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Valparaiso University Law Review

Volume 18
Number 1 *Fall 1983*

*pp.*141-165

Fall 1983

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Patrick David Hansen, *Stacking Appellate Dissents: Due Process in the Appellate Arena*, 18 Val. U. L. Rev. 141 (1983).
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STACKING APPELLATE DISSENTS: DUE PROCESS IN THE APPELLATE ARENA

A defendant is convicted of a major crime after trial by jury. The defendant appeals his conviction, raising two specifications of error on appeal.[1] First, he alleges that the trial court failed to use the correct procedure in determining his competency to stand trial. Second, he alleges that the trial court erroneously admitted a confession obtained by the police without a valid waiver of his *Miranda*[2] rights. On appeal to a five-justice state supreme court, one justice agrees that the competency procedure used by the trial court was incorrect. Two other justices decide that the admission of the confession by the trial court was erroneous. The appellate court is thus faced with the following situation: three of five justices agree that there has been a reversible error during the course of the trial, but the justices do not agree on which error. Therefore, the court's vote is four to one for affirmance on the competency issue, and three to two for affirmance on the confession issue. Two possible results may follow. The case may be reversed by virtue of the fact that three of five justices found error in the trial. Or, the verdict may be affirmed by virtue of the court's inability to agree on one specific error. The Indiana Supreme Court was faced with this very problem in 1982. However, the Court either failed to recognize the existence of a problem, or chose to ignore the issue, as there was no mention of it in the decision which affirmed the conviction.[3] The issue of a divided appellate court and the questions arising from it will be dealt with here.

Initially, it is important to understand the nature of the appellate process. Therefore, the purpose and functions of appellate courts will be explored first.[4] Next the evolution of the appellate process will

1. In some jurisdictions, the specification of errors is a mandatory procedural step prior to appeal. *See, e.g., Ind. T.R.* 59 (Burns Repl. 1983). Whether this procedure is mandated or not, every jurisdiction requires the specification of errors in the appellate brief. *See generally* L. ORFIELD, CRIMINAL APPEALS IN AMERICA, 98-99 (1939).

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. Bryan v. State, ____ Ind. ____, 438 N.E.2d 709, (1982). The Indiana Supreme Court split as follows:

	Prentice	Hunter	Debruler	Given	Pivarnik
Competency	Error	No Error	No Error	No Error	No Error
Confession	No Error	Error	Error	No Error	No Error

4. *See infra* notes 7-59 and accompanying text.

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be traced, emphasizing the rights of the litigants within the process.[5] Finally, two resolutions to the dilemma will be presented, both of which can be reasonably justified in the abstract, but only one of which can be condoned by the American Criminal Justice System.[6] The correct resolution stems from the unique concept of "justice" or "equity" found in the American system, rooted both in history and jurisprudence. Based upon such principles and considerations discussed herein, the correct resolution is to reverse the judgment, and remand the case for a new trial.

I. The Purpose and Functions of a Reviewing Court

Though not required to by the United States Constitution,[7] every state has provided some type of review from adverse rulings at the trial-court level. This is most noticeable in the criminal justice systems, reflecting the value placed on personal liberty found in the American system.[8] Some states provide appeal from criminal convictions by Constitution,[9] while others guarantee appellate review by statute.[10] In either case, the appellate process has, and consequently appellate courts have, a very definite purpose and exercise very basic functions.

It is vital to recognize the ultimate purpose of appellate review,[11] and to keep this in mind throughout this inquiry. The ultimate purpose of an appeal is to insure that justice is done to the appellant.[12] Again, this is particularly true in the criminal setting. As was explained by Professor Lester Orfield, a noted commentator on the appellate process, "to lose sight of this purpose is to commit the original

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5. *See infra* notes 60-99 and accompanying text.

6. *See infra* notes 100-165 and accompanying text.

7. McKane v. Durston, 153 U.S. 684, 687 (1894) ("A review by an appellate court . . . is not a necessary element of due process of law.")

8. For this reason, the scope of this note will be limited to appeals from criminal convictions. Rationale from civil cases may be used, however, as a comparison of the different concerns at stake. *See infra* note 107.

9. *See, e.g.*, ILL. CONST. 1970, Art. VI, § 6.

10. *See, e.g.*, IND. CODE ANN. § 35-38-4-1 (Burns Supp. 1983).

11. Very often in this section, the term "appellate review" is used as synonomous with "appellate courts." In the context of the purpose and functions for appellate procedure, they are for all practical purposes interchangeable.

12. L. ORFIELD, *supra* note 1. *See also* Commercial National Bank v. Parsons, 144 F.2d 231, 240 (5th Cir. 1944) (ruling that appellate courts sit "to do justice between the parties, not merely to decide points in a tilt between lawyers"), *cert. denied*, 323 U.S. 796 (1945); Wilner, *Civil Appeals: Are They Useful In the Administration of Justice?* 56 GEO. L.J. 417, 419 (1968) ("An unfair or unjust judgment below is error, and the object of the appellate procedure becomes that of correcting unfairness and of doing practical justice between the parties.").

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sin of judicial procedure . . . the substitution of the actual ends of judicature for the ends of justice."[13] Stating that the purpose of an appellate court is to do justice may seem axiomatic. However, this goal may be overlooked when one attempts to analyze the appellate system as an institution in itself[14] rather than simply a part of the overall process of criminal justice in America. Accepting justice as the ultimate goal of the criminal justice system is crucial to this inquiry.[15] Once it is accepted, it may be used as a reference point in discussing the specific appellate functions which seek to serve this goal.

A. *The Error Correction Function*

The first function of appellate courts is to review for errors made by the trial or lower court.[16] If errors are found, they should be corrected so as to prevent a miscarriage of justice.[17] This function may be termed "Error Correction." In exercising Error Correction, the appellate court will determine whether the trial court correctly interpreted the record and the facts, and whether the court applied relevant law to those facts.[18]

Error Correction produces several results. First, litigants are protected against misuse of power by the trial courts.[19] With appellate

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13. L. ORFIELD, *supra* note 1, at 33 (citing BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE, c. 19).

14. *See, e.g.*, Hufstedler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 587 (1969) (Appellate courts exist to formulate policy and precedents, to assure uniformity in the administration of justice, to provide executive direction to trial courts, and only incidentally to see that justice is done in any particular case.)

15. As is evident by note 14, *supra*, accepting justice as the ultimate goal is not always easy to do.

16. JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY, 102 (March 11-14, 1971) [hereinafter cited as JUSTICE IN THE STATES].

17. *Id.* The one exception to this rule is the doctrine of harmless error. However, for an appellate court to find error harmless, it must find it harmless "beyond a reasonable doubt." *See, e.g.*, Chapman v. California, 386 U.S. 18, 24 (1966). *See also infra* notes 100-165 and accompanying text. This stricter standard is presumably due to the fact that the errors will not be corrected.

