Journal of Criminal Law and Criminology

Volume 81
Issue 3 *Fall*

Article 3

Fall 1990

Were There no Appeal: The History of Review in American Criminal Courts

David Rossman

0091-4169/90/8103-518
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 81, No. 3
Printed in U.S.A.

"WERE THERE NO APPEAL"*: THE HISTORY OF REVIEW IN AMERICAN CRIMINAL COURTS

David Rossman**

The contemporary criminal justice system is guided, in large part, from the top down. A great deal of the force that drives the "terrible engine" of the criminal law is supplied by courts that consider cases on review after a defendant has been convicted.

Appellate courts determining cases in the context of review give the final stamp of approval to the validity of convictions. With appeal an almost automatic sequel to trial, it seems as if society must withhold its judgment about a defendant until the review process is finished. Contemporary appellate review has taken on the quality of an extension to the trial.

For their part, defendants and their attorneys shape their behavior to accommodate review as another stage in the long battle to avoid punishment. Defense counsel are constantly mindful of the need during trial to preserve the record for an eventual appeal. Moreover, every defense attorney has met with a case where he or she raises an issue at trial knowing full well it will not be successful, in hopes that he or she will find a more congenial audience on appeal.

Review not only provides additional opportunities for defendants to avoid conviction, it also has come to be seen as the final guarantor of the fairness of the criminal process. Appellate courts examine individual cases to ensure that convictions are not so in-

* Nor is there anything novel in allowing appeals to the supreme court. Actions are mostly to be tried in the state where the crimes are committed - But appeals are allowed under our present confederation, and no person complains; nay, were there no appeal, every man would have reason to complain, especially when a final judgment, in an inferior court, should affect property to a large amount.
Pamphlet of Noah Webster, addressed to Benjamin Franklin, on the proposed Constitution, October 10, 1787, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 53 (P. Ford ed. 1888) (reprinted 1968).

** Professor of Law, Boston University School of Law. This paper benefitted from comments by members of the Boston University School of Law faculty research seminar and by Professor Wythe Holt of the University of Alabama Law School.

fected with error that society should refuse to honor the trial court's judgment. Reversal on appeal is the quality control mechanism of the criminal justice system.

We have come to rely on review to shape the criminal process on more than an individual level. We invariably look to the opinions of reviewing courts, especially the appellate courts at the top of the judicial hierarchy, to announce the rules which must guide the behavior of the official actors in the criminal justice system. While confined to the context of affirming or reversing criminal convictions, these courts set forth the boundaries within which police, prosecutors, judges, and defense attorneys must operate if they wish to conform to the rules.

The role of review in the contemporary criminal justice system is so pervasive that it is easy to assume this feature is a constitutional requirement. Review seems as fundamental an aspect of the system as trial by jury or the right to defense counsel.[1] After all, every state and the federal system provide some means of review to defendants in criminal cases. However, according to a long line of Supreme Court opinions, there is no constitutional mandate that states provide any type of review process for defendants convicted in their criminal courts. As far as the Constitution is concerned, a state could eliminate everything but its trial courts.[2]

A criminal trial process that literally adhered to the Supreme Court's pronouncement that there is no right to appeal in criminal cases would create an unacceptable risk of jeopardizing defendants' rights to life and liberty, as each lower court judge would possess absolute, unreviewable discretion over the legal issues at trial. This model of unchecked power seems so at odds with the carefully bounded limits the Bill of Rights otherwise places on the power of the state that the dissonance is jarring. One only can wonder why a feature like review, which is so central to the legitimacy of the current criminal justice system, does not have a constitutional basis.

This article's thesis is that the conventional argument about the lack of constitutional support for a right to appeal in criminal cases misreads history because it ignores the differences between the

[1] Neither of these requirements is absolute, since the Constitution demands juries only in non-petty cases and defense attorneys in misdemeanors only when the defendant has received a sentence of imprisonment. But in the balance of cases, which encompass all serious criminal prosecutions, these features must be offered to the defendant.

[2] The Constitution does speak to the issue of habeas corpus; it therefore implies the existence of a federal forum to review criminal cases that a state would not. However, traditional wisdom posits that the Constitution requires neither the states nor the federal government to review their own criminal convictions.

eighteenth century view of how criminal courts should operate and our contemporary vision. The model of the criminal justice system with which the framers of the Constitution were familiar, and which they implemented in the first federal court system, contained many features that gave it the same advantages that appellate review provides today.

The first section of the article traces the genesis of the doctrine that the Constitution does not require review in criminal cases. The idea rests ultimately on an 1805 decision, which held that the Supreme Court did not have jurisdiction under the First Judiciary Act to entertain a writ of error in a criminal case. In order to evaluate how the Supreme Court's lack of jurisdiction over writs of error in criminal cases bears on the question of whether the framers' conception of due process would have encompassed a contemporary criminal trial without any possibility of review, the article's second section examines the early American criminal trial process in some detail. The third section of the article takes a closer look at the history of criminal litigation in the federal courts. It first examines the debates over the Constitution, the Bill of Rights, and the First Judiciary Act dealing with review in criminal cases. One of the important points that surfaces from this discussion is that criminal appeals were seen in some quarters as a danger to individual rights because of the fear that the government might seek review of an acquittal. The section then proceeds to examine four features of the early federal court's criminal process which gave it many of the characteristics of contemporary review. The fourth and final section of the article concludes that a fair reading of the historical record supports an argument that while review *per se* may not have been seen as a fundamental right of criminal defendants, there is nothing to suggest that the Due Process Clause was intended to condone leaving the final determination of all constitutional issues to an individual trial judge.

I. An Overview of the History of Review in Federal Criminal Cases

One need not look very far to find a Supreme Court decision that holds there is no constitutional right to an appeal. A 1983 habeas corpus case, *Jones v. Barnes*,[3] is an apt example. The Court in *Jones* dealt with the refusal of an indigent defendant's appellate counsel to present in his brief or argument a non-frivolous issue that his client wished to use to attack the client's conviction. The

[3] 463 U.S. 745 (1983).

majority opinion, which found that the attorney's refusal was not a constitutional violation, contained a statement which has been sprinkled liberally in one form or another throughout various cases dealing with the appellate process in the past thirty years: "There is, of course, no constitutional right to an appeal."[4]

These twentieth century statements of the relationship between the Constitution and the right to appeal in criminal cases have their immediate genesis in an 1894 case, *McKane v. Durston*.[5] The appellant in *McKane*, which was another habeas corpus case, challenged a New York state court practice that denied defendants bail pending appeal as a matter of right. In rejecting the claim that this policy denied the defendant the "privileges and immunities of citizens in the several states" guaranteed by Article IV of the Constitution, the Court stated:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common-law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.[6]

The offhand dismissal of the constitutional claim in *McKane* stemmed from the fact that at the time of the decision, appellate review of criminal cases in the Supreme Court was only five years old.

For roughly the first hundred years of the federal courts, there was no right of review in criminal cases. Congress did not provide the circuit courts with the power to review federal criminal convictions until 1879.[7] Moreover, Congress waited until 1889 to give the

---

[4] *Id.* at 751. *See also* Evitts v. Lucy, 469 U.S. 387, 393 (1985); Abney v. United States, 431 U.S. 651, 656 (1977); Estelle v. Dorrough, 420 U.S. 534, 536 (1975); Blackledge v. Perry, 417 U.S. 21, 25 n.4 (1974); Ross v. Moffit, 417 U.S. 600, 611 (1974); North Carolina v. Pearce, 395 U.S. 711, 719 (1969); Griffin v. Illinois, 351 U.S. 12, 20-21 (1956); Cobbledick v. United States, 309 U.S. 323, 325 (1940); Reetz v. Michigan, 188 U.S. 505, 508 (1903).

[5] 153 U.S. 684 (1894).

[6] *Id.* at 687. It was unnecessary for the court to have made the statement in *McKane* concerning the lack of a constitutional requirement for the right to appeal. There was no reason to assert that defendants lacked a constitutional right to appeal in order to dispose of the far more limited question of whether they had an absolute right to bail pending appeal. Moreover, in none of the twentieth century cases repeating the *dictum* of *McKane* was the due process right to appeal a necessary ingredient of the Court's decision.

[7] Act of Mar. 3, 1879, ch. 176, 20 Stat. 354.

Supreme Court jurisdiction to entertain writs of error[8] in criminal cases from the lower federal courts.[9]

The First Judiciary Act, enacted in 1789, implemented the Supreme Court's appellate jurisdiction by permitting writs of error to review judgments of the Circuit Courts[10] in civil cases where the matter in controversy exceeded $2,000 in value.[11] The Act made no explicit provision for writs of error in criminal cases.[12]

Whether litigants could obtain writs of error in federal criminal cases in the years immediately following the First Judiciary Act was an unresolved question. Justice Chase apparently thought writs were available. Presiding over the trial of James Thompson Callender for seditious libel in 1800, Chase remarked to defense counsel in explaining his refusal to allow a witness to testify:

> [B]ut if I am not right, it is an error in judgment, and you can state the proceedings on the record so as to show any error, and I shall be the first man to grant you the benefit of a new trial by granting you a writ of error in the Supreme Court.[13]

Three years later, the Supreme Court actually entertained a writ of error in a criminal case. In *United States v. Simms*,[14] the prosecutor in the Circuit Court of the District of Columbia brought a writ of error seeking to reverse a lower court decision which held that the indictment did not charge a crime within the jurisdiction of the court. Chief Justice Marshall wrote the opinion, affirming the judgment for the defendant. Neither the Court nor the parties explicitly

---

8 Writs of error were the traditional format the common law provided for reviewing a lower court's judgment. The writ was an independent action in a higher court, conceptually quite unlike a contemporary appeal. The court which issued the writ first had to obtain the record of the proceeding in the trial court, and then had to determine if it was defective because of an error. *See* Sunderland, *The Problem of Appellate Review*, 5 TEXAS L. REV. 126, 139 (1927) [hereinafter Sunderland].

9 Act of Jan. 25, 1889, ch. 113, 25 Stat. 656. Section 6 of the Act gave the Supreme Court the power to issue writs of error to review capital convictions from the circuit courts where the defendant had been sentenced to death.

10 The First Congress established the Circuit Courts to try all but minor criminal offenses as well as civil cases.

11 Act of Sept. 24, 1789, ch. 20, sec. 22, 1 Stat. 73.

12 Congress, however, was not displaying a general disregard for constitutional issues in criminal cases by neglecting to allow review in federal criminal cases. *See* Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981); Derousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1805). Section 25 of the First Judiciary Act permitted Supreme Court review of state cases in which a claim of constitutional privilege had been denied. Under this provision, the Court could review state criminal convictions. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

13 United States v. Callender, 25 F. Cas. 239, 251 (C.C. Va. 1800) (No. 14,709).

14 5 U.S. (1 Cranch) 252 (1803).

considered the Court's jurisdiction to issue the writ as a threshold matter.

When the next writ of error for a criminal case came before the Court in 1805, however, the matter of its appellate jurisdiction was laid to rest. The case, *United States v. More*,[15] also originated in the Circuit Court of the District of Columbia. In the lower court, the judges sustained a demurrer to an indictment charging a District of Columbia magistrate with collecting fees illegally. When the government sought a writ of error, Chief Justice Marshall raised the question of the Supreme Court's jurisdiction on his own initiative.

The prosecutor in *More*, John Mason, also had represented the government in *Simms*. Mason argued that Article III section 2 of the Constitution gave the Supreme Court appellate jurisdiction in all cases of law (of which this was one) subject only to Congress' expressly promulgated exceptions. When Congress granted the Court the power to issue writs of error in civil cases, it never expressly forbade their use in criminal cases. Thus, Mason concluded, the Court had appellate jurisdiction in criminal as well as civil cases. In addition, Mason argued that the Court's authority to issue these writs was provided by the fourteenth section of the Judiciary Act of 1789, which gave federal courts the power to issue all writs "necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law."[16]

Mason concluded his argument by asserting that it made no sense to allow the writ in civil cases, where only property was at issue, but to deny it in criminal cases, where a criminal defendant stood in jeopardy of life or liberty. Errors, Mason noted, were as likely to occur in the latter context as in the former. Moreover, writs of error in criminal cases were hardly novel. They were frequently available in England,[17] and the Supreme Court already had demonstrated the power to issue such writs in *Simms*.[18]

Chief Justice Marshall's opinion dealt only with the Court's ju-

---

15 7 U.S. (3 Cranch) 159 (1805). More was originally tried in front of a three judge panel which included the Chief Justice's brother and Judges Cranch and Kilty. None of them was a Supreme Court Justice.

16 Act Of Sept. 24, 1789, ch. 20, sec. 14, 1 Stat. 81.

17 The practice in England was to allow writs of error in misdemeanor cases; in felony cases, the writ had to have the express approval of the prosecutor.

18 The report of the case does not contain any mention of defense counsel presenting an argument to the Court on the jurisdictional issue, although it was typical for the reporter to summarize the arguments on both sides. The report does contain, however, an account of the presentation that More's attorney gave on the merits of the case, prior to Chief Justice Marshall's suggestion that the Court lacked jurisdiction. *See More*, 7 U.S. (3 Cranch) at 165-69.

risdiction to entertain writs of error in criminal cases.[19] Marshall dismissed the authority of *Simms* on the ground that it had never raised the question of the Court's jurisdiction. His opinion relied solely on a construction of section 22 of the First Judiciary Act, which dealt with the Court's jurisdiction to issue the writ in civil cases. Marshall interpreted the Act's affirmative grant of jurisdiction in a limited class of cases to mean that Congress intended to withhold jurisdiction in the balance of cases in which the Constitution would have allowed the Court to exercise its appellate power.[20] He made no mention of the policy argument that Mason raised, nor did he refer to any other principle that would shed light on why he chose to restrict the Court's jurisdiction in such a manner.[21]

Thus, if one traces back through the centuries from *Jones* to *McKane* to *More*, the principle that there is no constitutional right to review in criminal cases seems firmly based on history. It is indisputable that the original plan for the federal courts did not include a provision for review of criminal convictions, and, shortly after the adoption of the Constitution, the Supreme Court found no reason to infer such a power. History seems a dead end to an argument that due process requires review of a criminal conviction.

To leave the trail at this point, however, would be premature. Although federal procedure in the eighteenth century did not permit writs of error for criminal cases, other features of the early criminal process did provide some of the advantages that contemporary review grants defendants convicted in modern courts.[22]

---

[19] The Court in *More* need not have addressed the broad jurisdictional questions because it had a narrower ground on which to refuse to entertain the writ. Since it was the government that sought access to the court, *not* the defendant, the Court could have relied on the long recognized disfavor with which the common law viewed government appeals. In fact, this reason moved the Court to reach the same result as *More* in United States v. Sanges, 144 U.S. 310 (1892), when the government sought again to appeal a trial judge's dismissal of an indictment. *Sanges* came three years after the Court had been given jurisdiction to review criminal cases in general.

[20] *More*, 7 U.S. (3 Cranch) at 173.

