

2-1-1995

## FOREWARD: The Second Circuit - Year in Review

Joseph M. McLaughlin

Follow this and additional works at: <http://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

Joseph M. McLaughlin, *FOREWARD: The Second Circuit - Year in Review*, 61 Brook. L. Rev. 347 (1995).  
Available at: <http://brooklynworks.brooklaw.edu/blr/vol61/iss2/2>

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks. For more information, please contact [matilda.garrido@brooklaw.edu](mailto:matilda.garrido@brooklaw.edu).

# BROOKLYN LAW REVIEW

---

Volume 61

1995

Number 2

---

## FOREWORD

### THE SECOND CIRCUIT—YEAR IN REVUE\*

*Hon. Joseph M. McLaughlin*<sup>†</sup>

Judicial humor is a dreadful thing. . . . [T]he bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.

The Judicial Humorist vii (W. Prosser ed. 1952).

The judicial humorist has been highly suspect at least since 1875 when *The Mikado's* Lord High Executioner labelled him a *nisi prius* nuisance and put him on a "List of Those Who Would Not Be Missed." Federal Courts of Appeals, in particular, are not known for their humor. Litigants and attorneys who appear there have come to expect penetrating legal analysis woven in finely crafted, sober prose.

Entering the majestic courtroom on the seventeenth floor of 40 Centre Street, attorneys can easily be overwhelmed by the majesty, the tradition, the solemnity. The mood is serious. Second Circuit panels sit stoically in their funereal robes, flanked on either side by the scowling busts of Judges Henry Friendly and Learned Hand. They sit—fearsome, face-

---

\* ©1995 Joseph M. McLaughlin. All Rights Reserved.

† Judge, United States Court of Appeals for the Second Circuit.

less—waiting patiently to pounce on the inevitable fuzzy analysis or misstated fact. Questioning is pointed and exacting. Where does humor have a place in all this?

Risibility is the most prominent trait distinguishing us from the rest of the animal kingdom. It is inevitable, therefore, that like the shifting of tectonic plates, humor will raise its jovial head, even in the most sacred of precincts. "Believing that, in today's world of often unrelieved solemnity," humor should have a place, the Second Circuit has long been hospitable to occasional flashes of humor. See *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam). In this Foreword, I seek to present some of the highlights from the Second Circuit's 1994-95 "Year in Revue."

This term, we said farewell to two of our colleagues, Hon. Lawrence C. Pierce and Hon. George W. Pratt, who served this Court with distinction. They have shown the uncommon good sense to explore distant horizons.

Judge Pierce, a federal judge for twenty-four years, retired at the end of March to become director of the Cambodian Provincial Court Training Project in Phnom Penh. Sponsored by the International Human Rights Law Group, the project offers the assistance of judges, lawyers, and court administrators to Cambodia's developing justice system. Judge Pierce has joined his son in Cambodia, where he too is doing charitable work.

Judge Pratt has started a law practice manned (and womanned) principally by his former clerks. What motivated him to move in this direction? Was it the desire to counsel clients and advocate once again; the litigation itch; the thirst for a new challenge; intellectual curiosity; or the lure of lucre?

Every judge likes to leave some distinctive impress on the court he or she has served so long. In Judge Pratt's years on the bench, he enthusiastically agitated for the complete annihilation of footnotes in the opinions of this Circuit. In 1984, he initiated the "Intra-Circuit Footnote Reducing Competition" ("ICFRC"). Each year, he compiled the results of the competition, which included statistics that brought the most outrageous offenders into the glare of daylight. See *In Justice Breyer's Opinion, A Footnote Has No Place*, N.Y. TIMES, July 28, 1995, at B18 (Judge Pratt's statistics confute the *New York Times'* assertion that "no one keeps records of this sort of thing"). Although notions of collegiality compel me to respect

Judge Pratt's practice of veiling his analysis in secrecy, I am pleased to dedicate Part A hereof to his honor (well aware that many members of my court, not to mention the Supreme Court, will dissent from Part A). *But see id.* (applauding Justice Stephen G. Breyer for completing "his freshman year on the Court without writing a footnote").

