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Aynes: Integrity of Ohio Appellate System

MAINTAINING THE INTEGRITY OF THE OHIO APPELLATE SYSTEM

by

RICHARD L. AYNES*

“Reform, Sir, reform!

I’ve heard enough about reform. Things are bad enough as they are.”¹

“A gentleman who was rather prominent in his community attained his ninety-fifth birthday anniversary . . . the newspaper reporters came around to interview him: ‘. . . Well, you have lived a long, long time and have seen many changes in your life.’

“And he said, ‘Yes, and I was against every one of them’.”²

IT IS NOT AN unusual occurrence for one to look back upon times past and to long for their return. Remembering appellate practice as it was when I was first admitted to the bar, I cannot help but wish for the days when there were no page limitations on briefs; when each party received at least a half hour for oral argument; and when judges wrote opinions which, even if unpublished, fully addressed all of the arguments raised by counsel. This being the case, I was naturally pleased to accept the invitation of the Editors of the Review to write a conclusion — or Reply Brief, if your will — for this Symposium.

It is, of course, a special honor to be able to participate in this dialogue on the Ohio appellate procedures with such distinguished authors. Judge Bell, who opens the symposium, is an able and respected judge before whom I have had the pleasure to argue cases. Professor Parness is a friend and colleague with whom I have worked cooperatively on many projects since we both came to the Law School in 1976. Mr. Reagle is one of my former students whose

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¹Comment of An English lord in the 1840s *quoted in* Cramton, *The Current State of the Law Curriculum*, 32 J. OF LEGAL EDUC. 321, 335 (1982).

²Senator Sam J. Erwin, Jr. *quoted in* W. O. DOUGLAS, *THE COURT YEARS, 1939-1975* at 11 (1980).

career I watch with great interest. Though I do not personally know Mr. Marvel, or Judges Black and Moyer, they are individuals whose articles and opinions I have had an opportunity to read with favorable impression. As for Judge Day, I knew him by reputation before our friendship began and find that he deserved all of the favorable commentary he has received and more.

With so many different perspectives, there are bound to be disagreements between the participants of this Symposium. Happily, those disagreements are friendly ones which may have the effect of sparking new ideas which may be productive in improving the appellate system and thereby enhancing the quality of justice.

I. DISTINCTIONS BETWEEN THE EFFECTS OF PROPOSED REFORMS

Though at times the reader may wonder otherwise, I really am not like Senator Ervin's old-timer who opposed every change that he had seen in his lifetime. But I do value highly the historic function that appellate courts have served and believe that function is worthy of preservation.

Appellate courts have traditionally played an important role in maintaining the integrity of the judicial system. They not only serve to correct errors which may occur at trial but also provide a reflective forum for the refinement of established principles of law and the development of new ones. Equally as important, they maintain the boundaries of various departments of government. If operating properly, they ensure that the humblest citizen shall be placed on an equal footing with one who occupies the highest position and that for every illegal wrong there is an adequate remedy. These functions become all the more important in an age of increasing governmental activity and an era in which the individual is confronted by bureaucracies in both the private and public sectors. The traditional appellate court, as a non-bureaucratic institution, has played a key role in protecting the rights of individuals against the overreaching that may naturally occur with bureaucratization.

Because I deem this role a valuable one, I make a distinction between those changes which may improve the efficiency of the court and not change this traditional role as opposed to those which would change the traditional functions of the court. Three examples may make this distinction clearer.

Expanding case loads spur much of the talk of the need for "reform". One solution might be to substitute the traditional review by a three-judge panel with a new innovation under which the judgment of the court below would be reviewed by a single appellate judge.³ This would triple the number of cases that could be disposed of in a single year and quickly solve — at least in the short term — the backlog with which so many are concerned. Such a solution would be objectionable because it destroys the collective decision-making process and thereby radically changes the nature of the appellate system.

³See Marvel, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43 (1982) and accompanying notes.

By way of contrast, one might consider the use of new technological advancements such as computers to keep track of cases or word processors to prepare opinions. These innovations, if used properly, can enhance the efficiency of the court system without altering its fundamental nature.

There are other alternatives outside the appellate system itself which could result in a substantial reduction in the case load of the appellate courts. For example, one imaginative scenario of a possible "future" of the legal profession posits a several-fold increase in the filing fee for all cases and the elimination of *in forma pauperis* provisions.⁴ This would drastically reduce the number of cases filed in the trial courts and the resulting number of appeals. Without respect to the merits of such a proposal, the example is an important one because it highlights the existence of alternatives which would not undermine the traditional function of the appellate courts and would reduce the caseload which produces the backlog.

It is from this perspective that the following proposals will be analyzed: 1) increasing court personnel; 2) increasing court efficiency; 3) prehearing settlement conferences; 4) limiting oral arguments; 5) limitations on briefs; 6) use of unreported opinions; 7) determinations as to which decisions should be reported; 8) writing upon every assignment of error; and 9) sanctions for frivolous appeals. After consideration of these topics, an alternative method of analyzing the "problem," with potential solutions, will be advanced.

II. INCREASING COURT PERSONNEL

The view that an increasing caseload in the Ohio Court of Appeals can be solved by increasing the number of judges in the respective courts is a "natural response."⁵ Yet, as Messrs. Reagle and Parness point out, this approach has been generally unsuccessful.⁶ Further, as Judge Day indicates, the addition of more judges may, itself, have adverse consequences.⁷

Any rapid expansion of the judiciary may result in decreased quality in the selection of judges. To significantly expand the number of individuals selected from a relatively constant pool inevitably leads to the elevation of certain individuals to the appellate bench who could not have otherwise attained that position. If it is assumed that in a more competitive environment the "abler" person would have been selected, then there will be at least an incremental decline in the quality of the individuals selected to fill new openings on the appellate bench.

A second consideration, not unrelated to the first, is that a "prolifera-

⁴Johnson, *Where is the Law Heading? Four Legal Scenarios for the Future*, JUDGES' J., Fall 1981, at 34, 42-43.

⁵Meador, *The Federal Judiciary — Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 641.

⁶Parness and Reagle, *Reforms in the Business and Operating Manner of the Ohio Courts of Appeals* 16 AKRON L. REV. 3, 8 (1982). See also Marvel, *supra* note 3.

⁷Day, *Response to Professor Parness and Mr. Reagle*, 16 AKRON L. REV. 37 (1982).

tion” of judgeships can result in “a depreciation of the judicial currency”⁸ with a resulting inability to attract individuals of the highest quality to the bench.⁹ Further, the expansion of judges on an appellate court may produce institutional problems that do not exist at the trial level. While each trial judge is “an autonomous decisionmaking entity” appellate judges render decisions collegially.¹⁰ “The most stable, certain, and predictable appellate arrangement would be a court composed of permanently assigned judges, all of whom sit on each appeal. The farther we move away from that model, the greater risk of eroding those qualities.”¹¹

The addition of judges increases bureaucracy and diminishes collegiality. The multiplication of judicial decision-making units decreases uniformity. In the Eighth District Ohio Court of Appeals, for example, there are nine active judges.¹² There are eighty-four possible combinations of judges, not including retired judges, trial judges sitting by assignment, and visiting panels.¹³ In such a system it is inevitable that there should be conflicting decisions. The problem is aggravated by the fact that Ohio, unlike the federal system, has no provision for *en banc* review by the entire court. Moreover, it would appear that the process by which court of appeals decisions are certified to the Ohio Supreme Court applies only to conflicts between appellate districts and not between panels within the same district.¹⁴ One ultimate effect is to place increased stress upon the Ohio Supreme Court to watch for inconsistencies within multiple-panel districts, as well as for conflicts between the districts themselves.

As Daniel Meador has counseled, “[d]angerous consequences may follow, just as they may in a period of unrestrained economic inflation, if the inflation in caseloads and [judicial] personnel remains unchecked. . . .”¹⁵ One of those consequences is that: “Over the long run, augmenting judicial capacity may erode the distinctive contribution the courts make to the social order. The danger is that courts, in developing a capacity to improve on the work of other institutions, may become altogether too much like them.”¹⁶

III. INCREASING COURT EFFICIENCY

As Thomas Marvel indicates, the use of case-management techniques is

⁸Lumbermen’s Casualty Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). These sentiments are shared by many, including the current Chief Justice of the United States Supreme Court. Tamm & Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447, 493.

⁹See generally McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 782-84 (1981).

¹⁰Meador, *supra* note 5, at 642.

¹¹*Id.*

¹²OHIO REV. CODE ANN. §§ 2501.01-01.2 (Page 1981).

¹³Meador, *supra* note 5, at 644.

¹⁴See OHIO CONST. art. IV, § 3 (B) (4).

¹⁵Meador, *supra* note 5, at 618.

¹⁶Shattuck & Norger, *Political Uses of the Legal Process by Black and American Indian Minorities*, 22 HOW. L. REV. 1, 23 (1979).

currently a “popular” response to growing caseloads.¹⁷ Yet, he concludes that such techniques are “of little or no use in reducing the substantial backlogs that result from caseload growth. . . .”¹⁸ In addition to the weaknesses of this approach,¹⁹ one should not lose sight of the fact that taking steps beyond case-management techniques to alter the traditional appellate process may adversely affect the effectiveness of the Court itself: “Legal institutions are simply not effective, not efficient . . . unless they manage at least to create legitimacy.”²⁰ Legitimacy is maximized when judges approach their work with the high aspirations articulated by former Justice Stewart:

I think it is very important for a judge — *any judge anywhere* — to remember that every case is the most important case in the world for the people involved in that case, and not to think of a case as a second-class case or a third-class case or an unimportant case. It behooves a judge or a justice to apply himself fully to every case and to give it conscientious consideration.²¹

This type of consideration, and the corresponding legitimacy that comes with it, may be impossible under the pressures of many of the reforms advocated for the appellate courts:

If we force our judges to become mass production workers rather than craftpersons, our citizens will inevitably lose respect for the process. An assembly line concept has no place in a judiciary whose members take pride in the quality and craft of their work. . . . We have come to terms with an ever-increasing caseload, but we must be careful that our answer does not bring efficiency at the expense of a fair hearing.²²

One of the difficulties of an increasing caseload and bureaucratic responses to that case load is the opportunity for error increases without individual attention to each case. In many instances the errors may be both correctable and understandable. An incomplete footnote is attributed to a failure of the United States Supreme Court’s word processor;²³ the Court receives, but misplaces, all of the copies of a petition for rehearing;²⁴ or orders are issued

¹⁷Marvell, *supra* note 3, at 44.

¹⁸*Id.*

¹⁹*Id.* at 44-49.

²⁰Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981). This same idea was expressed by Chief Justice Bird of the California Supreme Court in slightly different terms: “[T]o the extent that efficiency stresses weighted workloads and judicial man-hours over the people who are being affected, to the extent that the system rewards the processing of cases as opposed to a concern for people, the economic benefits of such sufficiency may in a larger sense be outweighed by the social costs.” Bird, *Courts, Community and Individual Rights*, JUDGES’ J., Spring 1982, at 8, 10.

²¹Justice Potter Stewart: *An Interview, Reflecting on the Court*, THE NATIONAL LAW JOURNAL July 12, 1982, at 20 (emphasis added).

²²Address by Rose Elizabeth Bird, Chief Justice of the California Supreme Court, International Academy of Trial Lawyers Annual Convention (January 23, 1978) quoted in Gazell, *Chief Justice Rose Bird: A Two-Year Performance Review*, 1980 DET. C.L. REV. 419.

²³See *Correction*, 51 U.S.L.W. 3005 (1982).

²⁴*Perini v. Bell*, No. 80-1430, one of three cases decided in *Engle v. Isaac* ___ U.S. ___, 102 S. Ct. 1558

indicating that a case is dismissed for lack of a timely notice of appeal that should be applicable not to the case in which the order was issued but to another case.²⁵ How does one assess the significance of these mistakes? Does the fact that small errors are made mean that large ones are made too?²⁶

Similarly the use of form entries contribute to suspicion about the individual attention given to cases. For example, when one is denied a discretionary appeal in the Ohio Supreme Court two entries are received. One indicates that the motion for leave to certify the record is overruled, and the other indicates that the case is dismissed for want of a substantial constitutional question. Does the latter order really mean what it says? Is the Court actually deciding the case upon the merits or only using discretion to deny review?²⁷

Attempts to increase the efficiency of a given court, by definition, increases the work-load of already busy judges. In order to cope with that workload judges must limit their own personal attention to the cases and increasingly rely upon other court personnel, form entries, and machines. This, in turn, increases the opportunity for error not only in technical matters but also in substantive matters where the error is much more likely to go undetected.