[21] Justice Story speculated on the reason that the Supreme Court lacked appellate criminal jurisdiction in a case that arose 17 years after *More*. In *Ex Parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822), a habeas corpus case in which the petitioner sought to obtain his release from confinement for contempt, Justice Story wrote in refusing to grant the writ:

> [The Supreme Court] cannot entertain a writ of error, to revise the judgment of the Circuit Court, in any case where a party has been convicted of a public offence. And undoubtedly the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this Court every case, in which judgment passed against him, for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and, in some cases, totally frustrated.

Id. at 42.

[22] These features are described in section II.B, *infra*.

One cannot fully understand how the framers of the federal judicial system developed a policy denying review of criminal cases without some background on how the eighteenth century state courts dealt with the issue. The manner through which the states provided defendants in criminal cases with the advantages of review, either directly or indirectly, helped shape the federal view of the matter.

II. The History of Review in State Criminal Cases

Since the Supreme Court relied entirely on the historical record to support its denial of a constitutional basis for a right to review in criminal cases, a detailed examination of the criminal procedure in existence at the time of the adoption of the constitution is warranted. However, it is important to recall that appellate review in the eighteenth century was quite different than the process today.

Appeals, through which a higher court reviews the entire case developed at the trial level and has the power to render a judgment based on an overall assessment of the quality of the verdict, were not part of the common law tradition.[23] Instead, common law review was accomplished by the use of a writ of error,[24] which provided rather limited means of examining the record of a trial court for errors apparent on its face. It was, unlike an appeal, an original action, not a continuation of the case that had been litigated in the trial court.[25] The conception of the process was, literally, to try the record below to determine if an error existed.[26] Thus, it had a limited scope. For example, a court considering a writ of error could not consider any question concerning the evidence introduced at the trial, since the record did not include an account of the evidence.[27] The entire process lent itself to a quite mechanical application.[28]

Writs of error were available at common law in criminal cases only in limited circumstances. Prior to 1700, the writ did not issue as a matter of right in any class of criminal cases.[29] Thereafter, misdemeanor defendants had free access to it, but defendants in felony cases needed the Attorney General's approval, which was a matter

---

23 *See* Sunderland, *supra* note 8, at 139, 143.

24 *Id.* at 130.

25 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 409 (1821).

26 *See* Hood, *The Right to Appeal*, 29 La. L. Rev. 498, 499 (1969).

27 *See* Sunderland, *supra* note 8, at 142.

28 *See* Pound, *Introduction* to L. Orfield, Criminal Appeals in America 5-9 (1939) [hereinafter L. Orfield].

29 *See* L. Orfield, *supra* note 28, at 23.

of grace.[30] In England, in fact, it was not until 1907 that felony defendants had the right to review their convictions.[31]

A. THE ORGANIZATION OF STATE CRIMINAL COURTS

Although the administration of justice in the new Republic was overwhelmingly a matter of state rather than federal concern, the state court systems largely existed to adjudicate civil controversies. Criminal cases in colonial days typically made up no more than ten percent of the docket of the general trial courts,[32] and there is no reason to believe that the mix of cases after the Revolution was any different. Nevertheless, each state, following common law practice, constructed a series of specialized courts for the adjudication of crime. While the same judges heard civil as well as criminal cases, the title of the court and the procedures it used depended on the type of case at trial. In civil cases, common pleas ruled, while in criminal cases, pleas of the crown governed procedure.

The organization of criminal courts in early America followed a pattern based on the English criminal justice system.[33] Justices of

---

30 J. ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE 725 (Waterman ed. 1860) [hereinafter J. ARCHBOLD]; L. ORFIELD, *supra* note 28, at 23; I. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 310 (1883). The requirement that the Attorney General consent to the defendant's use of a writ of error has been explained as stemming from the fact that defendants could use this means of review to reverse convictions for the most trifling slips of form. *See* J. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW 299 (1986).

31 *See* 7 Edw. 7, ch. 23 (1907); L. ORFIELD, *supra* note 28, at 28-31; M. KNIGHT, CRIMINAL APPEALS (1970).

32 CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, Introduction at xvii (Hoffer ed. 1984) [hereinafter CRIMINAL PROCEEDINGS]; C. CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606 - 1660 76 (1983) [hereinafter C. CHAPIN]; Flaherty, *Criminal Practice in Provincial Massachusetts* in LAW IN COLONIAL MASSACHUSETTS, 1630-1800, 192 (Colonial Society of Massachusetts 1984).

33 For a general overview of the criminal justice systems of the early state courts, see S. BALDWIN, THE AMERICAN JUDICIARY (1905); C. CHAPIN, *supra* note 32; and R. POUND, ORGANIZATION OF COURTS (1940) [hereinafter R. POUND, ORGANIZATION]. For details concerning each of the thirteen original states, see the following: *Connecticut* I. DAVIS, THE ADMINISTRATION OF JUSTICE IN CONNECTICUT (1963) [hereinafter I. DAVIS]; E. GOODWIN, THE MAGISTRACY REDISCOVERED; CONNECTICUT, 1636-1818 (1981) [hereinafter E. GOODWIN]; Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (1796). *Delaware* THE FIRST LAWS OF THE STATE OF DELAWARE (1981); J. MUNROE, COLONIAL DELAWARE - A HISTORY, (1978). *Georgia* B. ALMAND, A HISTORY OF THE SUPREME COURT OF GEORGIA (1948) [hereinafter B. ALMAND]; K. COLEMAN, COLONIAL GEORGIA, A HISTORY (1976) [hereinafter K. COLEMAN]. *Maryland* C. BOND, THE COURT OF APPEALS OF MARYLAND, A HISTORY (1928) [hereinafter C. BOND]. *Massachusetts* G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960) [hereinafter G. HASKINS]; W. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825 (1981) [hereinafter W. NELSON]. *New Hampshire* E. PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE, 1640-1700 (1959). *New Jersey* R. FIELD, THE PROVINCIAL COURTS OF NEW JERSEY (N.Y. 1849) [hereinafter R. FIELD]; J. POMFRET, COLONIAL NEW JERSEY: A HIS-

the Peace occupied the bottom rung. These local magistrates rarely were trained in the law, but were empowered to dispense justice to miscreants who faced only the most minor punishment. Justices of the Peace ordinarily did not preside over jury trials, which all the colonies guaranteed to those charged with non-petty offenses.[34] Juries for non-petty offenses were provided by a layer of courts that were termed the General Sessions of the Peace, or the Quarter Sessions. These courts met four times a year, and typically provided for a bench composed of selected justices of the peace. Sessions Courts had trial jurisdiction over misdemeanors, could impanel grand juries to return indictments, and could commit those charged with a crime to jail if they failed to meet their bail conditions. The Sessions Courts could not, however, try those who faced indictable offenses.[35]

The judges who had the power to try these more serious cases had to operate under a broader grant of authority or commission. Three general commissions existed which empowered judges to adjudicate felony cases: Gaol Delivery, Oyer and Terminer, and *Nisi Prius*. These commissions were exercised mainly by judges riding circuit on a county-wide basis. The circuit judges, unlike the gentry who served as magistrates, were trained in the law, and were thought more competent to deal with the legal issues that might arise in complex and serious criminal matters. The pool of judges from which the circuits typically drew was composed of members of the jurisdiction's highest court. Even the justices of a colony's supreme court were expected to leave the seat of government and

---

TORY (1973). *New York* J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK (1970) [hereinafter J. GOEBEL & T. NAUGHTON]. *North Carolina* THE FIRST LAWS OF THE STATE OF NORTH CAROLINA (1984); H. LEFLER & W. POWELL, COLONIAL NORTH CAROLINA - A HISTORY (1973). *Pennsylvania* H. BRACKENRIDGE, LAW MISCELLANIES (1814) (reprinted 1972) [hereinafter H. BRACKENRIDGE]; W. LOYD, THE EARLY COURTS OF PENNSYLVANIA (1910) (reprinted 1986) [hereinafter W. LOYD]. *Rhode Island* P. CONLEY, DEMOCRACY IN DECLINE, RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT (1977) [hereinafter P. CONLEY]. *South Carolina* THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA (1981); R. WEIR, COLONIAL SOUTH CAROLINA - A HISTORY (1983). *Virginia* W. BILLINGS, J. SELBY & T. TATE, COLONIAL VIRGINIA, A HISTORY (1986) [hereinafter W. BILLINGS, COLONIAL VIRGINIA]; O. CHITWOOD, JUSTICE IN COLONIAL VIRGINIA (1905) (reprinted 1971) [hereinafter O. CHITWOOD]; CRIMINAL PROCEEDINGS, *supra* note 32; A. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS, CREATORS OF VIRGINIA LEGAL CULTURE (1981); A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA (1930) [hereinafter A. SCOTT].

34 *See* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 936-65 (1926); C. BOND, *supra* note 33, at 19 (Maryland).

35 Colonial Quarter Sessions ordinarily had no power over cases involving life and limb, while English Quarter Sessions did. *See* C. CHAPIN, *supra* note 32, at 84.

go out to the frontier to represent the King's, and later the State's, justice by presiding over felony trials.

Gaol Delivery operated as a clearing house for prisoners who had been indicted by a grand jury supervised by General Sessions. It possessed all of the power of a general jurisdiction felony trial court, except it lacked the ability to preside over its own grand jury. The power of Oyer and Terminer, to hear and determine, included the ability not only to try felony cases, but also to initiate them through the grand jury process.

Circuit judges also operated under a third grant of authority, acting as *nisi prius* courts. In a *nisi prius* case, the full bench would preside over the pre-trial pleadings, the most complex and challenging portions of the proceedings, before remitting the actual trial to the venue where the crime occurred. *Nisi prius* jurisdiction resulted from the highest court's exercise of original trial jurisdiction over the most serious felony cases. In some colonies, for example, all capital crimes had to be tried by the supreme court.[36] Not all of these trials took place before the full bench. Such a trial would have required all the witnesses to travel to whatever city the court typically sat in, and travel in colonial days presented a considerable travail.[37] Typically, the full bench would oversee the pre-trial pleadings. A circuit-riding judge would conduct the trial, and would proceed so far as to receive a verdict, but would withhold formal judgment. The case would then return to the full bench for entry of judgment and consideration of post-verdict challenges to the conviction.

B. FEATURES OF STATE CRIMINAL TRIALS: HIGH COURT DECISIONS, POST-CONVICTION REVIEW, AND MULTI-JUDGE BENCHES

Thus far, we have not identified a feature of the early American criminal court system that is strictly analogous to our criminal justice system's process of review. Yet, such mechanisms existed. A number of states allowed convicted defendants to appeal their cases and to receive trials *de novo* at a higher level in the court system. Defendants also could institute a separate action in a higher court using a writ of error, arguing that the judgment below was defective because of a mistake of law. However, even before examining how prevalent these forms of review were, the search for a historical answer to the inquiry how our forbearers viewed review requires an

---

36 *See, e.g.*, W. NELSON, *supra* note 33, at 24 (Massachusetts).

37 In Maryland, for example, it was a rough rule of thumb that witnesses would be allowed one day for each 15 miles that they had to travel to get to court. *See* C. BOND, *supra* note 33, at 94.

examination of the differences between the way trials were conducted in the past and the way trials are conducted presently. Several aspects of the states' criminal trial process at the time of the adoption of the Constitution bear on the question of whether any historical support exists for features similar to modern day review.

1. High Court Decisions

The first significant feature of the eighteenth century American trial system was that a defendant in a serious case typically could obtain the resolution of an issue relevant to his trial by the highest judicial authority that existed in the jurisdiction.[38] A defendant in a non-petty case was not subject to the unchecked exercise of power by a lower court judge who might decide a legal point in a way that varied from the state's organic law.

Means existed to provide felony trial judges with the institutional point of view of the jurisdiction's highest court even when no formal contact occurred between the two levels of the court system. Although a trial might begin and end before a panel of circuit riding judges exercising the power of Gaol Delivery or Oyer and Terminer, the decisions the panel made were likely to reflect the view of the jurisdiction's highest court by virtue of the fact that the judges were members of the higher court as well. Sir Matthew Hale's *History of the Common Law*, a basic text found in the library of colonial lawyers,[39] explained one of the advantages of the circuit system:

> [b]y this means their judgments and their administration of common justice, carry a *consonancy*, *congruity* and *uniformity one to another*; whereby both the laws and the administrations thereof, are preserved from that confusion and disparity that would unavoidably ensue, if the administration was by several *incommunicating* hands, or by *provincial* establishments.[40]

Supreme court judges not only conducted trials while riding circuit, but colonial and state high courts also conducted trials under a grant of original jurisdiction. The notion that the highest legal authority should function as a trial court was, in part, an inheritance from colonial legislatures. At the time of the Revolution, important criminal cases were tried by the legislative branch of the government, and this practice was within the recent memory of many colonial judges. In a number of the colonies,[41] the legisla-

---

38 *See* R. POUND, ORGANIZATION, *supra* note 33, at 67-72.

39 *See* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 472 n.40 (1971) [hereinafter J. GOEBEL].

40 M. HALE, HISTORY OF THE COMMON LAW 289 (4th ed. 1779) (emphasis in original).

41 *See* C. CHAPIN, *supra* note 32, at 69-74 ("from the beginning, colonial legislatures

tures undertook the burden of resolving criminal cases themselves.

The practice of consolidating legislative and judicial functions was obsolete by the end of the eighteenth century. However, in most of the new states' court systems, the state's highest court typically conducted the trials of the most serious crimes.[42] Thus, any legal questions that arose in the course of these trials were resolved as if the defendant was given an automatic right of review to the state's supreme court. The advantage of modern review, which allows the state's ultimate legal authority the opportunity to ensure that a conviction is in accord with their interpretation of the law, was achieved by the colonial criminal justice systems' practice of empowering their high court judges with the sole responsibility for the case from its inception.

Even if a case did not originate in the highest judicial arena, it could be removed there for trial. In New York, for example, the state supreme court could order inferior tribunals to transmit the records of their pending cases to it for trial by the use of writs of certiorari.[43] Defendants also could instigate this removal process by seeking certiorari, and lower courts could invite the parties to do so in cases presenting difficult questions that appeared on the record.[44] Thus, at either the request of the defendant or of the prosecution, the litigation could proceed in the state's highest court.[45]

The last feature of the early criminal trial system that gave defendants the opportunity to obtain the judgment of their state's highest court, even without any review mechanism, was the common practice of trial judges reserving complex or novel questions of law and reporting them, either formally or informally, to the high court for a definitive resolution. The operation of *nisi prius* cases represented one form of this referral practice. In a *nisi prius* trial, though,

---

regarded themselves as the highest courts in their jurisdictions"); *see also* E. Goodwin, *supra* note 33, at 76 (Connecticut); O. CHITWOOD, *supra* note 33, at 19 (Virginia).

42 *See, e.g.*, W. NELSON, *supra* note 33, at 23 (Massachusetts).

43 Both the Circuit and General Sessions courts were the subject of this type of supervision. *See* J. GOEBEL & T. NAUGHTON, *supra* note 33, at 257, 261. *See, e.g.*, People v. Townsend, 1 Johns. Cas. 103 (N.Y. 1799).

44 *See, e.g.*, People v. Lent, 2 Wheeler's Crim. Cases 548 (N.Y. Gen. Sess. 1819) (defendant invited by court to apply for certiorari). The Pennsylvania Supreme Court also controlled the course of the criminal justice system in the lower courts by exercising its power of certiorari and removing a case initially begun in Quarter Sessions or one of the circuit courts. *See infra* note 45.

