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CRIMINAL APPEALS: PAST, PRESENT, AND FUTURE

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This issue of the *Marquette Law Review* presents materials from the Marquette University Law School conference, "Criminal Appeals: Past, Present, and Future," which was held at the Law School on June 15–16, 2009. The conference brought together leading criminal law and judicial process scholars, as well as a panel of current and former state high court judges and justices, to examine enduring and emerging issues relating to the exercise of the appellate function in criminal cases.

Two factors provided the impetus for the conference. The first is the sheer timeliness of the topic. The past decade has witnessed the emergence of widespread concern over the fairness and reliability of the American criminal justice system. The ascendance of DNA evidence, and the resulting wave of exonerations, has demonstrated the fallibility of the criminal trial process to an extent previously only imaginable. This suggests the possibility of a greater role for appellate courts in policing the accuracy of trials. At the same time, efforts in many jurisdictions to guide and constrain the sentencing discretion of trial court judges have already resulted in new responsibilities for appellate courts to review the appropriateness of sentences.

The second impetus for the conference was our sense that there has been a relative lack of scholarly attention paid to the institutional role of appellate courts in the criminal context. Most of the scholarship concerning the functions of appellate courts, and indeed relating to the judicial role more generally, focuses on the civil system. Yet there are many reasons to believe that the lessons do not transfer from one context to another. Criminal law is different. As Roscoe Pound put the matter seventy years ago:

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> If one looked at the matter with no knowledge of its history and as something to be established *de novo* on the basis of modern conceptions of social control, it would seem that where life or liberty is at stake, as in a criminal prosecution, a rational re-examination of the whole case after trial, at least at the instance of a convicted accused, to be made by a tribunal insuring the best judicial power in the jurisdiction, in order to insure that justice has been done, would be a matter of course.[1]

Of course, Pound's vision has never held sway. But it serves to underscore the point that the dynamics of criminal cases differ greatly from their civil counterparts.

At the margins, perhaps, the line distinguishing criminal from civil may be hard to locate.[2] But the core criminal case pits an individual, whose liberty and perhaps life is on the line, against the resources of the state. The sides are not evenly matched either in terms of resources (in the aggregate, and in most cases, the state has more) or the procedural rules that govern (the government bears a high burden of proof, and defendants enjoy the protection of constitutional rights that apply only to them). And while the average criminal defendant's goal is simply to prevail, the prosecutor represents the people, and has as her goal not merely winning, but rather "doing justice" in some larger sense. These features render criminal litigation quite distinct from the typical private law dispute, which generally involves a bilateral dispute over money between parties that are, at least in terms of the rules that govern resolution of their dispute, relatively evenly matched.[3] It also differs from public law litigation, which often has direct, future implications for non-parties to the dispute that may differ in scope and in kind from the implications that criminal litigation often has for crime victims.[4]

The differences between the two systems extend into the appellate sphere, and manifest themselves both doctrinally and institutionally. Appeals in criminal cases are asymmetrically available; a convicted defendant can always

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1. Roscoe Pound, *Introduction*, *in* LESTER B. ORFIELD, CRIMINAL APPEALS IN AMERICA 3 (1939).

2. *See, e.g.*, JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 1–5 (5th ed. 2009).

3. The classic depiction of this model of adjudication is Lon Fuller's. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

4. For the classic statements of the public law model, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). For a discussion of the relationship between the involvement of victims in the criminal justice system and the civil–criminal distinction, see Michael M. O'Hear & Andrea Kupfer Schneider, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1, 2–3 (2007).

appeal, while the government's ability to appeal is quite limited.[5] In addition, the incentives facing a criminal defendant differ considerably from those facing the parties to a civil suit. For a host of reasons—among them the fact that he is likely incarcerated, faces the prospect of living the remainder of his life with a criminal conviction, and likely has access to free representation—a criminal defendant has little to lose and much to gain from an appeal, and consequently is apt to take one even in a case where he is unlikely to be successful.

The institutional setting differs in other ways. Because criminal appeals often involve specialized appellate lawyers on both the prosecution and defense sides, the process involves repeat players to a much greater degree than is true of civil litigation. This creates an opportunity for strategic lawyering designed to encourage courts to adopt favorable legal standards.[6] It also raises ethical issues for defense lawyers in particular. They must, on the one hand, contend with the situation of the client who they have concluded does not have a meritorious appeal, which raises the question of when, if ever, an *Anders* brief is appropriate.[7] Less obviously, the repeat-playing defense lawyer must also be alert to the possibility that she will argue more vigorously on behalf of some clients than others. A former colleague told one of us of a conversation he had with an appellate judge (in a social setting), in which the judge mused on how helpful it would be if the colleague could somehow signify the cases in which he had a "real" issue. Of course, they both knew that this would be improper. But there remains a danger that an appellate defender will convey the impression that *this time* she really means it.

