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Reflections on the Craft of Appellate Judging

Few if any of the important public institutions of the nation have so resisted the pressures of the industrial era toward increased size and standardized production as have the state and federal appellate courts. Fewer than a hundred judges of federal courts of appeals and several hundred judges of the states' supreme courts -- a total body approximating the size of the Congress -- are for most litigants the deciders of last resort. These courts have in common these uncontemporary attributes: they are small; they -- particularly the federal courts of appeals -- are far less visible than either the trial courts below them or the Supreme Court above them; they rely on the individual work of each judge assisted only by one or two law clerks and a secretary; they are collegial, the individual judge's opinions being molded by and representing a collective decision; and their raison d'etre is to be reflective, to take such time as is necessary to decide. On the whole they are pre-industrial institutions.

The roles they play and how they work have long attracted the attention of scholars. With some notable exceptions, judges have seldom joined the lists of self-analysts and with good reason. They have quite enough to do and are imbued with a healthy self-doubt that their immediacy of involvement entitles them to speak categorically about the craft in which they labor. I share both disabilities but make this effort to back away from my cases and reflect upon my vocation partly because the enterprise may give me some perspective and partly because the strictly personal, not cosmic, perceptions of one practicing judge may have the stamp of authenticity be it on or off the mark.

What I propose to touch upon first in this essay is the dramatic changes in the role of courts worked by the tidal waves in the law over the past forty years -- changes which deeply affect the quantity and nature of the work of appellate courts. I shall then give my view of the decision making process as I think it exists in all appellate courts below the Supreme Court. And I conclude with an important segment of this process, the ways in which an appellate judge goes about producing an opinion. I shall be parochial, drawing on my own journal entries. I have made it a haphazard practice for several years of trying to jot down, after some judicial experience, what I have been through. The entries have the merit of having been written contemporaneously and for no other purpose than saying what has most been on my mind during the experience.

The Shifting Roles of Appellate Courts

The oldest role of any court is that simply of settling a dispute between litigants or enforcing the sovereign's law against an alleged violator. Appellate courts were not absolutely essential for this function, although the reassurance of a second look is today almost universally conceded as desirable. Two other purposes have long been served by appellate courts --

preserving consistency and predictability while leaving room for change and evolution. These are the two facets of what Professor Keeton has called "creative continuity". A fourth role has also long existed, that of the appellate court as a monitor of fairness of the actions of trial judge, prosecutor, law enforcement officers, and even juries and defense counsel.

In its traditional form monitoring was confined to the institution of the court itself. As such, the role of monitor was no more significant than any other role, if indeed as significant. But beginning over four decades ago changes that can aptly be described as tidal waves or revolutions have continually enlarged the institution monitoring role of courts.

First came the development of administrative law in the '30's and '40's, empowering first the federal courts and, by osmosis, the state courts to review the decisions of governmental agencies. Second came the civil rights revolution of the 1950's with its mandate of desegregation. Third was the closer scrutiny of the criminal law process arising from the civil liberties focus of the Warren Court in the 1960's. Fourth was a second generation civil rights explosion starting in the late 1960's, when 42 U.S.C. § 1983 was rediscovered. Fifth was a little noticed statutory flood which, since 1969, has given federal courts responsibilities for policing some 42 major statutes -- the Freedom of Information Act, the Speedy Trial Act, the Federal Election Campaign Act, and environmental, crime control, anti-pollution, consumer, energy, health, safety, and age discrimination legislation. Analogous legislation has been enacted in many of the states.

Finally, up to now, a sixth major sea change if not tidal wave. I term this a third generation civil rights era. The new and troublesome cases do not involve rights, but remedies. Where formerly a plaintiff was an individual, he or she is now a class. Where one official was once the target, now a range of institutions are implicated. Where once the requested relief was simply to cease doing something, we now have prayers for affirmative action. Where formerly the wrong complained of was procedural, it is now substantive -- the level of care in a mental hospital or prison. And, particularly poignant for an appellate court, where once legal principles were available for guidance on review, now there is little remedial precedent for the trial court and less for a reviewing court.

All of this has added to the responsibility of the appellate courts. Not only has the volume of appeals been on the increase, but each new development poses a wide range of new problems that command disproportionate time and energy until the law stabilizes.

