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# Applied Freakonomics: Explaining the Crisis of Volume

Thomas E. Baker

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## SELECTED PRESENTATIONS

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### APPLIED FREAKONOMICS: EXPLAINING THE “CRISIS OF VOLUME”

Thomas E. Baker\*

Some of you have read the *New York Times* bestselling book titled *Freakonomics*.<sup>1</sup> The authors explain Freakonomics this way:

[T]he everyday application of Freakonomics . . . has to do with thinking sensibly about how people behave in the real world. All it requires is a novel way of looking, of discerning, of measuring. This isn't necessarily a difficult task, nor does it require super-sophisticated thinking.<sup>2</sup>

I want to take this approach to understanding the long-term trends in the “supply and demand” for appellate decisionmaking

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\* Professor, Florida International University College of Law. This essay is based on my talking points as one of the panelists for the session entitled *The Position of Appellate Courts Today—Overview: “Demand” and “Supply”* on November 5, 2006, at the National Conference on Appellate Justice. An effort was made here to preserve the informal spontaneity and accessibility of an oral presentation in the text. Candor, rather than immodesty, compels me to disclose some of my relevant professional involvements and to provide citations to some of my writings in these footnotes. I thank Judge Richard A. Posner and Dr. Russell Wheeler for their “give and take” on these issues during my preparation and presentation.

1. Steven D. Levitt & Stephen J. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (William Morrow 2005).

2. *Id.* at 205.

between the last National Conference on Appellate Justice and this one. I want to reflect on the so-called “crisis of volume.”

Beginning in the 1960s and continuing for the next three decades, nearly everyone affiliated with appellate courts—judges, lawyers, litigants, legislators, experts, and scholars—were all shouting, “The sky is falling!” and insisting that judges should run for their lives.<sup>3</sup> This was particularly true of the United States Courts of Appeals. A series of commissions, committees, study groups, conferences, and symposia predicted that the rapidly increasing number of cases was about to overwhelm the federal appellate court system and that only radical structural reforms could save it.<sup>4</sup>

Over the last ten years or so, however, the doomsday clamor has died away and the sense of urgency has disappeared. But the caseload did not subside—appellate demand did not decline. Indeed, it continued to grow apace. Furthermore, there was no radical structural reform. Yet, today the courts of appeals are not hopelessly backlogged. There is no panicky sense of being overwhelmed. Everything seems to be “business as usual,” at least on the surface.

I have been “thinking sensibly” about these questions lately because I have been working with Professors Dan Meador and Joan Steinman on a casebook about appellate courts that chronicles this period.<sup>5</sup> I have reviewed all the literature and studies on appellate courts over the last twenty years or so.

My assigned role today is “commentator,” so I made a list of ten “comments.” Some are tentative. Some are obvious. None of them is super-sophisticated. Together they help us make sense of what happened and what did not happen—in effect, how people actually behaved in the real world—since the so-called

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3. Millennialists were everywhere and everyone was a futurist. Thomas E. Baker, *A View to the Future of Judicial Federalism: “Neither Out Far Nor in Deep,”* 45 Case W. Res. L. Rev. 705 (1995).

4. See Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. Davis L. Rev. 395 (2000) (summarizing those various efforts).

5. Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* (2d ed., Lexis-Nexis Publ. Co. 2006). I also have been thinking about these questions for a long time. See Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* (West Publ. Co. 1994).

"crisis of volume" and possible reforms were debated at the 1975 Conference.

COMMENT 1: THERE REALLY WAS NO CRISIS.  
IT WAS A FALSE ALARM.

Maybe so. Some judges and commentators took this position all along.<sup>6</sup>

But there is no denying the statistics. There was an exponential increase in the total number of filings in state and federal appellate courts as well as in the ratio of appeals per judge. Something was going on and the courts reacted to it, as I will describe. (Interestingly, during roughly the same period, the federal rate of appeals rose by a factor of five times—from one appeal out of every forty district court decisions to one out of eight.)<sup>7</sup>

"Crisis" is an overused word. Increasing appellate caseloads were nothing new in the 1970s and 1980s. But what was new at the time was the widespread belief that the court system was on the verge of breakdown and collapse. You can recapture the sense of the times if you go back and review some of the studies and reports. Many in this room participated in those efforts: the Freund Committee,<sup>8</sup> the Hruska Commission,<sup>9</sup>

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6. E.g. Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 *Judicature* 96, 96, 102-03 (Sept.-Oct. 1993) ("The exact nature of this crisis is not altogether clear, however. . . . Given the mixed measures uncovered about the crisis, it is probable that claims of impending doom might be exaggerations of problems that may only have the potential to reach crisis proportion.").

