

2-1976

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Recommended Citation

Mosk, Stanley (1976) "Recycling the Old Circuit System," *South Carolina Law Review*. Vol. 27 : Iss. 4 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol27/iss4/5>

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RECYCLING THE OLD CIRCUIT SYSTEM

STANLEY MOSK*

I. INTRODUCTION

To paraphrase Winston Churchill's characterization of democracy: our judicial system is not a very good one, but it happens to be the best there is. Nevertheless, on a theory that justice, like chastity, must be an absolute, courts constantly receive an abundance of censure from a wide assortment of sources. Today the criticism of the judiciary, though couched in a variety of terms, is often bottomed on a theme that appellate judges in their ivory towers at both state and federal levels, fail to comprehend the daily agonies of contemporary society as reflected in trial court proceedings.

In the 1930's President Roosevelt and a liberal coalition railed against the Supreme Court for invalidating early New Deal legislation. The "nine old men," they said, were out of touch with the desperate needs of a society struggling to avoid economic disaster. The Constitution, the "shield of the common man," ought not to be "interpreted by pedants."¹ Three decades later conservatives launched attacks against the Warren Court when the asserted danger was not economic but internal security. The high court, we were told, was handcuffing law enforcement while the crime rate soared.²

As a result of criticism from various fronts, there are periodic movements to require appointees to high courts to have had previous trial court experience. While the argument that many of our greatest jurists had no such qualifications (Hughes, Stone, Brandeis, Jackson, Frankfurter, Douglas and Warren, for example) has to some extent blunted these demands, the criticism persists. Similarly, some of the greatest state judges of our time went directly to the highest court in their respective states from public life or the academic world. Former Chief Justice Roger Traynor in California and Justice Walter Schaefer in Illinois come immediately to mind as representatives of this class.

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1. SCHLESINGER, *THE POLITICS OF UPHEAVAL* 495 (1960). See generally *id.* at 447-96.

2. FRANK, *THE WARREN COURT* 34-35 (1964); L. KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* 471-72 (1967).

Adding to judicial qualifications is no panacea, and, indeed, is probably undesirable. On the other hand, the law is not a flower which blossoms in the desert by some mysterious phenomenon of spontaneous generation; it requires the nurturing of innovation. I suggest one such simple solution which can be adopted in the states—a program to encourage appellate court judges to sit on trial courts for some period each year.

I use the phrase “to encourage” advisedly, for until the feasibility of such a program is established empirically, it probably should remain voluntary rather than compulsory. The “some period of time” is deliberately vague, for whether an assignment be for 30 or 60 days, or some other term, must be related to the current court caseload. And “a program,” legislatively sanctioned, is probably necessary in most jurisdictions to clear up financing ambiguities. In most instances when a lower court judge is assigned temporarily to a higher court, he draws the higher salary. Dropping to a lower court for a brief period should not require an appellate justice to suffer a diminution in pay. The program should apply to all higher court judges, those on the state courts of last resort as well as any intermediate courts of appeal. Only the Chief Justice should be exempted because of his numerous administrative and ceremonial responsibilities.

My proposal is not entirely unprecedented. Indeed it finds support in current English procedure and in early American federal practice.

II. THE BRITISH EXPERIENCE

In England, the Lord Chancellor, comparable to our Chief Justice, may not only assign trial judges to sit temporarily on the courts of appeal, but he also has the power on occasion to assign appeals justices to act as judges in the trial of cases at first instance.³ Indeed, in England such transitions back and forth are the rule rather than the exception in the criminal field. The Court of Criminal Appeal has no permanent judges of its own. Its members are drawn from the Queen's Bench Division of the High Court, a tribunal for original trials. Appellate service can take only a portion of the judge's time, since most of their energies are devoted to the trial of cases in London or on the circuit, wherever the caseload requires attention.

3. R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 40, 43 (4th ed. 1964).

They sit in the Court of Criminal Appeal only when designated for such service by the Lord Chief Justice, just as they might be assigned by him to any other type of service within the Queen's Bench Division. So far as possible, assignments are rotated often enough to allow each judge to hear criminal appeals at least once each term that he is sitting in London, not on assize.⁴

The court sits in panels with each panel composed of three judges. This number may be increased at the discretion of the Lord Chief Justice, for particularly significant or difficult cases, "to five, seven, or conceivably the full membership of the Queen's Bench Division."⁵

Professor Delmar Karlen of New York University compiled a comparative study of American and British appellate procedure conducted several years ago by a delegation of seven Americans. I was privileged to serve in the group, which included Justice William Brennan of the United States Supreme Court, then Solicitor General Archibald Cox, Chief Justice Walter Schaefer of Illinois, Chief Judge Charles Desmond of New York, and Chief Judge Edward Lumbard of the Second Circuit. Professor Karlen stated our conclusions on the British mechanism in this manner:

One consequence of the judges serving both at the trial and appellate levels is that they sit in judgment on the work of their immediate colleagues. One term Judge A may be sitting on the Court of Criminal Appeal reviewing a case tried by Judge B on assize. The next term Judge B may be sitting on the court reviewing a case tried by Judge A on assize.

