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“Dealing with the Appellate Caseload Crisis”: The Report of the Federal Courts Study Committee Revisited

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ROGER J. MINER

“Dealing with the Appellate Caseload Crisis”: The Report of the Federal Courts Study Committee Revisited

57 N.Y.L. SCH. L. REV. 517 (2012–2013)

ABOUT THE AUTHOR: Senior Judge, U.S. Court of Appeals for the Second Circuit. The majority of this article was written by Judge Miner before he passed away on February 18, 2012. The remainder was completed by Judge Miner’s Law Clerks, Alicia Surdyk and Matthew J. Zappen, with the assistance of Judge Miner’s Judicial Assistant Shirley Hicks, based on the Judge’s comprehensive notes and annotated research and also on the clerks’ extensive conversations with the Judge prior to his passing. This article is published posthumously in his memory and represents the last in a long list of publications by Judge Miner, many dealing with judicial administration and the “appellate caseload crisis.” See, e.g., Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 JUDICATURE 104 (1993); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992); Roger J. Miner, *Consequences of Federalizing Criminal Law*, 3 CRIM. JUST. 16 (1989); Roger J. Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENT. 251 (1987); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J. L. & PUB. POL’Y 117 (1989); Roger J. Miner, *Research in Judicial Administration: A Judge’s Perspective*, 12 JUST. SYST. J. 8 (1987); see also Roger J. Miner, *Book Review*, 46 CATH. U. L. REV. 1189 (1997) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996)).

EDITOR’S NOTE: The *New York Law School Law Review* is pleased to publish this article in memory of The Honorable Roger J. Miner ‘56 and his many contributions to the law, the legal profession, the federal judiciary, and New York Law School. As a student at New York Law School, Judge Miner served on the *Law Review* in 1955 (then published as the *New York Law Forum*) and served as its first Managing Editor. He was always very proud of this accomplishment and in subsequent years was one of the *Law Review*’s greatest supporters.

“DEALING WITH THE APPELLATE CASELOAD CRISIS”

I. INTRODUCTION

The Federal Courts Study Committee (the “Committee”), created by an act of Congress in 1988, was charged with inquiring into the issues and problems confronting the federal courts of the nation and developing a long-range plan for the future of the federal judiciary.¹ In its Final Report, issued on April 2, 1990, the Committee recognized the need to respond “to mounting public and professional concern with the federal courts’ congestion, delay, expense, and expansion.”² The Committee clearly identified the burgeoning volume of appeals as a major factor underlying this concern. Accordingly, the Final Report included a chapter entitled *Dealing with the Appellate Caseload Crisis*. This portion of the Final Report responded to the unprecedented volume of litigation the federal courts of appeals were then confronting.³ The chapter began as follows:

However people may view other aspects of the Federal Judiciary, few deny that its appellate courts are in a “crisis of volume” that has transformed them from the institutions they were even a generation ago. Further and more fundamental change to the appellate courts would seem to be inevitable unless there is a halt to the climb in appellate workload. While it is impossible to read the future, we see little reason to anticipate such a halt.⁴

In this article, I revisit the Committee’s Final Report and describe how the “crisis of volume” has endured and intensified; analyze various causes giving rise to the crisis; review some of its consequences; evaluate the Committee’s study; discuss the inadequacy of methods presently employed to deal with the proliferation of appeals; and, finally, propose the adoption, in part, of a method considered and rejected by the Committee for dealing with the appellate caseload crisis.

II. DESCRIBING THE CRISIS, THEN AND NOW

Over twenty years ago, the Committee made the following observations in regard to the intensifying increase in appellate caseloads and in the workloads of individual judges:

In 1945, litigants appealed about one of every forty district court terminations; they now appeal about one in eight. As a result, appellate filings have risen nearly fifteen-fold. (As we note in the Overview, they have increased by ten-fold since 1958.) The number of appellate judges, however, has increased since 1945 by a factor of less than three, from 59 to 168. Consequently, the caseload per judge has multiplied by nearly six over the same period. Circuit judges of the 1940s and 1950s would find today’s caseloads unmanageable.

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1. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (codified as amended in scattered sections of 28 U.S.C.).
 2. THE FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990) [hereinafter FINAL REPORT], available at [www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf).
 3. *Id.* at 109–31.
 4. *Id.* at 109.

Even in 1965, each appellate judge, sitting in panels of three, participated in an average of 136 terminations after hearing or submission. By 1989, that number had almost tripled, to 372 per judge. In all but two circuits it exceeds 255, which is the Judicial Conference standard for an appellate judge's annual workload. In the five busiest circuits, the range is from 411 to 525. The 255 participation standard, furthermore, is too high according to most judges who responded to the committee's survey.⁵

There has been a major expansion in the "appellate caseload explosion," as described by the Committee,⁶ and the crisis of volume is now much more acute than when the Committee's Final Report was written. In 1990, 40,898 appeals were filed.⁷ Eighteen years later, the number of filings for the twelve-month period ending September 30, 2008, reached 61,104 (an increase of 49.41%).⁸ For that year, there were 448 terminations on the merits and 156 procedural terminations per active judge nationally.⁹ From the twelve-month period ending September 30, 2008, to the twelve-month period ending September 30, 2011, total filings declined 9.7%, from 61,104 to 55,126; however, the terminations per active judge rose during the same period to 456 terminations on the merits (an increase of 1.79%) and 151 procedural terminations (a decrease of 3.2%) on a national basis.¹⁰ The 255 participations per active judge, considered the standard in 1990, has long since, and remains to be, surpassed. The increase in the number of active judges from 168 twenty years ago to 179 today obviously has done nothing to stem the tide of individual judicial caseloads.¹¹

An overwhelming percentage of appeals are found to be without merit. For the twelve-month period ending September 30, 2011, of the 57,357 total appeals that

5. *Id.* at 110.

6. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2010: U.S. COURTS OF APPEALS—JUDICIAL CASELOAD PROFILE (2010) [hereinafter FEDERAL COURT MANAGEMENT STATISTICS 2010], available at <http://www.uscourts.gov/cgi-bin/cmsa2010Sep.pl> (select "National Totals" from drop-down menu then click "Generate"); *Filings in the Federal Judiciary Continued to Grow in Fiscal Year 2010*, ADMIN. OFFICE OF THE U.S. COURTS (Mar. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-03-01/Filings_in_the_Federal_Judiciary_Continued_to_Grow_in_Fiscal_Year_2010.aspx.

7. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 52 (1990), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1990-09.pdf>.

8. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2008: U.S. COURTS OF APPEALS—JUDICIAL CASELOAD PROFILE (2008), available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2008.pl> (select "National Totals" from drop-down menu then click "Generate").

9. *Id.*

10. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2011: U.S. COURTS OF APPEALS—JUDICIAL CASELOAD PROFILE (2011) [hereinafter FEDERAL COURT MANAGEMENT STATISTICS 2011], available at <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/CourtsOfAppealsSep2011.aspx> (select "National Totals" from drop-down menu then click "Generate").

11. FINAL REPORT, *supra* note 2, at 110; see also *Inside the Federal Courts, How the Federal Courts Are Organized, Federal Judges and How They Get Appointed*, FED. JUDICIARY CTR., <http://www.fjc.gov/federal/courts.nsf> (follow "How the Federal Courts Are Organized" hyperlink; then follow "Federal judges and how they get appointed" hyperlink) (last visited Oct. 28, 2012).

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were terminated for all circuits, 30,290 (or 52.8%) were terminated on the merits.¹² Of those terminated on the merits, 23,998 (or 79.2%) were affirmed/enforced (including appeals reversed in part); 3019 (or 10%) dismissed; 2438 (or 8%) reversed outright; 446 (or 1.5%) remanded; and 389 (or 1.3%) terminated by other dispositions.¹³ Accordingly, less than ten percent of the cases terminated on the merits were reversed outright with a finding that the lower court erred in its decision. The same statistical report for the same year shows a “percent reversed” breakdown ranging from a high of 15% in the D.C. Circuit to a low of 5.2% in the Tenth Circuit.¹⁴ In my own circuit, the percent reversed was 5.7, a reversal rate which has varied very little over recent years.¹⁵ Nor has there been much variation in the national “reversed” statistics.¹⁶

Not included in the reversal rate are the cases where a lack of merit has resulted in dismissal or remand. However, an outright reversal rate of less than ten percent in case terminations on the merits on appeal leads to the inevitable conclusion that more than ninety percent of the appeals filed were found to be without merit.¹⁷ Of course, an appeal found to lack merit certainly does not mean that the appeal lacks an arguable basis or was brought without substantial justification. But the statistics themselves compel the conclusion, by implication and logic, that a large part of that meritless ninety percent consists of appeals that are clearly meritless. It surely cannot be denied that the expansion of the appellate caseload explosion in recent years has been exacerbated, if not caused, by the filing of clearly meritless appeals.

Especially burdensome to the appellate courts are cases filed by pro se litigants. It is no secret that the vast majority of pro se appeals are clearly without merit. Much time and effort is spent in trying to discern the nature of the challenges raised by

12. ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 60 (2011) [hereinafter 2011 ANNUAL REPORT OF THE DIRECTOR], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>. The number of total appeals filed for the period ending September 30, 2010 (59,526) or September 30, 2011 (57,357) differs from the number of terminations as of these dates because termination data takes into consideration appeals that may have been filed in the prior year, which can result in a higher number of terminations than number of appeals in a given year. Cases terminated, but not terminated on the merits, include cases disposed of by consolidation and procedural terminations. *Id.*

13. *Id.* at 89.

14. *Id.* at 89, 92.

15. *Id.* at 90.

16. For the twelve-month periods ending in September 2010 and September 2011, the percentages have been 8.3% and 8.9%, respectively. *Id.* at 89; ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 111 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>.

17. As used in this article, I define a “meritless appeal” as an appeal that fails to present for appellate review any cogent arguments adequately supported by law and fact. It is an appeal whose lack of merit is immediately apparent to any reasonable appellate jurist. A meritless appeal generally can be identified as one that lacks thoughtful application of established law or precedent to ascertainable facts of record. An appeal that puts forth a logical and well-reasoned argument for the extension of existing law or for overturning precedent is not substantially meritless under this definition. But such an appeal must have an objectively reasonable basis in law and fact. A meritless appeal, then, is one that cannot be sufficiently justified.

these litigants, and liberal consideration is given to their arguments.¹⁸ Despite the lack of success of pro se litigants, they continue to file at an alarming rate—19,973 in 1995 and 27,143 in 2011.¹⁹ Pro se filings constituted 39.89% of the caseload nationally in 1995 and 49.24% in 2011.²⁰

III. ANALYZING THE CAUSES

What possibly could account for the fact that litigants now appeal one in every six district court decisions, and what possibly could account for the fact that such a large proportion of appeals are found to be without merit? In the absence of a scientific survey, the causes of the increased rate of filings must rest in speculation informed by experience, anecdotal evidence, and the speech of the legal community. It seems certain, however, that many such appeals are driven by clients whose attorneys advise of the futility of appeal, but nevertheless insist that the appellate court will see the “justice” of their cause or defense despite the lack of legal merit. The costs of appeal constitute relatively small barriers to such clients, who often have expended considerable sums on trial-court proceedings. Some appellants use the appellate process as a means of “stalling for time,” delaying through appeal what they know to be the inevitable outcome. Some may press meritless appeals for vindictive reasons, their aim being to cause additional expense and anxiety for their adversaries.

Appellants who pursue appeals simply because they have nothing to lose undoubtedly account for some proportion of meritless appeals. In this category are pro se appellants who are free of the need to pay attorneys and who are generally responsible only for the payment of filing fees.²¹ Those pro se litigants who have their applications granted to proceed under *in forma pauperis* status need not even pay filing fees.²² Many

18. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2008, at 45 tbl.S-4 (2008), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S04Sep08.pdf>; see also *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (“[W]e construe *pro se* appellate briefs and submissions liberally and interpret them to raise the strongest arguments they suggest.” (quoting *Wright v. Comm’r*, 381 F.3d 41, 44 (2d Cir. 2004))).

19. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATIONS OF FEDERAL COURT CASELOAD THROUGH FISCAL YEAR 2009, tbl.2.4 (2010) [hereinafter MULTI-YEAR STATISTICAL COMPILATIONS OF FEDERAL COURT CASELOAD THROUGH FISCAL YEAR 2009], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/alljudicialfactsandfigures.pdf>; 2011 ANNUAL REPORT OF THE DIRECTOR, *supra* note 12, at 32.

20. MULTI-YEAR STATISTICAL COMPILATIONS OF FEDERAL COURT CASELOAD THROUGH FISCAL YEAR 2009, *supra* note 19, at tbl.2.4; 2011 ANNUAL REPORT OF THE DIRECTOR, *supra* note 12, at 39.

21. “Notwithstanding any filing fee . . . that may have been paid, the court shall dismiss the case at any time if [it] determines that the action or appeal is frivolous” 28 U.S.C. § 1915(e)(2)(B)(i) (2006). This extends not only to the courts of appeals but also to the district courts. *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2d Cir. 2000) (per curiam).

22. See 28 U.S.C. § 1915(a)(1)–(2) (2006); FED. R. APP. P. 24(a)(5) (“A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court’s statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).”); see also 2D CIR. R. 24.1 (“Motion for In Forma Pauperis Status and Related Relief”) (“A motion for leave to appeal in forma pauperis, for appointment of

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indigent appellants who have pro bono counsel also fall into the “nothing to lose” class. In the same category are appellants in criminal cases who have the benefit of counsel appointed under the provisions of the Criminal Justice Act (CJA).²³

Lawyers themselves sometimes motivate meritless appeals. According to a recent survey, some lawyers simply overestimate their chances of success.²⁴ Other lawyers pursue appeals lacking in substantive merit to demonstrate to the client that they continue to support the client’s cause. Some, embarrassed that they lost in the trial court after advising that the client would prevail, encourage meritless appeals in order to have another court to blame for a loss occasioned by bad advice or bad lawyering. Some lawyers, loath to lose a client for failure to satisfy the client’s command to appeal, go forward merely to satisfy the client’s wishes. Some newly admitted attorneys, especially those associated with large law firms, pursue assigned pro bono appeals they know to be futile in order to gain experience in the appellate process. Finally, there are those lawyers who encourage appeals that have no chance of success simply (dare it be said?) to collect fees for briefing and argument in the appellate court.