The Decision Process

If what appellate judges do can be identified, classified, criticized and applauded, how they do what they do remains a mystery. For over a decade of judging I have constantly tried to look over my own shoulder to see why I decided as I did, why our court took the positions it did, what were the substantive principles and the forces of group dynamics at work. No formula for decision making has emerged. A graduate student concluded one study of the appellate decision process by saying that the method by which an experienced judge arrives at a position resists explanation as much as the pace and direction of an outfielder as he hears the crack of the bat. I would add this difference; the judge in the course of his thinking on a case hears the cracks of several if not many bats.

Perhaps the basic lesson is that group decision making is an attenuated, continuing, graduated, and incremental process. There may have been and there may be appellate judges whose diligence in preparation and brilliance of analysis bring them to conference after oral argument with a clear view of the right decision of even the most difficult cases. Nevertheless,

when I see a judge at this stage deeply convinced of both the decision and the rationale of a difficult case, I cannot resist the temptation to distrust him. Most of us have a clear view of the simplest cases. We may, if we have prepared extraordinarily well, have developed a sound approach to one or two of the moderately difficult cases. But, of the thirty or forty cases to be heard at a sitting of court, the most complex or novel cases and most of the middling ones do not readily yield their clue to resolution. Not infrequently a case I had thought simple turns complex during a good oral argument.

I see decision making as neither a process which results in an early conviction based on instant exposure to competing briefs nor one in which the judge keeps an open mind through briefs, discussion in chambers, argument, and conference, and then summons up the will to decide. I see the process rather as a series of shifting biases, much like tracing the source of a river, following various minor tributaries which are found to rise in swamps, returning to the channel which narrows as one goes upstream. One reads a good brief from the appellant; the position seems reasonable. But a good brief from appellee, bolstered perhaps by a trial judge's opinion, seems incontrovertible. Discussion with law clerks in chambers casts doubt on any tentative position I may have taken. Any such doubt may be demolished by oral argument, only to give rise to a new bias, which in turn may be shaken by the post-argument conference among the judges. As deep research and writing reveal new problems, the tentative disposition of the panel of judges may appear wrong. The opinion is written and circulated, producing reactions from the other judges which again change the thrust, the rationale, or even the result. Only when the process has ended can one say that the decision has been made, after as many as seven turns in the bend. The guarantee of impartiality of the judge lies not in suspending judgment throughout the process but in recognizing that each successive judgment is tentative, fragile, and likely to be modified or set aside with deepened insight. The non-lawyer looks on the judge as a model of decisiveness. The truth is more likely to be that the appellate judge in a difficult case is committed to the unpleasant state of prolonged indecisiveness.

The Area of Restraint and the Area of Freedom

If there is no all purpose prescription for decision, there are certain aids built into that body of law and disposition we call the judicial discipline. Some of these are restraints, making our job possible by limiting it. They constitute an elaborate self-denying ordinance. While some would call them negative, Alexander Bickel has enshrined them with the less pejorative title of "the passive virtues". They are all ways of asking: do we reach the merits? They embrace the threshold questions of substantive jurisdiction, appellate jurisdiction, procedural preservation of the merits, mootness, ripeness, standing, justiciability, exhaustion, abstention.

Once the merits are found reachable, the appellate judge must decide how open they are, or to what extent he must be restrained and inhibited in viewing them. To the extent that the Supreme Court has spoken, that his own court has spoken, or an impressive weight of well reasoned authority has been created by other courts, the judge should feel his area of freedom to be circumscribed. He must similarly feel not free to substitute his judgment for that of the trial judge, jury, or administrative agency if substantial evidence supports a decision and if the bounds of discretion are not exceeded.

What Cardozo said, almost 5'6 years ago, holds true today for the inferior federal and the state appellate courts. He said, "Of the cases which come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one." (Nature of the Judicial Process, p. 164.) Both the law and its application are plain. He added that in

another "considerable percentage, the rule of law is certain, and the application alone doubtful." Id. A final category which he characterized as "not large indeed, and yet not so small as to be negligible" was composed of cases "where a decision one way or the other, will count for the future . . . where the creative element in the judicial process finds its opportunity and power." Id. at 165.