### A. *Of Footnotes*

As then-Judge Mikva of the District of Columbia Circuit so eloquently stated, "The use of footnotes in legal writing has not been contained. Instead it has spread like a fungus and has magnified all of the shortcomings of legal writing. . . ." Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985). Indeed, I take Puckish delight in noting (in text) that the fungus has been cultivated within the pith of the *Brooklyn Law Review*—the very editorial board itself. In a letter, (sac-rilegiously sent to me on March 17, 1995), a board member edified me that "[i]n the past, the Forewords have been ten to fifteen publication pages, which correspond to about ten to fifteen pages of text and *five pages of footnotes*, double-spaced on 8-1/2" x 11" paper." (Citations omitted to protect my brethren) (emphasis mine, all mine). I feel compelled to deviate from this norm.

Judge Pratt pointed out in the Ninth Annual ICFRC, that I, myself, have been a terrible sinner on occasion. *See 701 Pharmacy Corp. v. Perales*, 930 F.2d 163, 168 n.2 (2d Cir.) (including a REALLY BIG footnote), *cert. denied*, 502 U.S. 815 (1991). Like Saint Augustine, another reformed sinner, I have renounced my wickedness and now exult in highlighting the folly of others. In *Varda, Inc. v. Insurance Co. of North America*, 45 F.3d 634 (2d Cir. 1995), the plaintiff submitted a fifty-page brief that included fifty-eight footnotes, many over a page long. Had the contents of the footnotes been presented in canonical form, the brief would have totaled approximately seventy pages, far in excess of the fifty-page limit permitted under Federal Rule of Appellate Procedure 28(g). *Id.* at 640. In denying costs to the plaintiff in its successful appeal, I suggested that plaintiff's counsel was fortunate to practice law in the present day. In the late 16th century, for example, an English court imprisoned the pleader of a 120-page replication and

ordered the warden to:

cut a hole in the midst of the same engrossed Replication . . . and put the said [pleader's] head through the same hole, and . . . lead the said [pleader] bareheaded and barefaced round about Westminster Hall, whilst the Courts are sitting . . . .

*Id.* at 641 (quoting *Mylward v. Weldon*, (1596), first reported in 1 George Spence, *EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 375 n.h (Philadelphia, Lea & Blanchard 1846)).

Seemingly bemused by this footnote contretemps, the American Bar Association Journal contacted the writer of the offending *Varda* brief:

[S]he suggested the decision recalls a scene in the movie "Amadeus" in which the king is asked what he thinks of Mozart's newest symphony. Replies the critical monarch, "There are too many notes."

*Footnote Furor: Court criticizes long briefs*, A.B.A. J., May 1995, at 38.

While I applaud the author's quick wit, I assure her that her brief was more Metallica than Mozart. Perhaps the *Varda* decision will spur Congress to amend the Federal Rules of Appellate Procedure to allow sanctions against courts for the abuse of footnotes. See *Laborers' International Union of North America v. Foster Wheeler Corp.*, 26 F.3d 375, 378-402 nn.1-33, and in particular, 386-88 n.8 (3d Cir.) (using footnotes which, had they been included in an opinion of this Circuit, would have colossally skewed the standard deviation in Judge Pratt's annual statistics), *cert. denied*, 115 S. Ct. 356 (1994).

Noel Coward once observed that "[e]ncountering [a footnote] is like going downstairs to answer the doorbell while making love." See Arthur Austin, *Footnotes\* Skulduggery\*\* and Other Bad Habits\*\*\**, 44 U. MIAMI L. REV. 1009, 1012 n.20 (1990) (footnotes in article title omitted) (quoting Noel Coward). That said, even I must concede there were several occasions when it was worthwhile to answer the doorbell. Regrettably, I had to stray from our own circuit to find them.

(1) We begin in California, the very cynosure of judicial efficiency. In *People v. Arno*, 153 Cal. Rptr. 624 (Cal. Ct. App. 1979), the defendants were convicted of possessing obscene films with intent to distribute, and the California Court of Appeal split over whether the use of binoculars was a search in violation of the Fourth Amendment. Footnote 2 of the majority opinion responded to the dissent:

2. We feel compelled by the nature of the attack in the dissenting opinion to *spell out* a response:

1. Some answer is required to the dissent's charge.
2. Certainly we do not endorse "victimless crime."
3. How that question is involved escapes us.
4. Moreover, the constitutional issue is significant.
5. Ultimately it must be addressed in light of precedent.
6. Certainly the course of precedent is clear.
7. Knowing that, our result is compelled.