Some blame for the spike in appeals must also fall on the academic sector of the legal profession. The centerpiece of law school teaching continues to be appellate court decisions.²⁵ The leading moot court competitions involve appellate brief writing and oral argument.²⁶ This emphasis on the appellate process encourages law students

counsel, or for a transcript at public expense must include (1) the affidavit prescribed by FRAP 24(a)(1), and (2) a statement that identifies the relevant facts and makes a showing of likely merit as to each issue the appellant intends to present on appeal. Failure to comply with any of these requirements may result in denial of the motion and dismissal of the appeal.”). *See generally* FED. R. APP. P. 24(a). In addition to being relieved of the filing-fee requirement, a district court may direct payment by the United States of the expenses of printing the record on appeal, of preparing a transcript of proceedings, and of printing the record on appeal. 28 U.S.C. § 1915(c) (2006); *see also* 28 U.S.C. § 753(f) (2006) (“Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question).”).

23. *See* 18 U.S.C. § 3006A(d) (2006) (defining “Payment for Representation” under the Criminal Justice Act); *see also* 18 U.S.C. § 3011 (2006) (defining “Computation of Time”); FED. R. CRIM. P. 45.
24. Amanda Bronstad, *Attorneys Tend Toward Overconfidence, Researchers Find*, N.Y.L.J., May 13, 2010, at 6, available at <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202458011382>; Martha Neil, *Lawyers—Especially Men—May Be Too Optimistic About Case Outcomes, Survey Says*, A.B.A. J. (May 11, 2010), http://www.abajournal.com/news/article/lawyers--especially_men--may_be_too_optimistic_about_case_outcomes_survey_s/.
25. John B. Attansio, *Out-of-the-Box Dialogs: Foreword*, 52 J. LEGAL EDUC. 473, 474 (2002).
26. *See* MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, *APPELLATE ADVOCACY AND MOOT COURT* 179 (2006) (“Moot Court competitions simulate appellate practice in particular”); *see also* N.Y.C. BAR ASS’N, *SIXTY-THIRD ANNUAL NATIONAL MOOT COURT COMPETITION, COMPETITION RULES AND COMMENTS* 1 (2012) (“The New York City Bar Association’s National Moot Court Competition is an annual inter-law school event designed to promote the art of appellate advocacy.”); Colleen Walsh, *Moot Points: Chief Justice Roberts Returns to HLS to Judge Ames Competition*, HARV. GAZETTE (Nov. 17, 2010), <http://news.harvard.edu/gazette/story/2010/11/moot-points/> (“Established in 1911, the Ames Moot Court Competition unfolds in three rounds over the course of two years and challenges students to develop briefs and oral arguments addressing legal issues that the Supreme Court has not addressed or answered on-point.”).

to believe that any adverse trial court determination can and should be tested on appeal. Reinforcing this belief by example, many law professors seek to advance their expansive approaches to legal doctrine through the use of the appellate process. Sometimes they do so as amici curiae and sometimes as counsel for those seeking to promote various social justice issues through the courts rather than through the legislative process where they belong. These professors often are assisted in their endeavors by law students in “clinical studies” programs. Is it any wonder that newly minted lawyers see appellate courts as the most important locales for the application of their law school skills training? In this they are of course wrong, for the greater part of their work will be done in the trial courts, in administrative proceedings, in negotiations, in transactional activities, and in providing legal advice to clients, both public and private. Specialists in appellate work are few and far between, and a relatively small percentage of appeals are successful, as noted earlier in this article.

Why, then, do the law schools place such emphasis on appellate court decisions and processes? The fault lies of course with the increasing disconnect between the professoriate and other branches of the legal profession, a matter that has been the subject of widespread comment.²⁷ Many professors have lost sight of their obligation to train lawyers in the skills and ethical responsibilities that will be pertinent to their employment. A good number of these academics have served as appellate clerks and have had little experience in the trial courts or in any type of legal practice. They are most comfortable teaching and litigating at the appellate level, which is a more familiar territory for them. Today, it is the rare professor who does not dwell on constitutional issues or U.S. Supreme Court decisions in whatever subject he or she might teach. In view of these developments, the proliferation of the “legal scholars” of academe as well as the proliferation of the students they educate²⁸ gives cause for concern. I do not mean to say that there should be fewer law students and fewer

27. See, e.g., Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); Roger J. Miner, *A Significant Symposium*, 54 N.Y.L. SCH. L. REV. 15, 18–20 (2009–2010); see also Roger J. Miner, *Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions*, 23 SETON HALL L. REV. 821, 821–22 (1993); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 202–03 (1996).

28. The Law School Admissions Council (LSAC) reports that since the 2000–2001 cycle, the number of Law School Admission Tests (LSATs) administered has risen, from 109,000 in 2000–2001 to a staggering 171,500 in 2009–2010 and to 129,958 in the 2010–2011 cycle. *LSAC Volume Summary*, LSAC, available at <http://www.lsac.org/LSACResources/Data/LSAC-volume-summary.asp> (last visited Feb. 5, 2013); see also Rebecca R. Ruiz, *Recession is Pushing Up Law School Applications and Interest in Graduate Studies*, N.Y. TIMES, Jan. 10, 2010, at A18; Debra Cassens Weiss, *October LSAT Test-Taker Numbers Are 2nd Highest Ever*, A.B.A. J. (Dec. 2, 2010), http://www.abajournal.com/news/article/october_lsac_numbers_are_2nd_highest_ever/. But see Debra Cassens Weiss, *Are Smartest People Avoiding Law School? Stats Show Bigger Drop in High LSAT Applicants*, A.B.A. J. (Apr. 11, 2012), http://www.abajournal.com/news/article/are_smartest_people_discouraged_avoiding_law_school_stats_show_bigger_drop/; Matt Leichter, *What the Numbers Don't Say: Law School Applicants Are Getting Older, Not Dumber*, AM. LAW. (Apr. 19, 2012, 3:57 PM) <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202549589531> (noting the “wave of news stories about the latest Law School Admission Council’s (LSAC) Current Volume Summary, which shows a notable drop not only in the number of applicants, but also in the number of applicants with high LSAT scores”).

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professors just to cut down on the volume of appeals. I do say that greater emphasis in legal education should be placed on the duty of lawyers to assist in the effective functioning of the legal system.²⁹ It seems to me that this duty includes the obligation to decline the pursuit of meritless appeals. The performance of this duty will be of great benefit to overburdened appellate courts.

In any analysis of the causes of the appellate caseload crisis, criminal appeals are worthy of special scrutiny. As an early critic of the federalization of criminal law, I estimated that there were about 3000 federal criminal offenses in the then-fifty titles of the U.S. Code.³⁰ Current estimates run as high as 4500, to say nothing of the thousands of federal regulations that criminalize all sorts of conduct deemed contrary to the public good.³¹ The problems implicated in the federalization of criminal law have long been recognized.³² The problems implicated in overcriminalization have now become the focus of attention, going so far as to draw the interest of a congressional subcommittee.³³ Whatever the consequences of federalization and overcriminalization, it cannot be gainsaid that criminal cases are a major cause of an expanding appellate caseload. More federal crimes equal more criminal prosecutions. In 1990, 48,035 criminal cases were filed in the nation’s district courts.³⁴ By 2009, the number had climbed to 65,394.³⁵

29. Miner, *A Significant Symposium*, *supra* note 27, at 19 (“[L]aw schools are falling short” in effectively providing the “required courses necessary for the training of lawyers. . . . [T]hat is, ‘persons learned in the law.’”).

30. Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992).

31. See JOHN BAKER, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES, No. 26 (2008), *available at* http://www.heritage.org/Research/Reports/2008/06/Revisiting-the-Explosive-Growth-of-Federal-Crimes#_ftn3; see also BRIAN WALSH, THE CRIMINAL INTENT REPORT: CONGRESS MUST JUSTIFY NEW CRIMINALIZATION, No. 2933 (June 9, 2010), *available at* <http://www.heritage.org/Research/Reports/2010/06/The-Criminal-Intent-Report-Congress-Must-Justify-New-Criminalization> (estimating that there are over 4450 federal crimes in the U.S. Code and up to 300,000 federal regulations that can be enforced with criminal penalties); Robert C. Scott, *Commentary: The Overcriminalization of Federal Law*, MAIN JUSTICE (Sept. 28, 2010, 3:39 PM), <http://www.mainjustice.com/2010/09/28/commentary-the-overcriminalization-of-federal-law/>.

32. See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996) (noting that the expansion of federal criminal jurisdiction has threatened the effective functioning of federal courts); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1135–37 (1995) (arguing that expanding federal criminal law cannot be reconciled with principles of federalism); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (recognizing the criminalization phenomenon); Miner, *supra* note 30, at 683–85 (arguing that too many state crimes are prosecuted in federal courts).

33. The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security has held two hearings on the problems of overcriminalization of conduct and overfederalization of criminal law. *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. (2009).

34. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2005, tbl.5.1 (2005), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2005/alljudicialfactsfigures.pdf>.

35. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2009: U.S. DISTRICT COURT–JUDICIAL CASELOAD PROFILE, *available at* <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2009.pl> (select “All District Courts” from drop-down menu then click “Generate”).

More criminal prosecutions of course equal more appeals. In 1990, when the appellate caseload crisis was identified, 9642 criminal appeals were filed.³⁶ In 2011, 12,198 criminal appeals were filed, an increase of 26.51%.³⁷ This number has been fairly steady for the past three years,³⁸ although a high of 16,060 was reached in 2005.³⁹ The proliferation of federal crimes has required more law enforcement agents and more prosecutors, but there has been no correspondent increase in the number of judges who hear criminal appeals.

All of this, of course, is the doing of Congress, which needs to take a hard look at overcriminalization and overfederalization, not only because of the impact of such factors on the caseloads of the federal courts, but also because it is the right thing to do. No sensible person would say that the transport of water hyacinths in interstate commerce should be a federal offense.⁴⁰ Nor would any sensible person believe that garden-variety state drug offenses should be prosecuted in federal court.⁴¹ The list goes on, and the result is a federal system warehousing too many inmates at too great an expense,⁴² and an avalanche of federal appeals filed on behalf of those convicted of these crimes. In the Final Report, the crisis of volume in the federal appeals courts was said to be caused “mainly by a heightened proclivity to appeal district court terminations.”⁴³ Having analyzed various factors underlying an even more “heightened proclivity” two decades later, I now turn to some of its consequences.

36. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2005, tbl.2.3 (2005), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2005/Table203.pdf>.

37. FEDERAL COURT MANAGEMENT STATISTICS 2011, *supra* note 10.

38. *See id.* In 2010, 12,797 criminal appeals were filed, and in 2009, the number was 13,710. *Id.*

39. FEDERAL COURT MANAGEMENT STATISTICS 2010, *supra* note 6.

40. *See* 18 U.S.C. § 46 (2006) (“Whoever knowingly delivers or receives for transportation, or transports, in interstate commerce . . . water hyacinth plants . . . [s]hall be fined under this title, or imprisoned not more than six months, or both.”).

41. In a report released by the Director of the Office of Research and Data of the U.S. Sentencing Commission, it was reported that drug offenses represented 30.3% of the cases (25,206 convictions) in the federal system, including 760 convictions for “an offense involving simple possession of a drug.” U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009 2, 5 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. Prosecuting these types of state drug offenses in federal court has been the subject of widespread criticism. Miner, *supra* note 30, at 683.

42. According to the fiscal year 2009 annual report of the Bureau of Prisons (BOP), the BOP housed 208,759 federal inmates in 2009. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, ANNUAL REPORT 57 (2009); *see also* Miner, *supra* note 30, at 688–89 (analyzing the issue as it existed in 1990).

43. FINAL REPORT, *supra* note 2, at 110.

IV. REVIEWING THE CONSEQUENCES

The Committee saw the consequences of a spiraling appellate caseload as jeopardizing the need “to preserve the hallmarks of our judiciary.”⁴⁴ Its Final Report defined the “hallmarks” to

include that the judges do most of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including independent, constructive insight and criticism from judges on the court and the panel other than the judge writing the opinion.⁴⁵

The Committee opined that the foregoing “conditions are essential to a carefully crafted caselaw” and concluded that “[m]odern society requires no less.”⁴⁶

More than twenty years ago, the Committee found that “[t]oday’s federal appellate courts have been able to provide these conditions only through increases in productivity that seem to be approaching their limit.”⁴⁷ Attempts to further raise “productivity” by such measures as increasing staff and reducing oral argument were said to be such as could “threaten the integrity of the process.”⁴⁸ Anyone familiar with the operation of the federal appellate court system over the past two decades will have noticed a continuing erosion of “hallmarks” that an overburdened judiciary just cannot maintain.⁴⁹ One of the major consequences is the reliance on staff to achieve the necessary productivity.

44. *Id.* at 109; see also Robert A. Katzmann, *The 2005 National Conference on Appellate Justice: Selected Presentation from the General Sessions: No Court is an Island*, 8 J. APP. PRAC. & PROCESS 115, 116 (2006) (discussing how a “host of issues,” including, *inter alia*, the “prospect of an ever-rising caseload; federalization of the law; resource constraints; [and] compensation,” can affect not only the judiciary but the relationship between it and the other branches of government). See generally FED. JUDICIAL CTR., *MANAGING APPEALS IN THE FEDERAL COURTS* 13–207, 535–691 (Robert A. Katzmann & Michael Tonry eds., 1988) (setting forth the Federal Judicial Center’s major research concerning the “crisis of volume” in, the case management in, and administration of the federal courts of appeals).