45 *See, e.g.*, Respublica v. Cleaver, 4 Yeates 69 (Pa. 1804) (removed at request of prosecutor from Quarter Sessions to Circuit Court); Commonwealth v. Franklin, 4 Dall. 255, 256 (Pa. 1802); Respublica v. Duquest, 2 Yeates 493 (Pa. 1799) (removed by agreement from Mayor's Court to Supreme Court).

the high court itself instituted the mechanism for case referral.[46] When questions were reserved and reported, however, it was at the initiative of the trial judge, at a stage when the defendant could influence the forum in which the legal issue was determined.

One is struck by the degree to which the opinions decided in the context of such a referral system resemble those of contemporary appellate courts. In the 1790 New Jersey case of *State v. Wells*,[47] the defendant, who was convicted of manslaughter, moved for a new trial, alleging errors in both the judge's instructions to the jury and his rulings on admitting and excluding evidence.[48] The judge, who had doubts about whether he had misconceived the law, reserved and reported the case to the New Jersey Supreme Court for resolution.[49] The new trial motion, argued before the New Jersey Supreme Court, was denied on the ground that if an error had occurred at trial, it did not fundamentally affect the verdict.[50] Pennsylvania,[51] Virginia,[52] and North Carolina[53] judges all made

---

46 *See, e.g.*, People v. Croswell, 3 Wheeler's Crim. Cases 330, 381 (N.Y. Sup. Ct. 1804) (describing *nisi prius* practice as one where "the defendant thought proper to carry his cause before a tribunal constituted for the trial of issues of fact alone, where it is the invariable practice to reserve all doubtful points of law for a decision at bar"); *see also* J. GOEBEL & T. NAUGHTON, *supra* note 33, at 78.

47 1 N.J.L. 486 (N.J. 1790). Another example of a case reported from Oyer and Terminer to the Supreme Court for determination of a legal issue is State v. Aaron, 4 N.J.L. 263-66 (N.J. 1818).

48 *Wells*, 1 N.J.L. at 491.

49 *Id.* at 487.

50 *Id.* at 493.

51 In Pennsylvania, a major mechanism for promoting uniformity was for judges to settle among themselves disputed points of law that arose in the course of a trial. When only a few judges of the state's supreme court sat as a trial bench and faced a controversial question of law, it was common for them to reserve their decision and report the matter to the full bench for resolution. *See, e.g.*, Commonwealth v. Franklin, 4 Dall. 255, 255-58 (Pa. 1802) (prosecutor and defense counsel agreed that the question of the constitutionality of the statute on which the indictment was based should be argued in the state supreme court, before all the judges); *see also* Respublica v. Cleaver, 4 Yeates 69, 69-74 (Pa. 1804).

52 Virginia's court of general trial jurisdiction was the General Court. The bench of the General Court could reserve a ruling on a perplexing question of law and report it for decision to the Court of Appeals. *See* Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782). The General Court also functioned in the same capacity, providing answers as a full bench on disputed questions of law referred by constituent members while riding circuit as trial judges in the District Court. *See, e.g.*, Commonwealth v. Feely, 2 Wheeler's Crim. Cases 585 (Va. Gen. Ct. 1813); Commonwealth v. Mitchell, 2 Wheeler's Crim. Cases 471 (Va. Gen. Ct. 1796); Commonwealth v. Crane, 2 Wheeler's Crim. Cases 586 (Va. Gen. Ct. 1791); Commonwealth v. Richards, 3 Va. (1 Va. Cas.) 1 (1789); Temple v. Commonwealth, 3 Va. (1 Va. Cas.) 168 (1789).

53 If a question of law arose which posed a difficulty for trial judges in North Carolina, they could reserve their decision and report the matter to the full bench of the Superior Court, sitting as a Court of Conference. *See, e.g.*, State v. Boon, 1 N.C. (1 Tay.)

extensive use of this referral mechanism to obtain more authoritative answers than an individual trial judge could provide.

Georgia was the only state that did not allow its judges to obtain advice from other members of the judiciary in making decisions at trial. The state constitution of 1798 established a superior court, which had exclusive and final jurisdiction in all criminal cases.[54] Superior court judges were prohibited from reserving and reporting vexing questions of law to the full bench of the superior court for resolution. In addition, legislation passed in 1801 prohibited the full bench from deciding such issues and required that the presiding judge dispose of the case in the county where the trial was held.[55]

Although Georgia judges formally were required to determine the legal issues raised at trial themselves, they were able to consult on an informal basis. *State v. Monaquas*[56] is one example. The defendants in *Monaquas*, who were convicted of murder in the September 1805 term, filed a motion in arrest of judgment that presented the judge with an issue of first impression. Rather than deciding the case immediately after argument of counsel, the judge remanded the prisoners to the jail and announced that he would solicit the opinions of the judges of the other circuits of the superior court. At the May term of the court, the defendants were again set to the bar, and the judge delivered his opinion, sustained the motion, and ordered their discharge.[57]

2. *Post-Conviction Motions*

The second aspect of the early American criminal trial system that is similar to a feature afforded by modern day review was developed as a consequence of the format in which the defendant could raise objections to the proceedings. Defendants not only had an opportunity to raise legal points as they became relevant in the course of the trial, but they also had the ability to renew those points after conviction in a motion to arrest the judgment or in a motion for a new trial. The motion in arrest of judgment was confined to errors that were apparent on the record,[58] while a motion for a new trial

191 (1801). The North Carolina Superior Court judges served *en banc* as a Court of Conference from 1776 to 1818. *See* L. ORFIELD, *supra* note 28, at 217.

54 GA. CONST. of 1798, art. III, sec. 1, reprinted in THE FIRST LAWS OF THE STATE OF GEORGIA 39 (1981).

55 B. ALMAND, *supra* note 33, at 1.

56 1 Charlton Rep. 16 (Ga. 1805).

57 *Id.* at 23.

58 *See* Commonwealth v. Judd, 3 Wheeler's Crim. Cases 293 (Mass. Sup. Jud. Ct. 1807) (motion in arrest of judgment on ground of variance between verdict and indictment denied); People v. Thompson, 2 Johns. Cas. 342 (N.Y. Sup. Ct. 1801) (motion in

allowed the defendant to raise issues that were grounded in the evidence.[59] Through the use of these devices, defense attorneys could obtain for their clients a second look at a legal issue that had originally been decided against them.[60] The trial court's initial determination of an issue was not final. Although review was available only in front of the same group of judges, it existed nevertheless.[61]

These post-conviction motions offered the judges an opportunity to reflect at greater length on a legal issue than was possible during the hectic pace of the trial itself. Thus, even without a formalized review process, time for reflection, a hallmark of the contemporary appellate process, clearly existed. As one commentator noted in 1824:

> It is, of course, expected, that the verdict will be rendered as at *nisi prius*, under the unprepared, and sudden directions of the judge, who

---

arrest of judgment on ground that indictment does not charge a crime allowed); Commonwealth v. Feely, 2 Wheeler's Crim. Cases 585 (Va. Gen. Ct. 1813) (motion in arrest of judgment allowed on ground that trial court lacked jurisdiction of the offense); J. ARCHBOLD, *supra* note 30, at 671-74.

59 *See* People v. Crowell, 3 Wheeler's Crim. Cases 330 (N.Y. Sup. Ct. 1804) (new trial motion on ground of error in judge's instructions and in excluding evidence offered by defendant; *nisi prius* trial judge was one of the four *en banc* justices who considered the motion); People v. Dalton, 2 Wheeler's Crim. Cases 161 (N.Y. Gen'l Sess. 1823) (at court's suggestion, defendant consented to entry of guilty verdict and case reserved for opinion of the court; defendant did not want to be confined to grounds cognizable on motion in arrest of judgment only, and with leave of court, was allowed to move for a new trial as well; relief denied on former grounds but allowed on latter); J. ARCHBOLD, *supra* note 30, at 610-70. While new trial motions in felony cases were not granted in England under the common law, the American courts freely used the device. *See* People v. Morrison, 1 Parker's Crim. Cases 625 (N.Y. 1854) (extensive discussion of history of new trial motions in 18th and 19th century American courts). Where the defendant's motion for a new trial was based on a claim that the verdict was against the weight of the evidence, or on a claim that newly discovered evidence created a doubt about his guilt, courts were more reluctant to entertain the claim than when the new trial motion was based on other grounds. *See* People v. Harper, 1 Wheeler's Crim. Cases 495 (N.Y. Gen'l Sess. 1819). One reason for the reluctance to allow new trial motions solely based on the weight of the evidence was the fear that the prosecution might use this device to set aside acquittals. *See* People v. The Sessions of Chenango, 1 Cai. R. 319, 320 (N.Y. 1797).

60 For example, allegations that the indictment was defective were frequently found in the cases reported in the context of a motion in arrest of judgment, but they could be raised prior to the trial by the use of a demurrer. *See, e.g.*, People v. Conger, 1 Wheeler's Crim. Cases 448 (N.Y. Gen'l Sess. 1813); Commonwealth v. Myers, 3 Wheeler's Crim. Cases 545 (Va. Gen. Ct. 1811).

61 In New York, it appears that motions to arrest judgment were only infrequently used prior to 1776; this may be a consequence of the fact that success on the motion would result only in the prosecutor seeking a new indictment. *See* J. GOEBEL & T. NAUGHTON, *supra* note 33, at 278. *See, e.g.*, People v. Philips, 1 Wheeler's Crim. Cases 155 (N.Y. Rec. Ct. 1823) (defendants successfully object to indictment on ground that name of victim was misspelled; court dismissed indictment but ordered defendants held to answer to new indictment).

> has no other opportunity of correcting his errors or those of the jury, but on a motion for a new trial.[62]

These post-conviction motions provided expansive remedial opportunities. A defendant could challenge his or her conviction on the ground of a defect in the indictment process, the means by which the jury was selected, lack of jurisdiction in the court, or other procedural irregularities.[63] The niceties of eighteenth century criminal procedure gave defendants in some ways even greater opportunities to overturn their convictions than they have today.[64] For example, in an 1802 North Carolina case, *State v. Carter*,[65] the judges entertained a motion to arrest the judgment in a murder case on the ground that the indictment was faulty in describing the location of the mortal wound—it spelled the word "breast" at one point without the "a." Despite the fact that the judges who voted in the majority felt that their conclusion could "not easily . . . be reconciled to good sense or sound understanding,"[66] the court arrested the judgment.

3. Multi-Judge Trials

The third feature of eighteenth century criminal trials that raises a point of similarity with contemporary review is the number of judges who considered the legal issues raised by trial counsel. The legal arguments that defense attorneys made before trial (on pleas in bar and pleas in abatement), during trial (on points of evidence and rulings on instructions to the jury), and after conviction (on motions in arrest of judgment or for a new trial) were presented not simply to one judge but, as in a modern appellate argument, to a panel.

Trials of all but the most trivial offenses in state courts normally were held in front of a multi-judge bench. Typically, felony trials

---

62 Preface to 1 Charlton Rep. iii-iv (Ga. 1824).

63 J. GOEBEL & T. NAUGHTON, *supra* note 33, at 272-78; *see, e.g.*, People v. Barrett & Ward, 2 Cai. R. 304 (N.Y. 1805).

64 *See* I. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 284 (1883) (The highly technical grounds on which defendants succeeded in overturning their convictions "[d]id mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law. There was a strange alternation in the provisions of the law upon this subject, by which irrational advantages were given alternately to the Crown and to the prisoner.").

65 1 N.C. (1 Tay.) 319 (1802).

66 *Id.* at 321. *See also* People v. Quackenboss, 1 Wheeler's Crim. Cases 91, 92 (N.Y. Rec. Ct. 1822) (defendant charged with passing a counterfeit note, defense chiefly relied upon a defect in the indictment that in spelling the name of the cashier who received the note, the dot over the letter "i" in the name Tim was omitted; the jury acquitted the defendant on that basis).

would be held in a court whose judges were members of the state's highest tribunal. The reports of these early trials chronicle interchanges between the attorneys and the judges, and among the judges themselves, in ways that mirror the behavior of multi-judge appellate courts today.[67] As reported by the note-takers, the judges spelled out their reasoning at length, engaged in prolonged discussions among themselves and with counsel, and often disagreed with each other.[68]

The methods used by judges to resolve disagreements among themselves varied. When voting on how to resolve an issue, for example ruling on a motion, the majority (if there was one) prevailed.[69] When multi-judge trial courts were called upon to perform functions that did not require a vote, the judges performed seriatum. One early court reporter noted, for example, how the practice of three judge trial courts in New Hampshire sometimes lead to the jury receiving differing charges from each judge.[70]

The process by which the panel heard arguments more closely resembled a modern appellate court than a trial session. For example, four of the five members of the Pennsylvania Supreme Court sat together as a trial bench. Hugh Brackenridge, one of the first justices of the Supreme Court of Pennsylvania, described how such a court operated in the context of a complaint about the inefficiency of having more than one judge making decisions in a trial context; he explained:

> A paper offered in evidence must be read by the presiding judge, and a note taken of it. It then comes to the second who must read, and note also; and to a third, and a fourth who has the same right to read and note; and, if he does not, at least read, he is under a disadvantage in

---

67 *See, e.g.*, State v. Norris, 2 N.C. (2 Hayw.) 429 (1796) (multi-judge murder trial in which judges hear arguments on points of law and direct questions to counsel); Respublica v. Arnold, 3 Yeates 417 (Pa. 1802) (argument before Justices Yeates and Smith in perjury case on motion in arrest of judgment).

68 *See, e.g.*, *Norris*, 2 N.C. (2 Hayw.) at 429-33 (discussion among two presiding judges and counsel for both sides on the right of the defendant to put questions to members of the venire about whether they had already expressed an opinion on the defendant's guilt).

69 *See, e.g.*, Jones v. Commonwealth, 5 Va. (1 Call) 555, 560 (1799) (Statement of Judge Pendleton, outvoted 2-1, that "My opinion, therefore, is, that the judgment ought to be affirmed; but, as a majority of the Court differ from me, it must be reversed.").

70 Reporter's Note, 55 N. H. (7 Shirley) 6-8 (1876). In one notable civil case, the disagreements in the jury instructions the judges delivered contributed to three successive hung juries, until on the fourth trial the two associate judges agreed to sit by in silence and allow the chief judge to charge the jury by himself. *Id.* at 7. *See also* Commonwealth v. Addison, 4 Dall. 225 (Pa. 1801) ("[e]very Judge has a right, and emphatically, that is his duty, to deliver his sentiments upon every subject that occurs in Court . . . it would be indecent and improper, in any presiding Judge, to attempt to prevent his associates from the exercise of this right; from the performance of this duty.").

> understanding the cause. By the time it came to a fourth, *which* was my place, I found by both bar, and country, such an impatience at the vexatious delay, that I was led to dispense with looking at it at all; and to content myself with catching the substance from the argument of the counsel, or the hearing it cursorily read by them, without *seeing* it, which at all times fixes the impression of the contents more forcibly upon the mind.[71]

While Brackenridge's lament certainly paints a picture of an inefficient judicial operation, it also describes a process that provides some of the advantages of modern review by having more than one judge make the decision.

