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FOR A SWIFTER CRIMINAL APPEAL— TO PROTECT THE PUBLIC AS WELL AS THE ACCUSED*

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My proposal, predictably controversial, is that twenty-five (25) days—and not the prevalent six (6) months—ought to be sufficient time to ready a Federal criminal appeal for submission to the reviewing court. I would count it flattering indeed, if the ways and means I suggest may be disturbing and galvanize discussion.

The urgency for expedition of the criminal appeal is the protection of not only the defendant but the public as well. After sentence the *accused* though on bail may suffer severely from his change of status in society while awaiting the result of his appeal, but the *public* may in the same interval also suffer a threat to its peace and good order. These considerations raise a conflict between the individual's right of appeal with bail and the public's right in the interim to assurance of security. The only resolution of these competing privileges appears to be dispatch of the review process—at least the nearest approach to an accommodation of the two.

Ordinarily, and more frequently now when hourly there is violence on the streets, how often does the layman upon reading the account of a front page criminal trial and hoping for a just outcome, find at the end the words "An appeal has been noted"? What is the citizen's usual response? His or her interest immediately lags and soon dies. For the end is no longer in sight; the final determination of guilt or innocence passes behind an opaque curtain. The reader muses, "This case will be tied up in the courts for months."

The observation is true, regrettably, and more regrettably dis-

*The John Randolph Tucker Lecture, delivered at Washington and Lee University on April 27, 1968.

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appointment in the suspense is merely a surface distress. Though perhaps unconsidered, there is a much more profound reason to regret the delay. The convicted person whether or not his appeal succeeds can be hurt by the passage of time. If not guilty, a quick pronouncement is rightly his due. But the public, too, is subjected and exposed by the delay to the possible menace of continued criminal activity. An accused is, of course, not a convict until the appeal process has ended and gone against him. But the break between the trial and the appeal creates an incongruous status for the accused and a natural apprehensiveness in the public. These problems may not be wholly removed but they can be greatly mitigated by shortening the delay.

To begin with, an immediate question is whether the defendant should be kept in custody pending appeal. If he has been released on bond during trial, the trial judge is confronted with the issue of whether or not the defendant should continue free. One of the factors in this decision is how long will it be before completion of the appeal.

Additionally, the presumption of innocence, if theoretically still obtaining, has certainly been devalued after a jury of his peers and the court have adjudged him guilty beyond a reasonable doubt. His ability to maintain himself and his family pending appeal will be impaired; his prospect of procuring or retaining employment while his status is unresolved is doubtful. For instance, if his previous work has included the collection or retention of money or has been a position of trust, he may be suspended even before trial. These possible consequences must be considered in the knowledge that not all persons tried for crime are dangerous desperadoes without a sense of responsibility to their families or their communities. Many of them entertain a conscientious desire to clear their names, or to begin again to reclaim their place in society if their appeal fails. For example, an income tax evader may have been led into his transgression by an overweening zeal to advance the style of living of his family or the education of his children. He does not believe himself guilty, or if so, that circumstances tempered the turpitude of his deportment.

On the other hand, the public has a very sensitive concern. After a conviction, certainly of some violent or traumatic offense, like robbery or burglary, the public naturally fears or is apprehensive of the perpetrator while he is at liberty on bond. Indeed, a victim of robbery may each day face on the street his recent robber who is on bail pending appeal from conviction of assaulting him at gun- or knife-point. The victim has in the defendant's mind caused his arrest, incarceration and conviction, and each recognizes the other. Reprisals are reasonably to be anticipated. Imagine meeting your attacker or burglar constantly after his crime! That is what can happen, and at

least the period for these possibilities should be lessened so far as may be legally done.

Further, all criminals are not of so obvious a threat. There are bribers of jurors or public employees; narcotic "pushers"; forgers of checks, notes and credit cards; there are counterfeiters and embezzlers; there are car thieves; and there are pilferers of a lighter touch who take one's driver's license, shopping cards and auto registrations from accessible pocketbooks, wallets and car glove compartments. Until their convictions are final, these violent or soft operators may continue their depredations. A bail bond is but a slight restraint, and these plunderers can rarely be imprisoned before the ultimate determination of guilt.

There is no infamy in appeal. It is a privilege never to be thwarted in the slightest degree. Nor should bail be denied, for the Eighth Amendment of the Constitution vouches its availability. In the United States, trial and appeal today almost merge as one. Envisioning a trial, we at once contemplate an appeal with bail. Therefore, when the Sixth Amendment assures an accused a "speedy and public trial," it is only fair to apply this commandment to the appeal, although technically it may not be a step within the demand of Constitutional due process. It is equally fair, however, to include the public within the assurance, thus awarding it an expedited trial-appeal. The public is a party to every criminal prosecution, and it has been authoritatively declared entitled to the benefit of the companion requirement of a public trial. A speedy appeal should be no less an entitlement of the public.