7. See generally Carol Krafka, Joe S. Cecil & Patricia Lombard, *Stalking the Increase in the Rate of Federal Civil Appeals* (Fed. Jud. Ctr. 1995), reprinted in 18 *Just. Sys. J.* 233 (1996) (also available at <http://www.fjc.gov>). The rates of appeal vary dramatically from state to state; for example, Louisiana (283) has the highest number of appeals per 100,000 population, and North Carolina (38) has the lowest. See generally *Examining the Work of State Courts, 2003: A National Perspective from the Court Statistics Project* 64-66 (Natl. Ctr. for St. Cts. 2004).

8. See *Report of the Study Group on the Caseload of the Supreme Court*, 57 *F.R.D.* 573 (1972).

9. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 *F.R.D.* 223 (1973); Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 *F.R.D.* 195 (1975).

the Estreicher and Sexton study,<sup>10</sup> various ABA committee reports,<sup>11</sup> the Federal Courts Study Committee,<sup>12</sup> the Federal Judicial Center Report,<sup>13</sup> the Long Range Plan of the Judicial Conference,<sup>14</sup> and the White Commission,<sup>15</sup> to mention a few.

There is one methodological problem that has never been overcome: We only measure appellate demand *quantitatively*, not *qualitatively*, and so the statistics do not tell us enough of what we really would like to know. But I do not have a solution to this problem. Over the years the FJC and the National Center for State Courts and others have tried to come up with *qualitative* models for measuring appellate workload—trying to figure out how to weight appeals by complexity and difficulty and judicial effort. Our models are still rather crude. For example, we do not have a good statistical model for determining when a new judgeship is needed. Periodically, we just increase the threshold number. We cannot agree on a maximum size of an appellate court—how many judges is “too many”—or even whether there is a maximum at which diseconomies of scale become unacceptable.<sup>16</sup>

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10. See Samuel Estreicher & John E. Sexton, *Redefining the Supreme Court's Role: The Federal Judicial Process* (Yale U. Press 1986). For a critical review, see generally Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 Mich. L. Rev. 1472 (1989).

11. See e.g. American Bar Foundation, *Accommodating the Workload of the United States Courts of Appeals* (ABA 1968); American Bar Association, Standing Committee on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth* (ABA 1989).

12. *Report of the Federal Courts Study Committee* (Apr. 2, 1990). I served as an Associate Reporter to the Study Committee.

13. Federal Judicial Center, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States* (1993). I was commissioned to do the literature review for this report.

14. Judicial Conference of the United States, *Long-Range Plan for the Federal Courts* (December 1995). I was an invited presenter before the Committee. Relatedly, I also served as chair of the Planning Subcommittee of the Standing Committee on the federal rules. Thomas E. Baker & Frank H. Easterbrook, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (1995).

15. See Commission on Structural Alternatives for the Federal Courts of Appeals (Dec. 18, 1998); see also Thomas E. Baker, *Some Preliminary Comments on the Final Report of the White Commission*, 15 J.L. & Pol. 471 (1999).

16. See Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 Ga. L. Rev. 863, 877-97 (1994).

COMMENT 2: THERE WAS AN OVERSUPPLY OF APPELLATE  
DECISIONMAKING CAPACITY IN THE COURT SYSTEM BEFORE THE  
“CRISIS OF VOLUME.”

