

APPELLATE JUSTICE BUREAUCRACY AND SCHOLARSHIP

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Many of the other Articles in this Symposium demonstrate that a single great piece of legal scholarship can have an enormous impact on the development of legal doctrine. This Article differs in two respects. First, it focuses not on a single seminal work, but rather on a developing literature authored by a large group of scholars. Second, it attempts to assess the impact of that literature not on the growth of legal theory, but on the development of a single legal institution—the United States Courts of Appeals.

Recent years have seen a staggering increase in the work of the federal circuit courts. Between 1960 and 1986, filings in those courts rose from 3899 to 34,292—an increase of more than 900%.¹ During the same period, the number of active circuit judgeships increased from 68 to 168.² This increase, although substantial, has been unable to keep pace with the flood of filings.³ The judges have very little control over these two principal variables in the appellate productivity equation because Congress controls both the jurisdiction of the federal courts and the number of judgeships. Accordingly, the courts have sought to accommodate the overload by modifying the way in which they process appeals. Among the judges' strategies, three stand out as most significant: (1) increasing the number of parajudicial

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1. 1960 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 68; 1986 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 137.

2. 1960 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 68; 1986 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 6.

3. For a more detailed discussion of the caseload explosion, see R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-93 (1985). Not all commentators are convinced that there really is a problem. Professor Marc Galanter has suggested that the litigation explosion is "an item of elite folklore." Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 64 (1983). Professor Galanter's conclusion is disputed in R. POSNER, *supra*, at 76.

personnel, such as law clerks, staff attorneys, and legal externs; (2) decreasing the number of oral arguments; and (3) decreasing the number of cases decided in a signed, published opinion.

Judges, practicing attorneys, and academics have criticized these strategies. The critics see in the reforms significant dangers for the legal process, including the risk that courts are being transformed from highly visible, collegial bodies of personally involved legal craftsmen into hierarchically structured legal bureaucracies that often render impersonal, anonymous, and non-precedential justice.⁴ Part I of this essay describes the three

4. The commentators who have written about the bureaucratization of appellate justice include: R. POSNER, *supra* note 3, at 94-129; Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981) (a response to Vining, *infra*); Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983) (a response to the charge of bureaucratization); Fiss, *Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Higginbotham, *Bureaucracy - The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60 (1982); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659 (1983); Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 764-67 (1983); Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370 (1982); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981); Wald, *The Problem With the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983).

A related body of commentary discusses the three significant reforms—parajudicial personnel, reduction in oral argument, and limited publication—that have contributed to bureaucratization in American appellate courts: P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976); J. CECIL & D. STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* (1987); D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* (1980); D. STIENSTRA, *UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS* (1985); Anstead, *Selective Publication: An Alternative to the PCA?*, 34 U. FLA. L. REV. 189 (1982); Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125 (1973); Beyler, *An Appraisal of Supreme Court Rule 23*, 72 ILL. B.J. 80 (1983); Bird, *The Hidden Judiciary*, *JUDGES' J.*, Winter 1978, at 4; Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 UCLA L. REV. 465 (1976); Flanders & Goldman, *Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study in the Fourth Circuit*, *JUST. SYS. J.*, Mar. 1975, at 1; Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (1975); Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937 (1980); Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 386 (1973); Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732 (1983); Newbern & Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37 (1978); Nichols, *Selective Publication of Opinions: One Judge's View*, 35 AM. U.L. REV. 909 (1986); Oakley & Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286 (1979); Render, *On Unpublished Opinions*, 73 KY. L.J. 145 (1984); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U.

judicial strategies and the scholarly critiques evaluating them. Part II considers the concrete but minimal effects the critical commentary has had on the courts. Part III suggests reasons why the impact has not been more substantial.

I. THE STRATEGIES AND THE CRITIQUES

The proliferation of cases has seen a corresponding proliferation of judicial assistants and of cases decided without oral argument and published opinion. This section discusses the form and impact of those changes.

A. *Parajudicial Personnel*

One obvious way to increase the output of an organization is to increase the number of workers. It is not surprising, then, that the number of circuit judges has increased steadily over the years.⁵ At some point, however, the law of diminishing returns suggests that the creation of more judgeships causes as many problems as it solves.⁶ If more judgeships are added to the individual circuits, intra-circuit inconsistency becomes a problem,

CHI. L. REV. 573 (1981); Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); Schroeder, *Judicial Administration and Invisible Justice*, 11 U. MICH. J.L. REF. 322 (1978); Thompson, *Mitigating the Damage—One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476 (1975); Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1; Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157 (1984); Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980); Wald, *Some Thoughts on Judging as Gleaned From One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887 (1987); Wasby, *Appellate Delay: An Examination of Possible Remedies*, 6 JUST. SYS. J. 325 (1981); Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977); Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977); Hellman, *Courting Disaster*, 39 STAN. L. REV. 297 (1986) (Book Review).

5. In 1960, the number of authorized circuit judgeships was 68. 1960 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 68. In 1962, it was increased to 78, then to 88 in 1966, to 97 in 1968, to 132 in 1979, and to 156 in 1985. 1981 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 185; 1986 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 2.

6. A committee of the Judicial Conference at one point took the position that a single court of appeals should not be allotted more than nine active judgeships. 1964 U.S. JUD. CONF. REP. 15.

and en banc procedures become unwieldy.⁷ If new circuits are created instead, inter-circuit conflicts multiply, and the Supreme Court's ability to resolve them cannot keep pace.⁸ Finally, creation of more judgeships decreases both the collegiality of the courts and the prestige of the position, thus making the judicial profession less attractive to highly qualified candidates. These problems have led the circuit courts to develop an alternative strategy for augmenting their productive capacity—increasing the number of law clerks, legal externs, and staff attorneys.

