Ceremony and Realism: Demise of Appellate Procedure

In suffering the demise of appellate procedure, we have forgotten what appellate courts are for.

By Paul D. Carrington

THAT JUDGES make law is a perishable truth.

Undue attention to this central tenet of Legal Realism may be a cause of sickness in our legal system. The ceremonies of appellate procedure are atrophying in part because of their neglect by well-meaning Realists who see too little of their importance. If appellate procedure is important to the health of the law, the prognosis is not good. It is indeed time to decry the neglect and to revitalize our important ceremonies, even if this call sounds a retreat from the chief jurisprudential revelations of our time.

What has happened to appellate procedure is familiar. A major cause of change has been the enormous increase in appellate caseloads in recent decades. As our courts have responded to the pressure of time, they have abandoned the procedural amenities of oral arguments, conferences, and opinions.

A few years ago lawyers usually were assured in most courts that they would receive an attentive response to their arguments. Judges presented themselves at oral argument to discuss their contentions and in their opinions would present their reactions to advocacy. One could reasonably infer from the opinions that the judges had conferred and reached a deliberative decision.

The effect of these procedural amenities was that the court could be seen to be obeying and enforcing the law. Trial judges could be seen to be accountable for their obedience to the law. Lawyers so assured were better able to make predictions about the outcome of litigation, better able to identify hopeless claims and appeals that ought not to be litigated, and better able to plan transactions which avoid the presentation of disputes.

Gone are those days. In more than half the cases decided by some courts there is no oral argument, no conference of the judges, and no opinion. This is truly a radical change. Its like has occurred in almost every appellate court in the United States, federal or state.

There is no blame to be assigned to the judges. Caseloads have grown manyfold; judgeships have not. While Congress in 1978 increased the number of circuit judgeships by almost half, this number is still far less than enough to maintain the traditional ceremonies of appellate procedure. But the absence of fault does not assure the wisdom of what has been done. There is indifference to the radical change, which is widely shared among judges, legislators, and scholars. That indifference seems unjustified. My purpose is to protest it.

One reason for the indifference must be acknowledged. It is surely true that many of the cases now being brought to appellate courts are hopeless and require and deserve relatively little attention from the judges. In some cases oral argument is only an embarrassment. Granting this, it is yet very clear that summary procedures are not reserved for hopeless cases.

The broader and more important reason for the indifference of many participants and observers of the process is their shared perception that many of the cases are undeserving of full ceremony because they present no important and doubtful issue of the law or general public significance. Cases lacking these issues, it seems widely believed, do not merit the serious attention of appellate judges. In this view it is appropriate, at least when judicial energy is a commodity in short supply, for these cases to be handled by clerks or other anonymous functionaries of the judicial system or to be handled summarily. This widely shared view rests on a false doctrine that is Legal Realism run amok.

One statement of the false doctrine appears repeatedly in a recent article by a distinguished scholar, Owen Fiss, who asserts, "The task of the judge is to give meaning to constitutional values." But that oracular role can never for long be taken as a primary role of any judge. Explaining, refining, or expounding legal principles must be a secondary role at most.

Judges can, to be sure, make law. It took at least a century of jurisprudence to disengage our minds from the contrary untruth. But it is time, I believe, to remind ourselves that judges not only make law, they also decide cases—real cases between individuals and organizations who need always to be assured that their disappointments are the product of decisions made in conformity with law and not the personal whim of a judge; real cases between individuals and organizations whose obedience to the law is in some measure the product of their confidence that the law will in fact be enforced in case after individual case; real cases between individuals and organizations who will be tempted to exploit any doubt that can be turned to advantage in the planning of their legal affairs and in their conduct as litigants. In the Realists' obsession with judicial law making, we have lost our sense of purpose. We fail to perceive the basic and indispensable function of our appellate courts.

There are many causes for our confusion. The Supreme Court of the United States, without design on its part, has provided a false model for lower appellate courts. Legal education, equally without design, has contributed to our misdirection. Modern media of communication and our shared consciousness of the media also have served to confuse us. Confusion has been reflected not only in the process by which the bar has influenced the selection of appellate judges, it also has been reinforced by that influence. Some of the procedures of our present appellate courts themselves serve to reinforce the misperception of purpose.

Each of these causes merits brief explanation. The adverse influence of the Supreme Court is a product of its evolutionary response to the demands placed

on it. That evolution is marked by the 1925 legislation that gave the Court substantial control over its docket. With some exceptions, the Court chooses its cases. In accordance with the scheme of the 1925 draftsmen, Frankfurter and Landis, the Court generally declines to hear and decide by opinion cases that do not raise novel issues of law of importance to a significant number of people. As a result, the Court is rarely seen to be doing anything but making law. It is scarcely ever seen to soil its hands with the more pedestrian work of assuring enforcement of settled law. Insofar as the other courts naturally emulate the work of our highest Court, they are taught to disdain the basic function of the appeal.

