



January 2003

Irving L. Goldberg Lecture, Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent

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Recommended Citation

Richard S. Arnold, *Irving L. Goldberg Lecture, Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767 (2003)
<https://scholar.smu.edu/smulr/vol56/iss2/4>

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IRVING L. GOLDBERG LECTURE,
SOUTHERN METHODIST UNIVERSITY
DEDMAN SCHOOL OF LAW:
THE FEDERAL COURTS:
CAUSES OF DISCONTENT

*Richard S. Arnold**

THANK you, Dean, and good afternoon, friends. I want to thank the Dean especially for a few things that he left out of the introduction. He did not tell you how I managed to be appointed to the Federal Bench. Now the Dean has heard this story, but I am banking on the fact that there are a few new victims here who have not heard it.

Some judges (you may not believe this) are political appointees, but I was appointed on merit. My merit was that I worked for a United States Senator. One day in 1978, as I was working for Senator Dale Bumpers of Arkansas, word came that a vacancy had occurred on the District Court in Little Rock. A few days later, the Senator called me into his office, and he said, "Richard, fix up a letter to the President recommending you to be United States District Judge." So I wrote him a hell of a letter—the finest, most fulsome, most eloquent letter of recommendation ever sent by a United States Senator.

A few days later, I got a call to appear at the Department of Justice to be interrogated, and I thought they would ask me what my judicial philosophy was. I didn't have one. I don't think I have one now. But I was most relieved when only two questions were put to me: "Was I breathing?" and "Did I come from the Senator?" Because I was able to answer yes to both of those questions, I was duly nominated by the President for the District Court bench.

Well, as you know, there is another part to the story. There is a thing called the United States Senate, which has been in prominence recently in connection with judicial nominations, and, of course, the Senate was in the Constitution in that far distant time as well. But it was a kinder and gentler time. And so, one day when Senator Bumpers and I got on the elevator in the Dirksen Senate Office Building, who should come on with us but the powerful—the name and title of this man were never repeated without the adjective "powerful"—the powerful James O. Eastland,

* United States Circuit Judge for the Eighth Circuit.

chairman of the Senate Judiciary Committee. And so we got on the elevator and Dale said, "Jim, Richard here,"—and he jerked his thumb at me, as if at an insignificant object (which I was)—"Richard here has been nominated to be District Judge, and I want you to confirm him." And Senator Easton looked at him, and he said, "Whatever you say, Dale." Then we got down to the bottom of the building and it was time to get off of the elevator. The doors opened up, and Eastland looked at me and said, "After you, Judge." So I got confirmed in the elevator. I recommend that as a lesson in civics. Perhaps we could come to some pleasant medium between what occurs now and what occurred then, but I found the process very satisfying.

Well, let me first of all thank the Dean for inviting me to make this talk. I approach it with some trepidation. Not only am I in the presence of the family of a distinguished judge and some of his former law clerks, but I am in the presence of a formidable array of United States district judges and state trial judges. The trial judges, federal and state, are real judges. They don't just read other people's papers; they do their own work. I hope that they will be tolerant of what I am going to say.

It is a great honor for me to be at this law school, not least because it's named after a man from Arkansas. I know that it is a great law school. How do I know that? Because you invited me to speak, and because the Dean has invited me to teach here, which I have done with great pleasure. Dean Attanasio and Associate Dean Chris Szaj have been very kind to me, and I am most grateful to them.

It is also a great honor for me to deliver a lecture with the name of Judge Irving Goldberg attached to it. Now I have to say—this is going to sound terrible when I say it—but I have to say that I started out with less of a good opinion of Judge Goldberg. You see, a lawyer evaluates judges by whether or not the lawyer wins the case. This is the sole, only, and controlling criterion for determining greatness on the bench. I never met Judge Goldberg, but I did argue a case before him in 1974 in New Orleans, in which I was attempting to stop the Corps of Engineers from digging a very large ditch in Mississippi and Tennessee. My client was the Environmental Defense Fund. We had lost the case in the Northern District of Mississippi and had appealed to the Fifth Circuit, where we lost the case again.¹ I have to tell you that I reread the opinion about twenty years later. I came to be a good friend of Judges Charles Clark and Paul Roney, who were also on that panel with Judge Goldberg. As I read that opinion again, twenty years after the fact, I began to understand that maybe it made some sense after all. Of course, my clients had long since ceased to pay me.