The combination of these three aspects of the trial system resulted in a mechanism that greatly resembled modern appellate review. In fact, South Carolina's judicial system provided such a combination as an explicit alternative to review of a criminal case after conviction. South Carolina did not offer defendants in either criminal or civil cases the opportunity to obtain writs of error or appeals in order to review the judgments against them.[72] It did, however, provide multi-judge courts, post-conviction motions, and an institutionalized version of referring a case for report. South Carolina's courts found the result a "more speedy and less expensive"[73] alternative to traditional review, with just as expansive a remedy.

Defendants in criminal cases in post-Revolutionary South Carolina could raise any legal issue they contended bore on the validity of their conviction before the Constitutional Court.[74] Article X of the constitution provided that at the conclusion of the circuits where superior court judges held trial, all the judges would meet *en banc*, once in Columbia and once in Charleston, "for the purpose of hearing and determining all motions which may be made for new trials, and in arrest of judgments, and such points of law as may be submitted to them."[75]

The Constitutional Court was composed of six judges[76] who sat as a full bench.[77] The trial proceedings they reviewed had generally

---

71 H. BRACKENRIDGE, *supra* note 33, at 284 (emphasis in original).

72 *See* Muir & Boyd v. Whitehead, 4 S.C.L. (2 Brev.) 215 (1807).

73 *Id.* at 217.

74 This court derived its name from the fact that it was established by the constitution of 1790. *See* Preface to 2 S.C.L. (2 Bay) (1811). The Constitutional Court existed as South Carolina's only reviewing tribunal until 1836. R. POUND, ORGANIZATION, *supra* note 33, at 112-14.

75 THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA 42 (1981) (Part 2).

76 *See* State v. Harkness, 3 S.C.L. (1 Brev.) 276 (1803).

77 *See* State v. Speirin, 3 S.C.L. (1 Brev.) 119 (1802) (all 6 judges present); State v. Harding, 2 S.C.L. (2 Bay) 267 (1800) (5 judges present); State v. Connor, 2 S.C.L. (2 Bay) 34 (1796) (4 judges present).

been conducted by one of their members.[78] Although the proceedings in the Constitutional Court technically were continuations of the original trials,[79] the judges' decisions had the same impact as if they were reviewing a case on appeal. The reports of the interchanges between counsel and the judges give a picture of the type of argument that easily could have occurred in a twentieth century appellate court. The reports show that the court considered the widest range of legal issues. Its cases dealt not only with technical legal claims that would have been cognizable on a writ of error, like a defect in the indictment, but also with issues concerning the sufficiency of the evidence, jury misconduct, and claims that newly discovered evidence warranted a new trial.[80]

This right to have one's case considered by an *en banc* tribunal gave South Carolina's criminal courts a unique cast among the thirteen states.[81] It illustrates, however, the degree to which the existing structure of the trial system could provide a defendant with the advantages of review without resorting to the eighteenth century devices of an appeal for trial *de novo* or the use of writs of error.

C. REVIEW MECHANISMS: EXECUTIVE AND LEGISLATIVE REVIEW

The criminal justice systems established by each state after the Revolution were the direct successors of colonial courts that had operated under a regime of direct accountability to the King or Queen. Under colonial rule, defendants convicted of a crime had access, at least in theory, to seek redress based upon errors in the proceedings both across the Atlantic, to the Crown, and to the royal government in the colonies.

The ultimate forum for review of all colonial court judgments rendered was the King or Queen, acting through the authority of the Privy Council. The availability of this type of review was a regular feature of colonial charters.[82] This review, however, usually was confined to misdemeanor cases where a fine exceeding a certain amount was imposed as a sentence.[83] Nevertheless, appeals to the

78 *See* State v. Harding, 2 S.C.L. (2 Bay) 167 (1800) (1 judge).

79 Muir & Boyd, 4 S.C.L. (2 Brev.) 215, 216 (1807).

80 *See, e.g.*, State v. Harding, 2 S.C.L. (2 Bay) 267 (S.C. 1800).

81 R. POUND, ORGANIZATION, *supra* note 33, at 112 (the Constitutional Court was "out of line of development of judicial organization in the country at large").

82 *See id.* at 63.

83 *See, e.g.*, R. FIELD, *supra* note 33, at 238 (Lord Cornbury's Charter of 1702, New Jersey) ("You are also to permit Appeals to us in Council, all Cases of Fines imposed for Misdemanours; provided the Fines so imposed, amount to or exceed the value of *two Hundred Pounds*, the Appellant first giving good Security"). *See also* A. SCOTT, *supra* note 33, at 115 (same restrictions on appeals to King and Council in Virginia charter).

Privy Council were attempted by defendants convicted of serious felonies. Two men convicted of murder in a Pennsylvania court in 1718, for example, presented an unsuccessful appeal to the Privy Council on the ground that Quakers who sat on the petit jury had not taken a proper oath.[84]

Direct appeals to the Crown, even when theoretically possible, were too inconvenient and costly to be of much practical significance.[85] Rhode Island was the only colony whose citizens made any extensive use of this means of review in criminal cases.[86]

Within the boundaries of individual colonies, however, a much greater flow of cases from the courts to the executive took place. The Governor and Council operated more or less as an analogy to the House of Lords in England, and typically held themselves out as a court of last resort. Judgments of conviction were overturned both on grounds similar to a modern executive's exercise of clemency and on the basis of some perceived flaw in the judicial process. In Pennsylvania, for example, this means of review steadily increased after legislation in 1718 required far ranging application of capital punishment, and the minutes of the council are full of petitions for relief from capital convictions.[87]

Even after the break from England, some states kept open a legislative avenue of review. At the start of the Revolution, the New Jersey Constitution provided for the existence of the same courts as under English rule. New Jersey gave the Governor and Council responsibility as a Court of Appeals of last resort for all causes of law, specifically providing that they "possess the power of granting pardons to criminals after condemnation in all cases of treason, felony or other offences."[88] Where a formal grant of this type of power was not expressly given to the executive, it was still possible for defendants to ask the court to recommend that the executive authorities grant a pardon.[89]

---

84 *See* R. FIELD, *supra* note 33, at 84-85. *See also* K. COLEMAN, *supra* note 33, at 107-08 (providing an account of an appeal to Privy Council in 1734 by wife of Georgia defendant convicted of using unguarded expressions and committed for lunacy).

85 *See* O. CHITWOOD, *supra* note 33, at 18, 31; J. GOEBEL & T. NAUGHTON, *supra* note 33, at 224, 238; K. COLEMAN, *supra* note 33, at 178.

86 *See* P. CONLEY, *supra* note 33, at 44.

87 *See* W. LOYD, *supra* note 33, at 87. Similarly, in Maryland, the Governor and Council were given the power, by legislation beginning in 1694, to hear appeals and entertain writs of error in civil cases from the Provincial Court. Although the legislation did not explicitly authorize review in criminal cases, writs or error were actually used in criminal cases as well, one as early as May 13, 1699. *See* C. BOND, *supra* note 33, at 26.

88 N.J. CONST. art. IX, reprinted in THE FIRST LAWS OF THE STATE OF NEW JERSEY vi (1981).

89 *See, e.g.*, The People v. The Justices of the Sessions of the County of Chenango, 1

Another feature of early American criminal courts was the power of colonial legislatures to review convictions and provide redress.[90] The New England states, Maryland and Virginia all invested their legislatures with the power to review criminal cases.[91] In Connecticut, for example, the legislature modeled its powers after the English Parliament, and made itself available to redress wrongful convictions.[92] It would enact private bills granting new trials in criminal cases,[93] act as a general court of appeal entertaining questions certified to it by the general jurisdiction trial court,[94] and grant writs of error.[95] Even after the Revolution, defendants convicted in criminal cases sought relief from the Pennsylvania legislature.[96]

D. REVIEW MECHANISMS: TRIAL *DE NOVO*

The most expansive type of formal review was an appeal which allowed the defendant to obtain a trial *de novo*.[97] Appeal, which was not part of the criminal common law tradition, existed solely as the result of specific legislation. All of the New England states as well as North Carolina provided defendants convicted before a lower court the right to obtain this form of review. Massachusetts, the most influential of the New England states, established the model.[98] At each level of the Massachusetts court system, defendants were al-

---

Johns. Cas. 180, 181 (N.Y. 1797) ("[t]his case is a case of felony in which consideration of policy and expediency would prevent this court from granting a new trial. In such cases, the usual course is to recommend the convict for pardon.").

90 *See* R. POUND, CRIMINAL JUSTICE IN AMERICA, 153 (Cambridge 1945) [hereinafter R. POUND, CRIMINAL] ("But the practice of review of administrative convictions before colonial legislatures and the granting of new trials by colonial legislatures after judgment, made us familiar with review of criminal proceedings and granting of new trials for errors of law."); L. ORFIELD, *supra* note 28, at 215.

91 *See* R. POUND, CRIMINAL, *supra* note 90, at 64.

92 *See* E. GOODWIN, *supra* note 33, at 76.

93 This practice finally came to an end in 1815 in People v. Lung, when Judge Zachariah Swift declared that the judicial power was confined solely to the court system. *Id.* at 113.

94 *Id.* at 79.

95 *See* I. DAVIS, *supra* note 33, at 23. *See also* P. CONLEY, *supra* note 33, at 40, 42 (Rhode Island Assembly heard appeals and often reversed convictions); O. CHITWOOD, *supra* note 33, at 17-18, 21, 24-25 (Virginia Assembly heard appeals from both General Court and county courts until 1682 when it lost its power in a political fight with the Governor).

96 *See, e.g.*, Respublica v. Oswald, 1 Dall. 319 (Pa. 1788) (defendant, convicted of contempt for publishing derogatory documents, sought to have the legislature pass a resolution declaring the sentence unconstitutional).

97 Trial *de novo* involves the complete rehearing of the case on a clean slate. All legal and factual issues are redetermined.

98 R. POUND, ORGANIZATION, *supra* note 33, at 26.

lowed to appeal to the next tier for a trial *de novo*. Appeal was available as a matter of right for all cases from any level of the court system.[99] Thus, for example, if a defendant was found guilty of a felony by a jury in General Sessions, he or she could appeal for a trial *de novo* to the next level of the court system. If convicted again, he or she could appeal to the Supreme Judicial Court, where the case would be retried for the third time in front of a new jury with all the issues of law reargued before the full bench of the Commonwealth's highest court.[100]

The North Carolina Superior Court also had extensive power of review over criminal cases originally tried in the lower courts. The Superior Court could entertain appeals brought by any person dissatisfied with the sentence or judgment of the county court of quarter sessions, and grant the defendant a trial *de novo*.[101] Obtaining a trial *de novo* in the Superior Court was a great advantage to defendants, who could thus escape local passions and untrained county judges.[102] Even slaves could take advantage of this mechanism of review. In *State v. Washington*,[103] a slave, who was convicted in Quarter Sessions for the rape of a white woman and was sentenced to death, moved for an appeal to the Superior Court. His motion was denied. In an effort one can surmise was either an act of loyalty or an attempt to protect an asset, the defendant's owner obtained a writ of certiorari and a *supersedeas*, which stayed the execution of the sentence. In the Superior Court, the question of the jurisdiction to hold a trial *de novo* was reserved and reported. The judges eventually held that the defendant had an absolute right to a trial *de novo*, and the Superior Court had the power to issue whatever writs were necessary to protect that right.

---

99 *See* G. HASKINS, *supra* note 33, at 199 (appeal available from Justice of the Peace Courts; also in capital cases tried before a lower court, unlike the practice in England where review in capital cases was a matter of grace).

100 *See, e.g.*, Commonwealth v. Messenger, 4 Mass. 462 (1808). Defendants enjoyed the right to trial by jury in all criminal cases tried in General Sessions and in the Supreme Judicial Court. *See* W. NELSON, *supra* note 33, at 24.

101 *See* An Act for Establishing Courts of Law and for Regulating the Proceedings Therein, art. II, LXXXII & LXXXIV (1777), in THE FIRST LAWS OF THE STATE OF NORTH CAROLINA, at 297, 314-15 (1984). Prosecutors in North Carolina also took advantage of the trial *de novo* review process, *see, e.g.*, State v. M'Lelland, 1 N.C. (Tay.) 569 (1803), until the Superior Court declared in 1809 that no appeal could lie from an acquittal. *See* State v. Jones, 5 N.C. (1 Mur.) 257 (1809).

102 *See, e.g.*, State v. Dickens, 2 N.C. (1 Hayw.) 406 (1796) (sufficiency of indictment on trial *de novo* in Superior Court would be judged by the more lenient standards applied to county court, where indictment originated, than by the more exacting standards of Superior Court); State v. Johnson, 6 N.C. (2 Mur.) 201 (1812).

103 6 N.C. (2 Mur.) 100 (1812).

E. REVIEW MECHANISMS: WRITS OF ERROR

In England, writs of error were available as a matter of right in civil cases.[104] In criminal cases, however, writs of error under English common law were available as a matter of right only in misdemeanors, provided the defendant made a showing to the attorney-general of sufficient probable cause.[105] In capital cases, such a writ was granted only upon the express consent of the attorney-general, which was a matter of grace.[106] In the colonies, however, the practice of making writs of error available to defendants was more expansive.[107]

Almost all of the states which did not offer trial *de novo* did allow review by a writ of error of (at the very least) convictions obtained in front of a Justice of the Peace or before General Sessions. Courts in Maryland,[108] Virginia,[109] New York,[110] New Jersey,[111] Delaware[112]

104 *See* III W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 406-11 (N.Y. ed. 1844) [hereinafter W. BLACKSTONE].

105 *See* IV W. BLACKSTONE, *supra* note 100, at 392; W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 458-62 (1721) (reprinted 1978) [hereinafter W. HAWKINS]. Writs of error were available only to test judgments from common law courts of record. Where the court's authority stemmed from a novel source, a writ of certiorari served as the vehicle to cause the record to be examined for error. *See* J. BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 657 (Boston 1866).

106 *Id.*

107 *See, e.g.*, Z. SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 418 (Conn. 1823) (a writ of error "[i]s a matter of right and will be granted in all criminal cases, in the same manner as in civil cases").

108 *See, e.g.*, State v. Tibbs, 3 H. & McH. 50 (Md. 1791) (conviction for assault and battery in General Court reversed in Court of Appeal on a writ of error).

109 *See, e.g.*, Case v. Commonwealth, 3 Va. (1 Va. Cas.) 264 (1812) (writ of error challenging misdemeanor conviction in county court); Haught v. Commonwealth, 4 Va. (2 Va. Cas.) 3 (1815) (writ of error challenging misdemeanor conviction in county court); Conner v. Commonwealth, 4 Va. (2 Va. Cas.) 30 (1815) (writ of error awarded by General Court in perjury case, judgment reversed); Smith v. Commonwealth, 4 Va. (2 Va. Cas.) 6 (1815) (writ of error sought from General Court in second degree murder case, Court refused to award the writ on the ground that there was no error). The availability of writs of error, however, did not extend to felony convictions of slaves at Courts of Oyer and Terminer, as the General Court determined in 1823 that no record in the past 150 years revealed the use of writs of error to review such judgments. *See* Peter, a Slave v. Commonwealth, 4 Va. (2 Va. Cas.) 330 (1823).