1. *Law clerks and legal externs*— The personal law clerk, or “elbow clerk,” has been a fixture on the American legal landscape for over a century. The practice of employing recent law school graduates to serve as research assistants and sounding boards began in the 1880's in the Supreme Court and spread to the lower federal and state courts.⁹ By 1930, Congress had supplied each federal circuit judge with a law clerk.¹⁰ A second clerk was added in 1970, and a third in 1980.¹¹ In addition to the three law clerks, some circuit judges employ “legal externs.” They are second- and third-year law students who work in judges' chambers in the manner of law clerks and are compensated with law school academic credits instead of money.¹²

Several commentators have expressed concern about this proliferation of legal assistants within the judges' chambers. One danger is overdelegation. None of the commentators charges that clerks have taken over the decision-making process,¹³ but they do fear that clerks are performing significant judicial

7. More judges, of course, means more three-judge panels and thus more opportunity for different rulings on the same issue. En banc procedures are designed to resolve such inconsistencies, but en banc hearings can be unwieldy in large circuits. For a discussion of the difficulties that attend en banc hearings in very large courts, see P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 161-63 (1976). For reasons of this kind, Congress split the unwieldy Fifth Circuit in 1981 and created the Eleventh Circuit. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994.

8. The inability of the Supreme Court to resolve conflicts among the circuits is one of the reasons for the suggestion that a national court of appeals is needed. See U.S. COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 16 (1975).

9. A fine history of the judicial clerkship is contained in J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 10-35 (1980). A shorter treatment can be found in Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1128-37 (1973).

10. Act of June 17, 1930, ch. 509, 46 Stat. 774.

11. Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253, 256 n.10 (1980).

12. The practice is discussed in J. OAKLEY & R. THOMPSON, *supra* note 9, at 27-29.

13. See, e.g., Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 768 (1983); *Annual Judicial Conference Second Judicial Circuit of the United States*,

work.¹⁴ The traditional model of the law clerk as a research aid and a sounding board did not include ghostwriting for the judge.¹⁵ To paraphrase Justice Brandeis, one of the reasons for the respect enjoyed by judges is that they did their own work.¹⁶ Now, however, it is clear that the clerks are doing much of the drafting.¹⁷ As Judge Rubin of the Fifth Circuit observed:

These 1612 talented lawyers are doing something. They are not merely shelving books and shepardizing citations. . . . They are not making final decisions, but they are assuming some of the responsibility that inheres in the craft of judging. In one fashion or another we are delegating to them some of the things we don't have time to do. That is why they are there.¹⁸

The increase in both the number of clerks and in the reliance on their work has transformed the role of the circuit judge. As the judge's staff increases, more time must be spent interviewing candidates, supervising clerks, and editing their work; less time is available for reading, writing, and thinking. Furthermore, judicial collegiality suffers. As the judge's staff becomes larger, she necessarily will tend to consult more with her staff and less with her colleagues.¹⁹ Thus, the judge, once a "solitary craftsman"

93 F.R.D. 673, 748 (1981) (Remarks of Judge Alvin B. Rubin) [hereinafter Remarks of Judge Rubin].

14. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981); Remarks of Judge Rubin, *supra* note 13, at 748.

15. Remarks of Judge Rubin, *supra* note 13, at 748.

16. C. WYZANSKI, *WHEREAS: A JUDGE'S PREMISES* 61 (1965) (quoting Justice Brandeis, who made this comment about the Supreme Court justices).

17. The enhanced role of the clerks is revealed in the changing nature of judicial opinions. According to Judge Posner, they are longer, less individualistic in style, more cautious (string cites abound), and less candid (novelty and imagination are disguised as deduction). Paradoxically, Posner also finds them less well researched. Finally, and most important, they reveal less of the judge's decisional process and so are less valuable to the bench and bar as accurate predictors of how the judge will rule in future cases. R. POSNER, *supra* note 3, at 107-10.

18. Remarks of Judge Rubin, *supra* note 13, at 748 (discussing the 1612 staff and personal law clerks employed by federal district and circuit judges in 1981).

19. On the threat to collegiality, the leading treatise on appellate reform suggests that:

Numerous clerks serve to insulate the judges from one another. The larger the judge's personal retinue becomes, the greater is the tendency for the judge to

and a "collegial arbiter,"²⁰ has become a delegator and an editor.

2. *Central staff attorneys*— The courts came to realize that appointing more law clerks strained the judges' supervisory capacities and rapidly reached a point of diminishing returns in productivity.²¹ For more assistance, they have turned instead to staff attorneys—legal assistants who work for the court as a whole rather than for a single judge.²² One of the most important duties of staff attorneys in the federal circuit courts²³ is to screen cases for degree of difficulty.²⁴ Difficult cases involving novel or important issues of law or very complicated facts are placed on the oral argument calendar and routed to a panel. Easier cases—frivolous appeals or cases readily resolved by the application of well-settled law to uncomplicated facts—are scheduled for submission on briefs. For each of these easier cases, the staff prepares a memorandum to acquaint the judges with the relevant law and facts and often prepares a draft opinion as well.²⁵

confer with his staff rather than with his judicial colleagues. He may become less receptive to peer argument in conference. This kind of relationship between peers, which seems to be a probable outcome of the proliferation of personal clerks, can be seen in the working of several federal administrative agencies.

P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 7, at 45-46.

20. Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60, 62 (1982).

21. Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 UCLA L. REV. 465, 467-78 (1976); Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211, 1213 (1973). Further, some judges realized that the use of law clerks for preargument research involves a duplication of effort. If each judge on a three judge panel uses a law clerk to prepare for argument, the basic legal research is done thrice instead of once. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157, 159 (1984).

22. R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 83 (1976); D. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume* 17 (1974).

23. The early history of central staff goes back to the use of "commissioners" in some state systems. More recently, Judge T. John Lesinski of Michigan and Judge Winslow Christian of California began making extensive use of staff attorneys in the intermediate appellate courts of their states. The United States circuit courts began using staff attorneys in the late 1960's and early 1970's. Ubell, *supra* note 21, at 157-61.

24. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 7, at 48-51; D. MEADOR, *supra* note 22, at 31.

25. The use of staff attorneys by the circuit courts for screening appeals and drafting memoranda and opinions is discussed in Ubell, *supra* note 11, at 253.