*Id.* at 628 n.2 (emphasis added).

The dissenter failed to see the humor in the downward acrostic. *See id.* at 644 n.14 (Hanson, J., dissenting).

(2) In *Golden Panagia S.S., Inc. v. Panama Canal Commission*, 791 F.2d 1191 (5th Cir. 1986), a steamship company retained Henry Newell to litigate a collision claim. Newell allegedly stole the funds received in a settlement agreement between the steamship company and the United States Government. Although "noting" that the steamship company had not sued Newell, the court held that it nonetheless lacked personal jurisdiction over him:

7. Consistent with its theory that there was no valid settlement, and that the stolen funds still belonged to the Government, Golden Panagia [the steamship company] has declined to bring suit against Newell. Counsel for Golden Panagia informed this court at oral argument that Newell is now, in any event, dead. A Higher Court thus has jurisdiction over Henry Newell, and we are confident that any sins he may have committed will be dealt with more appropriately there. *See Matthew 25:41-46* (explaining Final Judgment procedures).

*Id.* at 1199 n.7.

(3) Some footnotes glitter with erudition on non-legal matters and the writer may be forgiven for yielding to the temptation to work it in. In *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986), Anita Kirchoff was arrested for feeding pigeons and walking her dogs in the park. The police escorted Anita, her dogs, and her parakeet to her home. When they arrived, Anita's husband William, who had a black belt, had a few choice words for the police as well as a few karate chops. In the scuffle, the Kirchoffs' red macaw entered the fray and allegedly landed on William's head, drawing blood. The court noted:

1. Anita Kirchoff will never be confused with the 30th Earl of

Mar, whose hobby was kicking pigeons.

2. Predatory birds rarely attack large animals whose eyes they can see, and perhaps William's eyes got distracted to his macaw's glee.

*Id.* at 320-21, nn.1-2 (citations omitted).

(4) In the Tenth Annual ICFRC, Judge Pratt praised Judge Amalya L. Kearse for preserving her eight-year string of noteless opinions. But before that dry spell, Judge Kearse, like me, occasionally lapsed into sin. Thus, in *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982), an action was brought for copyright infringement and for breach of a licensing agreement relating to the 1931 film *Tarzan, the Ape Man*. In footnote 20 of the opinion, Judge Kearse dispelled a famous misconception:

20. Contrary to popular belief, the line "Me Tarzan, you Jane," (or, as it is sometimes quoted, "You Tarzan, me Jane") does not appear in the 1932 film. The actual dialogue is as follows:

[Tarzan causes an ape that has frightened Jane to leave her alone]  
 Jane Thank you. [Tarzan does not respond]  
           Thank you for protecting me.  
 Tarzan [mimicking her] Me?  
 Jane I said thank you for protecting [pointing to herself] *me*.  
 Tarzan [tapping her on the chest] Me.  
 Jane No. [pointing to herself] I'm only me for *me*.  
 Tarzan [tapping her] Me!  
 Jane No. [pointing to him] To *you* I'm *you*.  
 Tarzan [tapping himself on the chest] You?  
 Jane No. [pause] I'm Jane Parker. Understand? Jane. [pointing to herself] Jane.  
 Tarzan [tapping her] Jane.  
 Together [Tarzan taps her] Jane.  
 Tarzan [tapping her] Jane.  
 Jane [nodding] Yes, Jane.  
 Jane [pointing to him] You? [Tarzan does not respond; she points to herself] Jane.  
 Tarzan [tapping her] Jane.  
 Jane [pointing to him] And you? You?  
 Tarzan [tapping himself] Tarzan. Tarzan.  
 Jane [slowly] Tarzan.  
 Tarzan [alternately tapping her and himself, harder and harder each time] Jane. Tarzan. Jane. Tarzan. Jane. Tarzan. Jane. Tarzan. Jane. Tarzan. Jane. Tarzan. Jane. . . .  
 Jane [exasperated] Oh, please stop. Let me go. I can't bear this. [realizing he cannot understand] Oh, what's the use?

*Id.* at 630 n.20.

Now that is erudition!

I conclude with another profundity from Judge Mikva: “[A] footnote is below the text to which it refers.” Mikva, *supra* at 647-48.