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Another consequence is that each judge quickly receives a well-rounded education in accustomed judicial ways. . . . What he learns while sitting on the Court of Criminal Appeal helps him when he is trying cases. . . . What he learns at the trial level illuminates the problems he faces when hearing appeals. There is no gulf of misunderstanding between appellate and trial judges, such as sometimes develops in systems where the judges who hear appeals do no trial work.

Stability in criminal-law enforcement would seem to be an almost inevitable by-product of the English system. The judges, staying closely in touch with each other and keeping abreast of the changing picture of crime throughout the country, are enabled to maintain a high degree of uniformity in their sentences.⁶

4. *Id.*

5. *Id.*

A similar conclusion had been reached two centuries ago by Sir Matthew Hale in his *History of the Common Law*, published posthumously early in the eighteenth century and in its fourth edition in 1779. Hale noted, after describing the close intellectual and professional relations of the judges at Westminster Hall, that

[B]y this means their judgments and their administration of common justice, carry a consonancy, congruity and uniformity one to another; whereby both the laws and the administrations thereof, are preserved from that confusion and disparity that would unavoidably ensue, if the administration was by several incommunicating hands, or by provincial establishments.⁷

Prior to the appearance of Blackstone's *Commentaries*, Hale's book was a basic text for those commencing the study of law. It was used by John Adams and others of our Founding Fathers who helped formulate law and procedure in independent America.⁸

III. THE EARLY AMERICAN EXPERIENCE

Appellate justices frequently sat on the trial bench in the early days of our republic. Indeed, for the first three years of its existence the United States Supreme Court "had practically no business to transact."⁹ The justices, however, soon "found themselves fully employed"¹⁰ as circuit judges.

By the provisions of [the Judiciary Act], the country had been divided into three circuits (the Eastern, Middle, and Southern), to each of which two Supreme Court judges were permanently assigned and directed to hold court twice a year in each District, in company with the District Judges. The framers of the act had expected this function of the judges to be of great value in keeping the federal judiciary in touch with the local communities. . . . It was, in fact, almost entirely through their contact with the judges sitting in these circuit courts that the people of the country became acquainted with this new institution, the Federal Judiciary; and it was largely through the charges to the Grand Jury made by these judges that the fundamental principles of the new Constitution and Government and the provisions

7. M. HALE, *HISTORY OF THE COMMON LAW* 289 (4th ed. 1779).

8. 1 *LEGAL PAPERS OF JOHN ADAMS* 169 (L. Wroth & H. Zobel eds. 1965).

9. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 57 (1922) [hereinafter cited as WARREN].

10. *Id.*

of the federal statutes and definition of the new federal criminal legislation became known to the people.¹¹

Indeed some newspapers gave almost rhapsodic accounts of a charge to a jury by Chief Justice Jay.¹²

The First Judiciary Act of 1789,¹³ which set up the original system of federal trial courts, did so in an interesting manner. The nation was divided into 13 districts, each with a district court and a district judge. The districts, in turn, were placed into one

11. *Id.* at 58-59.