My second comment is somewhat related to my first. It may be that in the good old days—often nostalgically identified as the Learned Hand Era—judges did not work as hard as judges work today.<sup>17</sup> Alternatively, if they were working hard, then the judges of that bygone era were lavishing too much time and attention on cases. Every appeal was afforded a lengthy oral argument and an elaborate published written opinion, and so forth. Appellate processes were excessive and inefficient. Judgepower was being wasted. Judges were spending an inordinate amount of their own time on individual appeals, performing time-consuming tasks that need not be performed by judges in the first place. Then, when the “crisis” hit, the judges ratcheted up their individual efforts and at the same time placed a premium on streamlined, more efficient appellate procedures.<sup>18</sup>

An important supply-side variable that deserves mention is developments in technology. Think what it would be like to be an appellate judge without Westlaw, Lexis-Nexis, e-mail, and word processing, even if you are a Learned Hand. Those are all inputs that have contributed greatly to increased efficiency in chambers today.<sup>19</sup>

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17. Chief Justice Rehnquist once made this point:

In short, the federal judiciary in the late fifties . . . had a good number of very able judges, but it was also able to accommodate some of the type of whom the humorist Finley Peter Dunne, writing as “Mr. Dooley,” spoke of in the early part of this century; he said of a judge that he knew, “‘e’s got a good judicial temperament; he don’t like work.”

William H. Rehnquist, *Seen in a Glass Darkly: the Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 2. *Nota bene*: For the record, I believe that the era of hardworking judges started exactly on the date of the appointment of the most senior judge attending this Conference!

18. See Comment 9, *infra*.

19. See Gordon Bermant, *Courting the Virtual: Federal Courts in an Age of Complete Inter-Connectedness*, 25 Ohio N. U. L. Rev. 527 (1999).

COMMENT 3: IN THE AFTERMATH OF THE “CRISIS OF VOLUME,” THERE SIMPLY IS MORE “JUNK”—MORE UNWORTHY APPEALS—IN THE APPELLATE SYSTEM THAN THERE WAS FOUR DECADES AGO.

The statistical breakdowns into categories of appeals bear this out. The Warren Court’s constitutionalization of criminal procedure resulted in making every state conviction into a federal habeas corpus case. Interpretations of the Eighth Amendment opened the courts to prisoners’ challenges of prison conditions, sometimes in appropriate and well-founded cases, but not infrequently in meritless challenges. Also during that era, Congress demonstrated a legislative propensity for federalizing criminal law. The pro se cases that resulted from these changes account for a large percentage of the increases in the numbers of appeals in the system. All the congressional efforts to reduce federal habeas corpus cases have not slowed down the growth of that part of the docket.

Qualitatively, these kinds of appeals are relatively straightforward and simply do not require or deserve as much time and attention from judges. Therefore, as a practical matter, we can discount some of the quantitative increases in the numbers of appeals, because they included a higher proportion of easier cases that the system could process with relative dispatch. In short, these categories of appeals exaggerate the statistical evidence of an appellate crisis.<sup>20</sup>

COMMENT 4: THE “CRISIS IN VOLUME” ALSO COINCIDED WITH THE ALTERNATIVE DISPUTE RESOLUTION MOVEMENT.

In the trial courts, ADR diverts some disputes—expensive commercial transaction cases, for example—out of the court system that otherwise might generate difficult and complex appeals. The ADR movement also took root at the appellate level. Most appellate courts today have established an in-court ADR track and more resources are being invested in settling

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20. The search for a useful definition or a meaningful standard to describe the “frivolous appeal” has been a snipe hunt. See Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 St. Mary’s L.J. 1321, 1351-56 (1994).

appeals with the result of increasing the supply of appellate decisionmaking.<sup>21</sup>

COMMENT 5: THERE HAS BEEN A DRAMATIC FALLING OFF OF LITIGATION-TO-TRIAL CASES IN THE INTAKE COURTS OVER THE SAME TIME PERIOD. BUT IT HAS NOT RECEIVED A LOT OF ATTENTION.

This trial court phenomenon is important. According to recent studies, the classic trial is vanishing.<sup>22</sup> There has been a long-term, gradual decline in the portion of cases that terminate in trials. There has been a pronounced, steep decline in the absolute number of trials in the past twenty years.

Thus, we may be experiencing a long-term development at the trial level that will have the net effect of offsetting the long term "crisis of volume" that occurred during the '70s, '80s, and '90s at the appellate level. Furthermore, today many appeals arise procedurally from a motion to dismiss or a summary judgment, and the issues are more or less issues of law without extensive records or evidence to slow down judges and their staffers. These appeals resemble law school exam questions, and they are well-suited to the procedural shortcuts that were implemented under the perceived threat of the "crisis of volume."<sup>23</sup>

COMMENT 6: THE "CRISIS IN VOLUME" RESULTED IN AN IMPORTANT STRUCTURAL REFORM IN MANY STATES: THE CREATION OF AN INTERMEDIATE APPELLATE COURT.