45. FINAL REPORT, *supra* note 2, at 109.

46. *Id.*; see also Frank M. Coffin & Robert A. Katzmann, *Steps Towards Optimal Judicial Workways: Perspectives from the Federal Bench*, 59 N.Y.U. ANN. SURV. AM. L. 377, 378 (2003) (recognizing that “if justice is to be dispensed fairly, efficiently, and wisely, then judges must have the time to devote to their responsibilities, both adjudicative and administrative, as well as the necessary resources; and the judiciary must have the authority, within reasonable limits and with appropriate accountability, to manage its own affairs, free from political retribution”).

47. FINAL REPORT, *supra* note 2, at 109.

48. *Id.*

49. See Coffin & Katzmann, *supra* note 46, at 378 (“[J]udicial dispositions are not widgets, and at some point the optimal number of decisions per judge may be exceeded. Productivity cannot be increased indefinitely without loss in the quality of justice.” (quoting A. Leo Levin, *Foreword* to Joe. S. Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project*, in FED. JUDICIAL CTR., *MANAGING APPEALS IN THE FEDERAL COURTS*, at vii (Robert A. Katzmann & Michael Tonry eds., 1988))); see also John G. McCarthy, *A Practitioner’s View of the Distinctive Practices of the Second Circuit*, FED. LAW. 41, 41 (Feb. 2006) (“The Second Circuit is the last bastion of oral argument in the Courts of Appeals of this country. Even with a caseload that now exceeds 7,000 filings annually, the court has held firm its conviction that oral argument of an appeal should be the norm, not the exception.”).

While active courts of appeals judges usually are assisted by four law clerks and a judicial assistant,⁵⁰ they also are assisted by staff attorneys, who provide support to the judges in various aspects of their work.⁵¹ In my own court, the Staff Attorneys' Office is headed by a Director of Legal Affairs. There are approximately four supervisory staff attorneys, twenty staff attorneys, and an administrative staff of nine.⁵² The major responsibilities of the staff attorneys pertain to motions and pro se matters, for which they prepare bench memoranda and proposed dispositions. There is also a separate Immigration Unit consisting of two supervisory attorneys and nine immigration attorneys. Their responsibilities lie in the processing of immigration cases assigned to the non-argument calendar.⁵³ They prepare memoranda and proposed dispositions for the cases to which they are assigned. Our Civil Appeals Management Program (CAMP) has two attorneys with preargument responsibilities in civil cases and an administrative staff of three.⁵⁴ Among other things, the CAMP attorneys confer with counsel for the parties in civil cases in an attempt to narrow the issues for appeal and effect settlements.⁵⁵ The Office of the Clerk of Court has two attorneys on staff—an administrative attorney and a motions staff attorney.

What use is made of all this legal firepower? It is used, of course, in the decisional process. It is no secret that the first drafts of opinions of the court frequently are undertaken by the judges' law clerks.⁵⁶ Similarly, staff attorneys prepare proposed orders for the disposition of motions and, in our court, for the disposal of immigration

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50. 28 U.S.C. § 712 (2006) ("Circuit Judges may appoint necessary law clerks and secretaries."); *see also* J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 326 (1988) ("The number of law clerks is not specified by statute; rather, a general provision for each court authorizes the hiring of law clerks, and the number of clerks is set in line items as part of the annual judicial appropriations act.").
 51. *See Office of Legal Affairs*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/legalaffairs2.htm> (last visited Nov. 18, 2012).
 52. U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DIRECTORY: U.S. COURTS FOR THE SECOND CIRCUIT (Mar. 7, 2011) (on file with the U.S. Court of Appeals for the Second Circuit, New York, N.Y.).
 53. *See* Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. AM. U. 547, 555 (2007) ("To assist in [asylum cases on the non-argument calendar], the Staff Attorney's Office within the Office of Legal Affairs became authorized to hire a supervisor and . . . attorneys to establish an immigration unit."). Pursuant to Second Circuit Local Rule 34.2, the court maintains a non-argument calendar for immigration cases raising claims for asylum, withholding of removal under the Immigration and Nationality Act, withholding or deferral of removal under the Convention Against Torture, or a motion to reopen or reconsider an order involving one of the preceding substantive claims. 2d CIR. R. 34.2 ("Non-Argument Calendar").
 54. U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DIRECTORY: U.S. COURTS FOR THE SECOND CIRCUIT (Mar. 7, 2011) (on file with the U.S. Court of Appeals for the Second Circuit, New York, N.Y.).
 55. In my court, almost all counseled civil appeals are referred to the Civil Appeals Management Plan for review, and such participation is mandatory. *See* 2D CIR. R. 33.1; *see also* Irving R. Kaufman, Comment, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986).
 56. *See, e.g.*, Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998) (stating that the first drafts of judicial opinions are sometimes drafted by law clerks); Mahoney, *supra* note 50, at 339 (noting that law clerks assist judges in drafting judicial opinions); Penelope Pether, *Sorcerers, not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 6 (2007) (commenting that unpublished opinions are drafted by law clerks and

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cases scheduled for the non-argument calendar. The sheer volume of cases makes reliance upon staff inevitable. Some say that this is leading to the bureaucratization of the judiciary.⁵⁷ It cannot be denied that appellate judges, although they still retain the power to decide, serve more and more as managers and editors in response to the demands for productivity in the face of the expanding volume of cases. But laying out the path to a decision is often the most important part of the decisional process. Rather than playing an adjunctive role in this regard, staff increasingly provides the path. And therein lies the erosion of the hallmark that judges do “their own work.”

The increased use of staff itself has consequences. The majority of staff is fresh out of law school and anxious to display their vast legal knowledge. The result is opinions that are overly lengthy and replete with basic legal precedent that every opinion reader should be familiar with.⁵⁸ One need not rehearse all the elements of a contract in every opinion resolving a breach of contract claim. While it is true that the judge is the ultimate decisionmaker, the system suffers when staff provides a longer path when a shorter one will do. The result may be an opinion not only much longer than necessary but also broader than necessary to resolve the issue before the court.⁵⁹

The higher the volume of cases decided in the federal appellate courts, the higher the number of intercircuit conflicts there will be. The result is inevitable, given the fact that two or more of the thirteen circuits are constrained to deal with novel issues of law and sometimes resolve them in different ways. Every month, *United States Law Week* provides a list of conflicting decisions rendered in various circuits during the preceding month.⁶⁰ And although intercircuit conflict is one of the criteria for granting certiorari in the Supreme Court,⁶¹ only a small proportion of intercircuit conflicts are resolved by the nation’s highest court each year.⁶² Consequently, the law

reviewed by the judge); Douglas O. Tice, Jr., *Reflections on Opinion Writing and Publishing: Part II*, 26 AM. BANKR. INST. J. 52, 52 (2007) (same).

57. Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 526–29 (2012) (describing the expansion of judicial support staff and the “bureaucratization” of the judiciary).

58. See Roger J. Miner, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, 65 ST. JOHN’S L. REV. 673, 712–13 (1991); see also Mahoney, *supra* note 50, at 339–40.

59. Some research “suggests that the busier a court is (in terms of the work required of each judge) the less likely it is to cite to legal scholarship” and “predicts that reported opinions citing legal scholarship decline as the number of reported opinions authored per active circuit judge increases.” David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1366 (2011). While some see this as a negative byproduct of the caseload crisis, I think, as I always have advocated, that judges should be concerned with precedent rather than the legal scholarship of today, such as Rebecca R. French, *The Case of the Missing Discipline: Finding Buddhist Legal Studies*, 52 BUFF. L. REV. 679 (2004). See Miner, *A Significant Symposium*, *supra* note 27, at 23–24.

60. See Bureau of Nat’l Affairs, Inc., *Circuit Splits Reported in U.S. Law Week—September 2012*, 81 U.S. L. WK. 467 (2012).

61. See FINAL REPORT, *supra* note 2, at 124–25.

62. See *id.*

becomes “fractured,” with different rules applying in different parts of the country. This situation would seem to be intolerable to most citizens, although the Federal Court Study Committee had this to say about inter-circuit conflicts:

Some conflicts, of course, may have the redeeming feature, especially in the constitutional area, of helping to develop legal doctrine and insight. Other conflicts need rapid resolution. Conflicts over some procedural rules and laws affecting actors in only one circuit at a time may have a negligible effect. A federal judicial system, however, must be able within a reasonable time to provide a nationally binding construction of these acts of Congress needing a single, unified construction in order to serve their purpose.⁶³

The Final Report went on to discuss various criteria established by commentators to distinguish “tolerable” conflicts from “intolerable” ones.⁶⁴ The Committee ultimately recognized “the proposition that there are an excessive number of unresolved inter-circuit conflicts.”⁶⁵

The exploding federal appellate caseload has led to a vastly increased use of summary dispositions marking the termination of the decisional process.⁶⁶ These dispositions are sometimes referred to as unpublished opinions, although they now are actually published and available to the public online as well as in periodic print publications.⁶⁷ A great debate preceded the adoption of the present federal rule governing these summary dispositions, owing to the fact that many circuits either prohibited the publication or denied precedence to the dispositions they represented.⁶⁸ One school of thought went so far as to consider such prohibitions unconstitutional.⁶⁹ In any event, the new rule provides that a court may *not* prohibit or restrict the

63. *Id.* at 125.

64. *See id.*

65. *Id.*

66. *See* David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1673, 1708 (2005) (“[T]he workload burdens on our federal appellate courts have grown to the point where something must be done or else the published opinion will become a statistical anomaly.”).

67. West publishes “opinions and decisions from 2001 to date issued by the U.S. courts of appeals that are not selected for publication in the *Federal Reporter*” in the Federal Appendix. *Federal Appendix: Description*, THOMSONREUTERS.COM, <http://legalsolutions.thomsonreuters.com/law-products/Reporters/Federal-Appendix/p/100000796> (last visited Feb. 22, 2013).

68. *See* Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 351 (2004) (comparing publication standards and citation rules for each of the circuit courts in Table 1). For a survey of the widespread commentary, see 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3506 n.42 (3d ed. 2012); *see also* 16AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3978.10 nn.10–11 (4th ed. 2012).

69. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (holding that the Eighth Circuit’s local rule on discouraging citation to unpublished opinions, “insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional”).

citation of a written disposition even though marked “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or similarly designated.⁷⁰ The summary orders issued by my court still contain the following designation: “RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT.”⁷¹ Other courts also deny precedential effect to designated opinions.⁷² But why cite an opinion that has no such effect? The courts themselves seem confused by the designation. For example, my own court has stated that “denying summary orders['] precedential effect does not mean that the court considers itself free to rule differently in similar cases.”⁷³ What then does it mean?

In any event, the use of summary dispositions has gained favor over time as a means of conserving judicial resources. These “unpublished opinions,” whatever they are called, were developed strictly as a shortcut to a disposition and in response to a caseload that does not permit a full opinion in every case. Many of these abbreviated writings start out by “assum[ing] the parties’ familiarity with the underlying facts, the procedural history, and the issues presented for review.”⁷⁴ The use of these dispositions is predicated on the assumption that the facts pertaining to the case are crystal clear and the applicable law well settled. This is always a questionable assumption.

More than two decades ago, long before the “no publication” rules were superseded, the Committee wrote the following: “There are also doctrinal reasons for questioning the non-publication rules: litigants should be able to argue that they are indeed similarly situated to a party in a previous case, even if the court thought it not significant enough to warrant publication.”⁷⁵ Any doctrinal concerns, however, have been outweighed by the need for summary disposition occasioned by the crisis of volume. And whether designated “unpublished” or “non-precedential,” there has been a spectacular rise in such dispositions,⁷⁶ as illustrated by the following national statistics issued by the Administrative Office of the United States Courts.

In 1990, case dispositions classified as “oral” numbered 94.⁷⁷ Dispositions classified as “written, signed” numbered 6008 designated as published and 2347 designated as unpublished.⁷⁸ Dispositions classified as “written, reasoned, unsigned”

70. FED. R. APP. P. 32.1(a). *See generally* Katzmann, *supra* note 44, at 116 (explaining how the rule that summary orders can be cited will invariably “affect how courts of appeals write those orders”).

71. *See, e.g.,* *Donovan v. Centerpulse Spine Tech Inc.*, 416 F. App’x 104 (2d Cir. 2011); *United States v. Gonzalez*, 415 F. App’x 336 (2d Cir. 2011).

72. *See* WRIGHT, MILLER, COOPER & STRUVE, *supra* note 68, § 3978.10.

73. *United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) (interpreting 2D CIR. R. 32.1).

74. *See Donovan*, 416 F. App’x at 105; *Gonzalez*, 415 F. App’x at 337.

75. *See* FINAL REPORT, *supra* note 2, at 130.

76. *See* Vladeck & Gulati, *supra* note 66, at 1670 (footnotes omitted) (“At present, fewer than 20% of appellate cases decided on the merits are resolved in written, published opinions. And that percentage is dwindling.”).

77. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATIONS OF FEDERAL COURT CASELOAD THROUGH FISCAL YEAR 2008, tbl.2.5 (2009), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/alljudicialfactsfigures.pdf>.

78. *Id.*

numbered 712 published and 9669 unpublished.⁷⁹ In the classification of “written, unsigned without comment” there were 4 published and 2161 unpublished dispositions.⁸⁰ Within these classifications, 14,204 dispositions by opinion or order were unpublished, or 68.01% of the total.⁸¹

Eighteen years later, there were no oral dispositions and in the “written, signed” category there were 4949 dispositions published and 5870 unpublished.⁸² The “written, reasoned, unsigned” category included 388 published and 17,399 unpublished.⁸³ The category designated “written, unsigned without comment” contained 40 published and 962 unpublished.⁸⁴ The unpublished total for the year 2008 was 24,231, amounting to 81.84% of the total!⁸⁵ Even under the new regime, when all dispositions are “published” and may be cited, one may wonder whether the nonprecedential status of over 80% of all decisions leads to a confused jurisprudence.