Use of staff attorneys for case screening and opinion drafting has proved much more controversial than the courts' reliance on law clerks. Indeed, one distinguished commentator labelled as "cancerous" the growth of the courts' central staffs.²⁶ The danger of overdelegation of the judicial function is greater with staff attorneys than with law clerks. The staff attorney is not hired by the individual judge and so owes his loyalty to the court as a whole rather than to an individual judge.²⁷ Further, the staff attorney works outside the judge's chambers, often in another city, and, therefore, is unable to acquire enough of the individual judge's outlook and values to function as his alter ego in the drafting process.²⁸ Finally, in some courts, staff attorneys hold their positions much longer than the traditional one- or two-year term of the law clerk; this practice has caused suspicion among the bar that there is a "hidden judiciary" upon which the nominal judiciary relies too heavily.²⁹

Critical commentary on central staff has also focused on the screening function. Once a case has been identified as routine or frivolous by the central staff, it will receive very little consideration by the judges.³⁰ The volume of the caseload and the need for time to work on "difficult" cases can lead the judges to rubber stamp a disposition proposed by the staff attorney.³¹ This practice leads to the "no judge opinion," excoriated by a number of commentators.³² Thus, the most damning critique of central staff screening is that it creates the possibility that the real decision-makers will not be the publicly chosen and accountable judges, but rather a group of legal bureaucrats unknown to the bar and the public.³³

26. McCree, *supra* note 14, at 787.

27. Posner, *supra* note 13, at 775.

28. *Id.*

29. Bird, *The Hidden Judiciary*, JUDGES' J., Winter 1978, at 4, 4-5. Concerns about a hidden judiciary prompted one leading scholar to recommend that staff attorneys be hired directly out of law school for a one- or two-year term. Hellman, *Central Staffs in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937, 951 (1980).

30. Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 21.

31. Schroeder, *Judicial Administration and Invisible Justice*, 11 U. MICH. J.L. REF. 322, 330-31 (1973).

32. The phrase originated with Professor Robert S. Thompson, retired Judge of the California Court of Appeal. Thompson, *Mitigating the Damage—One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476, 476 (1975); *see also* Bird, *supra* note 29, at 4-5.

33. *See* Bird, *supra* note 29, at 5; Schroeder, *supra* note 31, at 330. For this reason, the Commission on Revision of the Federal Court Appellate System (known as the

B. Process Efficiency: Reduced Oral Argument and Selective Publication

Instead of adding to the decision-making machinery, a court can attempt to cope with the flood of litigation by reducing the resources devoted to deciding each case. A number of expedients have been tried in this area, including streamlined appellate procedures,³⁴ prehearing settlement conferences,³⁵ and decision by oral opinion.³⁶ Two types of process reform that have received particular critical commentary are reduction in oral argument and use of unpublished opinions.

1. *Reduced oral argument*— We read more quickly than we speak. This simple truth lies at the heart of the widespread reduction of oral argument in many appellate courts. Many courts now decide appeals on what is euphemistically called “submission”;³⁷ appeals are decided on the basis of written briefs unaccompanied by the traditional oral argument. This reduction, entirely judicial in origin,³⁸ was designed to address the appellate overload problem, and its use has grown dramatically in recent years. In fiscal year 1984, for example, thirty-seven percent of all appeals in the federal circuits were terminated on submission.³⁹

Hruska Commission) recommended that central staff attorneys not have responsibility for screening cases for disposition without oral argument. U.S. COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., *supra* note 8, at 53-54; *see also* STANDARDS RELATING TO APPELLATE COURTS § 3.62, commentary at 98-99 (1977).

The major problem with a central legal staff is that judicial responsibility may be diffused among the staff to the detriment of the appellate process. If a court employs a central staff, it must be continually alert to the risk of internal bureaucratization and guard against any tendency to rely on staff for decisions that should be made only by judges personally.

Id.

34. Examples of “streamlining” include fewer and shorter briefs, expedited scheduling, and smaller records. *See, e.g.,* Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 COLUM. L. REV. 1209 (1978) (focusing on preargument conferences). The Civil Appeals Management Plan (CAMP) program is also discussed in Rack, *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 U. TOL. L. REV. 921 (1984).

35. *See, e.g.,* Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 MINN. L. REV. 1221 (1979).

36. This is a common practice in only a few American appellate courts, although it is the practice in England. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 739-41 (1983).

37. Submission is a euphemism because the parties generally are told there will be no argument. They may submit, but only because there is no choice.

38. Meador, *supra* note 36, at 734.

39. J. CECIL & D. STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS* 5 (1985).

Six of the circuits now dispense with argument in at least half of their cases.⁴⁰

The reduction in oral argument requires the circuits to develop screening procedures to identify the cases to be decided on submission; also, many circuits use a different apparatus to decide the submitted cases.⁴¹ The benefits derived from these steps include the conservation both of judicial resources⁴² and of litigants' time and money.⁴³ Combining the reduced argument regime with screening procedures and significant staff involvement further enhances efficiency.

Reduced oral argument has been subjected to significant criticism by both academics⁴⁴ and practicing lawyers.⁴⁵ Even many judges are uneasy.⁴⁶ Commentators contend that substantial benefits are associated with oral argument⁴⁷ and that a heavy price is exacted when argument is reduced.⁴⁸ Judge Richard Posner describes those benefits succinctly: "[T]he value of oral argument to judges is high. This is not just because it gives the judge a chance to ask questions of counsel, . . . but also because it provides a period of focused and active judicial consideration of the case."⁴⁹ A case decided without argument, then, is a case decided on the basis of paper alone. Moreover, given the growth of the judicial bureaucracy, it is possible that the paper has been processed by parajudicial personnel rather than by judges. Argu-

40. J. CECIL & D. STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* 2 (1987).

41. The procedures vary greatly among the circuits. *See generally* J. CECIL & D. STIENSTRA, *supra* note 39. In some circuits, screening procedures permit judges to decide nonargued cases at a single sitting, immediately after reviewing the case and determining that it does not warrant an oral argument. The judges save the time that they would otherwise spend becoming reacquainted with the facts and issues for a subsequent disposition of the case. *See id.* at 3.

42. There has been little analysis of the supposed benefits of reduction in oral argument. We do not know of any empirical data that validate the intuitive proposition that reduced oral argument saves time. Two careful investigators have concluded that any savings in time associated with reduced oral argument "appears to derive substantially from the additional resources provided by the staff attorney's office." J. CECIL & D. STIENSTRA, *supra* note 40, at 166.

43. *See* Rubin & Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?*, 42 MD. L. REV. 752, 761-62 (1983).

44. *See* J. CECIL & D. STIENSTRA, *supra* note 40, at 10 n.7.