Cardozo's first category may be called the judge's area of restraint, where the shared judicial discipline of all the judges points inexorably to the same result. This, I think, still covers a healthy majority -- perhaps as much as two thirds -- of appellate cases. The second category is one of qualified restraint. The standard is clear; only the application is in doubt. The judge must, after giving deference to the fact finders, answer such questions as: is there sufficient evidence of negligence, or conspiracy, or aiding and abetting to go to the jury? Is there substantial evidence on the record as a whole to support a Labor Board finding of an unfair labor practice? Did the trial judge abuse his discretion? While the judge possesses what might be called "freedom" in answering such questions, it is a freedom deeply informed by his court's past experience in handling such cases and the decisions of other courts in similar fact situations. More rarely than one might suppose does decision turn on a judge's posture of being pro-plaintiff or pro-defendant, pro-prosecution or pro-defense, pro-company or pro-union. Indeed only rarely have I seen our court divided on such questions when an opinion finally issues.

Perhaps the most difficult, because the most standardless, task of review in this category of cases is that of reviewing for abuse of discretion. I quote here from an entry I made in my journal after the torment of struggling with such a case.

> There is no more difficult a case than this kind. It arises when trial judges find facts in a case tried without a jury, when they set bail, qualify or refuse to qualify expert witnesses, refuse continuances, shut out or let in evidence, qualify or disqualify jurors, and declare or refuse to declare a mistrial, criticize or refuse to criticize counsel. The law governing the appellate courts is clear: the decision of the trial judge will be upset only if there is an "abuse of discretion".
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> This poses a stern and uncharted task for the reviewing court. Of course there is no problem if the appeals court is in sympathy with what happened at trial. But by definition the issue of abuse arises when, in the serene clear atmosphere of hindsight, the appellate court knows that what was done was not what it would have done. So one begins with the unhappy feeling that someone received a raw deal. Calibrating rawness is not a pleasant or sure task. It is not pleasant because the alternatives are both bad -- to countenance bad judgment or to slap down a beleaguered trial judge and have the whole case retried. And it lacks the saving grace of intellectual achievement, for one's decision either way is that the challenged ruling below was or was not an "abuse".
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> And yet one of the key justifications for an appellate court is to curb the occasional excesses and tyrannies which fallible judges, acting under pressures of time, provocation, and loneliness, can fall heir to. But what can an appellate judge do to inform his judgment? How bad must bad be before it is abuse?
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> Well, one tries to sop up the collective experience of all his peers who have dealt with the same problem. This kind of research is frustrating, because the cases turn so on their facts. There is no such thing as a case in point. But one reads and reads, gradually getting a feel for what has been deemed within and beyond the pale of civilized judging.

> A reviewing judge should also read every scrap of the record. The briefs may overlook the hints of reality that can place the cold record in a different light than first appeared. It helps to try to put oneself in the place of the trial judge, to see what has gone on before and what later. Sometimes what appears as stupidity or tyranny, taken out of context, will appear innocuous or only a minor slip if the tone of the trial can be recreated.
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> Then one must think of the future. This cuts both ways. One may think that what was done, if repeated or enlarged, would erode fairness so deeply that it must be nipped in the bud. Or one may reflect and come to the conclusion that a reversal in this case would mean that trial judges would be so chilled that they would never dare exercise their own judgment in the future, but would mechanistically hue to the policy line underscored for them by the court of appeals.
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> The appellate judge somehow must arrive at the point where he can have full sympathy for the crisis-strewn path of the trial judge and make -ample allowance for the pressures upon him, while remaining attuned to the occasion when prejudice cannot reasonably be justified by provocation.
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> I know of no formula in this kind of case except to live with the record until one breathes it, gain what one can from similar cases, brood over the consequences, and, finally, if one's sense of rawness becomes muted over time, affirm. But if the red hue remains, after days and weeks, take a big breath and reverse.

The freedom allowed in such cases is not, therefore, the kind of freedom where a judge's philosophy and views of society and of the individual play a significant role. This is reserved for Cardozo's final category. I have suggested that the "considerable percentage" of cases where the rule of law is certain and the application doubtful is less "considerable" today. The doubt as to application much more often than not dissipates during the decision process. But Cardozo's final category of cases allowing room for "the creative element in the judicial process" seems to me to be far beyond the negligible in quantity -- perhaps a sixth or a fifth of the current caseload -- and demanding a much greater proportion of a court's time.

