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Some Cautions about Structural Overhaul of the Federal Courts

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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ESSAYS

Some Cautions About Structural Overhaul of the Federal Courts

CARL TOBIAS*

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*Once a Century: Time for a Structural Overhaul of the Federal Courts*¹ substantially improves understanding of the federal judicial system. Professor Martha Dragich first clearly describes the phenomena which she attributes to unprecedented increases in the number of appeals since the 1960s. The writer asserts that this “crisis of volume” has compromised “appellate justice” and made federal case law less “coherent.” Because Professor Dragich finds that appeals courts’ dual responsibilities to correct error in specific cases and to declare the law have also decreased justice and coherence, she proposes the creation of District Court Appellate Panels for correcting error and a Unitary Court of Appeals for “making law.”

Once a Century significantly enhances comprehension of the judicial process. Professor Dragich affords much instructive information

* Professor of Law, University of Montana. I wish to thank Lauren Robel and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. I serve on the Ninth Circuit District Local Rules Review Committee and on the Advisory Group that the United States District Court for the District of Montana has appointed under the Civil Justice Reform Act of 1990; however, the views expressed here and errors that remain are mine.

1. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11.

and numerous perceptive insights about which there is widespread agreement. For example, she offers helpful empirical data on the growth of appellate filings; few federal courts experts dispute that this increase has modified the appeals courts particularly by requiring judges to resolve mounting dockets with limited resources. Even Professor Dragich's comparatively provocative ideas require readers to reconsider traditional ways of conceptualizing the courts. For instance, her analysis of appellate lawmaking, her plea for maximum national uniformity in the interpretation of federal law, and her call for a Unitary Court of Appeals suggest that regional circuits could now be outmoded.

Notwithstanding Professor Dragich's valuable contributions, some disagreement and even controversy attend her account. Most important, it remains unclear that justice is as diluted and that case law is as incoherent as she claims and, thus, that they are problematic enough to warrant treatment. This lack of clarity regarding justice, coherence, and many other attributes of modern appeals courts partly explains why there is less consensus about the need to apply numerous measures which might improve them.

All of these ideas mean that *Once a Century* deserves a response. This essay undertakes that effort. I first briefly describe the article and then evaluate Professor Dragich's critique of the appeals courts, emphasizing her assignment of responsibility for reductions in justice and coherence to the crisis of volume. I next assess Professor Dragich's prescriptions and ascertain that there is insufficient understanding of the courts to support changes which are as profound as she proposes. I, therefore, recommend ways to secure clearer comprehension.

I. DESCRIPTION OF *ONCE A CENTURY*

Professor Dragich initially examines the structural evolution of the federal courts² and then analyzes the appellate courts' present circumstances.³ She concludes that expanding appeals and strictures, such as limitations on oral argument, which address them have compromised justice in individual cases and that multiplying dockets have made federal law increasingly incoherent.⁴ Professor Dragich then posits requirements for the circuits' third century to enhance justice and coherence.⁵ She reviews various reforms—authorization of additional judgeships, institution of a fourth tier of courts, implementation of discretionary appeals and adjustment of circuit structure—which many people and

2. See *id.* at 18-24.

3. See *id.* at 25-28.

4. See *id.* at 28-39.

5. See *id.* at 39-45.

organizations have proposed.⁶ Professor Dragich suggests that a complex structure, incorporating certain aspects of these four possibilities, would be best; details its chief constituents, District Court Appellate Panels and a Unitary Court of Appeals; and surveys this approach's anticipated benefits.⁷

II. ANALYSIS OF DESCRIPTIVE ACCOUNT

A. Introduction

Professor Dragich's description includes considerable informative material with which a number of knowledgeable individuals and institutions concur. For example, there is widespread agreement about much in her discussion of the courts' structural evolution and their current condition.⁸ Perhaps most significant, a broad range of people and entities find that the appeals courts have experienced a crisis in volume over the last three decades which has modified the courts and that they have applied numerous techniques to treat the rising dockets.⁹

There is less consensus about these caseloads' impacts and efforts to address appeals. A few members of Congress and of the federal judiciary, scholars, and organizations which have studied the courts subscribe to Professor Dragich's assertions that the dockets and the circuit reforms have diluted justice in specific appeals and have made case law less coherent. For example, Ninth Circuit Judge Stephen Reinhardt and Professors William Reynolds and William Richman have contended that docket growth and these measures have eroded justice.¹⁰ Senator Conrad Burns (R-Mont.) and Senator Slade Gorton (R-Wash.), the leading proponents of a recent legislative proposal to split the Ninth Circuit have concomitantly treated incoherence and inconsistency as a major argument for dividing the court.¹¹

6. *See id.* at 45-57.

7. *See id.* at 57-73.

8. *See id.* at 18-28.

9. *See, e.g.,* COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* 11, 41-42 (1995) [hereinafter *LONG RANGE PLAN*]; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 109 (1990). Even the "crisis of volume" is disputed. For example, the fact that courts confront more appeals does not necessarily mean that there is a crisis. *See* Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264 (1996).

10. *See* Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A.J., Jan. 1993, at 52; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278-97 (1996).

11. *See, e.g.,* 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton) [hereinafter *Gorton statement*]; *id.* at S7505-06 (statement of Sen. Burns) [hereinafter *Burns statement*]; *see also* Ninth Circuit Court of Appeals Reorganization Act of 1995, S.956, 104th

However, additional public officials, judges, scholars, and institutions which have evaluated the courts claim that the expanding caseloads and reforms have not compromised justice or increased incoherence. For instance, former Ninth Circuit Chief Judge J. Clifford Wallace and Governor Pete Wilson (R-Cal.) believe that procedures which appeals courts employ have not diluted the delivery of justice.¹² Senator Dianne Feinstein (D-Cal.) and Professor Arthur Hellman have correspondingly found that case law remains coherent and that certain measures have maintained coherence, while no empirical data indicate that case law is incoherent.¹³

It is important to examine at the outset several ideas that should help to explain these different perspectives on the effects of enlarged dockets and responses to them. One significant concept involves the meaning of appellate justice, a phrase which has been variously defined. Some appeals court judges and writers essentially concur with Professor Dragich's observation that "caseload pressures make it impossible for [appellate judges] to devote sufficient time and attention to ensure a thoughtful and principled decision in each case."¹⁴ There is also substantial agreement, and considerable information which indicates, that circuits now afford fewer procedures to increasing numbers of appeals particularly cases which might be characterized as "routine" or "ordinary," even as relatively complex cases, such as complicated securities litigation, continue receiving comparatively thorough appellate treatment.¹⁵

Cong., 1st Sess. (1995). Professor Dragich and other observers use coherence and consistency similarly. See *infra* notes 20-25 and accompanying text. However, I treat consistency as narrower.

