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A SUMMARY OF CRIMINAL APPELLATE REFORM

LESTER B. ORFIELD*

Few of the problems of the administration of the criminal law are more important than that of criminal appeals. A number of critics have asserted that undue attention has been given to the appellate courts.1 Yet no American monograph has attempted to treat the subject as a whole. In fact the separate phases of the question have rarely received analysis. Where can one turn to find any detailed discussion of the nature and function of appeals, as to the scope of review by the appellate court, as to the procedure, the organization, and history of appellate courts, as to federal appeals, as to appeals in petty cases, and as to the causes and the devices for eliminating technicalities?

True it is that only a small number of cases ever reach the appellate court in comparison with the number of convictions.2 But the just disposition of those that do is a good that is not to be underrated. An improper release is the more unfortunate since a convicted defendant is more likely to be guilty than one released at some earlier stage in the proceedings. Furthermore their consideration has other indirect but highly important effects. They hold the trial courts up to the maintenance of certain standards. Hundreds of other cases tried below and never appealed are af-

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2 For instance in Iowa in 1931 out of 608 cases tried below there were appeals in but 49, and of these 49 but 7 were reversed. Perkins, Iowa Criminal Justice (1932) 68.

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affected by the decision; in fact need not themselves be appealed since the court has a standard to follow. An improper decision may demoralize the administration of the criminal law. Last of all, though not so important at the present time, they have resulted in the development and growth of the criminal law.

The greater dignity of the appellate judge is not one based merely on custom or usage. The small degree of power assigned to the trial judge in most jurisdictions has meant a corresponding growth in the power of the appellate courts to control the jury. Even though greater power were exercised by the trial court it is not rational to assert that the tribunal which may correct the lower court is not more important than the lower court. It might be conceded that the whole body of trial judges is more important than the appellate court. But such concession would still leave the appellate court a body worthy of the most careful study.

Even in England where the trial judges are men of first rate ability and where the Court of Criminal Appeal is made up of trial judges the highest or equally high salaries and the chief position of honor go to the judges of the Court of Appeal and the law lords of the House of Lords.\(^8\) The former are in practice appointed on the recommendation of the lord chancellor and the latter on that of the prime minister.

A study of the appellate courts is profitable since the data are more palpable and more easily available than are those of the trial courts. There are fewer courts to study. Trial judges do not usually write opinions while appellate judges do. These opinions furnish a mine of information concerning the court. The statutes governing the structure and procedure of such courts are fewer and more easily found than those governing the trial court. The rules of court furnish additional information. Reports of the various judicial councils give frequent and increasing attention to the appellate courts.

The appellate courts are further removed from the layman than other courts. Fewer persons are involved. Less publicity is given appeals. Appellate courts are thus peculiarly in need of

\(^8\) The Lord Chancellor receives £10,000 a year, the Master of the Rolls £6,000, the Law Lords £6,000, and the Lords Justices of Appeals £5,000. The Lord Chief Justice is, however, a trial judge, receives £8,000 a year and is appointed, in effect, by the Prime Minister. ENSOR, COURTS AND JUDGES (1933) 3.
scientific study by those legally trained. Improvement in appeals and appellate courts is peculiarly the work of the lawyer.

If the number of adjudications on a subject is any criterion appeals are of the utmost significance. More space is devoted to the single topic Appeal and Error in Corpus Juris than any other single topic of the law. A fifth of the discussion on Criminal Law in Corpus Juris is devoted to appeals.  

If the weaknesses in a system and the need of reform are any criteria the appellate courts are also worthy of study. One authority on the subject has said:

"It would probably not be an exaggeration to say that the United States as a whole has the least efficient system of judicial review to be found among civilized people in the world today."  

HISTORY OF APPEALS IN ENGLAND

The present day appeal in England is something very modern. But some sort of review has long existed. The ancient appeal of felony is of an appellate character only in the sense that it lay after the defendant had already been tried and acquitted by jury on indictment. It is, however, very unlike the usual appeal since the appeal is brought not by the defendant but by the victim.

The problem of review has long been linked with that of control of the jury. In civil cases a second and larger jury might set aside that of the first. It is extremely doubtful whether it was ever used in criminal cases. If special verdicts were used the jury found only the facts and the court pronounced judgment on the facts found. But the jury could not be compelled to return a special verdict and such a verdict was seldom returned.

