

Taking the Right to Appeal (More or Less) Seriously

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The right to appeal¹ at least once without obtaining prior court approval is nearly universal²—within the universe bounded by the Atlantic and Pacific Oceans, Mexico and Canada.³ Although its origins are neither constitutional nor ancient,⁴ the right has become, in a word, sacrosanct. During the past decade of high anxiety over the burdens placed on our judicial system by what has fairly been termed a litigation explosion, the basic right to take an appeal has remained virtually untouched and, indeed, uncommented upon.⁵

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1. My focus is limited to appeals from trial courts of general jurisdiction. Thus, I do not address appeals from administrative agencies, from specialized tribunals, or from courts of limited jurisdiction. Nor do I consider the special problems posed by appeals in habeas corpus and other collateral proceedings.

2. Among the states, Virginia and West Virginia stand out as the sole exceptions. Moreover, Virginia's claim to that status is more apparent than real. The procedure employed by her supreme court in determining whether to hear an appeal—review by a 3-judge panel; oral argument by appellant (but not appellee); briefs and a full record—is difficult to distinguish from the full scale review available in other states. See Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43, 72-74 (1982) (describing Virginia and West Virginia appellate procedures).

In West Virginia, a convicted criminal defendant has no right of appellate review. *State v. Legg*, 151 W. Va. 401, 404, 151 S.E.2d 215, 218 (1967). She does, however, have an absolute right to petition for review, *Carrico v. Griffith*, 272 S.E.2d 235, 239 (W. Va., 1980), and is permitted a 10-minute oral presentation in support of the petition. See W. VA. R. APP. P. 5(b).

3. We did not inherit the right from abroad. In England, a convicted criminal defendant may appeal a "pure question of Law" as of right, but must obtain leave from either the trial or the appellate court to appeal questions of fact. Leave to appeal a sentence must be obtained from the appellate court. D. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* 109 (1963). A civil litigant in the county courts may appeal a pure question of law as of right if the claim exceeds twenty pounds or injunctive relief is sought, and must obtain leave from the trial court to appeal questions of fact unless the amount in controversy exceeds two hundred pounds. *Id.* at 81.

4. It has long been clear that the right to appeal is statutory, and is not constitutionally compelled. *McKane v. Durston*, 153 U.S. 684, 687 (1894). As for the recency of the right, "[I]t was 100 years before the *defendant* in a criminal case, even a capital case, was afforded appellate review as of right Prior to the Acts of 1889 and 1891, there was no jurisdictional provision for appeal or writ of error in criminal cases." *Carroll v. United States*, 354 U.S. 394, 400 & n.9 (1957) (emphasis in original).

5. Occasionally, a commentator on the caseload crisis in appellate courts recognizes that abolition

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At the same time, the right to appeal has in practice begun to shrink to a mere formality in many jurisdictions as appellate judges severely restrict oral argument, deliberate alone, write skeletal opinions, write unpublished opinions, affirm without opinion, and in some cases rule from the bench.⁶

of appeal of right is, in theory, a solution, but then withdraws it from serious consideration. *See, e.g., Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 567 (1969) (“These costs of the process are permanent features.”); Hazard, *After the Trial Court—the Realities of Appellate Review*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60, 78 (H. Jones ed. 1965) (“To tinker with settled procedural rights or opportunities, such as the generally accorded right to at least one appeal, is, in the best of circumstances, a matter of some delicacy and in some circumstances politically impossible.”). More extended criticisms are few and far between. At the turn of the century, Supreme Court Justice Brewer was a lone voice advocating abolition. In his view, appeal of right reduced the likelihood that crime would be punished (because of disappearing witnesses, faded memories, and diminished sympathy for the victim), lessened respect for trial courts (including their self-respect), and simply passed along from one level to the next the “stress of litigation.” Brewer, *The Right of Appeal*, 55 INDEPENDENT 2547, 2548 (1903). Given the procedural safeguards then in existence, he felt confident that innocent persons would not be convicted, particularly since “no conscientious judge will let a verdict stand of whose justice he is not satisfied.” *Id.* at 2550.

Sixty-four years later, a practicing lawyer writing in the *Georgetown Law Journal* advocated not just that appeal of right be abolished, but also that appeals be eliminated altogether in civil cases. He argued, not altogether convincingly, that there is no reason to suppose that appellate decisions improve upon trial court judgments, absent proof that appellate judges are smarter or wiser than their trial court counterparts, and that scrapping appeals would serve to reinforce the authoritative nature of trial court decisions, a particularly salutary effect given the visibility and accessibility of lower courts. He further argued that appellate court enunciation of legal principles serves no useful purpose, because such principles are developed too late in any given lawsuit to be of use in resolving it, and are so hopelessly fact-bound as to be of little general use. Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417 (1968).

More recently, Chief Judge Lay of the Eighth Circuit proposed that appeal of right be abolished in civil cases, reasoning that the only appeal worth having is one in which oral argument is presented; that caseload pressure makes it impossible to provide oral argument in every case; that accordingly there is a serious risk that appellate courts are providing the appearance of justice rather than justice itself; and that the proper solution may be to give to the courts the discretion to hear only the most deserving appeals. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981).

Finally, and perhaps most significantly, in a recent speech challenging the profession to begin “talking seriously about how delay may be drastically reduced in ordinary civil litigation, and expense curtailed,” Justice Rehnquist floated the suggestion that perhaps “the time has come [in the federal system] to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only where it is granted in the discretion of a panel of the appellate court.” Address by Justice Rehnquist, University of Florida Law School 22 (Sept. 15, 1984) (on file with Yale Law Journal). Although the idea is left undeveloped and is but one of a group of what appear to be “talking points,” given its source and timing it is not to be taken lightly.

6. A particularly influential discussion of many of these reforms appears (in the form of excerpts from the works of leading scholars and judges) in chapter two of the published materials of the National Conference on Appellate Justice (1975), a conference jointly sponsored by the National Center for State Courts and the Federal Judicial Center. *See also* NATIONAL CONFERENCE ON APPELLATE JUSTICE, ch. 4(a)(1), pp. 3-8 (Supp. 1975).

By severely restricting or eliminating oral argument, appellate courts reduce the likelihood that latent issues will be developed and confusing issues sorted out, that everyone’s attention will be riveted on the same question at the same time, and that appellants will feel they have had a true “day-in-court.” By deliberating alone, appellate judges forego the collegial decision-making often associated with appellate courts’ unique competence. In publishing skeletal opinions or issuing unpublished opinions, appellate judges attempt no function other than to assure that a correct decision was reached in a fair manner in the case before them. In affirming without opinion, the court in essence declines to articulate its reasons for acting. In so doing it leaves litigants frustrated, compromises quality control,

It takes little prescience to predict that someday, ere long, the same forces that have led to the "reforms" listed above will drive judicial managers to consider whether the right to appeal should itself be abandoned.⁷ Perhaps it should; but I start with the proposition that if the right to appeal has any bottom at all, its demise ought not be predicated on caseload concerns alone. I fear that if the issue first arises in the context of an administrative response to a perceived caseload crisis in our appellate system, we will never, as a practical matter, be able to consider it whole. And so I propose that now, while we remain just outside baying range, we take the time to explore what it is we seem bent on eviscerating, even as we clutch it reverently to our collective breast.⁸

Motivated no doubt by some combination of belief in the justifications for appeal outlined below⁹ and an unwillingness to relegate my siblings at the appellate bar to the bread lines, I do not here propose, and would forcefully oppose, any suggestion that appeals be eliminated altogether, even for a limited class of cases.¹⁰ The choice I explore is not between appeal and no appeal, but rather between appeal of right and appeal by leave of court.

In jurisdictions with a three-tiered court system, the highest court typically picks and chooses which cases to hear.¹¹ Why are intermediate

and discards one of the checks on its power. Finally, in ruling from the bench, the court abandons even the appearance (though not necessarily the reality) of being a deliberative body.

Together, these reforms encourage appeals courts to take some cases less seriously than others, and assuredly discourage some litigants from appealing.

7. See Lay, *supra* note 5, at 1155; Rehnquist, *supra* note 5, at 22.

8. My great fear is that we are mindlessly heading off a cliff, carried by momentum and locked into cruise control. Imagine, then, my consternation upon realizing that my own analysis has forced me (in Part IV of this article) to take seriously the possibility that we might actually *want* to leap off that same cliff—to eliminate appeal of right in certain classes of cases. Fortunately, I take it as an article of faith that in this, as in all areas of life, it makes a difference why and how we do what we do. Even though it would be highly irresponsible (not to mention dangerous) to plunge ahead simply because we lack the discipline to decide in advance where we want to go and why, a well-considered decision to press forward might be the better part of wisdom.

I would be terribly disheartened to learn that my efforts had the effect of contributing to the current momentum. For by addressing the issue head-on, I mean to encourage a more deliberate, rather than a more hasty reconsideration of appeal of right, ever mindful that it is an institution long seen as essential to the achievement of justice. At the end of those deliberations, we might well choose a system that looks remarkably like the one we would create were caseload considerations our only guide. I doubt it, because I suspect that after thinking the problem through we will want to preserve the right in certain categories of cases even though they disproportionately strain an appellate court's resources.

9. See *infra* text accompanying notes 12–21.

10. With the exception of Irving Wilner, see *supra* note 5, I have found no commentator who goes that far.

11. As of 1976, 24 states had three-tiered court systems. In 16 of those states—Arizona, California, Colorado, Georgia, Indiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, Oklahoma (civil only), Oregon, Pennsylvania, Tennessee, and Texas (civil only)—the highest court had almost complete control over its caseload. Virtually no cases could be appealed at that level as a matter of right. In the other eight states—Alabama, Florida, Illinois, Louisiana, New York, North Carolina, Ohio and Washington—the highest court had limited discretion over its caseload, and

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appellate courts not afforded the same freedom, with consequent control over case mix and caseload? If the reasons for denying that freedom (or, to slant the issue the other way, for preferring party control) are sound, then we should adhere to them and maintain a vigilant watch against crippling procedural reforms. If, on the other hand, upon close inspection our articulated reasons for making first appeals a matter of right are unconvincing, overly problematic or no longer of concern to us, we should consider whether: (1) there are other more compelling reasons for the right which we aren't willing to admit; (2) there are other more compelling reasons which we'd gladly embrace if only we could figure them out; (3) the trend toward ersatz appeals already reflects, or in any event properly accommodates, this new learning; or (4) we should simply eliminate appeal of right in some or all classes of cases.

In Part I, I look at the rationales that have been articulated for appeal of right. In Part II, I take up the root question—whether allowing appeals at the option of the losing party promotes error correction, procedural fairness, and/or process satisfaction. What is the range of possible outcomes on appeal? How are those outcomes distributed? Which ones satisfy the parties? Do the answers change if we assume that the trial sometimes proceeds in a fundamentally unfair manner? The highly contingent answers I give to these questions are perhaps best thought of as invitations to further research, principally empirical.

If my overall conclusion holds—that the two articulated rationales for appeal of right do not withstand close scrutiny—then we still need to consider whether appeal of right is not so much a mechanism for correcting errors as it is a means of ensuring that such errors are not made in the first place. Perhaps the focus on what is happening on appeal obscures the reality that the game is largely played to influence what happens below. Therefore, in Part III, I take the down escalator and inquire whether the automatic availability of appellate review has a salutary effect on trial court decisions.

Finally, in Part IV, I consider how the structure of appeals might be altered in light of the analysis begun in Parts II and III. In so doing, I am mindful of the fact that the case for or against appeal of right need not be made wholesale. Accordingly, I identify some of the factors that should be taken into account in determining when appeal of right makes sense, and then demonstrate how these factors might be applied.

was required to grant review in a significant number of cases. *See* M. OSTHUS, INTERMEDIATE APPELLATE COURTS 44-70 (1976).

I. THE PROBLEM SET OUT

Rarely have commentators sought to justify why at least one appeal should be available in every case. The few justifications actually put forward are little better than conclusory observations, such as this one by Robert Leflar:

It is almost axiomatic that every losing litigant in a one-judge court ought to have a right to appeal to a multi-judge court. Most do not appeal, but the right is a protection against error, prejudice, and human failings in general. . . . Justice and good law are needed for little cases as well as for big ones, and even frivolousness is a matter of opinion. One appeal is enough, but one should be allowed in almost any case.¹²

Similarly summary is the comment of the American Bar Association's Commission on Standards of Judicial Administration in support of a standard mandating appeal of right except in narrowly specified circumstances: "The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country."¹³

These catch phrases, notwithstanding their homiletic quality, contain important kernels of meaning. Leflar's statement suggests that appeal of right furthers the substantive goal of a correct decision in every case.¹⁴ Simply bringing a dispute to an end and diffusing hostilities is not enough. No matter how much we value resolution per se, we also want to achieve the "right results." After all, had Solomon actually split the baby in half, he would have successfully terminated the dispute over its parentage. Instead, he merely threatened to bisect the child, not because he thought splitting the difference had a ring of fairness, but rather as a means of determining who the real mother was—of achieving the right result.

The A.B.A. statement suggests that appeal of right is also rooted in *process* values; that is to say that (quite apart from arriving at correct decisions) we are committed to arriving at decisions correctly, in a manner that assures that litigants are, and feel they are, treated fairly.¹⁵ At a min-

12. R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 4, 9-10 (1976).

13. ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary at 12 (1977) [hereinafter cited as ABA STANDARDS].

14. The error correction rationale for appeal of right is considered in some detail in Parts II and III, *infra*.

15. For a thoughtful exploration of this idea, see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-75.

Insofar as the "process" justification is concerned with procedural fairness, it is scrutinized in Parts II and III, *infra*. The notion that appeal of right may serve to foster party satisfaction more broadly

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imum, we insist that the process be fair in form: that the parties be afforded an adequate opportunity to present their cases and to respond to their adversaries; that tribunals be competent and unbiased; and that appropriate rules of decision be followed.¹⁶ Related to this concern with formal fairness is a desire that the legal process provide appropriate satisfactions to the parties caught up in it. The underlying assumption is that the way in which parties experience a process may be as important as its outcome.¹⁷ For the injured party, the opportunity to participate meaningfully in the vindication of her rights (or, less loftily, the chance to see the other side squirm) may be a far greater and even more socially useful reward than is money damages. For the injuring party, the realization that she has been treated fairly and has had a full opportunity to put matters in the best possible light arguably promotes an acceptance of outcome and a belief in the legitimacy of the system that is essential to the success of both private ordering and official compulsion.¹⁸

This appreciation of the value of participation is manifested in the appeals process as we hold ourselves ready to honor the litigant's classic boast: "If need be, I'll take this case all the way to the Supreme Court." To be sure, the more accurate version of the boast—"I'll take this case all the way to the court of appeals and then, if need be, I'll file a *cert.* petition"—doesn't invite quite the same swagger, but the general right to press ahead most of the way to the top adds to, and in recent tradition has

than by simply fostering procedural regularity is considered *infra* text accompanying notes 115–126.