Criminal litigation remains predominantly a creature of state court systems. This, too, presents a dynamic that differs from that in civil cases. As recent high-profile judicial election campaigns suggest, criminal cases often provide good fodder for those seeking to challenge a sitting judge.[8] We might accordingly be concerned that issues related to criminal law play a relatively large role in initial judicial selection, and that the potential consequences at the ballot box of a ruling in a criminal case might affect the manner in which courts

5. *See, e.g.*, Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1 (2008).

6. Andrew Hessick discusses the government's ability to do this below. *See* Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477 (2009). On the defense side, lawyers might choose, for example, to advance arguments for changes in the law in cases involving less serious crimes in the hopes that the perceived costs of a change and the perceived political consequences of a defendant-favorable ruling would be less.

7. For a discussion of no-merits briefs, see Randall L. Hodgkinson, *No-Merits Briefs Undermine the Adversary Process*, 3 J. APP. PRAC. & PROCESS 55 (2001). *See also* DANIEL J. MEADOR, THOMAS E. BAKER & JOAN E. STEINMAN, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 682–700 (2d ed. 2006).

8. *See* Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 644 (2009).

handle criminal appeals.[9] A related concern arises from the fact that criminal cases involve state courts in the business of applying federal constitutional law on a regular basis. Given that the Supreme Court is largely out of the business of error correction, it seems a legitimate concern that federal constitutional rights might be underenforced in state courts.

The differences between the two systems are likewise manifest in more narrow, doctrinal senses. The concepts of "structural error" and "plain error" appear primarily, if not exclusively, in criminal appeals. Both involve departures from core norms of the appellate process.[10] Recognition of structural error places an appellate court in the position of denying any competence to assess the effects of an error on the judgment. The acknowledgment of plain error involves a departure from the fundamentally adversarial nature of our legal system in that it requires the court to recognize an error that was not raised in the trial court (while at the same time concluding, in effect, that the error was so obvious no one could have missed it). The *Anders* brief likewise pulls the court out of the reactive role that it normally occupies, requiring it to review the record as an advocate for the defendant, looking for colorable claims of error.[11]

The implications of these differences for the nature of the judicial role and the design of judicial institutions remain largely unexplored. The criminal justice system necessarily (and properly) entails a certain solicitude toward criminal defendants, and consequently requires courts at both the trial and appellate levels to step outside the passive, neutral role that remains as an ideal in civil cases. The precise manner in which courts in criminal appeals (and criminal cases more generally) are called on to do so differs from the manner in which courts depart from the traditional role in public law and other sorts of cases that deviate from the typical bilateral private law dispute. It may be, then, that as a general matter the role of the judge in criminal law litigation is undertheorized.

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The conference took place over two days, and included six panels as well as a roundtable discussion of five current and former state supreme court

9. *But see* Aman L. McLeod, *A Comparison of the Criminal Appellate Decisions of Appointed State Supreme Courts: Insights, Questions, and Implications for Judicial Independence*, 34 FORDHAM URB. L.J. 343, 356 (2007) (reporting the results of an empirical study that suggest "that courts whose members were selected with the use of a merit selection commission decided a higher percentage of criminal cases in favor of the state than did courts chosen without the use of commissions").

10. *See* MEADOR, BAKER & STEINMAN, *supra* note 7, at 210; Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Error*, 117 YALE L.J. 1180 (2008).

11. *See* James E. Duggan & Andrew W. Moeller, *Make Way for the ABA:* Smith v. Robbins *Clears a Path for* Anders *Alternatives*, 3 J. APP. PRAC. & PROCESS 65 (2001).