12. Warren writes that

No better exposition of the basic principles can be found than in the memorable charge of Chief Justice Jay at the first of these Circuit courts, held in New York on April 4, 1790: "It cannot be too strongly impressed on the minds of all how greatly our individual prosperity depends on our National prosperity, and how greatly our National prosperity depends on a well-organized, vigorous government, ruling by wise and equal laws, faithfully executed. Nor is such a government unfriendly to liberty—that liberty which is really estimable. On the contrary, nothing but a strong government of laws, irresistibly bearing down arbitrary power and licentiousness, can defend it against those two formidable enemies. Let it be remembered that civil liberty consists, not in a right to every man to do just what he pleases, but it consists in an equal right to all citizens to have, enjoy and do, in peace, security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good.' He pointed out that it was universally agreed that it was 'of the last importance to a free people that they who are vested with Executive, Legislative and Judicial powers should rest satisfied with their respective portions of power and neither encroach on the provinces of each other, nor suffer themselves *nor the others* to intermeddle with the rights reserved by the Constitution to the people." His explanation of the necessity of a Federal Judiciary was particularly illuminating. "We had become a Nation. As such we were responsible to others for the observance of the Laws of Nations; and as our National concerns were to be regulated by National laws, National tribunals became necessary for the interpretation and execution of them. No tribunals of the like kind and extent had heretofore existed in this country. From such, therefore, no light of experience nor facilities of usage and habit were to be derived. Our jurisprudence varied in almost every State, and was accommodated to local, not general convenience, to partial not National policy. This convenience and this policy were nevertheless to be regarded and tenderly treated. A judicial control, general and final, was indispensable. The manner of establishing it with powers neither too extensive nor too limited rendering it properly independent and yet properly amenable involved questions of no little intricacy. The expedience of carrying justice, as it were, to every man's door was obvious; but how to do it in an expedient manner was far from being apparent. To provide against discord between National and State jurisdiction, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent and yet sufficiently combined was and will be arduous. Institutions formed under such circumstances should therefore be received with candour and tried with temper and prudence."

Id. at 59.61.

13. Act of Sept. 24, 1789, 1 Stat. 73.

of three circuits;¹⁴ each circuit court holding two sessions a year in each of its district courts. The circuits, however, did not have judges of their own. A circuit court actually consisted of any two justices of the Supreme Court of the United States and the district judge of the given district. Any two judges constituted a quorum, and it was provided that no district judge could vote in any case of error or appeal from his own decision.¹⁵

This three-circuit division of the country had been used for military administration in the first year of the Revolution.¹⁶ In employing Supreme Court justices at the circuit level, the drafters of the First Judiciary Act adapted

one of the fundamental postulates of English law enforcement and one of tried antiquity, viz., the employment of judicial personnel of the courts at Westminster to dispense justice in the country, sometimes but not invariably in association with local officials. The principle, if such it may be called, was well understood in the early days in America, although clumsily executed in Massachusetts and Pennsylvania where the whole or the majority of the bench of the highest court was bundled from county to county.¹⁷

IV. DECLINE OF THE CIRCUITS

The circuit system declined because of the distances in the new country and the rigors of constant travel. Warren writes that

[T]he judges of the Supreme Court strongly objected to the imposition on them of this circuit duty, and Chief Justice Jay wrote to the President, as early as September 1790, urging that the provisions of the Judiciary Act with reference to such duty be altered, and contending that it was inconsistent and incompatible for the Supreme Court judges to sit in both Courts, and that Congress had no constitutional power to impose these functions upon the judges.¹⁸

. . . .

It was soon found that the burden thus placed upon the

14. This was true except for two outlying districts whose courts for convenience were authorized to sit as circuit courts.

15. The circuit courts were given certain original jurisdiction to act as a trial court. In addition, they could review on writ of error final decisions of the district courts in civil cases if the amount in controversy exceeded 50 dollars and on appeal final decrees in admiralty and maritime cases in which the amount exceeded 300 dollars.

16. 1 J. GOEBEL, *HISTORY OF THE UNITED STATES SUPREME COURT* 472 (1971).

17. *Id.*

18. WARREN, *supra* note 9, at 85.

Judges was intolerable. The mere physical labor of travel, in view of the great distances and scanty means of transportation, was thoroughly exhausting. Judge Iredell, who had the Southern Circuit entailing a tour of the states of North and South Carolina and Georgia twice a year, as well as a journey twice a year to and from Philadelphia of nearly two thousand miles, quite reasonably termed his life that of a "travelling postboy," and writing to Chief Justice Jay, in February 1791, said that "no Judge could conscientiously undertake to ride that Circuit and perform the other parts of his duty." Jay, himself, who had the Northern Circuit, wrote that "the Circuits press hard on us all." Judge Johnson resigned rather than undertake the labor. Finally, President Washington himself wrote, in August 1791, that he hoped that Congress would give "relief from these disagreeable tours."¹⁹

Thereafter, on August 19, 1792, the justices complained again directly to President Washington about the situation:

We really, sir, find the burdens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms. On extraordinary occasions, we shall always be ready, as good citizens, to make extraordinary exertions; but while our country enjoys prosperity, and nothing occurs to require or justify such severities, we cannot reconcile ourselves to the idea of existing in exile from our families, and of being subjected to a kind of life on which we cannot reflect without experiencing sensations and emotions more easy to conceive than proper for us to express. . . . That the task of holding twenty-seven Circuit Courts a year, in the different States, from New Hampshire