For a time jurors were fined or imprisoned when they rendered improper verdicts. This seems to have covered improper acquittals. It came to an end in 1670, when the remedy of new trial was developed. New trial lay only as to cases tried by the King's Bench and only for misdemeanors. A venire de novo was available only in cases of mistrial. A demurrer to the evidence withdrew the case from the jury by admitting the facts. But where the evidence was circumstantial the demurrant had to ad-

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4 That is, a fifth of the discussion under the single heading Criminal Law. Some phases of criminal law are of course discussed under other titles.

5 Sunderland, The Proper Function of an Appellate Court (1930) 5 Ind. L. J. 483, 504.
mit in writing every fact which the evidence tended to prove, the defendant forfeited the opportunity of putting in his own evi-
dence, and if the demurrer was not well founded, judgment was
rendered against him. A verdict might be directed where on the
evidence introduced the jury could not reasonably declare the facts
necessary to establish his case to be proved.

Defendants were also protected by suspension of imposition of
sentence or execution of sentence. The power to pardon existed
in the Crown from early times.

The review thus far considered has not involved appellate
courts. Review by the appellate courts up to the Criminal Appeal
Act of 1907 was by writ of error and by the Court of Crown Cases
Reserved. The writ of error lay for errors of law apparent on the
record. The record included such matters as the indictment, the
plea, verdict and sentence. But it did not include rulings on the
evidence or instructions. Hence review was very narrow in scope.
In the nineteenth century it was confined to substantial errors
appearing on the record. It issued of right only in misdemeanor
cases and even then the fiat of the attorney general was necessary.
Bills of exceptions were held not to lie in criminal cases. Certiorari
was confined to summary cases. Indictable offenses could not be
removed after judgment by certiorari.

Prior to 1848 cases were often reserved for all the judges of
the superior courts. But this was confined to trials for treason or
felony tried by a court of oyer and terminer and gaol delivery.
Furthermore the trial judge had to deem the case worthy of
further consideration. In 1848 the Court for Crown Cases Re-
erved was established to hear misdemeanors as well as felonies and
cases from the courts of quarter sessions. But the stating of a case
lay in the discretion of the trial court. The court could not hear
new evidence. It could not consider rulings on demurrers or mo-
tions to quash. Very few cases were taken to it.

The ultimate development in appeals was reached with the
establishment of the Court of Criminal Appeals. Appeal of right
as to legal questions was provided. Questions of fact might also
be reviewed by leave as might sentences. Only a brief time is al-
lowed in which to appeal and appeals are decided within four or
five weeks after conviction. The court may within limits alter the
verdict. It may reduce or increase a sentence. It may hear new
evidence.
In brief the history of appeal in England has shown several trends. There has been a trend toward appeal on the merits. There has been a trend to make appeal of right on issues of law. There has been development towards allowing appeal on the facts though discretionary. There has been a trend to review of the sentence both as to legality and fairness. There has been no development of the motion of appeal by the prosecution. There has been a trend towards simplicity in appellate procedure and towards absence of technicality. The time in which to appeal has been curtailed and decision has come quickly to follow the taking of an appeal. The original proceedings in the trial court constitute the record sent up. Bail has been restricted. Assistance to indigent appellants has been provided for. Ample power to dispose of the case on appeal has been given to the appellate court. There has been little tendency to emphasize development of the law as the goal of appeals.

Can the English system be applied to the United States? The question is far from simple. In England most of the nation’s important litigation is concentrated at one place, London. The English bar is divided into barristers and solicitors. In civil cases high costs are taxed so that the courts are self supporting. High salaries are paid the judges, who are appointed not elected. Important as these differences are it is believed that they do not preclude the adoption in the United States of virtually every significant principle of criminal appeals in England. Ontario and other parts of Canada follow the English system of appeal with success. Many features of English practice and procedure have been adopted or are being proposed in the United States.

THE RIGHT OF APPEAL

At the threshold of the problem of criminal appeals is the question of whether there should be any appeals at all. A consideration of the functions of appeal shows its need. Justice is done to the parties. An innocent man is released or assured a fair trial.

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6 Clark, English Appellate Procedure (1929) 39 YALE L. J. 76, 91n; Taft, Possible and Needed Reforms in Administration of Justice in Federal Courts (1922) 8 A. B. A. J. 601, 606; Loring, Procedure in English High Court of Justice and Obstacles to Adoption Here (1922) 8 A. B. A. J. 609; Higgins, English Courts and Procedure (1924) 7 AM. JUD. SOC. J. 185.