There is a great deal that is admirable, some of which the Dean has already mentioned, in the life of Judge Goldberg. To serve on the bench for twenty-nine years, until the age of 85, and to do so with an acute

1. *Env'tl. Def. Fund, Inc. v. Corps of Eng'rs of the United States Army*, 492 F.2d 1123, 1127 (5th Cir. 1974).

awareness of the use of words. It is said that Judge Goldberg invented sixty-five new turns of phrase—that is a remarkable achievement. He was a model of a judge who did his own work, and that is going to be one of the themes of the talk that I am making today. He did his own work and could point to the books and show that he himself, with a sense of justice and a sense of craftsmanship, had contributed to the law.

As the story goes—and Judge Barefoot Sanders will correct me on this, because he is part of this story—on November 22, 1963, Judge Goldberg got a telephone call, picked up the phone and the voice said, “This is Lyndon. How do I become President?” And the Judge said, “You are President, by operation of law.” And Lyndon said, “But I need to take the oath. We need to find someone to administer the oath. It can’t be a Republican!” He was quite clear about that. And so Judge Goldberg called Mr. Sanders, who was then United States Attorney, and asked him to find Judge Sarah Hughes, who, in fact, did administer the oath on the airplane that day to President Johnson.

He was known for the wit and humor in his opinions. I just want to give you one quotation, which I think is probably my favorite. This is from a tax case: “When a marriage made in Heaven plummets to Earth, the postlapsarian ceremonies are presided over by that most fallen of angels, the Commissioner of Internal Revenue.”² And I quote something that Judge John R. Brown said about Judge Goldberg during the portrait-hanging ceremony that was held in his honor. Judge Brown said this, speaking of Judge Goldberg’s reverence for the Bill of Rights, “I have once said that I thought he went to bed each night wrapped in the Fourth Amendment, and when his feet were cold, he put the Fifth around them.”³ I think that is a wonderful summation of a judge who loved liberty and who loved those parts of the Constitution that preserve it.

Well, I guess I have to give this lecture. I dislike the term “lecture.” I am not really sure why anybody would come to an event billed as a lecture. I suppose the students had to come. I don’t know what inducement was offered to you or what punishment was threatened, but no one likes to be lectured at or lectured to. So I like to think of this as a conversation. I understand from the Dean that after I am through there will be time for questions. I want you to know that I will answer all questions, if I know the answer and if I want to. So this is a conversation, and the title that I chose is “The Federal Courts: Causes of Discontent.” Now that sounds negative. I don’t mean it that way. I think the federal courts probably function as well or better than any other branch of government because we have a simple task—to decide cases—and as long as we stick to that task, we will do well.

What worries me is that, in some ways, we are not sticking to that task. The problems of the federal courts, in my opinion, and this is probably true of state courts as well, which after all do the bulk of the work in this

2. *Stock v. Comm’r*, 551 F.2d 614, 615 (5th Cir. 1977).

3. 767 F.2d CXX (1985).

country, can be summed up in one word: volume. Let me give you some statistics from an article by Judith Resnick—I am not going to smother you with numbers, but some of these are interesting. In 1910, there were 134 federal judges.⁴ And when I say federal judges in this context, I mean circuit and district judges. I am not talking about the Supreme Court. I am not here to criticize the Supreme Court. I leave that to the public—that is your privilege. Thirty-two of those 134 judges were circuit judges, court of appeals judges.⁵ There were in the whole country that year 1,448 appeals.⁶ That is forty-five per judge. Now mind you, that does not mean that each judge would write forty-five opinions; it means that each judge would sit on forty-five cases, and, if the opinions were divided evenly, a judge would have fifteen opinions to write per year. By 1940, the number of judges was up almost double to 245, and the caseload had also more than doubled.⁷ As of 2000, the numbers are as follows: there are about 1,100 Article III judges; there are 642 authorized district judgeships; and 179 authorized circuit judgeships, but that is not the whole story, because most senior-status judges continue to work virtually full time.⁸ There are 337 senior district judges and 91 senior circuit judges,⁹ most of whom, as I say, are working. I am proud to be one of them.