IV. PREHEARING SETTLEMENT CONFERENCES

Messrs. Parness and Reagle advocate the use of Ohio Appellate Rule 20 to implement procedures prior to the hearing of a case in the Ohio Court of Appeals which might lead to settlement without adjudication.²⁸ Such procedures could be implemented without changing the nature of the adjudicatory process itself. By utilizing court staff or retired judges, procedures could be implemented without any significant diversion of scarce judicial resources. The fact that an amicable settlement may provide a more satisfactory resolution than a winner-take-all result from the court makes this an alluring proposal. Credence is added to the proposal by the apparent enthusiasm of those who have first-hand experience in similar programs, including the United States Court of Appeals for the Sixth Circuit,²⁹ and the Eighth District Ohio Court

(1982). The author, counsel for Mr. Bell, had a certified receipt from the United States Post Office and the Supreme Court Marshall's Office indicating that the Court had received the petition. However, it had never been docketed and, upon inquiry as to the status of the petition, could not be located. The personnel of the clerk's office were most courteous and helpful in accepting additional copies of the petition and bringing the matter to the court's conference at the earliest possible date.

²⁵The cover letter was for the United States Court of Appeals for the Sixth Circuit case No. 82-3082, *Payne v. Janasz*, while the entry was for case No. 82-3080, *Everette v. Marshall*. Again, the clerk's office was most helpful in correcting the error.

²⁶That may be an unfair approach, but it is certainly one which the legal profession adopts in many of its dealings. For example, it is assumed that a person who would lie on a small matter would also lie on a large one. It is assumed that a person who would cheat the government on income taxes would also cheat his/her clients and hence is not a person to properly be a member of the bar.

²⁷Analogous problems exist with practice before the United States Supreme Court with the distinction between decisions upon appeal and denials of certiorari. See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 327-30, 353-60, (5th ed. 1978).

²⁸Parness and Reagle, *supra* note 6, at 15-24.

²⁹In January of 1982 the Sixth Circuit implemented an "experimental program" to effect settlements in

of Appeals.³⁰

It is therefore relatively easy to support the proposal in principle and to agree that an experimental program should be initiated to test its efficacy. At the same time, candor requires acknowledgment of the fact that it would be surprising if such a program resulted in the “significant” reduction in the number of adjudicated cases contemplated by Messrs. Reagle and Parness.³¹ The even-handed critique of existing programs by Thomas Marvell points out the difficulties in assessing their productivity.³² It also suggests that there is reason to believe that their contribution to case load reduction may not be statistically significant and, in fact, may have the effect of increasing the number of appeals.³³

One reason for skepticism about the ability of such settlement programs to accomplish major results is a feeling that the maximum institutional forces for compromise coalesce in the trial court. Prior to trial there is great uncertainty as to the result. The vagaries of juries are well known and even when one’s subjective judgment would suggest that one party may prevail, the level of uncertainty still remains high. In contrast, the level of uncertainty in the intermediate court of appeals is diminished by the statistics which indicate that the overwhelming number of judgments below are affirmed.³⁴ Generally, the appellee can approach the court of appeals with a certain amount of confidence that as long as he or she makes no fatal admissions, the judgment won below will be affirmed.³⁵

Second, no matter what the expense of preparing for an appeal, it is likely to be relatively small compared to the expense that was devoted to trial. Consequently, to the extent that economic considerations create pressure to settle, that pressure is generally greater at trial than on appeal.³⁶

non-criminal cases. Two of the court’s staff lawyers were assigned to work on this program. UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, ANNUAL REPORT 3 (1982). During the first six months of the program fourteen cases were settled. This amounted to one percent of all cases disposed of for the entire year. *Id.* at 12. If the settlement rates were to remain constant for an entire year one could project a two percent settlement rate. Though this seems relatively modest in comparison to the number of cases dismissed for want of prosecution (seven percent) and voluntarily dismissed (seventeen percent), Chief Judge George Edwards is enthusiastic about the program. Remarks of the Chief Judge at the 1982 Sixth Circuit Judicial Conference, Asheville, North Carolina (July 15, 1982).

³⁰Day, *supra* note 7, at 38.

³¹Parness and Reagle, *supra* note 6, at 20.

³²Marvell, *supra* note 3, at 77-84.

³³Marvell, *supra* note 3, at 81.

³⁴For example, in the United States Court of Appeals, for the District of Columbia Circuit the affirmance rate is said to be eighty-three percent. Wald, *Become a Real “Friend of the Court,”* AM. PSYCHOLOGY A. MONITOR Feb. 1982 at 5.

³⁵There may be an exception if appellee’s counsel believes that there is error in the record. However, skillful counsel would generally have helped protect the record in the trial court and thereby avoided any such error. Unskillful counsel is unlikely to recognize its existence on appeal. Consequently, these instances are probably statistically small.

³⁶There may be instances in which the appealing parties simply exhaust their finances and cannot support even the smaller cost of pursuing the appeal. There may also be situations in which the personal finances of the parties change during the appellate process and create strong incentive for settlement. However, these are probably the exceptions rather than the rule.

Third, the trial judge is likely to have much more influence upon the party in the settlement process than a judge of the court of appeals. By scheduling status calls, prehearing conferences, and the trial itself the trial court has the ability — whether intended or not — to put tremendous pressure upon the parties to settle the case. Further, by ruling upon pretrial motions, the court may not only narrow the issues for trial but give the parties important signal, as to the possible outcomes if the case proceeds to judgment. This, in and of itself, may change the bargaining position of the parties and create strong incentives for settlement.

In contrast, the only leverage the Court of Appeals has is to threaten one party or the other with the loss of the case. Assuming that the assessment is made by a judge who will not participate in the final decision, it is simply his or her view of what three other colleagues may eventually do. While this informed opinion may put that judge in a position to make a reasonable assessment of the case's probable outcome, an attorney who regularly practices before the court and who has more carefully read recent case law on the issue may be in as good a position to make a similar judgment. Moreover, such a tactic would work only in those cases in which it was going to be indicated that the appellant might win. Obviously, to indicate that the appellee would probably prevail would not give any encouragement to the settlement process.

Added to these institutional factors is the consideration that if a trial judge has been concerned about his or her docket, extended efforts were probably already made to settle the case. Though there may certainly be new considerations that arise once the judgment is rendered, one must acknowledge that the appellate settlement process will, to some extent, be repetitious of that which has proceeded it. This prior consideration reduces the statistical likelihood of a settlement once the case is in the court of appeals.

Similarly, most attorneys have some sense of the strengths and weaknesses of their cases and the potential for settlement — even on appeal. Skillful counsel will themselves consider and discuss such prospects as evidenced by the fact that cases are settled or dismissed even in courts which do not have these procedures. The mediation process probably affects only those attorneys who have not already given independent consideration to such a settlement prospect. These are the very attorneys who may be less likely to understand the strengths and weaknesses of their cases and less likely to be amenable to the settlement process.

As Messrs. Parness and Reagle note, such a procedure was in effect for a time in at least one district of the Ohio Court of Appeals but abandoned due to “manpower restrictions.”³⁷ It appears to have been the judgment of the majority of the judges of that court that the time expended in conducting the settlement conferences exceeded the time saved by the settlement of those cases. While the experience of one court, over a relatively short period of time, does not

³⁷Parness and Reagle, *supra* note 6, at 19.

suggest that the proposal of Messrs. Parness and Reagle should not be considered; it does suggest that caution should be used in the mechanics of any program that is implemented.

Of equal concern is the cost of such programs. Judge Day suggests that financing is “no insuperable problem.”³⁸ However, Messrs. Parness and Reagle assert that in order to “be viable” counsel would be required to file some form of prehearing statement for either a determination as to whether the settlement conference was proper or for use in the conference itself.³⁹ On its face, the required filing of one additional document in an appeal does not appear to be excessive. However, in a complex case it can take several hours to fill out a prehearing conference form. Moreover, it certainly takes attorney-time to consult one’s client about settlement prospects and to physically attend the hearing.

It is somewhat ironic that Messrs. Parness and Reagle would oppose a quadrupling of the filing fee for an appeal as was proposed in the State of Washington⁴⁰ and yet would impose even greater costs upon the parties through the use of pre-hearing conferences. If one were to posit relatively modest fees of \$25 for one-half hour of work in preparing the prehearing conference statement and \$75 for attendance at the prehearing conference, this would itself be equivalent to a three-fold increase in a \$50 filing fee for the appellant.⁴¹ It would result in an additional \$100 of expense for the appellee. If increasing the filing fee would have the same comparable effect on case-load reduction as the prehearing conference, then the latter may well be the more desirable solution since it results in no underlying expenditure of judicial or attorney time.

Both the theoretical concept of the prehearing settlement conference and the enthusiasm of many of those who participated in that process suggests that it should be given serious consideration. But experience suggests that such a program is unlikely to be a panacea for the case-load problems of the appellate system.

V. LIMITING ORAL ARGUMENT

The literature debating the merits of alternatives to the traditional appellate oral argument is voluminous and any serious discussion of the Ohio appellate procedures should properly include consideration of that issue. Professor Parness and Mr. Reagle suggest that judicial resources can be conserved by reducing the number of cases in which oral argument is had. Judge Moyer’s position is summed up by the title of his article: *Oral Argument — Let It Be*,⁴² and seems to be shared by both Judge Day and Mr. Marvell.⁴³ These conflicting

³⁸Day, *supra* note 7, at 38.

³⁹Parness and Reagle, *supra* note 6, at 16.

⁴⁰*Id.* at 15.

⁴¹The filing fee for appeals varies from a low of \$25.00 in the Second District, Local Rule 1, to \$50.00 in the Eighth District, Local Rule 3.

⁴²Moyer, *Oral Argument — Let It Be*, 16 AKRON L. REV. 103 (1982).

⁴³Day, *supra* note 7, at 40; Marvell, *supra* note 3, at 60-62. Though Judge Black does not discuss this

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views raise a number of important issues which bear exploration.⁴⁴

Professor Parness and Mr. Reagle suggest that oral argument in Ohio is "simply a matter of policy."⁴⁵ However, as they note,⁴⁶ the Ohio Constitution specifically provides that in districts where the total number of judges exceeds three judges, ". . . three judges shall participate in the *hearing and disposition* of each case."⁴⁷ Reference to "the" hearing and the use of the conjunctive "and" to separate the hearing aspect of the case from its disposition suggests that the oral argument is required. This interpretation is reinforced by reference to the provision of the Constitution which requires that a majority of the judges "*hearing* the cause shall be necessary to render a judgment."⁴⁸ Though the matter may not be entirely free from debate, these provisions, on their face, suggest that there is a state constitutional right to oral argument.⁴⁹

Nor is the result necessarily any different under the federal constitution. As to the right of appeal itself, the American Bar Association has suggested that there may be a federal constitutional basis for claiming the right to a first appeal.⁵⁰ Indeed, there seems to be developing at least a rudimentary right of

issue in his Symposium article, he has indicated that oral argument is "important"; that one "should never underestimate the impact of face-to-face contact with the judges who are going to make the decision"; and that oral argument is "always worthwhile if the appeal has any value at all or if the result is in doubt." Remarks of Judge Robert Black, Ohio Appellate Practice Seminar, Ohio State Bar Association Convention (May, 1982).

"In part, one's view of oral argument may depend upon the role one plays in the appellate process. For example, one judge indicated that while acting as a lawyer he or she believed oral argument was a "right" in every case, but as a judge he or she "knows" that oral argument cannot be given in every case. Wasby, *Oral Argument in the Ninth Circuit: The View from Bench and Bar* 11 GOLDEN GATE U. L. REV. 21, 28 (1981).

⁴⁴Parness and Reagle, *supra* note 6, at 25-26.

⁴⁵*Id.* at note 162.

⁴⁶OHIO CONST. art. IV § 3 (A) (emphasis added).

⁴⁷*Id.* § 3 (B) (3) (emphasis added). This language was added when the Ohio Constitution was amended effective May 7, 1968. The former language, which was contained in article IV, § 6, read: "Only a majority of such Court of Appeals shall be necessary to pronounce a decision, make an order or enter judgment, upon all other questions. . . ." Constitution, State of Ohio (1979) (former provisions of the Constitution of Ohio, 1851, at 309, 316).

⁴⁸There is no reported case law upon this provision. However, local rule 2 of the Second Appellate Judicial District, adopted September 1, 1976, purports to preclude oral argument in criminal cases "except upon written motion supported by good cause." If this rule is enforced in such a manner as to preclude oral argument when requested it would squarely present the question of whether the rule could stand against the provisions of the Ohio Constitution as interpreted in the text above. There is at least one decision concerning the constitutional provisions, case law, statutes, and rules of court of another jurisdiction which holds that an appellant in a criminal case does have the right to have oral argument. *People v. Brigham*, 25 Cal.3d 283, 599 P.2d 100, 157 Cal.Rptr. 905 (1979).