The standards of the trial courts are maintained. The law of the jurisdiction is developed.

Other appellate remedies are inadequate. Mandamus merely directs the trial court to proceed; prohibition enjoins it from taking jurisdiction. Certiorari lies only as to summary cases. Habeas corpus lies only to determine the legality of the imprisonment of a person held in custody.

New trials are inadequate. The trial court is not a fair judge of whether there was reversible error at the trial. A dishonest trial court may grant new trials without any grounds therefor.

Neither is pardon a substitute for appeal. Pardons are usually granted to defendants admittedly guilty of a crime. Pardons do not assist in maintaining trial court standards nor developing the law. Pardons are usually given only in sensational cases. The pardon authorities act spasmodically. They may act under political pressure. Pardons are not of right. They are not granted as the result of a judicial process. The executive cannot take evidence on oath nor cross examine witnesses. Hearings are secret with the result that violent criticism may appear in the press.

A number of able judges and statesmen have expressed themselves as favoring the abolition of appeals. But such opinions are comparatively rare and usually date back thirty or forty years. Most authorities at the present time favor the right to appeal so strongly as to take it for granted.

Against appeals it is argued that there must be a final determination somewhere and that sufficient consideration is given in the trial court. But civil cases are appealable. If contract and property rights are to be safeguarded so much life and liberty. The preliminary hearing is not the equivalent of a trial. Frequently both sides hold back their testimony and usually only the evidence against the defendant is heard. The grand jury hears only the evidence against the defendant and is often a mere rubber stamp for the prosecuting attorney, who, in turn, may be seeking to build up a record of numerous convictions. The trial is before a single judge, who may be prejudiced against criminal defendants and who may be incompetent or corrupt. A wave of crime in the community may prejudice the jury.

It is also argued that juries may convict more readily when there may be an appeal. But this is impossible to prove. It is to be doubted whether jurors give any thought to the possibility of
an appeal. In the absence of appeals the jury acquit improperly bearing in mind that the defendant has no appeal.

Few arguments are more commonly pressed than that appeals result in inordinate delay. But statutes may reduce the time in which appeals may be taken. The procedure of appeal may be speeded up. The organization and methods of work of the appellate court may be improved. Frivolous appeals may be discouraged. The speed of appeals in England shows that the evil of delay is not incurable.

It is contended that appeals offer another loophole for the escape of guilty persons. Admittedly appeals are primarily intended to safeguard defendants. It is not to be fatalistically assumed that the appellate process may not be improved in such a way as to avoid the discharge of guilty persons. Delay may be eliminated, thus making frivolous appeals of no value. The trial court and the machinery of prosecution may be so improved as to decrease the need for appeal. Appellate courts must be selected and organized in such a way as to avoid technical reversals.

It is asserted that appeals result in inequality since only the rich man can afford to appeal. Two wrongs, however, do not make a right. The appellate process may be simplified so as to make appeals cheaper. The state may furnish the defendant with a transcript of the record. Legal assistance may be furnished.

It is also claimed that appeals are inconsistent with jury trials. But appeals on the law are not inconsistent. Appeals are allowed in civil cases tried by jury. Many cases are tried by the court. If the jury go wrong on the facts no notion of democracy should prevent the defendant from having a review of them.

Having established the need of appeal the next question is to determine its form. Appeals may be automatic, they may be of right on the initiative of the appellant, or they may be discretionary. The two great advantages of automatic appeal are that all defendants would be protected whether rich or poor and whether intelligent or ignorant and that effective central supervision of all cases would be made possible. There would be a waste of judicial effort in reviewing all cases as obviously only a small number of them require reversal. The amount of effort entailed might result in less satisfactory review of deserving appeals. If any substantial error was committed the defendant should bear the burden of taking the initiative in objecting. Automatic review would con-
gest the appellate courts with cases. It would be tremendously expensive if existing methods of procedure were followed.

The choice then seems to lie between appeal of right on the initiative of the defendant and discretionary appeal. Appeal of right insures the full consideration of a case on review, irrespective of the views of the trial court or the relatively uninformed view of the appellate court. Appeal of right results in the possibility of frivolous appeals since objections cannot be said to be frivolous until the appellate court has considered them. Appeal of right on the facts might result in a tremendous number of cases taken on appeal. The trial court can best pass on the facts. The appellate court can only do so with great inconvenience and expenditure of time. It might in effect turn the appellate court into a trial court. Hence it may be wise to leave appeal on the facts discretionary. Discretionary appeal with the discretion in the appellate court is equivalent to a right to appeal but with a less detailed and formal consideration.