There are also what we call Article I federal judges; that is to say, judges of courts created by Congress who do not have all of the protections that Article III judges have. Take an example—a United States Magistrate Judge has a term of eight years, not life. Actually, district and circuit judges, you know, are not appointed for life. They are appointed during good behavior. That could be quite a different thing, although we hope it is not. The magistrate judges are appointed for eight years and do not have the Constitutional protection against reduction in salary that Article III judges have. As a practical matter, however, I would have to say that most magistrate judges who want to be reappointed are reappointed, and Congress has never attempted to reduce the salary of a magistrate judge. There are 447 of them.¹⁰ Then there are bankruptcy judges—also Article I judges—and there are 326 of them.¹¹

Just to complete the picture volume-wise, there are something like 55,000 appeals now filed each year, compared with 1,448 in 1910. You say, well, there are more judges, too, but there are not that many more judges. If there are 180 active judges on the courts of appeals, and some-

4. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 933 n.18 (2000). Professor Resnik, in addition to her many other attainments, is to my mind the foremost scholar of judicial administration in this country today.

5. *Id.*

6. *Id.*

7. *Id.* at 938.

8. *Id.* at 985 n.241.

9. *Id.*

10. *Id.* at 990.

11. *Id.* at 952 n.94.

thing like 55,000 appeals, that is something like 300 per judge, compared with 45 per judge in 1910; and the numbers are similar for the district courts.

Now, what is being done in reaction to this volume? A lot of things, most of which are good in moderation, but some of which, in my view, are sometimes taken beyond moderation. You will recall that part of the title of Professor Resnik's article, to which I have referred, is "Trial as Error."¹² Now, what she means by "trial as error" is that some judges have apparently come to regard themselves as failures if a case goes to trial. She quotes a speech made by an unnamed judge in Los Angeles in which he said that in his district, out of 100 civil cases filed, eight went to trial, and he considered that eight percent to be lawyers' failure.¹³

So, instead of being case-deciders, people who sit on the bench and hear opposing sides and say who wins and why, judges are being converted into case-settlers. I have a good friend, also at Yale Law School, who wrote an article called "Against Settlement."¹⁴ I want you to know, I am neither against settlement, nor do I think that people should be coerced into settling their cases—and some lawyers feel that they are being coerced. In fact, the impetus towards settlement is becoming the major theme, it seems to me, in classes that are held for new judges.

Such was the case when I was in, as we called it, "Baby Judges School," in 1978. You may find it a little disconcerting that people who are appointed to the bench need to go to school to learn how to do it. We hope that they know something before they are appointed, but there is a virtue in getting together with other people. So, at "Baby Judges School," one of the teachers, a distinguished judge from the District of New Jersey, was telling us that every time you meet with the lawyers you must try to get them to settle the case. A woman participant from Michigan, who had a distinguished legal record (and later became a Supreme Court Justice in that state), questioned him as to why settlements should be so strongly urged. And she said to him, essentially, "Why isn't that the lawyers' business? Why don't we let them handle their own cases? If they can't settle them, we try them. If they can settle them, fine." And he looked at her and said, "Little lady"—and he could have just as well said, "little girl"—"Little lady, you just don't understand how the system works. It will totally break down if we do not encourage, strongly, people to settle their cases." I think that some of this is coercive, I think it is paternalistic, and I think it is big brother, the government, trying to tell people how to manage their own lives. Part of the American tradition is that we can sue people if we want to, and if we get to court and lose, fine, but we have that right.

Another thing which is occurring that bothers me is compulsory Alternative Dispute Resolution—though I am not sure whether this is true in

12. *Id.* at 933 n.18.

13. *Id.* at 925.

14. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1083 (1984).

the district court here or not. You go to court. You file your lawsuit. You conduct your discovery, and then instead of going before a judge and jury, the court tells you that you have to go before an arbitrator. Now, you may not agree with what the arbitrator does, and you are not going to be compelled to accept it, but you are going to have to pay the expense of that part of the proceeding. If the arbitrator rules a certain way and you don't like it and you go to trial, and if you don't get as good a deal from the jury as the arbitrator would have given you, you may end up paying some costs. In 1998, Congress passed a law making this system mandatory. Not mandatory in the sense that every party in every court is forced to do this, but mandatory in the sense that every federal district court has to have a plan for encouraging people to go to arbitration.¹⁵ Again, this is not intrinsically a bad thing. If people want to do it, they should be able to, but I am unconvinced that they should be compelled.

