

# Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective

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# JUSTICE ON APPEAL IN CRIMINAL CASES: A TWENTIETH-CENTURY PERSPECTIVE

PAUL D. CARRINGTON\*

I welcome the opportunity to participate in this symposium so that I may present once again, and not merely for old times' sake, a view of the role of appellate courts that was once widely shared and has now been dismissed by many judges as antique. I write chiefly of federal courts, but the same considerations arise in the conduct of appeals in state courts.

## THE 1976 SETTING

From 1971 to 1976, I worked with Dan Meador and Maurice Rosenberg, and with a very elegant group of judges and lawyers organized as the Advisory Council for Appellate Justice (Council or Advisory Council). Our Council was summoned into being by the eminent Circuit Judge Al Murrah,<sup>1</sup> who was then the director of the new Federal Judicial Center.<sup>2</sup> Our Council was also funded by the National Conference on State Courts<sup>3</sup> and the Law Enforcement Assistance Administration.<sup>4</sup> All of these organizations were then of recent birth and reflected a widely shared ambition to erect a legal system worthy of the Great Society that it was hoped America would become.<sup>5</sup>

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\* Professor of Law, Duke University. This Essay was presented to a Conference on Criminal Appeals at Marquette University Law School on June 15, 2009. Sara Beale, Lisa Griffin, and Michael Tigar offered very helpful comments. Todd Miller was very helpful in editing and in locating the references.

1. His biography is VON RUSSELL CREEL ET AL., *AMERICAN JURIST: THE LIFE OF JUDGE ALFRED P. MURRAH* (1996).

2. For a description of the role and functions of the center, see JOSEPH L. EBERSOLE, *THE FEDERAL JUDICIAL CENTER: A NONTRADITIONAL ORGANIZATION IN THE FEDERAL JUDICIARY OF THE UNITED STATES* (1979).

3. For a history of the founding of this organization, see ERICK LOW, *THE NATIONAL CENTER FOR STATE COURTS: A COMMEMORATIVE HISTORY OF ITS STRUCTURE AND ORGANIZATION IN HONOR OF 20 YEARS OF SERVICE TO THE STATE COURTS* (1991).

4. For an account of this program conducted by the Department of Justice, see generally MALCOLM M. FEELEY & AUSTIN D. SARAT, *THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION* (1980).

5. For an account of that vision and its expiration, see ANDREW J.F. MORRIS, *THE LIMITS OF VOLUNTARISM: CHARITY AND WELFARE FROM THE NEW DEAL THROUGH THE GREAT SOCIETY* (2009); MARK A. SMITH, *THE RIGHT TALK: HOW CONSERVATIVES TRANSFORMED THE GREAT SOCIETY INTO THE ECONOMIC SOCIETY* (2007); *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* (Sidney M. Miksis & Jerome M. Mileur eds., 2005).

Several years of regular meetings led to a large national conference in 1975 held in San Diego and attended by hundreds of the most eminent judges, lawyers, and scholars in the nation.<sup>6</sup> So honorific was our guest list that Wade McCree, an eminent circuit judge and member of the Council, and later Solicitor General of the United States,<sup>7</sup> remarked that we would need a mortally ill person to take responsibility for selecting those invited to attend because he or she would be a target for revenge by hundreds of powerful uninvited persons. Our conference was designed to elevate the profession's understanding of what was happening to our appellate courts and to advance the briefly stated views of the Council that were presented and discussed at the conference. In 1976, Meador, Rosenberg, and I published a book, *Justice on Appeal*, that was intended to express more fully views than widely if not universally shared, not only by members of the Advisory Council, but by most of the hundreds of eminent attendees at the Conference. This Essay is a reflection on that work and what has happened to it.

I had myself previously conducted a study of the federal appellate process for the American Bar Foundation. I was in that endeavor advised by an even more revered group that included two presidents of the American Bar Association (ABA), Bernard Segal<sup>8</sup> and Leon Jaworski,<sup>9</sup> and two of the most eminent federal judges of the 1960s, Carl McGowan and Thurgood Marshall.<sup>10</sup> Our unanimous 1969 report was an anticipation of the later work of the Advisory Council.<sup>11</sup> By 1976, there had been two other studies of the federal courts<sup>12</sup> that, like the Bar Foundation study, concluded that the federal appellate system needed radical reform to protect the integrity of the system of correcting errors in both civil and criminal proceedings in United States District Courts, a system that had been established in the preceding century.

The efforts of the Bar Foundation group and the Advisory Council

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6. The conferees were presented with ample readings. See *APPELLATE JUSTICE: 1975* (Paul D. Carrington et al. eds., 1975) (five volumes published by the National Center for State Courts).

7. For a personal commentary on Judge McCree, see Sara Sun Beale, *Wade H. McCree, Jr.*, 86 *MICH. L. REV.* 217 (1987).

8. See Robert McG. Thomas Jr., *Bernard G. Segal Dies at 89; Lawyer for Rich and Poor*, *N.Y. TIMES*, June 5, 1997, at B16.