45. "[L]awyer unhappiness and outright hostility to the cutting off of oral argument was apparent from the outset." Meador, *supra* note 36, at 734. The American Bar Association adopted a resolution in 1974 that urged that oral argument be preserved. *See* J. CECIL & D. STIENSTRA, *supra* note 40, at 12.

46. *See* Meador, *supra* note 36, at 735 n.16.

47. Professor Meador likes oral argument so much that he is willing to substitute it for written briefs in some cases. *See* Meador, *supra* note 36, at 749-51.

48. *See e.g.*, J. CECIL & D. STIENSTRA, *supra* note 40, at 134-39.

49. R. POSNER, *supra* note 3, at 119-20.

ment requires the judge to appear before counsel and demonstrate her own mastery of the case. As one judge has observed, after oral argument, "the bar then knows they have looked the judge in the eye and that the clerks aren't making the decision."⁵⁰ Without oral argument, it is impossible to be sure whether the judge has had any input into the decision-making process, or indeed, whether she has done more than sign an order prepared by a clerk, a staff attorney, or an extern. Of course, a judge can be as unprepared for argument as for any other part of the case. At least at argument, however, this lack of preparation can be exposed.

Oral argument also serves other ends. It removes the appellate judge from the insulating barrier of paper and helps her realize that the case involves real people.⁵¹ Oral argument helps keep the judicial office "a personal one."⁵² Ideally, the briefs adequately present the litigants' positions for judicial resolution, and further argument is unnecessary. In reality, however, that ideal is seldom realized, and attorneys use argument to supplement inadequate written materials.⁵³ Argument is also a chance to grab the attention of the court, to interest the judges in the case, and to change their perceptions of the problem.

In summary, oral argument increases the judge's personal involvement in the case, makes the judge more accountable to the litigants, and increases the litigants' confidence in the appellate process. These are benefits that should not be set aside lightly.

2. *Unpublished opinions*— The pernicious impact of the increased use of parajudicial personnel and the reduction of oral arguments has been exacerbated by recent developments in opinion publication. Again, the goal is to ease the work of overburdened judges.⁵⁴ The argument for selective publication turns upon the belief that judicial opinions serve two different

50. J. CECIL & D. STIENSTRA, *supra* note 40, at 136-37.

51. Reflecting on the relative insulation of trial and appellate judges, one U.S. appellate judge remarked that "any solemn chump can get away with being an appellate judge, but it takes an honest-to-God he-man to be a good trial judge." Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 1 (1958).

52. McCree, *supra* note 14, at 790.

53. *See id.*

54. When the bar was concentrated among a small number of lawyers at Westminster, the availability of judicial opinions was not an issue, for those opinions circulated freely among the members of the bar. Because the practice of law has expanded both geometrically and geographically, however, the need to have access to opinions requires that they be accessible readily—that is, that they be *published*. *See generally* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Ap-*

functions: (1) a dispute-settling function, which involves correcting lower court error and explaining the result to the parties; and (2) a law-making function, which involves construing statutes and constitutions, reshaping precedent, and commenting upon legal institutions.⁵⁵ Opinions that serve only the dispute-settling function have value only to the parties and the lower court and need not be published. By not publishing those opinions, it is argued, judges can save considerable time. Because of its limited audience and limited purpose, an unpublished opinion need not contain a detailed recitation of the facts, a discussion of every legal issue raised by the parties, or a scholarly review of the governing legal principles and authorities.⁵⁶ Further time savings are possible because the mechanical tasks associated with publication, such as cite checking and proofreading, are unnecessary.⁵⁷ Finally, limiting publication produces subsidiary benefits to the bench and bar by reducing both the cost of acquiring and storing more published volumes of reports and the cost of conducting research in a geometrically increasing legal library.⁵⁸

Many courts that have adopted limited publication programs have also adopted rules that sharply curtail or forbid the citation of unpublished opinions as precedent.⁵⁹ This curtailment grows out of two concerns. The first concern is with fairness based on a fear that some litigants, such as the Justice Department, will have better access to unpublished opinions than others; limiting the use of unpublished opinions as precedent eases but does not solve this problem. A no-precedent rule also insures that a judge can be confident that an unpublished opinion will not lead to problems later. Hence, the time savings promised by limited publication schemes can be realized without

peals: The Price of Reform, 48 U. CHI. L. REV. 573, 575-77 & nn. 6-14 (1981).

It has never been the practice to publish all opinions even of appellate cases; indeed, written English case law originated as the product of lawyers taking notes of what was said in courts. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 268 (5th ed. 1956).

55. See Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971).

56. See Reynolds & Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1182-83 (1978).

57. *Id.* at 1184.

58. *Id.*

59. D. STIENSTRA, *UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS* 3, 22-28 (1985).

worrying that a careless word might later come back to haunt the court.⁶⁰

The possibilities of saving significant amounts of resources led the circuit courts to begin limiting the publication of their opinions. Neither the Federal Judicial Center nor the Judicial Conference of the United States, however, has made definitive recommendations concerning the publication of opinions. Instead, each circuit has promulgated its own plan for determining when opinions should be published, whether they may be cited, and whether they may be used as precedent.⁶¹ The plans vary quite widely in the way they address those questions.

Limited publication of judicial opinions has met with substantial criticism from commentators,⁶² who have raised a number of objections to the practice.⁶³ The most strident attack has been directed at the diminished quality of the courts' products. One study found that in nine of the eleven circuits, at least twenty percent of the unpublished opinions failed to satisfy a very undemanding definition of minimum standards; in three circuits, sixty percent of the opinions failed to satisfy minimum standards.⁶⁴

A second critique focuses on the disproportionately frequent use of unpublished opinions in certain types of cases, especially in civil rights cases, Social Security cases, cases involving prisoner petitions,⁶⁵ and cases where the appeal was filed in forma pauperis.⁶⁶ The heavy concentration of unpublished opinions in those areas certainly gives rise to an appearance of a double standard of justice.

60. Of course, a court *might* use the opinion to buttress a later decision. That is unlikely to happen under a no-precedent regime because the unpublished decision cannot be used as support unless the court flouts its own rules.

61. The history is discussed in more detail in Reynolds & Richman, *supra* note 56, at 1168-72.

Many state courts have followed a similar pattern. In Ohio, the question of publication was left entirely up to the courts. Led by an intermediate appellate judge, reformers convinced the Ohio Supreme Court to adopt rules that set forth standards for publication and citation. See generally Reynolds & Richman, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313 (1985).