So, in order to meet volume, instead of asking for more Article III judgeships, what are we doing? Let me back up a minute. We have been asking for more Article III judgeships, but Congress has not passed a bill—an omnibus judgeship bill—creating more Article III judgeships since 1990. The Judicial Conference (of which I am no longer a member), which is an institutional body representing the federal courts, has a draft bill creating seventy-odd judgeships across the country. We can't even get a member of Congress to introduce it, let alone get it passed. Why? Well, the answer is not difficult. One party does not want to create judgeships if it believes the other party will fill them. That is easy to criticize, but I don't mean to criticize it. That is the political system. We live with that, but it seems to have reached a stage of breakdown.

Instead of creating more Article III judgeships to meet the problem of volume, the judicial branch has adopted another stratagem. We create Article I judgeships. Now, you may have thought that only Congress can create a judgeship, but that is not quite true. There is a law that allows the Judicial Conference of the United States to create magistrate judgeships in various districts, assuming that the Conference feels that the caseload is there to support it. The only thing that we have to get from Congress is the money. For nine years I served as Chairman of the Budget Committee of the Judicial Conference. It was my job to go to Congress and sufficiently humble myself so that they would give us the money, and they did. They are very good about funding the courts. And we could get funding for magistrate judgeships when we could not get Article III judgeships created.

"Well," you ask, "what's wrong with that?" The Constitution says that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish.¹⁶ Traditionally, and this is true since 1789, the judges

15. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(a), (b) (Supp. IV 1998).

16. U.S. CONST. art. III.

of those inferior courts—circuit and district courts—have been nominated by the President and appointed by the President with the advice and consent of the Senate. This is done for our protection. It puts us beyond public pressure. Not beyond all pressure—I mean, every human being worries about something, and judges are, after all, still human beings—but at least beyond public pressure. You don't have to worry about whether your neighbor is going to like your decisions. But, say you are a magistrate judge with an eight-year term, and you are in the last of the eight years, when you suddenly get the Pledge of Allegiance case. Maybe you think that public pressure would have been a good thing in that case. I don't know, and I am not here to comment about the merits of the case. Still, there are cases that are so controversial that they need to be decided by judges selected in the way that the Framers of the Constitution intended, that is to say through the political process, but after that process is completed, they have security of tenure. I am not suggesting that any particular district court would decline to reappoint a magistrate judge because of an unpopular opinion—probably not. But human nature being what it is, I suspect that if I were in that position in the last year of my term, it might give me a little hesitation.

The other thing that has happened is that, instead of judges doing all of their own work, we more and more rely on staff. This is true, as I will point out in a minute, in the courts of appeals, possibly more than it is in the district courts. But, on the district court level, typically each district judge has two law clerks. There are also specialized law clerks. There are pro se law clerks who read hand-written material submitted mostly by inmates. There are death penalty law clerks who are supposed to be experts in death penalty cases. There will soon be a proposal to create social security law clerks, another specialized group of lawyers. "Well, what is wrong with that?" you ask. Let's just say that you are a circuit judge, and you get in the mail (and this happens every day) a large stack of papers, and with the stack of papers there is a memorandum prepared by a staff attorney and a per curiam opinion already written. This is the first you have ever heard of the case. You don't know a thing about the facts, you don't know a thing about the issues, and yet this thing comes in the mail. I can tell you, and I have experienced this myself, the temptation to pick up the memorandum and the per curiam opinion and read them and approve them, if it seems that the world will not end, is great. Why should I read this big stack of papers when somebody else has already done it? Or, put it the other way: if I am going to read this big stack of papers, what do I need with staff attorneys to read it first? So, I think the process has a built-in incentive to accept, without detailed examinations, work that other people have already done—and, no, I am not accusing anybody of doing anything I haven't done myself.

Finally, the Judicial Conference has reacted to the volume of cases by asking Congress not to give us any more power, and this is most unusual for a branch of government. Most branches of government want power.