State after state added an intermediate tier to cope with appellate demand. (Thirty-nine states now have them, and a few are currently considering them.) Typically, these new intermediate courts were assigned the error-correction function

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21. See Robert J. Niemic, *Mediation Becoming More Appealing in Federal and State Courts*, 5 Disp. Resol. 13 (Summer 1999).

22. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Leg. Studies 459 (2004).

23. See Comment 9, *infra*.

so the state court of last resort could devote itself entirely to the law-making function. This familiar division of labor makes the appellate system more efficient, at least in theory.<sup>24</sup>

In the federal system, the creation of intermediate courts took place back in 1891, of course, in response to caseload growth that was threatening to overwhelm the Supreme Court. But there were also two more recent structural changes in the federal system: the division of the Fifth Circuit into the Fifth and Eleventh Circuits<sup>25</sup> and the creation of the Federal Circuit with its nationwide subject-matter jurisdiction.<sup>26</sup>

COMMENT 7: THIS STRUCTURAL ARRANGEMENT MAKES IT  
POSSIBLE TO INCREASE THE SUPPLY OF APPELLATE  
DECISIONMAKING BY ADDING MORE JUDGES TO THE  
INTERMEDIATE COURTS SITTING IN PANELS.

The number of authorized judgeships in the state and federal appellate courts increased significantly over the period of the “crisis of volume,” but still not as much as the increase in the appellate filings. Retired or senior judges also have had a net effect of increasing the supply of judges because they are replaced by active judges, yet they continue to sit on panels. The federal courts of appeals also make extensive use of visiting judges and district judges sitting by designation to staff hearing panels.

In the 1990s there was an animated national debate over whether the federal system had reached its limit of judgeships, and whether there should be a moratorium on new judgeships.<sup>27</sup>

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24. See Victor Eugene Flango & Nora F. Blair, *Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State's Highest Court?* 64 *Judicature* 74 (Aug. 1980); Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 *Judicature* 282 (Feb.-Mar. 1989).

25. See Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 *Ga. St. U. L. Rev.* 363 (1992); Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 *Sw. L.J.* 687 (1981).

26. See Daniel J. Meador, *Retrospective on the Federal Circuit: The First 20 Years—A Historical View*, 11 *Fed. Circuit B.J.* 557 (2001); Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 *Am. U. L. Rev.* 581 (1992).

27. Gordon Bermant, Edward Sussman, William W. Schwarzer & Russell R. Wheeler, *Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications* (Fed. Jud. Ctr. 1993).

Similar debates occurred in some states. That debate is still subtly playing out. Today, for example, the Ninth Circuit says, "We need more judges," but the Eleventh says, "We do not want more judges," even though filings in the Eleventh Circuit would seem to justify them. There are profound implications for appellate court administration from these opposing points of view, as well as for related concerns, such as funding the courts, collegiality among the judges, delegation to staffers, et cetera.<sup>28</sup>

COMMENT 8: ANOTHER PERSONNEL RESPONSE TO THE  
"CRISIS OF VOLUME" WAS TO INCREASE THE STAFFS  
OF THE APPELLATE COURTS.

Law clerks have been around for a long time, but more elbow clerk positions were added in chambers to deal with the growth of appellate dockets. The judges in some circuits cannibalized one of their secretary positions (the PC makes this feasible) so today some federal circuit judges have a chambers staff of one secretary and four elbow clerks.<sup>29</sup> Central staff attorneys were another direct personnel response arising out of the "crisis of volume" in the state courts. Once they were deployed and they proved to be helpful and effective, their ranks increased dramatically.

Law clerks and central staff attorneys perform tasks that judges once performed. There is no question that they increase the appellate capacity of the courts for which they work. There is a cost-benefit concern that there not be too many law clerks for the judge to supervise effectively, and some have voiced concern about too much delegation to staff attorneys.<sup>30</sup>

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28. See Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals*, 5 J. App. Prac. & Process 239 (2003).

