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THE RIGHT OF APPEAL IN CRIMINAL CASES*

Gester B. Orfield ⨂

In the conduct of a criminal proceeding certain steps are regarded as essential. The accused must be brought before the court. There must be a preliminary investigation to insure that the case is one which should be prosecuted. Notice must be given to the accused of the offense charged. He must have an opportunity to prepare for trial, procure witnesses, and make needed investigations. He should have a speedy trial. He should have a fair trial before an impartial tribunal. Finally, there should be one review of the case as a whole by a suitable tribunal. The principle of a right to appeal in criminal cases is well established in the United States. It is not, however, a requirement of due process.

Functions of Appeal

To arrive at any sound conclusions as to the need of appeals it seems desirable if not indispensable to consider the function of criminal appeals. An insight into the purposes to be fulfilled seems basic to a study of the form and scope of review. Obviously, the chief function of an appeal in a criminal case should be to see that justice is done to the appellant. An innocent defendant must be released. A defendant

*This article will form part of a book on Criminal Appeals now under preparation by the author.

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1 The essential stages of a civil case have been said to be obtaining jurisdiction over the defendant, ascertaining the character of the dispute between the parties, the trial of the dispute, and review in the appellate court of the proceedings below. Sunderland, “Improving the Administration of Civil Justice,” 167 Annals 60 at 70 (1933).


3 Llewellyn, The Bramble Bush 27 (1930); 6 Helie, Traité de l’Instruction Criminelle, 6th ed., par. 2983 (1867); Dodd, “The Problems of Appellate Courts,” 6 Am. L. Sch. Rev. 681 at 684 (1930); Millar, “The Reform of Criminal Pleading in Illinois,” 8 J. Crim. L. 337 at 338 (1917). Mr. Millar says, in criticizing the existing attitude, that there is a tendency “to cause a given case to be viewed abstractly and decided mechanically, by subordinating the verities to an artificial juristic situation—in other words, the disposition to make the ultimate inquiry, not whether the accused is guilty or innocent, but whether the requirements of the applicable legal formula have been in all respects satisfied. It is the ‘attitude of record worship,’
who did not secure a fair trial should have another trial. In other words, a criminal appeal should be one of the procedural safeguards provided by the law to protect the rights of the criminal. To lose sight of this purpose is to commit the "original sin of judicial procedure... the substitution of the actual ends of judicature for the ends of justice." 4

A second and very important function of appeals is to determine and maintain consistent standards in the trial courts.6 Since there is more than one trial court in any state it is likely, indeed certain, that contradictory rules will be laid down. The taking of an appeal, and perhaps even more the possibility thereof, prevents or does much to check lack of uniformity in the administration of the criminal law.6 It assures that the same rules of substantive law will be applied in all the courts of the state. It furthermore assures that the more basic and essential rules of procedure will be followed in the lower courts. Compliance with the rules of substantive and procedural law as enforced by the appellate court also contributes to the accomplishment of the first function, that of doing justice to the particular appellant on the merits.

A third function of appeals is to work out or develop the law of the jurisdiction.7 A century of judicial decisions and the passage of comprehensive criminal codes covering the substantive and procedural law or both have made this function one of much less importance than the two just discussed. As Dean Pound has so well pointed out, at the

the 'trial of the record rather than the case,' to use the phrases of Professor Pound, that is here in question."

4 BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE, c. 29; 2 WORKS 169 (1843). Bentham also says, ibid., 155: "At the same time, a state of things, in which it lies in the absolute power of a single person in the situation of judge (even with his moral aptitude thus checked and guarded) to subject a human being, perhaps innocent, to the extremity of allowed punishment, is a state of things which to a human mind cannot but present considerable harm." Leon Green says that the first and foremost function is the "review for error." "American Court Organization," 18 J. AM. JUD. SOC. 75 (1934).


6 In Georgia, where there was no appellate court until 1846, this lack of uniformity resulted in frequent conferences of the trial judges. Lamar, "A Unique and Unfamiliar Chapter in Our American Legal History," 10 A. B. A. J. 513 (1924). It has been pointed out that one of the grounds of dissatisfaction with the Mixed Arbitral Tribunals created by the treaties of peace after the World War was that there was no system of appeals. MULLINS, IN QUEST OF JUSTICE 142 (1931).

commencement of the independent existence of the United States when there were no such codes or decisions and the courts were adapting the common law to American conditions, the appellate courts were occupied almost exclusively with this function. The hangover from this early period still predisposes our appellate courts to assign too much weight to this function. Where, however, there is an intermediate court of appeal as in the federal system and in New York and a number of other states, this law-making function becomes the most important if not the only function of the supreme court.

**Other Remedies to Serve These Functions**

Under existing constitutional arrangements, the three functions—deciding the particular case, keeping the law uniform and developing the law—can only be served satisfactorily by appeal. There are various other devices in the appellate courts and trial courts and in the executive department which to some extent relate to these functions, but none of them is adequate.

**Judicial Remedies**

First, there are other appellate remedies. The writ of mandamus does not bring about a review of a case but merely directs the trial court to proceed. The writ of prohibition, seldom resorted to, merely prevents a trial court from taking jurisdiction. The writ of certiorari is discretionary, usually not available where there are other adequate remedies; at common law certiorari resulted in the removal rather than the review of a case except in summary cases. The writ of habeas corpus is frequently resorted to in order to review a conviction by a court of concurrent jurisdiction. But it has been repeatedly pointed out that the proper function of the writ is merely to determine the legality of the imprisonment of a person held in custody.