9. See generally LEON JAWORSKI, *CONFESSION AND AVOIDANCE: A MEMOIR* (1979).

10. There are, of course, numerous biographies of Justice Marshall. None seem very attentive to his career as a circuit judge. But see RANDALL WALTON BLAND, *JUSTICE THURGOOD MARSHALL: CRUSADER FOR LIBERALISM: HIS JUDICIAL BIOGRAPHY (1908-1993)*, at 183-200 (2001).

11. *AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* (1968).

12. *COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE*, reprinted at 67 *F.R.D.* 195 (1975) (known as the Hruska Report); *FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT*, reprinted at 57 *F.R.D.* 573 (1972) (known as the Freund Report).

proceeded from shared premises. We were all, in some sense, members of the celebrated Great Society that promised “justice to all.” By that phrase, we intended transparent enforcement of all legal rights. We assumed that every citizen charged with a serious crime was entitled, if he or she wanted, to a public trial by jury at which competent counsel would defend the accused.<sup>13</sup> We also assumed that the offender had a right to subject the conduct of that proceeding to further scrutiny by high-ranking judges who would, in public, bring their mature and disinterested wisdom directly to bear on their assessment of the fairness of the public trial. Indeed, we thought that citizens of the Great Society were equally entitled to know who was responsible for punishments imposed by law and the factual basis for their decisions. Transparency at all levels was in this shared view a moral and political imperative.

Meador, Rosenberg, and I explained our insistence on transparency on appeal:

Appellate justice should be a model for the government’s dealings with citizens. Appellate courts are the most dignified and receptive authorities to which individuals can turn to express their legal dissatisfactions in a pointed way, with assurance of a direct response. If these courts do not deal directly with litigants, we cannot expect agencies or bureaucracies of lesser sensitivity to legal rights to do so. It is therefore important that justice on appeal be visible to all.<sup>14</sup>

We legal scholars of the Great Society were of course aware that the right to appeal a criminal conviction was not written in stone. Why, our forebears in the nineteenth century might have asked, should we bother to allow appeals from criminal convictions? Pursuant to the prohibition on double jeopardy stated in the Fifth Amendment,<sup>15</sup> the forebears did not allow the states or the federal government to appeal acquittals. And the role of the judiciary in making criminal law through utterances in opinions of the court must be at best modest. Our federal and state constitutions leave little, if any, room for the enforcement of criminal law not enacted by legislatures but made by judges in the common law manner.<sup>16</sup> If Congress, or a state legislature, has

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13. The right to counsel emerged in the *Scottsboro* case in 1932. *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

14. PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL*, at v (1976).

15. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

16. Ben Rosenberg discusses the lack of federal criminal common law, while noting several exceptions. Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 202 (2002) (“*There is no federal criminal common law. But there is.*”). Most states have similarly attempted to codify common law crimes. For a brief account of this development, see Francis Barry

not clearly stated the prohibitions they mean to impose on our conduct, a court has no business prescribing new principles of criminal law. And in the nineteenth century, the procedural rights of those charged with a crime were few, save the right to trial by jury.<sup>17</sup> Given all these circumstances, there was not much a convicted defendant could have said, had his appeal been permitted. It was also a likely comfort to those concerned with federal law that there were few federal laws and few federal prosecutions.

The view of the appellate process voiced by many of us in the age of the Great Society was first expressed in the late nineteenth century in response to this absence of appellate review. The Judiciary Act of 1889<sup>18</sup> first established the right to appeal a conviction in federal court, but that right was for the moment limited to capital cases. In 1891, the right to appeal was extended to all convictions imposed by district courts, and the courts of appeals were established to provide a forum for review of all civil and criminal judgments of the district courts,<sup>19</sup> thereby constraining the exercise of what had been decried as the “kingly power” of the trial judges in federal courts.<sup>20</sup> The purpose, indeed the only purpose, of those responsible for creating the United States Circuit Courts of Appeals was to provide a system of public accountability for federal trial judges; it was only for that reason that Congress established appellate courts whose job, indeed whose only job, would be not only to correct judges’ errors but to affirm and support their contested decisions.<sup>21</sup> That remains a vital mission of the appellate court.<sup>22</sup> In 1897, six years after their establishment, the Circuit Courts of Appeals were given exclusive responsibility for the review of federal convictions.<sup>23</sup> That responsibility was enlarged by the Judiciary Act of 1925,<sup>24</sup> which greatly

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McCarthy, *Crimes of Omission in Pennsylvania*, 68 TEMP. L. REV. 633, 659–62 (1995) (describing the history of legality).

17. See U.S. CONST. amend. VI; see also, e.g., ALA. CONST. art. I, § 6; MINN. CONST. art. I, § 6; N.C. CONST. art. I, § 24; VA. CONST. art. I, § 8.

18. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656, 656.

19. Act of Mar. 3, 1891, ch. 517, §§ 2, 5, 26 Stat. 826, 826–28.

20. 21 CONG. REC. 3404 (1890) (remarks of Rep. David Browning Culberson); see also FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 88 (1928) (“No wonder that extravagant language, descriptive of tyranny, was employed by responsible lawyers to characterize the powers wielded at this time by a single federal judge!”).