⁴⁹The commentary to § 1.1 of the AMERICAN BAR ASSOCIATION COMMISSION ON APPEALS (Approved Draft 1970) [hereinafter cited as STANDARDS RELATING TO CRIMINAL APPEALS] states:

Whether or not the right to appeal is now secured under the Constitution, there is no disagreement today on the wisdom of providing a system of appeals in criminal cases. "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." *Coppedge v. United States*, 369 U.S. 438, 455-56 (1962) (Stewart, J., concurring) . . . "Appellate review has become such an integral part of our criminal procedure that it may properly be viewed as an extension of the trial itself." *Commonwealth ex rel. Neal v. Myers*, 424 Pa. 576, 579 n. 3, 227 A.2d 845, 846, n. 3 (1967).

While acknowledging that there are no cases indicating that due process requires a first appeal as of right, the commentary to § 3.10 of the AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS

appellate review for individuals who have been sentenced to death.⁵¹ Further, it is entirely possible that in attempting to create classes of cases in which no appeal will be allowed the mandate of the fourteenth amendment's equal protection clause would be violated.⁵²

It is, of course, quite different to maintain that the Constitution mandates an appeal as opposed to arguing that it mandates oral argument in such an appeal. But while the adoption of United States Circuit Court rules treating oral argument as a discretionary measure may portend poorly for the outcome of any constitutional challenge, it certainly does not provide its own judicial warrant for the actions taken. Unconstitutional actions do not gain constitutional stature by repetition or prescription.⁵³ It may well be that oral argument has become such a part of tradition of this country that it is now protected under fourteenth amendment procedural or substantive due process.

In focusing upon the policy questions raised by Messrs. Parness and Reagle, a beginning point is to examine the views of those who are participants in the appellate process. The American Bar Association has generally opposed the curtailment of oral argument.⁵⁴ Both Judge Day and Judge Moyer have set forth in explicit terms their reasons for wanting to maintain oral argument in the Ohio system as it presently exists.⁵⁵ If I read correctly the results of the

RELATING TO APPELLATE COURTS (Approved Draft 1977) [hereinafter cited as STANDARDS RELATING TO APPELLATE COURTS] nevertheless concludes that the right of appeal "is a fundamental element of procedural fairness as generally understood in this country."

The concept of one appeal from each final judgment is advocated by the STANDARDS RELATING TO CRIMINAL APPEALS, § 1.1 (a) (Approved Draft 1970) and, at least in this century, has been considered part of the "accepted model" for "fair" appellate procedure. R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 22 (1981).

As Messrs. Parness and Reagle note, *supra* note 6, at 6, n. 26, there is authority within Ohio suggesting that the state constitution guarantees the right of a first appeal. *State v. Nickles*, 159 Ohio St. 353, 112 N.E.2d 531 (1953); *Haas v. Mutual Life Ins. Co.*, 95 Ohio St. 137, 115 N.E. 1020 (1916).

⁵¹See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵²For example, if the proposed appellate scheme allowed appeals in civil cases even though they might involve a relatively small amount of money, and denied appeals in felony cases, when the individual's liberty was at stake, could it pass muster under even the low-tier rationality test of the fourteenth amendment's equal protection clause? Though it is true that past equal protection cases concerning appellate procedures have been concerned with the comparison within the "class" of criminal appeals, e.g., *Douglas v. California*, 372 U.S. 353 (1963) and *Griffin v. Illinois*, 351 U.S. 12 (1956), this does not automatically mean that a distinction between criminal and civil cases provides a rational classification scheme for all purposes. See, e.g., *Funkhouser v. Randolph*, 287 Ill. 94, 122 N.E. 144 (1919) (Statute allowing only plaintiffs to seek appellate review of findings of fact was invalid).

⁵³State ex. rel. *M'Cready v. Hunt*, 15 S.C.L. (1 Hill) 291, 501 (1834) ("[H]owever venerable the error may be and however often it may have been repeated, it must fall before the Constitution. . . ."); *CBS v. Dem. Nat. Committee*, 412 U.S. 94, 204 (1973) (Brennan, J., dissenting) "[W]e must not equate what is habitual with what is right or what is constitutional."

⁵⁴Section 3.35 of the STANDARDS RELATING TO APPELLATE COURTS *supra* note 50, (Approved Draft 1977), while making allowing allowances for exceptions, indicates that generally "[a] party to an appeal should have the opportunity for oral argument. . . ." The commentary to that section begins by expressing the opinion that "[o]ral argument is normally an essential part of the appellate process." See also resolution adopted by the House of Delegates in August, 1974, reprinted in AMERICAN BAR ASSOCIATION TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUDGE IN APPEALS: METHODS AND SELECTED MATERIALS 77 (1977).

⁵⁵Mr. Marvell's analysis of the benefits and detriments of curtailing oral argument would seem to support the positions taken by Judges Day and Moyer. Marvell, *supra* note 3, at 60-62.

survey conducted by Professor Parness and Mr. Reagle, this is an accurate reflection of the position of the majority of appellate judges in the State of Ohio.⁵⁶

Other surveys indicate that judges are more prone to favor the elimination of oral argument than lawyers.⁵⁷ Given the fact that counsel retain the power to waive oral argument under the existing system, it is predictable that a survey of counsel who regularly practice before the Ohio Court of Appeals would produce an even higher consensus opposing the proposed discretionary oral argument. Indeed, in other jurisdictions counsel have indicated a willingness to accept even further delays in the time required for decision rather than give up oral argument.⁵⁸

The assault upon oral argument is justified, primarily, in terms of scarce judicial resources. Judge Day has indicated that in actuality the hearings for oral argument "take up very little of judicial time"⁵⁹ and Mr. Marvell has concluded that the savings from curtailing oral argument is "rather slight."⁶⁰ If it were assumed that court discretion to deny oral argument would reduce the number of arguments by one half,⁶¹ and if it were assumed that no judicial time would be lost in determining which cases would receive oral argument and which would not,⁶² then the savings to each Ohio appellate judge would be approximately seven work days.⁶³ If each of Ohio's fifty-two appellate judges could author an additional decision for each of the gained seven days, it would still result in the disposition of slightly less than give percent of the cases pend-

⁵⁶In examining their text and footnotes 163-70, it appears that 24 judges responded to the survey. It appears that 12 of those judges indicated that oral argument should be provided subject to waiver by counsel; three judges thought that oral argument should be discretionary with the Court in certain types of cases; and one judge thought that counsel should have the right to argument if they could prove a "reason" for it.

⁵⁷Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340, 348-52 (1982).

⁵⁸See generally Wasby, *supra* note 44, at 73, where, after considering the results of surveys and writings in the areas, the author summarizes the findings by indicating lawyers wanted both oral argument and written opinions "even if it meant that more time would be consumed by cases . . . roughly seventy-five to eighty percent of the attorneys were willing to wait longer . . . to obtain the traditional practices" (footnotes omitted). Similarly, in response to a questionnaire from the Appellate Judges Conference of the A.B.A.'s Judicial Administration Division, the lawyer's responses under the heading of "oral argument" focused, *inter alia*, upon complaints about the limitations upon oral argument and the court's "discouraging" of oral argument. Attachment, "Problems Observed in the Appellate Courts," to letter from Edward J. Schenbaum to Richard L. Aynes (October 15, 1981).

⁵⁹Day, *supra* note 7, at 40.

⁶⁰Marvell, *supra* note 3, at 61. See also R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 25 (1981) and commentary to § 3.35 of the STANDARDS RELATING TO APPELLATE COURTS, *supra* note 50, (Approved Draft 1977) at 56.

⁶¹This is probably a high estimate because some cases are currently submitted on briefs without oral argument; and, given the strong support for oral argument among members of the bench and bar, it is likely that the court would be generous in granting oral argument when sought.

⁶²This assumption is probably incorrect. If that decision-making responsibility were totally delegated to the court staff, then it would be an unconstitutional delegation of judicial power. Any other solution requires at least some judicial time in making the decisions as to which cases deserve oral argument.

⁶³This figure is based on one-half hour of oral argument for 270 cases to be heard on a yearly basis. The average appellate judge's work-week is calculated at 50 hours. (It was limited to that number only because I suspect that many members of the bar and public would not believe the number of hours that appellate judges actually work.)

ing at the end of 1980.⁶⁴ Even if these figures are reasonable approximations, they suggest a very slight benefit could be gained by placing further restrictions upon oral argument. Of course, even slight benefits are welcome. If this decrease could be obtained without any cost to the essential functions of the appellate courts, then it would provide its own justification. But, the relevant question is whether the benefits lost outweigh the benefits to be gained.

Along with the benefits of oral argument outlined by Judges Moyer and Day can be added the following:

[O]ral argument is the absolute indispensable ingredient of appellate advocacy. . . . Often my whole notion of what a case is about crystallizes in a direct way with counsel available to correct error. Some judges assimilate ideas more readily by oral than by written transmission; and some ideas are more readily transmitted by oral means. Thus, the quality of decisions is likely to be enhanced.

Oral argument is important as a means of giving judges a continuing awareness of their relationship and dependence on others; without it, the judge is isolated from all but a limited group of subordinates. It is an important assurance both in fact and in appearance, that decisions are made collectively, because it is the occasion when all the judges responsible for the decision address themselves together and in public view. Oral argument gives to litigants the assurance that the judges themselves are making the decision. And it also gives litigants the sense of participation which is an essential of the adversary tradition.⁶⁵

The effect of oral argument upon the legitimacy of the court's decision-making power may be particularly important since the "accepted model for fair appellate procedure" includes the entitlement to present oral argument to the court.⁶⁶

To this, one might add that oral argument does, on occasion, actually change the views of the court.⁶⁷ Justice Brennan has indicated that:

⁶⁴Messrs. Parness and Reagle in the text at note 39 indicate that at the close of 1980, 5,290 were pending. Actually, these calculations inflate the effect of the elimination of argument since they use 1982 figures for the number of judges and 1980 figures for the number of cases pending.

⁶⁵P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *JUSTICE ON APPEAL* 17-18 (1976). A good summary of the benefits of oral argument is also found at Wasby, *supra* note 44, at 32-40.

⁶⁶R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 22 (1981).

⁶⁷Though almost everyone would agree that this may occur on occasion, the significant question is how great is the frequency. Judge Myron H. Bright of the Eighth Circuit United States Court of Appeals indicates that in one session of his court where he kept a record, it affected approximately 30 percent of the cases. Bright, *The Ten Commandments of Oral Argument* 67 A.B.A.J. 1136, 1139 (1981). Judge Engle of the Sixth Circuit indicates that 10 percent is the figure "most frequently mentioned among judges and law clerks." Engle, *Oral Advocacy at the Appellate Level*, 12 U. TOLEDO L. REV. 463, 471 (1981). Judge Coffin of the First Circuit and Judge Oakes of the Second Circuit placed the figure at somewhere between five and ten percent. See Oakes, *On the Craft and Philosophy of Judging* 80 MICH. L. REV. 579, 584 (1982). Judge Malcolm Wilkey has estimated that in about one fourth of the cases he could estimate in advance that the arguments would be helpful, even though one-half turned out to be helpful. Wasby *supra* note 44, at 33. Judge Black has indicated that oral argument is important in every case where the result is in doubt that he has had his opinion changed by what took place in the oral argument. *Supra* note 43.

[O]ral argument is the absolutely dispensable ingredient of appellate advocacy. . . . Often my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument. . . . Often my idea of how a case shapes up is changed by oral argument. . . .⁶⁸

It is considerations such as these, and not simply a devotion to the *status quo*, that provide the basis for the continuing support for maintaining the right of oral argument in every case before the state Court of Appeals. Nevertheless, even those who support the continuation of oral argument may still lament what is perceived as the low level of performance by counsel in presenting the argument.⁶⁹ Since this condition often provides a basis to attack existing provisions for oral argument, this issue also bears exploration.

One possibility is that the quality of advocacy really has not changed but rather is the product of the illusion of thinking back to good times past. Another possibility is that the *supra* quality of advocacy is declining because the quality of lawyers admitted to the bar is decreasing. Though my position as a faculty member of a law school may affect my judgment, that judgment is, nevertheless, that the quality has remained relatively the same over the past years and that if there is anything recent graduates are prepared to do, it is appellate work.⁷⁰

This is one of those occasions in which I believe I know more than I can prove. My supposition is that if there is a decline in quality in oral advocacy, it is because counsel lack the will, and not the ability, to represent clients in the manner in which the court would like. In making this suggestion, it is perhaps proper to consider this claim first as applied to private counsel and second as applied to institutional counsel.

⁶⁸HARVARD LAW SCHOOL, OCCASIONAL PAMPHLET No. 9, 22-23 (1967) *quoted in* Stern, *supra* note 66, at 358. For a collection of other accounts of the importance of oral argument see Stern, *supra* note 66, at 358-60.