To repeat, between these two just but opposing considerations—the hardships sufferable by a pre-appeal convict and, on the other side, the hazard to public safety of appellants enlarged on bail—seemingly the only reconcilement is to cut sharply the intermission between the trial and the appeal's submission.

Questions Posed

It is discouraging to discover that official statistics reveal that the median interval between notice—the beginning of the appeal in a Federal District Court—and the first day the appeal can be heard (not decided) is more than six months.[1] At once these queries arise:

What is the cause of the delay?

What, *if anything can be done* to minimize it?

In the interest of both the accused and the public these questions

[1]Annual Report of the Director of the Administrative Office of the United States Courts 1967 at 190. In the Fourth Circuit it is 4 months.

should be pressed. It is nothing new to observe that in England appeals are not only readied but are terminated within 30 days.[2] There are differences, of course, in the procedures of the two judicatures. The chief one is that briefs are not exacted in the English appeal and time for argument is not limited. Presumably, the indulgence of oral presentation substitutes for briefs. Nevertheless, these procedural differences do not excuse our delay. If the British courts can both perfect the record and resolve the appeal in 30 days, certainly we ought to have the case on the appellate docket in less than a month.

CAUSE OF THE DELAY

The criminal appeal deserves public attention. It may eventually lead to the reduction of crime. None of us can be sure that one day we may not feel the touch of the law-breaker or observe insidious crime such as the abuse of trust in high places. Anyway, good citizenship demands vigilant surveillance of law enforcement—clear through to the end of the appeal. Like any other, the canker here cannot be cured until its cause has first been traced. A typical case may instructively and clinically be dissected.

Assume that an accused was sentenced on April 1st, carrying deserved imprisonment. Under the criminal appeals procedure,[3] he has 10 days in which to note an appeal.[4] This will postpone its institution until April 10. On bail or in custody, he must have the Clerk of the Court file the record of the trial in the appeals court, and for this the Clerk is allowed 40 days, with possible extensions.[5] Thus the record may not arrive at the Court of Appeals until May 20, more than 7 weeks from the day of sentence. If he is at liberty on bail and recognizes he was rightly convicted, the appellant will use every means to absorb all of these allowable days.

Thereafter briefs will be filed by both sides. This can consume a minimum of 84 days[6]—another 12 weeks or 3 months—postponing until the middle of August the date before the case, at the earliest, is even ready for appellate presentation. *Thus 4 1/2 months will elapse before the Court of Appeals will have a look at it.* The actual median time taken throughout the United States for these steps is almost 7

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[2]D. KARLEN, *Appellate Courts in the United States and England*, 149 (1963).

[3]References to appellate rules, infra, will be to the Federal Rules of Appellate Procedure promulgated by the Supreme Court and effective July 1, 1968.

[4]FED. R. APP. P. 4(b).

[5]FED. R. APP. P. 11(a).

[6]FED. R. APP. P. 31(a).

months. This is made up of 2.8 months from the filing of the notice of appeal until the complete record arrives in the Court of Appeals, plus 4 more months for the filing of the last brief.[7]

The Wait for the Stenographic Transcript

The major reason that the appeal is not ready for transfer on the day the appeal is noted is that the stenographic report of the trial proceedings is not available. Usually there is only one reporter[8] for each judge, and with a series of trials or hearings to report, it may be several weeks before the reporter can suspend to prepare a transcript. Despite the help he employs in his own office, and his earnest personal desire to turn out the transcript more promptly, it is usually physically not practicable to do so. Depending on the length of the trial, it may be months before it can be delivered and an extension of the 40 days may be necessary.

The transcript has also been an impediment in English appeal practice. Apt is this comment:

> The only time that ordinarily elapses between the imposition of sentence in the trial court and the decision in the appellate court is that which is consumed in the preparation of the necessary papers on appeal. Here the only bottleneck is likely to be securing of a stenographic transcript of the evidence where that is necessary.... Even with that bottleneck, it is a rare case in which more than a month elapses between the sentence and the decision of the appeal. This is as true for capital and other very serious cases as it is for relatively minor cases.[9]

Mechanical Reporting

No mechanical means of reporting the trial and thereby producing an earlier transcript has yet been perfected, despite constant experiments with tape and other devices. Of course, if an instrument reproduction of the whole trial ever becomes available this delay will be erased. Indeed, such a recording could be put in the appellate court and those parts of it played—like a reference to the transcript—which are needed to reflect any critical trial event. Before appeal, too, the record would be available to refresh counsel's recollection on a fuzzy point. Any such mechanical improvement would effect a tremendous time-saving; it would warrant even further limitation of the period now suggested for the transition from trial to appeal.