At least, that is what the newspapers tell us. They go to Congress, they want more money, more programs, more employees, more jurisdiction, more power, more everything. The Judicial Branch, on the contrary, has taken the opposite view. When it was proposed, for example, to make it a federal crime to do almost anything with a gun, the Judicial Conference opposed that. When it was proposed to create a federal civil-rights action for gender-based violence, the Judicial Conference initially opposed that.¹⁷ By the way, there is an important political lesson there, because we got our noses bloodied when we did it. As you are aware, part of the Violence Against Women Act was ultimately held unconstitutional by the Supreme Court because it did not have a sufficient connection with interstate commerce.¹⁸ But what the Judicial Conference initially said was, “We don’t think this is an appropriate place to federalize; let the states handle this.”¹⁹ It is, like domestic relations, traditionally a state matter. The principle sponsor of the Act (the VAWA—they all have acronyms, you know, and if you don’t speak that language you can hardly get along in a group of lawyers) was Senator Joseph Biden of Delaware. By the time he got through with us, you would have thought we were in favor of rape, which, I might add, we were not. Ultimately, the Conference retreated and decided, “Okay, we will not take any position on the Act.”²⁰ It was counterproductive politically for us to attempt it.

Just one more point on this subpart of the subject. You often hear federal judges say, and I have said this myself, “The federal courts are specialized; they are courts of limited jurisdiction.” And then suddenly you hear yourself, inside your head at least, eliding the word “specialized” into “special.” And then you start complaining about, you know, we have too many drug cases. At a budget hearing, I heard a Justice of the Supreme Court say, “We are not going to be able to get good people to sit on the federal bench because there are too many drug cases.” This actually echoes what happened during prohibition. Let me read something to you from a very fine book—if you have spare time; I know law students don’t—written by Felix Frankfurter and James M. Landis entitled *Business of the Supreme Court: A Study in the Federal Judicial System*. It was written in 1928, but it is well worth reading. At that time, the judges were complaining about liquor cases, which was the 1920s analog of drug cases. This is what Professors Frankfurter and Landis said: “Lawyers of large scope and intellectual distinction, the kind of lawyers who alone ought to be put on the district courts will refuse to be drawn into police court work.”²¹ Now, there may be some truth in that, but when we say those things, we run the risk of appearing to paint ourselves as somehow superior to state judges. We are not. Our job is to do whatever

17. Resnik, *supra* note 4, at 1004-05 n.322.

18. *United States v. Morrison*, 529 U.S. 598 (2000).

19. Resnik, *supra* note 4, at 1004-05 n.322.

20. *Id.*

21. FELIX FRANKFURTER & JAMES M. LANDIS, *BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 251 (1928).

Congress gives us to do. Yes, we can express an opinion about what it ought to be, but once Congress decides that we are going to try drug cases, that is what we should do. Judges, I think, run into serious problems if they attempt to portray themselves as somehow superhuman or fitted for only specialized or more difficult kinds of cases.

Up to now, I have spoken mainly about the trial courts, and a great deal of what I have said is drawn from the article by Professor Resnik that I mentioned to you at the beginning. I am now going to talk a little bit about courts of appeals—probably the least known and possibly the least understood (maybe that is not bad) of the courts in the federal system. The same pressure of volume that the district judges are feeling is also felt on the appellate level. We have reacted in some of the same ways and in some ways differently. There has been, I think, in almost every circuit, an impetus towards the encouragement of settlement. On our particular court, the Eighth Circuit, this has been true for, I think, twenty-one years. I first came on the court in 1980, and the court voted to create a position called the Civil Appeals Manager. That is a fancy title for “settler of cases.” I voted against it (incidentally, I suppose no other judge agrees on this). Every other judge on my court at least voted to create the position, and then they took revenge on me. They instructed me to go out and find the person to fill the place, which I did. I got a very distinguished law professor, who later became Chief Justice of the Supreme Court of Missouri, to be our first settlement director. Now, the way our program is structured, I honestly believe it is not objectionable. Lawyers are not coerced; they are not ordered to appear before the settlement director. They don’t have to do what the settlement director says, and, whether they believe it or not, the settlement director doesn’t tell the judges what he is doing with particular cases.

On other courts of appeals, I have heard—and I can’t testify to this of my own knowledge—but I have heard that sometimes the settlement discussions get rather heated. If an employee of the court tells you, “You know, you ought to settle this case for X thousand dollars,” no matter how much you are reassured that the judges don’t know what is going on, I don’t know that you really believe it. There are courts in which, I think, some cases are disposed of coercively.