12. See *The Ninth Circuit Split: Hearings on S.956 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Judge Wallace) [hereinafter Wallace statement]; *Hearing on S.948 Before the Subcomm. On Courts and Admin. Practice of the Senate Comm. On the Judiciary*, 101st Cong. 284 (1990) (statement of Sen. Wilson); see also *infra* notes 40-46 and accompanying text.

13. See Senate Judiciary Committee Markup of S.956 (Dec. 7, 1995) (statement of Sen. Feinstein); *S.956 Hearings*, *supra* note 12 (statement of Professor Arthur Hellman) [hereinafter Hellman statement]; see also *infra* notes 47-57 and accompanying text. See generally Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. No. 104-197, at 10, 28-29 (1995).

14. Dragich, *supra* note 1, at 32; see also Jon O. Newman, *1000 Judges—The Limit For An Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993) (concurring judge); Reinhardt, *supra* note 10 (same); Richman & Reynolds, *supra* note 10, at 278, 293-97 (concurring writers); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 3-4, 38-40 (quoting judges' similar responses to survey).

15. See, e.g., Reinhardt, *supra* note 10, at 52; Richman & Reynolds, *supra* note 10, at 275, 296; Robel, *supra* note 14, at 3-4; see also Dragich *supra* note 1, at 29 (circuit screening of "routine" cases for summary treatment is admission that error correction merits less attention than lawmaking). I am not saying that routine cases are less worthy. See Robel, *supra* note 14; David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); see also *infra* note 42. Reduced procedures and judicial attention are closely related.

However, there is a lack of consensus, and little empirical data which show, that appellate courts deliver less justice in the sense of unfairly treating, or wrongly deciding, those appeals which judges accord less time or limited procedural opportunities.¹⁶ Indeed, courts have applied techniques, such as prebriefing conferences, partly to address the possibility that decreased time or procedures might reduce justice.¹⁷ The claim that complex cases still enjoy comprehensive treatment¹⁸ may reflect appellate courts good faith efforts to tailor temporal and procedural commitments to various appeals' perceived needs in attempting to resolve all cases on large dockets promptly, inexpensively and fairly by, for example, affording more judicial time and procedures to appeals which apparently require greater attention.¹⁹

Similar ideas apply to the notion of coherence in federal case law and help to illuminate diverse perspectives on docket growth's effects and measures that address it. Coherence has been susceptible to multiple definitions. Professor Dragich apparently equates coherence with intracircuit and intercircuit consistency, while she seems to assume that mounting appeals have enlarged the amount of relevant case law and concomitantly increased incoherence.²⁰

Professor Dragich ascribes intracircuit inconsistency to reforms that restrict the publication of opinions and the citation of unpublished decisions, thus obscuring the concept of "law" in a system premised on precedent,²¹ even as the vast quantity of determinations issued jeopardizes "coherence by creating innumerable rulings which are impossible to assimilate."²² Professor Dragich finds that "fragmentation," which she attributes to the existing appellate structure, further undermines coherence. For instance, Professor Dragich claims that modern circuit size masks the reality that a "court" is only a series of three-judge panels

16. See *infra* notes 40-46 and accompanying text. Professor Dragich claims that the "fact that judges spend less time studying cases must affect their decisions" and seems to equate fewer procedures with less justice. Dragich, *supra* note 1, at 30. She does offer much support for her ideas, deducing, for example, that a "rushed affirmance dilutes justice" from the fact the "affirmance rate has risen in the years since internal reforms were implemented." *Id.*

17. See *infra* notes 45-46 and accompanying text.

18. See *supra* note 15. Professor Dragich apparently agrees. See Dragich, *supra* note 1, at 31.

19. Prompt, inexpensive and fair resolution is Federal Rule of Civil Procedure 1's touchstone, and it may fairly be imported to appellate procedure. See Tobias, *supra* note 9, at n.90. See generally Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995).

20. I rely substantially in this sentence and the next two paragraphs on Professor Dragich's discussion of coherence. See Dragich, *supra* note 1, at 32-39.

21. See *id.* at 33 (citations omitted).

22. *Id.* (citations omitted). The two major ideas in this sentence seem to conflict. She also attributes inconsistency to caseload pressures which she says can lead judges to miss significant issues or gloss over their nuances. See *id.* at 32.

operating in a completely ad hoc manner and that measures, namely en banc review, for facilitating full circuit supervision of the court's own law are ineffective.²³ She also asserts that the appointment of more judges additionally threatens coherence by exacerbating fragmentation.²⁴ Professor Dragich considers intercircuit inconsistency equally problematic. She ascribes these conflicts to the courts' autonomous nature; the application of doctrines, namely law of the circuit, which emphasize the courts' regional character; structural disincentives for the appellate courts to interpret the Constitution and congressional legislation similarly; and reductions in the Supreme Court's monitoring and shaping of federal law's development from a national perspective.²⁵

A few observers effectively concur with Professor Dragich's suggestions that multiplying appeals have limited the appellate courts' ability to maintain coherence and consistency and that case law is increasingly incoherent and inconsistent.²⁶ There is also some agreement, and considerable data which indicate, that circuits have confronted and resolved growing numbers of appeals since the 1960s, while the courts may have issued decisions which expanded the quantity of applicable case law and correspondingly decreased coherence.²⁷

However, there is little consensus, and no empirical evidence which shows, that case law is currently incoherent or inconsistent in the sense that appellate constitutional and statutory interpretations are insufficiently uniform.²⁸ Several reasons apparently explain this situation. First, it remains unclear that additional, relevant case law actually exists now and, if so, how substantial it is. For example, today a much larger percentage of appeals receive no written opinions or decisions which lack any, or have minimal or uncertain, effect as "law."²⁹ Many cases that have most enlarged dockets are also the very type of appeals which expand case law incrementally, if at all, because they rarely become new legal precedent.³⁰

Even were there clearly more applicable case law, this finding

23. See *id.* at 33-34. But see *infra* notes 31, 55-56 and accompanying text.

24. See Dragich, *supra* note 1, at 34-35. For example, she explains that each additional appeals court member brings new perspectives to the law being interpreted. See *id.*

25. See *id.* at 35-39. See generally SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS (1986).

26. See Dragich, *supra* note 1, at 32-39; Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A.J., July 1993, at 70; *supra* note 11 and accompanying text.

27. See, e.g., LONG RANGE PLAN, *supra* note 9, at 11; JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 17-18, 21-23 (1993).

28. See *infra* notes 47-57 and accompanying text.

29. Professor Dragich apparently agrees and reproduces relevant data. See Dragich, *supra* note 1, at 33; see also *supra* note 21 and accompanying text.