### B. *New Judges*

While we lament the departure of old friends, we welcome three new members to this Court. To explain the selection process and impact that our new colleagues have had on this Circuit, we resort to an ageless mode of legal reasoning: analogy. Comparing the Second Circuit to a college basketball team, our recruiting season was a smashing success. Kudos go to Coach Clinton and his scouts Pat Moynihan and Al D’Amato. Three new judges joined the squad: Hon. José A. Cabranes, Hon. Fred I. Parker, and Hon. Guido Calabresi. Judge Parker, a center from a small town high school program in Vermont, enters the Court with the distinction of being the tallest judge, able to slam dunk appellants’ counsel in a single bound. Judge Cabranes, hailing from Connecticut, is a solid, dependable power forward. Finally, we recruited from the perennial high school powerhouse and state champion, New Haven High, its star scorer Judge Calabresi. Talented, but a real Bulldog, he is a true All-American of footnotes, and would have been a serious contender in Judge Pratt’s annual stats. *See, e.g., Taber v. Maine*, 45 F.3d 598, 621 (2d Cir. 1995) (Pratt, J. concurring in judgment only) (apparently twenty-two footnotes in the majority opinion were twenty-two too many). In their first season, each has made a substantial contribution.

### C. *In Bancs and Major Decisions*

For the first time in over a year, the Second Circuit sat *in banc* to hear argument on *Pro Choice Network v. Operation Rescue*, No. 92-7302 (2d Cir. Sept. 6, 1994). A dicey balancing of first amendment rights (pro-lifers) and abortion rights (pro-choicers), it was clear from the start that rational discourse and analysis were not uppermost in the minds of the litigants and many spectators.

Thankfully, few *in bancs* are heard in the Second Circuit. My personal antipathy for the *in banc* procedure is well known



and not original. See MARVIN SHICK, *LEARNED HAND'S COURT* 116-17 (1970) (during Learned Hand's some dozen years as Chief Judge of the Second Circuit, there were no *in bancs*). Privately, many consider it a waste of judicial resources. Others are fonder of the procedure, at least in theory. See Jon O. Newman, *In Banc Procedures in the Second Circuit, 1989-1993*, 60 *BROOK. L. REV.* 491 (1994).

No one could accuse the *in banc* court of not being a "hot" bench. Both sides were prodded, not always gently, by a series of hypotheticals and cross-examination. Judges Meskill and Oakes led the interrogation. Neither side was spared. Perhaps the most surprising aspect of the case was the high quality of the arguments by counsel, their responses to some penetrating and thought-provoking questions, the remarkably restrained courtroom crowd, and the lack of protesters. In the end, both sides withstood the questioning admirably.

In *In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995), Judge Van Graafeiland, long known as a lively member of this Court, produced a spirited dissent. The majority had agreed to affirm a jury verdict against Pan Am, concluding that Pan Am had engaged in "willful misconduct" and that the willful misconduct was a "substantial factor in causing the disaster." *Id.* at 812. Judge Van Graafeiland resolutely disagreed. Acknowledging that by penning a dissent, his name "[would] be anathema to the hundreds of people . . . seeking recoveries probably in excess of \$1 billion, and [his] long-time friendship with Judge Platt [the trial judge] [might] suffer some stress," *id.* at 830 (Van Graafeiland, J., dissenting), Judge Van Graafeiland began a sulphurous attack on the plaintiff's theory of causation in bold capital letters: "NO ONE KNOWS WHEN, WHERE OR HOW THE BOMB GOT ON THE PAN AM PLANE EXCEPT THE PERSON WHO PUT IT THERE." *Id.* at 834. He quoted at length from the lower court proceedings and the oral argument where he had forewarned plaintiffs' counsel: "All right, that's the issue. I'll read the record very carefully, Mr. Kriendler [plaintiffs' counsel]." *Id.* at 846. No one reads a record as carefully as Judge Van Graafeiland. Describing the plaintiff's case as a "house of cards" and lamenting that this Court would be "blinking reality" if it did not find the district court's errors were prejudicial, he concluded with characteristic

flair: "even-handedness is the *sine qua non* of a fair trial. A trial is not a 'game of blindman's buff.'" *Id.* at 846.