18. Note, *An Intermediate Appellate Court—Does Utah Need One?* 1979 UTAH L. REV. 107, 108.

19. Rosenberg, *Planned Flexibility to Meet the Changing Needs of The Federal Appellate System*, 59 CORNELL L. REV. 576, 585 (1974). Misuse of power is not meant to imply any bad faith on the part of the judges. To explain, the following maxim is supplied: *De fide et officio judicis non recipitur quaestio, sed de scietia, sive set error juris, sive facti*; ("The good faith and honesty of the judge are not to be questioned, but his knowledge, whether it be in error of law or fact, may be.")

review becoming the rule rather than the exception[20] trial judges are more motivated to make a correct decision in the first instance, as they are aware that their decisions will be closely scrutinized.[21] By supplying this motivation, the appellate court is serving the interests of justice even before a case is actually appealed.[22]

Secondly, Error Correction enhances the dignity, authority and acceptability of the trial.[23] The dignity of the trial is enhanced if the appellate court reviews for correctness and finds no error. The litigants, and the public as well, thus are assured that a conviction was not the result of an arbitrary decision made by a single judge.[24] If the appellate court does find an error, the normal procedure is to return the case to the trial court level for a correction of the error, which reinforces the dignity of the system by illustrating that the American system is one which will not tolerate mistakes.[25] The authority of the trial court is enhanced by Error Correction, because the motivation supplied for correct decision-making raises the public's confidence that a correct decision will, in fact, be rendered by the trial court.[26] Finally, the acceptability of the trial is enhanced through sheer repetition. The review of the same issues by two separate courts bestows greater certainty that an erroneous decision will not be made.[27] This, in turn, subjectively impresses upon the appellant the correctness of the decision. The litigant is therefore reassured that the decision "bears the institutional imprimatur and approval of the

20. *See generally* Crampton, *Federal Appellate Justice in 1973*, 59 CORNELL L. REV. 571 (1974) (suggesting that the major problems of the appellate system are caused by its accessibility to litigants.)

21. Rosenberg, *supra* note 19, at 585.

22. For this reason, one cannot measure the importance of the appellate process merely by calculating the percentage of cases which are appealed. The "backward reach" of an appellate court can only realistically be measured if one *removes* the process entirely. Then we would discover how trial judges not subject to review would behave.

23. P. CARRINGTON, D. MEADOR AND M. ROSENBERG, JUSTICE ON APPEAL 2 (1976) [hereinafter referred to as CARRINGTON.]

24. Though most actual criminal trials are jury trials, the judge often makes critical determinations before trial, *e.g.* on motions to suppress evidence. *See generally*, Y. KAMISAR, W. LAFAVE AND J. ISRAEL, MODERN CRIMINAL PROCEDURE 23 (1981) (hereinafter referred to as KAMISAR.)

25. Again, an exception to this may be the harmless error doctrine. *See supra* note 17.

26. Rosenberg, *supra* note 19, at 585.

27. For a good discussion of the enhancement of certainty through repetition, *see* Cover and Aleinikoff, *Dialectic Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-46 (1977).

whole social order as represented by the legal system."[28] Error Correction, then, is a vital part of the appellate process. When the review for errors is rigorously made, the interests of justice are served, as the probabilities of an innocent person being subjected to punishment are minimized.[29]

B. The Institutional Review Function

The second major function of appellate courts is "Institutional Review."[30] In utilizing the Institutional Review function, the appellate court is somewhat less concerned with the impact of its decisions on particular litigants, and more concerned with safeguarding justice in the long run for the benefit of all litigants.[31] Through Institutional Review, the appellate court is charged with the duty of maintaining consistency in the decisions of the subordinate courts in its jurisdiction.[32] Consistency is maintained through the announcement, clarification and harmonization of the decisions of the trial courts, as well as conforming its own decisions with those previously made.[33] In turn, this consistency leads to uniformity in the jurisdiction,[34] which assures an even-handed application of the substantive law and procedures to each litigant.[35] As long as the laws are uniform and consistently applied, any deviation in their application becomes more obvious. Error Correction, therefore, becomes less difficult, as the appellate court will be better able to notice and act on any errors reflected by the record.[36] Furthermore, when consistency of decisions is maintained, fewer errors will occur in the lower courts. The reduction of errors leads inevitably to the facilitation of justice.

28. CARRINGTON, *supra* note 23, at 2.

29. As Professor Cover points out, however, the lessening probability of an erroneous conviction entails a corresponding *rise* in the probability that there will be an erroneous failure to convict. This increase is then justified as the mandate of the United States Supreme Court, as shown by cases such as *Fay v. Noia*, 372 U.S. 391 (1963). *See* Cover and Aleinikoff, *supra* note 27.

30. CARRINGTON, *supra* note 23, at 2.

31. The courts must balance this concern with that served by Error Correction; that being justice in the individual case. For a fuller discussion of this issue, *see infra* notes 53-59 and accompanying text.

32. Kurland, *Jurisdiction In the Supreme Court: Time For A Change?* 59 CORNELL L. REV. 616, 618 (1974).

33. CARRINGTON, *supra* note 23, at 2.

34. *Id.*

35. L. ORFIELD, *supra* note 1, at 33. *But see* Wilner, *supra* note 12, at 426. ("The often articulated claim that appeals tend to promote uniformity and even-handed justice is not easily substantiated . . . .").

36. *See supra* note 17 and accompanying text.

C. *The Lawmaking Function*

A third major function of appellate review is lawmaking.[37] To "make" the law, the appellate courts structure the evolution of the common law through, and at times in spite of, the doctrine of stare decisis.[38] In spite of stare decisis, which requires the courts to stand by precedent and not disturb settled points of law,[39] an appellate court may act incrementally as a lawmaker. For example, while deciding case B, the court may incidentally limit case A, which had been decided earlier. The ruling of case B now becomes the law of the jurisdiction. The limiting of case A may continue through cases C, D, and E, until the rule in case A is no longer valid. Through this process, the appellate court can effectively change the law, and subsequently bind the court in the future to follow the new law. Thus, the court can change the law in spite of stare decisis, and at the same time legitimize the new law through stare decisis. The appellate court, therefore, has the power to enhance the development of the law, as well as to give direction to the growth of the law,[40] simply by modifying previously decided case law.

The appellate court may further act as lawmaker by giving definitive interpretations to the constitution and statutes operating in its jurisdiction.[41] Through this interpretation process, the appellate court is able to expand or limit laws which have been provided by

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37. *See* CARRINGTON, *supra* note 23, at 3.

38. Kurland, *supra* note 32. Though the lawmaking function is sometimes grouped with that of institutional review, *see, e.g.*, JUSTICE IN THE STATES, *supra* note 18, it is sufficiently distinguishable to warrant separate consideration.

39. The doctrine of stare decisis mandates that the court abide by, or adhere to, cases previously decided. BLACKS LAW DICTIONARY 1261 (5th ed. 1979).