110 *See* Act of March 20, 1801 (1 N.Y. Rev. Laws 200) ("writs of error in all civil cases, and in criminal cases, not capital, shall be considered as writs of right and issue of course . . . and in all capital cases writs of error shall be considered as writs of grace, and shall not issue but upon order of the chancellor made upon motion or petition, notice whereof shall be given to the attorney general or prosecutor of the people"). *See, e.g.*, People v. Rust, 1 Cai. R. 133 (N.Y. 1803) (writ of error). In capital cases, the Chancellor allowed the writ if he determined that probable cause was shown that a reversible error existed. *See* Yates v. People, 6 Johns. 334, 372 (N.Y. 1810). Prior to the enactment of the statute allowing writs of error, defendants convicted in Oyer and Terminer obtained review by having the court suspend passing judgment after a verdict of guilty and certify the issue in question to the supreme court, who considered the point and advised the

and Pennsylvania[113] all entertained writs of error in criminal cases. Only Georgia had neither type of review mechanism at any level of its court system.

Where statutory authority to issue writs of error in criminal cases did not exist, courts relied on the common law. The Virginia courts, for example, interpreted the statute dealing with writs of error to apply only to civil cases, a construction that made sense in light of the statute's requirement that the judgment exceed a certain dollar amount.[114] Under their common law power, however, the state courts could entertain writs of error without regard for the value of the judgment.[115] The writ was available by right, and the only requirement was that the defendant certify probable cause of an error existed.[116]

---

trial judges either to grant a new trial or to proceed to judgment. *See* Carnal v. People, 1 Parker's Crim. Cases 262, 268 (N.Y. Sup. Ct. 1851).

111 *See, e.g.*, State v. Halsey, 4 N.J.L. 369 (1816) (defendant charged with extortion; on defendant's demurrer, sessions rendered judgment for the state; in supreme court, on writ of error, judgment for defendant). *See also* Woodruff v. State, 4 N.J.L. 392 (1817) (defendant charged with unlicensed sale of liquor; on defendant's demurrer, sessions rendered judgment for the state; in supreme court, on writ of error, judgment for state).

112 *See, e.g.*, State v. Lowber, 2 Del. Cas. (3 Ridgley) 557 (Del. Ch. 1820). *Lowber* presented the question whether the High Court or the Supreme Court was the appropriate forum from which to seek a writ of error challenging a conviction in Sessions. The court declared the statute of 1760 giving the Supreme Court such jurisdiction, which had been in force since its enactment, unconstitutional on the grounds that it was inconsistent with the mandate given to the High Court under the 1792 constitution. The system described in *Lowber* allowed defendants convicted of non-capital crimes in either Sessions or the General Court to obtain a writ of error in the High Court either with the consent of the Attorney General or with the permission of a High Court judge. In *Lowber* itself, the Attorney General refused to agree to the writ, but the court allowed it. In capital cases, though, Delaware followed the common law rule that only with the prosecution's consent could a defendant obtain a writ of error. *Id.* at 564.

113 *See, e.g.*, M'Nair v. Respublica, 4 Yeates 326 (Pa. 1806); Tryer v. Respublica, 3 Yeates 451 (Pa. 1802); Fitch v. Respublica, 3 Yeates 49 (Pa. 1800); Respublica v. Honeyman, 2 Dall. 228 (Pa. 1795) (murder conviction in Oyer and Terminer reversed on writ of error to Pennsylvania Supreme Court).

114 *See* An Act Constituting the Court of Appeals, Chap. XXII of Acts of 1779, in THE FIRST LAWS OF THE STATE OF VIRGINIA 102 (1982).

115 *See* Temple v. Commonwealth, 3 Va. (1 Va. Cas.) 163 (1789). In colonial times, the General Court had the power to issue writs of error to county courts. *See* O. CHITWOOD, *supra* note 33, at 18, 45; R. POUND, *supra* note 33, at 54. However, several historians have concluded that criminal convictions in these minor cases were not appealable, *see* W. BILLINGS, COLONIAL VIRGINIA, *supra* note 33, at 70; CRIMINAL PROCEEDINGS, *supra* note 33, at xviii. *But see* A. SCOTT, *supra* note 33, at 113. However, appeals—involving a retrial—were separate procedures from review by a writ of error. *Cf.* W. BLACKSTONE, *supra* note 104, at 391-94.

116 *See* Jones v. Commonwealth, 4 Va. (2 Va. Cas.) 224 (1820).

F. ATTITUDE TOWARD REVIEW

Of the thirteen original states, only Georgia did not incorporate some form of review mechanism into its criminal justice system. In fact, it was not until 1848 that Georgia established a state supreme court.[117] The only type of review that a Georgia defendant could obtain was either to request a new trial or to move for an arrest of judgment before the single Superior Court judge who presided over his trial.[118]

Part of the explanation for the lack of review in Georgia's post-Revolution criminal justice system was widespread antipathy to the idea of appellate courts in general. In particular, Georgians viewed the United States Supreme Court with extreme disfavor due to the political reversals the state government had suffered there. This aversion to high courts played a role in the internal decision to restrict criminal courts to the trial level.[119] A number of other factors were important as well, such as a fear that a centralized court would favor the rich over the poor and thereby create an expensive barrier to the resolution of civil cases.[120] Since the highest level of the trial court was already involved in the resolution of criminal cases, without an appellate court or centralized meeting of the full trial bench, no effective review existed at all.

1. The Relevance of Individual Rights

The remaining twelve states did not share Georgia's attitude toward review. Review played a role in all of their criminal justice systems. The reason that review was widespread, however, did not reflect contemporary concerns. Although the modern rationale for review in criminal cases places great emphasis on the need to ensure that each individual defendant receives a fair trial, this atomistic view of the process played only a minor role in eighteenth century judicial thought.

Review was not seen as the great protector of defendants' rights for a number of reasons. One major factor was the idea that any sort of review would be too late to help the defendant. As one early

117 *See* B. ALMAND, *supra* note 33, at 16. All but the most petty criminal cases began and ended in the Superior Court. Although the Superior Court had review powers over cases brought in the inferior court, those courts had only civil jurisdiction. Statute of 1797, art. LIX, in THE FIRST LAWS OF THE STATE OF GEORGIA 636 (1981).

118 *See* GA. CONST. of 1798, art. III, sec. 1, in THE FIRST LAWS OF THE STATE OF GEORGIA 39 (1981).

119 *See* B. ALMAND, *supra* note 33, at 5.

120 *See id.* at 14.

Virginia prosecutor stated in an argument against granting an appeal to the Court of Appeals in an 1803 criminal case:

> Several reasons occur why the court should not exercise jurisdiction in criminal cases. If capital it would be useless, as the judgment would be executed before the decision here. It if was not capital, but imprisonment, the defendant would have suffered the whole or part of the punishment, before the judgment here.[121]

Two factors combined to reach this result. First, the review process required extensive amounts of time. The reviewing courts were often far away, and sat infrequently.[122] Second, at common law a writ of error did not operate to suspend the judgment of the court below.[123] In order to prevent the defendant from suffering the penalty his sentence provided for, either the appellate court specifically had to issue a writ of *supersedeas*[124] or the trial court had to grant the defendant a reprieve.[125] Neither course was a familiar one at common law, and it took some time for American judges to adopt them as solutions to the problem. Judge Brackenridge of Pennsylvania complained about the issue in 1816:

> With us . . . no writ or certiorari, or writ of error, shall be available to remove an *indictment, or stay execution of the judgment* in any *criminal case*; unless the same shall be *specially* allowed . . . Some time must intervene before application can be made . . . and before the writ of error can be heard; and in the mean time the sentence must go into part execution, which is a little like a person, so far as this goes, being hanged, or whipped first, as the phrase is, and tried afterwards. For where there was error, there can not be said in strictness, to have been a trial.[126]

Brackenridge went on to suggest as a solution, that the trial judge

---

121 Bedinger v. Commonwealth, 7 Va. (3 Call) 461 (1803). At common law, the fact that a defendant already may have been executed would not have ended the review process. The defendant's heirs could still maintain a writ of error in order to avoid the consequences to them of an attaint and a corruption of blood, which would have deprived them of their inheritance. *See* J. BEALE, A TREATISE ON CRIMINAL PLEADINGS AND PRACTICE 376 (1899).

122 *See, e.g.*, Lavett v. People, 7 Cow. 338, 339 (N.Y. 1827) (in speaking about a writ of error, the court stated, "These proceedings must be attended with great delay, and prejudice to public justice; and what in the meantime is to be done with the offender?").

123 *See* Conner v. Commonwealth, 4 Va. (2 Va. Cas.) 30, 32 (1815); Lavett v. People, 7 Cow. 338 (N.Y. 1827) (citing Rex v. Wilkes, 4 Burr. 2574 (K.B. 1770)). While a writ of error did not operate *per se* as a stay, statutes often gave it that attribute. *See* Carnal v People, 1 Parker's Crim. Cases 262, 263, 270 (N.Y. Sup. Ct. 1851).

124 *See* Conner v. Commonwealth, 4 Va. (2 Va. Cas.) 30, 32 (1815).

125 At common law, trial judges would reprieve a defendant under sentence in order to allow the defendant time to seek a pardon, if the defendant was *non compos mentos*, or if a woman defendant was quick with child. *See* W. BLACKSTONE, *supra* note 104, at 394-95; W. HAWKINS, *supra* note 105, at 462 (1721).

126 H. BRACKENRIDGE, *supra* note 33, at 529.

grant bail to the defendant, at least in the case of misdemeanors.[127]

Another major reason why the early American criminal justice system did not look upon review as a major component in the protection of defendants' rights was its view of how the trial system operated. If the trial system was seen as providing all the protection a defendant would ever need, then there was no reason to extend the review process to criminal cases. One explanation for this attitude stems from the system of having circuit riding members of the state's highest court conduct the most serious criminal trials. When the high court judges viewed the quality of the trial bench, there hardly could be cause for alarm that a conviction in the trial court was the result of the misapplication of the law by judges lacking in training or wisdom.

A Virginia court in 1803, in *Bedinger v. Commonwealth*,[128] relied on just this reasoning in narrowly construing the right to appeal to include only civil cases. In *Bedinger,* a clerk of court, who had obtained his office by promising to share his fees with a justice of the peace in return for that magistrate's vote to appoint him to his office, appealed his bribery conviction to the Court of Appeals. In seeking to have the high court review his conviction by an appeal, the defendant advanced a method of review that was not part of the common law tradition in criminal cases.[129]

In the eyes of the appellate judges, there was little cause for concern about the misapplication of the law by the trial judges of the Virginia General Court. As the court to which the original Virginia legislature gave jurisdiction over the most serious offenses, it

---

127 *Id.* Courts were reluctant to bail defendants who had been convicted of a felony, simply to allow them their freedom pending the resolution of a review process. *See, e.g.*, State v. Connor, 2 Bay's (S.C.) 34, 36 (1796) (court had no discretion to grant bail after conviction, because presumption of innocence no longer applied and no security was sufficient to assure defendant's presence). By the first quarter of the next century, courts were willing to stay the execution of a judgment to allow a writ of error, by analogy to the common law power used with cases of pregnant women. *See, e.g.*, Lavett v. People, 7 Cow. 388 (N.Y. 1827).

128 7 Va. (3 Call) 461 (1803).

129 Recall that appeals were strictly a matter of legislative grace. As the Massachusetts Supreme Judicial Court stated in an influential 1808 decision, "any jurisdiction vested in any court must be uncontrollable by appeal, unless the presumption is repelled by some legal provision; for a right to appeal is a privilege granted to an aggrieved party." Commonwealth v. Massenger, 4 Mass. 462, 469 (1808). The same attitude toward the right to appeal appeared in cases throughout the next few decades, dealing with how the courts should construe the procedural requirements set by the legislature as conditions precedent to appeal. *See. e.g.,* Commonwealth v. Brigham, 33 Mass. 10 (1834); Commonwealth v. Dunham, 39 Mass. 11 (1839). *Messenger* was influential in other early state courts. Connecticut, for example, relied on it to support its view that appeals, though not writs of error, were a matter of grace. *See* Bowers v. Gorham, 13 Conn. 527, 529 (1840) ("A right to appeal is a privilege granted to an aggrieved party.")

warranted the highest confidence.[130] Moreover, the General Court judges composed the majority of the Court of Appeals bench. As Judge Roane's opinion in *Bedinger* stated:

> To a court thus constituted and confided in, with whom in the last resort, these important and extreme cases of jurisdiction are confessedly deposited, it would seem a natural part of the same system to confide the residuary and inferior classes of criminal jurisprudence.[131]

Such benevolence did not extend to judges who lacked the legal training of the high court bench. This attitude is evident in a 1797 New York case, *The People v. The Justices of the Sessions of the County of Chenango*.[132] In *Chenango*, the Supreme Court of New York held that the Sessions judges did not have the power to grant new trials in criminal matters based upon their view of the merits of the case.[133] Part of their reasoning was that: "The [Sessions judges] are laymen and cannot be supposed to have been taught or trained in the science of the law."[134] The high court justices, though, did not have the same misgivings about their own competence. As Judge Kent stated for the court: "I am, with perfect satisfaction, of the opinion, that this great and transcendent *trust*, rests *solely* with this court; a court which the constitution and law has taken care so to organize, as to contemplate it *fit and competent*, for the due and safe exercise of this very delicate power."[135]

Another explanation for the attitude that review was not needed to protect defendant's rights also stemmed from how the judges viewed the trial process. While they conceded that trial courts made mistakes, they were confident that it was rare for a truly innocent person to suffer a conviction. Judge Roane noted in *Bedinger* that many parts of the trial system served to prevent injustice:

> The tenderness and leaning of our code in favour of the criminal, the uncontroulable power of the jury to acquit in a criminal case, the pardoning power of the executive, and the objection to great delays in the execution of the criminal law, fully justify [the policy of not permitting an appeal in criminal cases].[136]

This attitude toward the inerrant justice of the trial system sur-

---

130 *Bedinger*, 7 Va. (3 Call) at 469.

131 *Id.* Hamilton's statement in Federalist No. 81 is also illuminating. "In proportion to the grounds of confidence in, or diffidence of the subordinate tribunals, ought to be the facility or difficulty of appeals." THE FEDERALIST 547 (J. Cooke ed. 1961) [hereinafter FEDERALIST].

132 1 Cai. R. 319 (N.Y. 1797).

133 *Id.*

134 *Id.* at 320.

135 *Id.* (emphasis in original).

136 Bedinger v. Commonwealth, 7 Va. (3 Call) 461, 469 (1803).

vived into the nineteenth century. An expression by a New York City lower court judge in the early 1800's was typical:

> Nor is there any danger that innocence will suffer for want of a writ of error. Criminal proceedings have thrown around the innocent so many guards, that the writ of error is almost useless. . . . if there be the least irregularity in the proceedings, the court must either grant a new trial, or recommend the party to a pardon. It may be said, with truth, that probably an instance cannot be found on record, of an innocent man suffering, for want of a writ of error in a criminal case.[137]

While trials were viewed as providing ample protection for innocent defendants, especially through the provision of local juries, writs of error provided such a narrow scope of review that they often reversed convictions of the palpably guilty for the most trivial of reasons.[138] It is not surprising that the eighteenth century's conception of review in criminal cases played a different role in terms of protecting defendants' rights than the contemporary appellate process.