Oral argument has been a big loser as caseloads continue to rise. Much has been written about the value of oral argument, which most lawyers and judges have always thought to be an important ingredient of appellate advocacy.⁸⁶ To me, it has been a co-equal ingredient, along with the brief and appendix.⁸⁷ Oral presentation gives

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 306–07 (1986) (discussing the benefits of oral argument); Joseph W. Hatchett & Robert J. Telfer III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 150–51 (2003) (concluding that “[o]ral argument may be the most critical aspect of [an] appeal”). As Justice Harlan put it:

I should like to leave with you, particularly those of you who are among the younger barristers, the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.

John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1955). *But see* Debra Cassens Weiss, *Think Oral Arguments are Important? Think Again, Justice Alito Says*, A.B.A. J. (May 17, 2011), http://www.abajournal.com/news/article/think_oral_arguments_are_important_think_again_alito_says.

87. Roger J. Miner, *Common Disorders of the Appendix and Their Treatment*, 3 J. APP. PRAC. & PROCESS 39, 39–40 (2001) (“The three elements of appellate advocacy—preparation of the brief, compilation of the appendix, and presentation of oral argument—are co-equal in importance. Indeed, it is excellence in all three elements of a case on appeal that is the hallmark of successful appellate advocacy.”). From my perspective—as one who has been a target of appellate argument for some twenty-seven years—I disagree with those who would just as soon see oral argument to a final resting place, a historical artifact to be celebrated only in law school moot courts.

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counsel an opportunity to advance their contentions in a way that the written brief does not. Appellate advocates who argue before the court are able to provide emphasis to the points they consider important to their clients.⁸⁸ Oral argument provides judges with the opportunity to test counsel on the critical points in their cases and, through questioning of the lawyers, to share their thoughts with their colleagues on the panel as well as counsel. Counsel usually relish the opportunity to respond to questions from the court in order to dispel any doubts that the court may have about the positions they have taken. A not unimportant function of oral argument is its “public face.” The exchange between counsel and judges in open court is the only means that the public has to observe appellate courts in operation. The actual decisionmaking process is necessarily accomplished out of public view, taking place as it does in the conference rooms and chambers of the appellate judges. A well-known aphorism notes the need not only to do justice but also to see justice done.⁸⁹ The oral argument of appeals provides the citizenry with some insight in this regard. It is for this reason that I have long advocated the televising of oral arguments, especially arguments in the Supreme Court.⁹⁰

Whatever benefits oral argument may provide, those benefits are greatly diminished by the severe time limits now imposed by the courts of appeals. Rule 25 of the U.S. Court of Appeals for the Second Circuit in 1891 provided a time limit for oral argument of appeals as follows: “[t]wo hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins.”⁹¹ As to motions, Rule 21 provided: “[o]ne hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.”⁹² Today, even the allowance of fifteen minutes for the argument of an appeal is a rarity. Argument time is fixed by the judge presiding over the panel to which the appeal is assigned, and it is the unusual case that does not fall into the seven-to-ten minute category for arguments. The Federal Rules of Appellate Procedure as well as our local rule in the Second Circuit allow the court to determine when oral argument is unnecessary and to dispose of it

88. See Michael Duvall, *When is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 125 (2007) (“Oral argument can prompt the judges to ‘zero in’ on the precise turning point in an important case, which helps both the courts and litigants achieve a thorough, correct, and timely decision. In a ‘fifty/fifty,’ ‘fifty-one/forty-nine,’ or even a ‘sixty/forty’ case, the importance of this impact cannot be overstated.”).

89. See *R v. Sussex Justices*, [1924] 1 K.B. 256, 259 (“[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564–75 (1980) (detailing the value and history of open justice in the courts).

90. See Roger J. Miner, *Eye on Justice*, 67 N.Y. ST. B.J. 8 (1995).

91. 2D CIR. R. 25 (1892), reprinted in ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY, ITS JURISDICTION AND PRACTICE* 412–22 (3d ed. 1894).

92. *Id.* at R. 21.

altogether.⁹³ Many courts have established processes to “screen out” cases deemed not worthy of oral argument. Our long tradition in the Second Circuit has been to have oral argument in all cases, except for appeals by pro se incarcerated prisoners. We still do not employ a screening process, but we have established a non-argument calendar for certain types of immigration review cases,⁹⁴ and at one time maintained a non-argument calendar for some sentencing appeals.⁹⁵

It is now highly unusual for a motion to be argued in the Court of Appeals for the Second Circuit. The Federal Rules of Appellate Procedure provide that “[a] motion will be decided without oral argument unless the Court orders otherwise.”⁹⁶ The Internal Operating Procedures of the Court of Appeals for the Second Circuit provide that “[i]f the court orders oral argument on a motion, the motion will ordinarily be heard on a Tuesday when the court is in session.”⁹⁷ The motions calendared for Tuesday in the Second Circuit are designated as “counseled motions” and usually consist of five or six cases for which oral argument is rarely ordered. When argument is heard, the time customarily allowed is five minutes. Motions to file successive petitions for habeas corpus, motions by pro se litigants, and *Anders* motions all are taken by the court on submission only on designated days of a sitting week.⁹⁸ As many as twenty-five to thirty motions may be submitted on one pro se motion per day. As valuable as the oral argument of motions, especially of counseled motions, might be, volume and time constraints make the argument of motions all but impossible.

In reviewing the consequences of excessive volume, I now turn to the subject of collegiality, an important element of any enterprise requiring joint effort in pursuit of a common goal.⁹⁹ The caseload crisis impacts collegiality in various ways. For one thing, courts of appeals are now more reliant on visiting judges to get the job done.¹⁰⁰ District court judges from the same circuit and district, and circuit judges from other circuits, are called upon to assist the courts of appeals that are more seriously burdened by their caseloads. An intercircuit assignment system is in place, and all courts of appeals now

93. The court need not permit oral argument in a case where a panel unanimously agrees that “the appeal is frivolous” or “the dispositive issue or issues have been authoritatively decided.” FED. R. APP. P. 34(a)(2); 2D CIR. R. 34.1(b).

94. 2D CIR. R. 34.2(a)(1).

95. Starting in early 2008, certain types of sentencing appeals were assigned to the non-argument calendar. Once the court became current on the criminal docket in or around 2010, sentencing-only criminal cases were calendared instead to the regular argument calendar; however, they now are proposed as submitted cases. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 349–50 (2011).

96. FED. R. APP. P. 27(e).

97. 2D CIR. IOP 27.1.

98. GORDON MEHLER ET AL., *FEDERAL CRIMINAL PRACTICE: A SECOND CIRCUIT HANDBOOK* §§ 12–13 (12th ed. 2012).

99. See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PENN. L. REV. 5 (2003) (discussing how collegiality among judges affects appellate adjudication).

100. See JENNIFER EVANS MARSH, *FED. JUDICIAL CTR., THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT PERSONNEL* 41 (2001).

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use visiting judges to some degree.¹⁰¹ There is therefore less opportunity to sit with judges of our own court. The number of seats on the court has an impact of collegiality because, as the number of judges grows, the rotation of panels becomes such that one will sit with a colleague fewer times during the course of a year.¹⁰² When I first came to my court, the membership of a panel was the same for an entire week at a time.¹⁰³ After the completion of arguments we would retire to chambers, and each member of the panel would then circulate to the other panel members a brief voting memorandum pertaining to the cases heard that day. On Friday afternoon, the panel convened in the chambers of the judge who had presided that week to confer and review our voting memoranda.¹⁰⁴ After each judge was heard as to each case, a final vote was taken and the opinion assigned by the presiding judge.¹⁰⁵

Today, it is rare for one judge to sit for the entire week in the Court of Appeals for the Second Circuit. Judges rotate, and out of each week’s panel, some sit for as little as one or two days.¹⁰⁶ Accordingly, the conference of the judges is held after each day’s sitting, and the discussions customarily are brief. A tentative vote is recorded as to each case and the opinion assigned, but from time to time the vote is postponed so that a memorandum may be circulated after the judges have had more time to think about a proper disposition.¹⁰⁷ The lengthy face-to-face discussions of the past are replaced by abbreviated conferences with constantly changing judicial personnel. Obviously, collegiality in the sense of the opportunity to interact with colleagues is lessened as the volume of cases increases.¹⁰⁸ In this way, the “hallmark” of the judiciary that “independent, constructive insight and criticism [should be

101. *See id.* at 1.

102. *See generally* GORDON BERMANT ET AL., FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993) (noting that “there are also ways to deal with problems of diminished collegiality other than a ceiling on the number of judgeships”).

103. *See* Mahoney, *supra* note 50, at 329.

104. *See generally* McCarthy, *supra* note 49, at 41, 43 (discussing the Second Circuit’s practice of using voting memoranda).

105. *See generally* Feinberg, *supra* note 86.

106. *See* 28 U.S.C. §§ 291(a), 292(d)–(e), 293(a), 294(d) (2006); MARSH, *supra* note 100, at app. C (Certificate of Necessity); *id.* at app. E (Guidelines for the Intercircuit Assignment of Article III Judges (approved by the Chief Justice Oct. 21, 1997)); *see also* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REF. 351, 360–61 (1995) (discussing the temporary use of district judges in the courts of appeals).

107. *See* Feinberg, *supra* note 86, at 298–303.

108. *See* Charles Clark, *A Healthy and Diverse Judiciary* (“Such an unwieldy bureaucracy has the potential to smother justice as we know it. Character and collegiality will become rare, if not extinct, in such a swollen system.”), in FED. JUDICIAL CTR., THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 163, 166 (Cynthia Harrison & Russell R. Wheeler eds., 1989); Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, in FED. JUDICIAL CTR., THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 171, 180 (Cynthia Harrison & Russell R. Wheeler eds., 1989); Harrison L. Winter, *Goodwill and Dedication*, in FED. JUDICIAL CTR., THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 167 (Cynthia Harrison & Russell R. Wheeler eds., 1989); *see also* DONALD JOHN MEADOR &

provided] from judges on the court and the panel other than the judge writing the opinion” has been eroded.¹⁰⁹

Nevertheless, the use of senior judges is one measure to maintain collegiality and to respond to the increasing appellate caseload.¹¹⁰ The use of senior judges “fills the gaps caused by personnel needs,” because senior judges continue to serve on the circuit courts’ three-judge panels, participate in oral arguments, cast their vote or “tab,” author opinions, and remain a full part of a case’s decisional process.¹¹¹ Indeed, the “number of senior judges has risen sharply since its inception in 1918.”¹¹² But I agree that a “strong case may be made that the rise in senior status judges has been a contributing factor to reducing the burdens of expanding caseloads.”¹¹³ Given the current caseload in the appellate courts, the circuit courts have had to rely on not only senior judges but also district judges to constitute daily panels in the circuit courts.¹¹⁴ This reliance, although very beneficial, might also contribute to a lessened opportunity to interact with colleagues with lengthy face-to-face discussions because the regular use of visiting district judges essentially raises the number of rotating active judges being used.¹¹⁵

V. REVISITING THE COMMITTEE’S RECOMMENDATIONS

In this section I briefly review the Final Report’s recommendations for dealing with the appellate caseload crisis and the crisis of volume.¹¹⁶ The Committee’s Final Report made numerous recommendations on a variety of approaches and topics in the federal court system, including the reallocation “of business between the state and

JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 36 (1994); Miner, *supra* note 58, at 682–83.

109. JUDICIAL CONFERENCE OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS* 20 (1995) (quoting the FINAL REPORT, *supra* note 2, at 109), *reprinted in* 166 F.R.D 49, 80 (1995).

110. Todd Collins, *Re-Opened for Business? Caseloads, Judicial Vacancies, and Backlog in the Federal Circuit Courts*, 95 JUDICATURE 20 (2011); *see* 28 U.S.C. § 371 (2006) (providing that a federal judge may retire, or go take “senior status,” and continue to receive a full salary with continuing participation in a reduced number of cases).

111. Collins, *supra* note 110, at 28–29.

112. *Id.* at 29.

113. *Id.*

114. *See, e.g.*, Saphire & Solimine, *supra* note 106; *see also* MARSH, *supra* note 100, at 1.

115. *See* Saphire & Solimine, *supra* note 106, at 376; *see also* Miner, *supra* note 58, at 714–15.

116. FINAL REPORT, *supra* note 2, at 109. For a thorough review and examination of the Federal Courts Study Committee’s recommendations, both structural and nonstructural in nature, *see* Miner, *supra* note 58, at 683–90 (reviewing the major findings and recommendations of the Committee Report relating to federal courts of appeals and evaluating them in light of the condition of the U.S. Court of Appeals for the Second Circuit). *See id.* at 690–98 (reviewing the Committee’s recommendations for changes in district court procedure); *id.* at 698–707 (reviewing the Committee’s recommendations for the “development of innovations for court management”); *id.* at 707–15 (discussing the decisional process); *id.* at 715–24 (reviewing proposed adjustments in federal court jurisdiction that might affect the “flow of cases to the courts of appeals”).

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federal systems,” the creation of additional capacity within the federal judicial branch, and “concerns about sentencing, federal court administration, and ways to protect against bias and discrimination in the judicial branch and the judicial process.”¹¹⁷ Of the appellate caseload crisis specifically, however, the Committee made, for the most part, what can be called structural recommendations for dealing with the crisis.¹¹⁸ These recommendations, of which the Committee ultimately recommended the rejection,¹¹⁹ are premised on what the Final Report describes as the “‘five fundamental characteristics’ of the federal courts of appeals [that] have persisted since their ‘creation in 1891.’”¹²⁰ The characteristics, which pertain to the traditional “decisional and geographic structures” and organization of the courts of appeals, are that the courts of appeals “comprise the only intermediate tier of courts in the federal system, provide litigants an appeal as of right, assign cases for decision by three-judge panels, are organized geographically, and are divided into circuits roughly approximating the number of Supreme Court justices.”¹²¹

At the outset, it bears noting that the Final Report’s proposals did not include an increase in the number of federal circuit judges, the Committee having essentially reasoned that the appellate caseload crisis could not be “solved by the continuous and indefinite expansion of the federal judiciary.”¹²² The Committee further reasoned that effective judicial performance was contingent on the federal circuit court judges being

117. John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 427 (2002).

118. FINAL REPORT, *supra* note 2, at 111–13, 116–23.

119. *Id.* at 117; *see id.* at 123 (statement of J. Cabranes) (“[E]choing the committee’s call for more study of this subject and reiterating that *the committee has approved none of the various proposals noted in the text . . .*”).

120. Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201, 231 (2011) (quoting Final Report, *supra* note 2, at 113).

121. *Id.* (footnotes omitted); *see* FINAL REPORT, *supra* note 2, at 113. I believe that the number of judgeships per circuit also goes to the structure and organization of the courts of appeals and is therefore another structural characteristic addressed by the Committee’s Final Report. *Id.* at 111–12. On the other hand, contemporary characteristics of the courts of appeals, which have evolved over time, have been said to include nonstructural characteristics such as “the rising caseloads of the courts of appeals and the processes and procedures [the courts of appeals] employ to deal with expanded caseloads.” Dragich, *supra* note 120, at 232. Other contemporary characteristics responsive to the increased appellate caseload include increases in the number and use of law clerks and other staff, reductions in oral argument time allowed, the increased use of summary dispositions, and the use of settlement programs. FINAL REPORT, *supra* note 2, at 114; *see also* Dragich, *supra* note 120, at 232 (citing FINAL REPORT, *supra* note 2, at 114). Another evolving characteristic of the courts of appeals, which is said to have been affected by the appellate caseload, is the caseload makeup or types of cases before the circuit courts. *See id.* at 245 (“Given the marked shift in the federal courts’ caseload from diversity to federal question cases, the federal courts today far more often apply federal law (whether constitutional, statutory, or ‘genuine’ federal common law) than state law.”); *see also* Roger J. Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENT. 251, 253–54 (1987) (noting the direct correlation between (1) Congress’s “enthusiasm . . . for enacting criminal laws” and the general federalization of criminal law and (2) the great volume of cases added to the federal courts, “giving rise to the geometric progression of [the circuits’] workload”).

122. Miner, *supra* note 58, at 682; *see also id.* at 683–84 (noting that the Committee’s Final Report also rejected the 1975 proposal by the Hruska Commission, formally known as the Commission on Revision of the Federal Court Appellate System, for the establishment of a National Court of Appeals: a

“sufficiently few in number to feel a personal stake in the consequences of their actions.”¹²³ The Committee also noted its concern about maintaining intra- and inter-court uniformity in federal law, which could become fractured if there were an increase in the number of courts or judgeships.¹²⁴ I have remarked that typically neither my colleagues nor other circuit judges exhibit great enthusiasm for the expansion of the federal judiciary or for an increase in the number of judges sitting on our courts of appeals.¹²⁵

Turning to my review of the five structural alternatives proposed by the Committee’s Final Report, I reiterate that the Committee declined to endorse any of these proposals, so I only briefly review them here, although structural revisions and adaptations to the courts of appeals have served as cannon fodder to much scholarly debate on the topic.¹²⁶ The first recommendation envisioned multiple circuit courts functioning as a unified or nationalized appellate court operating through regional divisions and a federal circuit division from the U.S. Claims Court and the U.S. Court of International Trade.¹²⁷ The current geographic circuit boundaries would be replaced by larger regional boundaries, with the nation evenly divided into regions.¹²⁸ Under this approach, nine judges would serve in each of the regional divisions, and intercircuit conflicts generated by “the proliferation of panels would be handled in one of two ways: a rule could be adopted requiring adherence to precedents established by prior panel decisions in other divisions; or a central division of the unified court could be established to hear and decide conflicts among regional divisions.”¹²⁹ It has been said that with a central division of representative judges, these judges could “review panel decisions and resolve remaining conflicts as a kind of national [in] banc court.

nationalized appellate court “would not solve the problem of growth within the courts of appeals” and “could resolve only a piece of the problem”).

123. *Id.* at 682.

124. *See id.* at 682–83.

125. *Id.* at 683.

126. *See, e.g.*, AM. BAR ASS’N, REPORT OF THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS REGARDING THE RECOMMENDATIONS OF THE FEDERAL COURTS STUDY COMMITTEE 4 (1991) (noting the ABA Litigation Section’s disagreement with the Final Report’s preference for a “small” judiciary and recommending that additional judgeships should be created, that existing vacancies should be filled promptly, and that “the existing structure of the Federal circuits continue to be an appropriate way of deciding appeals”); THOMAS E. BAKER, JUSTICE RESEARCH INST., RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 33–51 (1994) (collecting and synthesizing the findings of previous studies examining the appellate caseload crisis and proposed adaptations); COMM’N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 59–66 (1998) [hereinafter WHITE COMMISSION REPORT] (opining that “some changes to the structure of the courts of appeals will help them deal with the conundrum they will face as caseloads grow” and proposing two-judge panels as one possible change to alleviate increasing appellate caseloads).

127. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 118.

128. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 118.

129. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 118.

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This would reduce the expectation of more frequent conflicts generated by more circuits without relying on the Supreme Court.”¹³⁰

The Committee’s second structural proposal featured a four-tiered federal court system, whereby “two appellate courts are interposed between the district courts and the Supreme Court.”¹³¹ “The first appellate tier would consist of twenty to thirty regional appellate divisions, with nine or ten judges per division.”¹³² “Appeals of right from the district courts within a designated geographical area would come to the first-tier appellate division covering that region.”¹³³ “The second appellate tier would consist of four or five tribunals located in various areas of the nation,” and “each second-tier court would have seven judges and would take cases on a discretionary basis from a specified grouping of the first-tier courts.”¹³⁴ I have stated that one advantage of a four-tiered federal court system “is said to lie in the ability of the higher tribunal to establish a more coherent body of law within a system that allows all the courts at both levels to remain small in size.”¹³⁵ Under this proposed model, the “Supreme Court would take cases only from the upper-level courts, allowing the upper-tier court to view and assess the development of uniformity in the decisions of the lower-tier courts.”¹³⁶ This approach would have the “Court of Appeals for the Federal Circuit designated as a second-tier court, with appeals taken directly to it from the U.S. Claims Court and the U.S. Court of International Trade.”¹³⁷ Commentators have noted that this model would “absorb the expected large cohorts of additional judgeships and . . . would be designed to handle the expectation of more frequent conflicts.”¹³⁸

The third structural revision proposed would organize the federal appellate courts according to subject matter, creating national subject-matter courts.¹³⁹ As we know, the Court of Appeals for the Federal Circuit is one such circuit court fitted to this mold.¹⁴⁰ This model called for leaving in place the present geographic courts of appeals but proposed a number of subject-matter appellate courts.¹⁴¹ Appeals from

130. BAKER, *supra* note 126, at 42.

131. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 119.

132. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 119.

133. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 119.

134. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 119.

135. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 119.

136. Miner, *supra* note 58, at 685; *see also* FINAL REPORT, *supra* note 2, at 119.

137. Miner, *supra* note 58, at 685–86; *see also* FINAL REPORT, *supra* note 2, at 119.

138. BAKER, *supra* note 126, at 42.

139. *See* Miner, *supra* note 58, at 686 (citing S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U.L. REV. 853 (1990)) (discussing the pros and cons of using national subject matter based courts to help alleviate the problems facing the federal appellate system); *see also* FINAL REPORT, *supra* note 2, at 119–20.

140. Plager, *supra* note 139, at 853.

141. *See* Miner, *supra* note 58, at 686; *see also* FINAL REPORT, *supra* note 2, at 120.

the district courts would be taken according to the subject of the case on appeal. Under this approach, the existing geographic “courts would be relieved of a substantial part of their caseload, and many areas of intercircuit conflict would be eliminated.”¹⁴²

The fourth structural adaptation called for having all circuit judges act as members of a single court assigned to sit at locations primarily near their homes.¹⁴³ Under this model, the circuit courts would again be structured as “one centrally organized tribunal.”¹⁴⁴ This model would purportedly have the flexibility to allocate judges and resources according to need. “It could establish its own precedents for the resolution of conflicts between panels and could experiment with subject-matter courts and internal tiers.”¹⁴⁵ This model, of course, could raise collegiality concerns as judges would seldom sit with colleagues living in other locales, and the existing rotation of three-judge panels providing for random panel member selection would surely suffer. Circuit judges living in more remote regions of the country would essentially find themselves sitting on relatively static panels with little to no rotation of panel members. This might also affect the consistency of federal law. Nevertheless, flexibility and the ability to develop internal mechanisms for resolving conflicts remain the hallmarks of this model.¹⁴⁶

The final structural proposal envisioned consolidation of the existing circuit courts into five large or “jumbo” circuits.¹⁴⁷ Under this model, judges would be assigned to sit in subdivisions of the five jumbo circuits.¹⁴⁸ Judges could be assigned to sit in the subdivisions, which would be made possible by the “shifting of resources within each jumbo circuit.”¹⁴⁹ Intracircuit conflicts would be resolved by each jumbo circuit in its discretion, and “in banc sittings, with rotating memberships, have been suggested as a means of maintaining uniformity in jumbo circuit.”¹⁵⁰ Because this proposal essentially recreates and multiplies the Ninth Circuit, adoption of this recommendation would seem unadvisable given the past and current debate surrounding proposals to split the Ninth Circuit.¹⁵¹

Because in my view it cannot be stated that the structural recommendations for addressing the appellate caseload crisis have gained any serious momentum (in one

142. Miner, *supra* note 58, at 686.

143. *Id.*; see FINAL REPORT, *supra* note 2, at 119.

144. Miner, *supra* note 58, at 686; see FINAL REPORT, *supra* note 2, at 119.

145. Miner, *supra* note 58, at 686; see FINAL REPORT, *supra* note 2, at 119.

146. BAKER, *supra* note 126, at 43.

147. Miner, *supra* note 58, at 686–87; see FINAL REPORT, *supra* note 2, at 122.

148. Miner, *supra* note 58, at 686–87; see FINAL REPORT, *supra* note 2, at 122.

149. Miner, *supra* note 58, at 686–87; see FINAL REPORT, *supra* note 2, at 122.

150. Miner, *supra* note 58, at 686–87; see FINAL REPORT, *supra* note 2, at 122.

151. See, e.g., WHITE COMMISSION REPORT, *supra* note 126, at 29–57; see also Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2011, H.R. 162, 112th Cong. (2011); Frank Tamulonis III, *Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?*, 112 PENN ST. L. REV. 859 (1992) (exploring the various split proposals regarding the Ninth Circuit and their effect on current jurisprudence).

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direction or another) in Congress since the Committee issued its Final Report,¹⁵² scholarship must also continue to examine the inadequacy of the present methods and nonstructural solutions, each of which I now turn to.

VI. ASSESSING THE INADEQUACY OF PRESENT METHODS

I focus in this section on the availability and efficacy (or lack thereof) of the imposition of sanctions, adjudication of an appeal by summary disposition, and the acceptance of *Anders* briefs as tools for managing the caseload crisis. What is apparent is that while they may be effective methods by which a court may discourage and quickly dispose of frivolous appeals, these methods are completely inadequate in their present employ to be used as tools for managing meritless, but not frivolous, appeals.

A. Sanctions

An appellate court’s power to impose sanctions derives from several independent sources: Rule 38 of the Federal Rules of Appellate Procedure,¹⁵³ 28 U.S.C. § 1927,¹⁵⁴ and the inherent authority of the court.¹⁵⁵ In addition, 28 U.S.C. § 1912 confers jurisdiction upon courts of appeals to, in each court’s discretion, award single or double costs or damages for “delay” to a prevailing party.¹⁵⁶ However, the cumbersome

152. See Miner, *supra* note 58, at 687 (noting and briefly surveying the “[v]arious criticisms [that] have been leveled at each one of the restructuring proposals,” which stem from, in part, “a simple reluctance to change a system that has worked so well for so long”); see also John Cooper Godbold, *Governance of the Courts and Structure of the Circuits* (doubting that any restructuring “can occur short of a nationwide breakdown in the federal judicial system” and, as a result, “changes in the number and the contours of circuits . . . will be few and far between”), in FED. JUDICIAL CTR., *THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY* 32, 35–36 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

153. FED. R. APP. P. 38 (“If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”).

154. 28 U.S.C. § 1927 (2006) (“Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”); see *id.* § 1912 (“Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.”); see also, e.g., *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1345 (10th Cir. 2009) (holding that “[b]ecause arbitration presents such a narrow standard of review, Section 1927 sanctions are warranted if the arguments presented are completely meritless” (internal quotation marks omitted)).

155. See, e.g., *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) (discussing court’s inherent power to sanction); *Pillay v. INS*, 45 F.3d 14, 17 (2d Cir. 1995) (discussing inherent authority of the court).

156. 28 U.S.C. § 1912 (2006) (“Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.”). This provision often has been applied to sanction frivolous appeals. *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984).

nature of the procedures established for the imposition of available sanctions,¹⁵⁷ and the limited scope of the conduct to which sanctions may attach, discourage their regular application.¹⁵⁸

Sanctions against appellants are currently available to discourage appeals that are so very meritless as to be deemed “frivolous.”¹⁵⁹ Rule 38 of the Federal Rules of Appellate Procedure provides for sanctions consisting of “damages” and single or double costs to the appellee upon a judicial determination that an appeal is frivolous.¹⁶⁰ My court has interpreted Rule 38 to permit an award of sanctions only in cases of clear frivolity, bad faith, or a multiplicity of filings.¹⁶¹ An appeal has been said to be frivolous where it “amount[ed] to ‘little more than a continued abuse of process’” and was “totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence.”¹⁶² An appeal that “appears to represent one more step in an outrageous abuse of civil process through persistent pursuit of frivolous and completely meritless claims” also has been characterized as frivolous.¹⁶³ Frivolous appeals have been described as those that rest upon “fanciful allegations of fact [or] inarguable assertions of law.”¹⁶⁴ Clearly, then, all frivolous appeals fall within the meritless category, but not all meritless appeals can, at present, be sanctioned as frivolous.

Pursuant to 28 U.S.C. § 1927, sanctions may be imposed personally upon an attorney who so “multiplies” the proceedings in any case “unreasonably and vexatiously.”