21. Indeed, the sole purpose of that Act was to provide a system for correcting error. See 21 CONG. REC. 3407–08, 10,221–22 (1890) (remarks of Rep. William Campbell Preston Breckinridge and remarks of Sen. William Maxwell Evarts, respectively). On the continuing centrality of that purpose, see Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49 (2010).

22. For elaboration of the point, see Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969). But see Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779–81 (1957).

23. Act of Jan. 20, 1897, ch. 68, 29 Stat. 492.

24. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 936–39.

extended the Supreme Court's discretion to deny petitions for certiorari, thereby leaving the error-correction task entirely to the intermediate courts.<sup>25</sup>

It was not until the second half of the twentieth century that the federal and state constitutions, bearing on criminal punishments in state courts, became major features of criminal procedure.<sup>26</sup> The federal constitutional provisions had come to be enforced in state court proceedings by means of habeas corpus proceedings in federal courts.<sup>27</sup> This evolution of procedural rights greatly increased the complexity and importance of procedural rulings prior to trial,<sup>28</sup> the evolution elevated the importance of effective review of all federal convictions, and also appellate review of collateral proceedings in which the constitutionality of state court convictions are assessed by federal district courts. Pretrial rulings today also include rulings enforcing numerous rights of non-parties pursuant to the Crime Victims' Rights Act of 2004.<sup>29</sup> The task assigned to the reviewing court is thus not only to assure the public of the sufficiency of evidence presented at trial, but also to certify compliance with all the many procedural rules enacted or imposed by constitutions or legislation to prevent the abuse of power by governments and prosecutors. Forty years ago, the leadership of the profession regarded this complex task as the defining mission of our appellate judges in criminal cases.

The federal courts' function of reviewing criminal proceedings in state courts pursuant to petitions for writs of habeas corpus has been limited somewhat by Congress,<sup>30</sup> but remains significant. The Supreme Court has lately had to remind courts of appeals that their grudging review of capital cases fails to meet even the minimal standards Congress has put in place.<sup>31</sup>

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25. See Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 797–98 (1983); cf. *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 524–25 (1957) (Frankfurter, J., dissenting) (criticizing the Court's exercise of jurisdiction "in the name of 'doing justice' in individual cases").

26. For a brief account of the constitutional law developments, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367–98 (1982).

27. 28 U.S.C. § 2245 (2006). On the advent of federal review of state convictions in habeas corpus proceedings, see generally Evelyn L. Wilson, *Federal Habeas Corpus: An Avenue of Relief for State Prisoners*, 18 S.U. L. REV. 1 (1991); Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125 (2005).

28. On appellate review of pretrial rulings in criminal cases, see 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* 2D § 3919 (2d ed. 1991).

29. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, tit. I, Pub. L. No. 108-405, 118 Stat. 2261 (2004) (codified as amended at 18 U.S.C. § 3771 (2006)).

30. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, § 101, 110 Stat. 1214, 1217 (codified as amended at 28 U.S.C. § 2244(d)(1) (2006)).

31. See *Miller-El v. Dretke*, 545 U.S. 231, 240, 266 (2005). One such case has been twice remanded to the Fifth Circuit. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 340 (1989); *Penry v. Johnson (Penry II)*, 532 U.S. 782, 804 (2001).

But the Court has also been quick to punish habeas corpus petitioners for procedural fumbles, and thus shield the courts of appeals from the burden of hearing their petitions. For example, the fact that a federal judge, in the presence of the state's attorney, informed a petitioner that he would have until Friday to file an appeal, did not excuse the petitioner's failure to file on Tuesday, which was in fact the statutory deadline.<sup>32</sup>

But even as we Great Society folk conferred in San Diego in 1975, two other evolutions were in full swing and already challenging the ability and suitability of the courts of appeals to perform the tasks of correcting errors in criminal proceedings and assure us that the rights of accused persons and crime victims were being appropriately observed. We conferees were then fully aware of both of these trends.

One trend was a growing use of federal criminal law to regulate more forms of misconduct, most notably in regard to the sale and use of "controlled substances," resulting in ever-increasing criminal dockets in federal district courts and appellate caseloads in the courts of appeals. That effort had commenced in 1909 but was not declared a war on drugs until 1970.<sup>33</sup> As a "war" it was lost long ago,<sup>34</sup> but its costs to the legal system continue. Its continuing enlargement increased the federal criminal caseload and pressed judges to abbreviate the attention they gave to criminal appeals. Meador, Rosenberg, and I observed in 1976:

What we have articulated as the imperatives of appellate justice stand in the way of many procedures that would heighten efficiency. In their commendable efforts to stay abreast of unprecedented workloads, some appellate courts have gone too far in curtailing oral argument, bypassing conferences, and deciding appeals with unexplained orders.<sup>35</sup>

There was also another evolution underway in 1976 that tended to demean the task of correcting and thus preventing errors in the enforcement of criminal law. It was the increasing tendency of United States circuit judges to invest their efforts in opportunities to make national law as expressed in published opinions of the court. Indeed, our legal institutions and profession were becoming increasingly committed to the idea that the primary

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32. *Bowles v. Russell*, 551 U.S. 205, 207–08, 214 (2007); *see also* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6–8 (2008).