What about magistrate judges? The phrase “appellate magistrates” makes my blood run cold. I have heard it uttered; it was uttered in connection with a proposal for “innovative case management”—that is always the phrase that goes with these proposals—in a circuit out west which includes California, but I won’t tell you the number of the circuit. The Chief Judge of that court at one time suggested that we should have appellate magistrates. You know, I would think that would be an insult to the district courts, but maybe not. Anyway, that has never gone anywhere except that on the Ninth Circuit there is—or at one time at least was—a commissioner who handled lawyers’ fees matters. Now if it is just a question of adding up numbers and multiplying the hourly rate by the

proper number of hours expended, that is okay. But this gentleman, who was not a judge—Article I or Article III—was actually deciding how much to award lawyers. You could of course appeal to the court if you did not like what the commissioner did, but that is time consuming, expensive, and a lot of people did not go to that trouble.

I have mentioned staff attorneys. Let me explain to you a little bit more about what they do. This is another reaction that the courts of appeals have had to volume. The senior judge on our court, the judge with the most years of service, is Don Lay. He was Chief Judge for twelve years. He came on the bench in 1966. It was two years after he came on that the position of staff attorney was first created. What is a staff attorney? A staff attorney is a lawyer who lives and works, in our case, in St. Louis, which is our main seat of court. We have about twenty of them. They are assigned rather loosely to one or two judges, and they handle, initially, almost all of the pro se appeals and also a lot of cases in which there are lawyers on both sides. These are the people who draft memoranda and proposed per curiam dispositions and send them to judges who, before they receive the memoranda, typically know nothing about the case. They are not under direct supervision by any judge. Now, I don't want to be misunderstood here; these people are lawyers of great ability, and all of those cases might come out the same way if we had no staff attorneys. They might. But, it is somewhat disquieting to me to realize, looking at it from the inside, that non-judicial personnel (by "non-judicial" I mean people who are not judges) are having that much input into the process. Maybe we have to do it because of volume, but I find it disquieting.

Let me give you another example—and this is, I thought, a shocker—but about four or five years ago, our court, hearing of "innovative case-management techniques" from other circuits, decided to convene what we called an "oral panel." An oral panel is three judges who travel to St. Louis and go into a room with two staff attorneys. They stay in that room for, I don't know, three hours. And when they come out, they have disposed of fifty cases in three hours. The staff attorneys tell the judges about the case, but the judges have no paper. Now we can ask for it, but we don't. You have no paper on the case. The staff attorney tells you about the case, and it is thumbs up or down; I can tell you they were all thumbs down the day I did it. There is something disturbing about this. I felt unwell after doing it for one day, and I never did it again. Incidentally, our court has not done it for three or four years now. These cases are mostly brought by inmates. They are what we call applications for certificates of appealability, and the only question to be decided is, in non-legal language, is there anything to this or can it just be brushed off and discarded without much thought? Most of them can be and most of them should be. The process by which the judge decides cases in four minutes with no advance knowledge of the case and with not even a memorandum to look at, however, seems to me to be disturbing. I once made a speech in Des Moines in which I described this process as "an

abomination.” I decided later—it got into the papers—that I had been too harsh about it. The judges who participated in this did it in an effort to do the job that Congress gave them to do. They were acting in complete good faith, and, as I say, it may well be that these cases would have turned out no differently if we had spent a week on each one instead of four minutes. Still, I came away from that experience with the feeling that whatever could be said about it, it was not judging. The essence of judging is to decide and give reasons for decision and that is not what we were doing.

Well, one more example, if I may, and this is a subject on which I have probably spoken too much,²² but I guess there is no way that any of you could stop me now, so I will proceed into it. There is what the courts of appeals call an unpublished opinion. That does not mean secret; it does not mean non-public. You can go into the clerk’s office of any court of appeals, and if you pay whatever amount per page it costs, you can get any opinion you want. Also, in most circuits, including the Eighth Circuit, if you have a computer and know how to use it, you can punch the buttons on the computer, and the opinion will appear, even so-called unpublished opinions. So, they are not non-public, and they are not secret. What makes them unpublished? The thing that makes an opinion unpublished is that the court, usually the writing judge, decides that it should not be sent to West Publishing Company or LEXIS or other publishers to be printed in a book. Now, West Publishing Company has done us one better, because they now have a book called the “Federal Appendix” in which they publish unpublished opinions. Incidentally, some circuits won’t play that game; they are not sending their unpublished opinions to West to be put in the published book of unpublished opinions. When I stop to think about it, I can’t imagine why a private company, which has a copy of an official governmental act, would refrain from printing it simply because the writer says he does not want it printed. It seems to me incredible that the publishing companies are that docile, but they are.