The emergence of the university law school also has had powerful effects of a like sort. This is a complex matter that could bear close study. It would be incorrect to suggest that there are many judges who dance to the tune of academics, but a judge would have to be quite impervious not to be influenced by peer pressures that are associated, indirectly but intimately, with the kind of academic status produced by university law schools and highly valued in professional circles almost everywhere. Law review criticism of appellate opinions is only the most obvious form by which the academic influence is transmitted. Perhaps for that very reason, it is the least consequential, but it is true that a court that wants to receive the notice of law reviews or scholars or to be the object of attention in classrooms can achieve recognition only by writing opinions that advance the law.

The pressure of the incentives for academic status is more keenly felt through the appointment of appellate court clerks. Students compete academically to secure appointments by judges who are most highly respected in the academic community for their creative intellectual achievements. And judges, like law firms, compete to attract the clerks with the strongest academic records. The arena for this competition is scholarship in opinion writing, and the competition contributes to the tendency of appellate judges to concentrate their efforts on a few opinions in big or novel cases, to the neglect of the more routine business of the court.

This tendency is self-reinforcing. Once a judge has acquired the talents of academic clerks, those talents must be exercised. There is no better morale booster for the young clerk than to see his scholarship in the published opinions of his master judge. It is relatively demoralizing to young clerks who have striven so hard to prove their intellectual capacities to be assigned to the less welcome work of helping to familiarize the judge with factual details presented in cases in which settled law is to be applied.

For these reasons, the substantial increases in the personal staffs of appellate judges have contributed more visibly to the length of appellate opinions than to their number or wisdom. No one associated with law schools intended this particular effect, but it was a byproduct of the efforts of law schools to improve their intellectual quality and to persuade their students and others of the worth of that effort.

Professional audience overbalances the larger audience

The influence of the professional audience that rewards judges who are creative and literary is not in any way balanced by the influence of the larger audience that episodically observes the work of appellate courts. The rewards of public attention go to the court that makes "impact" or "public interest" or "structural" decisions, as they have come variously to be known. In recent decades there has developed a subprofession of legal journalism that specializes in calling public attention to consequential decisions of appellate courts. This is undoubtedly a worthy occupation, but one of its side effects is to stimulate the preoccupation of the judges with those decisions that might be the subject of reportage.

Contemporary standards for the selection of appellate judges reflect and reinforce the idea that lawmaking is what the courts of appeals are about. The American Bar Association Committee on the Federal Judiciary, for example, has different criteria for appellate than trial court judges. It "looks for an especially high degree of scholarship and academic talent in prospective nominees for the courts of appeals. The prospective nominee's ability to write lucidly and persuasively, harmonize a body of law, and to give guidance to the district courts for future cases is a matter of concern." Desirable as these traits surely are, it cannot be surprising that judges who are selected for them tend to prize opportunities to exercise those traits and to feel burdened by labors that provide no outlet for them.

The emphasis on the consequential case also is reflected in and reinforced by such procedural devices as en banc hearings in federal appellate courts. En banc procedure developed, largely in the post-World War II era, as a means of controlling the potentially disruptive effects on the law of idiosyncratic panels sitting as representatives of large groups of judges. Its success requires the judges to be concerned not only with the cases for which they bear primary responsibility but also for those decided by others. Many federal circuit judges dutifully search one another's slip opinions for the big case worthy of the occasion of a massive hearing.

In recent years it has been deemed necessary in many appellate courts, state as well as federal, to develop techniques of sorting or screening or routing cases in a manner that allows for differential treatment, more important cases receiving more elaborate treatment. A side effect is to reinforce further the judges' preoccupation with the big case, which is seen to have social, political, or economic consequences that call forth the intellectually creative efforts of the judges and their clerks.

In light of these inducements, it is understandable that contemporary judges are preoccupied with the law-creative aspects of their role. In fact, the beginnings of this preoccupation reach back several decades. The career of Learned Hand gave it impetus in the federal courts of appeals as long as 40 years ago. Partly because of the deference of lawyers to the bar of New York City, which was marked at that time, and partly because of the extraordinary power of literacy exercised by Hand and a few of his colleagues, his court was in fact able to control many destinies by some of their decisions. He was right to believe that his creative role was very important.

But even his contemporaries were sometimes myopic. Charles Clark, a very distinguished member of the Hand court, expressed the view that only one case in ten that was brought before the court in the early 1950s presented a genuine issue of law and was worthy of the court's attention. The other nine, presumably, were there only because of the ignorance, unprofessionalism, or mendacity of the lawyers. Clark today probably would make a much, much higher count of the appeals that should

not have been brought. But even at the time of his writing, his figure was difficult to square with the fact that his court's own reversal rate was about 25 per cent. It can only be explained on the basis of Clark's belief that a mere reversal does not justify an appeal that fails to present a novel issue of law.