16. How this rather simple notion applies to appeals is far from obvious. At a minimum, appellate courts are called upon to redress the procedural failings of lower courts and to proceed fairly themselves. But should our insistence on procedural fairness play a role in promoting results that are substantively correct as well?

As a formal matter, we regard procedural fairness and outcomes as independent of each other. Thus, for example, when the rightful winner of a dispute prevails following a manifestly unfair trial, the fact that the correct outcome was reached does not undermine the loser's right to appeal. However, the true relationship between process and outcome may be considerably more complex.

In the first place, much of our adjudicative system is premised on the belief (hope?) that fair processes eventually produce correct decisions. At the same time, experience teaches that this relationship often breaks down, in part because honest people make honest mistakes, and because in nearly every case there are vast areas of uncertainty created by limits on available information and on mere mortals' ability to process it. Appellate review arguably is designed to uncover and correct honest (and dishonest) mistakes. But what do we do when, despite the fact that all parties at trial have been afforded a full and fair opportunity to litigate, factual ambiguity and informational uncertainty make it impossible for an appellate court to tell whether the trial judge reached the right result? To put it a little differently, at some point is our sense of fairness offended by a process that produces effectively unreviewable decisions? Can a trial proceeding be void for vagueness? And is there any way that an appellate system can address this problem?

17. See, e.g., Michelman, *supra* note 15, at 1172–75.

18. Indeed, quite apart from any such instrumental benefits, it has been argued that securing the satisfaction of the parties—and derivatively, of society—should be viewed as the primary purpose of the judicial system. See C. CURTIS, *IT'S YOUR LAW* 21 (1954). For Curtis, the decision whether to retain appeal of right presumably would turn on the question of whether appeal on demand maximizes party satisfaction. For a more complete description of satisfaction theory, see Golding, *On the Adversary System and Justice*, in *PHILOSOPHICAL LAW* 112–16 (R. Bronough ed. 1978).

been considered a fundamental part of, the satisfaction that litigants are entitled to derive from the judicial process.¹⁹

The litigants are not the only players whom we might have the system satisfy. The attention we pay to the job satisfaction of trial judges doubtless determines in part who will perform the judging function and with what degree of avidity and creativity. I will have a fair amount to say, presently, about how appellate review affects the psyche of lower court judges.²⁰ For the moment, I want simply to note that whenever a successful appeal is taken, there is a risk that the reversed trial judge may feel that her time and energy have been wasted, her work unappreciated, and her judgment called into question.

And then there is the jury, those "twelve [sic] men [sic] good and true"²¹ whose sense of efficacy and importance we would do well to cater to, in part because they can spread the word should it appear that the game is rigged or that the professionals are playing it solely for their own amusement, but more importantly because they are a stand-in for "the people," in whose name and for whose account public norms are elaborated and enforced. Moreover, to the extent that trials are intended to lead to public catharses,²² it is the jurors who most directly experience release; to the extent that trials are morality plays in which issues of public moment are explored, it is the jurors who observe the drama and divine lessons appropriate to us all. But unless a case is sufficiently important or notorious for its appellate meanderings to be reported in the press, the jury by which it was tried is not likely to have a clue about whether its verdict was challenged and, if so, how well the verdict stood up. Thus, the taking of an appeal and its outcome are usually non-events from the standpoint of juror satisfaction with the judicial process. However, even in the midst of trial the right to appeal may compromise jury satisfaction if one of the litigants is focused more on an anticipated appeal than on the immediate drama. A juror who witnesses a conscientious effort by counsel to "sow error" (by, for example, baiting the judge or maximizing confusion) may be forgiven if she emerges feeling sullied or irrelevant.²³

Although little has been written on why the right to appeal has attained the status of a right, a fair amount has been said about the larger ques-

19. See *infra* notes 46-47 and accompanying text.

20. See *infra* Part III.

21. The phrase is oft-quoted in legal literature. See, e.g., J. HALE, TRIAL BY JURY: REMARKS ON THE ATTEMPT BY CHIEF JUSTICE PARKER TO USURP THE PREROGATIVE OF THE JURY IN CRIMINAL CASES 9 (Exeter, N.H., 1842) ("If the province of the jury be as Judge Parker would make it only to sit like senseless automata and render such a verdict as the court may direct . . . then surely this inestimable blessing, is one that may be as well enjoyed by the intervention of twelve sheets of Fools Cap as of twelve good and true men."). Its source, however, appears lost to history.

22. See, e.g., G. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 122 (1978).

23. See M. FRANKEL, PARTISAN JUSTICE 57-58 (1980).

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tion: Why do we have appeals in the first place? Among the more compelling answers to that question are that appellate courts exist to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system.²⁴ As we have seen, the first-listed justification for having appellate courts—to correct errors—is also an argument for permitting recourse to those courts in every case. It remains to be seen whether the other justifications for maintaining an appellate structure likewise support access to it at will.

It is by now a commonplace that courts do and should engage in judicial lawmaking, in interpreting, shaping, and articulating the law, when statutory and constitutional pronouncements fall short or land wide.²⁵ Although in matters of first impression or initial application it falls to the trial court to perform this function, in general we look to appellate courts to abandon, reaffirm, or reformulate old principles²⁶ and to enunciate or select from among new ones.²⁷ Given a mechanism for alerting appellate

24. See ABA STANDARDS, *supra* note 13, at § 3.00 commentary at 4; P. CARRINGTON, D. MEADOR, M. ROSENBERG, *JUSTICE ON APPEAL 2-4* (1976). In a quite interesting piece on appeals viewed trans-historically and across cultures, Martin Shapiro suggests at least four other functions that appeals serve. Availability of appeal all the way to the top fosters loyalty to a central political regime, especially to the extent the appellant gets a fresh consideration; it serves to promote political integration, especially in colonial and federal systems; it serves to circumvent "family circles" and other information blockages and distortions by presenting to higher-ups a slice of life (as lives both in the lower courts and in the institutions whose practices are at issue) rather than the summaries that executives in bureaucracies usually see; and it provides a channel for the downward flow of command. Shapiro, *Appeal*, 14 *LAW & SOC'Y REV.* 629, 634-36, 638-39, 641-43, 643-44 (1980). While I'm not sure the first two functions can be said to apply to the contemporary United States (except insofar as appeal is sometimes allowed from the highest courts of a state to the federal supreme court), my more general observation, in classic comic book form, is that none of the phenomena described by Shapiro require that appeal be permitted as of right in every case.

A fifth function served by appeals is to provide a mechanism for second-guessing jury verdicts. Occasionally, a verdict will, even if plausible enough to survive a motion for judgment notwithstanding the verdict, be viewed by the appeals court as a serious miscarriage of justice. In such circumstances, the court can always find fault with some aspect of the charge to the jury and can thus reverse ostensibly on legal grounds. Given the subterranean quality of this phenomenon, we are not likely to hear an argument that it justifies appeal of right. At all events, it seems likely that such cases would receive the attention of the appellate court even if appeals were discretionary.

25. Statutory interpretation is not only unavoidable, it is essential to the establishment of a productive judicial-legislative colloquy. Legislatures frequently use vagueness in statutes to obtain approval from disparate interest groups that might otherwise block enactment. Courts must then assign a meaning to the statutory language, inviting the legislature either to correct the courts' interpretation or to reconsider the wisdom of the statute. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31-32 (1982).

26. The highest court in a jurisdiction of course shoulders the greatest responsibility for developing legal principles, because an authoritative tribunal is needed to settle differences among lower courts. But faced with conflicting common law rules or no applicable authority at all, even an intermediate appellate court has a duty to innovate. This is particularly true where the pronouncements of an intermediate court bind the territorial trial courts until and unless overruled. See R. LEFLAR, *supra* note 12, at 5. If, however, trial courts are given the responsibility of innovation, intra-jurisdiction conflicts will surely develop.

27. Robert Cover has suggested that instead of creating legal principles, courts select from among alternative conceptualizations of what the law should look like, which are generated by essentially private (or at any rate non-judicial) communities of interest. See Cover, *The Supreme Court 1982*

courts to the existence of issues on which legal clarification is desirable,²⁸ the law-making function of an intermediate appellate court is not inconsistent with its having discretion to decide which cases it will hear.

Unless we insist that every judgment be appealed,²⁹ we necessarily rely on some mechanism to sort out what gets reviewed and what does not. Traditionally, we leave it to the parties, a choice that is far from value-neutral inasmuch as party initiative and control is one of the pillars of the ideational structure underlying adjudication in this country. Party initiative not only resonates with radical individualism and distrust of the state, major strains in the American ethos; it also is an attempt to power the judicial engine with the fuel of individual self-interest.³⁰ Party initiative is, furthermore, commonly viewed as a means of allocating scarce judicial resources on the basis of intensity of felt need as expressed by willingness to pay to play. However, the ends served by party initiative could be served nearly as well by letting courts select from among those cases presented for appeal by the parties. Self-interest would still propel would-be appellants to the court's door, and relative desire would still determine the universe from which the appellate docket would be drawn. True, a *cert.* system (for that is essentially what we are talking about) would enhance somewhat the power of the state.³¹ But insofar as we are concerned here with the appellate court's lawmaking function, perhaps an enhanced judicial role is desirable.

The appellate court arguably is in the best position to determine

Term-Forward: Nomos and Narrative, 97 HARV. L. REV. 4, 25 (1983).

28. "Two basic mechanisms have been used for presenting to a higher court the question whether discretionary review should be granted. One is application of a party, in the form of a petition for certiorari or a petition for review. The other is that of certification by the court below, which gives a lower appellate court an opportunity to signal that a question has been presented that warrants immediate resolution by the highest court." ABA STANDARDS, *supra* note 13, at § 3.10 commentary at 17.

29. There may in fact be circumstances in which we wish to insist just that, as, for example, when the death penalty has been imposed. *See, e.g., Commonwealth v. McKenna*, 476 Pa. 428, 439, 383 A.2d 174, 180-81 (1978).

30. The theory is that parties in an adversary posture will bring to the court's attention all material favorable to themselves, and that therefore no relevant consideration will escape attention. *See Golding, supra* note 18, at 106. *See also G. HAZARD, supra* note 22, at 121.

31. I have in mind two different types of state power. The first is the power of the state's judicial apparatus to control the flow of cases to and through it. This shift of power (in a *cert.* system) from private litigants to the courts, rests uncomfortably with an adversary system that enshrines party initiative and control. The second level at which a *cert.* system tends to enhance state power involves basic considerations of governance. All litigation, including private disputes over private property, entails an appeal to the sovereign to interpret, apply, and enforce norms, and in most cases to supply or select them as well. In that sense, litigation is part and parcel of the way in which we are governed or, more aptly, govern ourselves, and is for most of us the most direct and intimate involvement we ever have with governance. It is our only assured access to the sovereign's ear, and our only realistic hope of employing, for our own narrow purposes, the sovereign's might. The judicial system also provides an avenue by which relatively powerless individuals can *challenge* the sovereign's might. It thus is no small matter when the state assumes for itself increased power to determine who may participate in this most personal form of governance, and who is permitted to hold the system to account.

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whether, where, when and how the law is in need of clarification or revision. Quite obviously there are occasions in which *trial* judges are acutely aware that the state of the law they are asked to apply is sorry; and litigants, too, are sometimes more concerned with the mess the law is in than with winning and losing.³² But even where appellate courts have control over their own dockets, these other actors are free to play a major role in guiding law reform. For example, trial judges can use written opinions to showcase the shortcomings of the applicable law; in jury trials, they can express appropriate dismay when passing on proposed jury instructions. And they can certify an issue to the appellate court under 28 U.S.C. § 1292(b) and its state law analogs.³³

And although trial judges are dependent upon an aggrieved party to bring such expressions to the attention of the appellate court, they are similarly dependent even where an appeal may be had as of right. There is, admittedly, a difference. To the extent that a party's willingness to seek review is related to the likelihood that review will be granted, a trial judge interested in communicating with those on high would be relatively worse off in a *cert.* system than in an appeal of right system. But perhaps not by much, if we assume (or build into the system assurances) that when a trial judge has expressed concern about the state of the law, that sentiment will weigh heavily in favor of review. Trial judges and aggrieved litigants alike would be decidedly worse off if in fact appellate courts were less able to spot law reform concerns when expressed in a petition for review than when expressed in a brief on the merits. But nothing in our experience with discretionary appeal systems, at either the state or federal level, gives us reason for such pause. Moreover, counsel can be counted on to assist the court. Even though the standards for granting review are not uniform across jurisdictions, it is at least helpful everywhere for a would-be appellant to highlight the fact that the law is in disarray, and can be corrected only by a higher court.³⁴

32. As Professor Galanter has pointed out, entities that litigate (or are drawn into litigation) repeatedly sometimes play for favorable rules rather than to win a particular case. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 100-03 (1974). Moreover, governments and other large organizations are frequently less concerned with which principle of law is applied than with ensuring that a single principle is applied so that rational planning is possible.

33. Of course, the appellate court may decline to consider the certified issue, an option exercised in fully half of §1292(b) appeals. See Note, *Interlocutory Appeals In the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 n.5 (1975).

34. This, of course, assumes that the appellate judges actually do, personally or by means of law clerks, read (or at least scan with an experienced eye) *cert.* petitions. Even if we leave to the side judges' own self-serving (which is not to say false) descriptions of the screening process, there is little reason to believe that they would put less effort into reading *cert.* petitions and briefs in opposition thereto than they now put into reading briefs on the merits in cases that would not be heard if review were discretionary. I say "little" rather than "no reason," because when a written opinion on the merits is in the offing, there is an incentive for the court, or at least for the particular judge who is

More troubling is the possibility that appellate courts, left to their own devices, will on occasion knowingly duck issues in need of resolution. There is no question that supreme courts in the exercise of their discretion sometimes decline to hear cases that are undeniably *certworthy*.³⁵ When that occurs in three-tier systems, the immediate dispute already has been reviewed by at least one court. Thus, the high court's "no thank you," whether based on considerations jurisprudential or political, does not leave the litigants at the mercy of a single decision-maker.³⁶ This would not be the case, however, were intermediate appellate courts permitted to exercise discretionary review. In view of the fact that individual case oversight is a principal function of intermediate courts,³⁷ we would do well to ensure that such courts not have the discretion to forego review in a case they believe to have been wrongly decided simply because the case is too hot to handle, because the issues it raises might be more (or less) sympathetically framed in a subsequent case, or for any other like prudential reason.