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8 *Pound, Criminal Justice in America* 117 (1930).
10 *Wrottesley and Jacobs, The Law and Practice of Criminal Appeals* 4 (1910). Appeals, they say, include "every judicial method by which a judicial determination may be questioned. Hence they include such matters as mandamus, certiorari, etc., which perhaps would not, at any rate invariably, belong to the subject if the term were used strictly."
11 State v. Stone, 3 H. & M. (Md.) 115 (1792); Commonwealth v. Balph, 111 Pa. 365, 3 A. 220 (1886); State v. N. J. Jockey Club, 52 N. J. L. 493, 19 A. 976 (1890); Connors v. Ball, 73 Vt. 182, 50 A. 804 (1901); Ex parte Rodgers, 12 Ala. App. 218 at 221, 67 So. 710 (1915).
Then there is the remedy of granting a new trial. The scope of this remedy overlaps the field of appeal. The grounds for new trial are even broader than those for appeal. Under the existing procedure practically all grounds which may be asserted on appeal may be asserted on motion for new trial. In fact, the system of new trial has been criticized on the ground that it permits the trial court to correct errors already considered by it instead of confining it to errors not canvassed. These errors under our present system again come up for consideration in the appellate court. The trial court is for several reasons scarcely the court to correct errors already presented to it. It is not so likely to regard as such, an error made by itself, as is an impartial tribunal. It may stubbornly out of pride refuse a new trial even though it secretly concedes the existence of the error. Or on the other hand, for reasons of corruption or false sentimentality it may grant a new trial even when there is clearly no call for one. In many such cases no second trial is ever had. In many American states a motion for a new trial is a prerequisite to appeal. Such motion is often purely formal, with an attendant delay in the taking of the appeal. It should be abolished. In England in civil cases new trials must be applied for in the Court of Appeal instead of in the trial court. They are rarely granted. In criminal cases there can be no new trial since the passage of the Criminal Appeal Act in 1907. Earlier when they were permitted, application was made not to the trial judge but to the court sitting en banc.

Executive Remedies

A remedy in the executive department closely related to appeal is that of pardon. Before the remedy of appeal was developed, almost

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14 Criminal Justice in Cleveland 332 (1922).
15 17 C. J. 86 (1919).
16 Nat. Comm. on Law Observance and Enforcement, Report on Criminal Procedure 30 at 47 (1931); Wigmore, Evidence, 2d ed., § 20 (1923). Wigmore points out that in the earlier practice a motion for a new trial and a bill of exceptions were alternative and mutually exclusive.
17 7 Edw. 7, c. 23 (1907). An allowance of the appeal results in discharge and acquittal of the defendant. Sec. 4.
the only thing a defendant might do to save himself after conviction was to apply to the King for a pardon, or reserve a point and get the judges to ask for a pardon. In those days pardons were clearly made to do the work of appeals. But today pardons are granted in most cases to persons admittedly guilty of the crimes for which they were convicted. Appeal is the remedy of the innocent man, while the guilty seeks a pardon. A pardon to an innocent man is rare, for the case where an innocent man cannot obtain exoneration in the courts is rare. The innocent man has done nothing for which he needs to be pardoned. A pardon does not necessarily wipe out guilt. The stigma of the conviction still remains, as no evidence is taken, no argument heard, and no reasons given.

While a pardon is a prompt, direct, and unrestricted mode of getting at the merits of a particular case, it serves no function of creating and maintaining standards in the trial or of developing rules of law. An appeal, on the other hand, is a deliberate and technical procedure through judicial processes for doing justice in the generality of cases. The scope of inquiry of the pardoning authority is unlimited; it may review and disregard the action of the trial court and the appellate court and hear evidence not considered by either. On the other hand, the usual appellate court can only review the case as it came up in the trial court. In jurisdictions where there is no judicial review of the facts, the pardoning authority may in some instances follow the method of an appellate court. This was the method taken in Massachusetts in the Sacco-Vanzetti case when the governor appointed a board of three citizens to pass on the case.

The pardoning authorities are likely to act only in death cases and in cases of long imprisonment. They are prone to give greater attention to sensational cases. On the other hand, appellate courts treat all cases alike whether the penalty be great or small and whether a case have attained great notoriety or not. The pardoning authorities act spasmodically and ex parte; appellate courts act systematically and after argument of counsel. In the case of the pardoning authority there may be political pressure for mercy or against it; the courts are relative-


20 In California, cause must be shown why a new trial was not applied for and obtained. In Kansas and West Virginia, an application for a pardon may not be made pending an appeal of the case to an appellate court. Jensen, The Pardoning Power in the American States 46 (1922).
ly immune from such pressure. Pardons are optional; while appeals must result in the defendant’s release when he shows sufficient grounds.

One of the reasons for the establishment of the English Court of Criminal Appeal was the dissatisfaction with the workings of the Home Office, the English pardon authority. The one great advantage of the Home Office was that it was not bound by technical rules of evidence. On the other hand, it could not take evidence on oath. It could not cross-examine witnesses. Since the hearing was not public, no one knew what evidence was received nor why certain evidence was rejected. As a result, any decision could be violently attacked in Parliament or in the press. More than one Home Secretary advocated the establishment of a criminal appellate court. The dissatisfaction with the handling of the Beck case by the Home Office was the immediate cause of the establishment of the court.