When the transcript finally reaches him, the Clerk of the trial

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[7] In the Fourth Circuit it is total of 3.9 months.

[8] 28 USC § 753.

[9] D. KARLEN, *supra* note 2, at 115.

court must compile the entire record. This consists of an orderly arrangement of all the papers in the case, including the exhibits and depositions and the orders of the court before, during and after the trial. Only a day or so is taken for this job.

Preparation of Briefs

Upon completion of the record, including the stenographic report, and lodgment of it in the appellate court, the lawyers undertake the preparation of their briefs. Availability of the record, they feel, is necessary in this work so as to insure a faithful recall of the evidence, facts and trial rulings.

Appeal Should be Readied in Not More than 25 Days

What has been outlined is the traditional procedure. Unfortunately it occupies months, as we have seen. Lawyers and judges are generous with a litigant's time. On an old sundial once was this inscription:

> Time is
> Too long for those who grieve,
> Too short for those who rejoice,
> Too swift for those who fear,
> Too slow for those who wait,
> But for those who love,
> Time is eternity.

If "litigate" be substituted for "love," these sentiments would be equally apt in their conclusion. Parties in criminal causes are entitled to more solicitude. Put in their places, we would fret under the uncertainties and laggardness. Anxiety would be acute, and we would expostulate vigorously against the judiciary's apparent unconcern. The tension might well be likened to the patient's anguish if his physician or surgeon deferred for months a final diagnosis of an earlier expressed suspicion of malignancy.

As lawyers, we are jealous of any encroachment upon our time-customs. "Reasonable time" has become a fetish and persistently measured by what we have "always done." Traditional waits have become sacred. So long have we honored schedules making our procedural progressions in 10, 30, 60 or 90 days it is not easy to acknowledge that all of these steps can be concluded in a month if we try hard enough. In short, there is a vast waste and extravagance in the use of time preparatory to a review. It should not require more than 20 or 25 days.

Admittedly, this is a startling and, maybe, revolutionary conception, but the interests of the accused and the public demand it.

Moreover, it can and ought to be achieved within the existing structure of the Federal judiciary, without recourse to Congress or the Executive for help. Good housekeeping or courtkeeping requires it. Additional judges are not the cure; they would still have no touch with the case until it had completed its turtle-like journey from the District Court. The purpose presently is to demonstrate how this desideratum can be accomplished.

WHAT CAN BE DONE

As just noted, the outstanding obstacles are two: the procurement of the transcript and the preparation of briefs. If these obstructions to dispatch could be dissolved or minimized, appeal delay would be contracted. I think these are not insurmountable impediments and can be removed. A suggested remedy is the prescription of the following steps:

To escape the wait for the stenographic transcript for inclusion in the official record, ask the District Judge:

One: *To include in his jury charge a full review of the evidence, prefaced by a narrative of the uncontested facts.* This would add little to the present practices of the trial judge.

He is now required to instruct on the law,[10] and customarily in this he will recount the evidence or the facts to which a legal principle applies. To present the case squarely and helpfully to the jury, the judge will ordinarily state the undisputed facts, pose the factual disputes and then set out the evidence on each side of the contested issues. Thus the charge will contain a recitation of almost the entire relevant evidence. If requested by the appellate court, the judge, I am sure, would willingly expand his references to the evidence and the facts.

Two: *In cases tried without a jury, ask the judge to make findings of fact.* This is altogether permissible. The rules require him "on request [to] find the facts specially."[11] A short oral opinion would usually be enough. Here, again, every judge would conscientiously comply if his Court of Appeals made the request a standing rule.

Three: *In either instance, have the judge file an addendum of not more than a page, containing the citations (not quotations) of the authorities relied on by the parties or the court in the case.* This information probably would already have been incorporated in written or oral rulings on pre- or post-trial motions.

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[10]FED. R. CRIM. P. 30.

[11]FED. R. CRIM. P. 23(c).

Four: *The judge would file his charge or findings and the addendum in multiple copies, and do so simultaneously with sentence and commitment.* Obviously, this step would exact no extra effort by the District Judge. His words would necessarily have been uttered and recorded before sentence, and hence could be readily made available for transmission at once to the Court of Appeals.