Setting limits on the exercise of discretion would not be easy. One means would be to invert the standard for review so that the exercise of discretion will be seen as an exception to the rule. The statute might read: "The court of appeals shall entertain all cases properly presented to it, except that the court may in its discretion decline to review cases in any of the categories hereinafter enumerated. [etc., etc.]" A less restrictive standard might include, in addition to the enumerated exceptions, a catchall provision allowing discretionary review in any case in which the court determined both that the decision below was clearly correct and that the interests of justice (or some such fancy phrase) would be disserved were appeal permitted. To keep the exception from swallowing the rule, courts wishing to take advantage of the catchall might be required to set forth in better than boilerplate their reasons for declining review.

The concern that intermediate appellate courts might duck politically tough issues if given control over their own dockets could be addressed in other ways as well. For example, trial courts could be allowed to certify cases which appellate courts would then be bound to hear.³⁸ Alternatively,

drafting the opinion, to read the briefs. There is no similar incentive at the *cert.* stage.

35. See, e.g., Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HASTINGS L.J. 131, 150 (1955); Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 VA. L. REV. 197, 202-03 (1975). See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (elaborating techniques that Supreme Court uses to avoid deciding cases).

36. Of course, when both the trial and appellate courts simply package the facts and legal issues in preparation for anticipated supreme court review, the litigants may never get a truly attentive hearing.

37. See Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RESEARCH J. 543, 586-91.

38. Such a proposal might not sit well with appellate judges and commentators, in part because it runs contrary to a hierarchical view of the judiciary, and in part because the trial judge is not in a position to determine whether other cases on the horizon are better vehicles for addressing the certified

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the effect of trial court certification could be to place upon the appellate court the burden of justifying in writing any decision to decline review.³⁹ I float these various possibilities not because I think any of them is unproblematic, but rather because they suggest that the case for or against discretionary appeal at the intermediate level need not turn on whether that discretion might be abused.

Less need be said about the remaining justification for maintaining the current appellate structure—to bind scattered local courts into a unified and authoritative judicial system. It is having the appellate system in place, rather than resorting to it in any given case, that accomplishes these purposes. Thus, an appellate court's supervisory power over the trial courts within its geographic domain, together with an inclination to step in whenever the latter are in disarray, is itself a sufficient unifier. Similarly, the fact that the power trial courts exercise ultimately emanates from somewhere on high is sufficient to lend authority to their pronouncements, and to promote acceptance of their word as final in most cases, without regard for whether an appeal could have been taken as of right.⁴⁰

In sum, error correction to the side, there is little reason (among the standard justifications for appeal) to prefer appeal of right to a *cert.* system.⁴¹ Error correction front and center, *certiorari* was never meant to be a way of assuring justice in individual cases;⁴² appeal of right is. Let us, therefore, consider whether that promise is in practice fulfilled.

II. DOES APPEAL OF RIGHT SERVE TO CORRECT ERRORS?⁴³

One striking characteristic of many, if not most, trials is that there are no clearly rightful winners. Assuming the usual unrealistic assumptions

issue. See, e.g., ABA STANDARDS, *supra* note 13, at § 3.10 commentary at 17. But see Lay, *supra* note 5, at 1156. The latter consideration should be balanced against the intermediate court's obligation to correct errors in specific cases. See *supra* text accompanying note 14.

39. For a more complete proposal for handling discretionary appeals so that review is not denied in meritorious cases, see Lay, *supra* note 5, at 1155-56.

40. Indeed, the relationship between trial court authority and availability of appeal may be inverse. See *infra* text accompanying note 51.

41. A possible exception is that appeal of right may be a better promoter of participants' satisfaction. See *supra* text accompanying notes 20-27.

42. To be sure, to the extent that the cases selected for review are intentionally drawn from categories in which trial courts historically have displayed relative ineptitude and appellate courts relative competence, a *cert.* system will do a better job at error correction than will appeal of right. See *infra*, text accompanying note 113.

43. Reasonable (and unreasonable) people may vary in their opinions about what kinds of errors are worth worrying about and why the availability of appeal leads to their correction. For example, should appellate courts concern themselves with whether trial court findings of fact are correct? With faulty reasoning that nevertheless results in a proper outcome? With errors that are not demonstrably outcome determinative? Because my interest is in exploring all possible justifications for appeal of right, I would argue for a fairly catholic approach. A narrow focus on, say, appellate review of findings of fact might lull us into ignoring equally important considerations such as the frequency with which trial courts commit, and appellate courts catch, procedural errors; the extent to which we

(that people behave rationally, are economically motivated, possess full information, face an opponent who has equal resources, etc.), clear-cut cases tend, if commenced in the first place, to wash out prior to trial.⁴⁴ Therefore, in the cases that do make it to trial, uncertainty is the norm: pertinent facts remain undeveloped, unclear or unavailable; the equities point every which way; facts point in one direction and equities in another; confusion abounds regarding what law to apply; or the applicable law is itself in a state of confusion. Furthermore, these factors vary from issue to issue, or claim to claim, and in exceptional cases a party's rightful victory on one claim is factually incompatible with its rightful loss on another.

Although we must eventually pick our way through many of these complexities if we are to understand fully how trial and appellate courts interact, for the present we can get a better view of the forest by simplifying the world a bit. It is meaningless to talk about error correction if we cannot, at least theoretically, isolate correct and incorrect outcomes. If the vast majority of outcomes are hopelessly ambiguous, or if we view the criteria for judging correctness as impossibly subjective, the error correction rationale for appeal of right is perforce dubious. My purpose in making the simplifying assumptions set out below is not to avoid grappling with the real world's untidiness, but rather to view the error correction rationale in the most favorable light.

So let's start by indulging the assumption that in every case there is a single rightful winner and a single rightful loser.⁴⁵ In our simplified world, victory and defeat are total, and a party who prevails on one issue prevails on them all.

In addition, let us imagine hypothetical litigants who bring and resist lawsuits for all the usual mix of reasons, noble and ignoble, and then

trust trial courts to divine legal principles; and the necessity of appellate review to assure proper application of such principles to particular cases. Similarly, a focus restricted to a single account of why appellate review reduces error might blind us to other possible explanations. Accordingly, I would embrace a definition of error as broad as the functions performed by trial court judges, and an approach to error correction that leaves no plausible dynamic unexplored.

44. In reality, lopsided cases not infrequently clear the summary judgment hurdle (because material facts are disputed) and head for trial. When that happens, the real world more closely resembles the simplified one I describe below.

45. By "rightful winner" (and "loser") I mean the party who *ought* to win (or lose) irrespective of the actual outcome. From whose vantage point do we evaluate rightfulness? Clearly the perspective of the judge whose handiwork is at issue won't do, nor does it make sense to treat the litigants' opinions as the last word. Instead, we should view the outcomes from the perspective of an omniscient judge, someone who combines the sophistication of a Brandeis with the simplicity of a Billy Budd; whose intellectual brilliance is tempered by common sense; who is dispassionate and at the same time morally engaged; who has a perfect grasp of relevant facts (under a standard of relevance that would make even Perry Mason blanch); who has an encyclopedic knowledge of the law and a correspondingly deep understanding of it; who is sensitive to subtext and drawn to subtlety; who is attuned to psychology, sociology, and organizational behavior. In a sense, our legal culture presupposes the existence of an omniscient judge insofar as it presumes that some outcomes are better than others, and that we are capable of sorting them out.

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somehow manage to view the outcome with dispassion and wisdom.⁴⁶ Even when they win, these half-saintly characters experience what I call “legitimate satisfaction” only if the victory is deserved and was achieved fairly. When they lose, they are demoralized only if they objectively should have won or if their process rights were abridged. Fortunately for us (else we’d have nothing to analyze), these hypothetical litigants feel no particular need to conform their conduct to their insights, and, accordingly they try cases and pursue or zealously resist appeals in the same circumstances and for the same reasons as do we mortals.

*Does the prevailing practice of freely allowing at least one appeal serve to maximize litigants’ legitimate satisfactions?*⁴⁷ We can begin to rough out an answer by first considering the range of possibilities. In our simplified world, all cases are tried to the bench, and the decision of the trial judge will be either correct or incorrect.⁴⁸ If it is correct, the unhappy (as distinct from the legitimately dissatisfied or demoralized) loser may still choose to appeal, in which event the trial court’s correct decision will be either affirmed or reversed. Similarly, if the trial judge reaches the wrong result, the legitimately dissatisfied loser may appeal, prompting the appellate court either to affirm or to reverse.

These outcomes can be graphically represented as follows, with “C” signifying a correct decision at trial, and “I” an incorrect decision; “A” an

46. I posit hypothetical litigants who in fact know which outcomes are just, and who experience satisfaction when the proper outcome is reached and dissatisfaction or demoralization when it is not. Obviously, real people are not quite like that, though we wish they were and have created a system that encourages them to be so. Thus, for example, one of the benefits of wide-open discovery is that through it litigants who have been imprisoned in their own view of the relevant transaction (or of the world in which it occurred) are exposed to other perspectives and to new information. As a consequence, by discovery’s end, each party is in a position (though not necessarily in the frame of mind) to make a reasonably objective assessment of what really happened and what legal consequences flow therefrom.

Unfortunately, the judge’s (or jury’s) assessment may be quite different if her data base differs. This is often the case, because efficiency dictates limitations on the presentation of evidence at trial (such as the rule that prior bad acts may not be proved extrinsically and can only be inquired into on cross-examination) and fairness dictates adherence to the adjudicative form (such as the rule disfavoring “views” of the crime scene because, *inter alia*, they take place outside the controlled setting of the courtroom). When such strictures actually affect the outcome, only a superhuman (i.e. hypothetical) litigant will conclude that it is all for the best.

In positing a hypothetical litigant, I don’t mean to imply that the real litigant’s actual perspective is unimportant. Although it is not of particular use in determining how cases ought to be decided (which is the first step in determining whether appeals, and in particular appeals of right, are worth the candle), the litigants-eye view of whether justice has been done is an important barometer of the overall success of our system of adjudication. If litigants routinely feel shafted, and that feeling is justified, the system has failed even if it unfailingly produces substantively correct outcomes.

47. Given the constructs developed in the preceding paragraphs, this is simply another way of asking: Does appeal of right serve to correct errors?

48. In our simplified world, the judges still make mistakes, even though we and the parties seem able to discern the correct outcome. This is because the parties still have incentives to slant the facts. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035-41 (1975). And in any event, how can there be error correction if trial judges do not make errors?

affirmance on appeal, and "R" a reversal. The numbers, as will be more fully explained shortly, are an admittedly arbitrary attempt to register the degree of legitimate party satisfaction or dissatisfaction with each outcome.

Table 1

	A	R
C	1 -½	2 -2
	3 -1	4 +2

I suspect that the paucity of scholarship on the desirability of appeal of right is attributable to the tyranny of the lower right-hand box. When we think, casually, about appeals, we feel a warm glow as visions of erroneous decisions being set straight dance in our heads. But as is by now plain, there are three other possible consequences of an appeal: an erroneous decision may be left to stand; a correct decision may be affirmed; and, worst of all, a correct decision may be reversed. I have sought, using a five-point scale, to reflect the probable reactions the hypothetical litigants would have to each.⁴⁹

The "+2" in box four (reading left to right, top to bottom) represents the ultimate in satisfaction. The "-2" in box two represents the nadir. Deciding what numbers to assign to the other two boxes is somewhat more problematic. Quite obviously, the situation represented by box three—the affirmance of an incorrect decision (a "false affirmance")—is not an occasion for rejoicing. Whether it is as demoralizing as snatching defeat from the jaws of victory (box two) is a matter of bitter taste. The rightful winner who loses for the first time on appeal at least has had the satisfaction of having had one court take her side; on the other hand, she has farther to fall than does a party who is already down. Because these numbers represent satisfactions with the appeals process, which is where all the damage is done when the appeals court reverses a correct decision,

49. Any numbers would do to illustrate my point, so long as there is rough agreement with my rank ordering, and substantial agreement regarding whether the assigned values should be positive or negative.

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I regard false affirmances as slightly less demoralizing than false reversals, and have therefore assigned box three a “-1” rather than a “-2.”⁵⁰

Significantly less distressing is the domain of box one—the affirmance of a correct decision (a “true affirmance”). Indeed, at first blush, this might seem like a reasonably positive event. However, there is wisdom to the downeaster maxim: “if it ain’t broke, don’t fix it.” If the trial judge has gotten it right, what advantage is there in an appeal? To be sure, we are accustomed to thinking of the pronouncements of appellate courts as being more authoritative than opinions rendered by trial court judges. But that hierarchy of authority exists in tension with our desire for resolution and repose, our need to bring a dispute to an end that is timely as well as acceptable to the parties. Moreover, the greater the disparity between the respect accorded trial and appellate courts, the greater the risk that the judgments of the former will be challenged reflexively or, worse, ignored, irrespective of their merit.⁵¹ Thus, even though a true affirmance applauds and adds weight to the conclusions of the trial court, it simultaneously undermines (over time) the lower court’s authority.

In addition, there are considerable dollar costs associated with permitting correct decisions to be appealed. When an appeal is taken, the rightful winner is forced to subsidize the printing and lawyering industries just to wind up in the same place. Moreover, she risks losing it all should the appellate court prove to be less perspicacious than was the court below. Not infrequently, litigants will, rather than endure the costs and risks of an appeal, settle with their adversaries for less than the trial court has awarded them. Indeed, even if appeal were cost-free and victory-assured, a perfectly rational winner of money damages would accept less than her due in order to avoid an appeal whenever (as is usually the case) the use value of having the money in hand exceeds the interest she could collect on the judgment. It thus appears that true affirmances lie somewhere between false affirmances and neutral (“0”) on the satisfaction scale, which explains the “-½” in box one.⁵²

Now that we have the outcomes on appeal properly arrayed, questions

50. Even if the false affirmances represented by box three were to be treated as equal to (or worse than) false reversals in their tendency to demoralize, my overall conclusions would stand.

51. I worry in particular about the respect accorded trial court decisions by *potential* litigants, i.e. ordinary people and institutions engaged in making personal and business decisions that must, in one way or another, take account of “the law.” Private ordering is appreciably undermined when people believe that unfavorable precedent may safely be ignored if it is not the work of an appellate court.

