

# University of Michigan Journal of Law Reform

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Volume 11

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1978

## Appellate Justice

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*United States Court of Appeals for the Third Circuit*

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### Recommended Citation

Ruggero J. Aldisert, *Appellate Justice*, 11 U. MICH. J. L. REFORM 317 (1978).

Available at: <https://repository.law.umich.edu/mjlr/vol11/iss3/2>

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## APPELLATE JUSTICE

Ruggero J. Aldisert\*

*Justice on Appeal* is a pithy analysis of the problem facing appellate courts. Dragon hunters Carrington, Meador, and Rosenberg were not content to look at the problem from an armchair. Instead, they walked to the mouth of the cave, pulled the troublesome dragon into the light, counted its teeth, measured its girth and tail, and decided neither to kill it nor kiss it. They decided to try taming it. I agree with their analysis of the specimen, its size, its growth, and the urgent necessity to bring the beast under control. I have some modest disagreements with some of their taming techniques.

I have lived through the age of the dragon. I was present when it started to squeak, or whatever baby dragons do, and I have heard its roar. I have watched the *dragetto* develop into a *dragone*. During my first full year as an appellate judge in 1968, I heard ninety-seven fully briefed appeals. Last year I heard 250. The judges on my court are now well beyond the Carrington/Meador/Rosenberg "rule of thumb imposing a limit of about 225 decisions on the merits each year" for each federal appellate judge.

Generalizations are always risky. I have no empirical data to substantiate what I am about to say, because this type of data is, at best, hard to come by. I can only report what I feel, and that is subject to extreme qualification because of my strongly held belief that it takes seasoning for an appellate judge to get the feel of his caseload. (I think a new judge, especially on a federal bench, has more difficulty reaching and justifying his decisions than a more experienced one.) Having announced these significant limitations, I will now have my say. It is this: the number of serious, arguable questions presented to my court from 1968 to 1977 has not increased proportionately with the increased caseload. Indeed, I make bold to say that there has been only a slight arithmetical increase of the number of these serious, arguable questions in the nine years I have been on the court.

In retrospect, it seems that when I first sat on six panels a year with fifteen cases per panel, only about eight to ten cases per panel deserved full opinions. The rest could be and were terminated by per curiam opinions. Nine years later, sitting on eight panels with thirty cases per

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panel, I am finding that only eight to ten cases out of thirty per panel deserve a full opinion.

Thus, on close inspection, that dragon is not all bone and muscle. There is a lot of flab on him which consists of a heavy layer of appealed cases which do not present issues of institutional or precedential significance. We might as well face up to this bit of jural physiology when we start to prescribe a regime for taming it.

In the *Justice on Appeal* analysis, all cases must be subject to review for correctness, though some of these cases are not the proper subjects of institutional review. My thesis is that only cases of precedential or institutional significance merit the piping of the side boys. The mine-run cases do not deserve the ruffles and flourishes that accompany the appellate tradition. And by ruffles and flourishes, I mean the ritual of oral argument and an opinion in every case.

I think that distinguishing review for correctness from review for institutional or precedential purposes is important if we are to see the flab on our dragon. Roscoe Pound divided the judicial process into four parts: finding the facts, choosing a legal precept, interpreting the precept, and applying the precept to the facts.<sup>1</sup> This analysis is indispensable to an accurate understanding of the cases that make up the slack of our dragon's torso. How do I describe these cases? First, and obviously, there are cases that are reviewed for correctness only. By this I mean that the dispute centers around the facts or the application of legal precepts to the facts. These cases are fact cases rather than law cases; they do not involve choosing or interpreting legal precepts. A reviewing court's role in the decision of such cases is extremely limited. Second, there are cases which purport to present legal issues but which do not actually present any legal point that is arguable on its merits. I hesitate to use the word "frivolous" to describe such cases because of its pejorative connotations, but I simply use the word in the sense that the Supreme Court used it in *Anders v. California*,<sup>2</sup> when it referred to "legal points arguable on their merits (and therefore not frivolous). . . ."<sup>3</sup> In 1921, drawing from his experience on the New York Court of Appeals, Benjamin N. Cardozo would say: "Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion."<sup>4</sup> Over a half century later, speaking from my vantage point on the United States Court of Appeals for the Third Circuit, I say: "Amen."