157. *See* FED. R. APP. P. 38. Federal Rule of Appellate Procedure 38 provides: “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” While the requirement of notice and an opportunity to respond is, of course, not “cumbersome,” the courts’ narrow definition of “frivolity,” as I discuss further below, does constitute a significant obstacle in applying sanctions more broadly. *See* WRIGHT, MILLER, COOPER & STRUVE, *supra* note 68, § 3984.1 (explaining the many reasons why a court may decide not to impose sanctions because, even if an argument contravenes circuit precedent or its probability of success seems weak, the appeal may still not be “frivolous”); *see also* Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603, 603 (1985) (assessing the Second, Third, Fourth, Seventh, Eighth, Tenth, and the District of Columbia Circuit Courts of Appeals as either “uncertain” or “reluctant” when it comes to imposing sanctions for meritless appeals).

158. In addition, applications for sanctions themselves can give rise to further litigation. Miner, *supra* note 121, at 255 (citing *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986)).

159. *Formica v. Malone & Assocs.*, 907 F.2d 397, 400 (2d Cir. 1990) (citation omitted) (“Since we . . . do not find [the] appeal to be frivolous, we deny [the] motion to dismiss the appeal and to impose appellate sanctions.”).

160. FED. R. APP. P. 38.

161. *See, e.g., In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 119–20 (2d Cir. 2000); *Moore v. Time, Inc.*, 180 F.3d 463, 463–64 (2d Cir. 1999).

162. *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381–82 (2d Cir. 1982) (*per curiam*).

163. *Chour v. INS*, 578 F.2d 464, 467 (2d Cir. 1987).

164. *United States v. Davis*, 598 F.3d 10, 14 (2d Cir. 2010); *see also* *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (describing an appeal as frivolous if it presents an “indisputably meritless legal theory” or “factual contentions [that] are clearly baseless”).

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These sanctions may include “the excess costs, expenses, and attorney’s fees” occasioned by such conduct. These sanctions are designed to discourage lawyers from burdening the opposing party with unnecessary delays. However, they do not necessarily discourage meritless appeals and seem to require the showing of some sort of intentional misconduct that is unreasonable and vexatious.¹⁶⁵ Nor does the provision apply to discourage a meritless appeal by a pro se litigant.¹⁶⁶

Leave-to-file or reporting requirements also may be imposed as a sanction as an alternative or addition to costs and damages.¹⁶⁷ “[C]ourts may impose sanctions, including restrictions on future access to the judicial system,” if a litigant “has a history of filing ‘vexatious, harassing or duplicative lawsuits.’”¹⁶⁸ Circuit courts typically warn a litigant before imposing sanctions that restrict future access to the appellate courts. The court may enter an order barring an appellant from making any future filings without approval by the court if the court makes a determination that the litigant or appellant “abused the judicial process to harass [the opposing party] with vexations and frivolous suits.”¹⁶⁹

Notwithstanding the availability of sanctions, they have been imposed in too few cases to penalize those who pursue frivolous appeals, to compensate those required to respond to them, and to discourage those who would unduly burden the appellate

165. *Pillay v. INS*, 45 F.3d 14, 16 (2d Cir. 1995) (per curiam) (“[A]lthough Fed. R. App. P. 38 permits the award of damages to an appellee in the case of a frivolous appeal, it does not authorize the dismissal of a frivolous appeal.”); *see also Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012) (noting that an award of sanctions must be supported by a finding that a party acted “in bad faith, *i.e.*, motivated by improper purposes such as harassment or delay” (internal quotation marks omitted)). *But see Hyatt v. Metro. Transp. Auth.*, 370 F. App’x 153, 154 (2d Cir. 2010) (denying a motion for sanctions where the appellant’s “argument on appeal clearly [was] meritless, [but] there [was] no indication that he was appealing the district court’s judgment in bad faith, or that he has made similar arguments in federal courts in the past”); *In re Drexel Burnham Lambert Grp. Inc.*, 995 F.2d 1138, 1147 (2d Cir. 1993) (“The standard for the imposition of [sanctions under Rule 38] is where the appeal taken is found to be groundless, without foundation, and without merit, *even though appellant did not bring it in bad faith.*” (emphasis added)).

166. In contrast to 28 U.S.C. § 1927, Rule 38 does not exempt pro se appellants. *See Meehan Rasch, Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 ARK. L. REV. 249, 275–78 (2009) (collecting practices of different circuits).

167. Most recently, an appeal arising from a complaint alleging that former senior government officials caused the September 11, 2001, attacks captured the attention of the Second Circuit Court of Appeals. *Gallop v. Cheney*, 642 F.3d 364, 366–68 (2d Cir. 2011). In that case, where the appeal (and the original complaint) were “brought without the slightest chance of success,” the court, *nostre sponte*, ordered petitioner and her counsel to show cause why they should not pay double costs and damages under Rule 38, 28 U.S.C. § 1927, and the inherent power of the court. *Id.* at 370 (internal quotation marks omitted). Pursuant to subsequent orders, the court imposed sanctions on two of the appellant’s attorneys for filing a frivolous appeal and ordered them to pay double costs to the government along with damages in the amount of \$15,000. *Id.* The court also imposed a one-year reporting requirement should either attorney file any matter in any federal court within the Second Circuit. *Id.*

168. *Hong Mai Sa v. Doe*, 406 F.3d 155, 158 (2d Cir. 2005) (quoting *Iwachiw v N.Y. State Dep’t of Motor Vehicles*, 396 F.3d 525, 528 (2d Cir. 2005)). The court first orders the litigant to show cause why a leave-to-file sanction order should not be issued. *Id.*

169. *Sassower v. Sansverie*, 885 F.2d 9, 11 (2d Cir. 1989) (alteration in original).

courts. It seems to me that courts, especially my court, too often deny applications for sanctions, or issue slap-on-the-hand warnings,¹⁷⁰ due to an oversensitized fear that granting such applications would “stifle [] enthusiasm” or “chill [] creativity.”¹⁷¹ Lest I be labeled as a “stifler” of the creativity of the bar, I instead suggest that such terms as “enthusiasm” or “creativity” no longer retain their original connotation but now include an all-too-often thinly veiled disguise for an argument completely lacking in merit. There certainly still is a place for the creativity and enthusiasm that characterize legitimate advocacy. As I have suggested previously, a meritless appeal is separate and distinct from one that while perhaps not a “home run,” has an objectively reasonable basis in law and fact or puts forth a logical and well-reasoned argument for the extension of existing law or for overturning precedent.

In the same vein, too many meritless appeals are considered to be nonfrivolous and thus, in most cases, nonsanctionable. A sister circuit has opined that “it’s pretty easy to distinguish a frivolous from a nonfrivolous case.”¹⁷² I respectfully think that this overstates what I believe to be “difficult business.”¹⁷³ Distinguishing a frivolous appeal from one “likely without merit” has always proved to be a challenging task for me,¹⁷⁴ and I have always thought that more meritless appeals belong in the frivolous category than perhaps some of my counterparts. If it were the case that frivolous appeals are easily identified, sanctions could serve more effectively as a deterrent for not only frivolous but also certain classes of meritless, appeals.¹⁷⁵

B. *Summary Dispositions and Anders Briefs*

Motions for summary affirmance and the filing of an *Anders* brief also exist for coping with frivolous appeals. An appellee may make a motion for summary affirmance of the judgment of the district court. Such a disposition is a rare exception to full merits briefing and is available only upon a judicial determination that an

170. *See, e.g.,* Vargas v. Wughalter, 380 F. App’x 110, 110 (2d Cir. 2010); Jeffreys v. United Technologies Corp., 357 F. App’x 370, 373 (2d Cir. 2009).

171. Oliveri v. Thompson, 803 F.2d 1265, 1268 (2d Cir. 1986) (alteration in original); *see also* United States v. Davis, 598 F.3d 10, 14 (2d Cir. 2010) (“We have cautioned the bar that overreaching attempts to dismiss appeals as frivolous, like excessively zealous claims that adversary counsel should be sanctioned, will not be accorded a friendly reception by this court.” (internal quotation marks and alteration omitted)); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (“[W]e do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.”).

172. United States v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 381 (7th Cir. 2010) (Posner, J.).

173. *See* WSM, Inc. v. Tenn. Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) (“Frivolity, like obscenity, is often difficult to define.”).

174. Love v. McCray, 413 F.3d 192, 194 (2d Cir. 2005) (per curiam).

175. Different circuits consider different factors in deciding whether to award Rule 38 sanctions. *See* Rasch, *supra* note 166, at 273–75. For example, the Third Circuit applies a “reasonable attorney” test, by which the court determines whether, “following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is frivolous.” *Id.* (citing Beam v. Bauer, 383 F.3d 106, 109–10 (3d Cir. 2004)).

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appeal is truly frivolous.¹⁷⁶ Especially in the context of a criminal appeal, an easy case for which the outcome “seems obvious” is to be distinguished from a frivolous case that is inarguable or fanciful. “More than a finding that the correct resolution of an appeal seems obvious is required.”¹⁷⁷

In the criminal context, defense counsel may file a brief pursuant to *Anders v. California*, along with a motion to be relieved as appellate counsel, if he determines that no nonfrivolous issues exist on appeal.¹⁷⁸ The standard for granting such a motion is high; it will be granted only upon a judicial determination that “counsel has diligently searched the record for any arguably meritorious issue in support of his client’s appeal” and that “counsel’s declaration that the appeal would be frivolous is, in fact, legally correct.”¹⁷⁹ While both summary dispositions and *Anders* briefs certainly serve a purpose in deterring frivolous appeals, as with sanctions, they do not serve adequately to discourage meritless appeals.

While special circumstances in the criminal context require “easy” cases to be distinguished from frivolous ones, it still seems to me that more attorneys, especially those appointed as CJA counsel, should be filing *Anders* briefs and motions to be relieved as counsel.¹⁸⁰ It is not the rare case where I have seen an attorney travel from as far away as Buffalo or Syracuse to argue an appeal that instead should have been resolved by filing such a motion. While the requirements are many, my court has prepared detailed instructions along with an “*Anders* Checklist” to assist counsel with compliance with these requirements. Finally, defense counsel would be wise to bear in mind that “the right to appellate representation does not include a right to present frivolous arguments to the court . . . [and] an attorney is under an ethical obligation to refuse to prosecute a frivolous appeal.”¹⁸¹

176. *Davis*, 598 F.3d at 14.

177. *Id.* at 13–14.

178. U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, HOW TO FILE AN ANDERS BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (2010), available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/Anders%20brief%20instructions%20and%20checklist%20combined%2010-11.pdf. See generally *Anders v. California*, 386 U.S. 738 (1967).

179. *United States v. Burnett*, 989 F.2d 100, 104 (2d Cir. 1993); see also *Pillay v. INS*, 45 F.3d 14, 16–17 (2d Cir. 1995) (“In substance, the granting of motions for summary affirmance in *Anders* cases is not significantly distinguishable from dismissal of appeals as frivolous.”).

180. Of note is a circuit split whereby the majority of the circuits, including the Second Circuit, require defense counsel to file an appeal upon a defendant’s request, notwithstanding any plea bargain into which the defendant entered. The Seventh Circuit, in contrast, has held that a plea bargain relieves counsel of any duty to file an appeal. See generally Tamar Kaplan-Marans, *An Appealing Split: Filing an Appeal After a Plea Bargain: Is Counsel Obligated to File a Meritless Appeal?*, 74 BROOK. L. REV. 1183, 1183–85 (2009) (citing *Nunez v. United States*, 546 F.3d 450 (7th Cir. 2008); *Campusano v. United States*, 442 F.3d 770, 777 (2d Cir. 2006)).

181. *Smith v. Robbins*, 528 U.S. 259, 272 (2000) (internal quotation marks omitted); see also *Johnston v. Maha*, 606 F.3d 39, 41 (2010) (“[A]sk[ing] first whether the claimant has met ‘a threshold showing of some likelihood of merit.’” (quoting *Cooper v. A Sargenti Co.*, 877 F.2d 170 (1989))).

VII. ADVANCING A PROPOSAL

As the title of this article indicates, my intent has been to revisit the 1990 Report of the Federal Courts Study Committee to illustrate that the problems identified by the Committee in 1990 continue to remain at the forefront today. In that light, as part of this revisit I also “readvance” an idea that was proposed but ultimately rejected by the Committee in 1990. In its Final Report, the Committee recommended that Congress reject adoption of a “loser pays” rule or, as also commonly known, the “English Rule.”¹⁸² In doing so, it opined:

Although sometimes advocated, a general rule making losing parties fully liable for the winners’ reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning claims, particularly when a prospective party is risk averse—as is likely to be true of middle-class persons who cannot risk a big loss. Furthermore, the rule could actually make settlement less likely: other things being equal, it increases the negotiation gap between the litigants. Even jurisdictions like the United Kingdom that formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases.¹⁸³

While rejecting recommendation of the “loser pays” rule, the Committee nonetheless noted its support for attorney fee shifting in certain circumstances, such as “discovery motions and in business litigation between well-financed adversaries.”¹⁸⁴ Interestingly enough, these “certain circumstances” now include over 200 federal statutes and 2000 state statutes that provide for some type of fee shifting.¹⁸⁵

In the years since the Committee’s rejection of this proposal, much has been written by both the proponents and opponents of the English Rule, but little has been done.¹⁸⁶ I myself have long advocated a departure from the American Rule¹⁸⁷

182. Under the English Rule, the successful party (upon the discretion of the court) may recover attorneys’ fees and expenses from the losing party. Civil Procedure Rules, 1998, S.I. 3132(L.17), r. 44.3(1)–(2) (U.K.); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

183. FINAL REPORT, *supra* note 2, at 105.

184. *Id.* The American Bar Association Standing Committee on Federal Judicial Improvements echoed the recommendation of the Federal Courts Study Committee that adoption of the English Rule be rejected. *See* AM. BAR ASS’N, *supra* note 126, at 5.

185. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1588–89 (1993); *see* Civil Rights Attorney Fee Awards Act, 42 U.S.C. § 1988 (2006).