#### D. *Literary and Artistic Allusions*

Legal writing is notoriously dry and crabbed. The occasional literary flourish adds charm to the exercise, and in this arena, Judge Cardamone leads the way among mice, men, women, and judges. *Herman Miller, Inc. v. Thom Rock Realty Co., L.P.*, 46 F.3d 183, 184 (2d Cir. 1995) ("Everyone knows how true is the poet's observation: 'The best laid schemes o' mice and men, Gang aft a-gley, And lea'e us nought but grief and pain, For promised joy.'" (quoting ROBERT BURNS, "TO A MOUSE," *THE POETICAL WORKS OF ROBERT BURNS* (Little, Brown & Co. 1863)); *Brown v. Commissioner of Internal Revenue*, 799 F.2d 27, 28 (2d Cir. 1986) ("As the poet Robert Burns so wisely observed: 'The best-laid schemes o' mice and men, Gang aft a-gley. . .'" (citations omitted)); *Perales v. Reno*, 48 F.3d 1305, 1317 (2d Cir. 1995) (Cardamone, J., dissenting) (comparing the INS to Charles Dickens's Circumlocution Office, stating "Through its delicate perception, through its tact, and through the genius with which it acted, 'the Circumlocution Office was beforehand with all the public departments in the art of perceiving—HOW NOT TO DO IT.'" (quoting CHARLES DICKENS, *LITTLE DORRIT* (Pt. One) 128 (Peter Fenelon Collier & Son 1900)); *Hill v. City of New York*, 45 F.3d 653, 656 (2d Cir. 1995) ("Here, because what function was being performed 'is smother'd in surmise,' that aspect of the case must first be resolved in the district court into a final order before we may entertain jurisdiction over it.") (quoting WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 3 (Oxford Press ed. 1928)); *United States v. Arboleda*, 20 F.3d 58, 62 (2d Cir. 1994) ("[T]he readback was not, to paraphrase Shakespeare, like one of those tedious twice-told tales vexing to the dulled ears of a drowsy juror.") (citing WILLIAM SHAKESPEARE, *THE LIFE AND DEATH OF KING JOHN*, act 3, sc. 4, 423 (Oxford Univ. Press ed. 1928)); *New York Health & Hospitals Corp. v. Perales*, 50 F.3d 129, 130 (2d Cir. 1995) ("It is more like examining a subject in that half-light called the gloaming, where to identify it accurately one needs to have the instincts of Argos, Odysseus' dog, who recognized his master dressed as a beggar

upon his return home after 20 years' absence.") (citing HOMER, *THE ODYSSEY*, 196-97 (W.H.D. Rouse trans., 1937)). Judge Miner also displayed a literary flourish by dividing an opinion like chapters in a book or acts in a play. See *United States v. Altman*, 48 F.3d 96 (2d Cir. 1995).

Although in this Circuit there have been whispers (and even drafts) of opinions completely in verse, other courts have been bold enough to go whither we have feared to treadeth:

We thought that we would never see  
 A suit to compensate a tree.  
 A suit whose claim in tort is prest  
 Upon a mangled tree's behest;  
 A tree whose battered trunk was prest  
 Against a Chevy's crumpled crest;  
 A tree that faces each new day  
 With bark and limb in disarray;  
 A tree that may forever bear  
 A lasting need for tender care.  
 Flora lovers though we three,  
 We must uphold the court's decree.  
 Affirmed.

*Fisher v. Lowe*, 333 N.W.2d 67, 67 (Mich. Ct. App. 1983) (footnote omitted, of course).

As to art, we have shown our familiarity with impressionism and realism. In *United States v. Cropper*, 42 F.3d 755 (2d Cir. 1994), a sentencing guidelines case, the issue was whether the defendant's sentence should have been enhanced for "more than minimal planning." *Id.* at 756-57. Holding that the evidence did not suggest serious planning at all, the court wrote, "[Cropper's] plan was a Monet impressionist rendering, fashioned as the thoughts occurred to him. It was certainly not a Manet of detailed execution." *Id.* at 759. Of course, many litigants and their attorneys do not always appreciate these fine literary or artistic distinctions. In fact, at oral argument, many of them have problems distinguishing between a red light and a green light.