Five: *The judge would direct the Clerk to forward immediately upon receipt of the appeal notice and without awaiting arrival of the stenographic transcript, all of the foregoing papers to the Court of Appeals,* along with all other papers then on file, arranged chronologically with a photostat of the docket entries. (The index can be made up later by the District Court Clerk from these entries, or be prepared subsequently by the Clerk of the Court of Appeals.)

All of these aims can be effectuated within a few days after final judgment. The stenographic transcript would be forwarded as soon as received.

What Would Be Achieved

What would this new procedure accomplish? It would be of inestimable value in advancing the appeal in these particulars: The appeals judges would be at once apprised of the case's nature, issues and proof. The indictment would disclose the accusation and, most importantly, the facts and a condensation of the evidence would appear in the jury charge or the special findings, all far more prominently and sharply than in a brief. Of course, if there were trial briefs, they as well as written opinions of the court would be sent on. If desired, counsel could insert citations of other precedents he wished to be considered.

Furthermore, at this early stage the record could produce these results:

Frivolous Cases Screened

First: The utter insubstantiality of an appeal would be revealed within a month and the case could be summarily dismissed. Conventionally, unworthy appeals possibly might not come to the attention of the court until the expiration of the 40 days allowed for the transcript, plus the 30 days thereafter for the appellant's brief.

Prompt dismissal of the appeal would save both sides the cost in money and time, and the public as well as the appellant would each be spared the preparation and presentation of a brief.

Dispensing with Briefs

Second: With the record perfected through the measures just spell-

ed out, and the issues so outlined, even meritorious cases could often be argued without briefs. The oral argument would come from counsel's fresh recollection of the case, instead of from a stale record and impersonal briefs. More recent authorities could be listed in a letter or other informal memo handed up at the time of argument.

Omission of briefs is an aspect of the proposed procedure that will not be easily accepted by the bar or the bench. Briefs have long been revered and held an esteemed place in appeals. But when the issues are starkly and simply framed in the record, with the evidence and facts in the foreground, no need exists for briefs. Here the English practice is precedent.

But experienced counsel will ask at once, how he can open the argument and follow through without a brief as a starter and guide. The immediate response is that he will present his argument just as he did in the trial court when the case came to an end. He had no brief then and needed none. On a prompt appeal memory will not have dimmed and he will have at hand the same tools as he used at the conclusion of the trial. Nor would argument time have to be allowed beyond the present limitations. The absence of briefs, too, would transform the hearing into an oral advocacy, always far more impressive than the printed page. Argument would then bare the controversy to the bone. It could no longer be only a rehearsal of the briefs.

Our existing procedure involves too much repetition. First, we have the facts outlined in two opening statements of counsel to the jury. Then the facts are restated in one form or another by the trial judge in his charge or findings. Next, this same material is recited in the briefs, with a substantial part of it simultaneously carried into the appendices of the briefs. Afterwards it is narrated to the court in oral argument, and lastly it is recorded on the tapes in the appellate court. Surely in most cases briefs would not be missed.

Third: If briefs were not required, an appeal could be put before the Court on Appeals within 20 days from the filing of the appeal notice.

Simultaneous Briefs

The following suggestion is also urged: use concurrent briefs. They could be made ready within 15 days, with 5 additional days to each side for replies, if desired. Experience has proved this procedure entirely feasible and successful. Indisputably it saves appeal time. The appellant certainly could not be hurt, for 15 days is abundant time, if printing is waived. He would prepare precisely the same type of brief as he would ordinarily. Only the negative side—the Government

as appellee—could complain, possibly for lack of advance notice of what the appellant would assert for reversal. But this is hardly a grievance; the Government knows well beforehand the appellant's points, having heard them at trial. Anything not anticipated could be met in its reply brief.

Briefing Time Too Long

On the other hand, if briefs are to be used and are to be consecutive, the space between trial and the appeal could still be drastically shortened. As already noted, briefs account for the greater portion of the interval between the appeal notice and the submission. The period allowed for briefs could be sharply shrunken without hardship, even to the busiest lawyer. The lavishness of time now permitted for briefs—2½ months—is an expensive indulgence.

It is not needed. Trial counsel is fully informed of the evidence, the facts and the legal issues long before the sentencing. His knowledge, at least in general, starts with the arrest. Greater acquaintance is gained at the preliminary hearing. It is improved in the days between this hearing and the return of the indictment. The subsequent lag awaiting trial provides further opportunity. Even if some of these stages are skipped, ample time is still left. True, the accused does not always consult counsel at once, but if he is without a lawyer, one will be promptly assigned and not later than the arraignment.