Unpublished opinions are supposed to be routine. You might say that these are cases in which not much is going on. There are fancy words and legal tags to describe this. We have a thing called “Plan for Publication of Opinions,” which describes those cases that ought to be published and those that shouldn’t. The criteria include questions like: Does it make no new law?; Is it clear from existing precedents?; and so forth and so on. If so, you mark it “unpublished.” Well, what difference does it make, as long as anybody can get it? I can understand that we do not want to burden the *Federal Reporter (Third)* with every routine case. Fine. Let me tell you what the magnitude of this is. You may say to yourself, “Well, most cases that go to courts of appeals are probably pretty important, so there are not going to be very many of these unpublished opinions,

22. See, e.g., *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.) vacated, 235 F.3d 1054 (8th Cir. 2000) (en banc); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PROC. & PROCESS 219 (1999).

maybe ten or fifteen percent.” The fact is that more than eighty percent of the opinions of the courts of appeals in this country are unpublished.²³ Four out of every five cases are in this category.

What does that mean? What are the consequences of being unpublished? I am over-simplifying here. Different circuits have different rules about this, but there are two major consequences. First of all, lawyers are not supposed to cite these cases.²⁴ If you can imagine that: I am a lawyer; I am appearing before three judges of a court of appeals; and I have somehow gotten my hands on an opinion that those very judges issued the day before. The opinion is on point (or I think it is), and I say, “I’d like to cite” Before I get the rest of the sentence out of my mouth, the presiding judge says, “Our rules do not permit this. You may not tell us what we did yesterday.” Now, if you think I am kidding, read *Hart v. Massanari*,²⁵ which says in a published opinion that lawyers who cite unpublished opinions are subject to sanctions.²⁶ We will fine you if you tell us what we did yesterday! Of course, that is a rhetorical exaggeration, but theoretically it could happen, and I think you get the point. That is the first consequence. How this can be squared with the First Amendment, I don’t know.

The second consequence is that we don’t have to follow unpublished opinions. They are not precedential.²⁷ The rationale goes something like this. We have a lot of cases here. Most of them aren’t worth much. Most of them are routine. Most of them are clear, so there is no need for you to cite them. But if they are clear and routine, what harm could there be in citing them? The proposition that—of all the branches of government—a court, which is supposed to be governed by reason, can say to the lawyers in front of it, “We don’t have to follow what we, or another panel of our Court did in a similar case two or three years ago,” is shocking. Now, cases can be overruled, but on the courts of appeals—because we normally sit only in groups of three instead of the whole court—one panel is not supposed to overrule what another panel has done. You are supposed to go to the en banc court to get that accomplished. But under this practice, which is widespread, one panel may simply ignore what another panel has done if the judges on the other panel have labeled the opinion unpublished.

Now, it is a good thing that I am delivering this talk in Dallas, because I have a bit of local color here. You may have heard of the case *Anderson v. Dallas Area Rapid Transit*²⁸ (“DART”). Some of you have probably

23. U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 49 supp. tbl.S-3, available at <http://www.uscourts.gov/judbus1999/supps.html> (last visited Feb. 12, 2002).

24. See, e.g., 8th Cir. R. 28A(i) (adopted as of December 8, 1994).

25. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

26. *Id.* at 1180 (declining to impose sanction in this case but saying that sanctions could be imposed in other cases).

27. 8TH CIR. R. 28A(i) (adopted as of Dec. 8, 1994).

28. *Anderson v. Dallas Area Rapid Transit*, 180 F.3d 265 (5th Cir. 1999).

ridden DART. The question comes up: if somebody sues DART, are you suing the State of Texas? If it is an agency of the State of Texas, you can't sue it, because the Eleventh Amendment says you can't. If it is an agency of a county or a city, you can sue it so far as the Eleventh Amendment is concerned. About three years ago, in 1999, a man named Anderson, brought a lawsuit against DART. Again I am oversimplifying, and I may be in trouble here because some of these judges may have been involved in the case. They will tell me where I have strayed if I do. So, Anderson brings the lawsuit, and the court says the Eleventh Amendment is a bar because DART is an agency of the State. The case goes up to the Court of Appeals and they affirm it in an unpublished opinion. I don't know why this was considered by the Court of Appeals to be routine and unworthy of publication, because it was a case of first impression.