## E. Pro Se Cases

This year has seen the continuation of our proud tradition of offering oral argument to almost all litigants on appeal. This tradition extends to an unusual but all-too-common category of

appellate litigant: the differently-mentally-abled litigants, *pro se* and otherwise. Typical cases from these friends of the court involve elaborate conspiracies. For example, one involved the FBI conspiring with the Mafia to deny the rights of plaintiff, and another involved a "cartel" of bank executives and officers conspiring to defraud plaintiff by lending him money to fund his losing schemes. It is with great respect for due process that we note that most of these litigants of varying abilities get their day in court.

The most interesting *pro se* cases come to us from the state courts, via the habeas corpus route. Many involve criminal defendants who have elected to represent themselves at trial, a right guaranteed them under *Faretta v. California*, 422 U.S. 806 (1975). Before *Faretta*, a trial judge could refuse to let a criminal defendant represent himself if he thought the defendant was not competent to do the job. Competence is now a minor factor in the equation as is evident in the transcripts that come before us.

In one case, a *pro se* defendant found himself stymied, like an up-ended turtle, after the trial judge sustained twenty-three successive objections to the defendant's questions. Giving up in disgust, the defendant rested. "What do you want to do with the rest of your exhibits?" inquired the judge. The defendant despaired: "Give them to the Salvation Army."

A defendant trying his own case is much like a man cutting his own hair. He is too close to the material to appraise what he is doing. Thus, in another case, a *pro se* defendant sought to shake an eyewitness's identification. He asked: "How can you be so sure? Isn't it a fact that I wore a ski mask when I robbed your store?"

The following could only happen in Brooklyn. A *pro se* defendant in a burglary case stood at counsel table and posed a question. Darting to the witness box, he answered the question and then returned to counsel table. There, he put another convoluted, incomprehensible question, dashed again to the witness box, where, after the jury stopped giggling, he answered: "Could you rephrase that question?"

Very few foreigners seek to proceed *pro se*, although the elegance level of the English spoken in some courts might suggest that even non-English speakers might be better advised to go *pro se* on occasion. In *United States v. Yee-Chau*, 17

F.3d 21 (2d Cir. 1994), a defendant argued to us that he was denied effective assistance of counsel when his appointed lawyer began his closing argument with the following gem: "The awesome majesty that has become the American bald eagle, yet, you must render unto Caesar only what justly belongs to Caesar, and it was the intention of our founding father that you use this rendition and temper it with reasonable doubt." *Id.* at 26-27. *Held*: counsel not ineffective.

Occasionally, a lawyer will bring his own lawsuit *pro se*, reaffirming the old jape that a lawyer who represents himself has an idiot for a lawyer and a fool for a client. Recently, one benighted soul sought to play both roles in a copyright infringement suit. His argument on appeal was that he had been deprived of his property rights by the failure of the defendants to put certain witnesses on the stand. Two of his point headings stand out:

POINT I  
THE FACTS CRY OUT—LIKE LINCOLN AT  
GETTYSBURG—  
FOR THE CONSTITUTION . . .

. . .  
POINT IV  
THE LAW

Perhaps fearful that this point heading might be unilluminating, he proceeded to argue Point IV:

"The corps, the corps, the corps," Douglas McArthur intoned, summing up his career in military defense of the United States Constitution. "The law, the law, the law," this officer of the Court sums up at the half-way mark of his career, duty bound with lawyer's tools to equally defend the Constitution.

#### F. *New Courthouse*

Nothing has stoked the flames of controversy more than the new courthouse. It has been derided by some as palatial, unnecessary, and lavish, and defended by the faithful as essential and long overdue. Could it really be true that whole chambers from 40 Centre Street fit neatly into a Secretary's office in the new courthouse? Or that the elevators there (even the judges' elevator) resemble bank vaults?

Who in their right mind would not want to move there?

Well, circuit judges (and some senior district judges), of course. Like 17th century Europeans being regaled with Marco Polo's stories of the riches of the East, we hear stories of magnificent chambers, impeccable courtrooms, and unspeakable luxury. When confronted with the choice of moving to the new world, circuit judges (and the elder district judges), never having been accused of possessing common sense in the past, passed on the opportunity. Why, say you? Tradition. To most of us, 40 Centre Street, the 17th Floor Courtroom, and our chambers evoke the living memory of our court's greatest moments. Remember, these are the halls where giants once roamed, where Learned Hand and Henry Friendly distilled the law (and other libations). Upon entering these hallowed chambers, one might stumble across such priceless treasures as Judge Irving Kaufman's "Glib and Superficial" rubber stamp, which I, on occasion, have been known to use. The "new" courthouse—the very name mocks tradition. It will, no doubt, become a new haven (pun intended) for the younger judges and magistrate judges: the next generation.