Thereafter the trial is an unstraitened exposure of the prosecution's whole case, in fact and in law. The truth is that when sentence is pronounced, defense counsel is more advantageously situated to press the appeal than at the end of the customary wait of weeks or months for the transcript. In actuality, he knows before the expiration of the whole 10 days allowed for the appeal notice whether he will seek it. Thus even these days are available in the preparation of a brief. With the judge's charge or findings before him, the defense attorney may readily assemble his brief with assurance of its accuracy.

Transcript Not Indispensable

Nor does counsel have to defer his labors on the brief until the stenographic transcript finally comes in. This is probably the most difficult concession for seasoned counsel to grant. The inescapable and dire necessity for having the transcript at hand has become an *idée fixe*. It is emphatically posed in connection with an assignment on appeal of the insufficiency of the evidence to convict. But even then everything necessary will be found in the judge's charge or findings. The same contention will necessarily have been pressed upon

the District Judge. Moreover, if one of the special findings is disputed, the opposing evidence will doubtlessly appear earlier in the defendant's motion to amend or the judge's ruling upon it. Actually, stipulations or concessions usually avoid the need for any particular part of the transcript. In addition, doubtlessly the transcript will have arrived by the time of argument or decision.

Of the necessity for the transcript the late John J. Parker, for many years the distinguished Chief Judge of the Fourth Circuit, said in his address to the American Political Science Association, "Improving Appellate Methods":

> As every lawyer of experience knows, there is *no sense in printing the entire record* [the transcript]. *Nobody reads it or ought to read it.* After a case has been threshed out in the trial court, the facts are pretty well established; and the matters in which the appellate court is interested are either questions of law or broad questions of fact which have little to do with the weighing of one piece of evidence against another.[12]

While the jurist was speaking to the requisite of printing, he was at the same time evaluating the urgency of a transcript. He finds no prejudice in its omission. Doing without the transcript is but another advance in expedition. At one time even a transcript was not acceptable. Lawyers were required to draft a narrative of the testimony from the transcript. This requirement was later repealed but still the whole transcript had to be printed. Subsequently this rule was relaxed in favor of putting in an appendix to the brief such portion of the transcript as the party deemed necessary.

25 Days for Briefs

If simultaneous briefs not be utilized, let the opening brief be filed within 10 days after the appeal notice, the Government's within 10 days thereafter and the appellant's rebuttal, if any, within the 5 days following. The Government, to repeat, is quite aware of the appellant's contentions long before his brief arrives. Its preparation requires but a short time, particularly if printing is not necessary.

Waive Printing

Printing of briefs certainly should not be expected. As the new Fed. R. App. P. 32(a) recognizes, typographic or other good copies from reproduction machines are an entirely adequate substitute. Typewritten sheets, if clear, ought to be acceptable. Time and effort in proof

[12] 25 N.Y.U.L. REV. 6 (1950).

reading would thus be spared, together with a large saving in expense.

In sum, it should be the exceptional case where the appeal could not be readied for argument *before 30 days* after the appeal is noted. Since there is a will among the Federal judges, trial and appellate, to speed the criminal appeal, the procedure now urged can readily be adopted.[13] Furthermore, the object can be achieved without harm to the defendant or the public.

Court Rules Permit Expedition

You may ask how this appeal process is achievable. The answer is that each United States Court of Appeals may do so by order. The new Federal Rules of Appellate Procedure promulgated by the Supreme Court and effective July 1, 1968, fix maximum periods for transmission of the record, but they allow restriction to a shorter time.[14]

Civil Cases

Civil suits, too, may become *cause célèbre,* and their appeals be of great import, but we leave them to another day.

I do not overlook the time taken by the courts in deciding cases. I can assure you that a judge is as much, if not more, worried by his inability to write an opinion promptly as are the litigants. Every endeavor is afoot to dispatch the renditions. If we expect a jury to decide guilt or innocence within hours or a few days, it is not too much to expect commensurate celerity at least in the presentation of appeals.

The proposals I have outlined doubtlessly have their infirmities but at least the aim is not without merit. In this spirit they are submitted as best I can outline them. Anyway, "What's writ is writ; I would it were worthier."

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[13]I know Chief Judge Haynsworth and his predecessor Chief Judge Sobeloff of the Fourth Circuit have both constantly sought expedition. I am sure a like effort has been exerted in each of the other Circuits.

[14]FED. R. APP. P. 11(a).