40. *See* M. FRIEDMAN, A HISTORY OF AMERICAN LAW 17 (1963). ("Precedent is commonly considered one of the basics of the common law. It was never quite a strait jacket, as some laymen (and lawyers) have tended to think. American judges have always assumed power to overrule an earlier case if they considered it egregiously wrong. The power was seldom exercised in the past. Still, it was there, along with the more important power to 'distinguish' an embarrasing precedent."); *See also* Neff v. George, 364 Ill. 306, 4 N.E.2d 388, 390-91 (1936).

41. Not all scholars agree that appellate courts should serve as lawmakers. As Professor Orfield points out, years of judicial decisions "and the passage of comprehensive criminal codes covering the substantive or procedural law or both have made this function one of much less importance . . . ." Orfield, *The Right of Appeals in Criminal Cases*, 34 MICH. L. REV., 937, 938 (1936). However, though such a view is ideally sound, in reality most appellate courts engage in lawmaking in one form or another, and therefore it is discussed here. *See, e.g.*, CARRINGTON, *supra* note 23, at 3. ("Today . . . it is widely understood that the judges who enunciate legal principles are engaged in a creative activity which can have significant . . . social consequences.")

either the legislature or by the constitution. For example, the fourteenth amendment to the United States Constitution provides that "[No State shall] deprive any person of life, liberty, or property, without due process of law."[42] The United States Supreme Court has interpreted this clause to provide an accused the right to counsel,[43] and a right to confront witnesses against him,[44] but has not interpreted the clause to mandate the right to an appeal.[45] By such interpretation, the appellate courts inform the lower courts, judges, lawyers and citizens of the meaning of the law as written. This sets the standards of appropriate procedures and interpretations as well as defining proper conduct.[46] Lawmaking, therefore, is one of the major functions of an appellate court.

The Lawmaking function is consistent with Error Correction and Institutional Review. Through appellate court opinions, lower courts are instructed as to the present status of the law.[47] With this information the lower courts may all apply the same rules to the cases before them. Also, with this information the trial courts are less prone to make erroneous rulings. Consequently, the ultimate purpose of appellate review, that of doing justice, is also served.

A note of warning is appropriate at this juncture as an appellate court which becomes unduly preoccupied with any one of these functions will necessarily do so to the neglect of the others.[48] For example, if a court focuses too heavily on institutional review by using the cases before it purely as vehicles to promote consistency and direction in the long run, the error correcting function may be overlooked. Were this to happen, the ability to focus on the specific errors in the case before the court would necessarily be de-emphasized, and the practical justice between the parties would be sacrificed.[49] Fur-

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42. U.S. CONST., amend. XIV.

43. Gideon v. Wainwright, 372 U.S. 335 (1963). The right is provided by the sixth amendment to the United States Constitution but made applicable to the states through the due process clause of the fourteenth amendment.

44. Pointer v. Texas, 380 U.S. 400 (1965).

45. McKane v. Durston, 153 U.S. 684, 687 (1894). There are of course many other examples of judicial rule-making in the fourteenth amendment context. *See generally* B. SCHWARTZ, THE FOURTEENTH AMENDMENT (1970).

46. CARRINGTON, *supra* note 23, at 2.

47. For a discussion of other benefits of written opinions, as well as the detriments, see Note, *Written Opinions In the Modern Legal System: Publish and Perish*, 41 ALB. L. REV. 813 (1977).

48. CARRINGTON, *supra* note 23, at 3.

49. The only way to avoid this result is for the court to espouse a rule of law or construction, and simply not apply it to the case before it by making the application prospective only. *See, e.g.*, Murdock v. Ward, 178 U.S. 139, 149 (1900) ("We

thermore, if a court concentrates too much on lawmaking, by espousing new rules or changing old rules, the function of institutional review will suffer, as the law will be in a state of flux, and consistency of decisions will be unattainable.[50] Once again, the interests of justice will suffer as a result. Therefore, an appellate court must take great care in striking the proper balance. Because an appellate court is charged with specific functions, there is always a danger that it will lose sight of the reason for it existence; the facilitation of justice.[51] The functions of an appellate court should not be seen as ends in themselves, but as the means of attaining the higher end of justice. If a court fails to recognize that it is ultimately working to achieve justice, the case before the court will tend to be viewed abstractly and decided mechanically.[52] In this situation, the purity of the law would take precedence over the realities of the case.

Not everyone would agree that preferring purity of the law over the realities of the case is necessarily bad. For example, the philosophy of "rule ultilitarianism"[53] theorizes that the greatest amount of good will accrue to the greatest number of people by strict adherence to, and general application of, rules of law. Rule utilitarianism recognizes that the rules expounded may work a hardship for a few individuals, but accepts it as the sacrifice which must be made for the general welfare.[54] Applying this philosophy to appellate review, it can be seen that each of the functions of appellate courts accomodate rule utilitarianism to a certain extent. The Error Correction function will determine whether the appropriate rule is consistently applied, and appellate Lawmaking will ensure that the rules are sufficiently modern and correctly interpreted for the greatest number of cases.

On the other hand, some believe that allowing the needs of the

think the practical injustice that might result from an affirmance of the judgment may be avoided . . . by a reversal of the judgment . . . .").

50. Wilner, *supra* note 12, at 427 ("[E]ach time an appellate court overrules a precedent, it necessarily dispels whatever uniformity may have existed . . . .").

51. *See supra* note 12 and accompanying text.

52. Millar, *The Reform of Criminal Pleading in Illinois*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY, 337, 338 (1917-1918): "It is the attitude of record worship, the trial of the record rather than the case . . . that is here in question." "Record worship," according to Roscoe Pound, is "an excessive regard for the formal record at the expense of the case, a strict scrutiny of that record for 'errors of law' at the expense of scrutiny of the case to insure the consonance of the result to the demands of the substantive law." R. POUND, CRIMINAL JUSTICE IN AMERICA 161 (1930).

53. For a good analysis of utilitarian ethics, *see* FRANKEN, ETHICS 29-46 (1963).

54. It was undoubtedly a rule utilitarianist that coined the phrase, "hard cases should not make bad law."

law to be placed on a higher plane than the needs of the actors within the law is the ultimate injustice.[55] These persons subscribe to the ethics of "case utilitarianism."[56] The philosophy of case utilitarianism suggests that justice must be individualized, so that the result of any case must necessarily depend upon the specific situation presented. Rules which would cause injustice in a particular case, although applicable, should be disregarded.[57] Case utilitarianism charges that any general rule which looks to the aggregate satisfaction of a group of cases rather than at the individual cases themselves makes the fundamental mistake of being oblivious to the distinctions among cases.[58] Applied to appellate review, case utilitarianism finds support not in the functions, but in the *purpose* of appellate courts; that purpose being to ensure that justice is done.[59]

As can be seen, appellate courts must deal with competing concerns when deciding individual cases. The court must deal not only with the issues presented, which represent the needs of the law, but must also deal with the cases before it, representing the individuals seeking justice within the system. In the vast majority of cases, both interests are adequately protected. However, when it becomes clear in a given situation that both interests cannot be protected, which interest should take precedence? Should the purity of the system outweigh the individual's personal interest? To achieve resolution of this issue, it is necessary to explore the evolution of the appellate system, emphasizing the individual's place within it.