As always the reach of both common and statutory law leaves gaps to be filled. Where state law is silent, as sometimes happens in the new products liability area, a federal court must either certify a question or hazard an educated guess. The statutory explosion I have mentioned has created vast new domains in sex and age discrimination, consumers' rights, environmental protection, and freedom of information litigation. Even venerable statutes somehow always seem to pose new questions. When the circuits split, a federal court of appeals is forced to make a choice. For example, should appeals be allowed from decisions certifying a class action? The Second Circuit says "yes"; other circuits say "no".

Beyond the traditional kind of "free choice" issues, the Constitution itself has opened up, through the stimulus of 42 U.S.C. § 1983, spacious territory for decision under the Due Process and Equal Protection clauses. All public and many quasi-public institutions are now subjected to their far reaching requirements on a scale which even Cardozo could only dimly have foreseen. Indeed the last five of the six law revolutions I have listed under the monitoring role of courts have given judges work to do in the moving frontiers of doctrine. Nowhere is there more challenge than in reviewing remedies as desegregation orders issue, as prisons and mental hospitals are placed under decrees to elevate standards, as voting redistricting takes place. These

are far removed from the negative injunction and damages of a half century or even a decade ago. Finally, a different kind of freedom exists under the aegis of an appellate court's supervisory power to set certain standards for trial courts and prosecutors -- a power seldom used when Cardozo presided over the New York Court of Appeals.

How judges respond to the opportunities afforded them in their area of freedom differs as widely among judges as their backgrounds, personalities, and values differ. No one answer can even be given for or by any one judge. Even if he has a clear view of his deepest values, which is not likely, he may well have different "philosophies" or approaches in different types of cases. This is not to say that a life long preoccupation for a judge should not be to develop and articulate a coherent system of thought. But it is to say that nothing valuable, in the compass of this essay, can be attempted on this perennial judicial "quest for the Grail". Perhaps more illuminating are this judge's more mundane reflections on his experience in writing opinions and interacting with his colleagues on a small collegial court.

The Creation of an Opinion

The only visible work product of an appellate judge is his published opinions. These are an imperfect measure of his contributions, for they do not reveal the influence he may have had on his colleagues' opinions, the unpublished decisions which are of interest only to the parties, his actions in the vast subculture of appellate decision making -- motions for bail, stay, or injunction pending appeal or certiorari; for rehearing; for expedited hearing, continuance, consolidation, default; for addition to or deletion from the record, permission to file an extended brief, and other formal matters; for costs and counsel fees; for appointment, discharge, withdrawal, and compensation of counsel; for intervention as a party or allowance of an amicus brief. Such decisions are often vital to the parties and make a large claim on the time of judges. Added to this unheralded and unreported decision making is the time and effort spent by the judge to maintain and improve his court as an institution -- service on committees to oversee various functions of his court and lower courts subject to its supervision, and service on wider organizations of courts and the bar. Another and perpetual obligation of the judge is to keep a watching brief on decisions of his court decided by panels of judges on which he did not sit, on decisions of the Supreme Court, and on important decisions by both federal and state courts.

When we consider this miscellany of duties together with the fact that an appellate court devotes one week a month to hearing as many as thirty or forty cases, some idea of the pressures of time begins to emerge. A federal appellate judge sits as a member of a three-judge panel. While some of the cases heard may be summarily disposed of by a brief order, the judge returns to his chambers with seven or eight opinions assigned to him. Some will be insubstantial cases, in Cardozo's first category. The bulk of them will be in his middle category, where the law is clear and the application is in doubt. But records of agency proceedings and lengthy trial transcripts must be read. The judge will, more often than not, also bring back with him one or two cases in relatively unploughed terrain -- cases demanding not only careful scrutiny of the record but his best thoughts on a novel legal issue. With good fortune the judge will have two uninterrupted weeks in chambers, but in the third week he must begin reading 30 or 40 sets of briefs for the next sitting of his court. And in the meantime he must, in addition to working on his new opinions, continue work on opinions from earlier months, comment on draft opinions sent him by his colleagues, and respond to or accommodate colleagues’ criticisms of his draft opinions.