⁶⁹Robert Stern has noted that, "it seems that a large number of oral arguments are perceived to be inadequate." R. STERN *supra* note 66, at 360. In speaking of arguments before the United States Supreme Court Justice Douglas indicated that 40 percent of those presenting arguments were "incompetent." W. O. DOUGLAS, THE COURT YEARS 183 (1980). Chief Justice Burger has indicated that no more than 50 percent of the lawyers in the United States were "competent" to handle an appeal. J. CAMERON, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, 204 (F. Klein 6th ed. 1981). See generally T. MARVELL, APPELLATE COURTS AND LAWYERS 21-37 (1981).

It should also be noted that Chief Justice Berger was not the first judge who decried "the growing tendencies to lower the standard of what was once properly termed a learned profession, by filling up the roll with men of little elementary training and whose knowledge of the law was obtained from the mere definitions and catch-words of a noble science." Judge Thompson Nixon *quoted in* Presser, *Judicial Ajax: Thompson Nixon in the Federal Courts of New Jersey in the late 19th Century*, 76 N.W.U.L. REV. 423, 431 (1981).

⁷⁰This view seems to be shared by a substantial number of members of the profession. As a result of a recent "LawPoll" the *A.B.A. Journal* concluded that the perception is that "[l]awyers entering the legal profession are better trained in law school than their counterparts of ten years ago." LawPoll, *Well-trained, but too many*, 68 A.B.A.J. 1080 (1982). (But note that the breakdown of responses from the regular A.B.A. members indicated that 30 percent thought the young lawyers were better trained than their counterparts of ten years ago, while 49 percent thought their quality was "about the same.") Whatever the validity of these perceptions, they should apply to appellate practice with greater force than other types of legal work. In addition to the almost universal requirement of completing an appellate oral argument simulation, the classroom methods of analyzing appellate cases should place every law graduate in the position of being able to confidently prepare an appellate brief.

As to private counsel, the quality of representation may be reflective of societal changes away from law being what we used to call a "profession" and towards being what we might call today a "business." Though some may think those terms would be either positive or negative, they are not intended to convey such connotations. Rather, they are intended to recognize that there has been an apparent shift away from measuring one's success at the bar in terms of reputation and estimation by one's peers to utilizing the amount of fees one generates as an index of such success.⁷¹ As more members of the profession gravitate toward the latter view it is predictable that the quality of advocacy will depend more and more upon the client's ability to pay for such advocacy.

One may say that this is nothing new. However, there has been in times past an atmosphere in which counsel's work in a given case might far exceed his or her expected compensation because one's personal worth was intimately connected with the work product. Today, it is more and more common to hear counsel say that a given case may have warranted \$10,000 worth of work; the client had only \$1,000; and consequently the appeal received only \$1,000 worth of work. This same principle obviously applies, *a fortiori*, in criminal cases where counsel is appointed and cannot expect to receive compensation commensurate with the work necessary for the preparation of detailed briefs and an extended oral argument.⁷²

With respect to institutional counsel, the result may be the same even though not dictated by a fee schedule. Particularly in the larger offices, both the prosecutor and the public defender may be plagued by problems that parallel those of the court: the pressures of a heavy case load minimizes the time that can be devoted to each case and increases bureaucracy within their own agency. The end result is the efforts of counsel may be inadequate to assist the court in resolving the issues before it.

This is often encouraged by the feeling that the result is inevitable. On the state's side, the prosecutor may feel that the court will be reluctant to order a new trial for a convicted felon and that the court and its staff will explore every possibility for affirming the conviction, thereby making arduous work by the state's advocate unnecessary. A similar feeling that there is an inevitable result in most of the cases to which they are appointed may effect the public defender.

⁷¹This trend was noted by Justice Ralph S. Locher of the Ohio Supreme Court: "Achievement is too often measured in terms of dollars with money the end-all of effort. So, too, in our profession we equate success with the size of the practitioner's bank account. I submit this equation represents a false sense of values. . . ." Remarks to the Candidates for Admission to the Bar on November 6, 1981, reprinted in 54 OHIO BAR 2142 (Dec. 14, 1981). See also Morrow, *Have We Abandoned Excellence*, TIME 90 (March 22, 1982) and Helpert, *On the Political and Pathology of Legal Education*, 32 J. LEGAL EDUC. 383, 390 (1982).

⁷²In Michigan litigation has been initiated to attempt to force the courts to adopt a "more reasonable" fee schedule for appointed counsel. The complaint claims that the "underpayment of counsel creates a risk of indigents receiving ineffective assistance of counsel and the loss of even the appearance of justice for indigents." *Michigan Lawyers Sue for Reasonable Fees*, VI THE CHAMPION 1 (June, 1982). Similar concerns have been expressed by the National Legal Aid and Defender Association with respect to the proposed use of competitive bidding to award contracts for indigent defense services. *NLADA Assails "Cheap Justice" in Contract Bid Programs*, VI THE CHAMPION 2 (June, 1982).

Having taken counsel to task, it is only fair to address a word or two to members of the bench. Counsel are only two of the actors in the oral argument. The quality of that argument depends, in large part, upon the role taken by members of the appellate bench. The more prepared and more active the judges, the greater benefit the argument can have. By changing the argument away from a lecture by counsel into a discussion of the issues among counsel and the members of the court, the oral argument may produce creative resolutions to issues which need to be addressed. But this presupposes that the judges are already thoroughly familiar with the case; that they are willing to let counsel know what issues they are troubled by; that they are willing to hazard tentative positions, knowing full well that they may not be their final position upon any given issue; and that they are willing even to disagree among themselves in the dialogue that takes place in public.

Another possibility is that the quality of oral argument is diminished by the court's restriction of oral argument time to unreasonable time periods — such as fifteen minutes. We know, for example, that in the early days of the United States Supreme Court there was no limitation on argument time. Until this century, each side was often given two hours to present its case,⁷³ and in major cases several days were often devoted to oral argument.⁷⁴ It is sometimes suggested that this was so because counsel relied upon oral argument rather than full briefs.⁷⁵ However, at least by the latter part of the nineteenth century, this was not true. Rather, in many of the major cases full briefs were presented to the Court as well as multiple-day oral arguments.⁷⁶

One United States Court of Appeals Judge has contrasted the limited amount of oral argument time in the court of appeals with the extended three-to-four hours of arguments that he allowed as a District Judge and found the former to be inadequate.⁷⁷ The question we should ask ourselves is: Are we so superior to those who preceded us that we can resolve a more complex case in a better fashion by devoting less time and effort to it?

My own supposition is that while the abilities of the bench and bar are perhaps improved they have not changed substantially and that we could benefit by a return to longer oral arguments. While the reduction in oral argument may have been a response to an increase in case load, it is also interesting to note that that reduction parallels an increasingly technological society in which everything from the telecast of war to the evening meal is instantaneous.⁷⁸ I

⁷³In 1849, the Court limited oral arguments to two hours per side. 7 How. IV (1849). This same amount of time was allotted in the Ohio Supreme Court. Rule III, 14 Ohio St. VI (1864).

⁷⁴For example, the argument in *Ex parte Milligan* 71 U.S. (4 Wall) 2 (1866) "ran from March 5 through 9, and was continued on March 12 and 13." Fairman, VI, *Reconstruction and Reunion* 143 (1971). *Ex parte McCordle*, 74 U.S. (7 Wall) 506 (1868) received 12 hours of oral argument over 5 days. *Id.* at 451.

⁷⁵Briefs were required beginning in 1821. 6 Wheat. V (1821).

⁷⁶*E.g.*, The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

⁷⁷Response to a survey quoted in Wasby, *supra* note 44, at 28.

⁷⁸California Supreme Court Chief Justice Bird has analyzed the cultural aspects of this phenomena. Bird, *The Idol of Instantaneousness*, JUDGES' J., Fall 1982, at 7. Another manifestation of this development may

suspect that culturally we have lost our patience for listening to others carefully and for thoroughly developing arguments in even important cases. It appears that the reduction in oral argument is part of the quest for the "instant judicial decision" as the companion of this morning's instant breakfast.

The curtailment or elimination of oral argument is not a proper cure for problems that may be arising because of the volume of cases being filed in the State Court of Appeals. Rather, Ohio should return to the day oral argument was at least 30 minutes for each side as advocated by Section 3.35 of the *A.B.A. Standards Relating to Appellate Courts*.

VI. LIMITATIONS ON BRIEFS

Like the reduction in oral argument, it is doubtful that reducing the number of pages allowed for appellate briefs could result in any significant savings of judicial time.⁷⁹ The average attorney already has significant incentives to present the issues to the court in the most concise fashion that he or she deems possible.⁸⁰ Indeed, it appears that "the vast majority of briefs are far shorter than the page limitations" currently imposed by the courts.⁸¹ Hence, the potential savings is *de minimis*.

Further, like reducing oral argument to fifteen minutes, placing stringent limitations on briefs may be counterproductive. For example, consider a ten-page limitation on reply briefs.⁸² The appellee, by the injection of new issues, citations of portions of the record not utilized in the appellant's brief, or use

be seen in the reports that the editors of *READER'S DIGEST* are publishing a "condensed" version of the Bible. *PARADE*, September 17, 1981, at 12. William Safire analyzed the effect of this approach, writing:

The attention span of most Americans on serious matters is about 20 seconds, the length of a television clip.

In the same way, people do not want to read articles as they once did; today, if you cannot get it in a paragraph, forget it.

As a result, we're becoming a short-take society. Our Presidency is a forum for 30-second spots. Our food for thought is junk food.

. . . as a people (we) are writing less and talking more. Because it takes longer to prepare your thoughts on paper, that means we are adlibbing more, and it means we are thinking more superficially. . . . "Commencement address at Syracuse University, Spring, 1978, *quoted in Davis, "Editor's Viewpoint,"* 14 *Law Notes for the General Practitioner* 1 (Summer, 1978).

⁷⁹The present Ohio Appellate Rules do not place any limitation upon the length of briefs. *See* O.R.A.P. 16. Some Courts have placed such limitations upon briefs by local rule, *e.g.*, Eighth District Local Rule 6 (40 pages); Ninth District Local Rule 13.7 (30 pages), Tenth District Local Rule 6 (50 pages). Nationwide the page limitations for opening briefs range from 25 to 100 (or none) with most seeming to fall in the 50-70 page range. *See* R. STERN, *supra* note 66, at 226-30.

⁸⁰Institutional counsel, such as the Prosecutor's Office or the Public Defender's Office, have strong pressures generated both from a realization that the court does not like long briefs and their own heavy case load. Similarly, the rate of compensation for court appointed counsel in criminal cases provides a disincentive for lengthy briefing of the case and makes it unlikely that any but the most diligent counsel will approach the page limitation, unless compelled to do so by ethical considerations. Privately retained counsel who take a given case, either upon a contingency or for a set fee, have strong interest in limiting the work they put into an appellate brief. The only time in which counsel would have an incentive to write a longer brief would be those billing upon an hourly basis. Of course, those working under the pressures of a heavy caseload or the constraints of low fees may have a disincentive to edit and revise a brief in order to reduce it to its most compact form.

⁸¹Marvell, *supra* note 3, at 67.

⁸²*E.g.*, Eighth Ohio Appellate District Local Rule 6.

of new authorities can make an effective ten-page reply impossible. By forcing counsel to summarize or abandon detailed argument the court may deprive itself of both analysis and citations of relevant authority that counsel might have otherwise provided. The end result may be that the judge and court staff may have to conduct independent research that would otherwise be unnecessary.

VII. USE OF UNREPORTED OPINIONS

The unreported opinion problem is intimately related to Ohio's requirement, under Appellate Rule 12, that the Court of Appeals write upon each assignment of error. In jurisdictions where there is no such requirement, the court, by disposing of the case by simple journal entry, produces no opinion. Hence there is no controversy over its lack of publication or its use as precedent.⁸³ It is only when an explanation of the basis of the decision is written that a "problem" develops.

The existence of unreported opinions raises two separate and discrete issues. First, opinions increase the volume of precedent. Though not advanced by any of the participants in this Symposium, the call for limiting the increase of authority is not a new one. Complaint was made against the "unmanageable volume of authority and the unnecessary restatements of settled points of law."⁸⁴ Justice McReynolds has been quoted as stating that "multiplied judicial utterances have become a menace to order administration of the law. Much would be gained if three-fourths (maybe nine-tenths) of those published in the last twenty years were utterly destroyed."⁸⁵

⁸³An appropriate response to just such an order was:

THE AFFIRM-THE-ORDER, NO-OPINION BLUES

I got the Affirm the Order
 No Opinion blues
 The Appellate courts won't tell me why I lose
 I wrote a brief like Darrow
 And I cited Blackstone's law
 But the Judges thought that Blackstone
 Was a General in some war
 I got the Affirm the Order
 No Opinion blues
 The phrases that they use have me confused
 I'm going to write the Court Supreme
 And I'll ask them what they mean
 By their Affirm the Order
 No Opinion ruse.

- Words and Music by W. F. Sutton (Circa 1966)
- Quoted in *WHERE THE MONEY WAS* by Willie Sutton with Edward Linn (Viking Press, N.Y. 1976) 269.