52. I recognize, thanks to Judith Thomson, that the demoralization experienced by the party whose rightful victory is affirmed flows not from dissatisfaction with the outcome, but from dissatisfaction with the process, and that the one perhaps ought not be confused with the other. I do not view them as identical, but I nevertheless wish to treat both types of dissatisfaction in the same way. That is to say, my hypothetical litigants find both lousy outcomes and an unnecessarily dragged out process demoralizing, and find the opposites satisfying.

of distribution become important. If, for example, outcomes are distributed equally among all four boxes, meaning that equal numbers of cases are correctly and incorrectly decided by trial courts and equal numbers of each are affirmed and reversed, then based on the assigned satisfaction ratings we would be better off either not allowing appeals or allowing them more selectively.⁵³ If, on the other hand, it is the case that virtually all appeals fall into boxes one and four (true affirmances and true reversals), then our appellate system would produce increased aggregate satisfaction, and therefore better outcomes, even if affirmances (to which I've assigned a somewhat negative rating) outnumber reversals three to one.⁵⁴

What, then, can we say about real-world distributions? We really know very little; largely, I suspect, because finding a satisfactory vantage point from which to judge the correctness of outcomes is not easy.⁵⁵ (Alas, my omniscient judge is but an analytic construct.) Fortunately, the other factor in our analysis is more accessible: We can easily determine whether cases have been affirmed or reversed on appeal.

Although there is substantial variation among jurisdictions, virtually all intermediate appellate courts affirm much more often than they reverse.⁵⁶ Among the possible explanations for this phenomenon is that the decisions

53. There are several ways in which allowing appeals more selectively might alter the distribution of outcomes. For example, a rule allowing appellate courts to decline to review cases in which the judgment below was quite likely correct would not only have the analytically trivial consequence of reducing the number of cases in the "correct decision affirmed" category; it would also free up judicial resources to pay more attention to close cases, and would in the best of all possible worlds help to reduce the number of erroneous appellate decisions. Bad reversals would become good affirmances (thus replenishing somewhat the "correct decision affirmed" category); bad affirmances would become good reversals. Moreover, the fact that a significant proportion of lower court decisions would be treated as effectively unreviewable would make trial court decisions more authoritative and thus reduce the pressure on appellate judges to accomplish the same end by erring on the side of affirmance.

54. If, say, 120 appeals were distributed evenly between true affirmances and true reversals, the result would be a marked improvement in outcomes, judged from the standpoint of litigant satisfaction. $(60 \times -\frac{1}{2}) + (60 \times +2) = +90$. If the same number of appeals were distributed 3 to 1 in favor of true affirmances, the result would be a slight improvement in outcomes. $(90 \times -\frac{1}{2}) + (30 \times +2) = +15$. A distribution of 4 to 1 is the break even point. $(96 \times -\frac{1}{2}) + (24 \times +2) = 0$.

55. It is not, however, impossible. One could, for example, have a panel of experts review the complete record in the cases chosen for study and indicate which, if any, errors were made and what the error-free outcome should have been. One could also ask the parties to the same set of cases (at the close of litigation and after they have had a chance to develop a little distance) whether, knowing what they now know, they think the court reached the right result. A third approach would be to ask the lawyers. More generally, it would be interesting to survey lawyers to find the percentage of their cases they regarded as correctly decided.

56. An empirical study of 16 state supreme courts for the period 1870-1970 found that the aggregate reversal rate was 38.5%. Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1198 n.30 (1978). While most of the states' reversal rates did not deviate appreciably from the aggregate rate, there were significant exceptions: e.g., Minnesota, at 28.8%; and West Virginia, at 58.1%. *Id.* at 1201 n.40. Interestingly, West Virginia was the only state in the survey whose supreme court had complete discretion to select cases for review. *Id.* The author found that there was a clear correlation between the amount of discretion to review and the reversal rate. *Id.* at 1201. Thus, it is reasonable to conclude that reversal rates for intermediate courts (which have little or no discretion to select cases) are, in the aggregate, appreciably lower than 38.5%.

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of trial judges are usually correct. Then, too, high affirmance rates may simply reflect a strong *presumption* that the decisions of trial judges are correct, a presumption rooted in various institutional considerations (e.g., the need to reinforce the trial court's authority;⁵⁷ the need to preserve the trial judge's broad discretion; the need to attract people to the trial bench capable of wisely exercising that discretion; the fear that a high reversal rate will lead to a swelling of the appellate docket; the belief that trial judges are better situated to make factual determinations than are appellate judges⁵⁸). The presumption that the decisions of trial judges are correct is also rooted in more personal considerations (e.g., the desire to remain on cordial terms with members of the judicial fraternity;⁵⁹ the strong identification, especially by former trial court judges, with those who labor under great pressure in the judicial trenches).⁶⁰

If it is true that trial courts usually decide correctly, high affirmance rates are a natural and appropriate consequence. However, to the extent that such rates simply reflect the deference paid to trial judges, we should be less sanguine. When, for example, an appellate court leaves a doubtful decision because it falls within the trial court's broad discretion, the resulting affirmance might well be false.⁶¹ Similarly, when an affirmance is motivated in part by feelings of kinship with the trial judge, we must wonder whether it is true. Absent empirical study, we have no real idea how affirmances (or reversals, for that matter) are distributed. We do know, however, that as long as institutional and personal considerations sometimes lead appellate courts to give trial court decisions a pass, there will be false outcomes, as well as true ones.

But let's assume for now that appellate courts do not affirm unless the judgment below is truly correct. Even then, does party-option appeal improve outcomes? As noted above,⁶² given an array of cases in which the affirmance/reversal ratio is three to one or lower, and in which there are no false outcomes, the exercise of the right to appeal results in increased aggregate satisfaction, hence better overall outcomes. However, an even higher satisfaction rating would be achieved were some of the correctly

57. *But see supra* text accompanying note 51.

58. *See Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 646, 660-61 (1971).

59. I use the term "fraternity" (rather than "frarority" or some such) advisedly, because I think it captures not only the sense of a privileged in-group, but also the overwhelming maleness of that group, in both gender and analytic style. Regarding the latter, *see* C. GILLIGAN, *IN A DIFFERENT VOICE* 24-63 (1982).

60. I do not, of course, purport to exhaust the possibilities. Nor do I mean to suggest that every pull in the direction of affirmance can be shoe-horned into the categories "institutional" and "personal." Take, for example, the tendency of some judges to affirm in criminal cases simply because it appears that the defendant is a bad person.

61. *See Rosenberg, supra* note 58, at 660.

62. *See supra* text accompanying note 54.

decided cases not appealed. After all, each true affirmance exerts a negative pull. Thus, if we were to limit appeals to those cases in which there is appreciable doubt about the correctness of the decision below, we would produce even greater aggregate satisfaction. Moreover, by thus limiting review we would perforce respond to some of the institutional considerations that presently entice appellate courts into false affirmances.⁶³

Until now, we have focused on affirmances. What do we know about the morphology of reversals? Again, we have little hard data to go on.⁶⁴ The principal study of the subject concludes, *inter alia*, that courts exercising discretionary review have higher reversal rates than those that do not; that "strong party" appellants (business organizations and the government) obtain a greater percentage of reversals than do natural persons; that complex cases are reversed relatively more frequently than simple ones; and that criminal cases are reversed much less frequently than civil.⁶⁵ Relying on intuition, I would add that reversals are more likely when the question is one of law;⁶⁶ the trial judge has exercised creativity; the trial judge has sought to finesse the previously expressed wishes of the appellate court; the trial judge is held in low esteem;⁶⁷ the trial judge has sought the appellate court's guidance, thus disavowing any investment in the outcome; or where retrial would be easy, inexpensive, or unnecessary.⁶⁸ None of this, unfortunately, tells us much about the breakdown between true reversals and false ones.⁶⁹ Of course, if appellate courts are

63. See *supra* text accompanying notes 57-60. I am not at this point proposing that we place limits on what may be appealed as of right, nor am I even attempting a complete catalogue of the costs and benefits of doing so. I simply want to plant the suggestion that there is less vice and more virtue in the prospect than first appears.

64. See Note, *supra* note 56, at 1191-92 (lamenting and accounting for the paucity of scholarship).

65. *Id.* at 1200-10.

66. Admittedly, the Yale study found that cases raising procedural issues were more likely to be reversed than cases raising only substantive ones. See Note, *supra* note 56, at 1208-09. (How rare to find a Yale student these days who would make so quaint a distinction.) However, the investigator only took into account cases in which the appellate court devoted at least a page of its opinion to the procedural issue. Left out of the calculus are cases in which the court does not bother to address the procedural issues raised by the parties, either because it prefers to reach the substantive merits and by so doing renders the procedural issues moot, or because it regards them as not meriting comment. Also missing are cases in which the court does treat the procedural issues, but sparingly. My hunch is that consideration of such cases would tip the balance the other way.

67. Breathes there an appellate court law clerk who has not been tempted to draft the words: "The decision below was rendered by Judge Gunch. Accordingly, we reverse."

68. There are other factors, including the size and nature of the stakes, that are likely to bear on the probability of reversal. However, the relationship strikes me as quite complex. For example, an appellate court might be expected to pay particular attention to a case with front page potential, and to strive to do the right thing even if that means reversing. On the other hand, in such cases the trial judge might well have taken extra care to be correct, or to be "appeal proof."

69. Though it doesn't get us very far, I should think that in general more thought is given to reversals than to affirmances, and that therefore a smaller proportion of them (relative to affirmances) are false. The Yale study, which finds that opinions accompanying reversals are longer and have more citations and supervisory information, tends to support the first part of my hunch. See Note, *supra*

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better than trial courts at sizing up and applying the law, then true reversals should preponderate within the subset of cases that turn on the law. However, the other factors just listed are not in any obvious way associated with correct (or incorrect) outcomes. For example, the fact that a case could be easily retried tells us nothing about whether in fact it should be.

Before I draw the moral, we should complicate the world slightly to take account of process concerns. Earlier we assumed that trial court judgments are either correct or incorrect. Now let us assume that a trial judge can be right (or wrong) on the merits, and at the same time wrong (or right) on a fundamental matter of procedure.⁷⁰ Thus, the number of possible outcomes is at least tripled,⁷¹ and includes the possibility that the rightful winner may prevail, even as her adversary is treated unfairly.

In table two, as in table one, “C” signifies a correct decision at trial, “I” an incorrect one, “A” an affirmance on appeal, and “R” a reversal. If a reversal is based on the substantive merits, the litigation comes to an end. If, however, the reversal is of a procedural error, in our simplified world a remand always follows. The letter to the left of the slash (“/”) refers to the substantive outcome; the letter to the right refers to the process.

The subscripts “W” and “L” refer to the rightful winners and losers at trial. Thus, “C/I_W” signifies that although the rightful winner won below, the proceeding was unfair as to her. Similarly, “C/I_L” signifies that the right person won below, but the rightful loser was treated unfairly in the process. “I/I_L” signifies that although the rightful winner lost at trial, the proceeding was unfair as to her adversary (who won, albeit wrongfully, on the merits), whereas “I/I_W” signifies that the rightful winner both lost at trial and was treated unfairly.

Unlike figure one, the satisfaction ratings are not based solely on the perspective of the rightful winner. Since even a rightful loser is entitled to fair process, the ratings are from the standpoint of whoever has been wronged, irrespective of whether she deserves ultimately to win. As with figure one, it is the rank order rather than the arbitrary cardinal numbers that matters most. Moreover, the rankings are less important than

note 56, at 1196.

70. For example, the trial judge may have wrongfully refused to grant a continuance; denied a well-founded motion to amend a pleading; placed inappropriate restraints on discovery; improperly granted or denied class certification; denied a meritorious motion to sever; wrongfully admitted or excluded evidence; or wrongfully refused to grant a new trial.

71. For the sake of simplicity, I have included only what I take to be the twelve most common outcomes in figure two. Given the fact that an appellate court may reverse either because it thinks the wrong outcome has been reached or because the right outcome has been reached in the wrong way, in at least four of the boxes in figure two reversal could have two different meanings. See *infra* notes 72, 75-79.

whether the values assigned are positive or negative, and strongly or weakly so.

Table 2

	A	R
	1	2
C/C	$-\frac{1}{2}$	-2
	3	4
C/I _W	$-\frac{3}{4}$	-2
	5	6
C/I _L	$-\frac{3}{4}$	$+1$
	7	8
I/C	-1	$+2$
	9	10
I/I _L	$-1\frac{3}{4}$	$+1\frac{1}{2}$
	11	12
I/I _W	$-1\frac{3}{4}$	$+2$

Boxes one, two, seven and eight (reading left to right, top to bottom) are in essence a repeat of figure 1 since they cover the same range of cases—ones in which the trial proceeding was fair.⁷² The remaining boxes (three through six and nine through twelve) cover a multitude of procedural sins. Sometimes a procedural error leads to the wrong substantive outcome, but not always. Oftentimes it is the rightful *loser* who is treated unfairly, as when the plaintiff in a frivolous strike suit is inappropriately denied the discovery necessary to divine the contours of the putative class,

72. In boxes two and seven, the appellate court could also erroneously reverse a procedurally correct trial court decision on the procedural ground, without reaching the substantive issue. Should the trial court follow the faulty appellate guidance, the result on remand would give rise to one of the procedural-error scenarios accounted for in the rest of table two.

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or when a guilty criminal defendant is not permitted to confront her accusers.

Box three represents cases in which the rightful winner managed to win below, notwithstanding a procedural wrong committed at her expense. She cannot herself appeal,⁷³ but can raise the procedural failing as an alternative ground for affirmance once her adversary appeals.⁷⁴ However, where, as here, the appellate court rules for her on the substantive merits, the procedural claim is usually considered moot. This leaves the rightful winner in much the same position as someone in box one, except that her procedural deprivation has gone unvindicated, hence the slightly more negative “-¾” dissatisfaction rating.

Box four involves the same trial result as box three, but this time the appellate court reverses on the merits. This is our old (least) favorite, defeat snatched out of the jaws of victory. Indeed, the outcomes in box four are even worse than those we encountered in box two if we assume that the rightful winner’s procedural claim was also wrongly decided (i.e., if that part of the decision below was affirmed). However, “-2” is as low as my scale goes.⁷⁵

Box five represents cases in which the appeals court affirms a substantively correct decision, but fails to rectify a procedural inequity visited upon the loser. In such circumstances, the rightful winner would not experience the dissatisfaction we’ve come to associate with being dragged through a needless appeal, since the appeal is in fact warranted (on the procedural issue). The rightful *loser*, however, is justified in feeling dissatisfied with the process. Since her dissatisfaction probably exceeds that of a litigant whose deserved victory is affirmed (box one), and is more or less on a par with that of the appellee in box three, I’ve assigned a rating of “-¾.”

Box six covers the opposite situation—a reversal to correct a procedural error against the rightful loser even though the decision on the merits was correct.⁷⁶ The parties may legitimately be satisfied that procedural justice

73. In general, if the reversal of a ruling would not improve upon the judgment, that ruling may not be appealed by the party in whose favor the judgment runs. See F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 673 (2d ed. 1977).

74. See C. WRIGHT, *FEDERAL COURTS* 721 (4th ed. 1983) (“[a]n appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court”). See also *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480–81 (1976) (appellee may urge support of decree by attacking reasoning of lower court or stressing issues overlooked by lower court without cross-appealing).