30. Many social security appeals involve review of application of well-settled law to similar

would not necessarily mean that it is less coherent or consistent. For instance, the circuit procedures which address mounting dockets as well as potential incoherence and inconsistency may have increased, or at least maintained, coherence and consistency, although it is difficult to ascertain the measures' precise impacts.³¹ Indeed, Professors Reynolds and Richman recently contended that growth in the amount of case law would enhance coherence: "more judges, writing reasoned opinions in all of the cases brought before them, will create a vast new body of precedent. . . . [T]hose precedents will make the law more certain [and] . . . [b]ecause this body of precedent will be the work of judges rather than staff, by definition, it will be better law."³² However, Professor Dragich and other observers seem to assume that expanded case law would reduce coherence.³³

In addition to justice and coherence, circuit variation warrants mention. For example, all of the courts face larger dockets, but their size, complexity, and growth rate differ.³⁴ Appellate courts also have disparate resources, namely judges, for resolving appeals and apply diverse measures, which may have a wide range of impacts, to treat cases and potential reductions in justice and coherence.³⁵ The above concepts suggest that justice and coherence can vary.

Despite these apparent discrepancies, instructive insights on justice and coherence can be gleaned by emphasizing the Ninth Circuit and augmenting its evaluation with relevant information pertaining to other courts. Several factors accentuate this circuit's value for illustrative purposes. The court is the largest in terms of geography, appeals, and judges, and the circuit has experienced rapidly expanding caseloads and has implemented the greatest number of, and the most innovative, mechanisms to address them and the possible decreases in justice and coherence. Critics claim that the court's gigantic docket and reforms have

facts. See Tobias, *supra* note 9, at nn.55-57. Some pro se and prisoner appeals may even be frivolous. See *supra* notes 15-19; *infra* notes 42-44 and accompanying text.

31. See *infra* notes 56-57 and accompanying text; see also *infra* notes 45-46 and accompanying text (suggesting measures meant to foster justice may promote coherence).

32. Richman & Reynolds, *supra* note 10, at 339. They propose a doubling of the bench.

33. See *supra* notes 11, 21-27 and accompanying text. I emphasize justice and coherence in this essay principally because they are central to her article. Other phenomena, such as growing bureaucratization, which can be ascribed to increasing dockets and other values, such as prompt and fair resolution, are also important to the circuits. The difficulties which the courts confront now and in the future thus comprise a polycentric problem. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 676-78.

34. See LONG RANGE PLAN, *supra* note 9, at 45-46; MCKENNA, *supra* note 27, at 31.

35. See, e.g., 1ST CIR. R. 36.1; 4TH CIR. R. 34(a); 7TH CIR. R. 53. See generally Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. No. 1 (1996); Tobias, *supra* note 9, at nn.18-19.

compromised justice and that its case law is increasingly incoherent and inconsistent.³⁶ Because justice and coherence have figured prominently in the current and ongoing debate over the circuit's division, this controversy informs understanding.³⁷ Certain ideas above mean that there are considerable empirical data and much recent information relating to the court.³⁸

The Ninth Circuit's analysis indicates, however, that justice is less diluted, and that federal law is more coherent, than Professor Dragich and other observers assert. If the court, which many critics consider the worst case scenario, apparently delivers higher quality justice and enunciates clearer case law than they contend, appeals courts that encounter less docket pressure probably dispense greater justice and articulate more coherent case law.

B. Appellate Justice

It is unclear that the Ninth Circuit's increasing appeals and responses to them have eroded justice. One reason for this uncertainty is the use of different criteria to measure justice.³⁹ An informative indicium that observers employ is the time which courts need to decide cases. Reliance on several parameters shows that the Ninth Circuit resolves appeals faster than numerous courts, even as additional parameters indicate that it requires greater time than some courts. For example, in the Ninth Circuit, the "median time from oral argument submission to disposition is 1.8 months, or .4 months *less* than the national average," but the average time from filing of the notice of appeal to final decision is 14.3 months.⁴⁰ The use of other criteria in fact suggests that the court's cases receive much justice. For instance, observers view the

36. See Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-197, at 9 (1995); *supra* note 11 and accompanying text; see also Dragich, *supra* note 1, at 28-39 (suggesting criticisms may apply to other circuits).

37. See Ninth Circuit Court of Appeals Reorganization Act of 1995, S.956, 104th Cong., 1st Sess. (1995); see also Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-197, at 10, 28-29 (1995); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995); Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990).

38. See, e.g., sources cited *supra* note 37; *infra* notes 40, 51; see also *infra* note 58.

39. See *supra* notes 12-19 and accompanying text (discussing variability).

40. Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 297 (1996); see also *id.* (affording other parameters showing prompt resolution); Hellman Statement, *supra* note 13 ("recent data indicate [court's record] is poor by some measures, good by others"). But see Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-197, at 9 (1995). My use of time here differs from, but implicates, the time that judges devote to the resolution of appeals. See *supra* notes 14-19 and accompanying text. For instance, insofar as Ninth Circuit judges require considerable time to decide appeals, they may deliver much justice. See Hellman Statement, *supra*.

number of appeals which secure written dispositions as a telling indicator of justice, and the Ninth Circuit writes decisions in a higher percentage of cases than most courts.⁴¹

Even when the time or the procedural opportunities afforded are consulted, the court may actually dispense considerable justice. For example, it is unclear that two severely-criticized strictures, namely limitations on oral argument and on published opinions, have diluted justice in many appeals. My recent survey of Ninth Circuit pro se cases, which comprise forty percent of the national docket,⁴² indicated that the reduced attention or procedures had apparently not diminished the justice accorded in terms of fair treatment and correct results. I found numerous unpublished decisions in which Ninth Circuit panels, without oral argument, reversed district courts that too summarily dismissed complaints filed by unrepresented parties⁴³ or closely analyzed, but ultimately affirmed, trial judges' dismissals of clearly frivolous claims.⁴⁴

Certain measures which the Ninth Circuit and the remaining courts apply to treat growing dockets have enhanced, or at least maintained, justice. A few mechanisms that generally expedite disposition have improved justice. Illustrative are Bankruptcy Appellate Panels, which Professor Dragich apparently found so effective that she modeled her District Court Appellate Panels on them.⁴⁵ Other techniques, such as prebriefing conferences which "help to narrow issues for appeal, limit the size of briefs, and explore the possibilities for settlement," have similarly increased justice for some cases.⁴⁶

41. See Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-97, at 22 (1995); see also Dragich, *supra* note 1, at 29-32 (finding written dispositions important and affording additional relevant information).