The Home Office still serves a useful purpose in England, however, in the matter of pardoning. It may release innocent men who have been convicted and who have lost their appeal in the Court of Criminal Appeal. Even an appellate court may affirm an erroneous conviction. The defendant may be too poor, too friendless and too ignorant to appeal or to establish his case on appeal. The Home Office may protect him. If the time to appeal has expired and there is no power to extend the time, a pardon is still possible. The Home Office decides whether death sentence shall be carried out. It may intervene to protect an insane person. A unique method of coordinating the pardon and appeal authorities is provided under section 19 of the Criminal Appeal Act, under which the Home Secretary may refer a case to the court, and this, too, although appeals have been dismissed. A judicial disposition of any case is thus made possible.

Judicial Council

It is possible that two of the functions of appeals—keeping the law uniform and developing it—may be performed otherwise. There seems to be no practical reason why a judicial council could not take over these functions, although this could probably not be done under present constitutions. In many states judicial councils already pre-

22 7 Edw. 7, c. 23 (1907).
23 On the constitutional point, there are two questions: (1) Whether the power is of a kind that can be delegated by the legislative body; (2) whether, conceding that it can be delegated, it may be given to a judicial body.
scribe, or assist in prescribing, rules of procedure. Judicial councils might well lay down rules of appellate procedure. They are well fitted to lay down rules of criminal procedure before and at the trial. Some objection might be raised to giving them the power to alter rules of substantive criminal law. Who but the legislature should prescribe what acts are crimes and what are not? In the past, however, the courts have developed even the substantive law. A judicial council, including as it would both appellate and trial judges, might conceivably be entrusted with this function. A judicial council might also secure uniformity in the administration of the criminal law. It might shift about judges who proved themselves unfit to try criminal cases in such a way that they would try very few of them, and those of lesser importance. In other ways it might bring pressure on the trial judges to hold them in line. It is by no means clear that the mere reversal of a case by the appellate court results in holding either the particular judge or other judges to the uniform application of the law. The performance of these two functions by a judicial council would leave the appellate court free to devote its whole attention to the decision of appeals. The confining of the appellate court to deciding appeals is followed to some extent in France and Russia.

**Arguments in Favor of Abolition of Appeals**

But there are certain considerations often advanced in favor of abolishing criminal appeals. Let us turn then to some of these.  

24 That the question is by no means an open and shut one is shown by the fact that such men as Justices Taft 25 and Brewer 26 have advocated the abolition of appeals and that the Criminal Appeal Act was passed in England only after long agitation with many able judges and lawyers opposing.


a final determination somewhere and that that determination should be in the trial court. In England the trial court in effect had the last word until the present century. This was also in effect the rule of the federal courts during the first century of our history. There was no appeal in Georgia until 1846 and none in Louisiana from 1812 to 1843. Moreover, the trial itself might almost be regarded as an appellate proceeding, since it has been preceded by a preliminary hearing or a grand jury indictment. The prosecuting attorney would not prosecute an innocent man; the court is watchful of the rights of defendants; defendants are presumed to be innocent; and juries are notoriously sympathetic. Hence in fact very few innocent persons are convicted.

All of these arguments for giving finality to the judgment below seem inconclusive. The decision of a trial court in a civil case may always be appealed. Civil cases are frequently wrongly decided and it is but logical to expect criminal cases also to be decided wrongly. Everything else being equal, a wrong decision should be righted. This would seem to be true even more in criminal than in civil cases since the life or liberty, not to mention the social standing, of the defendant is at stake. The fact that England so long did without criminal appeals shows not that appeals were undesirable but rather that English procedure was defective. The whole trend of English history for the past century has been towards establishing and maintaining a substantial right of appeal. Many parts of the British Empire followed the English example. The European countries have long maintained the right of


Poland and Cohen, The Criminal Appeal Bill 1906 Examined 7 (1907). The then Attorney General of England is there quoted as saying that "in criminal cases the trial is, in a sense, itself an appeal."

The chief differences between civil and criminal appeals appear to be as follows. In civil cases both sides have the right to appeal; in criminal cases there can be no appeal from a verdict of acquittal. The appellant in a criminal case is more likely to be unable to pay the expenses of his appeal. Frivolous appeals are harder to penalize in criminal cases. Speed in deciding an appeal is more essential in criminal cases. The scope of review should be broader in criminal cases since more is at stake; for example, the court should be able to consider errors though no exception was taken. Historically the rule has been the reverse, review in criminal cases being by writ of error, and in civil cases under our codes of appeal. Historically there was no bill of exceptions in criminal cases. Error of fact is perhaps more likely in criminal cases. On the other hand, there are likely to be more numerous difficult questions of law in civil cases. There are more preliminary proceedings in criminal cases.

The Canadian practice is described in Riddell, "Regina v. Sternaman: A Unique Case in Criminal Practice," 13 Mass. L. Q., No. 4, p. 23 (1928). The Scotch prac-
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appeal. And in the United States, while there has been much criticism of appeals, relatively little of it has favored the abolition as distinguished from the restriction of appeals.