It is in this context of manifold demands and limited time that we can best understand the

vital role played by the judge's law clerk or clerks. The time has long passed when the sole function of a law clerk was to check the citations of cases referred to by the judge, do minor critiquing of a draft opinion, and perhaps prepare an exhaustive memorandum of law on a key issue. Clerks must now often undertake the preliminary structuring of what will lead to the draft the judge will circulate. This involves a total immersion in the record, a wide canvass of the law inside and outside the briefs, a fair but concise presentation of the facts and relevant procedural setting, and an organized discussion of the issues worth discussing.

Thus far, of course, the task is precisely what a judge would do if he were to draft an opinion without assistance. But to stop the description of the judge-clerk collaboration at this point is to overlook the new demands made upon a judge as opinion architect and editor in this pressured era. He has obligations which exist before, during, and after the clerk does his work. The result, rationale, breadth, and tone are the subject of preliminary discussions between the judge and his clerk after oral argument has been held and the panel has reached its tentative conclusion. These marching orders cannot be chiseled in stone; if the clerk's research reveals problems of fact, law, or logic that have not been fully considered, further discussions take place. Sometimes, if the judge is not ready to elect which of two or more courses he will follow, alternative drafts are prepared. When the clerk's draft is finished, the judge begins his work in earnest. He must read the record, or at least the most relevant portions; he rereads the briefs; he rereads his notes of the oral argument. He reads pertinent case authority, treatises and commentary. He gradually -- far more quickly than if he started from scratch -- develops a feel for the case and is then able to make his contribution.

The judge may, having once been a practicing lawyer, add to or change the factual presentation; indeed he is more likely to differ with his clerk on the significance of facts than of law. The judge will look for sloppy organization, fuzzy transitions, redundancy, unnecessary dicta, language which he does not feel comfortable with, excessive footnoting and string citations, and unclear reasoning. Occasionally he will decide that the result will just "not wash" or that, as written, the draft would not persuade his colleagues. At this point the judge is likely to undertake the rewriting, having identified the points that bother him. The net result, however, is that he will have spent from several hours to a day or so on an opinion that, without effective clerk assistance, would have taken from several days of his time to a week or more.

This architect-editor role of a contemporary appellate judge on a "hot" court is little understood, more likely misunderstood, by the public. It is equally likely to be denigrated by judges themselves as being a necessary evil. The role lacks the satisfactions which come from creating an entire opinion unassisted. But fulfilling the non-delegable obligation to exercise command over concept and execution itself provides a subtle kind of satisfaction -- the kind of satisfaction a ship captain must feel on bringing his vessel safely to port, though he may not once have had a turn at the wheel.

When all this is said, however, that which gives zest to the life of an appellate judge remains the creation of an opinion for his court from the raw materials -- the cold record, the contesting briefs, the existing law, history, logic, custom, and such considerations of policy and social justice as the case permits. Here is how I felt about the process a year ago after emerging from my total absorption in writing one opinion.

> I have just come home early, in the beginning swirls of the season's last blizzard. I have also done something as rare as a blizzard on the eve of spring. I have spent all day in chambers, almost uninterrupted, working on one case, my own from start to finish -- or at least till my ruthless editors begin to work on it.

This is what people must think an appellate judge does all the time when he is not sitting behind a big bench. This is what judges of yesteryear did. It is what I did quite often in my first years at judging. But it is rare enough now to write about.

This adventure crept up on me. It began as a drab piece of goods -- so uninteresting that the lawyers on both sides let the case go without oral argument. Each was content to let the briefs speak for themselves. In this case the "speaking" was guttural -- the briefs were slim, diffident things, hardly competent. They did cite a few key authorities on both sides, but so ignored the facts and the scholarly debate which has arisen that I was early misled into thinking this was an easy affirmance.

The case concerned a ruling upholding subject matter jurisdiction against a belated challenge. Were the issue one of discretion, a one line affirmance would be adequate. But the law is a forest of totem poles, and some are bigger than others. And the tallest, most grimacing and heartless, is the totem of jurisdiction, the idea that judges, whatever their philosophy and society-individual values, will honor the boundaries set for cases they can and cannot decide.

So if step 1 was an assumption that the case was a trivial one, worth perhaps a page or two, step 2 was the realization that if we were to affirm, our opinion would have to be consistent with what courts, particularly the Supreme Court, have said about the bugaboo, Jurisdiction. Step 3 was dull work -- rereading briefs and thumbing through the court papers evidencing almost 8 years of futile and frustrated motions, notices, excuses. Step 4 was stepping beyond the briefs, reading what the treatise writers had to say, and realizing that the issue in our case had been recognized as a "problem" in modern times for 15 years.