More recently, Henry Friendly of the same court has expressed the same idea but in a different context. One of his arguments for the abolition of the diversity jurisdiction is that the federal courts are not able to contribute to the substantive law in those cases and therefore have no real function to perform. What is the point of litigating, he in effect asks, if the judges cannot make some law?

What tends to be forgotten in this is the historic function of the appeal. In the past little thought was given to judicial lawmaking. In the 19th century during the decades-long debate over the creation of the United States courts of appeals, there was not a single voice to suggest that those courts were needed to produce more scholarly opinions to illuminate and delineate the national law. There was in fact no hint of an expectation that the new courts would be sources of law. Indeed, for the benighted generation that did at last create those courts, the idea that they might exercise any law-making prerogatives might well have been sufficiently repugnant to cause the whole idea to abort for another half century.

The original purpose was otherwise. Representative Culberson, an exponent of the 1891 enactment that created the courts of appeals, put the matter in blunt terms that bespoke a mistrust of trial judges. He said that this bill was the result of a career-long determination to overthrow "the kingly power" of federal trial judges. His point can be made in terms that are less dramatic and more apt: the purpose of the appellate process is to assure that trial judges and administrative agencies are operating within the limits of the law. Even when it is affirming a decision made by others, the reviewing court is giving assurance of the accountability of the decision makers and is distributing responsibility for their decisions.

The trial judge who has been affirmed after a careful review by a higher court is not in the position of a king or any other autocratic authority. The judge is an officer of the law in the truest sense. The function of the appellate process is to give life and meaning to the law. Effective performance of this function requires not only that the careful review be performed but that it also appear to be performed. A legal system in which the rationality of decisions is no longer visible has lost much of its ability to command the respect of rational men and women. It has, in short, lost its virtue.

A legal system that is not able to assure the accountability of officials for their fidelity to law is one that allows little opportunity for truly effective judicial lawmaking. There is some paradox in this. But judges who are too self-conscious about lawmaking can be as ineffective as excessively self-conscious lovers. In a sense the more judges think about their lawmaking, the less law they really make.

What would happen if every judge emulated Learned Hand?

At some point, which happily we have not reached, judicial lawmaking becomes a conceit or a self-indulgence. When every judge seeks in every case to emulate the creative career of Learned Hand, there can be no Learned Hands because little that any of them write can be expected to control the behavior and decisions of other judges in the future who claim equal wisdom and equal right to the creative role. However elegant the rhetoric, it becomes increasingly difficult to believe what one reads in the reports. Even the most ardent supporters of an enlarged role for the judiciary would be forced to hope that judges are accountable to one another and to the system for their fidelity to judge-made principles.

When this truth is grasped, it is seen that the primary work of the appellate court is not creative or even particularly intellectual. The personal quality most required for the work is not intellect but care. Care is what is required to read tiresome transcripts and to listen to tedious arguments based on the details of the records in order to ascertain whether a trial judge has strayed from the true path of the law so far as to rest a decision on a clearly erroneous factual determination. Or whether an administrative agency has committed a substantial error "on the whole record" before it.

The importance of this work has been sadly underestimated. It is the essence of the idea of a government of law. The appellate process is in an important sense the model for the functioning for the rest of the government; it is the beacon by which officials in the trenches are led in the direction of restrained adherence to principle. It is also a revelation of vigilance. It is the means by which officials are told that all are ultimately accountable and that their decisions are not merely personal to those who make them, but are the product of the institutions of the law.

Some judges and perhaps some lawyers find the plea for visibility in decision-making to be offensive in its implication that the integrity and professionalism of our judges may be mistrusted. It is their view that we ought to be willing to trust judges to decide whether particular cases merit their full attention and explication. If we trust judges to make final decisions, it is a lesser trust to permit them to make decisions according to abbreviated procedures. This argument fails to take account of why we need judges in the first place. Persons who are in a trusting frame of mind do not need judges. The judicial process is to create trust, not consume it. Some of the same judges who ask for trust are themselves holding with increasing frequency that other officials or administrative agencies must reveal more of their deliberative processes to public scrutiny.

The amenities of appellate procedure, which provide visibility and which have been sacrificed under the pressure of mounting caseloads, are a serious loss. Recovering that loss will require a substantial legislative program. We cannot begin to agree on that program until we have cleared our heads of the false doctrine that judges can make law without expending effort on routine cases. What is humdrum work for judges must be seen to be important.

We need to reformulate Legal Realism by reconciling it to some older truths. We must acknowledge anew the frailty of judicial power and the fact that law itself is partly an illusion that achieves vitality, if at all, only in the minds of those who accept it. Public acceptance, whether voluntary or involuntary, is a thing to be earned daily through routine application and enforcement; it cannot be presumed by officials given to oracular pronouncements about great issues. We need again to know that ceremonies that celebrate the routine are a highly functional instrument of law. *Journal*

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