In spite of the theoretical considerations which might lead one to think that a criminal trial is so carefully hedged about with safeguards that there could be no unjust conviction in practice, such convictions do occur. At the preliminary hearing frequently only the evidence against the defendant is heard and both sides hold back their testimony. The hearing is conducted before an inferior court. The defendant may be bound over on a showing of probable cause—quite another thing from a finding of guilt. Nor is the finding of the grand jury tantamount to a finding of guilt; the grand jury frequently is merely a rubber stamp for the prosecutor. The prosecuting attorney may seek a conviction to build up a personal reputation. The single trial judge acts without the benefit of the advice and suggestions of colleagues; he may be by temperament hardened against all defendants and he may, by word, gesture, or inflection, bring about their conviction whether guilty or not. Cases are often tried at an impossible speed, especially in municipal courts. Not all juries are sympathetic, and the coincidence of a crime wave may easily result in the conviction of innocent persons. Such books as that of Professor Borchard indicate that in fact innocent persons occasionally are convicted and that sometimes the error fails of being righted even after review in an appellate court. And the much greater number of convictions of persons undeniably guilty, without the semblance of a fair trial, also cry out for appellate supervision.

Excessive Liberality of Conviction when Appeal Lies

In England the contention was frequently made that if an appeal lay, juries would be too ready to convict since their verdict was no longer final. Such an assumption is exceedingly hard to demonstrate.
It is doubtful whether the ordinary jury in passing on the guilt of the defendant has in the back of its mind the possibility of an appeal when it convicts. There is little in the conduct of an ordinary trial to emphasize to the jury the possibility of an appeal. But there is room to argue that a jury, aware that an appeal lies, is less tempted to convict or acquit arbitrarily. Certainly the statistics in England do not show any increase in the number of convictions after the passage of the Criminal Appeal Act which cannot be accounted for by other factors. There has been no complaint as to the attitude of juries since the passage of the Act.35

Delay

Another argument commonly made against appeals is that they result in long delay.36 The defendant in many jurisdictions may take his appeal within a considerable interval after conviction. A further interval is given him to prepare the brief. The docket of the appellate court may be congested so that his appeal will not be brought on for hearing for some time. After hearing, a month or two may elapse before the opinion is prepared. A rehearing may involve a still further delay. The result is that the defendant, who is often out on bail, feels that the criminal law has no teeth in it. Speedy punishment deters crime, but when there are long delays the deterrent effect of criminal penalties is largely lost. As a result the public loses confidence in the administration of the criminal law. It has been asserted that lynching is a by-product of delays on appeal.37

That many of these evils exist must be conceded. But that they are an inevitable concomitant of a system of appeal cannot be admitted. Of course it goes without saying that the taking of an appeal involves a certain amount of delay. But such delay may, by improvement in court organization and procedure, be cut to the minimum. Delay is not a reason for abolishing appeals but for improving the procedure of appeal. In England the appeal is usually decided within four or five

37 “The lawyer who has no case on the merits devotes his attention to playing the game in such a way that some reversible error will be committed. This is particularly true in criminal cases, and is responsible more than any other one cause for the courts which are conducted by Judge Lynch.” Wheeler, “The Abuse of New Trials,” 3 Mich. L. Rev. 257 at 263 (1905). See Eliot, “The Popular Dissatisfaction with the Administration of Justice in the United States,” 45 Chi. Leg. News 207 at 208 (1908); Brown, J. in State v. Nelson, 91 Minn. 143, 97 N. W. 652 (1903).
weeks after trial. Furthermore, appeals are taken in only a small fraction of cases, so that with respect to the vast majority of cases there is no delay.

Another Loophole for Escape

It has also been pointed out that appeals offer one more technical loophole through which to escape. The defendant, as has just been seen, procures an additional period of time before he commences his sentence. He may escape from the jurisdiction. The prosecuting attorney, who is primarily interested in obtaining a conviction with its attendant publicity, may lose interest on appeal. The appellate court may be persuaded to reverse on technical grounds. The trial court may be inclined to favor the defendant in its rulings if he has the right to appeal, particularly since the prosecution has in most jurisdictions no corresponding right.

Admittedly the right to appeal is provided primarily to safeguard the rights of the defendant. Appeals were not invented for the protection of the prosecution. There are certain cases where grievous injustice would be done to a defendant in the absence of an appeal. The defendant is provided with certain other safeguards such as the presumption of innocence, the right to counsel, freedom from double jeopardy, etc. The right to appeal must be regarded as the final and ultimate judicial safeguard (aside perhaps from the payment of compensation to innocent persons penalized for crimes they did not commit). As has already been indicated, the solution for the evils flowing out of appeals is not to abolish but to improve appeals. Delay must be shortened. The machinery of prosecution must be improved and coordinated in such a way that quite as speedy and careful attention is given to the course of the appeal as to the prosecution in the trial courts. Trial judges must be so selected, organized and supervised, as not to conduct trials with a sole eye to avoiding reversals. Appellate courts must be persuaded to adopt a policy of not reversing for purely technical reasons.