19. *Id.* at 86-87. Warren also reports that at the end of the first year of the circuit system Attorney General Edmund Randolph urged abolition of circuit duty stating in a report to Congress:

Those who pronounce the law of the land without appeal ought to be preeminent in most endowments of the mind. Survey the functions of a Judge of the Supreme Court. He must be a master of the common law in all its divisions, a Chancellor, a civilian, a Federal jurist and skilled in the laws of each State. To expect that, in future times, this assemblage of talents will be ready, without further study, for the National Service is to confide too largely in the public fortune. Most vacancies on the Bench will be supplied by professional men, who, perhaps, have been too much animated by the contentions of the Bar deliberately to explore this extensive range of science. In a great measure, then, the Supreme Judges will form themselves after their nomination. But what leisure remains from their itinerant dispensation of justice? Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency.

to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States and the small number of Judges, is too burdensome. That to require of the Judges to pass the greater part of their days on the road, and at inns, and at a distance from their families, is a requisition which, in their opinion, should not be made unless in cases of necessity.²⁰

While Congress appeared to ignore the judges' complaints, it did lighten the load somewhat by passing the Act of March 2, 1793,²¹ which provided that "the circuit courts should consist of one Supreme Court Judge and one District Judge; and thereafter, the Judges took the Circuits in turn, instead of being confined to fixed Circuits."²² Edwin Surrency notes with sympathy that

sitting on circuit from New Hampshire to Georgia was a burdensome task with so few Justices. Since few of their number enjoyed robust health, to require them to be away from their families and upon the road a large part of their time was a sacrifice that they should not be called upon to make "unless in cases of necessity." Another defect, in the opinion of the Justices, was the requirement that a Justice on circuit, who rendered the original opinion, was called upon to correct his own error (the Judiciary Act of 1789 provided that the district judge rendering the original decision not take part in an appeal to the circuit court, but this did not apply to the Justices when the case came to the Supreme Court). The petition reiterated that this was "a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court which it is so essential to the public interest should repose in it."²³

According to a Secretary of State report in 1838, Chief Justice Roger B. Taney traveled a total of 458 miles in one year holding the terms of the courts in his circuit, while most of the justices on his court averaged 2,000 miles.²⁴ The record, however, may well have been set by Justice John McKinley who traveled

20. 1 WARREN, *supra* note 9, at 88-89, *citing* 1 AMERICAN STATE PAPERS, MISCELLANEOUS, No. 32.

21. 1 Stat. 333.

22. 1 WARREN, *supra* note 9, at 89. Congress attempted to lessen the burden of travel by providing that only one justice and the district court judge would be sufficient; it is doubtful that this act was necessary, however, for the original quorum requirement provided that any two judges would constitute a quorum.

23. Surrency, *A History of Federal Courts*, 28 Mo. L. REV. 214 (1963).

24. Senate Doc. No. 50, 25th Cong., 3d Sess. 32.

a total of 10,000 miles during one year.²⁵ The roads, as well as distances, also presented problems. "Justice McLean, traveling 2,500 miles by public conveyance, complained that in May 1839 the mud was so deep in Indiana that it was impossible for a carriage of any description to pass. . . ."²⁶

One of the earliest dramatic examples of an appellate judge sitting on a trial court occurred in the treason trial of Aaron Burr, perhaps the most politically charged judicial proceeding in American history. Chief Justice John Marshall was required to preside over the Burr trial in the federal circuit court at Richmond in 1807. Leonard Baker, in his recent biography of John Marshall, describes the drama into which the Chief Justice, as a trial judge, was cast:

For John Marshall the coming months would be ones of turmoil and conflicting emotions. The man charged, Aaron Burr, was also the man who had killed Alexander Hamilton, one of the public figures whom Marshall most admired. Burr's alleged crime was attempting to dismember the nation, a charge which a nationalist like Marshall must have considered heinous. His accuser was a political figure Marshall had little respect for. Still, the identity of the accuser cannot wipe away a crime if one has been committed. Marshall knew, as everyone knew, that if Burr were found guilty, Thomas Jefferson would be vindicated for having publicly declared Burr a traitor and the public would be satisfied. Marshall also knew, as everyone also knew, that if Burr were found innocent or if the court appeared friendlier toward him than the law allowed, then the public's wrath would turn on Marshall. Either way in the months ahead it appeared that John Marshall could not win. As it turned out, however, the question was not Marshall's victory, nor Burr's guilt or innocence, nor Jefferson's vindication. Rather, the question was whether the nation would win, whether it would emerge from this episode strengthened in its legal protections; or if it would lose, and allow the beginning of the destruction of the rights it had promised in the blood spilled in the American Revolution and in the words written in the Constitution.²⁷

Marshall proved to be a superb trial judge. Indeed, in that capacity, he "showed that patience, consideration, and prudence so characteristic of him. . . ."²⁸

25. *Id.* at 39.