62. A partial bibliography is found in Reynolds & Richman, *supra* note 54, at 573 n.3. See also D. STIENSTRA, *supra* note 59, at 2 n.3.

63. Few critics believe that all opinions should be published. Almost all, however, believe that the current system needs substantial reform. Our own proposals are set forth in Reynolds & Richman, *supra* note 54, at 626-30.

64. *Id.* at 602 table 10. An opinion satisfied "minimum standards if it gave some indication of what the case was about and some statement of the reasons for the decision." *Id.* at 601 n.75.

65. *Id.* at 622 table 14.

66. *Id.* at 622.

Commentators have also pointed out that unpublished opinions reduce judicial accountability by making the decision-making process less public, and hence less visible. Visibility is critical if judicial performance is to be evaluated. An unpublished opinion can hide many problems ranging from laziness to incompetence to venality. Of course, it is possible that no such problem exists. Unless the judges make themselves and their craftsmanship publicly accessible, however, it is difficult to tell.

The use of unpublished opinions also makes intermediate appellate courts less accountable to reviewing courts. Because an unpublished disposition makes no "law," a reviewing court with discretionary jurisdiction does not have to accept review to correct a bad precedent. Moreover, congestion at the top of the judicial pyramid makes it unlikely that review will be granted in a case that lacks systemwide impact. Finally, because unpublished opinions are typically less thorough and elaborate than reported decisions, it is more difficult for a reviewing court to understand exactly what was done below. As a result, an unpublished opinion is less likely to draw the critical attention of that court.

Another line of attack contends that limited publication may undermine the rule of stare decisis. Because little attention is paid to the law and facts involved in an unpublished opinion, the court may miss out on the opportunity to create or modify precedent in an area that may well need it. The court may not realize that the seemingly routine case before it, if decided in a thoughtful and published opinion, would contribute to the body of available precedent. Further, a cursory unpublished opinion does not demand much mental effort from the judge. She need not analyze the problem at the depth that would be required to produce a fully reasoned opinion.⁶⁷ That kind of attention might have led to the conclusion that the case did have the potential for generating a law-making opinion. Thus, an early decision that a case does not warrant a published precedential opinion may be self-fulfilling.

Finally, the scholarly attack has focused on the premises underlying the limited publication regime. In the first place, the very limited empirical data do not demonstrate that time can be saved by not publishing opinions.⁶⁸ "Any opinion, published or unpublished, will set forth the relevant facts and explain why the case is governed by the precedents favoring the government

67. See McCree, *supra* note 14, at 790-91.

68. See Beyler, *An Appraisal of Supreme Court Rule 23*, 72 ILL. B.J. 80, 85 (1983); Reynolds & Richman, *supra* note 54, at 604-06.

. . . or vice versa. The degree of care necessary to bring this explanation up to publication standards should not be great."⁶⁹ There is also no evidence demonstrating that attorneys save time by having to research fewer decisions. In the absence of statistical evidence, one could just as readily assume that a greater body of precedent would facilitate the research process. More case law might make finding a case on point easier and less time consuming, thereby reducing the need to reason by analogy.⁷⁰

II. EFFECTS OF THE CRITICAL COMMENTARY

The appellate streamlining devices have worked major changes in staff and process in the circuit courts. Those changes have been subject to considerable scrutiny and criticism. This Part considers the rather minimal impact the critics have had on the courts.

A. *Parajudicial Personnel*

The commentary critical of the judges' reliance on parajudicial personnel has had three different kinds of effects. First, it has prompted some judges to defend publicly the practice of relying on law clerks. Judge Harry Edwards of the District of Columbia Circuit has responded to the suggestion that judges rely too heavily upon the opinion drafts of their law clerks by explaining how opinions are drafted in his chambers:

It is absolutely clear to me and to my clerks that no opinion leaves my chambers until I personally have completed work on a written product that satisfies my own standards. Every detail of my opinions must conform to my thinking and preferred methods of expression. Al-

69. Hellman, *Courting Disaster* (Book Review), 39 STAN. L. REV. 297, 301 (1986); see also Wald, *Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 782 (1983) ("A minimum opinion need not be unduly time consuming to write.").

70. R. POSNER, *supra* note 3, at 123. Judge Wald dissents on this point. See Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987).

though my clerks labor tirelessly to assist me in this work, they and I know that the final product is mine.⁷¹

Judge George Edwards of the Sixth Circuit views clerks in much the same way:

Law clerks are the most obvious aid to time-pressed appellate judges. I use the two which the federal government now allows me to save time in every way I can think of consistent with judicial duty. But no law clerk has ever—or will ever—write an opinion for me. And I likewise reject the incorporation in an opinion of language from any law clerk memorandum. If I write a sentence I know for certain what I mean. If I copy a sentence, I am by no means so sure. And I believe lawyers and litigants are entitled to judicial opinions.⁷²

A second development, probably a result of the commentators' criticisms, is the proliferation of empirical and descriptive studies of courts' use of central staff attorneys. The Commission on Revision of the Federal Court Appellate System considered the subject,⁷³ and the Federal Judicial Center sponsored three studies, one in 1974,⁷⁴ one in 1978,⁷⁵ and one in 1980.⁷⁶ Each study concluded that the use of staff attorneys helped the circuit courts deal with the increasing volume of appeals without sacrificing the fundamental imperatives of appellate justice.⁷⁷ Professor Arthur Hellman conducted the most intensive study of a court's use of central staff when he served as the Supervising Staff Attorney for the Ninth Circuit from December 1977 through August 1978. He reorganized the court's central staff and concluded that improper delegation of the judicial function can be avoided if: (1) each judge of a three-judge panel has equal

71. Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259, 266 (1981); see also Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 884-90 (1983).

72. Edwards, *The Avoidance of Appellate Delay*, 52 F.R.D. 61, 68 (1970).

73. See U.S. COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., *supra* note 8 at 53-54.

74. Flanders & Goldman, *Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study in the Fourth Circuit*, JUST. SYS. J., Mar. 1975, at 1.