186. *See, e.g.*, Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 37 (2006) (presenting an “economic theoretical analysis of fee shifting”); Vargo, *supra* note 185, at 1626.

187. Under the American Rule, each litigant bears his own costs, and “the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.” *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 448 (2007) (quoting *Wilderness Soc’y*, 421 U.S. at 270–71). An

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regarding attorneys’ fees in favor of the English Rule.¹⁸⁸ In addition to better serving the interests of fundamental fairness, I believe that adoption of such a rule would better serve to deter frivolous and meritless appeals (and actions filed in the district courts).¹⁸⁹ As I previously have written, I continue to advocate a meaningful shift toward (or at least an experiment with) the English Rule.¹⁹⁰

Because I believe that a key benefit of the English Rule is that it better fulfills fundamental fairness, it is essential that judges be afforded the discretion—as is generally the case with the current fee-shifting statutes—ultimately to make an award.¹⁹¹ Judges are well-suited to making these types of determinations. A prime example is in the case of litigation arising under the Copyright Act, which provides that a “court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof.”¹⁹² Pursuant to the Supreme Court’s directive, the lower courts are guided by the “*Fogerty* factors” as they exercise their equitable discretion in such cases.¹⁹³ These nonexclusive “*Fogerty* factors” include: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.”¹⁹⁴ In evaluating these factors, the courts are instructed to remain “faithful to the purposes of the Copyright Act.”¹⁹⁵ It seems to me that the same must remain in an “English Rule world.” Courts must remain faithful to a litigant’s right of access to the courts while balancing the considerations embodied in the *Fogerty* factors.¹⁹⁶

exception arises in the case of a specific statutory fee-shifting provision and a contract allocating fees. *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011).

188. The Supreme Court has opined on several occasions that the American Rule is “firmly entrenched” as a “bedrock principle” in American Society. *See Fox*, 131 S. Ct. at 2213; *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156–57 (2010). While it might be the well-established rule in this country, I believe that, if put to a vote, the American people overwhelmingly would support adoption of the English Rule. *See Miner*, *supra* note 121, at 257.

189. *Miner*, *supra* note 121, at 257.

190. Roger J. Miner, *Research in Judicial Administration: A Judge’s Perspective*, 12 JUST. SYS. J. 8, 14–15 (1987).

191. Such is not the case in all “loser pays” jurisdictions. The law in Austria, Germany, and the Netherlands, for example, does not permit the courts such discretion. *Bungard*, *supra* note 186, at 35–36.

192. Copyright Act, 17 U.S.C. § 505 (2006).

193. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

194. *Id.* at 534 & n.19.

195. *Id.*

196. A second example where judges are afforded discretion in determining whether to award fees is the Equal Access to Justice Act, which permits an award of fees and costs to certain classes of “prevailing part[ies]” where the position taken by the government was not “substantially justified.” 28 U.S.C. § 2412(d)(1)(A) (2006). These cases lie “[b]etween frivolous and meritorious” cases, and are “justified to a degree that could satisfy a reasonable person and hence ha[ve] a ‘reasonable basis both in law and fact.’” *United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 381 (7th Cir. 2010) (alteration in original) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). “The case must have sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion.” *Id.* at 381–82.

While implementation of the English Rule may help to quell the tide of meritless civil appeals, I concede that it would be a less effective tool for managing the crisis of volume regarding criminal appeals. An overarching concern is that, unlike a party wishing to appeal a civil judgment, in our legal system, a criminal defendant is afforded with a general statutory (but not constitutional) right to an appeal.¹⁹⁷ Therefore, any deterrent (such as a shift in fees) must not unreasonably discourage a criminal defendant from filing a legitimate appeal.¹⁹⁸ However, notwithstanding this right, legislatures cannot have intended to afford defendants with an unfettered right to burden the federal courts with appeals containing solely “loser” arguments. Therefore, I believe that meritless criminal appeals can and should be discouraged by affirmative measures.

The Prison Litigation Reform Act (PLRA)¹⁹⁹ was one such affirmative measure taken by Congress to dissuade and discourage frivolous litigation and appeals,²⁰⁰ but I believe that the PLRA simply does not go far enough to effectively deter frivolous appeals.²⁰¹ To this end, the PLRA, for example,²⁰² should be amended to impose an

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197. 28 U.S.C. § 1291 (2006); *Abney v. United States*, 431 U.S. 651, 656 (1977); *see also* *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.”).
198. *Cf.* *United States v. Rosa*, 123 F.3d 94, 98 (2d Cir. 1997) (“[A]ny plea agreement which contains a waiver of an important right, such as the right to appeal, poses theoretical concerns.”).
199. Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)).
200. *See* *Whitfield v. Scully*, 241 F.3d 264, 267 (2d Cir. 2001) (“Congress, in recent amendments to the *in forma pauperis* statute, aimed to reduce the volume of meritless litigation flooding federal courts by making payment of filing fees mandatory. [The PLRA] also provides a mandatory mechanism for collecting costs when assessed by courts against prisoners who are made to pay the consequences should they lose.”).
201. *See* 28 U.S.C. § 1915(b) (2006) (requiring that an inmate pay court filing fees in full and providing that an inmate may pay the fee over time with monthly installments); 29 U.S.C. § 1915(g) (2006) (setting forth what is commonly known as the “three-strikes provision”); 28 U.S.C. § 1932 (2006) (providing that a “court may order the revocation of such earned good time credit . . . that has not yet vested, if, on its own motion or the motion of any party, the court finds that—(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court”); *see also* *Feliciano v. Selsky*, 205 F.3d 568, 572 (2d Cir. 2000) (Miner, J.) (holding that under the PLRA “courts continue to have the authority to assess costs against an indigent prisoner,” but noting that, because the PLRA added a provision to the *in forma pauperis* statute requiring payment for costs in the same manner as the payment of the filing fee, an indigent prisoner may be required to pay “full costs [only] *in the event that the judgment requires it*”); Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 300–03 (2004) (surveying federal cases that have rejected constitutional objections to the PLRA’s three-strikes provision that “preclude[s] a prisoner from proceeding IFP if he or she, while incarcerated or detained, has on three or more occasions brought an action or appeal that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted”).
202. An amendment could also be made to 18 U.S.C. § 3013 (2006), which provides for special assessments on convicted persons, to provide courts with the authority to impose an additional assessment on a criminal-defendant litigant if that individual’s appeal was determined to be frivolous.

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assessment if a criminal defendant’s appeal were found to be frivolous.²⁰³ However, because many criminal defendants pursuing an appeal are either indigent or serving lengthy sentences and therefore less likely to be deterred by the threat of a monetary assessment, any amendment to the PLRA, for example, should include a provision expressly providing for payment of an assessment from the inmate’s commissary account.²⁰⁴

Regardless of whether Congress amends the PLRA to expressly provide for monetary sanctions imposed on an inmate’s prison account or commissary for pursuing frivolous litigation,²⁰⁵ there are provisions in place within the correctional systems—federal and state—to support such a practice. In the federal correctional system, correctional facilities are run and managed by the United States Department of Justice, Bureau of Prisons (BOP). The BOP issues Program Statements on policies and

203. Mallory Yontz, *Amending the Prison Litigation Reform Act: Imposing Financial Burdens on Prisoners over Tax Payers*, 44 J. MARSHALL L. REV. 1061, 1079–80 (2011) (“If a financial burden is placed on prisoners who bring frivolous suits by way of an amendment to the PLRA, their zeal for filing will likely be reduced to only those suits that boast legitimate claims. It is proposed that if a prisoner files a frivolous suit, he or she should be subject to a monetary penalty in the form of a deduction of a set percentage of his prison account balance.”).

204. *See* 28 C.F.R. § 506.1 (2012) (“The purpose of individual inmate commissary accounts is to allow the Bureau to maintain inmates’ monies while they are incarcerated.”); *cf.* 28 C.F.R. § 506.2 (2012) (explaining how deposits to an inmate’s commissary account are made to a “centralized inmate commissary account”); Inmate Commissary Account Deposit Procedures, 69 Fed. Reg. 40,315, 40,315–17 (July 2, 2004) (to be codified at 28 C.F.R. pts. 506, 540) (adding new regulations pertaining to inmate deposits to a centralized inmate commissary account designed to “provide for the more efficient processing of inmate funds”); Inmate Commissary Account Deposit Procedures, 64 Fed. Reg. 20,126, 20,126 (April 23, 1999) (to be codified at 28 C.F.R. pts. 506, 540); Yontz, *supra* note 203, at 1080 (“When a person becomes a prisoner, a personal account may be set up in his name to manage money he earns and spends while in prison. These accounts, referred to as commissary[, inmate, prison,] or canteen accounts . . . can be used to purchase a variety of items from the commissary including toothpaste or even candy bars, but money is also deducted from the account if the prisoner has any legal depend[en]ts.” (alteration in original) (footnotes omitted)). If a prisoner “does not have enough money in the account to cover such costs, funds may nevertheless be deducted from the account, in some cases leaving it with a negative balance.” *Id.* Because some state correctional facilities will recoup negative balances, “[i]f funds become available or if the prisoner reenters the jail at a later date,” prisoners do indeed “have an incentive to maintain a positive balance in their accounts so that they may purchase desired items while incarcerated, and also because they are paid the balance upon their release.” *Id.* (citing OKL. STAT. ANN. 57 § 549 (2012)).

205. An alternative to monetary sanctions imposed for pursuing frivolous litigation is 28 U.S.C. § 1932 (2006) (another PLRA provision), which provides that:

[A] court may order the revocation of such earned good time credit . . . that has not yet vested, if, on its own motion or the motion of any party, the court finds that—(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.

28 U.S.C. § 1932 (2006) (alteration in original). *See generally* *Tubwell v. Anderson*, 776 So.2d 654 (Miss. 2000) (holding that where a condition-of-confinement lawsuit is considered by the state or federal court and dismissed as frivolous, the statute providing for forfeiture of good-time credits passes constitutional muster).

management of the federal prisons.²⁰⁶ One of these Program Statements is the Trust Fund/Deposit Fund Manual, which pertains to an inmate's commissary account.²⁰⁷ The Trust Fund/Deposit Fund Manual expressly provides that an inmate's consent is not required for withdrawal of funds from an inmate's commissary account when compliance with a federal court order is required.²⁰⁸ In fact, the BOP's Trust Fund/Deposit Fund Manual also states that "Federal Court Orders requiring disbursement of funds from an inmate account must be followed. The court order serves as the source document for the withdrawal."²⁰⁹ It likely would not be disputed that an inmate greatly values his or her commissary account and the funds in that account since many items deemed essential or basic to living by individuals not incarcerated are available only for purchase in prison using funds from an inmate's commissary account.²¹⁰ It also likely cannot be disputed that an inmate contemplating the pursuit of a frivolous appeal would be deterred from doing so if he or she was aware that the federal court could impose monetary sanctions payable from the prisoner's commissary account.²¹¹ Because federal BOP "[i]nmates are not limited in the amount that may be maintained in their inmate account," federal courts could set the monetary sanctions at whatever amount it deems necessary to deter the inmate from pursuing frivolous appeals."²¹²

206. *See Policy Documents (Called Program Statements at the BOP)*, FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, <http://www.bop.gov/DataSource/execute/dsFormLoc>.

207. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT P4500.08, TRUST FUND/DEPOSIT MANUAL (2012), available at http://www.bop.gov/policy/progstat/4500_008.pdf.

208. *See id.* at 86 ("The requirement for prior inmate consent includes withdrawals for committed fines, attachments, liens, or any other legal process for the satisfaction of claims. Exceptions are the IRS Tax Liens . . . and Federal court orders . . .").

209. *Id.* at 96.

210. *See Yontz, supra* note 203, at 1079 ("If you do not want someone to do something, chances are hitting him where it hurts—his pocket book—will likely prove to be an effective deterrent. At the very least, a financial burden will induce consideration before action. It is precisely this contemplation of human behavior, as it corresponds to personal economics, which is the foundation for the solution to excessive frivolous prison litigation."); *see also* FED. JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION WITH SPECIAL EMPHASIS ON THE PRISON LITIGATION REFORM ACT 52 (1996) ("Although the majority of pro se litigants . . . have few assets that would make an award of monetary sanctions worthwhile to their opponents, such sanctions can still be an appropriate way to try to modify abusive litigants' behavior. Like a partial filing fee, monetary sanctions can make it less likely that a prisoner will pursue worthless claims or engage in truly abusive litigation. However, the prisoner's ability to pay must be considered in determining the sanction." (citing *Miltier v. Downes*, 935 F.2d 660 (4th Cir. 1991)); *Dodd Ins. Serv., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152 (10th Cir. 1991); *In re Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990).

211. *See Whitfield v. Scully*, 241 F.3d 264, 278 (2d Cir. 2001) ("With two separate ceilings, a prisoner has a relatively strong incentive to drop a frivolous lawsuit after he has filed the suit because, immediately after an adverse judgment, he could have to pay an additional 20 percent of his monthly income for costs arising from the suit. With one ceiling, a prisoner would have less incentive to drop a frivolous lawsuit because, no matter what costs are ultimately imposed on him, only 20 percent of his monthly income would be subject to recoupment—an amount already exposed to recoupment for filing fees." (citation omitted)).