⁸⁴Seliugson & Warnlof, *The Use of Unreported Cases in California*, 24 *HASTINGS L.J.* 37 (1936).

⁸⁵Quoted in Saeta, *What Price Written Opinions*, CAL. ST. B.J. 222, 223 (1934). See WARREN, *A HISTORY OF THE AMERICAN BAR* 520 (1911) for a collection of quotations complaining about the increase of precedent. See also FAIRMAN, VI RECONSTRUCTION AND REUNION, 1450-51 (1971).

Similar concerns have been expressed in modern times: "[T]he value of using these unreported decisions must be weighted against the costs to the practitioner and public in maintaining law libraries. Further, one must consider the hours wasted by the courts and attorneys in researching hundreds of unreported decisions of the courts of appeals" (footnote omitted). Shaw, *The Legal Significance of the Unpublished Court of Appeals Opinion in Ohio*, 6 *CAPITAL U.L. REV.* 393, 399 (1977). Like objections are raised to increasing the number of reported cases. After considering the costs of both publication and research time,

One can argue that the cases are really not precedential; that the cases do not measure up to standards for publication as precedential cases; and rules can be made which attempt to prevent the use of such cases.⁸⁶ However, if the cases were truly *not* precedential, then there would be no difficulty; a non-precedential case would not be cited by the bar, or, if cited, could be easily ignored. The difficulty stems from the fact that the cases are precedential and that both the bar and the court recognize them as such.⁸⁷ Consequently, alternatives vary from requiring all cases to be published — an unrealistic solution at the present — to suppressing precedent by the simple technique of not allowing any opinions to be written. The latter can itself produce problems.

The lack of any opinion diminishes certainty.⁸⁸ Counsel and his or her client may not realize why they lost the case and may take further appeal that otherwise would not be pursued. Similarly, even if the further appeal is inevitable, without any guidance from the court as to why the appeal was lost, the appellant may not be in a position to properly narrow the issues for the next stage of review.

Moreover, without an opinion no one in a similar situation can receive any guidance from the disposition of the case. The decision is akin to the Supreme Court's use of a "balancing approach" — the application of the law becomes less certain and it "becomes difficult to know how the case will be decided . . . until the judge has ruled. . . . The decrease in certainty will produce more litigation, and a greater proportion of litigated cases will be tried rather than settled."⁸⁹

The second major issue concerning unreported opinions is the equal access

it has been suggested that "[i]t may cost more than it is worth to peruse 100 cases on the legal problems of inspection at border crossings in order to be able to decide the 101st case." ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 109 (1977).

⁸⁶An example of this approach is found in Cameron, *The Improvement of the Administration of Justice*, see CAMERON, *supra* note 69, at 207, indicating that one result of "the large number of frivolous and nonprecedent-creating decisions, was . . . the authorization by court rule of memorandum decision(s); that is, summary, usually nonpublished and noncitable, decisions of the appellate courts" (emphasis added). Obviously if the decision was truly nonprecedent-creating there would be no need for a non-citation rule.

⁸⁷The United States Supreme Court has recently even relied upon argument of counsel that were *not made* as authority for supporting its conclusion. *United States v. Ross*, ___ U.S. ___, 50 U.S.L.W. 4580, 4586 (1982) citing and quoting *Bank of the United States v. Deveaux*, 5 Cranch 61, 88 (Marshall, C.J.). For a criticism of this approach see the dissent, 50 U.S.L.W. at 4591, n. 7.

⁸⁸It has been suggested that the use of unreported opinions makes the law "less predictable" because the discovery of unreported precedent may depend upon chance. Shaw, *supra* note 85, at 399-400. However, with the advent of an adequate indexing system the chance may be no greater than that occasioned with using the digests to discover reported authority. Moreover, as set forth in the text above, the Shaw's proposition appears to be incorrect. A court of appeals which has decided a case — albeit in an unreported opinion — is unlikely to adopt a different rationale in the succeeding case even if it is prohibited from citing or relying upon its prior case. The fact that the case cannot be specifically called to the court's attention does not mean that the court will either change its reasoning or forget that it has decided the case. Hence, access to such a precedent by counsel would actually increase predictability and perhaps eliminate certain appeals that might be doomed to failure. On the other hand, suppression of such cases as precedent would remove incentive to discover those decisions, increase uncertainty, and give incentive to appeals that might not otherwise be taken.

⁸⁹Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 810 n. 22 (1982).

to those opinions. As Judge Black indicates, it has sometimes been thought that certain counsel — such as government agencies — may have an unfair advantage in obtaining access to unpublished opinions.⁹⁰ Though this may have been a problem at one time, the access issue would now seem to be a moot one in the State of Ohio.

My colleague, Paul Richert, has traced the development from the late 1970's of various indexes that have been published to both criminal and civil unreported cases from the Court of Appeals in Ohio.⁹¹ Though Professor Richert initially proposed that access to unreported cases could be had through computer assisted legal research data bases,⁹² he also developed the idea that these opinions could be placed on microfiche and made available to the public. The latter suggestion has been adopted by the Banks-Baldwin Publishing Company which is marketing cumulative indexes and making available the full text of the unreported opinions.⁹³ In this fashion, either by subscribing to the fiche editions and reading each case individually or by using the marketed indexes, everyone is guaranteed equal access to the same opinion.⁹⁴

This leaves only the question of how such opinions should be presented to the court. The rule advocated by Judge Black and currently in effect in the Eighth District Court of Appeals⁹⁵ requires that counsel seeking to use any unreported case attach a copy to his or her brief. This seems to be an adequate way to insure that the court and opposing counsel have convenient access to the opinion.⁹⁶ It may well be that the use of microfiche or computer-based research will so increase that at some time in the future this requirement will no longer be necessary.

⁹⁰Black, *Unveiling Ohio's Hidden Court*, 16 AKRON L. REV. 107, 109 (1982). See also Shaw, *supra* note 85, at 399.

⁹¹Richert, *Update on Ohio Judicial Reporting*, 41 OHIO ST. L.J. 675, 680-81 (1980). In addition to those indexes, the Ohio Department of Administrative Services has published an unreported case service of significant civil service cases in Ohio from 1970 to the present. See letter from Jonathon J. Downes, Legal Counsel, Ohio Department of Administrative Services to Paul Richert (May 20, 1982). (Copy on file with the author.)

⁹²*Id.* at 682.

⁹³See generally ORAL News Letter at 6: *The Door to Ohio Appellate Decisions Opens*, (May, 1982); Law Library Microform Consortium, 1982 Catalog at 45 and, e. g., Banks/Baldwin ad 55 Ohio Bar (Inside cover) June 14, 1982.

⁹⁴However, there may still be some inequality in terms of the timing. Counsel who litigate in a certain area and whose office accumulates a large number of opinions may have access to them sooner than other members of the bar.

⁹⁵Local Rule 19.

⁹⁶At least with respect to informing any given court of appeals of the existence of its own unreported cases counsel may already under a duty to take some action in that regard: "In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." Ohio Code of Professional Responsibility DR 7-106(B) (1) (Adopted October 5, 1970). This is identical to the provisions of the A.B.A. Code of Professional Responsibility.

Though DR 7-106 is contained under the title "Trial Conduct" it would seem to be equally applicable to appellate practice. See generally Code of Professional Responsibility DR 7-102 (A) (5) and (7).

VII. DETERMINATIONS AS TO WHICH OPINIONS SHOULD BE REPORTED

Judge Black has made a significant contribution to the improvement of the Ohio appellate system by highlighting the underpublication of decisions of the intermediate state Courts of Appeals.⁹⁷ In his article for this Symposium he features Ohio Appellate Rule 25⁹⁸ as proposed by the Ohio Court of Appeals Judges Association.⁹⁹ That proposal would not only adopt standards for the publication of opinions, but would also provide a formalized procedure under which counsel could request publication of an opinion through the court and under which the reporter of the Supreme Court could determine which opinions should actually be published.

While acknowledging the salutary effects of the proposed rule, there is nevertheless the possibility that it could be improved. For example, section (B) of the proposed Rule vests with the supreme court reporter the power to refuse to officially publish a decision certified for publication by the appellate court. This is a departure from the current requirement.

The reporter, while selected by the Supreme Court, is actually the reporter for all the appellate courts of the state.¹⁰⁰ The statute requires that the reporter publish the decisions of any court of appeals "furnished him for publication by any such court. . . ."¹⁰¹ As Judge Black has indicated,¹⁰² this language would appear to create a duty for the court reporter to publish all opinions that are referred to him or her by the court.¹⁰³

The continuation of a policy under which judges, as opposed to the reporter, have the ability to require the publication of opinions they deem important is a beneficial one. The drawback occasioned by a possible lack of objectivity in judging the importance of one's own work is more than offset by the more informed decision-making that comes from being more intimately familiar with both the case itself and the likelihood that the nature of the litigation within a given appellate district is such as to make the case important to members of that community.

The current statute requires that a majority of the judges certify an opinion

⁹⁷Black, *Hide and Seek Precedent: Phantom Opinions in Ohio* 50 U. OF CIN. L REV. 477 (1981).

⁹⁸The full text of the rule is set forth in note 27 of Judge Black's article.

⁹⁹Black, *supra* note 90, at 112.

¹⁰⁰OHIO REV. CODE ANN. § 2503.20 (Page 1981) Historically, the office of reporter was held by eminent counsel. Reverdy Johnson was a reporter of the decision of the Court of Appeals of Maryland. BROCKETT, MEN OF OUR DAY, 345 (1868). Edwin Stanton was chosen by the General Assembly of Ohio as a reporter for the decisions of the Ohio Supreme Court, *Id.* at 201, and Jeremiah S. Black was the reporter for several years for decisions of the United States Supreme Court, FAIRMAN, VI RECONSTRUCTION AND REUNION 71 (1971).

Ohio has continued this tradition by appointing an able attorney, Walter S. Kobalka, as its reporter. Mr. Kolbalka assumed the duties of that office August 2, 1982.

¹⁰¹*Id.*

¹⁰²Black, *supra* note 97, at 481.

¹⁰³However, Judge Black indicates that the practice "is otherwise." *Id.*

for publication. Proposed Appellate Rule 25(B) would perpetuate that practice. An alternative proposal would be to allow any single judge to certify a decision for publication. Where the matter is one of simple disagreement, we see the caliber of judges at their best when we have two individuals, each having read the briefs and record, marshalling facts and law against each other in their conflicting opinions. It is in this crucible of majority/dissenting opinions that one can form the most accurate judgments as to the caliber of individual judges and the quality of justice in a given case. Further, the prospects of a dissent have always been thought to have been a check not only against superficial reasoning,¹⁰⁴ but also against any possible misconduct.¹⁰⁵ Knowledge that a dissenter would have the right to require publication of a given opinion would serve the public interest in accountability without any appreciable adverse affects.

Of course, cases may arise where none of the judges desire publication — but counsel does. This may simply reflect a difference of opinion as to the significance of the case or it may be an attempt by counsel to bring into public light an opinion which he or she thinks is deserving of critical comment. Whatever the motive, the provisions of proposed Appellate Rule (C) would make for an increasing number of motions to be filed in the Court of Appeals at a time when most agree that judicial resources are scarce. It would seem that a more appropriate process would be to allow the parties to petition the court reporter directly for publication of a case not deemed publishable by the court that authored it. This would give counsel an avenue to request publication from one not involved in the decision and hence create an additional check and balance within the system.

These proposals would require the court reporter to publish all decisions requested for publication by at least one judge but would leave the court reporter free to publish additional opinions thought deserving of publication either upon his or her own initiative or, after review, upon the request of any other person. Such a process would enhance the accountability of the judiciary and serve the public interest.

IX. WRITING ON EVERY ASSIGNMENT OF ERROR

One of the significant features of the Ohio Appellate system is Ohio Appellate Rule 12 (A) which provides, in part that “[a]ll errors assigned and

¹⁰⁴Aynes, *Much Ado About Nothing* . . . 13 AKRON L. REV. 507, 518 n. 98 (1980). Similar views have been expressed by Justice Rehnquist: “[T]he inevitable dissents generated by difficult cases are themselves a form of ‘check and balance’ within the federal judicial system itself.” Rehnquist, *All Discord, Harmony Not Understood: The Performance of the Supreme Court of the United State*, 22 ARIZ. L. REV. 973, 986 (1980). However, not everyone shares this view of the desirability of the dissent, and some have even condemned it as a “menace to law and order.” Lee, *Dissenting Opinions*, 2 JOHN MAR. L. Q. 404, 405-06 (1937). In contrast, Justice Douglas believed that “The right to dissent is the only thing that makes life tolerable for a judge of an appellate court.” W. DOUGLAS, AMERICA CHALLENGED 4 (1960).