Two years later, a man named Williams brought a case against DART.²⁹ The same question comes up and the Court of Appeals says, in a published opinion, that DART is *not* a state agency and can be sued. Now, in defense of the court, I will say that the opinion does explain why those three judges disagreed with the previous three judges, which is more than you might have thought you would get. Essentially, one panel has overruled another, and the only justification for it is that the judges on the other panel did not mail their opinion to West and LEXIS. It is hard for me to believe that this is happening, but it is. Moreover, most circuit judges—this may not be true, but I sense that it is—think it is okay. I think the public is entitled to know that this is happening, and I hope that the public can somehow be made to feel some concern about it. So, what if you are Mr. Anderson, the man who lost the first case? When you hear about the Williams case—and this is imaginary since people don't usually do this (probably they ought to do it more)—you go see the circuit judge who decided your case, and you say, "Hey, what is this? Mr. Williams gets to go to court against these people, and I didn't." And here is what the judge must be saying: "You have to understand that we have a lot of cases here. We don't have time to think about all of them as much as we would like. We didn't think your case was very important, and we didn't spend much time on it. But now that we have had time to think about the question, we have decided that the position you took was correct. But that won't help you. Your case has already been decided. You lose. But the plaintiff in the second case wins even though the only difference between the two of you is that we did not send the opinion in your case to private companies that publish court opinions."

Now, I am happy to tell you that some courts are moving away from this practice. The Supreme Court of Texas recently took a step away from it.³⁰ The D.C. Circuit has adopted a rule that allows citation of un-

29. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001).

30. *See TEX. R. APP. P. 47.7* (2002) (maintaining that unpublished opinions are not precedential, but allowing their citation).

published opinions as precedential,³¹ and the Ninth Circuit allows you, in a rehearing petition, to point out the difference between what the panel has just done to you and a previous unpublished opinion.³² The House of Delegates of the American Bar Association has taken a similar action.³³

Well, I know that many of my colleagues are tired of hearing me talk on that subject, and I will stop. Let me just sum up. Here is our problem. Because of the volume of cases, the judges are not doing as much of our own work as we used to. I am just as guilty as anyone else here. We are not taking the time to give reasons for what we do. The essence of a judicial decision has to be reason. If you simply file an opinion that says affirmed, period, well, the district court thinks that is fine. But what about the litigants? What about the appellant? He has been given no reason. More than twenty years ago, I sat as a visitor with the Eleventh Circuit. There were sixteen cases to be argued. One of the judges on the panel brought with him to court five already prepared per curiam opinions that read: "Affirmed. See rule 25." That is all they read. We got into conference, and on a particular case I said, "I don't really agree with this. I think the judgment should be reversed." The other two judges looked at me and said, "Fine. You write it." So, I did, and they concurred in it. There is a danger with brushing off cases this way.

Finally after we have given reasons for deciding a case, we ought to be willing to stand behind the reasons. We ought to be willing to publish them, put them out for criticism by the bar and the public, and take what comes. If it is wrong, people will tell us. We may disagree with them, but at least we are not saying to them, "You may not tell us what we, an arm of government, have done yesterday or last year."

I don't want to end this on a negative note, because, as I said in the beginning, I think that the courts are performing as well or better than any other branch of government. We are, however, threatened by volume. The stratagems that I have described are not being taken because judges are lazy or because they don't like to work. They are being taken because the judges want to dispose of business in an orderly and reasonably prompt fashion. What we need is more time for each case, and this means more Article III judges. It is my hope that the logjam will be broken one of these days, and that there will be more Article III judges to decide these cases.

31. D.C. CIR. R. 36(c)(2) (adopted as of Mar. 1, 2002) (allowing for citation of unpublished opinions but indicating that they may not carry much precedential value).

32. 9th Cir. R. 36-3(b)(iii) (adopted as of July 1, 2000).

33. This action was taken in August of 2001. See ABA House of Delegates, *2001 Annual Meeting*, 2001 DAILY J. 1, 21 (Aug. 6-7, 2001), at <http://www.abanet.org/ftp/pub/leadership/2001journal.doc> (last visited Feb. 12, 2003) (approving report number 115, which recommends that courts alter their practices regarding unpublished opinions). For the adopted report, see ABA Section of Litigation et al., *Report to the House of Delegates* (Mar. 30, 2001), available at <http://www.abanet.org/leadership/2001/115.pdf> (last visited Feb. 12, 2003).