Cardozo continued his analysis: "In another and considerable percentage, the rule of law is certain, and the application alone doubtful."<sup>5</sup> By 1924 Cardozo would say, "Nine-tenths, perhaps more, of the cases that

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<sup>1</sup> 4 R. POUND, JURISPRUDENCE 5-6 (1959).

<sup>2</sup> 386 U.S. 738 (1967).

<sup>3</sup> *Id.* at 744.

<sup>4</sup> B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 164 (1921).

<sup>5</sup> *Id.*

come before a court are predetermined—predetermined in the sense that they are predestined—their fate preestablished by inevitable laws that follow them from birth to death. The range of free activity is relatively small.”<sup>6</sup> In 1961, Judge Henry J. Friendly would observe: “Indeed, Cardozo’s nine-tenths estimate probably should be read as referring to the first category alone. Thus reading it, Professor Harry W. Jones finds it ‘surprising’ on the high side. . . . So would I. If it includes both categories, I would not.”<sup>7</sup>

Cardozo suggested a third category:

[A] percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power.<sup>8</sup>

The mine-run federal criminal cases probably can be classed in Cardozo’s first category, where “[t]he law and its application alike are plain.”<sup>9</sup> The judicial menu is dreadfully routine. Swollen United States Attorney staffs are now prosecuting cases that traditionally have been the province of state prosecutors. They are giving us bank robberies, narcotics dealings, and conspiracies galore, as well as a host of state misdemeanors, made felonies by federal law, which embellish and aggrandize federal prosecutorial statistics. Putting aside the crises in identification and guilty plea procedures, and the suppression issues, of a few years back, the criminal appeals are now a dreary lot. Last year, our court affirmed 92.3% of all criminal appeals. The average for all federal courts of appeals was 89.3%.<sup>10</sup>

In the same category are civil appeals raising questions of the sufficiency of evidence, the exercise of discretion in the reception of evidence, and the precise, detailed correctness of jury instructions. Likewise, petitions for agency review raising only questions of substantial evidence in the record as a whole would fall into Cardozo’s first category.

Second category cases—deciding whether the facts at hand are governed by the rule of law—require more attention. They require more than mere knowledge of the precedents, for these are amply provided by the advocates in their briefs. What is required is an understanding of the policy behind the precedents, and here judicial experience counts a lot. Here also the skill of the appellate advocate comes to the fore, to persuade the court whether a given precedent, in Karl Llewellyn’s formulation, should be given strict or loose interpretation. The strict view confines the precedent to its particular facts: “This rule holds only of red-headed Walpoles in pale magenta Buick cars.”<sup>11</sup> The loose view, of

<sup>6</sup> B. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924).

<sup>7</sup> Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *YALE L.J.* 218, 222 n. 23 (1961).

<sup>8</sup> B. CARDOZO, *supra* note 4, at 165 (1921).

<sup>9</sup> *Id.* at 164.

<sup>10</sup> In fairness to the federal prosecutors, I ought to add that the statistics do reflect a concentration of resources on cases where solid convictions can be obtained.

<sup>11</sup> K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 66-67 (1960).

course, goes the other way and expands welcome precedents. These cases are usually judgment calls. Their resolution depends upon the skill of the advocate in highlighting those interests—social, political, economic—which intrigue the court at a given time. But the decision process is not taxing, and the work of justification, the reasoned elaboration, is not too burdensome.

It is the third category cases where maximum time and energy must be committed. These are the cases, in Cardozo's phrase, which involve the "creative element"<sup>12</sup> in the judicial process. In Pound's formulation, these are the cases which involve choosing or interpreting legal precepts. And it is for these cases that sufficient time absolutely must be allotted to allow full institutional review.