75. It is of course possible for the appellate court to reverse the correct judgment on the merits and at the same time reverse the procedural error. That would leave the rightful winner back in the trial court on remand, reasonably assured of a fair hearing, but with the erroneous “law of the case” to somehow get around. Given the procedural vindication, and the opportunity, albeit illusory, to continue the fight, this alternate outcome justifies a somewhat less negative rating, say “-1½.”

76. Box six could also encompass cases in which the court overturns a correct substantive decision

has been done, but certainly less satisfied than when the rightful winner's undeserved loss at trial is reversed (box eight). Hence, the "+1" rating. If the trial judge conducts a fair trial on remand, she should again reach the correct substantive result. As an unfortunate consequence, the rightful winner must wait for her eventual victory, but by definition she would not be satisfied with a victory that was unfairly achieved.

In the cases covered by box nine, the court has the opportunity to demoralize both sides.⁷⁷ Box ten appeals could go either way for the procedurally injured rightful loser, but at all events the rightful winner's claim is vindicated.⁷⁸ Box eleven contemplates an affirmance of the substantive and procedural shafting of the party who deserves to win. At the other extreme, box twelve shows the reversal of a decision that was, with respect to the rightful winner, both substantively and procedurally flawed.⁷⁹

Figure two leads us to the same conclusions as does figure one. If we assume a perfectly even distribution of outcomes, the aggregate satisfaction rating is negative. If we assume, consistent with all we know, that affirmances predominate, the negative sum is greater still.⁸⁰ Thus, the message of figures one and two together is that the correction of errors rationale for appeal of right stands up only if the exercise of that right produces a quite improbable distribution of outcomes. A distribution that produces positive outcomes is improbable because: even true affirmances are negative; false affirmances are virtually guaranteed, given the considerable pressure to uphold judgments that seem reasonable; and false reversals (which are inevitable, given the fallibility of real-world appellate judges) exert an even stronger downward pull.

Of course, the distribution of outcomes is highly dependent on who chooses to appeal. For example, assuming an equal number of affirmances and reversals, aggregate satisfaction is significantly enhanced if only rightful winners appeal.⁸¹ On the other hand, it is even more significantly re-

and affirms, reverses, or passes over as moot an incorrect procedural one. Such outcomes would be decidedly negative.

77. To be sure, the court may simply affirm the incorrect merits decision and never reach the procedural issue. Although not reaching an issue is arguably less demoralizing than reaching it and deciding it incorrectly, I have assigned box nine the same rating as box eleven.

78. In other words, the court could, after considering favorably the rightful winner's argument on the substantive merits, turn to and decide correctly the rightful loser's procedural argument. Or it could erroneously reject the procedural argument. The first scenario could lead to a remand; the second would not, and would leave the rightful loser somewhat demoralized. Hence, the "+1½" rating.

79. Box twelve comprises other possibilities as well. For example, the appellate court could reverse solely on the merits, leaving the procedural claim hanging and producing a satisfaction rating of "+1½." My least favorite possibility is that the court could affirm on the substantive ground and reverse and remand on the procedural one.

80. A quick glance down the "A" column shows why.

81. Given the numbers in figure one, each affirmance generates a "-1"; each reversal a "+2." Thus, for every two appeals, aggregate satisfaction will grow by "+1."

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duced if only rightful losers appeal.⁸² If both rightful winners and rightful losers appeal, then roughly 75% of appellants must fall in the former category (again assuming an equal division of affirmances and reversals) in order for appeals to produce positive aggregate results.⁸³

Who appeals? Existing studies⁸⁴ tell us little about the justness of the causes of appellants in civil cases, perhaps because of the difficulty inherent in making such determinations. There is, however, empirical support for the unsurprising proposition that a substantial percentage of the appellants in *criminal* cases have no legitimate (as that term is used herein) cause to complain about the decision below.⁸⁵

We do know, or can predict, a fair amount about the other factors that set appellants apart from those who make do with the trial court's determination. It stands to reason that the class of appellants is largely composed of people who have ready access to experienced appellate counsel; have a political interest in reversing the trial court result; have a social or reputational interest in seeking a reversal; are emotionally invested in the litigation; are engaged in other transactions affected by the outcome in question; would benefit from delay; have concluded that their adversary cannot afford (for financial or other reasons) to fight an appeal; and/or have concluded that the trial court committed reversible error. Unfortunately, none of these factors, save the last, tells us much about the merits of the controversy. Thus, it may turn out that even if we can specify the kinds of litigants who tend to appeal, we will learn little about how their appeals should be decided.

What then are we to make of all this? If empirical research and further analysis confirm that appeal of right does not leave litigants better off (in terms of legitimate satisfaction and just outcomes) than they would be without it, we will have even more reason to question why we continue to insist upon it. Part of the answer may be that we have never thought the problem through or, indeed, even seen it as a problem. And even if we have seen glimmerings, there is always the force of inertia working against actually doing something about it. Then there is the question of who should be doing the doing. Perhaps no one can be expected or trusted

82. Each affirmance generates a "-½" whereas each reversal generates a "-2." Thus, for each pair of appeals, aggregate satisfaction decreases by "2½."

83. If three times more rightful winners appeal than rightful losers, positive numbers would be generated. $(3 \times -1) + (3 \times +2) + (1 \times -\frac{1}{2}) + (1 \times -2) = +\frac{1}{2}$.

84. For the best and most comprehensive empirical study of state appellate courts, see Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977).

85. See, e.g., Davies, *supra* note 37, at 569 (tabulation estimating "no doubt" of factual guilt in 78% of criminal appeals).

to decide what kinds of cases can safely be removed from ready appellate oversight.

It is at least possible that the reforms instituted since the 1960's in response to caseload pressures have already served to modify appeal of right in ways that produce better outcomes. For example, if frivolous appeals are discouraged and, when pursued, quickly disposed of, then rightful winners will be less burdened by the appeals process and more time can be devoted to deciding harder cases correctly. In part IV, I will address this issue of informal or de facto modifications in the system, and then consider whether and to what extent appeal of right should be eliminated. But first I want, in Part III, to consider the possibility that our love affair with appeal of right has little to do with what happens on appeal, but instead is tied to the effect we think the right has on the results at trial.

III. DOES THE THREAT OF APPEAL SERVE TO KEEP TRIAL JUDGES IN LINE?

Just as the image of an erroneous judgment being set straight dominates our thinking about appeals, so, too, are we moved by the image of a trial judge heroically resisting the impulse toward carelessness and inattention, spurred on by the realization that an appellate Big Brother is watching. It is important to recognize that this image rests on a particular view of what motivates judges and how they see themselves. Given a different set of psychological assumptions, we would expect trial judges to welcome the ready availability of appeals, and to proceed almost casually, secure in the knowledge that an appeals court exists to catch any mistakes.

Both of these scripts assume that trial judges are affected by the fact that their handiwork is subject to review.⁸⁶ While all judges are doubtless aware that review is possible, some are even more keenly aware of the unlikelihood that any given case will in fact be appealed, much less reversed.⁸⁷ Similarly unfazed are judges who, as a matter of temperament or philosophy, refuse to acknowledge the possibility that they will be reversed. Even among those for whom the specter of appellate review looms

86. As then-District Judge Alvin Rubin once put it:

Trial judges and appellate judges are not adversaries, but the trial judge who keeps his eyes on what the appellate court might do with his decision is somewhat like the tennis player who watches his opponent instead of the ball: He's likely to make a bad shot. Trial judges ought to reach decisions in accordance with the law and the evidence; they should not be overly concerned about whether the appellate court is apt to reverse them.

Rubin, *Views From the Lower Court*, 23 UCLA L. REV. 448, 448 (1976). One wonders whether Judge Rubin would have thought this admonition necessary if he believed his district court siblings were already "watching the ball" rather than the "opponent."

87. My information on this score is entirely anecdotal, and is based on the most casual of conversations with trial court judges at academic and social gatherings. That said, the attitude described in the text is, frankly, one I did not anticipate, and was surprised to hear.

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large, the shadows it casts are many and varied, depending, *inter alia*, on the particular judge's psychological make-up, her objective situation, and her conception of her role.

Let us consider three types of judges: bench warmers; bench climbers; and bench builders.⁸⁸ The bench warmer is someone who is content to be part of the team—who would forego the chance to be the heroine in order to avoid being the goat. Although she lacks initiative, the bench warmer is willing to pull her weight, so long as others pull theirs. She never thought she'd become a judge and is, if anything, a little too appreciative of the status it gives her. To tell you the truth though, the job is not all it's cracked up to be; mainly you just process cases.

In contrast, the bench climber fairly brims with ambition. Her fantasy is to sit on the Supreme Court. Realistically, she thinks there might be a spot for her on the intermediate appellate court if she plays her cards right. The trick, she has decided, is somehow to rise above the crowd without alienating anyone; to make few mistakes while doing a few things really well. She calculates constantly but adds little; she sees all but lacks vision.

Then there is the bench builder, the judge who takes her role quite seriously; who believes that in most cases justice is achieved, if at all, in the court of first resort; whose ambition is to be thought of as a "judge's judge," bold, creative and fair. As a rule, she does not regard precedent as particularly instructive; it either confirms her own instincts or is an obstacle to be gotten around. She works hard and takes great pride in what she accomplishes. She views appellate review as a necessary evil, especially given the limitations of some of her colleagues, but for her part it is less a constraint on what she does than on how she does it.

How does appeal of right affect each of these types? Again, let us start with the bench warmer. With or without the constant threat of review, she would never disobey or attempt to circumvent the teachings of the appellate court. The problem is that except in the most straightforward cases, she may lack the incentive or perhaps even the capacity to determine what the higher court would have her do. The bench warmer is likely to feel quite comfortable dealing superficially with issues that are unsettled or unsettling. Her attitude is: "If the court of appeals wants to get fancy on this one, let 'em. My job is to move the cases." To be sure, the bench warmer would never be so insensitive to the possibility of reversal as to leave herself open to humiliation. In cases in which appellate review is especially likely, the bench warmer knows how to protect her

88. I mean these to be ideal types rather than descriptions of actual persons. Accordingly, all the usual caveats are in order.

flank—by, for example, making sure she hasn't overlooked anything obvious, by formally "curing" glaring errors, and by leaning into precedent whenever possible. Such practices do not necessarily produce better decisions, just better insulated ones. But these practices would occur even in a *cert.* system.⁸⁹ Appeal of right, then, has a minimal impact on bench warmers, at most underscoring their sense that the role they perform is a bureaucratic one, subordinate to the work of appellate judges.

Bench climbers sometimes resemble bench warmers and sometimes do not, depending upon what seems best calculated to advance their careers. For example, should it appear that caution earns respect, a typical bench climber will take steps to minimize the risk of reversal whenever an appeal or any other form of second-guessing (such as press coverage or scrutiny by the organized bar) seems likely. Indeed, given her superior vigilance and acuity, the bench climber will go the bench warmer one better. Not only will she play to the appellate court's prior decisions; she will also try to anticipate shifts in the higher court's thinking. More commonly, however, bench climbers treat appellate bound cases as vehicles for self-promotion. If craft is "in," bench climbers will produce particularly well-crafted opinions. If being well-known is the best route to promotion, craft may give way to splash. And if elevation turns on popularity, the savvy bench climber will occasionally challenge an unpopular appellate court precedent, perhaps even courting reversal, in order to clearly identify herself with the politically appealing side of the controversy.

Ironically, the bench builder, the most independent-minded of the three judicial types, is the most affected by appellate review. For her, such review, even where an affirmance is virtually assured, is a bit of a nuisance, though she of course values it in theory. It's just that she didn't devote all that time and energy for her handiwork to be undone by distant, insulated appellate judges who couldn't possibly, given time and institutional constraints, appreciate the intricacies of the problem she has wrestled with so long and hard. Moreover, personal feelings aside, the bench builder takes outcomes seriously, acutely aware that she is a part of (what ought to be) a system of *justice*.

Thus, when the correct outcome has been reached and the appellate court cannot be counted on to preserve it, the bench builder's task is clear: Her opinion must be insulated from review at all costs. This can be done in a number of ways. The case can be made to rest on its facts;⁹⁰ the facts

89. To be sure, the trigger would be more complex. In order to predict whether an appeal was likely, the trial court would have to consider, in addition to the incentives facing the parties, the selection rules and practices of the appellate court (or other agency chosen to keep the gate).

90. Making a case rest on its "facts" is an insulating tool of exceedingly wide application if one believes that there is no sure way of distinguishing "factual issues" from "legal" or "mixed" ones. *See, e.g., Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123 (5th Cir. 1978) (discussing difficulty in distin-

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can be massaged; critical points in the argument can be underplayed or left vague; the opinion can be made to rest on a barely apposite but safe legal ground rather than on a better-suited but riskier one; the safe ground can be offered as an alternative to the “real” one; “well-considered dicta” can be followed by an ostensibly narrow holding. The net effect of all this is that distortions abound, analytic and doctrinal clarity suffer, and creative capacities are misdirected. In such circumstances, the threat of appellate review produces more tortured outcomes instead of improved ones.⁹¹

Of course the story neither ends, nor begins, here. We have simply broken into an institutional dynamic at a convenient point—at the moment a trial judge anticipates appellate review. By this point, much pulling and hauling already has occurred. The appellate court precedents that constitute the bench warmer’s bible, the bench climber’s calculus, and the bench builder’s constraint, are themselves instruments of the appellate court’s desire to exert control over trial court judges. Appellate opinions speak not only to the judge whose work is being immediately reviewed, but also to all other “inferior” judges who might someday be presented with similar issues.⁹² Insofar as appellate judges think of themselves as speaking to bench warmers, to promote future compliance they need only state the operative rule in clear language. Of course, if the rule is one that is best left open-textured so as to invite the thoughtful exercise of discretion at the trial level, communicating it to the bench warmer is problematic as her conception of her professional role is somewhat at odds with the conception implicit in such a rule. On the other hand, insofar as judicial lawgivers see themselves as speaking to bench *climbers*, clarity is less important than firmness of intent: Appellate judges must somehow communicate to their ambitious subcolleagues that strict obedience to the rule is desired and that noncompliance might invite political retaliation. Such threats would not sway a bench *builder*, especially one with life tenure. To keep her in line, a prescient appellate judge would do well to restrict

guishing “factual” from “legal” or “mixed” issues). Of course, it works both ways. Appellate courts subject trial court decisions to stricter review by treating factual determinations as if they were mixed issues of law and fact. *See infra* note 94 and accompanying text.