At common law appeals were heard only after conviction. Review at an earlier stage might avoid the delay and expense of subsequent proceedings. On the other hand when unfounded it delays the trial and results in the greater likelihood of several appeals. The interests of three parties are involved: the defendant, the trial court, and the appellate court. It is to the advantage of the appellate court to settle the whole case on one appeal rather than several. It is to the advantage of the defendant and the trial court to settle the point at once. Of course in some cases the defendant is adequately protected by habeas corpus, or mandamus or prohibition. In other cases it may be desirable that the trial court be authorized to certify the case up to the appellate court.

**Appeal by the State**

From the unanimity of sentiment and frequent expression on the subject one might infer that one of the most important and needed appellate reforms is the conferring on the state of the right to appeal. A consideration of the problems involved leads, however, to the conclusion not only that such a power if granted would not often be employed in practice, but that its use would be harmful and unfair.

Appeal by the state finds no support in history. Appeal by the defendant is itself a very modern development, the writ of
error being established as of right only in the eighteenth century and appeal on the merits in the twentieth century. Historically appeal has been regarded as a safeguard for defendants. Appeal by the state in the United States was therefore not a common law right and required express constitutional or statutory authorization.

With respect to the legality of appeals by the state two objections have been raised: that no statute permits and that the defendant is placed in double jeopardy. A statute on the subject does away with the first objection. The second requires more detailed consideration. To begin with appeals at certain stages of the proceedings obviously do not put the defendant in jeopardy. An appeal from an order of the court quashing an indictment is unquestionable since the jury has not been sworn. There is no jeopardy when appeal is to lay down the law only. From the point of view of logic the defendant has never been in jeopardy until he has been legally tried. An appeal may be regarded as a continuation of the original proceeding. The double jeopardy doctrine grew up before appeals existed hence has no necessary application to them.

The most unobjectionable form of appeal is that from orders of the court, such as those quashing an indictment or sustaining a demurrer thereto, especially where this is done on the ground that the statute under which the indictment was drawn was unconstitutional. Where there is a ruling of unconstitutionality the state is foreclosed from any further prosecution for the crime. There is no jeopardy under any theory at this point. Other trial judges, however, would not be bound to follow the decision. There is, moreover, a possible hardship on the defendant. If the appeal fails the ultimate disposition of the case is delayed. Many defendants are unable to pay the expenses of defending an appeal. The defendant is made to suffer through the mistakes of the trial court. Two court proceedings should not be necessary to bring him to justice. Even where the power to appeal is granted it is seldom exercised. Prosecutors are too busy with other cases in the trial courts to devote much attention to appeals. The analogy of appeal in civil cases is not apropos since neither life nor liberty are at stake, the likelihood of indigence of the defendant is not so great, the defendant is not imprisoned or forced to give bail on appeal, and there are less preliminary proceedings. Civil appeals themselves are necessary evils.
Criminal Appellate Reform

Appeal from the grant of a new trial to the defendant involves the defendant in additional expense. Furthermore, new trials should be grantable only by the appellate court. An appeal where the defendant also appeals is scarcely an appeal since the defendant has taken the initiative. The appellate court is not likely to give much attention to other than the points raised by the defendant. Appeal from sentence would be unnecessary if a disposition tribunal were created. Appeal from an acquittal merely to lay down the law means the decision of a moot case. The defendant is not likely to fight the case in the appellate court, hence that court hears only the arguments in favor of the state. The position of the defendant is anomalous since he is free yet the appellate court may find that he ought not to be. There is little incentive for the prosecutor to appeal merely to lay down the law. Appeal from an intermediate court is undesirable because of the expense to the defendant. The defendant ought to be allowed to go to the court of last resort in the first instance, or be entitled to finality in the intermediate court. A rehearing on petition of the state is not particularly obnoxious because of its close connection with the hearing itself. Rehearings, however, by either the defendant or the state are unfortunate.

The most sweeping form of state appeal is that from a verdict of acquittal. It has been seen that from a logical standpoint double jeopardy is no objection since the doctrine of jeopardy developed before appeals, since in reality there is no jeopardy when the defendant is not legally tried and since an appeal may be regarded as a continuation of the original proceedings. From the point of view of policy, however, such appeal is undesirable. It is permitted only in Connecticut, is strictly limited there, and rarely used. In England there can be no new trial even when the defendant appeals. It is a severe hardship when the proceeding has gone as far as verdict to put the defendant to the inconvenience, delay, and expense of an appeal and another trial.