### G. *Sundry*

The judges' elevator can be a source of discomfort. Derided by the misanthropic as elitist, aristocratic, or anti-democratic, it is not as regal as the uninitiated may surmise. The elevator is designed for one, and can be a source of uneasiness when a circuit judge rides it with a district court judge whom he or she has just reversed.

The quick turnaround time of opinions in the Second Circuit vis-a-vis other circuits is a source of pride. The recent *New York Times* article on delay in decisionmaking at the district level was a libelous affront to common dignity. See Doreen Carvajal, *Awaiting Judgment: A Special Report—New York's Clogged U.S. Courts Delaying Civil Verdicts For Years*, N.Y. TIMES, Apr. 17, 1995, at A1. It has made some of us rethink our position on prior restraints.

The United States Sentencing Guidelines have come to occupy an alarming percentage of the Federal Reporter Third. Almost every criminal appeal involves some sophistic claim regarding the Guidelines. A judge needs a slide rule and a clerk well-versed in theoretical math and statistics to verify

the offense level calculations. Some enterprising young lawyer should create a software package plotting the Criminal History Categories and the offense levels in graphic form with appropriate deviations for upward and downward departures.

The O.J. Simpson trial, a prosecution that no self-respecting judge would deign to: (a) follow closely; (b) admit to watching; (c) admit to caring an iota about; and (d) mention in a scholarly work, has an unusual relevance to this forum. At the outset, as an evidence professor and a former trial judge, I respectfully decline to comment on Judge Ito's handling of the case. Besides relocating Cardozo Law School's criminal law department (DNA specialists) for a semester, Judge Ito has besmirched the good name and reputation of a portion of our circuit—the home of the venerable Eastern District of New York—my old stamping grounds—the borough of Brooklyn. See Ann V. Bollinger & Bill Hoffmann, *Ito to Attorney: You Tawk Funny—Brooklynite Told: Speak Californian*, N.Y. POST, Apr. 27, 1995, at 2 (“Both the pace and your Brooklyn accent—they are having difficulty.”) (quoting Judge Ito). Replying in brass-knuckles style, Brooklyn's renowned pastry shop, Junior's, sent Judge Ito one of its “famous” cheesecakes on which was written: “Brooklyn to Ito: ‘Bite Me.’” See Ann V. Bollinger & Bill Hoffmann, *Diss Judge Won't Budge on Apology*, N.Y. POST, Apr. 28, 1995, at 12; see also Sandy Gonzalez, *Noo Yawkers Ask: Accent? What accent?*, N.Y. POST, Apr. 27, 1995, at 2 (“Yo! Judge Ito, take a hike!”).

Unfortunately, we have become accustomed to working under the constant threat of terrorism. Bomb scares abound here, the site of the World Trade Center trial and the related Sheik Omar Abdel-Rahman trial. In the wake of the World Trade Center bombing, the smoke bomb at the Fulton subway stop, the near-daily bomb threats, and now the terrible tragedy in Oklahoma, frayed nerves are the norm. Others are resigned to working in a crisis atmosphere. We are truly a federal courthouse under siege. I long for the old days when all judges had to fear were loosed criminals and crazed litigants getting by the marshals and showing up at chambers. Old-time judges had a provision for such dangers: they kept service revolvers in their desks (next to their Jack Daniels). Would that today's dangers were so easily handled.

Finally, on a serious note, we mourn the death of our col-

league and dear friend, Hon. William H. Timbers. For twelve years as a trial judge in the United States District Court for the District of his beloved Connecticut and for twenty-three years on the Second Circuit, he served his country with distinction. His opinions were always well-reasoned and well-crafted, and he took firm stands on difficult issues. All connected with the Second Circuit—judges, litigants, attorneys, and staff—grieve. We will miss Bill.<sup>1</sup>

---

<sup>1</sup> And he too hated footnotes.