91. I do not mean to suggest that bench builders necessarily, or indeed ever, deserve the cause of justice. That depends, inter alia, on whether they have in fact reached the correct outcome, on whether they have correctly assessed the likelihood that the appellate court would screw things up if given half a chance, on whether the distortions occasioned by strong-arming negatively affect the development of the law, and on whether and to what extent the judicial system is harmed by such practices. (The issues implicit in the latter question are wonderfully complicated, and are deserving of extended treatment in another article.) Moreover, even if the dynamic between bench builders and appellate courts skews the development of the law or the outcomes of cases in undesirable ways, it is not obvious that the appropriate solution is to curb the bench builder rather than to limit the appellate court.

92. *See infra* text accompanying notes 98–100.

the bench builder's options and circumscribe her power. This, of course, is most easily accomplished when the issue raised by the appeal is the power of the trial court.⁹³ In more common circumstances, control is maximized by enunciating fixed rules of law and by strictly determining how they are to be applied. An appellate court anticipating a bench builder rebellion would therefore tend to avoid rules that are fact-sensitive or that permit discretionary enforcement.

So far we have only looked at the generalized interaction that takes place between trial and appellate courts: Appellate decisions often take account of how trial courts will respond, and trial courts often take into account the likelihood and likely outcome of a subsequent appeal. In processing the subsequent appeal, the appellate court has a more direct chance to address a balky trial judge and, if necessary, to bring her to heel. The court now knows precisely whom it is dealing with, and how compliant, confused, opportunistic, or willful she is.

Let's take the most difficult match-up, an appellate court faced with the well-crafted and well-insulated opinion of a defiant bench builder. The court can either act as if it hasn't been challenged, or it can fight back. The one thing it can't do is countenance an acknowledged slap in the face. If it chooses to fight, special rules of inter-judicial war seem to apply. Thus, embattled appellate judges commonly treat factual issues as if they were mixed questions of law and fact; purport to accept the trial judge's findings while rejecting the inferences drawn from them; judicially notice facts adverse to the judgment below; stretch the record by relying on published studies and reports not introduced into evidence below; remand only when absolutely necessary; accompany necessary remands with explicit instructions; and, in extraordinary cases, remand to a different trial court judge.⁹⁴

In the event of a remand, the struggle continues.⁹⁵ Once again, it is the trial judge's turn to decide whether to yield. The classic bench builder will, of course, press on. There is always the possibility that a new judgment will not be appealed, even if it closely resembles the old one. The losing party might run out of resources or the will to commit them; she might come to accept the judgment; she might conclude that a further appeal would be pointless so long as the trial judge is determined to have

93. This occurs most directly and dramatically when one of the parties has petitioned for a writ of mandamus or prohibition directed at the trial judge. Of course, in such circumstances appeal of right is inapposite, because the petition itself provides the mechanism for review.

94. For a thoughtful analysis of some less commonly used appellate court weapons, see Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

95. Even where the appellate mandate terminates a controversy, a broader, more long-term dialogue continues as appellate decisions in particular cases become the bases for trial court behavior in future cases.

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the last word; or the case might become moot, formally or as a practical matter, before an appeal could be heard. Should a trial judge wish to leave nothing to chance, she could short-circuit further appeals by pressuring the parties into a settlement.

Even when a second appeal seems certain, the trial judge is in a strong position. She can insulate her opinion in all the old familiar ways.⁹⁶ Moreover, this time she does so with the benefit of hindsight. If the appellate court found her first opinion an affront, then the second will surely adopt a more respectful tone, even though the bottom line is the same. If the appellate court balked at the bottom line, the bench builder can make it more palatable (by, for example, showing that the alternatives are worse) or less open to challenge. And she is free to shore up weak points by making additional findings of fact and by supplementing the record if necessary. Alternatively, she can cast about for a new bottom line that is the functional equivalent of the old one and is more appealing or less assailable. Where the rationale for her decision, rather than the decision itself, was the sticking point, she can turn her creative impulses to the fashioning of a more workable legal theory.

On appeal, if the appellate court is satisfied with the new judgment, it is a happy day, though perhaps one long in coming. If, on the other hand, the court continues to feel that its teachings have been flouted, it is in an even more uncomfortable position than before: On the surface there is less to quarrel with, yet to get under the surface requires even more strong-arming than was necessary the first time around. And so the story continues, the parties willing, until someone cries "uncle."

Conceivably, this *sturm und drang* could produce a net gain; but certainly not in cases in which the trial judge sticks to her guns and manages to outwit or outlast the appellate court.⁹⁷ Nor are we benefitted when the appellate court rises to the challenge and forces the trial judge to reach a less correct decision, or to rely on a less satisfactory principle. Even if the trial judge is pulled in a desirable direction, the distance would have to be great to justify the cost.

Whether or not a trial judge is genuinely interested in taking direction from the appellate court, the fact that written formal opinions are the primary means of communication and supervision creates an additional barrier to effective appellate control of lower courts.⁹⁸ What is more, in

96. See *supra* text accompanying notes 90–91.

97. If the trial judge reached the wrong outcome, we are no better off throwing good money after bad. If she was right all along, going through the appeal will still have been a waste of time and other resources.

98. See Note, *supra* note 56, at 1193–95:

In addition, there is no face-to-face communication between judicial superiors and subordinates about official duties. Appellate court supervisory directives and criticism are not communicated

writing opinions, appellate judges do not speak solely to their trial court kin.⁹⁹ In appropriate cases, they look upward, and anticipate further review in much the same way trial judges do. Appellate judges also speak to history and to its contemporary recorders and interpreters, to the broader legal community, to the electorate (where applicable), and/or to the polity. Sometimes the messages aimed at these audiences, and the codes used to transmit them, bear little resemblance to the kind of discourse best suited to keeping trial court judges in line.¹⁰⁰

Thus, on several counts there is reason to question the intuitively appealing notion that the threat of reversal induces trial judges to self-correct. Some judges just don't take the threat seriously, because the ratio of reversals to total cases is so small, because they view reversals as inevitable or arbitrary, or because they think it inappropriate to concern themselves with what might happen on appeal. For others, appellate review is a pressing concern, but their response to it may have little to do with improving case outcomes. Where the name of the game is to avoid reversal by toeing the appellate court line, victory will bring juster justice only if the appellate court has drawn the line in the right place, and if there is no better place that the trial judge might happen upon if left to her own devices. Where the trial judge fends off the higher court by insulating her opinion from review, the world is better off only if she has reached a better result than that dictated by the appellate court's teachings and has protected that result in a manner that does not itself produce offsetting injustice. In those happy cases where the trial judge responds to the pressure of Big Brother by taking a sober second look at her handiwork, justice is enhanced only if she has the capacity to self-correct¹⁰¹ and has rightly determined when she should and should not follow the appellate court's lead.¹⁰²

Finally, and most importantly, even if appeal of right does promote self-correction by trial judges, any consequent gain in accuracy may be more than offset by harm done to the trial court as an institution. The more we underscore the fact that trial courts are hierarchically inferior to

directly and privately; rather, they are given general publication. The formality of this communication can lead to confusion about meaning, and the lower court cannot ask directly for clarification.

Id. at 1194 (footnote omitted).

99. See Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813-14 (1961).

100. For example, an opinion geared to the press may be too general to be of use to a trial judge concerned about what to do differently next time. An opinion written for posterity may exhibit a sweep that encourages a trial judge to soar inappropriately in subsequent cases.

101. She may lack the time, the talent, the temperament or the resources to reevaluate the myriad decisions upon which her ultimate judgment is based.

102. This task is complicated by the cross-signals emanating from opinions aimed at more than one audience. See *supra* text accompanying notes 99-100.

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appellate courts, the more we feed the notion that they are inferior in other ways as well.¹⁰³ Furthermore, the specter of appeal induces passivity in some judges, blunts or misdirects the creativity of others, distorts fact-finding and law-choosing, undermines common law doctrinal development, promotes doctrinal vagueness, encourages jurisprudential sleight of hand, imperils candor, imposes on the parties (as well as the system) additional costs and delays,¹⁰⁴ and imposes on the losing party psychic costs whenever negative facts about her are embellished by the trial judge in an effort to render the opinion appeal-proof.¹⁰⁵

IV. THE FUTURE OF APPEAL OF RIGHT

A. *De Facto Modification*

At the outset of this article, I noted the myriad ways in which rulemakers and judges have, over the last decade or two, truncated the appeals process while leaving the right to appeal standing.¹⁰⁶ It is arguable that these process reforms, insofar as they discourage appeals or give to appellate judges the power to decide which cases they will take seriously,¹⁰⁷ produce nearly the same effect as would be achieved by a straightforward *cert.* (or partial *cert.*) system, and do so with considerably less muss and fuss.

We could test this claim by pinpointing the process reforms at work in a specified jurisdiction and determining in which cases, with what frequency and in which circumstances they are employed. We could then compute the rate of appeal for each type of case prior to and subsequent to the reforms; control other variables that might affect the rate of appeal;

103. See *supra* text accompanying note 51.

104. I have in mind not only the costs and delays suffered as trial judges search for ways to protect their opinions on appeal, but also those associated with genuine attempts to self-correct.

105. Twice in my life as a litigator, I found myself appealing a case largely because an appeal-conscious trial judge had "over-written" the facts, and in so doing had said things about my client that were not only untrue but also quite hurtful. Given the reality that the findings of fact could probably stand up under the "clearly erroneous" standard, and that if they survived so too would the judgment, I had little choice but to be candid with the appellate court about my client's motivation in appealing. I argued that, essentially, my client's reputation had been unfairly and unnecessarily besmirched by the offending findings, and suggested that even if the judgment were affirmed, that unhappy result could be reached in a way that avoided repeating or crediting the libel. In both cases, my argument apparently had the collateral benefit of making the court skeptical about the findings generally, and I wound up not only with sanitized findings, but with a better-than-expected opinion on the merits as well.

106. There is a very real sense in which the distinction is arbitrary; nevertheless, in keeping with convention, I have chosen to view statutes setting out the circumstances in which appeals may be taken as fixing a "right" to appeal rather than as simply stating the means by which cases end up on the appellate docket. Adhering to that distinction has, I think, made for clarity of exposition. What I'm asking here is whether the procedures attending the right to appeal have been so altered that the right cannot meaningfully be said still to exist.

107. See *supra* note 6.

and pick the brains of potential appellants who took the reforms into account in deciding whether and what to appeal. Once we understood how the reforms had affected the right to appeal, we could consider whether the changes produced were desirable. But even if at the end of our labors the de facto modifications in appeal of right proved to be exactly the modifications we would institute directly and de jure upon mature consideration,¹⁰⁸ I would remain troubled by the neutron bomb quality of the reform. Why leave buildings standing if there are no longer people to live in them? Why maintain the form of appeal of right while eroding its substance?¹⁰⁹ More plainly, why not openly press the argument that the right to appeal has to be subordinated, at times, to caseload and efficiency concerns, rather than maintain the embarrassing pretense that an appeal shorn of oral argument and resulting in a summary affirmance is the real thing?

To the extent that the process reformers are even aware of how their handiwork affects the "rights" of appellants,¹¹⁰ their reluctance to admit the effects reflects in part a fear that the public will not tolerate limitations on the right to appeal. But such fear is misplaced. If the reformers are convinced that the right should be trimmed in the interests of caseload control, why wouldn't the public reach the same conclusion? The cognoscenti's presumption that the "ignoranti" would not, given sufficient data, understand and accept the need for reforming appeal of right, reflects and breeds arrogance. That is a particularly dangerous trait in judges who have power over the participants in the judicial process, in lawyers who have power over their clients, and in scholars who have the power to shape legal debate and (as teachers) to mold the outlook of fledgling lawyers.

The covert quality of the process reforms reflects, moreover, a basic unfaithfulness to the nature of litigation which is, ultimately, participatory and governmental, an appeal to the sovereign to supply, interpret, apply, and enforce norms that are often collectively agreed upon. Citizens subject to the law developed by courts are the governed, and, as litigants who

108. To the extent the de facto changes in appealability were the unconscious byproduct of an effort to lessen the workload of appellate judges and to speed up appeals, a close resemblance between them and the modifications dictated by careful analysis would be highly unlikely, absent a genie or an invisible hand of some sort.

109. Perhaps it is anticipated that the buildings will be reinhabited, the shell of appeal of right filled with a new substance. But that raises many more questions (including the journalist's standard five) than it answers.

110. There is little evidence that those who have instituted process reforms have consciously sought, by the same act, to reshape the right to appeal. They certainly have not acknowledged any such motivation, and while we might hypothesize that judges and the advisory committees that serve them would be understandably reluctant to own up to so heretical an ambition, that is the kind of argument that admits of no proof.

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invoke the adjudicative process, they are governors as well. In both roles, they can and should insist that the real nature of the process be revealed to them.¹¹¹

B. *Should Appeal of Right Be Eliminated?*

1. *In General*

The answer depends, in substantial part, on how completely one rejects the intuition that the existence of the right leads to improved case outcomes. In calling that intuition into question, I have not sought to seal its doom; instead, I mean to do no more than suggest the terms of a debate that is sure to come and, yes, to foreshadow its outcome. But even if at the conclusion of that debate it appears that on balance appeal of right leaves us no better off, and possibly worse off than we are without it, abolition of the right does not necessarily follow.

To justify that step, we would first have to reckon demolition and reclamation costs. Included among those is the inevitable struggle within the profession between the reformers on the one hand, and those who remain unconvinced, who have an interest in the old order, or who place a particularly high value on not disturbing settled expectations. Another cost is

111. Deception may have hidden costs; candor, unexpected virtues. Let me illustrate with a scene out of *Dear Abby* or, perhaps, Dr. Ruth. A couple have for years been more or less happily involved in a committed, long-term relationship in which they share their immediate thoughts and aspirations more or less freely, but not to excess. While on a business trip, one of the partners meets an attractive person in inviting surroundings and—you guessed it. The question, now, is should she tell, knowing that she will never otherwise be found out. (Please send your answers to me care of the *Yale Law Journal*. Final poll results will be announced in the Spring.) If she does not tell, the affair will sit there like an island around which her feelings for and from her partner must flow. She will have avoided a major blow-out, perhaps even dissolution of the relationship, but the cost will be a kind of estrangement known only to her. Even if she reacts by being more attentive and loving than before, she will not enjoy the rewards of increased intimacy because her extra effort will feel like penance and the reciprocating tenderness of her partner will feel undeserved. If, on the other hand, she does tell, her partner doubtless will feel deeply hurt and personally diminished. Nevertheless, if the relationship somehow weathers the upheaval and periodic aftershocks, it is possible that a stronger and more intimate bond will develop. The partner may take the opportunity to unburden himself or herself of a similar dalliance, or to acknowledge and come to grips with longings for others. Both may come to see that, all things considered, they have fared rather well in the struggle to be simultaneously true to themselves and each other. At a minimum, they will feel like mature, honest adults who have gone through a searing experience together. When hard truths are revealed, the process of grappling with them leaves both partners feeling spent, but also hopeful, trustful, and more deeply committed to each other.

