inc. v. Farida*, 571 F.2d 131 (2d Cir. 1978).

⁷⁶ *O'Gee v. Dobbs House, Inc.*, 570 F.2d 1084 (2d Cir. 1978).

I cannot imagine what "jurisprudential purpose"⁷⁷ was served by most of these opinions that would not also have been served by full opinions on almost any of the 500 or so cases decided without opinion. I can only speculate about why they, rather than others, were chosen for such treatment.⁷⁸

We also need careful and laborious analysis of the court's statistics. Understanding of the court would be furthered by statistical analysis of the correlation of case-related variables to outcomes. There are, of course, limitations on what can be learned from such studies. We are not surprised to learn in a recent study of state supreme courts, for example, that when a court has discretion to take appeals, its reversal rate is higher than when appeals are of right,⁷⁹ nor that wealthier parties tend to win,⁸⁰ that complex cases are reversed more frequently than simple ones,⁸¹ that criminal defendants lose more often than any other identifiable group,⁸² that among criminal defendants, those convicted of victimless crimes stand the best chance of reversal,⁸³ but it is important to have our hunches confirmed. Moreover, there was a surprise: no correlation was found in the study between reversal rates and caseloads.⁸⁴

I rest with a reiteration: problems of administering appellate justice are too important to leave to the judges to solve. Besides, they don't have the time.

⁷⁷ 2ND CIR. R. 0.23 provides:

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

⁷⁸ Most, if not all, the opinions cited above seem to fall within the category that Judge Mansfield thinks ought not to be published. "Confronted with the prospect that each of his opinions will be published generally, the conscientious judge . . . naturally strives to emulate the quality of reasoning and style that has traditionally characterized Second Circuit opinions, at least since Learned Hand presided." Mansfield, *Foreword: The Second Circuit Review, 1973-74 Term*, 41 BROOKLYN L. REV. 757, 758 (1975). Although in agreement with Judge Mansfield's observations about the consequences of publication, a different view on the ultimate issue of publication is argued by P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 26, at 35-41.

⁷⁹ Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1201 (1978).

⁸⁰ *Id.* at 1204.

⁸¹ *Id.* at 1206.

⁸² *Id.* at 1209.

⁸³ *Id.* at 1210.

⁸⁴ *Id.* at 1203.