The early reports do contain arguments in favor of review based on the severe consequence a conviction has for the individual defendant. However, when courts or prosecutors sounded this theme, it was used as an instrumental device towards ends other than protection of defendants' rights.

---

137 Lavett v. People, 7 Cow. 339, 343 (N.Y. 1827). It is worth noting that among the safeguards mentioned by Recorder Riker in *Lavett* was the fact that the jury was the final authority on the law as well as the facts.

138 *See* R. POUND, CRIMINAL *supra* note 90, at 161. One can see this sentiment expressed in the opinions of Justice Yeates of the Pennsylvania Supreme Court. In Spangler v. Commonwealth, 3 Binn. 533 (Pa. 1811), for example, the court considered a writ of error from a conviction for larceny of bank notes. The defendant argued that the indictment was defective because it did not specify the bank which issued the notes. Justice Yeates, concurring in the judgment reversing the conviction, stated:

> Where an indictment states a criminal charge with sufficient certainty, so that the party may be fully informed thereby of the facts he is called upon to answer, and prepare for his defence, it is disreputable to the administration of the law that he should be suffered to escape with impunity for a mere slip of form, totally unconnected with the merits of the case. At the same time we well know, that too great a laxity in matters of this nature, will lead to consequences dangerous to innocence. To preserve uniformity of decisions we are necessarily obliged to follow precedents; the utmost uncertainty would ensue from our disregarding them.

Id. at 537. In White v. Commonwealth, 6 Binn. 179 (Pa. 1813), Justice Yeates dissented from the judgment of the court on a writ of error which reversed the conviction in a murder case on the ground that the precept to the sheriff commanding him to compel the attendance of twenty-four "sober and judicious" persons to serve as jurors was defective because it did not specify that the petit jurors as well as the grand jurors should be from Cumberland County. Justice Yeates stated:

> Upon the whole, imperious duty constrains me to declare, that there does not appear to me such error on this record, as would justify me in reversing the judgment against the prisoner. I entirely assent to the opinion, that too great nicety in proceedings is a reproach to the criminal law of any civilized country.

Id. at 189.

The Virginia Court of Appeals decision in *Commonwealth v. Caton* is an apt example.[139] In *Caton*, the court confronted the issue of whether it could resolve questions reported to it in criminal cases. A General Court had convicted several men of treason; however, before the sentence of death could be executed, the House of Delegates issued a pardon with which the state Senate did not concur. The trial judges reported the question of the validity of the pardon to the Court of Appeals. The issue was a highly charged political controversy. Before it could reach the merits, however, the *Caton* court first had to resolve a challenge to its jurisdiction to entertain questions referred to it in a criminal case. The court noted that although the language in the statute authorizing this procedure did not explicitly mention criminal jurisdiction, it would make no sense to confine its use to civil matters. Judge Pendleton, President of the Court, wrote:

> If I were to consider this question in a political light, I should wonder indeed, that disputes about property to the value of £50, which dwindles into nothing when compared with the subject which gives rise to the present discussion, might be removed for difficulty, and that in a case where the judges are to decide between the safety of the state on the one hand, and the life of a citizen on the other, however, overwhelmed with doubts and difficulties, they must go through them and determine without that assistance which they might wish to have on the occasions; the reason for such assistance, must increase in proportion to the magnitude of the subject.[140]

While the opinion used an argument couched in language that referred to the effect of a conviction for the defendant, the underlying force that propelled the court to expand its jurisdiction was on other grounds. The court politically manipulated the argument about the consequences of criminal cases to bolster its conclusion that it was the appropriate institution to decide important legal issues. Especially in light of the fact that the court declared the pardon invalid, one cannot fairly read the decision as expressing a concern that review is necessary to protect defendants' rights.[141]

---

139 8 Va. (4 Call) 5 (1782).

140 *Id.* at 16.

141 John Mason, the prosecutor in United States v. More, sounded a similar theme before the United States Supreme Court when he argued for writs of error in matters where life or liberty were at stake by noting they were available in civil cases where only property was at issue. However, Mason used this argument in the service of a request that the Court grant a writ of error to overturn a circuit court decision that favored the defendant. It is noteworthy that Chief Justice Marshall's opinion rejecting Mason's claim did not even allude to this argument. *See supra* note 15. One also find references in arguments of defense counsel that review was necessary to serve the purpose of correcting errors. Where the defendant's attorney made this type of claim, it was likely to be based on a real concern for the defendant's rights. One can see this in the report of a

2. *Review and the Institutional Need for Uniformity*

The major justification for review of criminal convictions in the eighteenth century rested on institutional rather than individual concerns. The eighteenth century courts in a number of states articulated one major justification for the various types of review that existed: promoting uniformity. Review provided a means for ensuring the uniform application of the law. While each of the newly formed states could rely on its colonial common law inheritance to guide its trial judges, the central courts saw the need to ensure that all the members of the judiciary moved in the same direction. Uniformity not only harmonized the law as an instrument of social control but served an important political function well. As an integral part of the structure of the newly declared state governments, the state courts had to maintain power over the direction of criminal prosecutions as a means of securing political power in the nascent Republic.

One can find repeated explanations in the early case reports of the organizational need to have some sort of review process for criminal cases. The importance these early trial judges placed on getting the opinion of the full bench was expressed in *Respublica v. Cleaver*.[142] In *Cleaver*, the Circuit Court of Pennsylvania denied the defendant's motion to quash a larceny indictment, but noted that if the defendant was convicted, "[w]e can keep the matter under advisement until we can consult our brothers in bank, and form a satisfactory opinion on the subject. The code of criminal justice should remain fixed and certain on the most solid grounds."[143]

This attitude was echoed in a New York case, *The People v. The Justices of the Sessions of the County of Chenango*.[144] *Chenango* was a mandamus action brought by the Attorney General against the lower court judges, seeking to have the New York Supreme Court order them to proceed to judgment in a criminal trial pending in the General Sessions Court in Chenango County. The lower court had convicted one Noah Taylor of a felony, but, on motion of the

1796 case, State v. Connor, 2 S.C.L. (2 Bay) 34 (1796), which chronicles the arguments of counsel on the issue of the eligibility of a defendant for bail pending the decision by the Constitutional Court of his motion in arrest of judgment. After summarizing sources of possible error, defense counsel reminded the court, "The constitution of our country [has] therefore wisely established another, and higher tribunal than this court, for the purpose of investigation and determining all those points, and ordering new trials in all such cases." *Id.*

142 4 Yeates 69 (Pa. 1804).

143 *Id.* at 74. For other examples of cases where legal questions were reserved and reported to the full bench, see Respublica v. Roberts, 1 Yeates 6 (Pa. 1791).

144 1 Johns. Cas. 180 (N.Y. 1797).

defendant, they had granted a new trial on the ground that the verdict was against the weight of the evidence.[145]

The possibility that a Sessions Court might have the power to grant a new trial presented a grave problem to the Supreme Court. Because of the procedural limitations on the means by which it could supervise lower court proceedings, the Supreme Court would have been unable to review the grant of a new trial.[146] The Court clearly saw the need to enforce its view of the law on all the inferior tribunals. The Supreme Court recognized that:

> The jurisdiction of every country requires a regular gradation of courts and a common centre of judicial power. This is essential to its existence, and to preserve consistency and harmony in the administration of justice . . . if [lower court] proceedings were not subject to be here reviewed, we might find different rules of law and of justice in almost every county. This would introduce disorder and confusions, and be inconsistent with a regular and uniform administration of justice.[147]

Thus, the need for institutional uniformity and consistency exerted a strong influence in the creation of a formalized review process for criminal cases.

III. A Closer Look at Review in the Federal Courts

It was against the backdrop of the existing state criminal justice systems that the first federal courts were formed. Initially, the federal government under the Articles of Confederation did not have its own judicial system. It relied on the state courts to try federal cases in the first instance.[148] The central government became involved only in cases of prize and capture, a specialized branch of admiralty law dealing with ships seized at sea. In 1775, Congress created a Court of Appeals in Prize Cases to hear appeals from state courts in these matters.[149] Criminal cases, however, remained completely within the jurisdiction of the state court systems.

It was not until the Constitutional Convention met that the shape of an independent federal judiciary was formed. The structure of the federal criminal justice system was a result of the Constitution, the Bill of Rights, and the First Judiciary Act. The framers

---

145 *Id.*

146 *Id.* at 181.

147 *Id.*

148 *See* E. Surrency, History of the Federal Courts 7-11 (1987) [hereinafter E. Surrency].

149 *See* H. Bourguignon, The First Federal Court, The Federal Appellate Prize Court of the American Revolution, 1775-1787, 45 (1977) [hereinafter H. Bourguignon].

did not explicitly provide for review of convictions in criminal cases in any of these documents. However, it does not follow that the lack of an explicit appellate mechanism in criminal cases was an indication that the framers believed that review of federal convictions was of no significance to the rights of defendants. Far from indicating a lack of concern for defendants' rights, the absence of appellate review may have been a consequence of fear of the power of the new central government. Appellate review, especially the appeal process which involved a new trial, was viewed with suspicion in many quarters as a device which had the potential to limit the rights of defendants because of the prospect that the prosecution could obtain a new trial after an acquittal. In addition, the need for traditional appellate mechanisms was obviated in the federal courts, as well as in the state courts, by the existence of a number of means at the trial level to provide defendants with many of the advantages of modern day review. The discussion of the federal system will begin with a look at the development of the federal judiciary; it then will examine the operation of the early federal criminal courts.

A. THE CONSTITUTION

The delegates to the Constitutional Convention had a basic knowledge of the judicial structure of their own states and how it operated.[150] Thus, the delegates would have known about the common law tradition that denied review to felony defendants[151] as well as the varied means of review that took hold in the American states.[152]

The records of the Convention debates reveal little evidence of a concern for grafting some means of review of criminal cases onto the structure of the federal judiciary which was in the process of being created by the convention delegates.[153] The major topics of controversy that emerged concerning the court system were the method of appointing judges and their tenure in office, whether inferior federal courts should exist, the right to trial by jury, and the scope of the Supreme Court's appellate jurisdiction over questions

150 *See* J. GOEBEL, *supra* note 39, at 207.

151 *See id.* at 610.

152 *See id.* at 207. Not all of the members of the Constitutional Convention were lawyers; however, they were educated in the general structure of the law. Blackstone's *Commentaries* was considered a staple of an educated gentleman's library, and it is safe to say that all of the delegates to the Convention were familiar with it. *See* R. POUND, CRIMINAL, *supra* note 90, at 82.

153 *See* J. GOEBEL, *supra* note 39, at 196-251; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923) [hereinafter Warren].

of fact.[154] Resolution of the issue of Supreme Court review in criminal cases was not a matter of great concern. It was not, however, completely ignored.

Both the proponents and opponents of a strong federal judiciary first proposed plans for the structure of a court system that included Supreme Court review of what was contemplated to be a major class of federal criminal cases. Edward Randolph of Virginia put forward a plan which formed the basis for much of the early discussion. It provided for inferior federal courts "to hear [and] determine in the first instance," and for a supreme tribunal "to hear and determine in the *dernier* resort, all piracies & felonies on the high seas . . . ."[155] Since not even the federalists proposed that the central government's interest in criminal matters should intrude into areas traditionally policed by the states, crimes on the high seas were a significant portion of what the delegates would have contemplated of federal criminal law.[156] When Randolph's provision was debated, it was embroiled in the controversy over whether inferior federal courts would supplant the existing power of state courts. As a consequence, Randolph offered a substitute resolution that omitted any explicit reference to piracy and felony jurisdiction at both levels of the proposed federal courts.[157]

An alternative plan, offered by William Paterson of New Jersey three days after Randolph's amendment, did not provide for inferior federal courts, but left the trial of federal matters to the existing state court trial structure. However, it described a role for a

---

154 *See* J. GOEBEL, *supra* note 39, at 196-251.

155 *See id.* at 207. Piracy and felonies on the high seas would have been traditionally tried on the criminal side of an Admiralty court rather than in one of the common law criminal courts such as the King's Bench. The English practice of conferring criminal jurisdiction on the Admiralty court eventually gave way at the end of the eighteenth century to a procedure in which the Admiralty judges referred such cases for trial to judges of the common law courts sitting by virtue of a special commission. *See* H. BOURGUIGNON, *supra* note 149, at 8-9. At the time of the Revolution, the jurisdiction of admiralty courts to try criminal cases was well established. *See* E. SURRENCY, *supra* note 148, at 118-19. The initial grant of jurisdiction to the federal trial courts, under the First Judiciary Act of 1789, gave the district courts jurisdiction of all minor crimes and offenses cognizable under the authority of the United States, committed within their districts or upon the high seas. 1 Stat. 76-77. The circuit courts were given jurisdiction concurrent with the district courts over minor crimes, and exclusive jurisdiction over all other crimes, without any specific mention of crimes on the high seas. The first federal criminal code, Act of April 30, 1790, 1 Stat. 112, made certain specific crimes on the high seas capital offenses, and provided that the venue of the trial should be the district where the offender was apprehended or first brought. Act of April 30, 1790, sec. 8, 1 Stat. 114.

156 *See* Letters from "A Federal Farmer", October 10, 1787, in H. STORING, THE ANTI-FEDERALIST 53 (1985) [hereinafter H. STORING].

157 *See* J. GOEBEL, *supra* note 39, at 216.

supreme judicial tribunal that gave it appellate jurisdiction in cases involving piracies and felonies on the high seas.[158] This language also failed to survive the debates. No further reference to review in criminal cases appeared.[159]

The lack of attention devoted to review in criminal cases was due, in part, to the resolution reached by the Convention on the heated issue of the existence of inferior federal courts. The establishment of federal courts, other than the Supreme Court, was not required by the Constitution; instead, the issue was delegated to Congress for resolution. The solution to this controversy was a compromise between the contending factions.[160] Since the existence of inferior federal courts might never have come to pass, it was unnecessary for the Convention to address the question of reviewing the judgments of those courts.

Thus, the ultimate resolution of the scope of the Supreme Court's appellate jurisdiction in Article III of the Constitution left open the question of the availability of review in criminal matters. The Constitution, which was sent out to the states for ratification, provided only that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[161]

The ratification process in Maryland and New York, however, did call attention to the issue of review in criminal cases. Luther Martin spoke in the Maryland Assembly against ratification on the ground that the Constitution's grant of appellate jurisdiction with respect to questions of fact nullified the right to a jury in criminal cases. He argued that even if inferior federal courts were established for the trial of federal crimes,

> a jury would only be a *needless expense*, since, on an appeal, the *determination* of that *jury, even on questions of fact*, however honest and upright, is to be of *no possible effect* . . . . If, therefore, *even* in *criminal* cases, the general government is not satisfied with the verdict of the jury, its officer may remove the prosecution to the Supreme Court, and *there* the *verdict of the jury is to be of no effect*, but the *judges of this court* are to *decide upon the fact* as well as the law . . . ."[162]

Martin saw a deliberate plan behind this dilution of the right to a jury, and attributed it to the Federalists' fear that the local population from whom the juries would be selected would be too partial to

158 *See id.* at 217.