26. Surrency, *A History of Federal Courts*, 28 *Mo. L. Rev.* 222 (1963).

27. L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* 455-56 (1974).

28. A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 375 (1919).

It was bigness—increased litigation and expansive geography—that for all practical purposes ended the practice of the highest judges of the land presiding on occasions in local courts, not dissatisfaction with the practice itself. In more recent times there have been a few cases of Supreme Court justices sitting on trial courts. This occurs generally, however, after their retirement. Justices Stanley Reed and Tom C. Clark have been particularly active in federal trial courts around the country, as have a number of circuit judges, notably Judge Elbert Tuttle of the Fifth Circuit.

V. WEIGHING THE CONCEPT

The reverse of my suggestion is a proposal made 25 years ago by Judge Jerome Frank that trial judges should be called upon to sit on the appellate bench. His concept was expressed this way:

Our procedures on appeal are today excessively formal. The trial judge is walled off from the upper-court judges. They may not consult him. They learn about the trial only from a formal printed record. This practice complicates and artificializes appeals. I think that, at any rate, whenever the upper-court judges deem it desirable, the trial judge should sit with them on the hearing of an appeal, but that he should have no vote. He could then point to facts in the record to which neither litigant had directed the upper court's attention. This is not a new idea. It means a return to a practice which once prevailed in some English and in some American courts.²⁹

A similar scheme for an intermediate "Court of Review" consisting of two appellate judges and the trial judge has been proposed in California, but it has not advanced beyond the preliminary discussion stage.³⁰

As with any innovation my suggestion contains many pluses and minuses which must be weighed. There are some obvious disadvantages. We would be depleting for periods of time the number of available appellate court judges despite the fact that the caseload is heavy enough in some districts to justify creation of more judgeships. There may be complicated administrative problems of assignment, including factors of time and geography.

29. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 1 252-53 (1949).

30. See 47 CAL. ST. B.J. 28-36 (1972). See also NELSON, JUDICIAL ADMINISTRATION AND THE ADMINISTRATION OF JUSTICE 804, 809 (1974).

And there may be a significant increase in the number of subsequent disqualifications by appeals justices as the cases which they tried below come up for review.

Offsetting the foregoing difficulties is the significant advantage to appellate jurists of learning what daily dilemmas trial judges face in coping in the first instance with the very real world of crime and criminals, parole and narcotic rehabilitation, civil disputes, rules of evidence in instantaneous application, and the administrative burdens of synchronizing litigants, lawyers, witnesses and the court's calendar. The experience gained in hearing witnesses, judging credibility and weighing evidence—instead of merely reading cold transcripts—would be an invaluable and constant refresher course in judicial education. And, of course, it would enable a pragmatic evaluation of decisions rendered in the appellate process.

There are at least three additional purposes served by such assignments. First of all, they will keep appellate judges in continuous and sympathetic touch with current and developing trial practices and expose them to the numerous new problems arising in the trial courts. The assignments of appellate judges to work in the trial process will give to trial judges the feeling that they are not an isolated part of the judicial system; that, rather, all members of the judicial hierarchy are working together toward a common goal of improving the administration of justice. And thirdly, this process will give to appellate judges the opportunity, through the personal contacts they will maintain with trial judges, to urge their brethren on the trial courts to use their discretionary powers and innovative potential more courageously and creatively.

To those who, out of timidity or worship of the status quo, fear change, I quote the recent message of Chief Justice Burger to the Institute of Judicial Administration:

Courts have always had new problems and difficult problems, but never in such profusion as today. If we want to improve the administration of justice in this country, we must experiment and search constantly for better ways, always remembering that our objective is fairness and justice, not efficiency for its own sake.

Justice Cardozo once urged disciples of the law to risk innovation, to retain a quality of resilient adaptability. It is not easy, he warned, to find a just mean between timidity and boldness.

Even when changes are made, it is best at the beginning to mark out the general lines of tendency and direction, leaving details to be developed by the system of trial and error which is of the essence of the judicial process.³¹

But as, in a boisterous sea, we creep “from cape to cape,” so we must ask not merely whether current practice has come to us from ancient days, but “whether this rule or that one is adapted to the present needs of life.”³²

31. B. CARDOZO, *What Medicine Can Do for Law*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 391 (M. Hall ed. 1947).

32. *Id.*