¹⁰⁵It is said, for example, that in one instance a majority of a California Appellate Panel reversed a decision to have an opinion published in order to “suppress” a dissent they did not like. Andreani, *Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California’s Selective Publication System*, 12 PAC. L. J. 727, 733 (1981) citing L.A. Daily Journal, Oct. 31, 1979, at 1, col. 6.

briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." Judge Day¹⁰⁶ and Messrs. Parness and Reagle¹⁰⁷ advocate the abolition of this requirement upon the grounds that it is an inefficient use of judicial resources. Because this rule is, in effect, the only practical way to implement a requirement that the court give the parties an opinion which is responsive to the issues presented on appeal, the real question is the desirability of requiring the court to state its reasons for disposition of a given case.¹⁰⁸

The *A.B.A. Standards for Appellate Courts* indicate that a "reasoned explanation should be given" for the court's resolution of any given case¹⁰⁹ and that "[e]very decision" should be supported by at least a "citation of authority or statement of grounds upon which it is based."¹¹⁰ The rationale underlying the requirement of written opinions may be divided into three general categories: 1) to preserve the integrity of the appellate process; 2) to enhance the perception of the integrity of the appellate process; and 3) to assist others in the judicial system.

The reliability of the decision-making process itself may be dependent upon whether the judges of the court go through the process of writing out reasons for a proffered decision. To resort to a frequently utilized analogy, the unwritten judicial decision may be compared to a scientist's "hunch," with the written opinion being the "experimentation" which demonstrates that the hunch was or was not justified.¹¹¹

The practical result of this is that a requirement to set forth written reasons "not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid."¹¹² The truth of this claim has been verified by historical research concerning the conferences of the United States Supreme Court which identifies numerous occasions in which the vote of particular Justices or the Court, changed between the conference vote and the final release of a given decision.¹¹³ Further, the tale of the decision that "wouldn't write" is one that

¹⁰⁶Day, *supra* note 7, at 40.

¹⁰⁷Parness & Reagle, *supra* note 6, at 29-31.

¹⁰⁸There is, obviously, a distinction between requiring the Court to set forth its reasons in a written statement and requiring the publication of that statement.

¹⁰⁹Section 3.30 (Approved Draft, 1977).

¹¹⁰Section 3.36 (Approved Draft, 1977).

¹¹¹This analogy is developed in numerous places. See, e.g., Wasserstrom *The Judicial Decision* 25-30 (1961) quoted in BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS 3-5 (1975); Jones, *Multitude of Counselors: Appellate Adjudication As Group Decision-Making*, 54 TULANE L. REV. 541, 542-43 (1980); Rubin, *Book Reviews*, 130 U. OF PA. L. REV. 220, 227 (1981).

¹¹²CARRINGTON, MEADOR, & ROSENBERG, JUSTICE ON APPEAL 10 (1976). See also *Id.* at 31.

¹¹³See generally, FAIRMAN, VI RECONSTRUCTION AND REUNION 1864-1888 864, 871-72, 1019-20 (1971). See also MURPHY, THE BRANDEIS/FRANKFURTHER CONNECTION 377 n. 34 (1982).

has been reiterated enough so as to be deserving of credit.¹¹⁴ Indeed, any lawyer who has served as an arbitrator where written opinions are required or who has authored frequent appellate briefs has probably within his or her own personal experience examples of conclusions which appeared overwhelming in thought but which had to be abandoned once placed in written form. That these same occurrences should happen in the preparation of written opinions by Appellate Judges should not be surprising.

Like the debate over the effect of oral argument, the number of times in which a tentative opinion may be changed by a requirement of writing upon the issues presented by the appeal is not subject to easy verification. In part this is because the very knowledge of a writing requirement may, in and of itself, result in more serious attention to the case prior to the preparation of any opinion. Nevertheless, it is submitted that the requirement of writing upon each assignment of error serves a valuable validating function even if it does nothing more than demonstrate the accuracy of the court's initial hunch. The alternative to written opinions is, in the words of former Arkansas Supreme Court Justice George R. Smith, that "judicial mistakes would proliferate beyond knowing and beyond knowability."¹¹⁵

A second concern is not only that the decision-making process be accurate, but that it be perceived by the public and the litigants as being a fair one since "[the] litigants and the public are reassured when they can see that the determination emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify."¹¹⁶ A written decision, accessible to the public, can give assurance that the "corrective process is working";¹¹⁷ provide an understanding of "how the numerous decisions of the system are integrated";¹¹⁸ and give a basis for dispell notions that decisions are made upon other than legal grounds.¹¹⁹ Thus, the use of written opinions may be directly linked to the legitimacy of the action of the court and thereby to its effectiveness in the community as a proper institution to resolve disputes.

¹¹⁴Judge Rubin of the Fifth Circuit, in confirming the experiences of Judge Coffin of the First Circuit, recently described the phenomena in these terms:

We read the briefs, we study the record, we decide that we will affirm or reverse, and we undertake to prepare an opinion stating the decision and its rationale. We find that "it won't write" — our jargon for saying that we cannot prepare an opinion reaching the desired result in acceptable professional form. We start over and we find that our second opinion not only reaches an opposite result, but that it also conforms to our jurisprudential standards. By this time, the result that we originally rejected appears correct . . . the discipline of opinion writing does affect the result. Rubin, *supra* note 111, at 227.

¹¹⁵Rose, *The Primer of Opinion Writing for Four New Judges*, HANDBOOK FOR JUDGES 127 (Winters ed. 1975).

¹¹⁶*Supra* note 112.

¹¹⁷*Id.* at 10.

¹¹⁸*Id.*

¹¹⁹Like the dissent, the requirement of a written opinion may serve as a check upon judicial misconduct. It has been thought that the requirements of giving reasons for opinions was security for honesty because "some persons would be ashamed to talk nonsense to the world in support of a judgment that they would

Nor should one ignore the relationship between the Court of Appeals and other actors within the judicial system. To be sure, the requirement that an intermediate appellate court write an opinion responsive to the issues raised on appeal may be beneficial to the state Supreme Court making decisions about discretionary review. It may also be helpful to the United States Supreme Court in making those same decisions and to the federal courts who may be forced to consider which issues were properly resolved in habeas corpus.¹²⁰ Of equal importance, a written opinion may be utilized, even if not published, for purposes of certifying a conflict between state Court of Appeals for purposes of obtaining review by the Ohio Supreme Court.¹²¹

The written opinion has an effect not only upon counsel but upon the public as well. As Judge Skelly Wright has observed:

In applying and shaping law to novel arrays of facts, judges are required by their office not just to decide particular cases but to justify their decisions in terms of more generally valid principles or policies. Members of the public bear no similar obligation to think systematically. Their moral and legal views are far more likely to be intuitive — unreflective hunches about what is right in this or that particular case. . . . [T]he judge's task is frequently to formulate principles that are persuasive in their own right — rationales that the public, if it troubled to give the matter serious thought, would hopefully find persuasive. . . .¹²²

Even in a case which has little public interest,¹²³ the same imperatives apply to counsel and his or her client. Judge McCree rhetorically suggests that one “try explaining to a client why the court ruled against him when the only judgment you have says nothing more than ‘affirmed’.”¹²⁴ Assuming the advocate has prepared a brief which presents claims that are at least plausible to the client, the most natural conclusion to be drawn is that the court failed to make an explanation of its rejection of the arguments upon appeal because it could not do so. Hence, in the eyes of many a client, the court's unexplained opinion is, in and of itself, persuasive evidence of an illegitimate result.

suffer themselves to give silently.” Lord Hardwick, *quoted in* Holdsworth, XII History 250 *quoted in* E. DUMBALD, THOMAS JEFFERSON AND THE LAW 173 n. 118 (1978).

¹²⁰A habeas corpus petitioner is required to exhaust state remedies before presenting his or her claim to the federal courts. However, the State Court's disposition of issue raised — whether treating the issues on substantive or procedural grounds — may determine whether claims are properly cognizable in federal courts. *See generally* YACKLE, POST CONVICTION REMEDIES 231-427 (1980).

¹²¹For examples of the use of unpublished opinions for conflict certification purposes *see* Viers v. Dunlap, 1 Ohio St. 3rd 173 (1982); Straub v. Voss, 1 Ohio St. 3rd 211 (1982); State v. Mowery, 1 Ohio St.3rd 192 (1982).

¹²²Wright, *Book Review*, 33 STANDARD L. REV. 179, 196 (1980).

¹²³One of the difficulties in allowing the Court to make decisions as to cases which do have widespread public interest is that they may be in error. Consider, for example, Rowley v. Board of Education, 632 F. 2d 945, 948, n. 7 (7th Cir. 1980) where the court purported to find that its decision lacked “precedential character” only to have the case accepted for certiorari and reversed by the United States Supreme Court. 450 U.S. 907 (1981).

¹²⁴McCree, *Bureaucratic Justice: An Early Warning* 129 U. OF PA. L. REV. 777, 780 n. 21 (1981).

Equally as important, a convincing explanation of the reasons for a disposition of a case may have an effect upon counsel's judgment of the case and the future course of the litigation. It is not uncommon for counsel, no matter how diligent in research, to discover an unexpected view or an undiscovered case in a Court of Appeals opinion. While this may not always change his or her mind about the fairness of the result below, it may have a major impact upon the assessment of the prospects of relief in further litigation. One of the consequences of a written opinion may be to terminate, or at least narrow the scope, of the litigation.

Though these considerations apply generally to the concept of writing an opinion, they also apply with equal force to vindicate the existence of Ohio's Appellate Rule requiring the court to write upon each assignment of error. The failure to address any assignment of error properly raised by the parties suffers from the same defects as the failure to write at all: it provides no test of the court's opinion upon the issues not addressed; it does nothing to assure the public that reasoned consideration was given by the court to the omitted issue; and it provides no information to other participants in the judicial system about the nature of the court's reasoning process. Ohio Appellate Rule 12 serves to effectively implement the values underlying the requirement that courts not simply say "trust us," but explain the reasons for their decision.¹²⁵ Since that is a policy which is one of the strengths of the Ohio appellate system it should be continued as presently constituted.

X. SANCTIONS FOR FRIVOLOUS APPEALS

Messrs. Parness and Reagle advocate the use of sanctions for "frivolous" appeals.¹²⁶ The difficulty with this concept is that: "Frivolity is in the eye of the beholder. One person's frivolity is another person's ingenuity."¹²⁷

¹²⁵The only criticism of the current rule which is not responded to by the policy reasons supporting published opinions is that which indicates that the Judges do not follow the rule anyway because they use "boilerplate reasons" in disposing of "many types of assignments of error." Parness & Reagle, *supra* note 14 at _____. Three observations are in order:

First, if the point is seriously made that the Judges are in violation of Rule 12 then enforcement, not abandonment, would seem to be the appropriate response.

Second, if by "boilerplate" responses it is meant that the Court has standard responses which include the applicable legal standards, but that an individual determination is still made, then the practice would not seem to be objectionable.

Third, the claim made is contrary to the author's personal experience. In reading, in one capacity or another, what must easily be over 1,000 unpublished Ohio Court of Appeals opinions the author's impression is that most panels of the Court attempt to comply with the Rule. While one may often desire a more detailed explanation of reasons, the decisions of the Ohio Courts of Appeals compare most favorably to the two-page unpublished opinions of the Sixth Circuit.

¹²⁶Parness & Reagle, *supra* note 6 at 32-35.

¹²⁷Attorney Ronald Mallen, author of *Legal Malpractice* (1981) and Chair of next year's A.B.A. Standing Committee on Professional Liability quoted in Hurley, *Much Ado About Nothing*, DOCKET CALL Summer, 1982, at 15.

It has been suggested that many suits denominated frivolous are a product of a breakdown of the relationship between individuals and institutions which, in the past, would have resolved the disputes without resort to the judicial system. See generally *id.* at 15. At the same time, Jethro Liberman, author of *The Litigious Society* suggests that many of the suits in question are actually "frontier cases" and that calling them frivolous is "an insult that's easy to hurl at what you don't like." *Id.* Hurley sets forth fourteen

Consider a few examples. What about the attorney who consistently raises claims that judges might describe as frivolous because the court overrules the overwhelming majority of them? The complaint may be made that though the court knows he or she is wrong, it has to work hard in order to prove it. In spite of the ultimate resolution the case was apparently a difficult one for the court. Because the court ultimately rejects such arguments, it is understandable that judges may see this as unproductive time. However, any issue the court has to struggle with is, by definition, non-frivolous.