II. THE EVOLUTION OF INDIVIDUAL RIGHTS ON APPEAL

As previously noted, all states now provide some form of appellate review to convicted defendants,[60] although not required to do so by the United States Constitution.[61] In most of these states, appellate review is granted to defendants as a matter of right and is provided by statute.[62] Since access to the appellate courts is provided

55. *See generally* Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 190 (1958).

56. Case utilitarianism is a variation of the concept described by Franken as 'act utilitarianism'. *See* FRANKEN, *supra* note 53.

57. It is from the case utilitarian ethic that the defense of mistake in a criminal trial was fostered.

58. *See generally* Sartorius, *Dworkin On Rights and Utilitarianism*, 1981 UTAH L. REV. 263.

59. *See supra* note 12 and accompanying text.

60. This fact was recognized in the plurality opinion of Griffin v. Illinois, 351 U.S. 12 (1955).

61. *See supra* note 7.

62. *See e.g.*, IND. CODE ANN. § 35-38-4-1 (Burns Supp. 1983).

to individuals by the various systems, it is important to examine the rights of the individuals within the appellate system. This section, therefore, will examine the evolution of the rights of appellate litigants.

The vast majority of criminal actions are local in nature. The individual states have therefore, been more progressive in providing for criminal appeals than has the United States federal system.[63] For example, in California, appellate review was guaranteed to any person convicted of a felony as early as 1872.[64] Today, California provides the right to appeal *any* criminal conviction.[65] In that state, it is recognized that "the right to appeal is guaranteed by law to every convicted person; it is one of the most important rights possessed by a convicted defendant, and every legitimate element should be exercised in its favor."[66] Though not all states have the certitude of California in this area, it is reasonable to conclude that all states now recognize the importance of appellate review to ensure correctness in the adjudication of guilt or innocence.[67] Nevertheless, the United States Supreme Court has remained firm throughout the years in its judgment that appellate review of criminal convictions is not a necessary element of due process of law.[68] However, the Court has also recognized as early as 1915 that once an appeal is provided for by the state, and the criminal defendant has exercised his right of review, the proceedings in the appellate tribunal are to be regarded as part of the process of law of that state.[69] Appellate proceedings therefore are to be considered in determining any question concerning the deprivation of life or liberty without the due process of law guaranteed by the fourteenth amendment.[70] This ruling suggests that the imposition of certain safeguards on the appellate process itself is not an unprecedented notion.

The most noted instances where the United States Supreme Court has imposed fourteenth amendment standards of due process

63. For a good discussion of criminal appeals in the federal system, *see* ORFIELD, *supra* note 1, at 243-58.

64. CAL. PENAL CODE § 1235 (1872).

65. CAL. PENAL CODE § 1235 (1982).

66. People v. Serrato, 47 Cal. Rptr. 543, 545 (1965).

67. Griffin v. Illinois, 351 U.S. 12, 18 (1955) (Plurality opinion of Justice Black) ("All states now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.").

68. *See e.g., McKane*, 153 U.S. 684 (1894); *Griffin*, 351 U.S. at 18.

69. Frank v. Magnum, 237 U.S. 309, 326 (1915).

70. *Id. See also* Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151 (1957) (suggesting that a finding that the appellate process itself may offend constitutional standards is not a novel concept).

and equal protection on the state appellate system are in *Griffin v. Illinois*[71] and in *Douglas v. California.*[72] In *Griffin,* the Court was faced with a state appellate scheme that required convicted defendants to furnish the appellate court with a bill of exceptions or report of the proceedings at trial as a prerequisite to complete review.[73] In many cases, however, it was impossible to prepare such documents without a transcript of the trial proceedings. Illinois law provided that indigent prisoners who alleged Constitutional errors in their trial could obtain a free transcript, but those who alleged other trial errors were required to pay for a transcript regardless of their financial status.[74] The petitioners in *Griffin* alleged that they were indigent and unable to pay for a transcript, and were therefore precluded from exercising their right to appeal under Illinois law.[75] Although the petitioners could not point to any Constitutional error in their trial, they alleged that the Illinois appellate scheme *itself* was violative of the fourteenth amendment.[75] The United States Supreme Court agreed.[77] In reaching this result, the plurality opinion took notice of the fact that appellate review had become an integral part of the state system for adjudicating guilt or innocence, and that a substantial proportion of criminal convictions were reversed by state appellate courts.[78] A denial of adequate review to the poor would therefore cause many to lose their life, liberty or property because of unjust convictions.[79] Though the Court again admitted that appellate review is not Constitutionally mandated, it established that once review is provided, "the Due Process and Equal Protection clauses [of the fourteenth amendment] protect persons . . . from invidious discriminations."[80] Thus, the Court made it clear that the appellate system is not immune from procedural scrutiny.

In *Douglas v. California,*[81] the Court was faced with an appellate

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71. 351 U.S. 12 (1955).

72. 372 U.S. 353 (1963).

73. The Illinois statute which established these requirements was ILL. REV. STAT. ch. 110 § 259.70A (1953).

74. *See Griffin,* 351 U.S. at 15. *See also* ILL. REV. STAT. ch. 38, §§ 826-832 (1955) (Illinois Post Conviction Hearing Act).

75. *Griffin,* 351 U.S. at 13.

76. *Id.* at 15-16.

77. *Id.* at 20. The decision was 5-4. Mr. Justice Black authored the plurality opinion, and Mr. Justice Frankfurter specially concurred. Two separate dissenting opinions were filed.

78. *Id.* at 18-19.

79. *Id.*

80. *Id.*

81. 372 U.S. 353, 355 (1963).

scheme which provided that the state appellate courts, upon an indigent's request for counsel, could make an independent investigation of the record to determine whether it would be advantageous to the defendant, or helpful to the appellate court to order counsel appointed. The petitioners in *Douglas* requested assistance of counsel for their appeal, and the California District Court of Appeals denied the request.[82] The United States Supreme Court reversed the denial, ruling that "denial of counsel on appeal [to an indigent] would seem to be a discrimination at least as invidious as that condemned in *Griffin* . . . ."[83] The Court therefore held that fair procedure mandates the right to counsel when pursuing an appeal,[84] and thereby reaffirmed the notion that appellate courts must comply with fourteenth amendment standards.

Since the *Griffin* and *Douglas* decisions the United States Supreme Court has extended the principle of due process to other aspects of the criminal justice system,[85] including most phases of post-conviction relief.[86] Additionally, the due process principle has been applied to traditionally non-criminal proceedings where a deprivation of physical liberty is at stake, such as juvenile proceedings.[87] Due process and equal protection safeguards therefore are applicable beyond the traditional criminal trial. Recently, the courts have construed *Griffin* and its progeny to stand for the proposition that the due process clause is applicable to appellate review with "the same vigor" as it applies to criminal trials,[88] and the states have accepted this proposition.[89] It follows, then, that the appellate courts must meet the due process standard of "fundamental fairness" which is required in all other steps of the proceedings.