33. For an account, *see* DOUGLAS VALENTINE, *THE STRENGTH OF THE WOLF: THE SECRET HISTORY OF AMERICA'S WAR ON DRUGS* (2004); *see also* *Opium Exclusion Act*, Pub. L. No. 60-221, 35 Stat. 614 (1909).

34. JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 13 (2001).

35. CARRINGTON ET AL., *supra* note 14, at 41.

professional mission of appellate judges is to make law as illuminated in the signed and published opinions of their courts.<sup>36</sup>

At least in the federal system, as a consequence of these two foreseen and continuing developments, the humble tasks of correcting the errors of lower courts and certifying the quality of justice provided there were no longer deemed to be primary, or even important, missions of federal appellate judges. This role transformation was confirmed by the creation of the en banc hearing designed to produce opinions expressing the “law of the circuit.”<sup>37</sup> Writing opinions became the dominant mission of the circuit judges. A difficult moral and ethical challenge is posed for a federal circuit judge who assigns to himself professional responsibility for the correctness of every judgment that he is called upon to review.<sup>38</sup>

Certainly, the Supreme Court of the United States is a negative role model for the lower courts in this respect, dismissive as it is of most of its potential workload. The Justices are increasingly relaxed in choosing to review fewer and fewer cases, writing longer and longer opinions declaratory of their shared views on national policies, and enjoying more time away from their professional duties. In 1925, the Supreme Court was deciding roughly 300 appeals a year;<sup>39</sup> it is now down to as few as 87.<sup>40</sup> Never mind conflicts in the laws of the circuit. Let troublesome questions of national law percolate in the circuits<sup>41</sup> perhaps indefinitely, or at least until those questions attract the interest of at least four Justices<sup>42</sup> as informed by their law clerks.<sup>43</sup>

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36. For an economic analysis of this evolution, see Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63 (2010).

37. A. Lamar Alexander, Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities* (Part I), 40 N.Y.U. L. REV. 563, 582 (1965); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 580–81 (1969); see Henry J. Friendly, *The “Law of the Circuit” and All That*, 46 ST. JOHN’S L. REV. 406 (1972).

38. See Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 46 (2005); Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095 (2004). But see B.E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* § 10, at 14–17 (1977).

39. FRANKFURTER & LANDIS, *supra* note 20, at 301 n.2, 302 tbl.I (showing 209 cases disposed of by written opinion and 83 per curiam decisions).

40. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 80 tbl.A-1 (2010) [hereinafter 2009 U.S. COURTS REPORT]. This is the number of cases argued during the 2008 term. The number may be higher for the 2009 term.

41. For a favorable assessment of this scheme, see generally Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (1998); see also Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 92–106 (2001).

42. SUP. CT. R. 10. While the Rules do not indicate the precise methodology for granting



Perhaps I exaggerate the degree to which circuit judges adhere to the role model the Justices provide.<sup>44</sup> I have not myself been sitting on any appellate court. But my clear sense is that the task of correcting errors in trial courts, or in courts of first instance as Europeans tend to designate them, is a task increasingly deemed unworthy of the attention of federal circuit judges. The task seems one to be delegated, if possible, to staff lawyers or law clerks holding no commissions to make judicial decisions and who are anonymous in the sense that they take no public responsibility for their work. On that account, the eminent Circuit Judge Donald Lay was moved to urge that federal appellate jurisdiction be made entirely discretionary,<sup>45</sup> as it is in state courts in Virginia and West Virginia.<sup>46</sup> Professor Steven Shavell, calling attention to the costs savings to all involved, proposes that appellants be allowed to confer such discretion on the appellate court.<sup>47</sup>

My impression that our appellate courts have become entranced with their lawmaking role and repelled from their mundane and routine error-correction role was reinforced by discussions at the 2005 conference of state and federal appellate judges conducted by the American Academy of Appellate Lawyers.<sup>48</sup> Many federal circuit judges appeared to be invigorated by the importance of their duty to make the law of the circuit<sup>49</sup>—the role delegated to them by a Supreme Court that has forsaken its own longstanding responsibility to unify and harmonize the administration of our national law<sup>50</sup>

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certiorari, a minimum of four Justices must agree to grant certiorari. For an explanation and discussion of the origins of the “Rule of Four,” see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–73 (1988).

43. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 191–205 (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 109–49 (2006).

44. *But see* RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102–09 (1985).

45. Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1155 (1981).

46. The Supreme Court of Virginia does not allow an appeal of right except under limited circumstances. Virginia Courts in Brief, <http://www.courts.state.va.us/courts/cib.pdf> (last visited June 16, 2010); the Supreme Court of Appeals, West Virginia’s only appellate court, has entirely discretionary review. The West Virginia Judicial System, <http://www.state.wv.us/wvsca/wvssystem.htm> (last visited June 16, 2010).