42. *Caseload Increases Throughout Judiciary*, THE THIRD BRANCH, Mar. 1996, at 1, 2. Incarcerated individuals pursue a significant percentage of these appeals. See *id.*

43. See, e.g., *Allen v. Figueroa*, 56 F.3d 70 (9th Cir. 1995) (unpublished table decision); *Deas v. Deas*, 51 F.3d 279 (9th Cir. 1995) (unpublished table decision); see also Hug, *supra* note 40, at 304-05; Tobias, *supra* note 9, at n.45.

44. See, e.g., *Menefield v. Helsel*, 78 F.3d 594 (9th Cir. 1996) (unpublished table decision); *Jenks v. Hull*, 67 F.3d 307 (9th Cir. 1995); see also Tobias, *supra* note 9, at n.46; *supra* notes 15, 19, 41 and accompanying text. This is not the type of empirical data collection that I suggest below.

45. See 28 U.S.C. § 158 (1994); 9th Cir. R. 8001; see also Dragich, *supra* note 1, at 58-62. See generally Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. REV. 545; Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181 (1989).

46. Tobias, *supra* note 37, at 1364; see also JAMES B. EAGLIN, FEDERAL JUDICIAL CENTER, *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS* (1990). For analyses of more measures, see JOSEPH CECIL, FEDERAL JUDICIAL CENTER, *ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT* (1985); McKenna, *supra* note 27, at 40-42.

C. Coherent Federal Case Law

The Ninth Circuit's experience indicates that case law is more coherent and consistent than Professor Dragich and additional observers of this court and others assert.⁴⁷ The Ninth Circuit is significant because its expanding docket and apparent plethora of precedents, which written decisions' issuance in many appeals may accentuate,⁴⁸ have prompted critics to assume that circuit case law is incoherent and inconsistent.⁴⁹ Considerable research shows that this is incorrect. Illustrative and most relevant is Professor Hellman's work, which the Federal Judicial Center (FJC) described as the "only systematic study of the operation of precedent in a large circuit."⁵⁰ The scholar's several empirical analyses did "not support the argument that the Ninth Circuit has been unable to maintain consistency in its decisions," hundreds of cases' evaluation led him to conclude that it has "generally succeeded in avoiding intracircuit conflict," and he found insufficient inconsistency to require treatment, especially with solutions as radical as circuit-splitting.⁵¹ Some recent research also suggests that case law across the appeals courts is more coherent, and intercircuit inconsistency less problematic, than numerous observers contend. Most applicable is additional, related work of Professor Hellman. He has discovered no evidence which indicates that the appellate system needs more authoritative precedents.⁵²

Indeed, no empirical data show that case law in the Ninth Circuit or in the remaining courts is incoherent or inconsistent. For instance, the FJC stated that the "only substantial empirical work on the issue found little evidence for intracircuit conflicts in the largest circuit."⁵³ The

47. See Dragich, *supra* note 1, at 32-39; *supra* note 11 and accompanying text.

48. See *supra* note 41 and accompanying text; see also *supra* notes 29-32 and accompanying text (suggesting that court's gigantic docket and large number of written decisions do not mean that circuit case law is incoherent).

49. Critics who find the circuit the worst case scenario may assume that other courts' situations will only worsen as growing dockets make them increasingly resemble it. See *supra* notes 11, 36-37 and accompanying text (suggesting that the court is also significant because the consistency of its case law is a major issue in the debate over the court's division).

50. McKenna, *supra* note 27, at 94. The FJC is an important research arm of the courts. See 28 U.S.C. § 620 (1994). See generally William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129 (1995).

51. Hellman Statement, *supra* note 13. His research is *Maintaining Consistency in the Large Circuit*, in *RESTRUCTURING JUSTICE* 55-90 (Arthur D. Hellman ed. 1990); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989); see also Hug, *supra* note 40, at 298-99; *infra* notes 53-54 and accompanying text.

52. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995); see also *infra* note 55 and accompanying text (affording additional relevant findings).

53. McKenna, *supra* note 27, at 15. It was alluding to Professor Hellman's work.

authors of the 1995 Senate Committee Report, written in support of a circuit-dividing bill, were compelled to concede that "one *empirical study* suggested that the Ninth Circuit may *not* suffer from significant intracircuit conflicts" and were reduced to making the tepid statement: "[a]necdotal evidence indicates that the ninth circuit is marked by an increased incidence of intracircuit conflicts."⁵⁴ Respected studies by the Judicial Conference of the United States in 1995 and the FJC during 1993 found empirical material which shows that case law is coherent and consistent beyond the confines of this circuit. For example, the Conference declared that "current empirical data on the number, frequency, tolerability, and persistence of unresolved intercircuit conflicts . . . indicate that intercircuit inconsistency is not a problem that now calls for change," thereby confirming the FJC's conclusions.⁵⁵

The Ninth Circuit and other courts employ measures which seem to foster coherence and consistency. For instance, the Ninth Circuit staff attorney office reviews every case and codes into a computer the issues to be resolved.⁵⁶ The court then assigns to the same three-judge panel those appeals that raise similar issues and are ready for disposition at the same time. The circuit also uses a limited en banc mechanism to maintain coherent and consistent case law, although observers dispute how much coherence and consistency the court has realized.⁵⁷

In sum, this assessment suggests that the decreasing justice and coherence which Professor Dragich attributes to multiplying appeals are imperfectly understood. Indeed, justice and coherence may well have increased. Even if both have clearly declined, those reductions' extent and whether they are troubling enough to warrant treatment would resist very precise delineation. In the final analysis, there is inadequate information respecting justice and coherence to permit definitive conclusions.

54. Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-97, at 10 (1995) (emphasis added). The authors did assert that the study, which was apparently Professor Hellman's, had received criticism. *Id.* at 10 n.19.

55. LONG RANGE PLAN, *supra* note 9, at 46 (citing Professor Hellman's FJC study). The FJC relied upon his work and its own study. See MCKENNA, *supra* note 27, at 57-65; see also *id.* at 15 (finding "inconsistent interpretation and application of federal law by different courts of appeals is not . . . a significant problem"); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 125 (1990) (finding little empirical data on, and calling for study of, intercircuit conflicts).

56. I rely in this sentence and the next on MCKENNA, *supra* note 27, at 50-51; Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 945 (1980); see also Hug, *supra* note 40, at 301.

57. Compare Gorton Statement, *supra* note 11, and Burns Statement, *supra* note 11, with Wallace Statement, *supra* note 12, and Hellman Statement, *supra* note 13. Most circuits require judges to circulate drafts to their colleagues who may respond if the "opinion conflicts with the law of the circuit or if they have a case pending on a similar issue and a consistent approach is needed." MCKENNA, *supra* note 27, at 97. For analyses of more measures, see CECIL, *supra* note 46; Hug, *supra* note 40, at 300-01.