159 *See id.* at 196-251.

160 *See* 3 M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 80 (1913) [hereinafter M. FARRAND].

161 U.S. CONST., art. III, sec. 2.

162 M. FARRAND, *supra* note 160, at 221 (emphasis in original).

state interests to be trusted with a case in which the federal government was concerned.[163]

In New York, Robert Yates used the pseudonym "Brutus" to write about the Constitution's grant of appellate power to the Supreme Court. One of Brutus' letters addressed Article III, section 2 and its application to criminal convictions:

> The appellate jurisdiction granted to the supreme court, in this paragraph, has justly been considered as one of the most objectionable parts of the constitution . . . . By this article, appeals will lie to the supreme court, in all criminal as well as civil causes. This I know, has been disputed by some; but I presume the point will appear clear . . . . If then this section extends the power of the judicial, to criminal cases, it allows appeals in such cases . . . . I believe it is a new and unusual thing to allow appeals in criminal matters. It is contrary to the sense of our laws, and dangerous to the lives and liberties of the citizen. As our law now stands, a person charged with a crime has a right to a fair and impartial trial by a jury of his country, and their verdict is final. If he is acquitted no other court can call upon him to answer for the same crime. But by this system, a man may have had ever so fair a trial, have been acquitted by ever so respectable a jury of his country; and still the officer of the government who prosecutes, may appeal to the supreme court. The whole matter may have a second hearing. By this means, persons who may have disobliged those who execute the general government, may be subjected to intolerable oppression.[164]

Other New York anti-federalists echoed these views.[165] In response, the Constitution's supporters at the New York ratification convention offered a resolution expressing the true intent of the document to be that the Supreme Court, in exercising its appellate jurisdiction, could not authorize a second trial in criminal cases.[166]

The implication of this argument against review in criminal cases is quite interesting because it sheds light on why the initial scheme of the federal courts lacked this feature. If one is to take the argument at face value, which may not be entirely warranted since the anti-federalist letters of the time were not above erecting straw men,[167] the prospect of review without the protection of the Bill of Rights' Double Jeopardy Clause presented more danger of government oppression than it did the possibility of protecting individual

---

163 *See id.* at 222.

164 Letters from "Brutus" (Feb. 28, 1788), in H. STORING, *supra* note 156, at 177-78.

165 *See, e.g.*, Letters from "A Federal Farmer" (Oct. 10, 1787), in H. STORING, *supra* note 156, at 54.

166 *See* J. GOEBEL, *supra* note 39, at 405.

167 Hamilton, in Federalist No. 81, addressed at some length the implications of the Supreme Court's appellate jurisdiction as to questions of fact, and argued that it would not allow the Court to re-examine facts determined by juries in common law trials. *See* FEDERALIST, *supra* note 131, at 551.

liberty. Although appeals of acquittals by the prosecutor were by no means the norm in the state court systems, there were instances where they did occur.[168] Thus, it was possible to see a danger of prosecutorial abuse in Article III's language concerning appeal on questions of fact. Since the Bill of Rights was not part of the Constitution at the time of ratification, one explanation for the absence of any feature ensuring review in criminal cases may be the fear that Martin and Brutus identified.[169]

B. THE BILL OF RIGHTS

As with the debates over the Constitution, nothing in the Congressional debates over the Bill of Rights directly addressed the question of review of criminal convictions. The debates did address the Supreme Court's appellate power, but the discussion was confined to a concern over the effect it would have on civil cases. The debate recognized a common fear that appealing one's case to Washington would allow those rich enough to afford it an opportunity to wear down litigants of ordinary means.[170] Madison, in fact, proposed as one of the original amendments to the Constitution an article limiting the Court's appellate jurisdiction to cases where the matter in controversy involved more than one thousand dollars.[171] The context of the ensuing discussion, however, was confined entirely to civil cases.

Yet, the debates on the Bill of Rights dealt with an issue relevant to review in criminal cases; namely, the question of multiple trials. The original version of the amendments to the Constitution stated: "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offense . . . ."[172] While this language solved the problem of a potential government appeal of an acquittal that had troubled Luther Martin and Robert Yates[173], it raised another problem in the minds of Representatives Benson and Sherman. They believed that this language would abrogate the right of a defendant to move in arrest of judg-

168 North Carolina is one state where prosecutors in the eighteenth century very likely exercised the power to appeal an acquittal and obtain a trial *de novo*. *Compare* State v. M'Lelland, 1 N.C. (Cam. & Nor.) 569 (1803) (prosecutor appealed an acquittal) *with* State v. Jones, 5 N.C. (1 Mur.) 257 (1809) (state supreme court held that the state could not appeal an acquittal).

169 *See supra* text accompanying notes 162-166.

170 *See* J. GOEBEL, *supra* note 39, at 437.

171 *See* I Annals of Congress 452, 784 (1789).

172 *See* J. GOEBEL, *supra* note 39, at 436. This section first came before the House in mid-August.

173 *See supra* text accompanying notes 162-166.

ment and obtain a new trial in order to correct an error.[174] A motion to strike the language dealing with "one trial" was defeated.[175] In the final form, however, the original, clumsy language was stricken by the Senate, and the more traditional common law maxim dealing with twice being put in jeopardy was inserted in its place.[176]

C. THE FIRST JUDICIARY ACT

The first Congress began work on the legislation that put flesh on the skeleton of judicial authority described in the Constitution well before the Bill of Rights took effect. In April, 1789, the Senate appointed a committee to write a bill organizing the judiciary.[177] The Bill of Rights, with its ban on double jeopardy, did not take effect until Virginia ratified the amendments in December, 1791 (although it was approved by the Senate in September, 1789).[178] The only reference in the record of the discussion of the First Judiciary Act on the issue of whether the Supreme Court's appellate jurisdiction should extend to criminal cases came from the writings of members of the committee charged with drafting the legislation. Caleb Strong of Massachusetts wrote an account of the initial stages of the bill that included this description of the Supreme Court's appellate jurisdiction: "Writs of Error from the Circuit to the Supr. Court in all Causes *not criminal* of which the Circuit Court has original Cognizance and the matter in Dispute does not exceed 2000 Dolrs."[179] However, the language expressly excluding criminal cases from the scope of the writ of error was not included in any of the existing drafts of the Act.

An official record of the Senate proceedings concerning the First Judiciary Act does not exist. There is an indication, however, that at least one Senator mentioned the lack of appeal in criminal

---

174 *See* J. GOEBEL, *supra* note 39, at 436. Both Benson and Sherman were lawyers and thus would have been familiar with the traditional formulation of the common law's protection against jeopardy.

175 *Id.*

176 *Id.* at 448. The fifth amendment addresses the protection against double jeopardy in the following language: "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

177 J. GOEBEL, *supra* note 39, at 458. The Judiciary Bill was reported out of committee in June. It was voted on by the Senate in July and sent to the House, which voted on it in September.

178 The language in the Bill of Rights dealing with the question of double jeopardy was not voted on by the Senate until early September. *Id.* at 448.

179 *See* J. GOEBEL, *supra* note 39, at 462 n.19 (letter to Thomas Paine written May 24, 1789) (emphasis added). Ralph Izard of South Carolina wrote a similar account in a letter dated April 24, 1789 to Edward Rutledge. *See* Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1530-31 (full text of letter provided).

cases in the debate on the legislation. Senator William Paterson of New Jersey left preliminary notes and a draft outline of a speech he gave on June 23, 1789, in opposition to an amendment that would have restricted the inferior federal courts' original jurisdiction to Admiralty cases, thereby leaving the trial of federal crimes to the state courts. Paterson's notes contain the following: "How as to Appeals - Bring Law Home - meet every Citizen in his own State - not drag him 800 miles upon an appeal - The silent operation of Law - or by Force - An appeal from Scotland to England - *No appeal in criminal Cases* . . . ."[180] The amendment to which Paterson addressed himself would have confined non-admiralty federal cases to the state courts, which would have left appeal to the United States Supreme Court as the only federal role.[181] Placed in the context of supporting a system of inferior federal courts, Paterson's comment about the lack of appeal in criminal cases may have been intended to allay fears that defendants in federal criminal trials could be dragged off to Washington by government appeals. The prospect that common litigants in civil cases might find their resources quickly exhausted in defending an appeal to Washington played a role in the House debates over the Bill of Rights.[182] Thus, it is possible that the lack of review in criminal cases was seen as a protection for ordinary citizens. However, one can only speculate about the meaning of Paterson's remarks.

The House debate on the First Judiciary Act occurred contemporaneously with its discussion of the Bill of Rights. The House debates hotly contested the existence of inferior federal courts and their effect on the existing state court structure. The opponents of the bill asserted that state courts could adjudicate any federal matter that required a trial, including crimes, and that the availability of an appeal in such cases to the federal Supreme Court would be all that the constitutional scheme of government required. There is no mention, however, of the issue of appeals in criminal cases.[183]

The final Judiciary Act provided for the use of writs of error from the Supreme Court to the new federal circuit courts in civil cases. It said nothing about review in criminal cases.[184] There are a

---

180 *See* Casto, *The First Congress's Understanding of its Authority over the Federal Courts' Jurisdiction*, 26 B.C.L. REV. 1101, 1127-35 (1985) (full text of notes and draft outline given) (emphasis added).

181 *See* J. GOEBEL, *supra* note 39, at 494.

182 *See id.* at 437. *Cf. id.* at 47-48 (describing colonial propensity for litigation and appeal).

183 *See* I Annals of Congress, 813, 826-65 (Aug. 1789).

184 Shortly after the new federal judicial system began operation, the House of Representatives sought the opinion of the Attorney General on the plan which the Judiciary

number of reasons that may have lead to this omission.

It is possible that the anti-Federalist argument against review based on the fear of government appeals, voiced by Martin and Yates[185] and perhaps alluded to by Paterson, led to the restriction on the Supreme Court's power. The timing of Congress' consideration of the Supreme Court's appellate jurisdiction and the Bill of Right's double jeopardy provision support this hypothesis. The major deliberations in the Senate on the Judiciary Act took place several months before the double jeopardy section of the Bill of Rights was first presented to the House. Thus, the decision about the Supreme Court's appellate jurisdiction may have been made in the context of uncertainty about the implication that review would have for the ability of the government to appeal an acquittal in a criminal case.

It is also possible that the language that appeared in the final Act was the result of a compromise that deliberately left the matter unsettled. The Act neither expressly excluded writs of error in criminal cases nor expressly allowed them. Thus, the Federalists, who as Martin and Yates warned, really may have wanted to be able to appeal jury verdicts of acquittal, still had the potential to argue, as Mason did in the *More* case, that writs of error were still available. By not expressly allowing writs of error, on the other hand, the anti-Federalists were left with the argument that eventually prevailed in

---

Act had established. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 14 (1927) [hereinafter F. FRANKFURTER & J. LANDIS]. Attorney General Randolph, one of the authors of the Virginia plan for the judiciary present at the Constitutional Convention, presented his report to the House on New Year's eve of 1790. *Id.* The report contained Randolph's comments on the existing Judiciary Act as well as his proposal for an improved bill. Randolph envisioned a federal trial bench composed solely of district judges, sitting either in a district court or in one of three circuit courts. *See* Report of the Attorney General, AMERICAN STATE PAPERS, MISC., No. 17, 27-28. His proposal did not provide for any circuit-riding Supreme Court Justices. However, Randolph's plan did provide for Supreme Court review of criminal cases. Unlike section 22 of the Judiciary Act, the language of the provision in Randolph's proposal dealing with writs of error made specific reference to criminal convictions. His bill proposed that: "Writs of error shall be issued *ex debito justicia* [of right]; except in capital offenses, provided that the judgment, exclusive of costs, shall amount to — dollars . . . and no writ of error shall issue in a capital offence . . . ." *Id.* at 32. The most reasonable interpretation of this language is that it contemplated following the English common law tradition of allowing writs of error of right in non-felony cases, since according to Blackstone, felonies were generally capital crimes. *See* W. BLACKSTONE, *supra* note 104, at 94. If Randolph had meant to exclude writs of error in all criminal cases, he would not have referred solely to "capital offences." The House referred Randolph's report to the Committee of the Whole, where it eventually died of neglect. *See* J. GOEBEL, *supra* note 39, at 542.

185 *See supra* text accompanying notes 162-166.

More, namely that the Supreme Court did not have the power to issue writs of error in criminal cases.

Other reasons have been advanced to explain the omission of criminal cases in section 22 of the First Judiciary Act. Some historians have attributed it to the legislators' blind adoption of the common law position found in Blackstone.[186] However, if that was the case, it is puzzling that writs of error were not permitted even in federal misdemeanor cases, where the common law would have granted them as a matter of right. Speculation also exists that the lack of writs of error in criminal cases may have been a consequence of the hostility in anti-federalist quarters to the Supreme Court's appellate jurisdiction in general.[187] Although, without the fear expressed by Martin and Yates concerning the prosecutor's use of review, it would seem that writs of error in criminal cases would have worked to weaken the central government.

D. THE CRIMINAL CASELOAD OF THE FIRST FEDERAL COURTS

While the first form of our criminal justice system under the Constitution did not include a means for defendants to obtain review of their convictions, it does not mean that the system lacked all of the features we associate with contemporary review. If one is looking at the historical record for an original understanding of how due process viewed the finality of a criminal trial and the need for review, one cannot stop simply at the fact that the limited review afforded by writs of error was unavailable in criminal cases. Some aspects of the type of appellate review that we take for granted today were also part of the federal criminal justice system at the time of the adoption of the Constitution. It is relevant to set the question in the context of the criminal caseload of the time.

Prior to the adoption of the Constitution, commentators assumed that federal crimes would be confined to a small class of cases dealing with treason, revenue offenses, counterfeiting and crimes committed on the high seas or against the law of nations.[188] In reality, the actual business of our first federal trial courts was

186 *See* J. GOEBEL, *supra* note 39, at 610. *See also* E. SURRENCY, *supra* note 148, at 215-16 (absence of criminal review in the First Judiciary Act due to lack of familiarly of eighteenth English lawyers with criminal procedure, since counsel in criminal cases in England was not allowed until the nineteenth century).

187 *See* J. GOEBEL, *supra* note 39, at 610.

188 *See, e.g.*, Letters from "A Federal Farmer" (Oct. 10, 1787), in H. STORING, *supra* note 156, at 53. This statement about what the scope of federal criminal law would be was made by a prominent anti-Federalist, whom one would expect to have exaggerated the case of the dangerous prospect that federal crimes presented in the context of an argument against ratifying the Constitution.

composed of ordinary civil disputes, admiralty cases, and actions designed to aid the power of the federal government to impose import duties.[189] Only a small number of federal crimes existed,[190] and few such cases made their way to court. From 1790 to 1797, in all of the federal circuit court system, there were only one hundred forty-three criminal matters, or four percent of the total cases on the docket.[191] Moreover, of this one hundred forty-three total, fully fifty-six came from Pennsylvania and were related to the Whiskey Rebellion trials.[192] Truly, criminal trials played a very minor role in the business of the early federal courts.