Inequality Between Rich and Poor

Against the right of appeal it is frequently asserted that only the rich can afford to appeal. The poor man is unable to pay for a printed

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transcript, briefs, court fees, and the retaining of a lawyer. Hence in practice the right to appeal can be exercised only by the rich. But the remedy for this inequality does not seem to lie in the direction of abolishing appeals. Depriving the rich defendant of the right of appeal would do the poor defendant no good. Two wrongs do not make a right. The inequality of the poor defendant on appeal is just one phase of his inequality throughout the whole of criminal procedure. If he had had a better lawyer he might have been acquitted at his trial, or even discharged upon preliminary examination. If the position of the poor man before the law is to be equalized with that of the rich, should not emphasis be laid on the procedure before conviction? And the criminologist might well ask, why not improve social conditions so that the criminal who is their product will not become a criminal in the first instance? Why pick out appeal as the object of our concern and try to produce equality at this belated stage of affairs?

But granting that the rich defendant now has a better opportunity on appeal, this objection can be overcome, partially at least, by assisting the poor defendant in various ways. He can be relieved of any obligation to pay for a transcript of the record, court fees, and attorney's fees. The procedure can be simplified so as to be cheaper. His appeal can be taken by a public defender, or by a lawyer chosen from a selected panel. And could not a real equality be brought about by forcing the rich appellant to choose his lawyer from the same selected panel though requiring him to pay for legal services?

Inconsistency with Jury Trials

It is also said that appeals are at variance with jury trials. The defendant has been tried by a jury of his peers, and no court should have authority to interfere with their verdict. That was the frequently reiterated theory of "no review of the facts" in England. It was the theory with respect to jury findings in the *Cours d’Assises* in France.

This theory, however well it may have sounded in days when the philosophy of Rousseau was current, can meet with little approval today. In the first place, the theory would not bar review of issues of law. The business of the jury is to pass on facts. Hence it should not bar review on rulings by the court with respect to motions to quash or demurrers. It should not bar review where the verdict is clearly contrary to the

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evidence—a state of facts long regarded as presenting a legal question. It should not bar review with respect to the legality or propriety of a sentence imposed by the court. It should not bar review of the increasingly great number of cases where a jury is waived and trial is by the court.

Even with respect to the facts the view of the jury should not be treated as final. The notion of democracy involved can offer little solace to a defendant improperly convicted. Jury trial can serve its function as a safeguard against arbitrary invasion of individual rights, without being treated as final or absolute. This function does not demand that arbitrary convictions be accepted. True, as a matter of convenience an appellate court will generally take the view of the jury or trial court as to the facts of the case. But the appellate court should not be precluded from reviewing the facts. There should be nothing sacrosanct about the view of twelve laymen who happen to sit in a case. The whole history of juries has involved efforts at controlling their verdicts. The theory of finality of jury determination of facts must be thrown into the scrap heap of discarded absolutes.

The Form of Appeals

Having made clear that appeals serve certain functions and that they do not necessarily involve countervailing disadvantages, it remains to consider what form the appeal should take.

Review as a Matter of Course

In its broadest form the appellate courts might review all cases. Such review would have certain obvious advantages. First and foremost, it would insure the protection of all defendants, whether they were rich or poor, whether they were too ignorant to realize that they had been improperly convicted or not, whether they happened to take the initiative in seeking review or did nothing. Under the present system the rich man is likely to have his case reviewed, the poor man not. Even the most perfect system of appeals forma pauperis might

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41 “This is an ideal which civilian justice has been dreaming of ever since Magna Carta. Complete justice to the poor man is still a dream in our civilian courts. In the military courts, it is already a fact. And it costs not a cent. It does not even need a motion in court. It is automatic.” Wigmore, “Some Lessons for Civilian Justice to be Learned from Military Justice,” 10 J. Crim. L. 170 at 173 (1919).
do occasional injustice. Under a system of automatic review, the problem of determining who is a rich man and who a poor would be removed as presumably all cases would go up at state expense. Under the present system the element of chance plays a considerable part in review. A given case is reviewed because the defendant took the initiative in having it reviewed. An equally deserving case is not reviewed because the defendant failed to act. Many a frivolous case reaches the appellate court. Is not the other extreme likely now and then—that no steps will be taken to review a case where there has been a substantial miscarriage of justice? The problem of determining what are issues of law and what are issues of fact would no longer vex the appellate courts. There would have to be no litigation over what is appealable. Under the present system only issues of law are treated as reviewable.

A second great advantage of automatic review is that it would make possible effective central supervision of all criminal cases. The records of all cases would be in the hands of the appellate courts. The trial court would know that the case would be reexamined and not that there was a mere possibility of such reexamination. The supervising powers of the appellate court would no longer be dependent on the initiative of the defendant in turn determined by his wealth and intelligence. Similarly, the maintenance of the standards of the trial courts and the growth of the law of the jurisdiction might be developed on a broader basis as a far greater number of cases would be before the court—cases, moreover, not arbitrarily taken from a group. An earlier decision on a controverted question of law might be obtained.