If time is to be rationed, as it must be, maximum time must be given to the decisionmaking process. I am persuaded that a reasonably intelligent, experienced judge should have no difficulty in reading thoroughly and understanding 240 sets of briefs per year. I doubt whether one can do more and do justice to an appeal which, for all intents and purposes, is final. The assistance of parajudicial aides, whether law clerks in chambers or staff attorneys at the courthouse, cannot supplant the absolute necessity that the judge read the briefs himself. I do in every case. This is an article of faith. Moreover, the standard operating procedure in my chambers is that at least one of my two law clerks reads every set of briefs as well. In cases coming within the second and third categories of the Cardozo formulation, a second law clerk also reads the briefs. We prepare a bench memorandum in every case identifying the arguments raised, the answers to the arguments, and the district court's disposition. And each of us makes a tentative recommendation for disposition of the appeal. If my law clerks and I are not unanimous in our thinking, the case is marked for a chamber conference in which the three of us will discuss the case in depth, face to face. All of this takes place at least ten days before the case is listed for disposition.

Under the Internal Operating Procedures of our court, oral argument may be had upon the vote of one judge on a panel. Where another judge has voted for oral argument in a case in which argument was not requested by our chambers, that case is listed for a chamber's conference and reexamination. Thus, I believe in maximum utilization of chamber's time for thorough, detailed, analytical study of the briefs prior to the week of disposition. I consider this to be the most essential aspect of the appellate process.

Nearly as important as chamber's preparation is a full and complete discussion of the issues among the judges at the decision conference. Because decisions reached at conference are so often final, I make it a point to encourage discussion, even prolonged discussion, among the judges as we sit around the conference table analyzing the cases. To me this face to face discussion of the issues raised is not only essential, but it

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<sup>12</sup> B. CARDOZO, *supra* note 4, at 165.

must be unhurried. Thus, I cannot accept the suggestion that a decision conference can be held on the bench. I admit that I have not had any experience with this type of conference but, because it is not conducive to extended discussion, I would not recommend it.

From what I have said, it should be obvious that I vote for oral argument in a minority of cases. After reading the briefs thoroughly, preparing a bench memorandum synthesizing the arguments and, frequently, discussing the case in chambers, I see little purpose in having the arguments repeated orally in any case where the law is clear and its application to the facts is plain and in most cases where the sole issue is the application of a given rule of law to the facts at hand. I always vote for oral argument in cases in the third category, where the court works for the future.

Constraints of time demand the tradeoff. I would rather have adequate time for a decision conference, allowing for the discussion of complex and difficult issues, in third category cases than be forced to shortchange those cases by the process of automatically granting oral argument in every case. The suggestion that there be a rule requiring argument only where the attorneys request it is not realistic, because no attorney worth his salt will ever waive oral argument.

I would agree that the optimum is to have a written opinion in every case. I embrace completely the concept of reasoned elaboration, a phrase coined by Henry Hart and Albert Sacks in 1958.

The phrase, as applied to the Supreme Court, demanded, first, that judges give reasons for their decisions; second, that the reasons be set forth in a detailed and coherent manner; third, that they exemplify what Hart called "the maturing of collective thought"; and fourth, that the court adequately demonstrate that its decisions, in the area of constitutional law, were vehicles for the expression of the ultimate social preferences of contemporary society.<sup>13</sup>

Unfortunately, time does not permit an opinion in every case, and the suggestion that a short memorandum will suffice runs contrary to the experience in writing and speaking that it often takes longer to prepare a short, concise presentation than it does to prepare a longer one.

Looking to the future, I can only hope that lawyers, and their clients, will learn to discipline themselves and present to the appellate courts only those cases that survive the *Anders* definition of frivolity, i.e., those cases presenting an arguable question.<sup>14</sup> Sanctions of some kind will sooner or later have to be imposed to prevent the groundless appeal. Until then, the appellate courts will have to limit the full treatment of oral argument and opinion writing to cases of institutional or precedential value. In those cases where the appellate courts merely approve the correctness of the trial court's application of settled law to the facts, there should be no oral argument and no opinion. Briefs will be sufficient, and no explanation will be necessary for the good lawyer. The good lawyer will know why he lost.

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<sup>13</sup> White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286 (1973).

<sup>14</sup> 386 U.S. at 774.