III. ANALYSIS OF PRESCRIPTIONS

A. *An Introductory Word About Descriptions and Prescriptions*

I emphasize justice and coherence throughout this essay because they are essential to Professor Dragich's descriptions and prescriptions. It is important to recognize that additional phenomena, such as increasing bureaucratization, can be ascribed to docket growth and that other values, namely prompt, inexpensive and fair appellate resolution, are significant to the federal courts. These concepts mean that the complications which the appeals courts presently address, and will meet in the twenty-first century, constitute a polycentric problem, the efficacious resolution of which will require application of a complex mix of possible solutions.

Numerous ideas above and much expert research show that there is now insufficient comprehension of justice, coherence, and many additional attributes of the courts to support dispositive determinations, much less fundamental circuit restructuring. For instance, the Federal Courts Study Committee apparently found so little consensus about justice, coherence, and other phenomena affecting the courts that it primarily described potential remedies for difficulties which purportedly implicate the appellate system and called for further study.⁵⁸ When the Judicial Conference and the FJC recently assessed the appeals courts, they evinced similar skepticism regarding those attributes and analogous reluctance to prescribe solutions.

Insofar as the Conference and the FJC mentioned incoherence, neither believed it problematic enough to deserve remediation, especially with structural reforms, ostensibly because no empirical data so indicated. For example, one Conference recommendation stated: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload."⁵⁹ The FJC proclaimed that "structural change to resolve intercircuit conflicts . . . is likely to provide relatively little benefit at a relatively high cost [and that] . . . [m]aking structural changes solely to reduce current levels of intracircuit inconsistency . . . is likely to do more harm than good."⁶⁰

58. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 109-25 (1990).

59. LONG RANGE PLAN, *supra* note 9, at 44; *see also id.* at 46 (finding no such evidence and "current empirical data . . . [indicating] intercircuit inconsistency is not a problem that now calls for change"); *supra* note 55 and accompanying text.

60. MCKENNA, *supra* note 27, at 15; *see also id.* (finding little data showing either form of inconsistency is problematic). The studies found reduced justice insufficiently problematic to need treatment but evinced concern about it. See REPORT OF THE FEDERAL COURTS STUDY

Finally, Professor Dragich correctly observes that Congress has not responded in a decisive manner to the decreased justice on appeal and case law coherence which she detects. Indeed, the recent machinations involving the proposal to bifurcate the Ninth Circuit show that legislative inaction relating to this court and the appellate system may well have been advisable and that inadequate understanding of the appeals courts exists.⁶¹

In short, because justice and coherence, the two phenomena which are critical to Professor Dragich's suggestions and additional significant attributes are not clearly comprehended, it is exceedingly difficult to analyze her proposals. There is also insufficient information on which to premise confidently changes as profound as those that she recommends, while the material which is available warrants caution before adopting major modifications. Despite the above caveats, mainly pertaining to Professor Dragich's descriptions, I assume for the purpose of evaluating her prescriptions that growing dockets have reduced justice and coherence enough to be characterized as serious complications which need remediation.

B. *Assessment of Prescriptions*

1. ADVANTAGES

Professor Dragich has crafted valuable, elegant suggestions for revamping the federal courts to address the decreased justice and coherence that she perceives. Her proposed structural overhaul, which would substitute District Court Appellate Panels and a Unitary Court of Appeals for the twelve regional circuits, could afford certain benefits. Professor Dragich's recommendations might increase justice and coherence, even if the phenomena are less problematic than she claims. The Appellate Panels may improve the quality of justice that individual cases receive by emphasizing error correction. The Court of Appeals could enhance coherence by focusing on lawmaking and attempting to clarify constitutional and statutory interpretation. Professor Dragich's reforms might also promote other values which are important to the federal courts. For instance, if the two tribunals function as she intends, they

COMMITTEE, at 109-10 (1990); LONG RANGE PLAN, *supra* note 9, at 43-46; MCKENNA, *supra*, at 13-14; *see also* Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-97, at 23 (1995) (stating that no thorough appeals courts study has occurred since the 1973 Hruska Commission study).

61. For example, the Senate Judiciary Committee approved a circuit-splitting bill only after adding Arizona and Nevada to the Pacific Northwest states to create a proposed Twelfth Circuit. The Senate then passed a study commission measure that the House did not pass. *See supra* note 37 and accompanying text; *see also* Dragich, *supra* note 1, at 18.

may facilitate more expeditious and economical resolution of some cases.

One reason why her prescriptions could offer these advantages is that Professor Dragich carefully draws upon several ideas—authorizing more judges, making all appeals discretionary, creating a fourth tier and adjusting circuit structure—which Congress, the judiciary and experts have considered for decades but which remain controversial. Moreover, she astutely manages to exploit the suggestions' best features and to minimize their less desirable aspects.⁶² A helpful illustration is her call for Appellate Panels which may improve justice in many cases that raise the possibility of error by essentially adding new judges whose core responsibility would be error correction.⁶³ She concomitantly eschews Congress' century-long approach of only approving more judges for the existing system as a palliative which would not enhance justice or coherence partly because it will exacerbate intracircuit inconsistency.⁶⁴ Professor Dragich also proposes that some appellate jurisdiction be discretionary, that another tier be effectively invoked, and that the current circuits be dramatically restructured while rejecting recommendations for every appeal to be discretionary, for the formal establishment of a fourth tier, and for the mere reconfiguration of the present appellate system.⁶⁵ She does so principally because the latter reforms could fail to promote justice or coherence. For example, completely discretionary jurisdiction might jeopardize justice by permitting the denial of appeals in worthy cases, while another tier may threaten justice by unduly extending the appellate process.⁶⁶

Finally, Professor Dragich's cogent prescriptions should provoke critical thinking about numerous issues that are significant to the federal courts' future. Her proposals specifically illuminate the need to assemble, assess and synthesize the maximum relevant information on the

62. She candidly states that this was her intent, a result which she has substantially achieved. *See id.* at 66; *see also id.* at 45-57 (analyzing four major proposals).

63. This proposal would capitalize on existing judicial capacity in the district courts and limit the need to appoint promptly many new judges which would complicate the Panels' implementation, although the Panels' duties would require numerous new judges. *See id.* at 59 n.274. *See generally* Baker, *supra* note 37, at 952; Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996).

64. *See* Dragich, *supra* note 1, at 45-49. Some find this approach outmoded and inadequate for the circuits' third century. *See, e.g.,* THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 101-05, 147-50, 181-85 (1994); Tjoflat, *supra* note 26. *But see* Richman & Reynolds, *supra* note 10, at 297.