A review of the chief arguments in favor of state appeal demonstrates the weakness of the proposal. It is asserted that the number of convictions would be increased. This can neither be proved nor disproved. Few appeals are taken in states permitting such appeal. Moreover the number of convictions per se is not the goal of the administration of the criminal law. Only guilty persons are to be convicted and even they should be given a fair
It is also contended that state appeals will develop the law. But the law should not be developed at the expense of harassing individual defendants. Furthermore if but a mere handful of appeals is brought, as is usually the case, there can be no extensive development of the law. The law is not likely to be satisfactorily developed unless the defendant has counsel presenting his side.

Last of all it is claimed that the absence of state appeals demoralizes all parties concerned at the trial. The prosecuting attorney has to be too cautious, the defense attorney is under no restraint, and the trial judge passes a reversal only for rulings against the defendant. But many cases against the defendant are so clear that there is no such evil. In actual fact many cases are reversed for misconduct of the prosecuting attorney or the trial judge. The real remedy is better prosecuting attorneys and better judges and the improvement of the bar from which defense attorneys are drawn.

THE SCOPE OF APPEAL

It is a far cry from the ancient writ of error to the modern appeal. Under the ancient writ of error there might be review only of errors apparent on the record, which was confined to parts of the proceedings in which error rarely appeared. The American code appeals amounted to little more than review of the record together with review by bill of exceptions. They did not permit the review of the facts except where there was no evidence to support the verdict and did not permit the hearing of new evidence. In England under the Criminal Appeal Act there may be complete review of the facts in the broadest sense. This is also the general rule on the Continent.

Review of the facts has several possible meanings. In its broadest sense it involves a rehearing of the case. In the sense often used in the United States it means a review of the facts appearing in the record and transcript.

Review of the facts makes possible an appeal on the merits since the court may consider all issues involved. Errors of fact do occur in actual life. When they occur they may be much more serious in their effects than errors of law. Errors of law are often hard to disentangle from errors of fact.
Against such review is the remoteness of the appellate court from the facts. It is further separated in time and place than is the trial court. The trial court can see and hear the witnesses face to face. The record is not a substitute for such contacts. Furthermore it is inconvenient for the appellate court to examine the facts. Its dockets are already congested with cases appealed on legal issues. Review of the facts is tedious and often a waste of the court's time. Such review neither develops trial court standards nor develops the law. Where there is an intermediate court and the law requires the case to go through it before review by the highest court, the highest court should be confined to review of legal issues.

The fact that the jury has made certain findings should not be determinative. Courts have constantly increased their control over juries. Juries may err like anyone else and their findings should be subject to review. Cases do occur where the court or jury have erred as to the facts. The power to review the facts is necessary to maintain public confidence.

Abuse of review of the facts may be avoided by restricting the right. Such review should be by leave. The court should be empowered to penalize frivolous appeals or applications to appeal. The defendant should not be allowed to introduce new evidence above which he might have introduced at the trial.

Appellate courts in fact do sometimes review the facts without authorization, assigning technical reasons for the result. But it is doubtful that many judges follow this practice. Furthermore the law is not developed by such decisions. Instead it is confused and made more technical.

One of the much vaunted reforms of English criminal appellate procedure has been review of the sentence both as to legality and fairness. Concededly the last word on these subjects should not be left with the trial judge. Where, as is everywhere the rule at the present time, sentence is imposed by the trial court, the appellate court should not simply reverse the conviction, or reverse and send back for a new trial, but should send the case back for imposition of the correct sentence or impose the correct sentence itself. The appellate court should also have the power to modify a sentence that is unfair, certainly to reduce, and even to increase the sentence. Without such review sentences will be gross-
ly inequal though the same crime and surrounding circumstances are involved.

Appellate judges, however, are not trained in the fields of knowledge necessary to determine what the proper sentence should be for individual offenders. Their usual functions are strictly juridical. They know little or nothing of criminology, social case work, psychology and psychiatry. They do not even follow their own standards of fairness. For these reasons the sentencing function should be sharply distinguished from the guilt finding function and placed in the hands of a group of experts to be known as a disposition tribunal. The decisions of this tribunal should be final except in cases of corruption, arbitrariness and want of support in the evidence. In the latter cases appeal should lie to the appellate court.