Step 5, by this time already under way, was my book collecting phase. My desk is a spacious, pine Federalist-type work table, usually showing much woodwork between the in and out baskets and on either side of my green desk blotter. But one case leads to another. Law Review articles and treatises suggest others. The books -- some from the Supreme Court (with a musty smell if they came from the last century), some from Courts of Appeal, and some from the district or trial courts -- begin to stand in line, first in threes and fours, then in phalanxes of ten or twelve, then in double phalanxes, then scouting; parties camp out on a nearby radiator and, in extremis, they bivouac on the floor.

Meanwhile, I try to keep track of where I have gone, even though I do not yet know where I am going. So, with a light pencil, I mark the margins near passages of opinions that strike me as useful. This may qualify as defacing government property, but I know that when "I come back to the fine print in two columns in what is by now hundreds of pages of opinions, I shall need a few marker buoys. That alone is not enough. I also begin to fill pages with brief notes of cases and points made. I wish I could say that this is systematic note-taking but it isn't. Nevertheless it is my retrieval system and this sheaf of papers is my basic working tool.

Step 6 comes when I have the feeling that I "know the territory". This means being aware of the cases, commentary, and arguments on both sides of the issue. The parties and their briefs are now far behind; now what is in my mind --

sometimes at odd moments while going to bed, driving, jogging -- is "the problem", disembodied from the particular facts of my case, and now seen as an institutional contest of nationwide importance between being fair in an individual case and being faithful to the "first principle" of keeping courts within their chartered domain. All of this means that at this stage I am in an uncomfortable state of imbalance, sometimes pursuing an approach with enthusiasm until I run into or recall a fact or a legal principle that blocks the road like an overturned trailer truck. Then I try an opposite track, but come a cropper before too long a time.

The task of research takes on wings when I find myself gaining fresh insights. I check the cases on which a leading opinion relies -- and I find they do not stand for the proposition for which they are cited. One after another of the supports proves termite ridden, and the "authority" appears stripped down to a court's say-so. Or it may be the provocative article of a scholar, placing a new construction on venerable Supreme Court cases. Then I read the cases -- with a microscope -- taking care to see exactly what the facts were, to see whether the Justices appeared to focus on a point or merely said something in passing which, taken out of context, may appear as a solemn pronouncement. And I realize that the scholar in his advocacy was deemphasizing facts which stood in the way of his theory. I begin to gain the confidence that on this small issue and at this precise time I know more of the subject than any other person. I shall soon forget, pass on to the next case, and begin all over as an amateur . . . but for this moment I am expert.

During this phase logic, precedent, policy, concern for the parties, respect for tradition, excitement over boldness and innovation, desire to influence legislation -- all were at war with each other. Once in a while, when vexed to despair, I would air a problem before my clerks. This was always helpful. Merely stating the problem somehow helped. Then, even though we ended the discussion without resolution, it helped to put the issues in focus. And sometimes one of the clerks might mention a case, an analogy, or a relevant legal principle, which inched me forward in my quest.

Step 7 comes -- sometimes during step 6 -- when I take my sheaf of notes -- my working tool No. 1 -- and begin to construct working tool No. 2, an outline of the opinion. Again I would like to be able to say that I quickly marshal the issues and subissues in a crisp symmetrical structure of I's, A's, 1's, and a's. But my outline efforts begin most tentatively. Indeed, at the start, I write in exceedingly small script, as if I were on my hands and knees, making the most humble offer to the god of Justice. Not only is the script small but, since I do not yet see clearly the relationship, sequence, or priority of ideas, I list basic topics in various parts of the paper -- but close together. Then, on another part of the page -- after an interval -- I'll try another outline, perhaps this time in sequence. This may do it, for a starter. Or perhaps a third set of scribbles will appear.

Then, preferably, I wait a while. Perhaps I have doodled on the outline for an hour or so after breakfast. Then the office beckons and I plunge into the morning mail, telephone calls to other judges and our clerk, conferences with my law clerks, drafting memoranda on various points in my colleagues' opinions,

answering mail, and so on. But, round about midafternoon, I have a feeling in my viscera that tonight I shall begin to put words on paper. It is a good feeling.