65. Her partial use of the reforms also makes her proposals appear more evolutionary. *See* Dragich, *supra* note 1, at 66. I am not criticizing this use. Indeed, she significantly advances the inquiry by creatively assembling a more workable package.

66. *See id.* at 41, 49-57.

complications which the circuits now face and will confront in the next half-century, thus facilitating the problems' efficacious resolution.

2. DISADVANTAGES

Despite the benefits which implementation of Professor Dragich's suggestions might afford, they may impose disadvantages. These adverse impacts are difficult to identify primarily because justice, coherence and many other attributes of the judicial system are imperfectly understood. Moreover, the structure that she advocates has never actually existed. However, the earlier federal courts and a few state judiciaries resemble the tribunals which Professor Dragich recommends⁶⁷ and experts have posited and analyzed similar concepts.⁶⁸ Thus it is possible to extract relevant information, or extrapolate, from those experiences.

A commonplace saying is that the "devil is in the details," but this idea seems peculiarly applicable to Professor Dragich's prescriptions because many theoretical and practical complications would apparently accompany their effectuation and could detrimentally affect justice, coherence and additional important values. Some problems would probably attend Appellate Panels' institution and functioning. Several issues implicate the tribunals' personnel and their responsibilities. The process of selecting most current federal judges has emphasized different qualifications for appointment to the appellate and trial tiers.⁶⁹ For instance, few district judges have been members of appeals courts or have actively participated in appellate practice. Moreover, federal trial court experience may only minimally improve their service on Appellate Panels, although numerous district judges secure appeals court expertise when sitting by designation on appellate courts⁷⁰ and this experience would resemble less closely the judges' existing trial court duties than their responsibilities as Panel members.⁷¹

Present district judges might perform certain duties of the Appellate Panels rather ineffectively principally because they could consider them distasteful, unrewarding or tedious. For example, the judges may be reluctant to review rigorously, and find erroneous, rulings of colleagues

67. *See id.* at 58-62.

68. *See, e.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 116-17; BAKER, *supra* note 64, at 198-215, 234-79; MCKENNA, *supra* note 27, at 105-21.

69. *See* Tobias, *supra* note 37, at 1402; *see also* Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1266, 1272 (stating that numerous circuit judges initially serve as district judges).

70. *See* 28 U.S.C. § 292 (1994). *See generally* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351 (1995).

71. *See* Dragich, *supra* note 1, at 58-62. I am only saying that district judges might be better qualified to assume these duties, not that they are unsuited.

who occupy identical positions in the judicial hierarchy and with whom they enjoy continuing, valuable professional and personal relationships.⁷² Judges, when discharging somewhat similar obligations in the 1988 and 1990 Judicial Improvements Acts (JIA), evinced considerable unwillingness to evaluate, much less suggest modifications in, procedures which district judges had adopted.⁷³ Many district judges might also find unfulfilling the duties to scrutinize lengthy, boring trial transcripts and to assess claims of mistakes that could lead to reversal or to additional proceedings in appeals, most of which will by definition be routine. These activities sharply contrast with the satisfying challenges that numerous district judges apparently experience in resolving complex, intellectually stimulating litigation.⁷⁴

Another potential difficulty with Appellate Panels' operation involves the responsibility to decide whether Panels or the Unitary Court of Appeals must initially hear cases. Judges may encounter problems differentiating between appeals that require error correction and law-making, particularly in those cases which seem to implicate both functions. Professor Dragich's proposal that Panels apply existing standards of appellate review affords insufficient specificity to treat felicitously numerous appeals.⁷⁵ Her concomitant reliance on a trichotomy of easy, hard, and very hard cases appears no more helpful.⁷⁶ Exercises which require line drawing can also consume scarce resources of judges, lawyers, and parties. Recent experience, primarily in the district courts with Federal Rules of Civil Procedure governing sanctions and discovery and with related provisions adopted under the 1990 JIA, suggests the difficulties of making distinctions as refined as those that Professor Dragich's recommendations would necessitate.⁷⁷ For instance, to ascertain whether prefiling inquiries or discovery requests were reasonable, litigants and counsel prepared and filed papers and presented evidence in

72. This may be especially true if the panels are drawn from the "same or nearby districts." *Id.* at 58-59; see also IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980) (discussing continuing relationships); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (same).

73. See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) [hereinafter Tobias, *Balkanization*]; Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994). Most judges are very protective of their prerogatives to adopt local procedures. See Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995).

74. See Robel, *supra* note 14, at 3-11. I recognize that circuit judges often, and district judges occasionally, discharge duties similar to those prescribed for Panels and that federal judges will fulfill the oath of office that they have sworn to uphold.

75. See Dragich, *supra* note 1, at 59-60.

76. See *id.* at 60; see also MCKENNA, *supra* note 27, at 51.

77. See FED. R. CIV. P. 11, 26, 37; see also 28 U.S.C. § 473(a)-(b) (1994).

hearings and conferences, while judges read the documents, presided at the proceedings and issued decisions.⁷⁸

Some problems could accompany the effectuation and operation of the Unitary Court of Appeals. These difficulties should be fewer, and less troubling, than the ones that would attend Appellate Panels' implementation primarily because the duties of Court of Appeals judges would rather closely resemble their current responsibilities. The Court of Appeals, nonetheless, might experience several complications, especially involving case selection, which are analogous to the problems that the Appellate Panels would confront.⁷⁹

An additional possible difficulty with Professor Dragich's prescriptions is that the members of Congress who must adopt, and the federal judges who must implement, the reforms may oppose them. First, those officials might find that the proposals depart too substantially from the status quo while trenching too much on certain established interests. These ideas are manifested in the "strong or moderate opposition" which a large majority of appellate and district judges recently registered to hypothetical suggestions that resembled those of Professor Dragich.⁸⁰ Many federal judges have also strenuously resisted recommendations for expanding the bench.⁸¹ Numerous senators would probably oppose Professor Dragich's prescriptions, if the lawmakers believed that her reforms might somehow dilute their judicial selection prerogatives, which seem to be one of the last vestiges of unalloyed political patronage.⁸²

I am not saying that the preferences of members of Congress or of the judiciary should control potential federal court improvements, particularly ones which purport to deliver more justice.⁸³ Instead, the views of senators and representatives to whom the Constitution assigns responsibility for federal court policymaking and the perspectives of judges who must effectuate any changes that Congress prescribes deserve serious consideration. No proposals for modifying the courts, especially

78. See, e.g., William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); Tobias, *Balkanization*, *supra* note 73, at 1422-23; Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933 (1991).