47. Shavell, *supra* note 36, at 70–75.

48. For an account of the conference program, see Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141 (2006).

49. *See* Lauren K. Robel, *Caseload and Judging: Judicial Adaptation to Caseload*, 1990 BYU L. REV. 3, 44–47 (1990); THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 34–37 (1994); POSNER, *supra* note 44, at 151–52.

50. *See* Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1406 (1987); COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, *FINAL REPORT* (1998).

to assure, for example, that we all pay the same taxes.<sup>51</sup> Often to be heard at the 2005 conference were judicial expressions of disdain for many of the cases judges are expected to decide which they deem unworthy of their attention. Many attributed the lengths of their dockets to the neglect or incompetence of counsel.

The attraction of appellate judges to their lawmaking role is not, to be sure, a novelty discovered in the late twentieth century. That impulse to make law and public policy can be identified with the origins of the common law tradition in which explicit legislation was largely absent. But English common law judges did not write and publish opinions of their courts; they expressed their views of the law only orally and individually. It was the Marshall Court in 1801 that introduced the concept of the opinion of the Court as an institutionalized statement signed and published by some or all the Justices to overtly prescribe legal principles to govern the future conduct of officials and citizens.<sup>52</sup> It did not thereafter take long for American electorates to recognize that their judges were competing with elected legislatures for the role of sovereign lawmaker. One response was the revision of state constitutions to provide for the election of judges.<sup>53</sup> If the people were to presume to govern themselves, they would have to govern their judges. In many states, we elect our judges because we know that they make as well as enforce our law. Elected judges publish opinions of the court in part to validate their elections.

The nineteenth century in the United States was also a time of continuous debate over codification. David Dudley Field was a leader of those who favored comprehensive codification<sup>54</sup> similar to the European civil law

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51. See Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1158–64 (1944).

52. The first appearance of the opinion of the Court came in the first decision rendered after the appointment of Chief Justice John Marshall. The story is told in GEORGE LEE HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15*, at 382–87 (1981). There was a precedent for such a device in the opinions of the Privy Council giving advice to the Crown, but the Council was not primarily a judicial institution, at least until the Privy Council Appeals Act of 1832. 2 & 3 Will. 4, c. 92 (Eng.); SELECT COMM. ON THE APPELLATE JURISDICTION, REPORT, 1872, H.L., at 27 (1872); see generally John P. Dawson, *The Privy Council and Private Law in the Tudor and Stuart Period* (pt. II), 48 MICH. L. REV. 627 (1950).

53. ARNDT M. STICKLES, *THE CRITICAL COURT STRUGGLE IN KENTUCKY 1819–1829* (1929); FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 444–75 (John William Ward ed., 1968); EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 80 (1944) (“[W]ithin a short twenty years, the states of this Union, taken as a whole, abandoned the practice of the rest of the civilized world, and amended their constitutions so as to provide for popular election of judges, to hold office for short terms of years.”). For details, see HAYNES, *supra*, at 101–35.

54. See David Dudley Field, *Reasons for Adoption of the Codes* (Feb. 19, 1873), in 1 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 361, 361, 365–66 (A.P. Sprague ed., New York, D. Appleton & Co. 1884).

tradition so that elected legislators would make the most of the law.<sup>55</sup> The anti-codification position was advanced by the professional elite, including James Coolidge Carter<sup>56</sup> and James Barr Ames,<sup>57</sup> who supposed that wiser and more coherent law could, and would, evolve from the published opinions of appellate judges unobstructed by clumsy statutory texts crafted by common folk. Theirs was a position that fit with the ambitions of the emerging organized bar and the nascent legal academy; it served to justify not only their existence as learned professionals and scholars, but also their claim to elevated status. Enthusiasm for judicial lawmaking was surely reinforced by the case method of teaching law advanced by Christopher Columbus Langdell in the last decades of the nineteenth century.<sup>58</sup> In the view thus advanced, well-educated and professionally disciplined lawyers can be expected to make better national law, one judicial opinion at a time, than can mere lay congressmen. A secondary consequence of this infectious disdain of the democratic legislative process is that it distracts appellate judges from their primary but more mundane task of correcting errors committed by lower courts.

Indeed, by the second half of the twentieth century, our judiciary could be seen as “the ‘ascendant’ branch”<sup>59</sup> of the federal government. For the most part, mistrust and disdain of legislative enactments, and confidence in the wisdom and integrity of the judiciary and the elite profession of which it is a part, emerged as a central and defining feature of our national legal system. Understandably, therefore, the lawmaking duty is an article of faith for American appellate judges, and it seriously diminishes their interest in and commitment to their duties as error correctors.

Associated, perhaps inevitably, with that diminution has been the contemporaneous decline in the concern even of trial judges for getting the disputed facts right, and assuring the public that they have done so. The ADR movement,<sup>60</sup> with its commitment to privacy in the resolution of disputes, has perhaps contributed to this evolution away from transparency in public

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55. Michael E. Tigar, Comment, *Automatic Extinction of Cross-Demands: Compensatio from Rome to California*, 53 CAL. L. REV. 224, 252–57 (1965).