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82. *Id.* at 354.

83. *Id.* at 355.

84. *Id.* at 354.

85. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1969). (preliminary hearing); United States v. Wade, 38 U.S. 218 (1967) (pre-trial line-up).

86. *See e.g.*, Burns v. Ohio, 360 U.S. 252 (1957).

87. McKiever v. Pennsylvania, 403 U.S. 528 (1971) (due process clause requires "fundamental fairness" in any juvenile proceeding).

88. *See, e.g.*, Reauark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980) (ruling that a delay in transcript preparation for appeal may constitute a denial of due process); Macon v. Lash, 458 F.2d 942, 950 (7th Cir. 1972) (ruling that the state is constitutionally required to protect a petitioner's right to appeal over a critical mistake from court-appointed counsel allowing deadline for appeal to lapse); Doescher v. Estelle, 454 F. Supp. 943, 948 (N.D. Texas 1978) (ruling that any substantial delay in the processing of appeals may be a denial of due process).

89. *See, e.g.*, Gallagher v. State, ___ Ind. ___, 410 N.E.2d 1290, 1293 (1982); Palmer v. Superior Court, 114 Ariz. 279, 560 P.2d 797 (1977).

The term "fairness," when discussed in a due process context, has historically been an extremely problematic concept. This is presumably due to the inherent ambiguities and differing normative connotations presented by the term "fair." In the procedural sense, "fairness" is often linked to adequate notice and the opportunity to be heard,[90] representation by counsel,[91] as well as other selective safeguards protected by the Constitution. *Griffin* and its progeny have undoubtedly imposed this standard of fairness on the appellate courts.[92] There is, however a different use of the word "fair" that is of primary concern here. It is this concept of fairness that has troubled legal philosophers for years, as it has no clear definition. Scholars have attempted to label this aspect of fairness with such terms as "substantive due process,"[93] or the "immutable principle of justice."[94] Because these labels are themselves problematic, however, they are inappropriate for use in this discussion. Therefore, for present purposes, the concept of fairness in the normative context presented herein will be referred to as "equity."[95]

Equity, as used here, may be described as "that fundamental fairness essential to the concept of justice."[96] It is undoubtedly "equity" that Professor Orfield was referring to when he wrote that "justice" is the ultimate purpose of a criminal appeal.[97] As Orfield observed, "an innocent defendant must be released. A defendant who did not secure a fair trial should have another trial."[98] As defined, equity is implicitly recognized in the concept of due process of law. It is unclear, however, whether equity is one of the notions that the United States Supreme Court was referring to when it applied the due process clause to the area of appellate review.[99] For this reason, resolution of the legal problem confronted herein must be achieved on two different

90. *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

91. *Gideon*, 372 U.S. 335.

92. *See supra* note 88.

93. *See generally* Lupu, *Untangling The Strands Of The Fourteenth Amendment*, 77 MICH. L. REV. 981 (1978).

94. *See* Adamson v. California, 332 U.S. 46, 60 (1947) (Justice Frankfurter, concurring).

95. It may well be argued that the term "equity" elicits as many inappropriate connotations as the terms already discarded. Therefore, an alternative label of "Phred" is now given to the concept described. Any person uncomfortable with the term "equity" is invited to make the substitution freely.

96. Lyons v. Oklahoma, 322 U.S. 596 (1944); Lisenba v. California, 314 U.S. 219, 236 (1941).

97. L. ORFIELD, *supra* note 1, at 32. *See also supra* note 12.

98. L. ORFIELD, *supra* note 1, at 33.

99. *See supra* note 70 and accompanying text.

Produced by The Berkeley Electronic Press, 1983

planes—one which encompasses only acknowledged due process rights in criminal appeals; and a second which incorporates the notion of equity into the analysis. The incorporation of an equitable ethic into the appellate process may be seen as the next step in the progressive evolution of the protection of rights of litigants through the appellate system.

III. Resolution of the Problem

Recall the particular factual situation presented earlier:[100] A defendant is convicted of a major crime. Exercising his right to appeal, he alleges two distinct errors. First, he alleges that the procedure followed by the trial court in determining his competency to stand trial was improper. Second, he alleges that his confession, which was admitted into evidence by the trial court, was improperly obtained, and therefore should have been suppressed. Either one of these errors if accepted by the appellate court would result in a reversal of the conviction. On appeal to a five-member supreme court, three justices rule that the trial court did in fact commit an error. However, the justices cannot agree upon which particular error the verdict should be reversed. Only one justice agrees that there was error in the competency determination, while two others conclude that the admission of the confession is erroneous. The remaining two justices find no error.[101] What is the result? Viewed from one perspective, a majority of the court ruled that the trial court was correct in its decision on both counts. Resolution of this problem may vary depending on what standard of due process is imposed on the appellate court. Therefore, alternative resolutions to the problem will be examined; one with and one without the concept of "equity" imposed on the court. Furthermore, in reaching each conclusion, the functions and purpose of appellate review[102] will be interposed to determine which will be served by each resolution.

A. *Resolution Under The "Procedure Only" Standard*

Under the first standard, that of applying purely procedural safeguards, the logical resolution of this problem is to affirm the conviction. All that is required under the *Griffin* and *Douglas* analyses is that once an opportunity to appeal has been given, it cannot be

100. *See supra* text accompanying notes 1-3.

101. *See* Bryan v. State, ____ Ind. ____, 438 N.E.2d 709 (1981). *See also supra*, note 3.

102. *See supra* notes 7-59 and accompanying text.

denied arbitrarily or discriminately, and indigents cannot be treated differently because of their lack of funds. The petitioner in this situation will have the right to present his claim through counsel to a higher authority, and his right will be fulfilled when the court reviews the issues. If a majority of the court finds neither issue to be meritorious, his conviction will be sustained. Therefore, his right to appeal will have been afforded and the trial court's verdict sanctioned.

Such a result, on its face, appears to serve the functions of the appellate process. The first function, Error Correction, is fulfilled when the appellate court reviews the issues raised. Since a majority of the appellate court found that neither issue constituted reversible error, the trial judge is deemed correct on both counts. Therefore, there is no error to be corrected. Institutional Review, the appellate court's second function, is also served by the decision to affirm. In holding that the trial court's action on both issues was appropriate, the appellate court is ruling that the action was not inconsistent with the law of the jurisdiction, as previously adjudged by the appellate court. Therefore, uniformity of decisions is maintained. Furthermore, the trial court is reassured that its rulings were in line with the legal structure. Since the appellate courts are charged with the duty of changing laws that are inconsistent with society,[103] the fact that the rulings in question were deemed correct indicates that the rulings were not inconsistent with the legal structure.