79. Perhaps most significant, when the Court of Appeals exercises discretionary review, it will probably face difficulties that are similar to the ones which the Appellate Panels must address when drawing lines. See *supra* notes 75-78 and accompanying text.

80. See MCKENNA, *supra* note 27, at 139; see also Dragich, *supra* note 1, at 63 n.291.

81. See, e.g., Newman, *supra* note 14; Tjoffat, *supra* note 26; see also *supra* note 63 (suggesting Panels' creation would require numerous new judges).

82. See, e.g., DAVID M. O'BRIEN, *JUDICIAL ROULETTE* (1988); Laura E. Little, *Loyalty, Gratitude and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995); Tobias, *supra* note 69.

83. See J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288 (1994) (suggesting courts should operate in best interest of public, not judges); Richman and Reynolds, *supra* note 10, at 338 (same).

alterations as dramatic as Professor Dragich suggests, will succeed without the support or at least the cooperation of Congress and the judiciary.⁸⁴

In short, the disadvantages which would apparently attend the institution of Professor Dragich's recommendations indicate that their implementation may not foster justice, coherence or other important values. However, uncertainty about all of her suggestions' impacts and the exact nature of justice, coherence and numerous additional phenomena precludes definitive conclusions. This lack of clarity also complicates accurate evaluation of many prescriptions' efficacy, which could mean that some approaches are superior to Professor Dragich's proposals, or at least that caution is warranted when considering changes which are as fundamental as she espouses. The uncertainty is not a criticism of her insightful contributions. Indeed, many of Professor Dragich's thought-provoking ideas and a number of the concepts explored above show that there is a compelling need for much greater, and considerably more precise, information respecting the appellate courts before Congress substantially modifies them. The fourth section of my response, accordingly, suggests ways to improve understanding of the circuits, of the most pressing problems which they face, and of the finest solutions to these difficulties.

IV. SUGGESTIONS FOR THE FUTURE

A. Introduction

Recommendations for the future require relatively limited treatment in this essay because quite a few people and entities, which are familiar with the federal judicial process, have provided numerous cogent ideas elsewhere. For example, Professor Thomas E. Baker, who has thoroughly examined the appeals courts, and the Federal Courts Study Committee, have recently called for comprehensive studies of the appellate courts to clarify imperfect comprehension.⁸⁵

Evaluators must rigorously collect, analyze and synthesize the maximum applicable empirical data, both on the appellate system and on individual regional circuits, remembering that they may vary signifi-

84. See Hug, *supra* note 40, at 306; Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-197, at 8 (1995); Hellman Statement, *supra* note 13. These factors are not a compelling reason to criticize her proposals, which could lead to an efficacious solution, even if Congress rejects them. My concerns are that proposals have a realistic prospect of being adopted and improve the courts.

85. See BAKER, *supra* note 64, at 292-300; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 116-17 (1990); see also S.956 Hearings, *supra* note 12 (statement of Sen. Heflin) (suggesting similar study); *supra* note 61 (same). I have afforded some suggestions in Tobias, *supra* note 9, and Tobias, *supra* note 37.

cantly. Assessors should compile material which identifies the most vexing complications that the appeals courts currently experience and will encounter in the next half-century as well as a broad range of possible remedies for these problems. Evaluators ought to seek the help of many public and private organizations, including the Senate and House Judiciary Committees, the Administrative Office of the United States Courts, the American Bar Association, the American Judicature Society and the National Center for State Courts which possess considerable relevant expertise and information on the federal courts. Further, assessors must capitalize on previous studies such as those of the FJC and the Federal Courts Study Committee.⁸⁶

Evaluators should initially answer some normative questions or attempt to enunciate expressly and fully the normative presuppositions which are central to their efforts. Certain of these questions resist easy resolution and are comparatively theoretical. For instance, the above discussion demonstrates that appellate justice and case law coherence must be defined more clearly. Other normative issues are principally practical. Illustrative are the resources which the United States should devote, and the appropriations that Congress will authorize, to deliver every appeal the justice it deserves; these ideas assume that greater judicial attention would benefit cases which now receive less treatment and the appeals courts without compromising the expeditious, economical and fair disposition of substantial dockets.⁸⁷

B. *Potential Problems*

When assessors specifically explore potential difficulties that the appellate courts presently confront and will face, the evaluators should invoke the largest amount of relevant empirical material and remember the normative questions considered above. Assessors must attempt to identify those phenomena affecting the appellate courts which warrant denomination as problems, the exact nature of the complications that are most pressing, and whether they are sufficiently troubling to deserve treatment. The attributes which can be ascribed to docket growth, and to mechanisms which address it, obviously need emphasis. Evaluators thus

86. See MCKENNA, *supra* note 27; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990). These entities and studies are not exhaustive. For more, see BAKER, *supra* note 64, at 295-96.

87. Some issues have theoretical and pragmatic features. For example, how significant should litigant satisfaction be and how do oral argument and written decisions affect parties' experience of appellate review? See Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 66-68, 75-86 (1985); Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part I*, 1973 DUKE L.J. 1153, 1172-77.

should stress justice and coherence, although the examination throughout this essay illustrates the complexities entailed in defining and analyzing these phenomena. Assessors, therefore, ought to define these attributes as clearly as possible and develop the most refined methods for measuring them.

The tenet of prompt, inexpensive, and equitable appellate resolution, as well as the distinctions between fairly treating or correctly deciding cases and the procedures or judicial attention afforded, could serve as departure points for attempting to assign a meaning to justice.⁸⁸ However, these rather rudimentary definitions require elaboration, so that the idea of justice will have the clearest meaning. The earlier discussion of coherence indicates that the phenomenon is more difficult to define than justice, that consistency may not fully capture coherence and that the notion of clarity in constitutional and statutory interpretation might offer some guidance.⁸⁹ The meaning of coherence, therefore, deserves expansion and elucidation.

Evaluators should also gather, scrutinize and synthesize the greatest quantity of applicable empirical data which measure as accurately as possible circuits' delivery of justice and enunciation of case law. Examples of the type of endeavors that I envision are the above examination of Ninth Circuit pro se appeals, which is an admittedly circumscribed effort to analyze justice,⁹⁰ and Professor Hellman's meticulous research that implicates coherence.⁹¹

Assessors could specifically estimate the impacts of provisions, such as restrictions on written decisions, which courts employ to treat multiplying dockets and which some critics claim dilute the delivery of justice.⁹² Evaluators similarly might calculate the effects of mechanisms, namely computerized issue coding and case assignments and limited en banc review, that respond to mounting appeals and potential incoherence and that purportedly do not maintain coherence.⁹³ Assessors could additionally consider justice and coherence in terms of particular parameters, such as litigant satisfaction and costs to courts,

88. See *supra* notes 14-19 and accompanying text; see also *supra* notes 39-46 and accompanying text. Literature on the broader concept of justice is legion. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

89. See *supra* notes 20-33, 47-57 and accompanying text.

90. See *supra* notes 42-44 and accompanying text.

91. See *supra* notes 50-52 and accompanying text. Evaluators should consult, and consider applying, the specific methodologies that Professor Hellman has employed.