56. See Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 151–52 (2007).

57. Ames opposed the Uniform Negotiable Instruments Law and maybe the formation of the Commission on Uniform State Laws. See James Barr Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241 (1900).

58. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 51–63 (2001).

59. Marcia Coyle, *Court Is the “Ascendant” Branch, For Now*, NAT’L L.J., Aug. 6, 2001, at C7 (quoting Seth Waxman, former Solicitor General of the United States).

60. See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003).

adjudication. Others have vigorously protested the vanishing trial.<sup>61</sup> The public trial was and remains the primary instrument of public accountability.<sup>62</sup> The public could attend trials, see legal decision making, and know who was personally responsible for judgments, whether civil or criminal. And it was afforded at least some access to the error-correction process through public appellate hearings and published opinions. Alas, the absence of such public proceedings leaves us without such knowledge. We should worry about that.

At least in federal courts, final judgments are now often largely the work product of a bureaucracy.<sup>63</sup> The chambers of federal district judges have expanded to make room for an array of others, including law clerks, staff lawyers, and magistrate judges, who were not appointed by the President nor confirmed by the Senate, but who do much of their court's work. The visible deed of the judge, if any, is often limited to a mere signature accepting the recommendations and legal opinions expressed by lesser officers of the judicial staff.<sup>64</sup> Indeed, the Supreme Court has approved the use of party-drafted findings of fact in civil cases, so that all a judge need do to dispose of many cases is just say yes and sign his or her name.<sup>65</sup>

Similar delegations are made by circuit judges to their law clerks and to growing central staffs. Their decisions are often unpublished and even unsigned. This trend, already visible in 1975, was a subject of regret to our Advisory Council.<sup>66</sup> Owen Fiss in 1983 captured the concern by linking it to Hannah Arendt's concern about a social order subject to "Rule by Nobody."<sup>67</sup> Judge Harry Edwards, in response to this concern, offered a reassurance that the quality of judicial work is not impaired by the use of talented law clerks, but he acknowledged that at some point, excessive delegation of judicial power undermines public confidence in the institutions.<sup>68</sup> And the measures

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61. See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 526 (2004); Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1422–23 (2002).

62. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 565–70 (2006) (emphasizing the continuing importance of public access, particularly in the face of the ADR movement).

63. See generally JUDITH A. MCKENNA ET AL., FED. JUDICIAL CTR., *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* (2000).

64. Patrick E. Higginbotham, *A Few Thoughts on Judicial Supremacy: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 637, 648–49 (2009).

65. See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 572–73 (1985).

66. Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981).

67. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1452–53 (1983).

68. Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 882, 889 (1983).

of delegation to central staff seem steadily to have increased since his reassurance,<sup>69</sup> steadily diminishing the professional responsibility, moral duty, and individual accountability of the appellate judge. As Fiss noted, this trend corresponds to similar trends in other institutions, private as well as public.

While our federal district and circuit courts have become increasingly bureaucratized in their administration of private civil, as well as criminal, law, that trend appears to be stronger in federal criminal proceedings. A radical transformation of the legal process in criminal cases was achieved by congressional enactments specifying and lengthening the sentences to be imposed on convicted persons and providing more complex degrees of criminality,<sup>70</sup> thus establishing very strong inducements to the negotiation of guilty pleas.<sup>71</sup> Convictions resting on guilty pleas of course lack transparency and afford little basis for the exercise of appellate jurisdiction. It is increasingly a brave accused who denies guilt and demands the right to a public trial, whether by a judge or a jury.

The discretion of the district judge in sentencing was partially restored in 2005 by the Supreme Court,<sup>72</sup> but the statutory Federal Sentencing Guidelines still confine the choices open to the sentencing judge.<sup>73</sup> Appeals protesting excessive sentences are common, but the prosecution may also appeal a sentence it deems too light.<sup>74</sup> An “abuse of discretion” standard is applied. The degree of adherence to the Guidelines varies among districts and between circuits.<sup>75</sup> It seems fair to say that the role of the courts of appeals is modest, and seldom is the occasion for transparent public proceedings.

Our 1975 National Advisory Council on Appellate Justice was aware of, and resistant to, the trend of appellate judges to focus an ever-greater share of energy and intellect on their politically engaged lawmaking function, to the detriment of their error-correction functions. We were also aware of the growing tendency of Congress to enact more and more criminal laws as

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69. BAKER, *supra* note 49, at 143–46; Mary Lou Stow & Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet?*, 75 JUDICATURE 216 (1992).

70. See generally U.S. SENTENCING GUIDELINES MANUAL (2009).

71. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1472–76 (1993).

72. See *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (Stevens, J.) (acknowledging that the Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range”); *id.* at 245 (Breyer, J.) (addressing *Booker*’s second constitutional question and rendering the previously mandatory Guidelines “advisory”).

73. See *Rita v. United States*, 551 U.S. 338, 353 (2007); *Gall v. United States*, 552 U.S. 38, 49–50 (2007); *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007).

74. *E.g.*, *United States v. Livesay*, 525 F.3d 1081, 1087 (11th Cir. 2008).

75. NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 240–41 (4th ed. Supp. 2008).

expressions of their disapproval of conduct deemed to be antisocial.<sup>76</sup> We were striving to resist the manifest effects of these developments on our shared aim of assuring transparency and accountability in the law enforcement process.

It is fair to say that in our time, we lost. The vanishing trial has been accompanied by the vanishing appellate hearing,<sup>77</sup> and even perhaps the vanishing review by judges of the enforcement of federal criminal law. But the need abides for transparency and public accountability of the appellate judges responsible for correcting the errors of our former “trial” courts in the administration of criminal laws. That transparency is needed to provide public assurance that our laws are being faithfully enforced by those appointed or elected to enforce them. In this statement, I adhere to a view expressed with Meador and Rosenberg in 1976, to wit, that

The central purpose of a criminal appeal is to insure that the trial court decision was reached fairly and accurately. The lack of precise uniformity in doctrinal application, though not unimportant, is relatively of less concern. The appellate court’s mission is to provide assurance that the defendant was convicted and sentenced on adequate evidence and without prejudicial error at trial or in the preliminary proceedings. In short, the chief function of a criminal appeal is to see that the appellant was not done an injustice.<sup>78</sup>

We were of course fully aware in 1976, as we are today, that many criminal appeals are hopeless. A trial judge at our 1975 conference offered an example we all considered and discussed. He described an appellant who argued that a conviction should be reversed because the national flag was not on display in the courtroom at the time of trial. And then, the informing judge reported, counsel went on to advance his weaker arguments. How long, the question was posed, should appellate judges, otherwise burdened with important public responsibilities as lawmakers, have to listen to such trivial arguments?

Our answer then, and my answer now, is, not long, but long enough.

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76. A prescient recognition of the problem is Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54 (1968).

77. *Compare Federal Court Statistics Are Reported*, 54 A.B.A. J. 1096, 1096 (1968) (noting an upward trend in appellate workload and a 15% increase in appeals), with LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2000 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 79–82 tbl.B-1 and 2009 U.S. COURTS REPORT, *supra* note 40, at 82–85 tbl.B-1 (showing an 11.8% decrease over the past decade in the percentage of cases disposed of by appellate hearings, from 9,752 to 8,593, despite a 25% uptick in the number of appeals pending over the same time period).

78. CARRINGTON ET AL., *supra* note 14, at 58.

Long enough to demonstrate to the world that someone appointed by the President and confirmed by the Senate has heard and understood the substance of the appellant's contention. Long enough to assure us that responsibility for the decision has not been delegated to anonymous staff. And that the judges appointed to perform the duty have, as we used to say, "stood up in front of God and everybody" to say that, yes, this conviction was correct. That should not take long. But it is not a duty adequately performed merely by an instantaneous response or signature made on the advice of staff. Responding to that challenge, the late, great Circuit Judge Richard Arnold,<sup>79</sup> sadly remarked that possessing 98% confidence that a case was rightly decided below did not justify a practice of reading only 2% of the record on appeal.<sup>80</sup>

The Supreme Court in 1967 had of course held that counsel for a criminal appellant could acknowledge the absence of a plausible argument for reversal, but only by means of a legal brief explaining the absence.<sup>81</sup> That practice appears to abide.<sup>82</sup> But it is still a task for the appellate court to review that brief, and staff can help. Several sitting judges reported to our Advisory Council in 1975 that they had reversed convictions notwithstanding *Anders* briefs filed to concede the cases.<sup>83</sup> Whether the problems presented to counsel appointed to appeal a hopeless case have since been resolved, it cannot be that we have since found a means of disposing of hopeless criminal appeals without the need for the public engagement of the court as advocated for by the Advisory Council and advanced in our 1976 work.

The public interest continues to call for public exposure and accountability, and therefore requires some form of oral argument in every criminal appeal.<sup>84</sup> As Michael and Jane Tigar have affirmed, "[o]ral argument is always important and should *never* be waived."<sup>85</sup> Given modern

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79. His biography is POLLY J. PRICE, *JUDGE RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH* (2009).

80. Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 34 (1996).

81. *Anders v. California*, 386 U.S. 738, 744 (1967).

82. It is presently a contestable issue whether that holding applies to proceedings leading to the commitment of the accused to a mental institution. Joseph Frueh, *The Anders Brief in Appeals from Civil Commitment*, 118 YALE L.J. 272, 291–92, 314–15 (2008).

83. CARRINGTON ET AL., *supra* note 14, at 77.

84. STANDARDS RELATING TO APP. CTS. § 3.35 (1994). *But see* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986).

85. MICHAEL E. TIGAR & JANE B. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* § 10.01, at 476 (3d ed. 1999) (emphasis added); *see also* Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 68, 69. *But see* Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 310 (1987).

technologies, appellant's counsel need not come to the courthouse.<sup>86</sup> The argument can be conducted electronically on a computer screen. But counsel, or even a pro se appellant, seeking reversal should be required to state the argument for reversal on the record and in a forum exposed to public scrutiny. And at least one appellate judge should be seen, electronically if need be, responding to the appellant's argument and taking personal responsibility for any summary disposition. Thus, the lawyer making the sappy argument about the absence of the flag in the courtroom, or one arguing that his case is hopeless, should be obliged to present that argument or conclusion in person, however shamefully, by a visible, transparent means. A real appellate judge, one appointed by the President and confirmed by the Senate, should be available publicly to ask counsel for a citation to a law requiring such a flag in the courtroom before dismissing the appeal.