While this psycho-sexual dilemma is doubtless more interesting than the fate of appeal of right, it is not unrelated. At its best, the connection between the people and their government is rather like a personal relationship. It is built on mutual need, mutual trust, give and take, shared responsibilities, and an irrational element that looks a lot like love. It is that relationship more than (or over and above) fear of punishment that makes people law-abiding, loyal, patriotic, and optimistic. I am convinced that the relationship is deepened whenever a government takes the people into its confidence, levels with them, and trusts them to make hard choices. Certainly the converse is true, as both Viet Nam and Watergate vividly demonstrate.

the psychic loss experienced by litigants who have long viewed the right to appeal as a procedural ace-in-the-hole.

Even if the case for eliminating appeal of right were rock solid, the loss of what has long been considered "a fundamental element of procedural fairness"¹¹² would not go down easily. Were I in the market for a dining room chair, I probably would not buy one that seemed to be falling apart. But if a chair that had been my steady companion for years eventually began to show signs of age, I would tell friends, "Be careful how you sit in that chair; it's a bit temperamental," though I wouldn't throw it out. And if some well-meaning person chose to disabuse me of my decades-long belief that my chair was a genuine Windsor, I would muster up a cavalier "so what," but part of me would mourn the loss of the Windsor I never really owned.

Nevertheless, a rickety chair is, no matter how cherished, rickety; and a knock-off is, no matter how good the copy, not an original. If, when the guests are all gone, appeal of right proves dubious or worse, we must ask ourselves whether we place too high a value on sentimental attachments, and whether our self-delusion is as harmless as we might wish. At the very least, the analysis developed in Parts II and III, would seem to shift the burden of justification to those who argue for retention of the right.

2. *Cases in Which Appeal of Right Leads to Improved Outcomes*

This reversed burden, reflecting the conclusion (albeit tentative at this point) that appeal of right does not lead to improved outcomes, is based upon analysis performed wholesale. It is certainly possible that were we to examine particular categories of cases, we would find some in which appeal of right produces positive results. If such categories exist and can be delimited, appeal of right should be retained as to them.

A sensible starting point is to ask the following questions: Are there issues that trial judges are particularly ill-equipped to handle? Do their mistakes tend to crop up in particular kinds of cases? What kinds of errors are appellate courts particularly adept at catching? At what are appellate courts especially competent?

Although many of the factors that account for the relative competencies of trial and appellate courts are fairly constant across jurisdictions,¹¹³ some factors vary from jurisdiction to jurisdiction, such as the level of

112. See *supra* text accompanying note 13.

113. At a certain level of generality, courts conduct business in pretty much the same way in every jurisdiction. For example, with occasional exceptions, trial judges sit alone and decide cases alone, unless assisted by a jury. Intermediate appellate judges sit in panels and have the opportunity to deliberate collaboratively. Typically, trial judges hear from live witnesses at least some of the time. Appellate judges never do.

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resources allocated to each bench, and the methods employed in selecting judges for each. Any rigorous attempt to sort out what trial courts do worst and appellate courts do best would have to take such local considerations into account. (Since my intent, however, is simply to suggest how further inquiries might proceed, we needn't attend to such niceties here.) Assuming *arguendo* that there exist categories of cases in which trial judges routinely display less than thoroughgoing competence, it stands to reason that in those cases the need for error correction is greatest and the likelihood of careful and non-deferential review highest. If we also assume that the appellate court does not share the trial court's inadequacy, and indeed possesses a special flair for the targeted cases, then appeal of right seems especially warranted. After all, in such circumstances, the proportion of true reversals is likely to be abnormally high and the number of false affirmances abnormally low.

How can such wondrous cases be located? The best I can do is to suggest a process. If the cases (or issues) at which appeals courts are especially adept are arrayed next to the cases at which trial courts are maladroit, the area of overlap, if any, is fertile ground. But even if we could isolate such categories, we should be sensitive to the possibility that retaining appeal of right as to them might serve to perpetuate the relative inadequacy of the trial court. That is no problem if the disparity stems from inherent differences in the two institutions, as when, for example, the appellate court's superiority in a given class of cases stems from the collective nature of its decision-making. When, however, the trial court's relative deficiency is attributable to mutable factors such as available resources, the quality of the bench, or morale, a difficult judgment has to be made regarding which course—shoring up the trial court or creating a more secure backstop—is preferable, both short-run and long-term.

3. *Cases in Which Appeal of Right is Extrinsically Justified*

In addition to proceeding wholesale, the analysis that has led me to question seriously the utility of appeal of right assumes that justifications for the right must be located somewhere within the appeals process.¹¹⁴ It is, however, perfectly possible that the right is justified, in some or all cases, by considerations external to the appeals process. In other words, even if we conclude that appeal of right does not improve case outcomes and may even worsen them, we might still choose to retain the right because it produces gains in other areas that more than offset the costs of uncorrected error.

114. I include in this category the suggestion explored in Part III, *supra*, that appeal of right creates an incentive for trial judges to self-correct.

The first extrinsic justification proffered below—that appeal of right provides a necessary fig leaf for the unbridled exercise of power by trial court judges and helps to legitimize their efforts—applies across the board to all cases and would therefore, if accepted, support maintenance of the status quo. As I will argue, this justification is less than compelling. The other proffered extrinsic justifications would, if accepted, support retention of appeal of right only in selected categories of cases—criminal cases, suits against the government, class actions, and public law cases. As will become clear, I embrace these “saving arguments” with varying degrees of enthusiasm.

a. *Appeal of Right as a “Fig Leaf” and Source of Legitimacy*

Regardless of whether appeal of right improves upon the efforts of trial court judges, it arguably serves to make them more acceptable. So long as review is at least theoretically possible in every case, we can hide from the disturbing thought that opinions of judges are just that—opinions, and scarier still, the opinions of persons to whom we have rather blindly delegated enormous power and discretion.¹¹⁵

We, in this country, are loath to sanction the exercise of unbridled governmental power. Our Constitution is a monument to the notion that, in the main, government’s role should be limited; that the power of the central government should not, except in specified areas, eclipse that of the states; that the power of each should not eclipse that of the people; and that, within the central government, power should be constrained through a system of checks and balances.¹¹⁶ We used to worry a lot less about unchecked discretion when we didn’t think courts exercised it,¹¹⁷ or when

115. Maurice Rosenberg suggests a useful distinction between two types of discretion. An actor exercises “primary” discretion if she may reach any of two or more decisions, none of which is considered wrong. She exercises “secondary” discretion if the decision she reaches, even if wrong, will not be overturned. See Rosenberg, *supra* note 58, at 636–43. In general, the discretion exercised by trial courts is of the secondary type; appellate courts will let certain types of decisions stand even if they think they are wrong.

At first blush, such discretion doesn’t appear to be unbridled or uncontrollable. Appellate courts could step in but simply choose not to. If, however, the primary reasons appellate courts forbear are, as Rosenberg argues, because the decision under review is of a type not amenable to rule formulation, or is the sort a trial judge is in a better position to make, then the trial court really does act, within broad limits, free of effective control. *Id.* at 662–63.

116. The judiciary is far from exempt from our fear of unconstrained official power. If anything, our concern is especially acute in light of the fact that judges, who often are not electorally accountable, wield power not effectively checked by other branches of government. Even though judicial opinions can be overridden by a legislature or superlegislature, and cannot be enforced without the assistance of the executive, such weapons are too cumbersome and outsized to be used in most circumstances, and consequently represent a constraint more apparent than real.

117. Similarly, we used not to worry so much about judicial overbearing when the work of judges was less governmental in nature. So long as courts existed primarily to resolve disputes between private parties about private matters, see, e.g., Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122–25 (1982), judges could make mistakes and even act arbitrar-

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we thought they did so according to clearly determinate rules.¹¹⁸ However, the heresies of the legal realists have long since become today's dogma, rendering those who would continue to portray the law and its institutions in "legalistic" terms an endangered species.¹¹⁹ And so we respond by shutting our eyes tight, and uttering a silent prayer that somehow the right to appeal will make everything all better.

Unfortunately, to the extent that trial judges do wield unaccountable¹²⁰ and virtually uncheckable power, our failure to acknowledge that fact cannot help but cause us to misapprehend how they function, what we realistically can expect of them, and in what ways we can cabin them by means unrelated to the apparatus of the state. Our failure to acknowledge what we see is far from harmless; our innocence, no excuse. In our unwillingness to own up to judicial nakedness, to say that the Emperor (read Chancellor) has no clothes, we imply the opposite—that the Emperor is fully garbed in robes that command our allegiance. Not only do we misperceive the Emperor in maintaining this delusion; we also fail to realize how awed we are by royal raiment. Because we delude ourselves into seeing garments where none exist, we fail to question whether "clothes" indeed "make the man."

We fail to consider whether we truly need appeal of right, or any other institutional gamekeeper, to tame trial court judges. We are closed to the possibility that the general public might rest perfectly easily even if it knew that trial court judges were on the loose. After all, we, the cogno-

ily without implicating the allocation of power among the branches of government and between government and the people. However, with the rise of the welfare state and of concomitant judicial oversight, the so-called "due process revolution," and the rise of public law and institutional reform litigation, the business of courts (especially federal ones) is increasingly indistinguishable from other forms of governance. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

118. The Critical Legal Studies movement is far from the first collection of scholars to focus on the indeterminacy of law. But CLS stands out from its legal realist heritage by providing a richer and more sophisticated explanation for why law is inevitably indeterminate. See, e.g., Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 625-30 (1984). Moreover, unlike most other present day legal cognoscenti, CLSers are quite willing to let word of this phenomenon escape the temple. Indeed, it is a necessary part of the demystification of the law that the people massed outside be told the truth. See, e.g., Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1224 (1981).

119. An example of how the "heresies" have taken hold is the broad front of criticism leveled at Herbert Wechsler's insistence that constitutional cases be decided strictly in accordance with general and "neutral principles." See, e.g., M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 17-32 (1964); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller & Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571 (1960); Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 (1962). Had these critics failed to absorb legal realism's fundamental tenets and remained unreconstructed positivists, Wechsler's argument would doubtless have appeared relatively uncontroversial.

120. I mean politically unaccountable in the formal sense; thus the statement in the text does not apply to judges who are elected. I recognize of course that irrespective of whether they must stand for reelection, judges are also politically constrained in a number of ways having nothing to do with the ballot box.

scents, the privileged few who have come to recognize that judicial power is not so narrowly exercised or readily controlled as we pretend, have somehow managed to make our peace with that unsettling notion. I think we make a grave mistake in not trusting "the masses" to do likewise.¹²¹

The related but distinct argument that appeal of right helps to legitimize judicial review presents a closer question. Whereas the fig leaf hangs on the *illusion* that appeal of right makes safe the exercise of judicial power, the legitimacy argument is premised on the view that appeal of right does so *in reality*. Thus the legitimacy claim sees the appeals process as part of what makes courts particularly competent to explore and resolve complex and difficult social problems; as a mechanism for self-correction that minimizes the likelihood that judicial power will be abused; and as a vehicle for fuller participation by parties in judicial decision-making than is afforded by trials alone.¹²²

To be sure, whether appeals in fact make the judiciary more competent, promote self-correction, or make litigation more participatory is open to debate. In theory, appellate courts bring to litigated disputes attributes that a trial court could not possibly possess—distance, the opportunity for reflection, and hindsight. However, the process reforms of the past decade have called into question whether appellate courts do, in practice, proceed deliberately and critically.¹²³ As for the assumption that appeal of right promotes self-correction (thus rendering the exercise of power less dangerous), that is the very proposition explored and found wanting above in Parts II and III.

I cannot as easily dismiss the claim that appeal of right helps to legitimize the judicial enterprise by ensuring further direct participation to anyone who feels wronged by the trial judge's decision. Litigation most certainly affords an opportunity for individuals to participate directly in the law-making process, and appeal of right increases the level of participation by assuring every litigant a second day in court.¹²⁴ This direct par-

121. See *supra* note 111 and accompanying text.

122. Many justifications for judicial power have been offered up in recent years, especially as courts perform more and more of the functions traditionally associated with legislatures and executives. We are told that it is necessary for courts to perform such roles; that they are particularly competent to do so; that they have managed to gain widespread public acceptance in the process; that they engage in dialogue with clearly democratic institutions; that they are, if not themselves democratic, at least participatory; and that they were created by a democratic body and are part of an overall structure that is democratically accountable. (This last point is, alas, also true of the FBI and, even, the National Security Agency.) See Chayes, *supra* note 117, at 1307-1309; Fiss, *supra* note 117, at 127. Appeal of right fits neatly into this grand justification, to the extent that it makes the judiciary an even more competent policy-maker, makes judicial outcomes more just, hence more acceptable, and provides extended opportunity for dialogue and participation.

123. See *supra* note 6.

124. For a litigant whose claims or defenses were disposed of on a motion to dismiss or for summary judgment, the appeal may constitute, or at least feel like, her only day in court.

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ticipation not only functions as a check on judicial power (in much the same way as “sunshine laws” curb legislative and executive excesses); it also is valuable in itself and is somehow central to our sense of why appeal of right is desirable.¹²⁵ At the same time, we have not previously thought of the right to participate as unbounded or as a trump,¹²⁶ and we ought not so view it now.

How, then, do we determine whether enhanced participation is sufficient to justify appeal of right, recognizing that the right is costly (both to the system and to the litigants) and that it probably doesn’t improve outcomes? At a minimum we should face the value conflict squarely, and ask ourselves, as lawyers, legislators, taxpayers and citizens whose concerns extend beyond the pocketbook, but most importantly as potential litigants with cases the merits of which are not clear-cut: If we were reasonably certain that an appeal would be to no avail, and we understood full well its costs to us and to society, would we nevertheless want a guaranteed right of review? Until now, our answers, individual and collective, were most likely based on a rather different assumption about the prospects for success on appeal. Therefore, we would be well advised to put our prior conclusions to the side and consider the question anew.

On balance, I am left feeling that the legitimacy justification for appeal of right is more theoretical than real. And although I am moved by the claim that participation is meaningful in itself, and considerably less moved by the claim that it somehow helps to make uncheckable judicial power acceptable (in a normative rather than psychological sense), it seems wise, in my present unsettled state, to take the lawyers’ way out and conclude that the presumption against appeal of right, so laboriously developed in the preceding two Parts, has not been overcome.

b. *Criminal Cases*

The analysis presented above in Parts II and III rests on the premise that, in deciding whether to make appeals available in every case, our primary objective should be to promote the optimal satisfaction of appellants in the aggregate. In civil cases, this essentially utilitarian notion is, though not unproblematic, widely accepted and acceptable.¹²⁷ In criminal cases, however, the utilitarian calculus is in my view inappropriate.