There is strong logic in affirmance, and this logic springs from the consequences of a reversal. For example, if a majority of the court does not agree on one specific ground for reversal, but the case is reversed nonetheless, and remanded back to the trial court for a new trial, the trial court might[104] have to rule the same way on each issue should it arise again.[105] If the trial judge were to reverse his decision on either of the issues raised again at trial, this new decision may be contrary to the law as agreed upon by a majority of the appellate court.[106] On the other hand, if the same issues arise and the trial judge makes the same rulings as in the original trial, the defendant could simply appeal the rulings again. Unless there has been a change in the personnel of the appellate court (and possibly even if there has been such a change), the identical problem will surface, and the ap-

103. *See supra* note 40.

104. There are at least three different possibilities of what will happen with these same issues once the case is remanded. *See infra* text accompanying notes 149-154.

105. Likewise, it is not always assured that the same issues will arise again. *See infra* note 154 and accompanying text.

106. *See supra* note 104 and *infra* notes 149-54 and accompanying text.

pellate court would be forced to make the same decision.[107] "Such would be the strange and anomalous attitude of the case *ad infinitum*, as often as it should be tried below and [appealed again] under the same set of facts."[108] Therefore, in order to give finality to the judgment, it is argued that an affirmance is in order.

To resolve this problem with an affirmance would be consistent with the rule utilitarianist philosophy.[109] The laws or rules in question are kept pure, and the applications of the rules are kept general. Since it is determined that the rules were not erroneously applied, it follows that the decision must be affirmed. The greatest number of persons are said to benefit from this approach, as the law can be applied even-handedly and with no exceptions. A code of conduct is thereby prescribed to the trial courts. The appellate system itself is made a product of the law, questioning only whether a specific situation falls within its boundaries, or outside its parameters. Consistency is maintained, and therefore justice is served. The litigant is seemingly assured that the decision "bears the institutional imprimatur and approval of the whole social order as represented by the legal system."[110] The logic of this analysis has been termed "unanswerable."[111] However, analysis of the problem using the "equity" standard may provide a response to the "unanswerable."

B. *Resolution Under the Equity Standard*

Since the ultimate purpose of the criminal justice system, and

107. For a good discussion of this line of reasoning, see *In Re* McNaughton's Will, 138 Wis. 179, 118 N.W. 997, *on reh'g*, 120 N.W. 288 (1908). In *McNaughton*, the Supreme Court of Wisconsin was divided over two issues; one dealing with undue influence in the making of a will, and the other questioning the weight of the evidence. The Court split as follows:

	Siebecker	Barnes	Kerwin	Timlin	Start	Dodge	Marshall
Preponderance of	No Error	Error	Error	Error	No Error	No Error	No Error
Undue Influence	Error	No Error	Error	Error	No Error	No Error	No Error

As can be seen, four of the seven justices found error in the trial, yet on each specification of error it was adjudged that the trial court made a correct ruling. The Court affirmed the judgment.

108. Browning v. State, 33 Miss. 47, 89 (1856) (Handy, J., dissenting).

109. *See supra* notes 53-57 and accompanying text.

110. *See* CARRINGTON, *supra* note 23, at 2.

111. *McNaughton*, 120 N.W. at 290. *See also supra* note 107.

hence an appellate court,[112] is to do justice, an unjust result must not be tolerated. The court, in reaching the result of affirming the conviction, despite a majority finding prejudicial error in the criminal trial, has committed the "original sin of judicial procedure."[113] The court has substituted "the actual ends of judicature for the ends of justice."[114] When the majority of an appellate court finds that a person has not had a fair trial, he is certainly entitled to another trial.[115] Without this, he cannot be assured that the result " bears the institutional imprimatur and approval of the whole social order as represented by the legal system."[116] These statements do little to disturb the logic for affirmance, for the logic is sound. However, these statements are not based on logic, they are based primarily on the concept of "equity."[117] Therefore, a re-evaluation of the problem presented is necessary; a re-evaluation based on due process which imposes the element of equity on the appellate decision-makers.

When the majority of an appellate court finds fundamental error in a criminal trial, it is only fair that a new trial be given. This result would serve the ultimate purpose of the appellate court, to insure that justice is done.[118] Justice demands that those found guilty be punished, and those found innocent be freed. In America, guilt or innocence can be legally adjudged only after an accused has had the benefit of a fair trial. If a trial is deemed unfair it must not be tolerated by the American system. In fact, a number of courts[119] have refused to tolerate the notion of an unfair trial, even though faced with the identical problem posed here.

The Supreme Court of Mississippi was confronted with the problem of a divided appellate court in 1856, in the case of *Browning v. State*.[120] In *Browning*, the defendant had been convicted of murder and sentenced to death. He sought appeal of two issues.[121] Although two members found error, the three member supreme court could not

112. *See supra* note 12 and accompanying text.

113. L. ORFIELD, *supra* note 1, at 33 (citing J. BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE, c. 29).

114. *Id.*

115. State v. LeDuc, 89 Mont. 545, 559, 300 P. 919, 933 (1931).

116. See CARRINGTON, *supra* note 23, at 2.

117. *See supra* notes 60-99 and accompanying text.

118. *See* L. ORFIELD, *supra* note 1.

119. *See infra* notes 120-139 and accompanying text.

120. 33 Miss. 47 (1856).

121. The first issue was whether the verdict was supported by the evidence, and the second was whether there had been juror misconduct.

agree on either issue,[122] so the court affirmed the conviction. However, the court recognized the problem that its disunity had created, and granted a rehearing.[123] Realizing that the defendant's life was at stake in its decision, the court reversed its position.[124] Justice Fisher, writing for the court, explained that although there was no agreement on a specific issue, there was agreement that the trial court "erred in pronouncing the judgment of death upon the prisoner, upon a verdict which [two of us] say was manifestly wrong."[125] The court then assigned as error the fact that the trial judge failed to set aside the verdict and grant a new trial.[126] The judgment was therefore reversed and the case remanded.[127]

The Supreme Court of Montana was faced with an identical problem in *State v. LeDuc.*[128] In *LeDuc*, the defendant had been convicted of second degree murder and sentenced to twenty-five years in prison.[129] Again, three of five members of the court found error, but the three were divided over which allegation was actual error.[130] In

122. The Court split as follows:

	Fisher	Smith	Handy
Sufficiency of Evidence	No Error	Error	No Error
Conduct of Jury	Error	No Error	No Error

123. *Browning*, 33 Miss. at 84.

124. *Id.*

125. *Id.* at 87.

126. *Id.*

127. *Id.* In 1857, John Browning's re-trial for murder ended up in a mistrial. In 1858, he was again tried and acquitted. *Id.* at 92.

128. 89 Mont. 545, 300 P. 919 (1931).

129. 89 Mont. at 547, 300 P. at 920-21.