justices.[12] The first panel was devoted to historical perspectives. Professor Roger Fairfax explores the development of the harmless error rule, tracing its origins to larger efforts in the early twentieth century to reform criminal appellate procedure.[13] He outlines the ways in which reformers advocated in favor of the rule on the grounds that it would make the system more efficient, effective, and fair, as well as through such rhetorical devices as tying the lack of a harmless error rule to increasing crime rates and portraying appellate judges as "fearful of judging."[14] He concludes by posing the question whether the doctrine of harmless error has in application evolved in such a way as to meet the goals the reformers sought to achieve.[15] Professor Frank Bowman steps back even farther in time, examining criminal appeals in antebellum Missouri through detailed study of a series of individual cases.[16] He humbly disclaims the notion that his consideration of the exploits of lawyers James Rollins and Odon Guitar allows for the drawing of "any profound lessons or deep insights."[17] Still, the comparison of that criminal justice system to our own helps to underscore the extent to which the contemporary criminal appeals system rests on assumptions that are not so inevitable as their familiarity might lead us to believe. Paul Carrington covers more recent ground, tracing how current appellate processes have drifted even farther away from the ideal in the thirty-four years since he, along with Dan Meador and Maurice Rosenberg, published *Justice on Appeal*, a classic text that embodied much of the work of the Advisory Council for Appellate Justice.[18] Focusing on the federal courts, he concludes that much of what takes place in the guise of criminal litigation is not adjudication but rather "informal bargaining in a bureaucratic process."[19] He forcefully articulates the case for "transparency and accountability in a process of adjudication of guilt" and against "practices allowing criminal appeals to be papered over by staff work so that those appointed by the President and confirmed by the Senate give no more than glancing attention to the question of whether a proceeding resulting

12. The panelists were Justice James Duggan, New Hampshire Supreme Court; Chief Justice Karla Gray (Ret.), Montana Supreme Court; Judge Arlene Johnson, Oklahoma Court of Criminal Appeals; Chief Justice Randall Shepard, Indiana Supreme Court; and Judge Diane Sykes, United States Court of Appeals for the Seventh Circuit (and former Justice, Wisconsin Supreme Court).

13. Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433 (2009).

14. *Id.* at 447.

15. *Id.* at 455–57.

16. Frank O. Bowman, III, *Stories of Crimes, Trials, and Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349 (2009).

17. *Id.* at 376.

18. Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459 (2009).

19. *Id.* at 474.

in a conviction was properly conducted."[20] We are fortunate as well to have Professor Michael Klarman's article on the Scottsboro cases, in which he explores the role of race and injustice in the Supreme Court's development of modern criminal procedure.[21]

The second panel explored institutional roles. Professor Andrew Hessick investigates the government's role as a repeat player in criminal appeals, and considers the strategies the government might employ in furtherance of its interest in developing favorable legal rules.[22] These include its ability to select which arguments to raise in a given case and to choose to bring a series of cases in a sequence designed to maximize the chances of convincing the court to adopt a preferred rule.[23] He articulates reasons for concern about this potential for influence, which include not only the tension between such influence and separation of powers, but also the seeming unfairness of the government enjoying this power in addition to the various other ways in which it enjoys advantages in the criminal process.[24] Professor Gerald Uelmen describes his experience as executive director of the California Commission on the Fair Administration of Justice.[25] He outlines the dysfunction of California's death penalty regime, and conveys the frustrations of seeing the Commission's recommendations fall to a veto.[26]

The third panel concerned the right to effective assistance of counsel. Professor Stephen Smith contends that a recent line of cases represents a shift in the Supreme Court's approach to ineffective assistance claims, one in which he contends the Court has taken the right to counsel more seriously.[27] Although these recent cases have all involved the imposition of the death penalty, he contends that their more stringent standards should not be limited to capital cases, for only then will the results of criminal cases regularly generate reliable, accurate outcomes.[28] Professor Greg O'Meara analyzes the application of ineffective assistance law in the circuit courts in the wake of the Antiterrorism and Effective Death Penalty Act (AEDPA), and concludes that, despite Congress's efforts in AEDPA to restrict access to habeas review, the lower federal courts have required more of defense counsel than the Supreme

20. *Id*.

21. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379 (2009).

22. Hessick, *supra* note 6.

23. *Id*. at 480–90.

24. *Id*. at 490–93.

25. Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495 (2009).

26. *Id*. at 495–96.

27. Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515 (2009).

28. *Id*. at 537–42.

Court's cases seem to require.[29] He suggests two reasons for this trend. The first is that AEDPA ignores the constitutional underpinnings of habeas review, and the second is that AEDPA falsely assumes an equivalence between the binding nature of statutory text and precedential case law.[30]

The fourth panel addressed wrongful conviction issues. Professor Keith Findley poses the question of how well the appellate process serves to protect against mistaken convictions, and concludes that there is considerable room for improvement.[31] He surveys the recent evidence, much of which has emerged from DNA testing, revealing that the criminal justice system has not been error-free even with respect to its handling of the most serious crimes.[32] He contends that there is a greater role for appellate courts to play in protecting against wrongful convictions, and outlines a number of ways in which the appellate process might be modified to respond to claims of innocence. Professor Sandra Guerra Thompson focuses on eyewitness identification testimony, which is notoriously unreliable and plays a role in a large portion of wrongful convictions.[33] She examined a year's worth of appellate cases involving challenges to eyewitness identification testimony.[34] Her study revealed that courts have continued to sanction the use of such testimony in circumstances that present misidentification dangers recognized by researchers, reformers, and various government and private task forces.[35]