29. See Thomas E. Baker, *The Institution of Law Clerks in the U.S. Courts of Appeals*, 3 Long Term View 71 (1995).

30. See Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 947 (1995).

COMMENT 9: THE “CRISIS OF VOLUME” CREATED A KIND OF SIEGE MENTALITY AND CONVERTED MANY JUDGES INTO ZEALOUS PROCEDURAL REFORMERS.

The epicenter of the reform movement was the old Fifth Circuit, which in its day was the largest court with the most judges and the most cases. But the reforms spread and were adapted in all the other federal courts, especially the Ninth Circuit, which is the largest circuit today.<sup>31</sup> State courts have followed suit, implementing various shortcut appellate procedures of their own.<sup>32</sup>

The procedural reform movement was reinforced when structural and personnel responses to the “crisis of volume” showed signs that they were playing out as viable strategies. For example, in 1981 the Fifth Circuit was split and judgeships were added—but to no avail, because the new Fifth Circuit and the new Eleventh Circuit continued to be plagued by docket growth. A couple of years after the split, both courts ranked among those with the most filings.

At the federal level, the “crisis of volume” served as the necessary rationale—some would say “rationalization”—for wholesale intramural procedural reforms. Judges discarded traditional appellate processes and implemented procedural shortcuts. The modern appellate processes are characterized by triage screening, reliance on law clerks, delegation to central staff attorneys, elimination of oral argument, and truncated expectations for written opinions (published and unpublished).

Pardon my academic jargon, but I submit that the “crisis of volume” thus was the impetus for *deconstructing* the traditional appellate processes and *reconstructing* novel and dramatically different appellate processes in the post-modern era. You might describe what happened as “Learned Hand meets Michael Foucault and Jacques Derrida.”

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31. Judith A. McKenna, Laural L. Hooper & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* (Fed. Jud. Ctr. 2000).

32. Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?* 35 Ind. L. Rev. 467 (2002); *Symposium: Expedited Appeals in Selected State Appellate Courts*, 4 J. App. Prac & Process 191 (2002).

This procedural reconstruction has continued to evolve. Consider a recent example from the Fifth Circuit called the "Conference Calendar," a method by which three judges and a couple of staff attorneys sit in a room with 100 case files and have to dispose of them in three days' time, as if they were competing on some TV reality show.<sup>33</sup> No one could make this up.<sup>34</sup>

Thus, over the tenure of a single generation of judges, the state and federal appellate courts discarded venerable Anglo-American procedures that had evolved over centuries, traditional appellate procedures that had been remarkably stable for over a century in the United States. Choose your own headline for this out-with-the-old-and-in-with-the-new tabloid-style storyline: a "Procedural Metamorphosis" or a "Perverse Mutation." And add the corresponding tag line after the colon: "necessary and efficient modernization" or "misguided betrayal of tradition."

The late Chief Judge Markey of the Federal Circuit once waxed nostalgic when describing the "before" and "after" of all these administrative reforms and procedural shortcuts:

As performed as recently as [forty] years ago, the personally conducted federal appellate process comprised: (1) review of the record and briefs by the judge; (2) oral argument of thirty or forty-five minutes on a side; (3) preparation by the judge of a written opinion; (4) assistance in each chamber by one elbow law clerk and one secretary; and (5) frequent and adequate conferences of the judges on the cases.

As performed today, the bureaucratically conducted federal appellate process comprises: (1) screening and track-setting by staff attorneys; (2) review of records and briefs by a law clerk or a staff attorney; (3) oral argument in less than one third of the cases, and then for fifteen or twenty minutes on a side; (4) preparation of opinions by law clerks and staff attorneys; (5) dispositions without opinions in two-thirds of the cases; (6) assistance in each chamber by three law clerks and two secretaries and

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33. See Jerry E. Smith, *Foreword: Fifth Circuit Survey*, 25 *Tex. Tech L. Rev.* 255, 255-58 (1994).

34. Cf. Thomas E. Baker, *2020 Year-End Report on the Judiciary by the Chief Justice of the United States*, 24 *Pepp. L. Rev.* 859 (1997) (a satirical description of twenty-first century appellate innovations such as the Coin-Toss Calendar and the Scratch-an-Appeal).

assistance to all chambers by a corps of staff attorneys; and  
(7) infrequent, short judicial conferences on the cases.<sup>35</sup>

COMMENT 10: ONE POSSIBLE REASON WHY NOTHING EVEN MORE RADICAL HAPPENED IN RESPONSE TO THE “CRISIS OF VOLUME” IS THAT JUDGES AND LEGISLATORS BELIEVED THAT THE SOLUTIONS BEING PROPOSED WERE WORSE THAN THE PROBLEM. AS THE OLD SAYING GOES, THEY FEARED THAT THE CURE WOULD BE WORSE THAN THE DISEASE.