Finally to be considered is review of questions not properly raised and preserved. The appellant must take his objection below and must present it properly to the appellate court. The appellate court may consider other questions, but is not bound to do so. This state of the law is not without adequate foundation. If the question had been raised below the error might have been corrected immediately. Defendants might deliberately withhold points for review on appeal. The common notion of the function of an appellate court is that it exists to correct errors made below and error is not made below in this sense unless it is objected to. The time of the appellate court is too valuable to be spent in the original consideration of questions not raised below.

As a matter of fact appellate courts do consider a considerable range of objections not raised below and this seems necessary in order to avoid a hardship on the appellant. The remedy is not, however, merely to review such questions. The remedy is rather to elevate the standards of the bar so that this type of error will seldom be made. There is little excuse for a failure to comply with such obvious prerequisites of appeal.

THE PROCEDURE OF APPEAL

The time element in appeals can be much abbreviated. The statutory time granted in which to take an appeal should be limited to a few days after verdict, not several months after judgment as is commonly the case. The court should, however, have power to hear appeals at later dates where good cause is shown and in-
justice would otherwise result. Time taken to prepare the record should be made less by abolishing the narrative record and sending up a question and answer form. Time given to prepare briefs is also too long. In England no briefs are employed. Delay in submission to the appellate court should be avoided by giving criminal appeals consideration before civil. If there is a large number of criminal appeals the appellate court if large enough should sit in divisions to hear them. Delay because of the existence of both an intermediate and final court should be eliminated by sending criminal cases directly to the court of last resort. Delay after the hearing should occur only in rare cases; ordinarily the appellate court should render its decision immediately at the end of the hearing. Rehearings should be discovered. The mandate should go down promptly to the trial court.

The appeal papers should be greatly simplified. Appeal should be taken by a notice of appeal filed in the trial court and served on the defendant. The record should be in question and answer form. It is easier and cheaper to prepare. A more accurate picture of what happened below may be given. If more work is demanded of the appellate court it is work they ought to perform. But abstracts and helpful briefs will avoid this. The bulkiness of records can be diminished. Only so much of the evidence should go into the record as is necessary to secure a full review. The appeal papers should not have to be printed. Printing means additional delay and expense. Printing should not be required as to appeals in state appellate courts, especially intermediate courts. If printing be thought necessary only the brief should be printed or the brief and abstract. A separate assignment of errors should not be required. The errors should be assigned in the brief and possibly in the notice of appeal with some leeway for later assignment for good cause.

The granting of bail pending appeal should be made much stricter than it now is. A convicted person does not deserve the same consideration as one merely accused of crime. A convicted person is more likely to seek to escape. One long out on bail loses his respect for the law as do other possible criminals. But many states draw little or no distinction between bail before and after conviction. No other inferior court than the trial court should have power to grant bail. Bail should be grantable only as the filing of a certificate showing good faith. Notice should be given
the prosecution of the application for bail. Bail in cases when the penalty is a fine is not objectionable when payment of the fine is secured. Bail in misdemeanor cases is not especially objectionable. But it should be rarely granted in felony cases. Bail should be grantable in the appellate court when the case reaches it though it has been previously refused in the trial court. In general bail on appeal should be discretionary.

Adequate provision should be made to protect indigent defendants having cases deserving of review. Automatic review of all cases would of course protect the poor as well as the rich. But the adoption of any such program seems hopeless. It would cost a great deal. Perhaps the man who can afford to pay ought to pay. Possibly he should have to pay only attorney’s fees with the state paying for the appeal papers. The principal problem is to assist the defendant without any means. Administrative machinery should be worked out to determine who qualify as poor persons. This task should not devolve upon the courts either trial or appellate. This same machinery should determine whether the defendant has a meritorious case. Assistance is thus to be given only to poor persons with meritorious cases. Legal aid societies cannot be relied on to take appeals as they have not the financial resources. Public defenders, where they exist, might well take such appeals. Cases might be assigned to attorneys engaged in private practice from a selected list as is the rule under the Model Litigants Statute and the Criminal Appeal Act in England. Appeals should be made so simple and cheap that persons living on the margin of poverty may take them. The original papers should be transmitted to the appellate court. No printing should be required. Appeals should not be dismissed for a failure to comply with the rules when non-wilful, but the appellant should be permitted to correct his error.