130. The Court split as follows:

	Angstman	Galen	Callaway	Matthews	Ford
Admission of Dying Declaration	No Error	Error	Error	No Error	No Error
Jury Instruction	Error	No Error	No Error	No Error	No Error

LeDuc, as in *Browning*, the court initially affirmed the conviction,[131] and later reversed itself on rehearing.[132] The court recognized that the situation presented a legal tangle,[133] but also ruled that the resolution would have to be in favor of the defendant. The real issue, according to the court, disregarding any legal phraseology, was "Did the defendant have a fair trial?"[134] The court then ruled that since three of the justices found that the defendant did not have a fair trial, and "the law of the land guarantees to every man a fair trial,"[135] the conviction must be reversed. Furthermore, the court characterized the assignment of specific errors as a "mere procedural requirement,"[136] and a "hypertechnicality" with a "tendency to subvert justice."[137] In opting for reversal, the court reasoned that while the rationale of the *McNaughton* case,[138] which warned of repetition of trial and appeal, is a possibility, a court of justice cannot very well condemn a man to twenty-five years in prison because of the fear of a possibility.[139]

The reasoning and results of the *Browning* and *LeDuc* cases coincide with the philosophy of case utilitarianism,[140] and may satisfy the rule utilitarianism ethic as well.[141] Under the case utilitarianist view, the appellate court is required to view the case as a whole rather than just reviewing the assigned issues. While the errors individually did not call for a new trial, collectively the errors rendered the trial unfair, and therefore unacceptable in the American system of justice.

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131. 89 Mont. at 554, 300 P. at 928. (citing *McNaughton*, 120 N.W. 288 (1908), as authority for affirmance). *See supra* note 107.

132. 89 Mont. at 559, 300 P. at 932-34. It is interesting to note here that the decision to reverse the conviction was on a three-two vote with Justice Angstman, who found error in the trial, voting to affirm, while Justice Matthews, who found no error in the trial, voting to reverse. *See supra* note 130.

133 This fact is noted here because in a number of cases involving the problem at hand, the court does not recognize in its opinion that the problem is before it. *See, e.g.*, Bryan v. State, 438 N.E.2d 709 (1982) (affirming); Husband v. Salt Lake City, 69 P.2d 491 (1937) (affirming); State v. Nadlman, 63 Idaho 153, 118 P.2d 58 (1941) (reversing).

134. 89 Mont. at 559, 300 P. at 933.

135. *Id.*

136. *Id.*

137. *Id.*

138. *McNaughton*, 138 Wis. 179, 118 N.W. 997; *See supra* note 107.

139. 89 Mont. at 560, 300 P. at 934. There are other cases reaching the same result with analogous reasonings, but for present purposes, *Browning* and *LeDuc* will suffice. *See, e.g.*, Pollack v. Heinecke, 64 Ark. 180, 46 S.W. 185 (1898); Price v. State, 114 Ark. 398, 170 S.W. 235 (1914).

140. *See generally supra* notes 55-57 and accompanying text.

141. *See generally supra* notes 53-55 and accompanying text.

This view also rejects the mechanical approach to appeals which may develop in courts which simply review for error. The question of whether the applicable legal formula has been satisfied enters into the judgment, but will not preclude the further inquiry of whether, on the whole, the defendant received a fair trial.[142]

The outcome may also satisfy the rule utilitarianist view. The American criminal justice system has one major rule which takes precedence over all others. That rule is that an accused shall have a fair trial.[143] When the majority of an appellate court agrees that the trial provided to a criminal defendant was not fair, the verdict from that trial must not be allowed to stand lest the primary rule of American justice be broken. Therefore, to reverse the conviction in a case such as this would be consistent with the rule utilitarianist ethic. The primary rule that all defendants should have a fair trial is kept pure and, moreover, is applied even-handedly throughout the system, regardless of the circumstances leading to the decision.[144]

Furthermore, reversal of the verdict in such a situation adequately serves the functions of the appellate process.[145] Error Correction is facilitated even though the judgment is reversed as the appellate court will still search the record for errors in need of correction. When the court rules that no reversible error has been found, it does not necessarily mean that the trial court's actions were entirely correct. It means solely that any mistakes made by the trial court did not reach reversible status.[146] For example, in the factual situation presented in the introduction, the first issue urged as error was the procedure used to determine the defendant's competency to stand trial. The defendant alleged that the law of the state required the trial court to have the defendant examined by two psychiatrists before the trial began.[147] The trial judge, however, accepted the opinions of only one psychiatrist and one psychologist.[148] Therefore, although the court ruled that this action by the trial court did not

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142. *See generally* Millar, *supra* note 52.

143. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process.") *See also* M. FRIEDMAN, *supra* note 40 at 133 ("No other field of law garnered as much constitutional attention as criminal procedure. The basic rights of man turned out, in large part, to be rights to fair criminal trial.")

144. *See supra* notes 53-55 and accompanying text.

145. *See supra* notes 7-59 and accompanying text.

146. This statement is not meant to imply that the trial court committed a "harmless error," just that the court did not act entirely correctly.

147. *See* IND. CODE ANN. § 35-5-3.1-1 (Burns Repl. 1979).

148. *See* Bryan v. State, ___ Ind. ___, 438 N.E.2d 709 (1982).

constitute an abuse of the court's discretion, it is clear that the action was not entirely correct. Were the case to be remanded, and the trial court accept only the opinions of two psychiatrists, there would be no doubt about the correctness of the procedure. Were the defendant to be convicted again, and were he to appeal the judgment again, the competency procedure could no longer be challenged. Therefore, the possibility of endless re-trials and appeals on identical issues would be foreclosed in this case. The appellate court would have served its first function of Error Correction, and the court would also be fulfilling its obligation to facilitate justice by giving the defendant the benefit of the doubt in the fairness of his trial. This can be seen as the first possibility of what can happen once a new trial is granted.[149]

The errors alleged in *Browning v. State*[150] exemplify the second possibility of what can happen to these issues on remand, as well as give another example of a case where Error Correction may be served by a reversal. One of the errors alleged in *Browning* concerned the conduct of a juror.[151] Were a new trial to be given, a new jury would be impanelled. The odds are overwhelmingly against the same factual situation occurring with a new jury. Were the defendant convicted again,[152] his appeal would not be identical to his previous appeal. Therefore, it is not only possible that a ruling on one of the alleged errors can legitimately be made either way within the trial court's discretion, it is also possible that some conduct alleged as error will not reoccur at a second trial. Giving the defendant the benefit of the doubt in these situations would not send the legal system into arrears, as predicted.[153]

There are, of course, cases in which the errors disagreed upon are assured to arise again, and could not reasonably be decided otherwise in the trial court, based on the existing authority. For example, two assignments of error could deal with the admissibility of evidence, the first being a confession, and the second some physical evidence. If a majority of the appellate court cannot agree on which admission was erroneous, it is faced with a difficult situation. On remand, if the law of the state mandated admission of both the confession and the

149. *See supra* note 104.

150. 33 Miss. 47 (1856). *See supra* notes 121 and 122.

151. *See supra* note 121.

152. *See supra* note 127.