The fifth panel took up the topic of sentencing appeals. The discussion opens with an article in which Chief Justice Randall Shepard traces the history of appellate review of sentences in Indiana.[36] Amendments to the Indiana constitution adopted in the late 1960s provided for an appellate review power that, despite taking some time to mature, has led to a meaningful appellate role in the sentencing process. Next, Professor John Pfaff investigates state appellate courts' implementation of the Supreme Court's decisions in *Blakely v. Washington*[37] and *United States v. Booker*,[38] which created a legal

29. Gregory J. O'Meara, S.J., *"You Can't Get There From Here?": Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545 (2009).

30. *Id.* at 557–68.

31. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591 (2009).

32. *Id.* at 593–601.

33. Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639 (2009).

34. *Id.* at 649–57.

35. *Id.* at 657–68.

36. Randall T. Shepard, *Robust Appellate Review of Sentences: Just How British is Indiana?*, 93 MARQ. L. REV. 671 (2009).

37. 542 U.S. 296 (2004).

38. 543 U.S. 220 (2005).

landscape that he characterizes as "confusing and self-contradictory."[39] He considers the effects of *Booker* on appellate review of sentencing in three states—Indiana, New Jersey, and Tennessee—that have elected to follow it by converting their presumptive guidelines to voluntary guidelines. He concludes that *Booker* has had very little effect in those states, and based on his inquiry outlines some issues with which states must grapple in the process of determining whether *Booker* review is normatively desirable.[40] Professor Carissa Byrne Hessick likewise delves into the Supreme Court's sentencing jurisprudence, focusing on the impact of the Court's decision in *Kimbrough v. United States*,[41] which concerned district courts' ability to depart from the Federal Sentencing Guidelines based on a policy disagreement with the Guidelines' treatment of crack cocaine.[42] She identifies a series of problems and inconsistencies in the resulting regime, and questions the effectiveness of appellate review in this context. In its place, she proposes that the United States Sentencing Commission work to persuade district courts that the policy underpinnings of the Guidelines are appropriate, with the anticipated result being greater sentencing uniformity as courts opt to impose Guidelines sentences.[43] Professor Michael O'Hear examines the nature of the processes by which appellate courts engage in review of sentences.[44] In particular, he considers the appropriateness of appellate review directed toward an assessment of the adequacy of trial courts' explanations of the sentences they impose. In the course of making the case for "explanation review," he outlines the relevant jurisprudence under federal and Wisconsin law, and articulates a set of principles by which courts should engage in explanation review.

The sixth and final panel presented quantitative research. Professors Sara Benesh and Wendy Martinek address the topic of state court adherence to Supreme Court precedent.[45] They compare the outputs of state supreme courts and the federal courts of appeals in cases dealing with criminal confessions. They find that, while both sets of courts are largely compliant with Supreme Court precedent, federal courts of appeals appear to be more

39. John F. Pfaff, *The Future of Appellate Sentencing Review:* Booker *in the States*, 93 MARQ. L. REV. 683, 685 (2009).

40. *Id*. at 712–15.

41. 552 U.S. 85 (2007).

42. Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717 (2009).

43. *Id*. at 741–49.

44. Michael M. O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751 (2009).

45. Sara C. Benesh & Wendy L. Marinek, *Context and Compliance: A Comparision of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795 (2009).

compliant.[46] Professor Michael Heise provides an empirical perspective on criminal appeals in the federal courts.[47] Drawing on data gathered by the United States Sentencing Commission, he outlines the general contours of the federal appellate courts' criminal dockets. He concludes, however, that the data are insufficient to allow for a meaningful assessment of this work, and identifies a number of limitations in the data that will have to be addressed to further develop our understanding of criminal appeals in the federal courts.[48]

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We are grateful to all of our authors, other participants, and guests at the conference for making the event as lively and productive as it was in person, and for generating such useful contributions to the literature on criminal appeals. We would also like to thank Dean Joseph Kearney of Marquette University Law School for his generous support and encouragement, and also the many members of the law school's staff and administration for their work in putting on the conference. Finally, we are grateful to the editorial staff of the *Marquette Law Review* for providing a forum for the conference papers and doing the hard work of bringing them into print.

46. *Id.* at 814–16.

47. Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825 (2009).

48. *Id.* at 838–42.