Step 8 now begins -- the writing. It begins with placing a long pad of paper on my desk. Then, without waiting so long that I am intimidated by the pristine blankness, I write "Coffin, Chief Judge", and struggle with my first sentence. The first paragraph soon becomes a mess of cross-outs, inserts, and rearrangements. The problem is to give a succinct overall statement of who has sued whom, what kind of a case it is, what the ruling below was, and what the appeal is all about. To compact all this in from six to ten lines, without doing violence to each item, is a challenge for the most austere editor.

Then come such earthy chores as sketching the procedural background, the relevant facts, and leading into the issues. This is important and time consuming work but not exhilarating. It is also slow work. If the facts are important and extensive, I will have made an index of the transcript of testimony. I will have checked the key facts, and I will laboriously try to tell the story. I know at the time that I will have to edit this down to a leaner skeleton -- but I also know that the only way to write is to put something on paper. I may leave the evening job with distaste, but I have the assurance of experience that, come morning, something, perhaps a great deal, will be salvageable.

As the writing progresses, as the necessary but grubby work of building a foundation is finished, my interest, excitement, and speed increase. As I write upon the issues, I try to put as fairly and strongly as I can the contention that I shall rule against. Sometimes, while writing, a new thought will occur to me. If, after rolling it about in my mind a while, trying to see the flaws, it withstands testing, I'll put it down. Sometimes the next day I will see its unsoundness, or my law clerks will. (The more tactful of them will gently shave it down by layers until by final draft I realize that nothing is left.) Sometimes, however, the thought survives. More often than not the thought will be an effort to say how our decision makes broad and enduring policy sense and how a contrary decision would be lacking such if applied to other cases.

After four or five hours of steady work -- with the foundation laid, the issues stated, and innumerable little decisions made as to sequences, what authorities to use and what to leave out, tone -- I find my pen flying over the pages. This speed at this point is a built-in stimulant to succinctness. I am now anxious to finish and more easily reject excessive refinement. Or, if a footnote is needed, I shall mark the gap and leave it for the morrow. The result is a shorter draft than I would have done without impatience. My clerks, doing most of their writing during office hours, perhaps without the pressure that comes from knowing that sustained writing time is a rare and precious commodity, will present me with long, intricate, heavily footnoted drafts that I would never have the time to construct. Then my job is to winnow, shear, simplify. With my drafts they add flesh to the bones; with theirs I try to take some off.

Step 9 is a loose ends step. I had so immersed myself in the cases and commentaries that the normal busyness of my routine faded into the background. For I was on the chase of little points to make, little gems found among my notes, additional gap-filling footnotes. My clerks, not used to my absorption, ask me

when my "encyclopedia" will be finished.

As I go over my copy before giving it to my secretary, I realize once again what a collage I expect her to interpret. Not only does my writing degenerate into minute hen tracks, but carats and arrows and inserts affixed with paper clips force me to give a guide's talk to the sequence of each page -- which may consist of half dozen pieces of paper.

Step 10. Miraculously, a legible draft issues from the typewriter, because of the seasoned eyes and skilled hands of my secretary, who brings to her task of deciphering two decades of hard learning. I look at the clean copy. It is like a fetus at six months, the recognizable form of the creature it is to be.

Ahead lie other steps -- the humbling of seeing excisions, additions, word substitutions, possibly even quite radically different approaches, and, once in a humiliating while, the hard-come-by realization that my whole theory and proposed result are wrong. And all this from young men and women less than half my age. Then come the reactions from my colleagues, ranging from suggestions in phrasing, to leaving out my choicest thoughts, even occasionally a profound disagreement with my conclusion. Next comes the slow task of judicial diplomacy as I try to defend what I deem essential, while yielding on points well made by my fellow judges, or points not worth quibbling about.

And finally the opinion meets its public . . . and a deafening silence ensues. Once in a blue moon I will see the opinion emerge in a law review article, usually to be dissected and criticized for weaknesses of logic, law or policy that had never occurred to me, my clerks, or my fellow judges and their clerks.

But at the moment these steps lie ahead. For the moment, my creative work on this opinion is done. Tomorrow morning, early, I shall pick up another set of briefs and wonder what new adventure lies ahead.