The hearing of criminal appeals can be made much more efficient. The appellate court should have read the record and briefs or an abstract before the hearing so as to be familiar with the case. The hearing should be conducted in a way so as to get at the matters in issue in a direct and informal way. The appellate court should feel free to ask questions and to direct the argument. The court should except in extraordinary cases arrive at their decision and deliver their opinions immediately after argument. If the present system of delivering opinions a month or two
after argument is to continue, it should be mitigated in several ways. Opinions should be written only where they add to the development of the law. When opinions are written they should be made shorter and less elaborate.

**Technicallity and Prejudicial Error**

The appellate courts cannot be assigned the major blame for weakness in the administration of the criminal law. A mere comparison of the proportion of reversals to affirmances is not enough to show whether or not appellate courts reverse for technical reasons. A seemingly technical decision may be on the merits. Appellate courts in the past have had to maintain trial court standards and develop the law as well as decide the case on the merits. Insistence on certainty carries with it the drawing of sharp lines. Appellate courts may not have the power to review a case fully, or to dispose of it finally where that is desirable.

There is no one remedy for eliminating technicalities. The passage of a statute forbidding reversals except for substantial error is but a step. Much more important is the bringing about of a change of attitude on the part of the appellate court. Having appellate judges try cases might help but is hardly feasible since appellate courts are congested. A unified court system would be a step in the right direction. Criminal procedure both in the trial court and in the appellate court should be made simpler. This may be done by statute but preferably by rules of court. If appeals were discretionary the frivolous cases would be sifted out. The appointment instead of election of appellate judges would improve the quality of opinions. Appellate judges should write fewer and briefer opinions covering only the issues argued by the attorneys. The whole legal system must be strengthened since appellate courts do not exist in vacuo. Additional power should be conferred on the trial court and trial judges should be appointed, not elected. They should be subject to supervision. Liberal provision for waiver of jury trial should be made thus eliminating or reducing reversals for misdirection or erroneous rulings on the admission or exclusion of evidence. Prosecuting attorneys should be appointed for long terms and subject to central supervision. The bar must be improved. Law schools must engage in research in criminal law and procedure. A ministry of justice should be established. It has been
said that technicality is the sign of an undeveloped system of law. The remedies just outlined do much to supply such development.

HISTORY AND STRUCTURE OF STATE APPELLATE COURTS

Up to the middle of the nineteenth century criminal appeals were frequently dealt with by the legislature. The early mode of review was by writ of error. Provision was early made for bills of exceptions. Trial and appellate functions were at first performed by many state appellate courts. Early appeals emphasized the development of the law rather than deciding the concrete case. Judges were at first appointed instead of being elected.

State appellate courts usually have either five or seven members. In four states they are assisted by commissioners. In several states trial judges may be called in. There are only two states having separate courts of criminal appeals, Texas and Oklahoma. In both states there have been several proposals to abolish these courts. Proposals in other states to establish such a court have received little encouragement. Conflicts in jurisdiction and conflicts in rules of law laid down are likely to ensue. In most states there is not enough business for a separate court. Criminal appeals may be given precedence in existing courts.

The number of appeals taken ranges very widely, all the way from less than ten a year to over eight hundred a year. The median number is about thirty and the average number about ninety. In the northern states criminal appeals are less than ten per cent of all appeals. In the southern states they are almost twenty-five per cent of all appeals.

In twenty states the appellate court may sit in divisions. There is usually no separate division to hear criminal appeals. The divisional plan is desirable where there is a large court and a large number of appeals.

In twelve states there are intermediate courts of appeal. Capital cases usually go directly to the court of last resort as do felonies. Even misdemeanors might well go up directly.

The divisional court plan is preferable to that of intermediate courts in civil appeals and even more so in criminal appeals. It saves time. One appellate court does not reverse another. A defendant is not entitled to two appeals. The labors of two courts should not be required.

*Judson, The Judiciary and the People (1931) 248.*
Criminal Appellate Reform

Appeal is usually of right in states where there is no intermediate court. Appeals are usually heard at the state capital. When they are heard elsewhere delay results unless the court can hear appeals from any place within the state.

The organization of the appellate court is not the most fundamental problem of appeal. Yet its effects are not to be lightly treated.

Petty Appeals

From the point of view of numbers alone appeals from justice of the peace and other inferior courts are far more important than appeals from the trial court of general jurisdiction. Obviously individual petty appeals are not of the same importance as other appeals.

While petty appeals in practice involve a complete rehearing of the case with no weight given to the finding at the first trial they still involve a problem of appeal since the time may and should come when petty appeals are for errors in the original trial.