Cases in which the legal issues have already been resolved contrary to the appellant's position would normally be considered one of those categories of cases which could easily be denominated frivolous. But, even the United States Supreme Court reverses itself.¹²⁸ For example, in *Monroe v. Pape*¹²⁹ the Warren Court, after canvassing the legislative history, concluded that cities were not persons within the meaning of 42 U.S.C. § 1983. That was a decision which seemed to weather time well and which one would have thought the Burger Court would not have been predisposed to change. This is all the more true since Congress could have overruled *Monroe* by enacting legislation to change or define the word person. It is now a matter of history, though, that the Burger Court did overrule *Monroe* in *Monell v. New York City Department of Social Sciences*.¹³⁰ And we have examples of Judges who have indicated that they would not follow their own prior decisions. Justice Holmes, upon being quoted dictum from his opinion in *Patterson v. Colorado ex rel Attorney General*¹³¹ during the oral argument in *Near v. Minnesota*,¹³² was supposed to have "smilingly" interrupted the state's attorney and said: "I was much younger when I wrote that opinion than I am now. If I did make such a holding, I now have a different view."¹³³

In these instances counsel on one side was proceeding against what appeared to be well-established precedent. They, of course, were fortunate enough to

examples that he believes fall within the "don't like" category.

For a discussion of a California case where the intermediate appellate court imposed a \$500 sanction for a frivolous appeal only to be reversed by the California State Supreme Court see Grace, *The Purpose of Sanctions*, JUDGES' J. (Summer, 1982). The disagreement between the California Court of Appeals and the Supreme Court illustrates the difficulties in this area. The court of appeals deemed the appeal "utterly hopeless." However, the state supreme court was quoted as applying a different standard: "Counsel and their client have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win in appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions." *Id.*

¹²⁸Between 1960 and 1979 the Supreme Court explicitly overruled 47 of its own cases. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 494-96.

¹²⁹365 U.S. 167 (1961).

¹³⁰436 U.S. 658 (1978).

¹³¹205 U.S. 454 (1907).

¹³²283 U.S. 697 (1931).

¹³³Murphy, *Near v. Minnesota in the Context of Historical Developments*, 66 Minn. L. Rev. 95, 152 n. 251 (1981) quoting R. McCORMICK, *THE FREEDOM OF THE PRESS* 51 (1936). Justice Douglas indicated that his vote to affirm in *Korematsu v. United States*, 323 U.S. 214 (1944) was a mistake, DOUGLAS, *THE COURT YEARS, 1939-1975* 39, 279-80 (1980).

ultimately prevail in the high court. But what of individuals who raised these same issues and did not proceed to further appeal or whose case was not heard because the Court refused to exercise its discretion and grant certiorari? Are they to have sanctions imposed upon them?

These examples demonstrate the difficulty in establishing an appeal which could be termed the proper subject of sanctions. The skillful lawyer who wants to present the appeal will always be in a position to make a non-frivolous claim, even if only by announcing that he or she is bringing the appeal for the very purpose of changing the established law and seeking to overturn well-established cases. Consequently, except as a trap for the unwary, sanctions for frivolous appeals will always be largely illusory.

XI. ALTERNATIVES: PROBLEMS AND SOLUTIONS

Justice Holmes once cautioned that "we need education in the obvious more than investigation of the obscure."¹³⁴ The obvious may include the discovery of choices where none are thought to exist; or, it may include the revelation of assumptions made but not articulated.

The number of appellate cases filed is increasing as is the backlog of cases in many courts. The response of many is that recognition of caseload increase inevitably leads to the *assumption* that backlog must be reduced. A typical response is to express regret about the reduction of oral argument but to conclude that "the logistics of a huge docket *permit no alternative*."¹³⁵

This approach overlooks the fact that alternatives do exist. It is one thing to argue that the benefits of resolving cases are such that expeditious treatment is worth the cost of eliminating some part of the traditional appellate process. But, it is quite another to claim that there are no alternatives. One alternative is to simply let the case backlog increase. One may say this is an undesirable alternative. However, recognizing its existence makes debate possible on the merits of allowing such a backlog to exist. Regretfully, those concerned with court administration too often merge the fact of growing caseload with the assumption that such backlog must be corrected and thereby stifle any debate upon the alternatives.¹³⁶

¹³⁴Quoted in F. WEINER, A PRACTICAL MANUAL ON MARITAL LAW 16 (1940) citing O. W. HOLMES, COLLECTED LEGAL PAPERS 292-93.

¹³⁵Engle, *Oral Advocacy at the Appellate Level*, 12 U. TOL. L. REV. 463, 465 (1981) (emphasis added). Similar views were expressed by a judge of the Ninth Circuit United States Court of Appeals when he indicated that given the court's caseload the court "can't give oral argument in every case. Wasby, *Oral Argument in the Ninth Circuit Court of Appeals: The View from the Bench and Bar*, 11 GOLDEN GATE L. REV. 21, 28 (1981). This concern with caseload appears to be shared by the Ohio Bar Foundation which had indicated that its "first priority" will be an "in-depth study of the administration of justice in Ohio" which focuses upon "efficiency" and "case flow management." See Swisher, *Report of the Research Director to the Fellows*, 54 OHIO BAR 2074, 2077 (1981). See also, Parness and Reagle, *supra* note 6, at 3, terming the increase in case load a "crisis" and indicating "[n]ecessity" has caused appellate courts to establish "new techniques for handling caseload pressures." Applying the same principle to Ohio, they are willing to assume that "all appellate cases . . . must be immutably accorded the full range of all appellate procedures." *Id.* at 14.

A. Creative Inaction

“Speedy” justice is held out as a high ideal and delay in the disposition of cases has been seen as an historic evil.¹³⁷ Delay was, of course, one of the evils decried by Roscoe Pound in his address on the causes of popular discontent with the judiciary.¹³⁸

Because of the high value placed upon speedy disposition of cases and an abhorrence of delay, courts with heavy caseloads tend to adopt an assembly-line concept of justice. This was first evidenced in courts “processing” misdemeanors:

An inevitable consequence of volume that large is the *almost total preoccupation in such a court with the movement of cases*. The calendar is long, *speed often a substitute for care*, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, in protecting his rights, shifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction.¹³⁹

That same type of volume now exists in many domestic relations courts, with the same attendant criticisms.

Historically, one of the tensions between the high-volume trial courts and the less pressured appellate courts has been upon the manner in which such cases should be disposed. Appellate courts made decisions which sought to impose process-oriented requirements upon the trial court which both consume time and cause increased expense. A reading of the appellate opinions often leads one to the conclusion that appellate courts were shocked by the lack of individual attention and procedure afforded to each case. By contrast, it was not uncommon for the trial judges in such high-volume courts to decry the impracticability and naivete of the appellate judges and attempt to mitigate the impact of those decisions upon their day-to-day lives.

¹³⁶This is often accomplished by ascribing improper motives to anyone who opposes “improvements” in the appellate system.

For example, one leading advocate of court reform, Daniel Meador, has concluded that while there may be exceptions, the “dominant attitude among individual lawyers and among the organized bar is either indifference or negativism regarding proposals to alter existing structure, jurisdiction or procedure” as a method of reforming the court. Meador, *The Federal Judiciary — Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U.L. REV. 617, 639. He indicates that these attitudes may be attributable to “several reasons” and catalogues the following: 1) inertia; 2) specialization of the bar causing counsel to protect their client’s interests which might be jeopardized by reform; and 3) the lawyer’s own economic interests. *Id.* at 639-40.

It is interesting to note that nowhere is allowance made for the fact that the proposed reforms may be ill-conceived (surely there must be some reform which is ill-conceived) or that the opposition may stem from a reasoned good-faith disagreement.

¹³⁷*E.g.*, *Habakkuk* 1:4: “Therefore the law is slacked, and judgment doth never go forth: for the wicked doth compass about the righteous; therefore wrong judgment proceedeth.”

¹³⁸Pound, *The Cause of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906) reprinted in 35 F.R.D. 273 (1964).

¹³⁹THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967) quoted with approval in *Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972) (emphasis added).

It is therefore ironic that as the appellate courts themselves are experiencing increasing case loads, they are moving away from their own model and approaching closer approximations to the techniques of high-volume trial courts that they have previously condemned.

Former Attorney General Bork has indicated that the increase in the volume and the complexity in cases in the federal courts threaten to convert the United States Court of Appeals from "deliberative institutions to processing institutions."¹⁴⁰ And Chief Justice Burger has quoted with apparent approval Solicitor General Bork's conclusion that the work load forces the courts "towards an assembly line model."¹⁴¹

This is the result of a heightened concern for the disposition rate of cases. However, there are other values to be considered besides processing cases: "A judge's time is precious, to be sure, but precious only in relation to the task the judge performs."¹⁴² As Judge Oakes has indicated, there must be more to judging than "mere bureaucratic management."¹⁴³

This obsession with processing cases has not always held such sway. For example, in an analysis of the embryonic Court of Claims, one of that court's reporters indicated:

It is almost an axiom that justice is neither swift nor cheap. The summary proceedings before a Turkish Cadi are an exception. But in courts, where deliberation and method are supposed to prevail, the process is always attended with expense. As a general thing, cheapen justice and you will weaken its administration.¹⁴⁴

A good expression of this concept in modern times is that of Judge McKay of the United States Court of Appeals for the Tenth Circuit:

[A] much loved cliché is based on a false assumption that inhibits clear thinking about the management of the judicial process. That cliché is: justice delayed is justice denied. It essentially assumes a cost-free access to judicial dispute resolution . . . no system would ever tolerate enough judges to permit all disputants who desire a chance for prompt low-cost access to judicial settlement.¹⁴⁵

The result is that when judges crave speedier judicial processes it may result in a "parody of the judicial function."¹⁴⁶

¹⁴⁰Bork, *Dealing with Overloads in Article III Courts*, 70 F.R.D. 231, 233 (1976).

¹⁴¹W. BURGER, YEAR END REPORT OF THE JUDICIARY 2 (1981).

¹⁴²Galtieri v. Wainwright, 582 F. 2d 348, 375 (5th Cir. 1978) (Godberg, J., dissenting).

¹⁴³Oakes, *On the Craft and Philosophy of Judging*, 80 MICH. L. REV. 579, 587 (1982).

¹⁴⁴Devereux, *The Court of Claims, Its Origin and Progress*, DEVEREUX'S COURT OF CLAIMS REPORTS 10 App. (1856).

¹⁴⁵Letter from Judge Monroe G. McKay to Attorney Beverly J. Quail (April 8, 1981) (Copy on file with author.)

¹⁴⁶New York Times Company v. United States, 403 U.S. 713, 752 (1971) (Burger, C. J., dissenting). In that case, of course, Chief Justice Burger was referring to what he considered the over-expeditious treatment

Thus analyzed, the problem may not be the increasing case load but the judiciary's attempt to take action itself to decrease that case load.¹⁴⁷ Certainly one option that should be considered is to do nothing. The courts could continue to give individual attention to each case in the manner in which they have always done without thinking about any resulting backlog. This might have a number of consequences.

First, it is possible that such an approach, while leading to increasing backlog, would prompt someone outside the judiciary to take some corrective action. That corrective action might be to increase the number of judges, to limit the court's jurisdiction, or to take some as of yet unthought of approach. It might also be to order the judges — by something akin to a speedy trial statute — to decide the cases within a specified amount of time. If the choice is to be made between preserving the traditional role of the appellate courts and an increasing backlog in the disposition of cases, that choice might be more properly made by the legislative branch of government than the judiciary. Even if the Legislature took no action, this would in and of itself be a choice: By inaction the Legislature might well be saying that the delay and backlog — no matter how great — does not outweigh the virtues that the traditional judicial process protects.

Equally as important, an economic analysis of the appellate system would suggest that eventually the backlog would lead to its own solution. There surely must be a point in time when the increased delay and expense of appeal will make it a less attractive alternative. One would think that the demand for appeals is somewhat elastic and that on a simple supply/demand curve, as the delay increases, the number of individuals seeking appeal might decrease.¹⁴⁸ Further,

that individual case was receiving — without adequate time for briefing by the parties and reflection by the Justices. These sentiments were echoed by Justice Harlan and Justice Blackmun in their separate dissents. Both the magnitude of the legal issues involved in *New York Times* as well as the schedule for decision that was set by the Court were unique circumstances which may not be generally applicable to intermediate state appellate courts. However, it is noteworthy that the sentiments expressed by the dissenters provide an equally sound rationale against attempting to process any case without full deliberation.

¹⁴⁷This point is recognized in *Marvell*, *supra* note 3, at 47.

The amount of delay depends mainly on how much the judges tolerate delay, not on caseload size. . . . The reaction of some courts to rising caseloads has been to continue the traditional, thorough decision procedures, while accumulating a backlog. The reaction of other courts has been to increase productivity by chopping away at traditional decision procedures (and often by working harder), and thus giving less attention to each case.