As our Great Society gang conceded decades ago, hopeless appeals should not command full or prolonged attention. But the designation of an appeal as unworthy of serious attention by judges is a decision not properly delegated entirely to staff. And if an argument on the merits is advanced, it is imperative that real judges be seen to hear and consider it.

We Great Society law reformers did see the need for support staff to manage the flood of criminal appeals pursued by the new generation of appointed defense counsel. Indeed, an important and recognized function of support staff would be to provide quality control for appointed counsel, i.e., to alert judges to inadequacies of performance by defense counsel, especially those filing *Anders* briefs explaining their inability to make a serious argument for reversal.

Thus, the central question I mean to propose for the twenty-first century is whether, in federal courts, minimum standards of transparency and public accountability are met in the resolution of criminal appeals. Are we assured that convictions have been carefully and conscientiously reviewed by one or more United States circuit judges who have taken personal responsibility for affirmation of every conviction?

Can one circuit judge represent her court in transparently affirming a conviction? I insist only on the absolute minimum of one such visible hearing officer. On this point, I recall my 1969 dispute with the late Bernard Segal, then the president of the ABA, who chaired the advisory committee on the Bar Foundation study I was conducting. Bernie advised that an oral argument before two circuit judges would suffice to meet minimal standards of transparency. I obstinately insisted on a full panel of three circuit judges.<sup>87</sup>

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86. See Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1525 (1998).

87. Carrington, *supra* note 37, at 561–63.



As you see, I am now down to one. I can abide a process of review by one member of the court of appeals if she (1) is actively and openly engaged in responding to the appellant's arguments and (2) is empowered then to submit the recorded public presentation to two colleagues who share responsibility for the appellate disposition and who might possibly reopen the oral argument if substantial issues are presented.

What we sought decades ago was assurance of transparency and accountability in a process of adjudication of guilt.<sup>88</sup> I adhere to that purpose and continue to oppose 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 in a conviction was properly conducted. It seems fair to say that most federal criminal cases are no longer adjudicated but are resolved by informal bargaining in a bureaucratic process. In deploring this development, I do no more than repeat the thoughts of wise circuit judges who have publicly protested the deterioration of the federal appellate process.<sup>89</sup>

But let us not stop there. One should not be permitted to address issues of criminal procedure without noting the demerits of our substantive criminal law. The severity of the sentences prescribed by Congress that serve to compel plea bargaining is highly objectionable, especially those severe sentences imposed for violations of criminal laws imposed to control substances. Congress seems too far removed from community life to appreciate the human and family consequences of such severe sentencing. We have, by far, more citizens in penitentiaries than any other nation.<sup>90</sup> A high percentage of those in prison are there for non-violent crimes—generally for use or trafficking of substances that were lawful in the United States in the nineteenth century.<sup>91</sup> These substances are, for most, less addictive than

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88. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–66 (1978).

89. E.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 128–29 (1996); Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52; Higginbotham, *supra* note 64.

90. My own previous utterances on this point are found at Paul D. Carrington, *The Twenty-First Wisdom*, 52 WASH. & LEE L. REV. 333 (1995) and *The Federal War on Drugs: Time for a Reality Check?*, 14 T.M. COOLEY L. REV. 179 (1997). For a modern account of the War on Drugs and its disparate impact on African-Americans, see Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25 (1994).

91. There were 1,841,200 arrests for drug abuse violations in 2007, far outpacing the number of arrests for each of the next five offenses. See Office of Justice Programs, U.S. Dep't of Justice, *Drugs and Crime Facts: Drug Law Violations and Enforcement*, <http://bjs.ojp.usdoj.gov/content/DCF/enforce.cfm> (last visited June 21, 2010). The greatest number of arrests is for marijuana, a drug not made illegal until the early twentieth century. *Id.*; see Kristin J. Balding, Comment, *It Is a "War on Drugs" and It Is Time to Reload Our Weapons: An Interpretation of 21 U.S.C. § 841*, 43 ST. LOUIS U. L.J. 1449, 1462–65 (1999) (detailing the history

cigarettes or whiskey and have been in use elsewhere for a thousand or more years. Did we learn nothing from the national experience with the abolition of liquor? Can we not resist the impulse to criminalize every form of conduct that a majority might strongly disapprove? I am skeptical that we can establish a prudent and decent process of law enforcement as long as we insist on criminalizing moral principles that many do not share and will not accept.

With that concession, I conclude that our commitment to due process and respect for the rights of citizens requires an appellate process in criminal cases that assures the public, as well as the accused, that our laws are being faithfully and correctly enforced by judges lawfully designated to bear responsibility for the laws' enforcement.