75. R. BANTA, *CENTRAL LEGAL STAFFS IN THE UNITED STATES COURTS OF APPEALS* (1978).

76. Ubell, *supra* note 11.

77. See R. BANTA, *supra* note 75, at 5; Flanders & Goldman, *supra* note 74, at 13-14; Ubell, *supra* note 11, at 307.

responsibility for every appeal on which he sits until the case is assigned for drafting of the opinion; (2) every case decided on the merits is discussed at a conference; (3) the staff does not draft opinions until the judges have considered the case; and (4) the court employs recent law school graduates for one- or two-year periods rather than hiring more senior lawyers who serve as career staff attorneys.⁷⁸

A third and more concrete development was also due in part to the commentary critical of the burgeoning bureaucracy of parajudicial officials in the circuit courts. The Judicial Conference adopted guidelines limiting the number of central staff attorneys in a circuit to the number of active judgeships authorized for that court.⁷⁹ Congress later ratified that limitation.⁸⁰

B. Process Reform

Criticism of process reform has had an even less significant effect on judicial behavior. Despite a fair amount of unease among the judges concerning the reduction in oral argument and the increase in unpublished opinions, silence has been the only real response to the critics. Although both trends have been the subject of rule making and elaborate studies, there has been no retreat.

1. *Oral argument*—One response to concerns about reduced oral argument has been the development of procedures to regulate the process while achieving efficiency and fairness. Today, almost all circuits have developed procedures for identifying

78. Hellman, *supra* note 29, at 998-1003. Hellman believes that the danger of overdelegation is greater if the staff is composed of career attorneys whom the judges have come to know and trust. He also suggests that a recent graduate is likely to perceive difficulties or questions in the law that a more seasoned attorney would regard as settled matters. *Id.* at 1002-03.

79. 1981 U.S. JUD. CONF. REP. 69. The Conference adopted the guidelines after a report by the Committee on Court Administration chaired by Judge Elmo B. Hunter. The guidelines seem to have originated as a response to Congressional concern, which in turn may have been caused by critical commentary. Reports from the Appropriations Committees of each house expressed the expectation that authorization of a third law clerk for each active circuit judge would remove the need for staff attorneys. The reports requested a study of the question by the Judicial Conference. See S. REP. No. 251, 96th Cong., 1st Sess. 53 (1979); H. REP. No. 247, 96th Cong., 1st Sess. 39 (1979). Pursuant to these congressional requests, the Administrative Office of the United States Courts assigned Judicial Fellow Donald Ubell to make the requested study. Ubell concluded that the staff attorney positions could not be eliminated without creating an increased backlog in the circuit courts. See Ubell, *supra* note 11, at 307-09.

80. 28 U.S.C. § 715 (1982).

cases not to be argued.⁸¹ There are also protocols in most circuits that describe judicial responsibilities in this area.⁸²

The Federal Judicial Center has also sponsored two studies of reduced oral argument. The first describes the various procedures used by the courts.⁸³ The second, an exhaustive and intelligent evaluation of the work of four circuits, provides the first systematic report of the practice.⁸⁴ Because it concludes that there is general judicial acceptance of current procedures, this report is not likely to spark any change.

Thus, large-scale reduction of oral argument seems to be a permanent alteration of our appellate landscape. It is not hard to see why, for it combines the promise of efficiency with ease of disposition. Moreover, the reduction reduces judicial contact with the routine and unexciting case. The judge can devote the greater part of her energy to the cases where that involvement will be rewarded, and her support staff can handle the routine matters. One judge captured this point nicely when he said that "even if there were no caseload pressures, there still would be a place for the [screening program] to get the junk out of the system."⁸⁵ For these reasons, there has been no movement to restore oral argument to its former glory. The clock is not likely to be turned back.

2. *Unpublished opinions*— Scholarly analysis of selective publication has been overwhelmingly critical. Even some judges have joined the chorus.⁸⁶ Nevertheless, the flood of unpublished opinions continues unabated.⁸⁷

Again, there have been studies and rules. The Federal Judicial Center sponsored a study of the entire process a decade ago⁸⁸ and recently released a report on the problem of unequal access

81. See generally J. CECIL & D. STIENSTRA, *supra* note 39. The two exceptions are the D.C. and Second Circuits, which hear arguments in most cases. *Id.* at 7.

82. See *id.* at 33 table 4.

83. J. CECIL & D. STIENSTRA, *supra* note 39.

84. J. CECIL & D. STIENSTRA, *supra* note 40.

85. *Id.* at 136 (quoting anonymously a judge interviewed as a part of the study).

86. See, e.g., R. POSNER, *supra* note 3, at 124. *But see, e.g.,* Anstead, *Selective Publication: An Alternative to the PCA?*, 34 U. FLA. L. REV. 189 (1982); Nichols, *Selective Publication of Opinions: One Judge's View*, 35 AM. U.L. REV. 909 (1986).

87. The current nonpublication rate is around 50%. D. STIENSTRA, *supra* note 59, at 40 table 2. The situation in the states is even worse. Kentucky's intermediate appellate court published about 10% of its opinions in the early 1980's. Render, *On Unpublished Opinions*, 73 KY. L.J. 145, 145 n.4 (1984). Ohio's intermediate court published less than 5% of its opinions. Reynolds & Richman, *supra* note 56, at 316 n.24. The figure has been declining dramatically in recent years. The Illinois intermediate appellate court publication rate fell from 72% to 46% in civil cases between 1980 and 1982. Beyler, *supra* note 68, at 82.

88. Reynolds & Richman, *supra* note 54.

to unpublished opinions.⁸⁹ Although those reports made specific recommendations for change, they have had little impact.

The courts have also engaged in rule making. Each circuit has adopted Publication Plans of varying scope and level of generality. Those Plans have been in effect for more than a decade with little change.⁹⁰ The absence of revision is not surprising, for the available evidence suggests that the judges pay but scant attention to the content of the Plans.⁹¹ Once the "paper rule" is in place, judges seem to feel that no more attention need be paid to the problem.

As is the case with the reduction of oral argument, the widespread use of selective publication is here to stay. Again, in spite of judicial disquiet and academic and professional discontent, there is not likely to be significant change.