Whatever merits the system of automatic review may have in theory, it has not been adopted in practice to any great extent. It was used in France in the sixteenth century in cases of corporal punishment. It is employed in Argentina. It is used in South Africa. It is used in the Virgin Islands as to capital cases. It is used in cases of court martial in the United States. There seems little or no inclina-

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42 This is partly remedied in England by Rule 6 (b) of the Criminal Appeals rules allowing the trial court of its own initiative to inform a defendant that in its opinion the defendant has a case fit for appeal on other than purely legal issues and giving him a certificate of appeal. Statutory Rules & Orders, No. 227, p. 242 (1908).
43 ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 161 (1913).
45 Braffith v. People of Virgin Islands, (C. C. A. 3rd, 1928) 26 F. (2d) 646.
46 Wigmore, "Some Lessons for Civilian Justice to be Learned from Military Jus-
tion to extend it to ordinary criminal cases in the United States. Indeed, at the present time there is no right to a review of the facts in most American states, and in a number of states review is discretionary. The whole trend of American thought has been in the direction of limiting the right of review. Such states as Oklahoma and Texas, in which the number of appeals runs into the six hundreds and and eight hundreds each year and congests separate courts of criminal appeals, are ordinarily viewed as horrible examples.

It is very doubtful whether the interests of defendants as a whole are served by casting this mass of cases into the laps of the appellate courts. Probably it would mean a much less careful examination of the individual case. There is nothing to mark the meritorious case; it is very apt to be lost in the mass of cases. Time which might be spent in the examination of a worthy case would be squandered on cases where there were no errors and none were claimed. The need for protection of defendants can be better met in other ways. Competent trial judges should be provided. A scientific and simplified system of appeals \textit{forma pauperis} could be used to insure the protection of virtually all defendants. If the error be such that defendant is not aware of it, he is probably not prejudiced. If he has an attorney, the latter would usually discover the error if it is at all important. Although it is true that the present system is dependent on the initiative of the defendant, an adequate system of providing legal assistance at the trial and on appeal should assure that appeals taken correspond closely with those which ought to be taken.

The objection to automatic review is not so much that it is unnecessary as that it is practically impossible. An unwieldy mass of cases would be poured into appellate courts already congested or working to capacity. For instance, in England where six or seven per cent of the cases are taken up to the Court of Criminal Appeal it would mean the review of fifteen times as many cases. And in states where a large proportion of appeals are already taken and crowd the courts, automatic review would enormously increase their congestion. Even a separate court of criminal appeals could scarcely cope with such a number unless it were vastly augmented in size. The cost of such a system, if carried on like the present system with printed records and briefs and attorney's fees, would be prohibitive. On the other hand, if merely the record went up and there were no briefs nor arguments by attorneys,
such review would be far less thorough. If review were merely of the record and no objections or exceptions were necessary below, the work of the appellate court would be still further increased.

**Appeal as of Right on Initiative of Accused**

A much less extreme form of appeal would be appeal whenever the defendant took the initiative in asking for it. In its broadest form this right would involve review irrespective of the opinion of the trial court or the appellate court as to the need therefor, review with respect to all crimes, serious or slight, review whether the errors were substantial or trivial or even nonexistent and whether they were of law or fact, and review on the whole record with a hearing in the appellate court. The state constitutions frequently guarantee a right of this scope. But under the rule prevailing in most American jurisdictions a defendant has a right to appeal only with respect to errors of law. In England the defendant similarly has a right to appeal only on issues of law with a discretionary right as to issues of fact. That a review should be possible on the facts as well as on the law seems clear, but whether a review of the facts should be a matter of right or be discretionary seems more doubtful. Appellate courts cannot as conveniently go into issues of fact as can the jury. If review of the facts were a matter of right the number of cases in the appellate courts would probably be considerably increased. The defendant is perhaps amply protected by having the right to apply for review. Such an application, involving the submission of a short statement of the case to the court and a hearing, amounts to an abbreviated review. At any rate, the present rule in England, leaving appeals on issues of fact to the discretion of the trial or appellate court, seems to have met with little or no criticism in that country. The defendant is quite amply protected, as he may first apply to the trial judge; failing there, he may obtain leave from a single appellate judge; if the single judge refuses he may apply to the full court. At one of these stages the merit of the case, if it has any, should be perceived.

An appeal of right appears to involve too much opportunity for frivolous appeals. Until the appellate court has spoken, it cannot be said that an appeal is frivolous. In order fully to protect defendants,

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47 Where this is true, discretionary jurisdiction could not be substituted by statute, as it could in civil cases where the constitution merely provides that the supreme court shall have the power of review. Schweppe, "Possible Methods of Relieving the Supreme Court of the State of Washington," 4 Wash. L. Rev. 1 at 8 (1929).

it is perhaps necessary that the appellate court should give some attention to any claim of injustice made by them. This may be necessary rather to maintain public confidence in the doing of justice by the courts than actually to bring about justice. To prevent the squandering of the time of the court by frivolous appeals, various safeguards may be provided. The appellate court or its clerk may have the case brought on for summary hearing. The sentence may be made to run from the date of the decision on appeal rather than from conviction. An appellate court with the power to increase the sentence can discourage defendants from taking groundless appeals. All these safeguards exist in the English Court of Criminal Appeal. The Scotch court, unlike the English court, can increase not only when the appeal is from the sentence but from conviction, thus even more effectively discouraging frivolous appeals. Other remedies are the striking out of appellant's brief and the reprimand or other discipline of his lawyer. A monetary penalty as in frivolous civil appeals would perhaps be of no practical value since so many appellants would be unable to pay it.

Under the laws of most states the defendant is given the right to appeal in all cases whether the crime was a serious felony or a petty misdemeanor. This is desirable in one aspect, since classifications into felonies and misdemeanors are often purely arbitrary. Questions of jurisdiction are eliminated. The defendant may feel himself injured, and may in fact be as much injured, by a conviction of a misdemeanor as of a felony.