153. *See* the dissenting opinion of Justice Handy in Browning v. State, 33 Miss. 47, 89 (1856). *See also McNaughton*, 120 N.W. 288, 291 (1908) (If the rule contended for were to prevail, a jury case could never be terminated.)

evidence, the trial court would have no discretion in the matter. On appeal, the appellate court would split the same way on these two issues. The only equitable solution in this instance is for the appellate court to direct the trial court to reverse its decision on one of the two issues, should they both come up again.[154] The authority for such a direction is found in the notions of "equity" and due process of law, discussed earlier. Since the ultimate rule of the American judicial system is to give a defendant a fair trial,[155] the result reached here is the only fair solution, as it is the only possibility of having a majority of the appellate court agree that the trial given was, in fact, fair.[156]

This result would stem from an equitable view of the interests involved. The state's interest in institutional purity, a system free from consecutive trials and appeals is advanced by this result, as once the trial court rules in favor of the defendant on one of the alleged errors, the defendant would not be able to raise that issue on appeal. Most importantly, though, the defendant's interest in securing a fair trial, as well as society's interest in providing a fair trial, would be served by this result. Though there may be a competing interest in the state's using all of its evidence gathered against the defendant, this interest is clearly outweighed by the defendant's right to a fair trial.[157]

The remaining functions of the appellate courts, Institutional

154. Though likely, there is no guarantee that the situation will, in fact, reoccur. Any person familiar with the intricacies of a criminal trial and the unpredictability of juries will attest that there is always a possibility of a mistrial, a hung jury or an acquittal at the second trial. Therefore, the affirmation of the conviction here would be based on the fear of a mere possibility that the situation would occur.

155. *See supra* note 143 and accompanying text.

156. To some, such a result may seem too idealistic for the realities of the criminal justice system. However, it would not be the first time that the ideals of fairness in the system outweighed all other concerns. *See, e.g.*, KAMISAR, *supra* note 24, at 1367, reporting on the Seale-Huggins case. It is noted that after screening some 1000 prospective jurors for the murder and kidnapping trial of Bobby Seale and Erika Huggins, the trial ended up in a hung jury. Judge Mulvey of the Connecticut Superior Court thereafter dismissed all charges against both defendants, concluding that an unbiased jury, which is essential for a fair trial, could not be selected without "superhuman efforts;" efforts which none of the parties should be made to endure.

157. There are many other interests which outweigh that of the state's to put forth all of the evidence gathered against a defendant. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (excluding evidence to protect the rights of persons against illegal searches and seizures); United States v. Wade, 388 U.S. 218 (1967) (excluding evidence of post-indictment line-up done without the opportunity of having defendant's counsel present).

Review and Lawmaking, would suffer no adverse affects from an equitable view of the problem presented. As for Institutional Review, the written opinions of the appellate court on the issues themselves will sufficiently inform those interested in the state of the law.[158] Any confusion resulting from the reversal of the judgment can be minimized by the appellate court, simply by explaining what it is doing, and instructing the trial court accordingly. The written opinions of the court would also sufficiently fulfill the appellate court's lawmaking duties. If the case before the court is one of great consequence on a point of law, the majority concurrence on this point would be just as valid as if the conviction had been affirmed. If the case presents no such issue of major legal significance, the points of law would remain unscathed, as lawmaking would not even be implicated.

An equitable view of the interests would also be consistent with the purpose of appellate review—that of doing justice between the parties.[159] The actual ends of judicature would not, in this situation, be allowed to subvert the ends of justice.[160] The appellate court will look beyond the sterile record in which the issues are presented, and recognize the defendant's interest in having a fair adjudication of guilt or innocence.

The imposition of an equitable standard on appellate decisionmakers would not be a difficult task, nor would it be completely unique. For example, in *Chapman v. California*,[161] the United States Supreme Court held that before a constitutional error occuring in a criminal trial may be deemed harmless by an appellate court, the appellate court must be able to declare the error harmless beyond a reasonable doubt.[162] In reaching this decision, the Court reasoned that although the appellate court does not ordinarily perform the task of deciding issues on such a high standard, the beyond a reasonable doubt standard "is a familiar standard to all courts . . ."[163] Thus, to ensure fairness, the appellate courts were charged with the duty of making decisions on a higher level than was ordinarily done. The same rationale, stated in *Chapman*, is applicable to the imposition of equity

158. *See* Price v. State, 114 Ark. 398, 170 S.W. 235 (1914) ("While the law of the case is settled by the concurring view of the judges as expressed in this opinion . . . the net result . . . is that the judgment must be reversed.").

159. *See supra* note 12 and accompanying text.

160. *See supra* note 13.

161. 386 U.S. 18 (1967). *Chapman* dealt with the issue whether a prosecutor's comment to the jury on the defendant's refusal to testify should be deemed "harmless error."

162. *Id.* at 24.

163. *Id.*

on the appellate courts. The standard of equity, in the context used here, is one that is familiar to all courts. When the interests involved in this case are weighed using an equity analysis, the result is a fair, just solution to a legal tangle. To impose a standard of equity on the appellate courts, then, is a logical step in the evolution of the appellate system.

The mechanics of imposing an equity standard on appellate courts would not be difficult. All that is necessary is to impose a requirement for a decision on the "case." To do this, the appellate court could simply vote among the justices on the ultimate question: "Did the defendant have a fair trial?" Implicit in this question is the query of whether the result was just.[164] Regardless of the reasoning used to determine the conclusion, if a majority of the court responds in the negative, the judgment of the trial court must be reversed.[165]

IV. CONCLUSION

The basic purpose of appellate review of criminal cases is to ensure that justice is done. To ensure justice, appellate courts exercise three basic functions; Lawmaking, Institutional Review and Error Correction. Each function is exercised in a way to serve the interests of justice.

The right to appeal a criminal conviction has never been deemed a constitutional imperative. However, once an appeal is provided for, the constitutional standard of due process applies to the appellate proceeding with the same vigor as in criminal trials. The notion of due process of law encompasses a fundamental fairness standard which may be termed "equity." Therefore, both the concepts of justice and "equity" must be taken into account by appellate decision-makers.

When the majority of an appellate court agrees that there has been a reversible error in a criminal trial, yet cannot agree on any

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164. This requirement would undoubtedly bring serious criticism from persons who would view this as simply the substitution of the judgment of the appellate court for that of the trial court. However, there should be nothing inherently wrong with such a substitution when the interests of justice are at stake.

165. This is analogous to the situation where the votes on a specific error come from different lines of reasoning. For example, if a three-judge appellate court is faced with the issue of the admissibility of a confession, one judge may believe that the confession was obtained through coercion, yet a second judge may believe that the confession was inadmissible because the defendant did not waive his *Miranda* rights. The case will obviously be reversed because of the erroneous admission of the confession, and no one would question the decision, even though they disagreed on the reason for inadmissibility.

one error, two resolutions can be made, affirmance or reversal. The concept of equity requires that before the court makes a final determination, it inquire as to whether, on the whole, the decision is just. When seen in this fashion, a conviction should be reversed when a majority of an appellate court determines that a criminal trial is not free from prejudicial error. Such a result shifts the focus of the appellate court away from the sterility of the law to the realities of the case. The appellate courts thus could become full participants in the American scheme of justice.

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