III. THE FAILURE OF CRITICISM

The preceding section has described the relatively minimal effects of the substantial body of scholarship critical of the streamlining procedures of the courts of appeals. Commentators have clearly identified significant costs that these devices have imposed on the judicial process—more bureaucracy, less accountability, and a dramatic reduction in the visibility of justice.⁹² Yet the criticism seems to have had very little effect—at least if effect is measured by changes in judicial behavior. The percentage of terminations without oral argument has increased rather than decreased during the last ten years—the period

89. D. STIENSTRA, *supra* note 59.

90. There have been a few changes in the circuits' opinion publication rules that appear to be responsive to critical commentary. Several circuits have changed their rules to permit citation of unpublished opinions. See 5TH CIR. R. 47.5.3; 6TH CIR. R. 24(b); 11TH CIR. INTERNAL OPERATING PROCEDURE (pursuant to 11TH CIR. R. 36-1). Interestingly enough, one circuit changed its rule in the opposite direction and now, with certain exceptions, forbids citation of unpublished opinions. 10TH CIR. R. 36.3. Three judges dissented publicly from this decision, citing several commentators critical of no-citation rules. See 10TH CIR. R. app. III (Holloway, C.J., joined by Barrett and Baldork, JJ., concurring and dissenting in the Rules). In apparent response to a suggested model rule in Reynolds & Richman, *supra* note 54, at 626-28, two circuits have amended their rules to provide for publication of opinions that reverse the decision below or that are accompanied by a separate dissenting or concurring opinion. See 5TH CIR. R. 47.5; 6TH CIR. R. 24(a).

91. See generally Reynolds & Richman, *supra* note 54.

92. See, e.g., J. CECIL & D. STIENSTRA, *supra* note 40, at 133-68.

when the critics have been most active.⁹³ Similarly, nonpublication rates remain high. Finally, reliance upon parajudicial personnel increased radically during the 1970's, although it appears to have stabilized in this decade.⁹⁴

On initial examination, this lack of significant change is surprising. First, it is very difficult to believe that the appellate judges have been unaware of the critiques; many have been published in prestigious journals with high circulation. Occasionally, papers have been published by the Federal Judicial Center and distributed to all federal judges. Second, the volume of criticism has been relatively large, and articles criticizing the appellate streamlining devices outnumber those defending them. Indeed, some of the judges themselves have joined the attack. Third, the critics' arguments, directed as they are to the traditional goal of common-law judging—considered decisions by accountable judges explained in reasoned opinions—are not the sort of academic carping that can be dismissed cavalierly by the courts.

Why then has there been so little result from so much scholarship? From the judges' point of view, the critics might appear to be ivory tower scholars out of touch with the urgent demands of steadily increasing caseloads. Law professors typically teach fewer than eight hours per week. Given this leisure of the theory class, the judges might find academic criticism of caseload streamlining devices hypocritical. Moreover, judges, like everyone else, dislike criticism, are defensive about it, and resist changing in response to it.

We believe, however, that the major reasons for the lack of significant effect are quite different. The principal causes for the judges' reluctance to abandon or curtail the streamlining strategies are: (1) their perceptions of the quality as well as the quantity of their caseload; (2) their pre-judicial status, work styles, and conceptions of appellate judging; and (3) the comforting illusion that the streamlining strategies permit. These explanations tell us much about the nature of judging in late twentieth-century America.

93. Compare 1976 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 161 (2558 cases out of 8660, or 29.5%, decided without oral argument) with 1986 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 103 (8306 cases out of 18,199, or 45.6%, decided without oral argument).

94. In 1980, the number of clerks per circuit judge stabilized at three. See *supra* note 11 and accompanying text. In 1981, the Judicial Conference of the United States limited the number of staff attorneys in a circuit court to the number of authorized judgeships, and Congress later ratified that limitation. See *supra* notes 79-80 and accompanying text.

A. *Quantity and Quality*

The cumulative effect of the three streamlining strategies has been to create different levels of judicial involvement, and perhaps different classes of justice, within the mandatory appellate jurisdiction of the circuit courts. Some cases, the most interesting or notorious, will benefit from intense judicial involvement. The judges will hear full oral argument, confer with their colleagues, prepare (with the aid of law clerks) and circulate draft opinions, and, finally, produce a published precedential opinion. Other cases get very different treatment. The judges will not hear oral argument, and they may or may not confer. The opinion, unpublished and non-precedential, will be prepared by a member of a staff of young attorneys generally attached not to a single judge but to the court itself, and often working in a city hundreds of miles away from the judges on the panel. Because of this bifurcation, the circuit courts have come to resemble certiorari courts.⁹⁵ The appeal of right guaranteed by statute seems to guarantee only a review by staff working under judicial supervision. Traditional appellate review is reserved for only a select portion of the entire caseload.

The present bifurcation is not a necessary result of increasing caseloads. Judges do not have to lavish attention on one class of cases and spend little of their own time and effort on another. They might, for instance, cope with increased caseloads by reducing proportionately the amount of time spent on each case. Their collective choice of one time-saving strategy rather than another is dictated by their perceptions of the great differences in quality among appellate cases.⁹⁶ Some cases—the ones that demand new law, require the interpretation of federal statutes and constitutional provisions, or implicate significant or controversial economic and social problems—deserve more attention. Other cases—hopeless appeals prosecuted by criminal defendants or prison inmates who have no disincentive to appeal, and routine appeals of monotonous Social Security administrative decisions—warrant less judicial time and effort.⁹⁷ That these

95. For an earlier suggestion that the circuit courts are becoming certiorari courts, see Reynolds & Richman, *supra* note 54, at 625.

96. See Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195, 195 (1972); COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 2-3, 5 (1973).

97. The law-and-economics scholars have adopted a sophisticated variation on this argument. They contend that although recent changes in appellate procedures are costly, they are worthwhile because they help the justice system work more efficiently. A more

perceptions exist is shown both by the arguments in favor of the streamlining devices and the disproportionate application of the time-saving devices to certain types of cases.⁹⁸ The judges' perceptions may be correct and their reactions to the perceptions understandable, but the bifurcated system is inconsistent with our stated goals of equal access to justice and the traditional role of our courts as the last refuge for society's dispossessed.