Even if appeal of right makes little difference in ultimate outcomes, and indeed even if it has a negative effect, we should retain it in each and

125. *See supra* text accompanying note 13.

126. For example, rarely have litigants been afforded a second appeal of right. Never have they been permitted to participate in the court’s deliberations.

127. This is particularly true if we assume that appellate outcomes in individual cases can be neither predicted nor evaluated with confidence. *But see supra* text accompanying note 113.

every criminal case because of our overriding commitment to the following principles: that the awesome power of the state must not be allowed to overwhelm individuals, especially individuals who are genuinely believed to have transgressed laws we hold dear;¹²⁸ that in assigning blame the state must be scrupulously fair, lest in seeking to sanction those contemptuous of its rules it create even more contempt; that before it officially stigmatizes a citizen as standing outside the law and as deserving of society's condemnation, the state must satisfy itself several times over that such a judgment is warranted; and that before depriving an individual of liberty the state must act in a way that evidences and reaffirms respect for that liberty,¹²⁹ lest we all be cheapened, diminished, and rendered more vulnerable.¹³⁰

Retention of appeal of right in criminal cases is warranted for other reasons as well. The Constitution commands that defendants be provided effective assistance of counsel. One needn't be overly scrupulous to question whether the bar is meeting that mandate, given the overworked, underfunded nature of most public defender systems and the inadequacies of many appointed counsel systems.¹³¹ The fact that her performance may be the subject of appellate debate creates at least some incentive for a harried defense counsel to provide an acceptable minimum effort in every case.

There is another sense in which the right to counsel and appeal of right are intertwined. The Supreme Court has held that although there is no constitutional right to an appeal,¹³² when such a right is afforded by statute, defendants are constitutionally entitled to effective assistance of coun-

128. I suspect that the more righteous the prosecution, the greater the likelihood that power will be abused.

129. Given the state's interest in protecting its citizens from abuses of power, in affirming their personhood and in enhancing their self-regard even (or perhaps especially) when they seem themselves to have abandoned it, it is at least arguable that in the criminal context, the affirmation of a justified conviction does not produce negative satisfaction. While the state, like other litigants, must endure transaction and opportunity costs every time a meritless appeal is taken, unlike other litigants it derives benefit from this display of respect for even the least deserving of its citizenry.

130. In less divided times, I suspect that we all breathed a secret sigh of relief every time the law displayed respect for the accused, at least where she was a small fry. We were more inclined to think, "There, but for the grace of God, go I," or more likely, "There, but for the grace of God, goes Uncle Willie." Even if we didn't make so direct a connection, we had, I think, an intuitive sense that *we* somehow benefited when an accused's rights were respected; that *we* were made more secure in our persons, papers and effects when the Fourth Amendment was vindicated. Maybe it's just that we were closer in time to the days of the general warrant, but more likely the change is attributable to the present inability of many to identify with "criminals." Many of us have a stereotyped image of persons who commit crimes and are convinced that we and they look nothing alike.

131. For empirical discussions of the inadequacies of appointed counsel systems, see Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975); Friloux, *Equal Justice Under the Law: A Myth, Not a Reality*, 12 AM. CRIM. L. REV. 691 (1975). *But cf.* Stover & Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. LAW 265 (1975) (quality of criminal defense provided by public defenders comparable to that provided by private attorneys).

132. *See supra* note 4.

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sel in the appeal.¹³³ Given this linkage, to tamper with the right to appeal in criminal cases would be to jeopardize an exceedingly important, albeit indirectly derived, protection.

c. Cases in Which the Government is a Party

A sound argument can be made that even in civil cases, litigants who find themselves tilting against the overwhelming might of the state, in a forum set up and operated by the state, should have the right to a sober second look. Two premises underlie this argument—that the government’s status or disproportionate power distorts trial outcomes; and that the right of appeal somehow serves as a corrective.

The former premise is a rather natural corollary of the adversary system. Because the system properly relies on rough equality of litigative resources, a gross imbalance between the parties reduces the likelihood that the system will achieve its ends, including the most elusive one—getting at the truth. In response one may fairly question whether such an imbalance exists. (“Not all citizens are David,” runs the argument, “the government is not always Goliath, and in any event look who won that confrontation.”) In truth “the government” does appear in all shapes and sizes, and some corporate litigants are scarcely distinguishable from medium-sized countries. I would therefore embrace a rule, if one could be drafted, limiting appeal of right to private appellants who are demonstrably outgunned by the governmental opposition.¹³⁴ A second response is that imbalances in wealth and power should be addressed head-on rather than by tinkering with the appeals system.¹³⁵ My short counter is that in general it is desirable that the State of New Jersey have a larger treasury than does an individual whose land it condemns. The trick is not to eliminate the differential, but instead to keep it from influencing the outcome of any litigation between them.

More problematic is the second premise—that distortions created by the presence of unequal adversaries at trial can somehow be remedied on appeal. Relative inadequacies at trial are “preserved” in the record presented to the court on appeal. If the power difference between the parties is reflected in the quality of counsel, the effect can be as devastating

133. *Evitts v. Lucey*, 105 S. Ct. 830 (1985).

134. A clearly underinclusive (and somewhat overinclusive, given the likes of Ted Turner and Rupert Murdoch) scheme would be to limit appeal of right in government cases to natural persons. A better tailored but perhaps unworkable system would tie appeal of right to some measure of wealth, like net worth, or would seek to identify proceedings or transactions in which the government is typically the weaker party.

135. There are, I suspect, two types of people who hold this view: those who somehow imagine themselves being in the position to effect a radical redistribution of wealth, and those who are in the position to block any such redistribution.

on appeal as it is at trial. On the other hand, since an appeal is a more limited and controllable enterprise than a trial, gaps in wealth are less likely to have a significant impact on strategy. The narrower scope makes it possible for the weaker party to conserve and target resources, fighting on one or two rather than several fronts. Further, oral argument provides an opportunity for the court to play a significant role in the development of issues, thus equalizing somewhat the presentation of the parties.

Arguably, if parties who litigate against governments are permitted to appeal as of right, then as a matter of fairness governments should be able to do so as well. However, this naked appeal to parallelism ignores the fact that in relevant respects, governments and individuals are not similarly situated and are not equally likely to be swamped at trial. Appeal of right by governments might, nevertheless, be justified on other grounds. Although occasionally the judiciary (or a judge in her official capacity) is a party to a lawsuit,¹³⁶ more commonly the government litigant is the executive or the legislature. As a sign of respect for coordinate branches of government, and in the interests of federalism when state agencies or officials litigate in federal court, it might prove prudent not to confer upon intermediate appellate judges the discretion to slam shut the judicial gate.

d. *Class Actions*

Although class actions (and comparable procedures) are an enormously important means of vindicating interests that might otherwise go unattended,¹³⁷ the notion that someone who neither initiates nor controls litigation can nevertheless be bound by its results is a peculiar one, and exists in considerable tension with the due process clause.¹³⁸ And even though concepts like commonality of issues and typicality of claims have been developed as means of assuring virtual representation,¹³⁹ enormous theoretical and practical problems spring up whenever, as seems inevitable, the interests of the represented and of the representers begin to divide.¹⁴⁰ Equally troubling are cases in which none of these difficulties arise because the trial court refuses to certify a class and the appellate court re-

136. Rare are cases like *United States v. Will*, 449 U.S. 200 (1980) (challenging judicial salary freeze) in which judges *qua* judges initiate litigation in their own interests. More common are suits against judges for alleged judicial improprieties.

137. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1329-71 (1976).

138. See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940) (due process clause of fourteenth amendment required that petitioners not be bound by judgment rendered in earlier class suit to which petitioners had not been formal parties, because of dual and potentially conflicting interests of putative class members).

139. See *Developments in the Law—Class Actions*, *supra* note 137, at 1454-71.

140. See Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186-1202 (1982) (discussing intraclass conflicts and disclosure obligations).

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fuses to intervene pending a final judgment.¹⁴¹ In both circumstances—where a class is certified and adequacy of representation is at issue, and where the class is not certified and therefore is not represented at trial—an appeal becomes critically important in protecting the interests of absentees, and should therefore be guaranteed as a matter of right.¹⁴² In some circumstances, the appeal affords dissatisfied absentees their first real opportunity to take issue with proceedings ostensibly litigated on their behalf. In all cases, appeal of right provides an extra margin of process, a fuller opportunity to participate.

e. *Public Law Cases*

Quite apart from the identity of the litigants and the capacity in which they sue or are sued, there may exist categories of cases in which appeal of right is extrinsically justified because of the issues involved. It is no longer news that since the advent of the welfare state, much of what our courts are called upon to do, particularly but not exclusively at the federal level, is to resolve (or at least address) issues of considerable public moment. Some cases involve challenges to public authority or the way in which it is exercised.¹⁴³ Others involve attempts to activate public authority or to prod it into a partnership with aggrieved citizens.¹⁴⁴ Still others revolve around private attempts to develop or vindicate public policy.¹⁴⁵ Not surprisingly, many cases fall into more than one category. Given the nature and complexity of the issues involved in these “public law” cases, the possible participation in them of disparate interest groups, and the fact that governmental or quasi-governmental entities often are called to account, appeal would almost always be justified, absent complete resolution at the trial level.

Admittedly, isolating categories of cases is not easy. Neither is it impossible. Challenges to statutes, ordinances, regulations, governmental policies and routine governmental practices are readily described. So too are actions against public or private persons for running afoul of government regulations. The hard part is defining actions brought to develop or vindicate public policy. Insofar as such proceedings are statutory, it is possible to include them in an appeal of right statute by simply cross-referencing

141. For cases with this procedural history, see, *e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

142. On the other hand, it is at least arguable that to permit appeal of right in class actions but not in individual actions arising out of the same transaction would create an inappropriate incentive to proceed on behalf of a class.

143. I have in mind desegregation suits, prison conditions suits, and the like.

144. A good example is litigation under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982).

145. Discrimination suits against private employers are paradigmatic.

the relevant statutes.¹⁴⁶ In the alternative (or as a supplement), the appellate court could, in classic common law tradition, decide as needed what types of cases raise issues of sufficient public interest to justify appeal of right.

f. *What's Left?*

The careful reader may, at this point, feel like a witness to a bit of sleight of hand. Having concluded (albeit tentatively) that appeal of right presumptively should be scrapped, I have proceeded to argue that it should be restored in a substantial number of cases. A fair question presents itself: What's left? What, if anything, remains in the column of cases that should not be appealable as of right?¹⁴⁷

In fact, the list remains long. Even if all the cases described above were removed, the *cert.* column would still include virtually all domestic matters;¹⁴⁸ tenant/landlord cases; garden-variety contract cases; garden-variety tort suits;¹⁴⁹ products liability suits; suits for fraud, conversion, and the like, or to replevy property; commercial transactions; and even more exotic cases such as those involving patents, copyrights and trademarks.¹⁵⁰ Using fiscal 1983 figures, these cases account for nearly 30% of the appeals from district courts to the federal intermediate courts.¹⁵¹ If private law cases in which the government is a defendant are added, ap-

146. Cf. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1982)) (providing for attorney's fees awards in proceedings commenced under specifically designated statutes).

147. If the list is short or has disappeared altogether, a second question arises: Why go to all the trouble? What's the point of killing off so many trees just to arrive at approximately the same place? The short answer is provided by an old cigarette commercial (remember those?): "It's not how long you make it; it's how you make it long." See *supra* note 8 and accompanying text.

148. The rare exceptions would be cases in which the government is involved, in which one of the parties proceeds on behalf of a class, and in which issues of considerable public moment are involved. If, for example, a man in a support proceeding challenges on equal protection grounds a statute that favors wives in alimony disputes irrespective of the parties' relative wealth, under the scheme I've outlined an appeal could be taken as of right. Similarly, if the United States sues a poet to recover a federally guaranteed student loan that, allegedly, is due and owing, any appeal would be as of right.

149. Under the outlined scheme, suits under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), would be appealable as of right because the government is a party. A preferable approach might be to leave federal tort actions in the *cert.* column (given their fact-based nature) and leave it to the "public law" and "class action" categories to assure review in more complex litigation, such as that involving Agent Orange.

150. It is worth noting that in federal cases, most actions premised on diversity would not be appealable as of right. For an interesting counter example, see *Newman v. Yale*, 84 Civ. No. 656 (MJB) (D. Conn., Dec. 17, 1984) (motion for class certification pending in contract action).

151. Annual Report, Administrative Office of the United States Courts 103 (1983). Given the less than perfect correspondence between the Administrative Office's statistical categories and my own categories, the percentage guesstimate is exceedingly rough. I eliminated from the discretionary appeal column all cases in which the United States was a party, all civil rights cases not involving the federal government, all state prisoner petitions, all environmental cases, all cases challenging the constitutionality of a state statute, and all criminal cases.

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proximately 40% of appeals from district courts would be discretionary.¹⁵² Although the statistics are not readily available, the percentage of discretionary state court appeals would likely be higher still, given the greater proportion of private law cases (torts, contracts, domestic relations, tenant/landlord, estates, etc.) at the state level.

While undoubtedly appellate courts would, under a partial *cert.* system, single out some of these cases for review, they presumably would devote a significant amount of the time saved to more careful review of the “of right” cases, those in which there is a greater likelihood that their involvement will serve to correct errors and foster extrinsic goals. Moreover, the additional time, together with greater freedom to select cases for review, should produce better judicial lawmaking and more careful supervision of lower courts. At the same time, the partial *cert.* system would, as a practical matter, make the trial courts the last word in many substantive areas and would, to that extent, make their decisions more authoritative. Ideally, the increased respect would generate an increased sense of responsibility and therefore improved outcomes.¹⁵³

Finally, given its origin, the partial *cert.* system would of necessity provide litigants with the maximum of satisfaction (as I have used that term herein) that is consistent with the extrinsic considerations set out above. In terms of results, litigants would be at least no worse off, sooner, and at considerably less cost than at present. Finally, the public would benefit from better outcomes, more careful decisions, potential resource savings and the possibility of attracting and holding onto better judges.

In sum, if we have the patience and wit to take a hard look at appeal of right, giving our present arrangements the benefit of every doubt and recognizing that our goals are often submerged or obscure, we will then be in a position to begin reconstituting our system of appeals. In so doing, we will not achieve the millennium. But if we are wise, we shall content ourselves, at least for the night, with our one quite healthy step toward a more just legal system.

152. *Id.* Although I have added back in cases in which the United States was a defendant, I continue to exclude federal civil rights cases, prisoner petitions and environmental cases.

153. With luck, bench climbers would rise to the occasion and bench builders would devote the energy previously spent on protecting their opinions from reversal to the task of formulating and monitoring creative remedies. Bench warmers would, in time, be replaced by talented and conscientious people who would find the trial court bench newly attractive.

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