In actual fact, however, it seems that there is much more reason to provide for the right to appeal as to more serious crimes. The penalty for the lesser crime is not very severe and the social stigma much less. Busy appellate courts should not be occupied with cases of small fines or short jail terms. Occasionally, however, the prosecuting attorney may make it a racket to prosecute certain types of crimes. Or serious doubts of constitutionality may arise as to statutes affecting the liberty or property of large numbers of people. As a minimum, then, it would seem that discretionary appeals should be permitted even as to the lesser offenses.

49 Criminal Appeal (Scotland) Act, 1926, § 2 (3).
50 28 Mich. L. Rev. 70 (1929). This note points out that there are no cases where an attorney prosecuting a criminal appeal was disbarred, suspended, fined, or got any punishment severer than the censure of the court in delivering its opinion. The desirability of disbarment is adverted to in the concurring opinion of Kenyon, T., in Bartos v. United States District Court, (C. C. A. 8th, 1927) 19 F. (2d) 722 at 727 and 729.
51 28 Col. L. Rev. 483 (1928); 43 Harv. L. Rev. 113 (1929).
Discretionary Appeal

Appeal by judicial permission is the last form for us to consider. In those states whose constitutions give the accused a right of appeal, this method could only be introduced by constitutional amendment. The method in use in England prior to the Criminal Appeal Act was in substance discretionary appeal; the writ of error required the fiat of the Attorney General and a case for the Court of Crown Cases Reserved required the consent of the trial court.

The discretion may be vested in the trial court or in the appellate court or in both. Perhaps the least desirable form is vesting the discretion in the trial court. The trial court is scarcely in position to entertain an opinion as to the correctness of its decisions. In fact it may twice have ruled on the point already. In the first place it may have overruled an objection raised at the time. In the second place it may have refused a new trial. In England perhaps the chief objection to review by the Court for Crown Cases Reserved was that review was possible only if the trial court stated a case.

Where the discretion is vested in the appellate court, the rights of the defendant are much more effectively protected. The right to apply for an appeal is in effect an appeal in miniature. The appellate court considers the error alleged by the defendant on an abbreviated statement with or without oral argument and without hearing the prosecution. If the appellant has been substantially prejudiced, the court is likely to discover that fact. Frivolous appeals are thus discouraged at the outset without the waste of time of a detailed prepara-

52 Appeals may also be in the discretion of a prosecuting official, as in England when an appeal is taken from the Court of Criminal Appeal to the House of Lords. The consent of the Attorney General is necessary.

53 19 Jur. Rev. 386 at 387 (1908), quoted Mr. Isaac Butt, Q.C., as saying in 1853 when moving the second reading of the New Trials Bill: "Upon principle the right of appeal against the decision of the judge should be absolute—it never ought to rest on the discretion of the man whose judgment you appealed. This was imposing upon the judge a duty which never ought to be cast upon him, that of determining when his own decision should be subject to review. By what was he to be regulated? If he did not believe his own decision right he would not make it. Was he then to grant an appeal or not as he was confident or the reverse? Men, even judges, were generally most positive when they were most wrong. The appeal was made to depend upon the temper of the judge..."

54 For a recent example of appeal by leave of the appellate court only, see Michigan Code of Criminal Procedure, c. 10, § 3 (1927), 3 Mich. Comp. Laws (1929), § 17357.

55 It has been claimed that a lack of the privilege to have oral argument will often result in injustice, as the interest of the court cannot otherwise be effectively aroused. Walsh, "The Overburdened Supreme Court," 34 Va. B. A. Rep. 216 at 229 (1922).
tion of a record and brief and a complete hearing. Thus the court can concentrate its attention on the cases deserving it.\textsuperscript{56} The written opinions of the court will be fewer and of better quality. To make appeals on issues of fact discretionary saves the court from having to wade uselessly through innumerable pages of testimony.\textsuperscript{57}

The relief from congestion afforded by making appeal discretionary is shown by the statistics of the English Court of Criminal Appeals during the first twenty-four years of its history. An average of 428 applications for leave to appeal were made each year, of which 73 were granted. Of the 110 cases heard on appeal each year, as distinguished from application for appeal, only 22 went up as of right because they involved issues of law. Five were heard on leave of the trial court and 73 of the appellate court. The other ten were reappealed under provisions of special statutes.

Where appeal may be by leave of either the trial court or the appellate court, the defendant is almost as well protected as if the appeal were of right.\textsuperscript{58} This is the type of discretionary appeal used in England except where the appeal is from sentence only, in which case leave is by the appellate court only.\textsuperscript{59}

Where there are two sets of appellate courts and appeal is first to the intermediate court, the appeal from the intermediate to the court of last resort should always be by leave. Otherwise the evils of double appeal appear in their worst form. Since the object of the intermediate court should be to decide the case correctly on the merits, appeal to it should perhaps be of right. Since the object of review by the final court should be to develop the law of the jurisdiction, appeal should

\textsuperscript{56} It has been asserted that the number of criminal appeals decreased about one half after appeal became discretionary in Michigan. 9 Mich. S. B. J. 7 at 20 (1929).

\textsuperscript{57} In some cases, however, the court would have to read all the testimony.