212. Inmate Commissary Account Deposit Procedures, 69 Fed. Reg. 40,315, 40,315 (July 2, 2004) (to be codified at 28 C.F.R. pts. 506, 540) (citing FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 2000.02 ACCOUNTING MANAGEMENT MANUAL (1986)). Although the BOP has established

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Several states also have statutory or institutional provisions in place to allow—or at the least that do not prohibit—their state courts to effectively deter frivolous litigation through the use of, *inter alia*, monetary sanctions deductible from an inmate’s commissary. Such express authority obviously goes beyond the current PLRA provisions allowing for the taxing of costs and filing fees. For example, in my home state of New York, the regulations provide that a state court may, “in addition to or in lieu of awarding costs . . . impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct.”²¹³ As to the correctional institutions’ policies in New York, the correctional facilities in New York State are run and managed by the New York State Department of Corrections and Community Supervision (DOCCS), which

is responsible for the confinement and habilitation of approximately 56,000 [inmates] held at 60 state facilities.²¹⁴ In its handbook made available to inmates and their families, DOCCS states that “often there are court surcharges, fees, or other encumbrances that inmates may have that are unpaid. Monies coming in from the outside will be applied to those outstanding obligations. Other than the inmate’s incentive wage, funds may not be available for commissary [purchases] and other items until these obligations are satisfied.”²¹⁵

Although the foregoing does not expressly state that sanctions may be levied on an inmate’s account, the handbook’s provision clearly puts the inmates on notice that their inmate accounts are subject to “court surcharges, fees, or other encumbrances,” which obviously may include monetary sanctions imposed by a court.²¹⁶ Moreover, despite the lack of specific federal or New York State regulations providing courts

a monthly spending limitation on an inmate’s commissary account “to eliminate the disparity between affluent inmates and inmates with few resources,” this should not affect the payment of a court-ordered sanction because such payment would neither constitute “spending” by the inmate nor conflict with the underlying purpose of the spending limitation—to wit, eliminating disparity between inmates. *See* FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, *supra* note 207; *see also id.* (increasing the spending limitation by \$50 “during the November/December holiday period”).

213. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (2012); *see also id.* § 130-1.1(c) (defining frivolous conduct). *See generally* N.Y. CORRECT. LAW § 116 (McKinney 2011) (“Inmates’ Funds”); *Id.* § 187 (“Earnings of [I]nmates”).

214. *About DOCCS*, N.Y. STATE DEP’T OF CORR. AND CMTY. SUPERVISION, <http://www.doccs.ny.gov/> (last visited Nov. 20, 2012).

215. BRIAN FISCHER, N.Y. STATE DEP’T OF CORR. SERVS., *HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCS INMATES* 18 (2007) (alteration in original).

216. *Id.*, *cf.* STATE OF N.Y. DEP’T OF CORR. SERVS., *COLLECTION & REPAYMENT OF INMATE ADVANCES & OBLIGATIONS* (DIRECTIVE # 2788) 8–11 (2009) (discussing only encumbrances on an inmate’s account resulting from required filing-fee and cost payments under the PLRA and CPLR and remaining silent on procedures for the payment of other types of encumbrances from an inmate’s account such as monetary sanctions imposed by a state or federal court). *But see id.* at 1 (setting forth “[e]xamples of financial obligations which [inmates] may incur,” which include those derived from “[c]ourt order[s]” (alteration in original)).

with express authority to impose sanctions on an inmate's commissary, federal²¹⁷ and state²¹⁸ case law appear to support the practice. And several other states have enacted statutory provisions expressly allowing for sanctions to be deducted from prisoners' accounts.²¹⁹

In addition to affirmative measures to deter the filing of frivolous and meritless criminal appeals, courts can do more internally to manage their calendars. I previously have argued that sentencing-only appeals should be directed to a non-argument panel.²²⁰ Although my court adopted this procedure for a short period of time during the post-*Booker*²²¹ years, sentencing-only criminal appeals are no longer routed to the Second Circuit's Non-Argument Calendar (NAC), since it was determined that such an approach is no longer necessary given the reduction in backlog. This was a mistake. In the dozens of sentencing-only criminal appeals that I see each term, most of the appeals are meritless, with each appeal generally amounting to court-appointed counsel applying varying sets of facts to well-settled law.²²² Such appeals are better placed on the NAC, where specially trained staff attorneys could (as the immigration staff attorneys currently do) prepare bench memoranda and proposed

217. See *Lay v. Anderson*, 837 F.2d 231, 232 (5th Cir. 1988) (per curiam) (taxing costs to the prisoner-appellant and holding that those "costs are payable from his prison account or any other source of assets or income he may have"); see also *Hickson v. Crawford*, 832 F.2d 1263 (5th Cir. 1987) (Table) (assessing costs to be paid from prisoner's trust fund); cf. *Whitfield v. Scully*, 241 F.3d 264, 278 (2d Cir. 2001) (concluding that "the *in forma pauperis* statute, 28 U.S.C. § 1915, permits the recoupment of filing fees and costs at a total rate of 40 percent of a prisoner's monthly income—20 percent for fees and 20 percent for costs"). But see *Tucker v. Branker*, 142 F.3d 1294, 1298 (D.C. Cir. 1998) (holding that § 1915 "never exacts more than 20% of an indigent prisoner's assets or income."). See Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 Sw. L.J. 1011, 1019–20 (1989) (noting the "development by the court of new remedies against unwanted litigants," including orders requiring prison officials to "withdraw moneys from prisoners' trust accounts"); see also *id.* at app. (listing unpublished Fifth Circuit cases where monetary sanctions were imposed).

218. See, e.g., *Encarnacion v. Goord*, 824 N.Y.S.2d 492, 493 (3d Dep't 2006); *Nardi v. E.S. Le Fevre*, 652 N.Y.S.2d 133, 133–34 (3d Dep't 1997); *Allah v. Coughlin*, 599 N.Y.S.2d 651, 653 & n.1 (3d Dep't 1993); see also *Faison v. State*, 673 N.Y.S.2d 853, 854 (Ct. Cl. 1998).

219. See, e.g., KAN. STAT. ANN. § 60-211(f) (2011) ("If the court imposes monetary sanctions on an inmate in the custody of the secretary of corrections, the secretary is hereby authorized to disburse any money in the inmate's account to pay the sanctions."); OHIO REV. CODE ANN. § 5120.011 (Lexis Nexis 2012) (providing that an inmate is subject to one or more of several delineated sanctions—including the loss of commissary privileges, and extra work without pay, for 60 days—if a court determines that the inmate's action or appeal is frivolous); OKLA. STAT. tit. 12, § 2011(B)–(D) (2012) (authorizing, *inter alia*, the confiscation an inmate's "nonmandatory trust funds" in the event a court imposes sanctions arising out of frivolous litigation); see also *Lowe v. Cantrell*, 1 P.3d 438 (Okla. Civ. App. 1999) (quoting and citing with approval § 2011(B)–(D)); OKLA. DEP'T OF CORR., OFFENDER ORIENTATION MANUAL 20 (2012) ("Fines, attorney fees and costs ordered as a sanction on an offender for filing a frivolous or malicious lawsuit will be paid out of any funds received to be deposited in an offender's trust account until the debt is paid.").

220. Miner, *supra* note 58, at 702–03.

221. *United States v. Booker*, 543 U.S. 220 (2005).

222. See, e.g., *United States v. Carranza-Salcedo*, 377 F. App'x 36 (2d Cir. 2010); *United States v. Berganza*, 371 F. App'x 133 (2d Cir. 2010).

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dispositions.²²³ Under the current model, a significant amount of time in my chambers is devoted to reviewing the briefs, preparing sitting notes and bench memoranda, and reviewing (and sometimes drafting), in most cases, summary orders. Time also is allocated to oral argument, where requested.²²⁴ This is a waste of judicial resources and of time—a scarce resource that is better spent allocated between calendared appeals that pose (hopefully!) meritorious arguments.²²⁵

In this same vein, for decades, I have advocated that, notwithstanding my court’s “long tradition” of affording oral argument to nearly all who wish it, a screening system be employed to ferret out those easily resolvable cases where oral argument would not be beneficial.²²⁶ I continue to advocate that the Second Circuit better utilize our specialized staff attorneys to accomplish this screening process, as I have recommended that they do with sentencing-only appeals. As is already the case, these staff attorneys prescreen cases for jurisdictional issues and then identify, for scheduling purposes, the issues raised by the briefs. The staff attorneys then assign a ranking to the case, from easy to medium or hard. These rankings are then used in organizing the calendar and providing each panel with a diversified caseload. Because the staff attorneys are already engaged in this process, court resources would be better served by permitting these attorneys to flag “easy” cases that do not identify any meritorious arguments and to direct them to the NAC.²²⁷ As is our established procedure for the NAC, any judge on the non-argument panel could refer any case to the Regular Argument Calendar for full argument.

VIII. CONCLUSION

Over twenty years have passed since the Committee first recognized the appellate caseload crisis in its “[u]nprecedented study of [the] federal courts.”²²⁸ The “crisis of volume” has not lessened, and yet Congress has failed to act effectively in responding

223. Miner, *supra* note 58, at 702–03.

224. Sentencing-only appeals are proposed as submitted cases, but a party may request oral argument time.

225. See Miner, *supra* note 121, at 258 (discussing the proposal that oral argument be eliminated in such cases where “the proper disposition of a case is apparent at a glance at the briefs”); see also ADMIN. OFFICE OF THE U.S. COURTS, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 4 (2010), available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf> (“Exemplary and independent judges, . . . well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation.”); J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT’L L. 187, 200 (2005).

226. Miner, *supra* note 58, at 702–03.

227. Case management practices vary widely among the circuits. In the First Circuit, for example, senior staff attorneys make recommendations about whether appeals should be placed on the regular argument calendar, with certain types of cases, such as pro se, bail appeals, social security appeals, *Anders* brief cases, and cases from the BIA tending not to receive oral argument. Levy, *supra* note 95, at 336. In the Fourth Circuit, the default rule is that pro se cases are to be resolved without argument. Similarly, social security, immigration, and *Anders* brief appeals “almost always are slated for decision without argument.” *Id.* at 338.

228. News Release, Federal Courts Study Committee, at 1 (April 2, 1990) (on file with the New York Law School, Mendik Law Library, *The Archival Collection of Judge Roger J. Miner: 1981–1993*).

to the “major structural or procedural options” identified in the Final Report.²²⁹ I have discussed the consequences resulting from this Congressional failure, and I have advanced several proposals in this article for dealing with the appellate caseload crisis.

Notwithstanding the foregoing, courts like my own have “developed effective responses to [their] mounting caseloads.”²³⁰ And today, my court continues to “function in a satisfactory manner, both in the quality of its work and in the speed with which its decisions are rendered.”²³¹ This is due to “[a] combination of custom-tailored procedures, unique practices, revered traditions, and continued fine-tuning of the decision processes and management techniques.”²³² These judicially crafted approaches include, for example, temporary increases in the number of cases scheduled on each day’s Regular Argument Calendar; the use of a morning (“A Panel”) and afternoon panel (“B Panel”) to hear twice as many cases on a given day; the increased use of senior and visiting judges;²³³ the creation of the Non-Argument Calendar to more effectively dispose of the thousands of asylum cases that my court has received petitions for review in over the past several years;²³⁴ the use of our unique “mini en banc” procedure;²³⁵ and an increased reliance on staff attorneys and law clerks.²³⁶ “The general public and practicing bar obviously have a tremendous interest in these policies” and in my court’s responses to the appellate caseload crisis, and it is my hope that researchers in various disciplines will continue to “contribute their talents” to the “enterprise of judicial administration.”²³⁷ To this end I have donated my papers to the Mendik Law Library at New York Law School to “establish a

229. See Miner, *supra* note 58, at 729–30 (“Despite many proposals for adjustments of various kinds made over the years, the customary congressional response has been to add more judges. The federal court system cannot be effective in the performance of the work expected of it if it becomes merely a duplicate of the state court system.”).

230. *Id.* at 730.

231. *Id.*

232. *Id.*

233. See, e.g., Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 410 (1990) (“[T]he Second Circuit Court of Appeals simply would not have been able to function as it has over the last two decades without the assistance of its seniors.”).

234. See Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 432–34 (2009).

235. See *The Shipping Corp. of India v. Jaldhi Overseas PTE, Ltd.*, 585 F.3d 58, 60–61 (2d Cir. 2009); see also Feinberg, *supra* note 86; Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 381–82 (1984) (“[O]n infrequent occasion, a proposed panel opinion is circulated when the panel members deem it especially appropriate for all members of the court to have an opportunity to see and comment on it prior to issuance. This has occurred twelve times in the past five years in the Second Circuit. The fact of prior circulation was not always noted in the opinion.”). See generally FEDERAL BAR COUNCIL, SECOND CIRCUIT COURTS COMMITTEE, *EN BANC PRACTICES IN THE SECOND CIRCUIT: TIME FOR A CHANGE?* 15–20 (2011), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

236. Roger J. Miner, Book Review, 46 CATH. U.L. REV. 1189, 1192 (1997) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996)).

237. Miner, *supra* note 190, at 15–16.

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research collection consisting of archival records relating to [my] career for the use and benefit of the students and faculty of New York Law School, other legal scholars, historians, political scientists, journalists[,] and researchers of all disciplines.”²³⁸

For over twenty-five years, I have discussed the problems of caseload management facing the federal judiciary.²³⁹ In addition to professional and legislative responses, I have advocated here for judicial responses to the appellate caseload crisis that I hope will be considered by my colleagues and court families, to whom I now entrust these matters.

238. New York Law School, Mendik Law Library, *The Archival Collection of Judge Roger J. Miner: 1981–1993*. My Archival Collection is a compilation of materials associated with my tenure as a U.S. District Judge for the Northern District of New York and as a U.S. Circuit Judge with the Second Circuit. In addition to my district court papers, the compilation totals approximately 250 boxes containing over 120 unpublished and published speeches and writings; over 4100 case files from the Second Circuit; video and audio recordings; and numerous other files relating to my tenure as a Second Circuit Judge.

239. See generally Roger J. Miner, *Professional Responsibility in Appellate Practice: A View From the Bench*, 19 PACE L. REV. 323 (1999); Miner, *supra* note 236; Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 42 AM. J. COMP. L. No. 4 (1995); Miner, *Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions*, *supra* note 27; Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 JUDICATURE 104 (1993); Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075 (1992); Miner, *supra* note 30; Miner, *supra* note 58; Roger J. Miner, *Consequences of Federalizing Criminal Law: Overloaded Courts and a Dissatisfied Public*, 4 CRIM. JUST. 16 (1989); Roger J. Miner, *Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151 (1987); Roger J. Miner, *Federal Courts, Federal Crimes and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987); Roger J. Miner, *supra* note 121; Miner, *supra* note 190.