E. FEATURES OF FEDERAL CRIMINAL TRIALS

1. Supreme Court Trial Judges

For criminal cases tried in early federal courts, it is also significant to consider the type of bench before whom the defendant appeared. The First Judiciary Act gave circuit courts the responsibility for trying all but petty crimes. These courts were composed of three judges, two of whom were assigned from the six members of the Supreme Court.[193] Thus, by creating a multi-judge bench for each trial, the original scheme of the federal system provided criminal defendants with a tradeoff for their inability to obtain review of the trial judge's rulings.[194]

Moreover, by placing one-third of the Supreme Court on the

189 *See* F. FRANKFURTER & J. LANDIS, *supra* note 184, at 12.

190 The Supreme Court ultimately ruled that there was no jurisdiction to prosecute common law crimes in federal courts. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). Until then, the subject was one of great controversy, and instances of federal common law prosecutions did occur. *See* S. PRESSER, STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT 32 (1982)[hereinafter S. PRESSER]; Warren, *supra* note 153, at 51.

191 *See* D. HENDERSON, COURTS FOR A NEW NATION 65-87 (1971) [hereinafter D. HENDERSON].

192 *Id.* at 70-71.

193 The number of Supreme Court Justices was reduced to one in 1793. Act of March 2, 1793, 1 Stat. 333.

194 When only one judge presided over a criminal trial, as was possible in the circuit court for the district of Kentucky which had only a district judge and no Supreme Court justice assigned to it for circuit duty, *see* F. FRANKFURTER & J. LANDIS, *supra* note 184, at 33, the lack of appeal lead to dissatisfaction. A report of the Senate Judiciary Committee in 1829 complained that

> [w]here a District Judge presides alone . . . this single option is decisive of the controversy in every matter of law. The evil is more striking in criminal cases. The fiat of an individual, which dooms the accused to imprisonment, or to death, is irresistible, irreversible. No appeal is allowed - no writ of error provided by law; and, from the constitution of the Court, no disagreement can arise to invoke the protective interposition of the supreme tribunal.

Id. (quoting SER. No. 181, SEN. DOC. 50, 20th Cong., 2d Sess. at 5).

bench at each defendant's trial, the format offered some assurance that the results the court reached on constitutional questions reflected, in some measure, the institutional view of the Supreme Court as a whole. The dynamic of having a trial panel reflect the view of the full court was a familiar one to American lawyers. Judge Brackenridge of Pennsylvania reported an 1803 case in his book, *Law Miscellanies*, which noted the effect of having two of the four appellate judges preside at *nisi prius* trials:

> [t]hat the court being constituted of but four judges, in the case of a reference to two, there could not be a majority out of four to reverse the opinion of two; a reason which it is well known did operate much at the *nisi prius* courts to prevent appeals or motions in bank from that which we had discovered to be the sense of the one half of the court who had already heard the matter, considering such a motion or appeal to be unavailing . . . .[195]

2. *Post-Conviction Motions*

Despite the lack of writs of error, several mechanisms existed at the time of the First Judiciary Act to review federal criminal convictions. Unlike the practice in England,[196] the American system allowed defendants to obtain review of their convictions by directing a motion in arrest of judgment or a motion for a new trial to the same court that convicted them.[197] Thus, defendants were not limited to the first judgment of a legal issue raised and determined in their criminal trials. It is likely that motions in arrest of judgment were available to defendants from the very beginning of the federal judiciary. The defense attorney in the first capital conviction ever obtained in a federal court, for example, attacked his client's conviction on a motion in arrest of judgment, claiming the indictment was defective.[198] Similarly, the First Judiciary Act provided that all of the courts of the United States had the power to grant new trials.[199] Federal trial courts considered a number of cases on

---

195 H. BRACKENRIDGE, *supra* note 33, at 535 (quoting Galbraith v. Colt, W. Cir, Pa., 1803).

196 J. ARCHBOLD, *supra* note 30, at 610-70.

197 *See, e.g.*, United States v. Wood, 2 Wheeler's Crim. Cases 325 (U.S. Phil. Cir. Ct. 1818) (defendant moved for new trial and in arrest of judgment); J. ARCHBOLD, *supra* note 30, at 616-17. *But see* Gibert v. United States, 25 F. Cas. 1287, 1297 (Mass. Cir. Ct. 1834) (Judge Story refused to grant a defendant's motion for a new trial on the ground that double jeopardy prevents new trials).

198 United States v. Bird & Hansen, 14 American State Trials 232 (Mass. Cir. Ct. 1790) (Lawson ed.). *See also* United States v. Cantrill, 8 U.S. (4 Cranch) 167 (1807); Orfield, *Early Federal Criminal Procedure*, 7 WAYNE L. REV. 503, 527 (1961).

199 First Judiciary Act of 1789, sec. 17, 1 Stat. 83.

motions for new trial.[200]

One of the first reported instances of a motion for a new trial in a federal criminal case came in the 1799 trial of John Fries in the Circuit Court of Pennsylvania.[201] Fries was charged with treason as a result of his involvement with the insurrection in Northampton County over the issue of tax collection. After the jury returned a guilty verdict, the defense attorneys moved for a new trial. The prosecutor doubted the power of the court to order a new trial in a criminal case, but the judges could see no reason to allow such a remedy in civil trials and to exclude it in criminal cases where a man's life was at stake.[202]

Of the three issues raised in the new trial motion, only one had been argued previously before the judges. At the start of the trial, Fries' counsel had moved without success to change the venue to the county where the treasonous acts were alleged to have occurred.[203] The new trial motion argued that the presiding magistrates, Iredell and Peters, did not place sufficient justification in the record for denying the change of venue. Judge Iredell took great offense at this argument, both because the basic question about the venue of the trial had already been decided and because of the suggestion that he had erred in not placing his reasons for the earlier decision on the record.[204] Fries' attorney met the judge's ire with both an apology and an explanation. He stated that he was sorry he had given the court grounds for discomfort, but pointed out that in criminal prosecutions, especially capital cases, the job of defense counsel was to put forward every ground on behalf of his client.[205] As it was common for courts to err, counsel was duty bound to point out the error and argue that the mistake was of sufficient consequence to afford his client relief. If the court agreed, it was fully authorized to retract from its former opinion.[206] Nothing further seems to have been made of this dispute, and the court went on to consider the other two grounds asserted in the new trial motion.[207]

---

200 *See* cases cited in J. ARCHBOLD, *supra* note 30, at 610-70; Orfield, *supra* note 198, at 526.

201 F. WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 458 (Phil. 1849) [hereinafter F. WHARTON].

202 *Id.* at 600.

203 *Id.* at 482.

204 *Id.* at 599.

205 *Id.* at 601.

206 *Id.* Counsel cited as authority for this proposition a passage from Blackstone dealing with the power to grant new trials in civil cases.

207 Judge Iredell voted to grant the motion. Judge Peters voiced the opinion that the motion did not have merit, but because of the importance of the appearance of justice in this notorious case, he voted with Iredell, and Fries was given a new trial. Fries was

Fries' case, though, established not only the legitimacy of new trial motions in criminal cases, but also their use as a means to get a reconsideration of an issue that had already been determined.[208]

3. Certifying Questions to the Supreme Court

Another mechanism for review of federal criminal convictions was to obtain the ruling of the Supreme Court on questions which a divided trial court could not answer. The formal means of certifying a question to the Supreme Court came into existence with the Judiciary Act of 1802.[209] An Act of 1793 changed the structure of the Circuit Courts, reducing the number of judges to two.[210] The 1802 Act added a provision allowing them to certify questions on which they were divided to the Supreme Court. Certification of questions under the Act occurred frequently in criminal cases.[211]

---

subsequently convicted and received a pardon. Legislation enacted in 1793 provided a means to settle differences such as the one in Fries' case. If the two judges could not agree, the case was continued to the succeeding court. Should the same thing happen a second time with a different Supreme Court justice, then the opinion of the circuit-riding Supreme Court judge over his district court brother would prevail. *See* D. HENDERSON, *supra* note 191, at 44.

208 For an enumeration of the grounds on which American criminal courts granted new trial motions as of the middle of the nineteenth century, *see* J. ARCHBOLD, *supra* note 30, at 610-70.

209 Act of April 29, 1802, 2 Stat. 156, 159.

210 Act of March 2, 1793, 1 Stat. 333. The bench would consist of one Supreme Court justice and one district judge. Section 1 of the Act provided that if the district judge was absent, the circuit court could consist of only the single Supreme Court justice. *Id.* In February, 1794, the Justices of the Supreme Court sent a letter to President Washington, requesting him to transmit their views to the Congress on the impact of the changes brought about by the 1793 Act. After acknowledging the relief the Justices felt over the reduction the Act brought about in their circuit riding obligations, the letter stated:

> It has already happened in more than one instance, that different judges sitting at different times in the same court, but in similar causes, have decided in opposite direction to each other, and that in cases in which the parties could not, as the law now stands, have the benefit of writs of error. They therefore also submit to the consideration of Congress, whether this evil naturally tending to render the law unsettled and uncertain, and thereby to create apprehension and diffidence in the public mind, does not require the interposition of Congress."

AMERICAN STATE PAPERS, MISC. No. 46, at 77. The Justices modestly refrained from suggesting specific resolutions, because some alternatives "would from the nature of them, be capable of being ascribed to personal considerations." *Id.*

211 *E.g.*, United States v. Kid & Watson, 8 U.S. (4 Cranch) 1 (1807); United States v. Cantril, 8 U.S. (4 Cranch) 167 (1807); United States v. Potts, 9 U.S. (5 Cranch) 284 (1809); United States v. Tyler, 11 U.S. (7 Cranch) 285 (1812); United States v. Chapels, 2 Wheeler's Crim. Cases 205 (Va. Cir. Ct. 1823); United States v. Perez, 2 Wheeler's Crim. Cases 96 (N.Y. Cir. Ct. 1823); United States v. Courlay, 2 Wheeler's Crim. Cases 102 (N.Y. Cir. Ct. 1823). *See* Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 196 (1960); B. CURTIS, JURISDICTION, PRACTICE AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 82-83 (1880) (certification "very often used"). Note that the 1802 Act, *supra* note 209, at 158, allowed

There is evidence, though, that even before the Act formalized the practice, federal trial judges attempted to use a similar procedure. In a 1798 trial, *United States v. Worrall*,[212] defense counsel moved in arrest of judgment on the ground that the indictment failed to charge a crime properly within the jurisdiction of the court. The indictment alleged that the defendant was guilty of the common law offense of attempted bribery, but the federal courts did not have the power to punish common law crimes. Justice Chase agreed with the defendant, but Judge Peters believed the court had the authority to sentence Worrall. Because of the division of opinion, both judges and the prosecutor proposed to defense counsel that "the case might be put into such a form, as would admit of obtaining the ultimate decision of the Supreme Court, upon the important principle of the discussion."[213] Defense counsel declined to enter into a compromise of that nature, probably concluding that he stood little chance with his arguments in the Supreme Court.[214] The court then withdrew for a short consultation, which has been surmised to have been with the other members of the Supreme Court to obtain their views.[215] The judges returned, declared the defendant's sentence mitigated in consideration of his circumstances, and sentenced him to three months imprisonment and a $200 fine.[216]

4. Habeas Corpus

Defendants in federal criminal cases were also able to obtain review of a limited class of issues by seeking a writ of habeas corpus directly with the Supreme Court. In the era of the establishment of the federal courts, habeas corpus was available to criminal defendants only prior to trial.[217] Its scope was confined to matters that pertained to the ability of the trial court to hold the defendant in custody. Under this rubric, however, a defendant could test both the legality of his commitment and the jurisdiction of the court which ordered his confinement. Some of the issues that fell under these two headings were the same as claims that would have survived in a different format if review were possible after a guilty verdict.[218]

---

circuit courts to conduct a trial before only one judge, either the Supreme Court Justice or the district court judge.

212 F. WHARTON, *supra* note 201, at 188.

213 *Id.* at 198.

214 *See* S. PRESSER, *supra* note 190, at 35.

215 *See* F. WHARTON, *supra* note 201, at 199.

216 *Id.*

217 *See Ex Parte* Watkins, 28 U.S. (3 Peters) 193 (1830).

218 For example, a defendant could raise the claim on pre-trial habeas corpus that the

IV. The Conclusion from History

While the historical record does not allow a definitive explanation for the lack of review in federal criminal cases, it is fair to say that its absence was not due to a general disregard for the rights of criminal defendants. One simply has to look to all the provisions in the Bill of Rights to find evidence of a deep concern over the need to limit the power of the state in the criminal process. Even in the original language of the Constitution, Article III's explicit inclusion of the guarantee of a jury in criminal cases supports the conclusion that the framers were concerned with protecting individuals from the power of the federal government. The American public in the eighteenth century held the jury in great awe as a means of guarding individual liberty.[219]

Nor is it fair to attribute the lack of review in the federal system to a general disregard for the political value of uniformity. Criminal convictions from state courts which denied the defendant a federal right were the proper subject of a writ of error under section 25 of the First Judiciary Act.[220] Chief Justice Marshall, in upholding the constitutionality of this grant of jurisdiction in *Cohens v. Virginia*, stressed the political need for such review by writing: "[t]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved."[221]

What conclusion can one draw, then, from the lack of criminal appellate jurisdiction? It seems fair to conclude that review *per se* was not seen as a fundamental right of all criminal defendants. At common law, only those charged with misdemeanors had a right to a writ of error. In the state court systems, while review was a common feature, it was not premised on a view that it existed primarily for the benefit of the defendants. On the other hand, nothing in the historical record suggests that the Due Process Clause was intended to condone leaving the final determination of all constitutional is-

---

acts he was alleged to have committed did not constitute a crime. The limits of habeas corpus jurisdiction required the claim to be couched in the language that probable cause did not exist to warrant the defendant's custody, but it did allow a habeas court to inquire into what would otherwise be the merits of the prosecutor's case. *See, e.g., Ex Parte* Bollman & Swartout, 8 U.S. (4 Cranch) 75 (1807). In addition, until *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), was decided in 1871, state court habeas corpus actions remained available to federal defendants in confinement to review the legality of their custody. *See* L. Orfield, *supra* note 28, at 245.

219 *See* J. Goebel, *supra* note 39, at 87; E. Surrency, *supra* note 148, at 216.

220 First Judiciary Act of 1789, 1 Stat. 85-86.

221 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416 (1821).

sues to an individual trial judge. Eighteenth century federal defendants had an absolute right to have a multi-judge panel, which originally included one-third of the bench of the Supreme Court. These judges not only made the original determination of an issue at trial, but could also be called upon to reconsider their rulings after a conviction by the use of motions in arrest of judgment or for a new trial. Indeed, only a few years after the adoption of the Constitution, defendants had access to the discretionary review mechanism afforded by the certification procedure.

In *Jones v. Barnes*, Justice Brennan, dissenting with Justice Marshall, took the Court to task for unnecessarily repeating the disclaimer about a constitutional right to appeal. He went on to argue:

> If the question were to come before us in a proper case, I have little doubt that the passage of some 90 years since *McKane vs. Durston* . . . would lead us to reassess . . . I also have little doubt that we would decide that a state must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state court, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. . . . Of course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.[222]

If it is ever appropriate for history to foreclose debate over the meaning of a part of the Constitution, the issue of a requirement for some means of review of criminal convictions does not qualify. The question should be open to further inquiry.

222 463 U.S. 745, 756 n.1 (1983).