There was no shortage of big ideas and novel proposals at the national level. Think back to various studies and remember some of their proposals. The Freund Committee and the Hruska Commission proposed a “National Court of Appeals.” Then there was Chief Justice Burger’s “intercircuit panel” and the Federal Courts Study Committee’s “En Banc Intercircuit Conference.” There were proposals to subdivide all the circuits and there were proposals to consolidate all the circuits. There were proposals to create appellate subject-matter courts. There were proposals to make the first appeal discretionary. There were proposals to locate the first appeal-as-of-right at the district court level. And on and on and on.<sup>36</sup>

The proposals back then called for elaborate futuristic appellate apparatuses. But more recently there seems to be no interest in them whatsoever on the part of the judges or the Congress, the officials with the power to implement them. Indeed, we still have not figured out what to do with the Ninth Circuit; we are all still having conferences and writing articles about it.<sup>37</sup>

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35. Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. Rev. 371, 376-77 (1988).

36. See Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. Fla. L. Rev. 225 (1985); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 Ga. L. Rev. 913 (1994); Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 Harv. L. Rev. 1400 (1987).

37. See Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such A Good Idea*, 22 Ariz. St. L.J. 917 (1990); *Symposium: Ninth Circuit Conference*, 48 Ariz. L. Rev. 221 (2006).

Back during the heyday of the "crisis of volume," the oft-expressed expectation was that some kind of radical structural change was inevitable. The experts kept saying that it was just a matter of time, and that a new appellate court system would be in place by the beginning of the new century. It is noteworthy, however, that the millennium has passed and those proposals are still only on the drawing table. The powers-that-be apparently have opted for retaining the present structure, at least for the indefinite future.

### CONCLUSION

What can we take away from my brief ten-point account of the long-term trends in the market for appeals? Here is one possible narrative with explanatory power:

Once upon a time—during the Learned Hand era—supply exceeded demand, but we were not aware of it at the time. Then beginning in the 1960s, when demand began to approach supply, the courts experienced the closing of that gap as "crisis of volume." We increased the supply of appeals by creating state courts of appeals and by adding judges to the federal courts of appeals. We also added appellate inputs to both federal and state court systems in the persons of law clerks and staff attorneys. We conserved scarce resources by reducing judicial inputs in some cases by various procedural reforms like screening appeals to non-argument calendars and relying on unpublished opinions or doing away with opinions. This amounted to a paradigm shift in appellate procedure that Thomas Kuhn could write home about: The new norm was to afford just enough procedure "sufficient unto the case."<sup>38</sup>

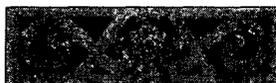
Today, most of us seem to be content in believing that the courts of appeals survived the "crisis of volume," whether it was real or imagined. The courts have maintained an appellate equilibrium: They manage to decide about as many appeals as

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38. One footnote-worthy curiosity about my narrative is that we never systematically focused on incentives and disincentives to appeal. We never fooled around with the demand side, except for some goofy efforts to limit habeas corpus petitions. Our responses to the "crisis of volume" were exclusively on the supply side. I am not exactly sure why, but I have some suspicions, a discussion of which would be beyond the scope of my role as the commentator on this panel.

are filed each year. This is important and significant. Cases are not queuing up on the docket, although disposition times have lengthened appreciably.<sup>39</sup> Furthermore, we now take for granted what were once characterized as “emergency” procedures. We have lowered our expectations for appellate procedure. We have defined down our appellate values. We all have internalized the postmodern norms of the minimalist procedural paradigm.

In short, what was a “crisis” for the previous generation of judges, lawyers, and scholars, is simply “normal” for our generation. We usually do not even stop to think about such things . . . except perhaps at a conference like this.



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39. Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the “Crisis of Volume” in the U.S. Courts of Appeals*, 51 Wash. & Lee L. Rev. 97 (1994).