B. Pre-judicial Status, Work Style, and Perceptions of Appellate Justice

Judges' pre-judicial professional status and work styles also help to explain their relative satisfaction with the bifurcated system of appellate justice in the courts of appeals. Circuit judges are not recruited from among the ranks of the young, inexperienced, or undistinguished. Before an attorney warrants serious consideration for a circuit judgeship, she will have generated an impressive record of achievement in private practice, public service, or law teaching, as well as academic success. Such attorneys ordinarily do not deal with trivial, repetitive legal problems. Their talents and time are too valuable. If they did practice in an area where repetitive and routine problems predominate (and most probably did not), subordinates—secretaries, paralegals, and younger attorneys—handled the monotony and the details. Their own time and energy were devoted to the challenging or momentous cases and to the supervision of their staffs or assistants. Thus, the pre-judicial careers of the judges prepare them to accept their roles in the new, bifurcated model of appellate judging. In the words of Judge Posner, the judges "were supervisors in practice, and they slip easily into the role of being judicial supervisors."⁹⁹

efficient system, in turn, will dispense more (better?) justice to more litigants. See Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 40 REC. A.B. CTRY N.Y. 12, 33 (1985); Varat, Book Review, 74 CALIF. L. REV. 649, 655 (1986). A more attractive system will also attract better judges, which, in turn, will further increase the quality of justice. R. POSNER, *supra* note 3, at 116. This avowedly utilitarian argument not only lacks empirical verification, but it also grossly distorts a fundamental precept of our legal process: that each case should be determined on its own merits, and that no individual's suit should be sacrificed for notions of expediency.

98. Nonpublication of judicial opinions is higher in prisoner civil rights, Social Security, and postconviction remedy cases than in other types of litigation. Similarly, appeals filed in forma pauperis generate higher nonpublication rates than other appeals. See Reynolds & Richman, *supra* note 54, at 621-23.

99. R. POSNER, *supra* note 3, at 105. One commentator suggests that the circuit judge, supervising a staff of two secretaries and three clerks (and perhaps some legal externs),

Another factor of perhaps even greater significance is the judges' ideal conception of appellate justice, an image that permeates our entire legal culture. According to the traditional model, appellate justice involves careful briefing and nimble oral argument from counsel. From the judges, the classical paradigm requires study of the briefs and the record, close attention and questioning during oral argument, collegial sharing and testing of ideas in conference, research and drafting (with the help of law clerks) of proposed opinions, circulation of draft opinions to other members of the panel, and publication of a final opinion to be used as precedent by the bench and bar.¹⁰⁰ The great jurists that our legal culture remembers and reveres are the judges who lived this ideal—Cardozo, Holmes, Hand, Friendly—judges whose opinions are reproduced in the casebooks and dissected in the law reviews. The professional life suggested by the ideal model is intellectually challenging and brings the rewards of peer respect and craft-satisfaction. Given current caseloads, the modern appellate judge simply cannot aspire to the ideal for the whole of the docket. The streamlining devices, however, by minimizing judicial involvement with one portion of the docket, permit the judges to approximate the revered and satisfying ideal in the remainder. Thus, paradoxically, the desire to emulate the great judges of our tradition, surely one of the reasons why able attorneys aspire to the bench in the first place, provides a powerful motive for judges to accept the modern bifurcated model of appellate justice.

C. *A Cherished Illusion*

Another reason that may account for the judges' relative satisfaction with the streamlining strategies is that the strategies permit the judges, the Congress, and the bar to maintain a cherished illusion—that high quality appellate justice is available equally to all litigants in the federal system. Formally, of course, there is ample access to the courts. Civil rights statutes,¹⁰¹ post-

has become the "judicial equivalent of the managing partner of a small law firm." Hoffman, *supra* note 20, at 62; see also R. POSNER, *supra* note 3, at 105.

100. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 7, at 14-16. The authors title this short subsection of their book: "The Appellate Process When Leisure Prevails."

101. *E.g.*, 42 U.S.C. § 1983 (1982). The accompanying jurisdictional provision is 28 U.S.C. § 1343 (1982).

conviction remedies,¹⁰² in forma pauperis rules,¹⁰³ provisions for appointed counsel for indigent criminal defendants at every stage of the case,¹⁰⁴ and mandatory jurisdiction of the courts of appeals¹⁰⁵ all proclaim the willingness of the federal courts to hear the claims of those who feel aggrieved yet lack the resources usually required to gain access to the system. The access provided to many such litigants, however, is not access to the traditional model of appellate justice, but rather to the second-class, bureaucratic model.

Further, the pronouncements of access are pious and formal—federal statutes and revered Supreme Court decisions—and the deprivation of access is subtle and hidden—local rules and internal operating procedures of the circuit courts. Thus, most of us can maintain the cherished illusion that there is enough high quality appellate justice to go around. The illusion is comforting but pernicious, for it obscures a fundamental question concerning the distribution of society's dispute resolution resources. It may be quite sensible, in light of all the competing demands on limited societal resources, to restrict access to the circuit courts to litigants whose claims meet some test of monetary amount, societal interest, or legal merit; but surely if that strategy makes sense, we should adopt it publicly. It makes no sense to permit the public pronouncements of access to coexist with the actual practice of restriction. Surely the right thing to do with a fundamental question about the distribution of access to our courts is not to hide it. Our legal system justly prides itself on the maxim that the law is no respecter of persons. Each person's legal rights are unique. Our law redounds with recognized claims of offbeat and despised groups, a truth that is one of the great glories of American Law. Reforms in appellate administration that sacrifice that basic ideal should not be undertaken lightly.

102. *E.g.*, 28 U.S.C. §§ 2254-2255 (1982).

103. *E.g.*, 28 U.S.C. § 1915 (1982).

104. *E.g.*, 18 U.S.C. § 3006A (1982 & Supp. IV 1986); *see* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on appeal).

105. Congress has provided for jurisdiction in the federal courts of appeals from all final decisions of the district courts. 28 U.S.C. § 1291 (1982).

CONCLUSION

The scholarly critiques of the appellate streamlining procedures used by the circuit courts have demonstrated that those procedures pose a serious threat to the legal process. Nevertheless, the criticism has produced little significant change in judicial behavior. The relative failure of the critics tells us a great deal about the limits on the effectiveness of legal scholarship. Scholarly criticism of the practices of a legal institution is unlikely to produce significant change as long as those practices fill the needs of the most powerful actors in the institution. The lesson, although humbling for the scholars, should not come as a great surprise.