92. See *supra* notes 4, 9-10, 15 and accompanying text. But see *supra* notes 12, 16-17, 42-46 and accompanying text.

93. See *supra* notes 4, 9, 11, 23 and accompanying text. But see *supra* notes 13, 31-32, 56-57 and accompanying text.

attorneys and parties.⁹⁴

Evaluators should next attempt to identify the phenomena affecting the circuits which can be characterized as difficulties and which now, and subsequently will, pose the most pressing complications for the appeals courts.⁹⁵ Assessors then ought to delineate as precisely as possible those attributes' nature, whether they vary across circuits and by case types, and whether the problems are severe enough to warrant remediation.

C. *Potential Solutions*

It is difficult to afford very specific guidance regarding potential solutions absent clearer understanding of the most vexing complications which courts confront today and will face in the future. However, I can offer general suggestions by assuming that some phenomena which affect the circuits are sufficiently problematic to require treatment and by emphasizing approaches that address growing dockets because Congress will not constrict jurisdiction.⁹⁶

Evaluators must attempt to designate the most efficacious measures. Assessors ought to rely upon the maximum amount of relevant empirical information, keeping in mind the applicable normative questions.⁹⁷ Evaluators should rigorously analyze a broad spectrum of potential remedies which may be classified as structural alternatives, including circuit realignment, and non-structural options, such as discretionary appeals. Courts have adopted quite a few mechanisms that do not require congressional authorization,⁹⁸ while expert individuals and institutions have formulated, espoused or assessed numerous others.⁹⁹ Evaluators must remember that various solutions could apply to the

94. The parameters in the text apply to both justice and coherence. Other parameters, such as time for appellate resolution, may pertain exclusively or principally to justice or coherence. Assessors should apply analyses similar to that for justice and coherence to other phenomena which significantly affect the circuits by defining and assessing the phenomena.

95. I can afford only general guidance about the ideas in this paragraph until assessors scrutinize relevant data. Even with that information, assessors may have to make complex value-laden judgments, comparisons and predictions. For example, identification of the most pressing problems in the next century will require clear understanding of today's difficulties, comparison of their relative severity, and projections into the future. *See supra* note 33.

96. Many agree that rising appeals require treatment because Congress will not shrink jurisdiction. *See Dragich, supra* note 1, at 16-17; *see also* Stephen G. Breyer, *Administering Justice in the First Circuit*, 24 *SUFFOLK U. L. REV.* 29, 34-37 (1990); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *HASTINGS L.J.* 1135 (1995). An example is the 1994 crime legislation. The focus in the text also permits analysis of measures that implicate justice and coherence. I am not saying that they warrant remediation, but evaluators should ascertain whether either does.

97. *See supra* notes 86-87 and accompanying text.

98. *See supra* notes 45-46, 56 and accompanying text.

99. *See, e.g.,* BAKER, *supra* note 64, at 106-284; REPORT OF THE FEDERAL COURTS STUDY

appellate system or particular courts and should determine whether systemic or circuit-specific approaches would be appropriate.

Assessors ought to examine efficacy by quantitatively and qualitatively estimating the advantages and disadvantages of possible remedies. For instance, evaluators might calculate the number and significance of measures' beneficial and detrimental impacts on the most severe problems that currently, and will later, plague the courts; on justice and coherence; on appeals' expeditious, economical and fair disposition; and on additional important values.¹⁰⁰ Assessors could also glean instructive insights on effectiveness from the endeavors mentioned in the paragraph immediately above,¹⁰¹ similar analyses of federal and state appellate court application of numerous proposed solutions,¹⁰² and many other studies.¹⁰³

Evaluators should concomitantly attempt to match the mechanisms that they survey with the complications which assessors discover the circuits address and will meet. For example, if evaluators conclude that the provision of fewer appellate procedures constitutes a serious problem which warrants treatment, assessors might examine more widespread application of approaches that have apparently improved the delivery of justice, the development of new techniques which may do so, or experimentation with both possibilities.¹⁰⁴

Evaluators will probably be unable to identify a single preferable measure that efficaciously resolves the major difficulties which appeals courts presently experience and will encounter in the future. Assessors, therefore, ought to designate as precisely as possible that mix of remedies which would be best, especially by predicting how numerous promising solutions could operate in varying combinations. For instance, if one mechanism might rectify a critical complication but may jeopardize an important value and a second technique would temper this threat and impose no disadvantages, the two procedures' application could be indicated.

COMMITTEE, at 116-17 (1990); MCKENNA, *supra* note 27, at 66-92, 95-121; Dragich, *supra* note 1, at 45-57.

100. My analysis of Professor Dragich's proposals illustrates the type of analysis that I envision. See *supra* notes 62-84 and accompanying text. However, evaluators should also subject her proposals to the more extensive examination which I suggest in this section.

101. See *supra* notes 98-99 and accompanying text.

102. The National Center for State Courts is a repository of valuable data on state courts. See generally BAKER, *supra* note 64, at 298; FRANK M. COFFIN, ON APPEAL 43-65 (1994).

103. Evaluators might also consider measures that other countries have applied. See Martin Shapiro, *Appeal*, 14 L. & Soc'y REV. 629 (1980).

104. See *supra* notes 45-46 and accompanying text. Evaluators may also prescribe experimentation with measures that have received only limited application or minimal analysis or the efficacy of which remains unclear. See Tobias, *supra* note 37, at 1405-07.

In the final analysis, evaluators must undertake a carefully-calibrated assessment that thoroughly considers the problems which appear to be the most substantial and the comparative efficacy of a broad spectrum of potential remedies for those difficulties. At that juncture, evaluators should be able to identify the finest approaches for treating the worst complications which the appeals courts will confront during the twenty-first century.

V. CONCLUSION

Once a Century contributes significantly to an understanding of the federal courts. There is much agreement about many, but less consensus regarding a few, aspects of the article. Most important, it remains unclear that increasing dockets have reduced appellate justice or case law coherence and, if so, sufficiently to require remediation. Indeed, without better understanding of those and other phenomena which affect the appeals courts, caution is warranted in adopting reforms that are as far-reaching as the ones Professor Dragich proposes. My response suggests ways to enhance comprehension of justice, coherence, and these attributes. Once there is clearer understanding, measures which will improve the circuits in their next century can be instituted.