\textsuperscript{58} This is recommended in the Report of Committee E of the American Law Institute of Criminal Law and Criminology, 3 J. Crim. L. 566 at 572 (1912).

be of leave. Where, however, appeal is direct to the court of last resort, as preferably it should be, appeal should perhaps be a matter of right on issues of law.

It has occasionally been urged that discretionary appeals will take as much time as appeals of right; that they must be assigned to a member of the court, considered by all the members of the court, and consulted over by the court. But since the appeal papers submitted go direct to the point and are much briefer, this does not seem true. Moreover, the action of the whole court need not be required; there need be no oral hearing; and the proceeding may be ex parte.

What amounts to a form of discretionary review is to provide that some official such as the governor or attorney general or the appellate court itself shall have the power to initiate a review. In England the Home Secretary may direct a review of the whole case or certain phases of it. In Soviet Russia there may be review by way of supervision at any stage, early or late, even though an appeal is barred by lapse of time. The president or procurator of an appellate court may call on any trial court to produce the record of any case, and may examine the whole proceedings, and set aside the decision. Such review serves a double purpose. The higher courts control more closely the work of the lower courts. The defendant obtains relief he otherwise could not procure.

Stage At Which Appeal May Be Taken

The common law view seems to have been that a defendant could appeal only after a conviction. He could not appeal with respect to his arrest or preliminary hearing. He could not take an appeal from an order overruling a motion to quash or a demurrer. He could not appeal directly from a ruling on a point of evidence or on an instruction. No matter how enormous the error, he had to wait until the end of the trial to ask for the correction of any errors.

61 Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 19.
63 There are several other problems in regard to appeals: Should there be any appeal on the facts? Should there be any appeal from the sentence? Should the state have a right of appeal? These are taken up in other chapters of the book of which the present discussion forms a part.
64 Green v. State, 10 Neb. 102 at 104, 4 N. W. 422 (1880).
Such a view has both advantages and disadvantages. It was disadvantageous in that if the objection raised by the defendant was correct the entire delay and expense of all the subsequent proceedings in the trial court might have been averted. For example, the defendant might have been tried by a court wholly without jurisdiction or under an unconstitutional statute. In a considerable number of jurisdictions the state is given the right to appeal at some preliminary stage. To allow the defendant to appeal would be merely to put him on the basis of equality.

On the other hand, to allow appeal before conviction would result in the possibility of an indefinite number of appeals and long delays. If the defendant’s appeal were unsuccessful it would represent just that much waste. Defendant would appeal for the sole purpose of delay. American lawyers are notoriously over-contentious. In New York where interlocutory appeals are permitted in civil cases a tremendous number of such appeals is taken. Perhaps the ideal to seek in criminal cases is a single review of the entire case with possibly some form of compensation for a successful appellant. In civil cases the line must be drawn experimentally. But in criminal cases appeal should come only after conviction because of the imperative need for expedition. In the criminal cases there is not the difficulty involved in civil cases of determining what is a final judgment. In England the defendant may not appeal before conviction to the Court of Criminal Appeal.

65 For an excellent discussion confined chiefly to civil cases, see Crick, “The Final Judgment as a Basis for Appeal,” 41 YALE L. J. 539 (1932). Discretionary review at any stage is criticized so far as the United States Supreme Court is concerned since petitions for certiorari are already too numerous. 48 HARV. L. REV. 302 at 308 (1934).

66 Proskauer, “A New Professional Psychology Essential for Law Reform,” 14 A.B. A. J. 121 at 125 (1928). In 1926 the Appellate Division of the First Department heard 1440 appeals, of which 576 or 40 per cent were from interlocutory determination below.


68 It has, however, been pointed out that the writ of habeas corpus often serves as a means of review in criminal cases which have not gone to final judgment. Crick, “The Final Judgment as a Basis for Appeal,” 41 YALE L. J. 539 at 557 (1930). For instance, it has been held to lie before conviction when an information failed entirely to show any offense under the statute which the defendant is alleged to have violated, Ex parte Garvey, 84 Fla. 583, 94 So. 381 (1922); to test the jurisdiction of a committing magistrate, People v. Snell, 216 N. Y. 527, 111 N. E. 50 (1916); where there is no legal evidence that a crime has been committed, or that defendant has committed one, State v. Huegin, 110 Wis. 189, 85 N. W. 1046 (1901).

69 But prior to the Criminal Appeal Act a defendant could have reviewed on writ
In determining whether there should be a review of anything but final judgments the interests of three parties are involved: the defendant, the trial court, and the appellate court. It is to the advantage of the defendant and of the trial court to have the point settled at once as a trial may thus be unnecessary. On the other hand, it is to the advantage of the appellate court to settle the whole case at once without the possibility of several appeals although occasionally the decision on an interlocutory appeal might settle the whole case. Compromise is thus essential. One way out is to allow interlocutory appeals in the discretion of the trial court or the appellate court. The former process, known as certification, is used in a number of states.\textsuperscript{70} Another way out is for the defendant to resort to the extraordinary remedies of mandamus, prohibition, and habeas corpus when appropriate. Or the defendant might be permitted to appeal of right at the same stages as the state in many jurisdictions is allowed to appeal.

of error a judgment given against him on a general demurrer to an indictment by the trial court. Sibley, Criminal Appeal and Evidence 63 (1908).