¹⁴⁸Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 73 n. 39 (1981) citing T. CHURCH L. LEE, J. TAN, A. CARLSON, & V. MCCONNELL, *PRETRIAL DELAY* 20 (1978). While it is true that generally the rate of growth of the appellate case load "does not appear to be abating," *Marvel*, *supra* note 3, at 43, more recent statistics show an actual decline within certain categories of cases. For example, within the former Fifth Circuit United States Court of Appeals the number of prisoner appeals decreased by 4.3% between 1979 and 1980. Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 791 (1980). In the Sixth Circuit United States Court of Appeals the number of prisoner appeals declined from 546 in 1981 to 517 in 1982. For the same years the number of criminal appeals declined from 351 to 347. UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ANNUAL REPORT 7 (1982).

In Summit County (Akron), Ohio, the number of post-conviction petitions filed in the trial courts fell almost 50 percent in a twelve-month period. Akron Beacon Journal, July 19, 1982, at D 1-2. The time period in which 75 petitions were filed was between June 19, 1980 and June 29, 1981. The following 12 months was the period in which only 47 petitions were filed. In this case, it may be "futility" which caused

delay may increase the settlement process that Messrs. Parness, Reagle and Judge Day all advocate.

The point of all of this is to emphasize that alternatives to abandoning the procedured traditionally afforded by the appellate process do exist and that one of those alternatives is to tolerate increasing case filings and backlog. Though this is, understandably, not a view frequently advocated by those writing in the area of appellate reform, it may be the most appropriate position to take given the fact that "there are no hard facts to establish that delay causes litigants much harm."¹⁴⁹ This is particularly true since there is evidence to indicate that a substantial majority of lawyers would be willing to accept even greater delay in the appellate process rather than to give up either oral argument or written opinions.¹⁵⁰

B. *Modest Proposals*

This approach would not, of course, mean that the courts could not take steps to improve their own efficiency as long as they did not diminish their effectiveness. For example, technological innovations such as the use of word processing equipment could decrease judicial time in editing and revising opinions and, at the same time, decrease the time required for producing opinions.¹⁵¹

Similarly, changes might be made in certain court procedures without effecting its role. For example, Ohio Appellate Rule 18(A) provides that appellate briefs must be filed within twenty days after the filing of the record. This requirement that the briefs be filed within twenty days after the filing of the record is the most stringent requirement in the nation. The norm appears to be between thirty and forty-five days and in some jurisdictions it is as long as seventy days after the record is transmitted.¹⁵² In at least some appellate districts a first extension of time for twenty to thirty days is granted almost as a matter of course.¹⁵³ Given the backlog of appellate cases waiting for argument, this results in no delay to the final disposition of the case. However, it does mean that busy attorneys must prepare motions for extension of time and that busy judges must review those motions.

An alternative to this procedure exists in the federal courts where the

the decline. Common Pleas Judge Frank J. Baird is quoted as saying: "I believe the word has gotten through to the institutions that it is a waste of time." *Id.* at 2.

¹⁴⁹Marvell, *supra* note 3, at 47.

¹⁵⁰*Supra* note 58.

¹⁵¹Much of the time involved in preparing opinions consists of re-writing and editing drafts. Recopying those portions in which no changes were made not only consumes time, but also creates an opportunity for new errors which requires renewed proofreading. Word processing equipment produces faster copy with less investment in court staff time. ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 63 (1977).

¹⁵²*See generally* STERN, *supra* note 66, at 219-20 (1981).

¹⁵³Such a practice is specifically codified by Local Rule II.3 of the Seventh District which provides that the first motion for extension of time "will be granted" unless special circumstances exist to make an extension inappropriate.

appellant's brief is not due in the court of appeals until forty days after the filing of the record.¹⁵⁴ If the Ohio rules were amended to either allow a longer time for filing, or, in the alternative, to allow the court the flexibility to provide for longer time in filing by local rule, there would be no predictable delay in the disposition of any cases. But the entire judicial system would save time and money that is currently expended in preparing and reviewing these motions.

Even with a longer time to file the appellant's opening brief there would probably still be some motions for extension of time. The federal system offers another example of an alternative to existing procedure. In the Sixth Circuit Court of Appeals the clerk of courts has the power to grant or deny extensions,¹⁵⁵ subject to the limitation that any party dissatisfied with that decision may "appeal" to a judge of the court.¹⁵⁶ Within the state court system such decision-making power could be allocated to either the clerk of courts or the court administrator, where such an officer exists, without jeopardizing either the rights of parties or improperly delegating judicial authority. At the same time this would free up precious judicial time without any corresponding negative costs.¹⁵⁷ Though these savings may be small ones, given the fact that they would not work any fundamental changes in the nature of the appellate process there should be no serious objection to their implementation.

There are, of course, also non-traditional approaches to curing the problem of case backlog. For example, in the State of Oklahoma some 600 volunteer attorneys were appointed by the state supreme court to sit on temporary panels to decide cases to attempt to alleviate a 2,600-case backlog.¹⁵⁸ Such a proposal would most likely require constitutional revision before it could be implemented in Ohio,¹⁵⁹ and might encounter opposition from members of the bench.¹⁶⁰ Yet

¹⁵⁴FED. R. APP.P. 31(a).

¹⁵⁵Rules of the United States Court of Appeals for the Sixth Circuit, Rules 4(f) and 8(c).

¹⁵⁶My own experience with this system is that it is a satisfactory one. Though I have been involved in several cases in which counsel on one side or the other has asked for an extension of time, I know of no instance in which an "appeal" was taken to one of the judges.

¹⁵⁷For an account of the change in the Sixth Circuit from having all motions considered by panels of judges to routing procedural motions to the Clerk, and the success of that program, see Hehman, *Motions Practice in the United States Court of Appeals for the Sixth Circuit*, 12 TOL. L. REV. 485 (1981). For a description of the same procedures in the Ninth Circuit see Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937, 953-58 (1980).

¹⁵⁸*Lawyers Recruited as Judges in Oklahoma*, 68 A.B.A.J. 792 (1982).

¹⁵⁹One might argue that a statute authorizing the appointment of attorneys as "temporary" or "acting" judges might suffice. However, the Ohio Constitution speaks of the court of appeals as being composed of judges, art. IV, § 3 (A) and makes specific provision for their election, art. IV § 6 (A) (2). Moreover, while provisions are made for common pleas, appellate and retired judges to set in the court of appeals by assignment, art. VI § 6 (C) and art. IV § 5 (A)(3), there is no provision for the utilization of attorneys in a similar capacity.

¹⁶⁰There might be a natural aversion to allowing attorneys to assume the role of a judge — even for a short time. In part, this might be susceptible to the criticism previously discussed about diminishing the prestigious status of the judiciary. In part, it also might be part of a fear that an attorney would later attempt to use this experience as a credential in running for a judgeship. However, on the merits, it would seem likely that some attorneys who have active appellate practices would be in a position to render service as a temporary judge. Surely there must be some individuals in the practicing bar who the court would view as having the competence to render proper judicial decisions. Indeed, because of the very institutional

with slight revision it might provide a real solution to some of the problems which concern the participants in this symposium.

If the Oklahoma model were followed, the lawyers would volunteer their time so that there would be no expense involved. If the lawyers were limited in the number of cases which they could hear, one could be assured that deliberations would proceed in a traditional fashion with full attention being given to each case. If, unlike the Oklahoma system, one attorney were paired with two sitting judges, one could be assured of stability within the system itself since at least one regular judge would have to agree with the attorney-judge before a decision could be rendered.

One further option might be to create an alternative track for appeals giving the parties the right to elect to have the case heard by three judges with the understanding that the disposition would take longer or by a panel consisting of two judges and one attorney-judge with the understanding that the case could be heard more promptly. Under this system the temporary judges could be used until the backlog was reduced to a specified level. Then the program could be held in abeyance until such time as the backlog again reached a point that outside assistance was desirable.

C. *Modifying Jurisdiction*

If the appellate courts were to insist upon exercising their traditional functions, then an increase in backlog might prompt the legislature to take some corrective action. In a valuable study Professor David Clark has demonstrated that, at the federal trial level, substantial reductions in backlog occurred when events arose which reduced the total number of filings:¹⁶¹ abolition of liquor prohibition;¹⁶² end of rent controls and other controls under the Defense Production Act;¹⁶³ and statutory changes making it harder to be a plaintiff in federal court.¹⁶⁴ This same process would seem to be applicable to appeals by limiting the types of claims that enter into the judicial system at the trial level, one may limit the number of appeals and hence escape the backlog of pending cases.¹⁶⁵

differences between a trial court and an appellate court, it is likely that some members of the appellate bar would be more suited to serve in the role as a temporary appellate judge than are trial judges who are, from time to time, assigned to sit upon the Court of Appeals. See *Marvel supra* note 3, at 52 and footnote 31, suggesting that in Missouri and Washington the use of trial judges temporarily assigned as appellate judges proved unsatisfactory.

¹⁶¹Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Court in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981).

¹⁶²*Id.* at 139-41.

¹⁶³*Id.* at 126, Table 15 (citations omitted) (1954).

¹⁶⁴*Id.* at 132. In 1958 Congress increased the amount necessary for diversity and federal question jurisdiction, redefined corporate citizenship to make diversity more difficult, and prohibited the removal of state worker's compensation cases from state to federal courts.

¹⁶⁵Emphasis is placed here upon trial filings rather than upon appellate filings because of the belief that it is more appropriate to treat the entire system than isolated parts. For example, the proposal of Messrs. Parness & Reagle to limit appeals in such a way as to exclude certain misdemeanors may be both over and under inclusive.

It is conceivable that many statutes involving first amendment claims (vagrancy, disorderly conduct,

Such a process may include trying to divert certain cases into arbitration or neighborhood dispute centers.¹⁶⁶ It might involve the use of economic incentives such as controlling the interest rate on judgments.¹⁶⁷ But it is likely that such an approach, to be successful, would involve more fundamental — and harder — choices. Though these choices could be identified only by a systematic consideration of which statutes generate the most appeals, they might include: Is it more important to provide punishment for those selling materials deemed to be obscene¹⁶⁸ or to provide protection under the Consumer Sales Practices Act?¹⁶⁹ Is it better to regulate landlord-tenant relations¹⁷⁰ or enact legislation providing for no-fault insurance? The very difficulty and controversial nature of such decisions make it unlikely that they would be adopted as an alternative to delay in the appellate courts.

XI. CONCLUSION

Robert Stern, in *Appellate Practice in the United States*¹⁷¹ has indicated that the “accepted model for fair appellate procedure” has generally included the right to appeal to one appellate court; the right to present arguments to the appellate court both orally and in written briefs; and the right to have the court disclose the reasoning underlying its decision.¹⁷² Mr. Stern acknowledges that these “fundamental elements of the appellate process” are being eroded and attributes that impairment to the “rapid increase in the number of cases taken to the appellate courts in recent years.”¹⁷³

There are many who would emphasize the promise of avoiding delay; identify increasing appellate caseloads and backlogs as a disease which must be treated; and prescribe, *inter alia*, limitations on oral arguments and the elimination of written opinions as a prescription for the illness. But those “measures may, like any strong medicine, produce side effects as serious as the disease they seek to cure.”¹⁷⁴

etc.) would be insulated from review under their proposal while others of less general importance would be the subject of review. (One option might be to give this case the type of discretionary review advocated by Judge Day for all appellate cases. However, this would still require work by the Appellate Court in making a case-by-case decision to determine whether review should be granted.

At the same time, the number of such cases appealed may not be statistically significant. For example, the *Akron Municipal Court - Judicial Division — Annual Report 1981* at 8, indicates that of 8,783 cases disposed of by the Court, there were only 15 appeals in misdemeanor cases. (No statistics were given as to how many of those cases reached actual disposition in the court of appeals.)

¹⁶⁶E.g., Erikson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 280-84 (1977).

¹⁶⁷E.g., Franelli, *Interest Hike on Judgements: An Appealing Remedy?*, NAT'L L.J. March 2, 1982, at 3.

¹⁶⁸OHIO REV. CODE ANN. § 2907.32 (Page 1980).

¹⁶⁹OHIO REV. CODE ANN. §§ 1345.01-1345.99 (Page 1979).

¹⁷⁰OHIO REV. CODE ANN. §§ 5321.01-5321.19 (Page 1981).

¹⁷¹*Supra* note 66.

¹⁷²*Id.* at 22.

¹⁷³*Id.*

¹⁷⁴ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS I (1977).

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... appellate justice can be the last best effort of our government and our law to gain respect and acceptance of the people. Appellate justice should be a model for the government's dealings with citizens. Appellate courts are the most dignified and receptive authorities to which individuals can turn to express their legal dissatisfactions in a pointed way, with assurance of a direct response. If these courts do not deal justly with litigants, we cannot expect agencies or bureaucracies of lesser sensitivity to legal rights to do so.¹⁷⁵

But in order to fulfill that promise we, like the Constitution, must recognize that there are "higher values than speed and efficiency."¹⁷⁶ To do otherwise is to avoid delay only at the cost of denying justice.

¹⁷⁵*Supra* note 65, at v.

¹⁷⁶*Stanley v. Illinois*, 405 U.S. 645, 656 (1971).