The problem of petty appeals is most acute in the New England states, principally Massachusetts. The petty appeals there flood the trial courts of general jurisdiction with appeal cases and result in extensive delays and numerous reversals. Several remedies are available. The defendant may be required to assert his right to a jury trial at once; if he does, he is to be tried by the trial court of general jurisdiction. Juries may be employed in the district court. The right to a jury trial in petty cases may be abolished.

In England though justices of the peace are used even to try the more serious cases, their powers are in fact limited. They are assisted by a justice's clerk who is a trained lawyer, the presiding justice is often a trained lawyer, and the more serious cases are reserved for the Assizes. Moreover it is questionable whether their use is successful even there.

In America justices of the peace are elected by popular vote. They frequently make no reports to anyone. They are often ignorant and incompetent. Trial justices trained in the law should be substituted, and they should be appointed. Where there are municipal courts a second trial on the merits should be abolished. Appeals should not be automatic. The inferior courts
should be so improved that review of all cases is not necessary. The defendant should have a right to appeal on issues of law with a discretionary right as to issues of fact. Petty appeals should not be so expensive that defendants cannot afford to appeal. Flooding of the courts with petty appeals because of such cheapness should be avoided by penalizing frivolous appeals.

**Federal Appeals**

That the problem of federal criminal appeals is a comparatively modern one is shown by the fact that cases in the lower federal courts could be reviewed only on certificate of division in the old circuit court up to 1889. Review on writ of error was made possible after that date as to capital cases and shortly after as “infamous crimes.” But such review was short-lived being abolished as to non-capital cases in 1897 and as to capital in 1911. Appeal from the Circuit Courts of Appeals created in 1891 was by leave. Direct review by the Supreme Court at the suit of the state in certain cases was provided in 1907.

Appeals from the state courts have been possible on writ of error ever since 1789. Such appeals are rare, most problems of criminal law and procedure being of a purely local character. Frequent appeals of this kind would result in great delay as to cases having already gone through all the state courts. Enforcement of federal laws in the state courts would greatly increase the number of such appeals. Habeas corpus should not be permitted as the ordinary mode of review of state cases.

Easily the most important event in recent years with respect to federal appeals has been the grant by Congress to the Supreme Court of the United States of the power to prescribe rules of procedure after verdict in the federal courts. The Attorney General in May, 1933, submitted proposed rules to the Supreme Court and rules were adopted in May, 1934. These rules cover bail, time and manner of appeal and specification of the grounds of appeal. They allow the circuit courts to frame rules as to certain matters not inconsistent with these rules.

The rules represent a vast improvement over the present chaotic and antiquated system of appeals in the federal courts. Petitions for allowance of appeal and citations are abolished. The grant of bail pending appeal is made most difficult. The grounds of appeal are to be specified in the notice of appeal. Time to ap-
peal is reduced to five days after the entry of judgment of conviction. An early hearing in the appellate court after the filing of the record is assured. The entry of such judgment may, however, occur at a considerable time after verdict. Control of the preparation of the record is placed in the courts and provision for speeding the preparation is made. The time in which petition to the Supreme Court for writ of certiorari may be made is reduced. In several respects the rules are conservative. The narrative form of the record is still possible, though provision is made to speed up its preparation. Printing of the record and briefs may still be required.

The problem of appeals in the federal courts is not as serious as that in the state courts. Few criminal appeals are taken to the Supreme Court. The Supreme Court gives first consideration to criminal appeals and keeps up with the docket. The number of appeals in the circuit courts of appeals is not great. The principal defect in the federal courts has been the delays which occur. Such delays, however, have been chiefly due to the preparation of cases for submission on appeal.

Summary

A satisfactory system of review of criminal cases involves at least the following considerations. The defendant should have a right to appeal. The state should have no such right. The appellate court should have the power to review the case on the merits. The procedure of appeal should be simplified. The time allowed to appeal and the time taken for consideration should be reduced so as to secure a prompt consideration. The appeal papers should admit of rapid preparation, should be inexpensive and should be less bulky. Indigent defendants should be assisted by the state. The hearings should be made to serve a real purpose. Decisions on technical grounds should be eliminated. The appellate court should be so organized as to secure a prompt and full consideration of the appeal. Petty appeals are to be so improved that a complete rehearing with no regard paid to the earlier trial is not necessary. Delay and antiquated methods of appellate procedure have been the chief faults in the federal courts. Many features of English criminal appeals should be adopted in this country.