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CRIMINAL APPEALS

TECHNICALITY AND PREJUDICIAL ERROR

LESTER B. ORFIELD*

A very common criticism of criminal appeals has been that appellate courts too often reverse a conviction on purely technical considerations.¹ Appeal is said to offer one more loophole for the criminal.² A few have gone so far as to charge the appellate courts with the major blame for inefficiency in the administration of the criminal law. Judge Kavanagh has said: "The American Courts of Review reflecting as they must the temper of the great body of the American Bar, tower above the trials of criminal cases as impregnable citadels of technicality."³

Technicality Against the Defendant

In the usual course of procedure criticism of technicality in the Supreme Court is made by the prosecution. But even defendants may now and then voice with justice the same criticism. Most appellate courts deem themselves as not having power to review the facts in the sense of hearing new evidence at the hearing. Furthermore the appellate courts have frequently held that the defendant's appeal must be dismissed because he has failed to comply with the statutes or rules of court,⁴ no matter how good

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¹ Brewer, J., *A Better Education the Great Need of the Profession* (1895) 18 A. B. A. Rep. 441, 448; Charles F. Amidon, *The Quest for Error and the Doing of Justice* (1906) 40 Am. L. Rev. 681; (1909) 34 Am. Bar. Assn. Rep. 578, 579; Charles F. Bostwick, *Proposed Reforms in Criminal Procedure* (1911) 2 J. of Crim. L. 216, 219; John W. Wigmore, *The Qualities of Current Judicial Decisions* (1915) 9 Ill. L. Rev. 529, 534; Charles K. Burdick, *Suggestions for Reform in Criminal Procedure Through State Action* (1925) 50 A. B. A. Rep. 679, 687; Raymond Moley, *Our Criminal Courts* (1930) 95; Paul M. Hebert, *The Problem of Reversible Error in Louisiana* (1932) 6 Tul. L. Rev. 169; John B. Waite, *Criminal Law in Action* (1934) 211. See the statement by Calvin L. Brown, J., *State v. Nelson* (1903) 91 Minn. 143.

² W. F. Dodd, *State Government* (1928) 327; Report of the Committee on Improvement of Personnel in Criminal Law Enforcement (1933) 58 Rep. of A. B. A. 526.

³ Improvement of Administration of Criminal Justice by Exercise of Judicial Power (1925) 11 A. B. A. J. 217, 222.

⁴ In North Carolina during the years 1890-1927, 15.6 per cent of all appeals taken were dismissed. C. R. Sherrill, *Criminal Procedure in North Carolina* (1930) 17. Many of these cases, however, doubtless involved either frivolous appeals or appeals by indigent dependents.

an excuse he has. It is not to be doubted but that in some cases appellate courts have too freely dismissed cases with the easy assertion that since there is no common law right of appeal (in the code sense) the appellant must comply literally with the statutes.⁵ More of the burden of complying with the rules should be borne by the trial courts.⁶ Appellate procedure should be simplified so that an appellant is not likely to make mistakes of procedure. When he does make them there should be ample provision for waiving non-wilful errors and permitting the appellant to correct his error and go on with the appeal.⁷ The standards of the bar must be improved so that defense attorneys will know how to comply with the procedural requirements. An expensive appellate procedure or one not providing for assisting indigent defendants may make the right of appeal an empty one.

Few Cases Appealed

In the writer's opinion, however, the critics of our appellate courts would do well to remember that only a small proportion of the cases tried in the lower courts are ever taken up to the appellate courts. Of course a single appellate decision may lay down one or more principles that affect vitally the handling of thousands of other cases. The police, the prosecuting attorney and the trial court may all be paralyzed by the action of the appellate court.⁸ If every case taken up were reversed it would mean that only five or ten per cent of the convictions were set aside. Indeed it has been increasingly seen in recent years that most crimes are disposed of even before reaching the trial court.⁹ That is to say, the defendant is discharged on preliminary examination, his case is dismissed or *nolle prossed*, or he bargains with the prosecuting attorney to plead guilty to a

⁵ *Barks v. State* (1915) 11 Okla. 446, 157 Pac. 1055. In this case the appeal was taken one day too late from a three year sentence to the state penitentiary. However, the defendant had six months in which to appeal. See the language of *State v. Leonard* (1913) 250 Mo. 406, 408, 157 S. W. 305.

⁶ Keith Carter, *The Texas Court of Criminal Appeals* (1913) 11 Tex. L. Rev. 455, 471.

⁷ This is the rule in England. See Criminal Appeal Rules (1908), Rule 45. In Soviet Russia there are no prescribed rules as to the form of contents of appeal. The appellant need merely say, "I wish to complain." The appellate court will review even though an improper ground is set out. Judah Zelitch, *Soviet Administration of Criminal Law* (1931) 280.

⁸ John B. Waite, *Criminal Law in Action* (1934) 215.

⁹ Raymond Moley, *Some Tendencies in Criminal Law Administration* (1927) 42 Pol. Sc. Quart. 497, 508; Raymond Moley, *Our Criminal Courts* (1930) XIII; Alfred Bettman, National Commission on Law Observance and Enforcement, *Report on Prosecution* (1931) 10; Felix Frankfurter & J. M. Landis, *The Business of the Supreme Court at October Term, 1928* (1929) 43 Harv. L. Rev. 33, 44, note 27.

lesser offense. If the major weakness does not lie in the trial courts, even less blame can be assigned to the appellate courts.

Dangers of Statistical Conclusions

The proportion of reversals to affirmances is often pointed at by critics of our system as indicating surely that the appellate courts are overly technical. The matter is not as simple as that, however. The number of reversals should also be compared with the number of convictions.¹¹ A large percentage of reversals may be no reflection on the appellate courts when the number of appeals taken is small. Hence in England where only six or seven per cent of convictions are appealed a considerable proportion of reversals to affirmances would have little significance. On the other hand, if a large number of appeals is taken, as compared with the number of convictions and there is an equal or greater ratio of reversals to affirmances than in the former case, as in Texas or Oklahoma, it seems not unreasonable to conclude that the appellate courts have not acted on the merits. Unfortunately the number of convictions is often not available in a jurisdiction.¹² In jurisdiction where appeal is of leave the fact that reversals run high will mean little since supposedly the weaker cases have been weeded out.¹³

Even where the proportion of appeals to convictions is high and the proportion of reversals to appeals likewise not all the blame is to be assigned to the members of the appellate court. The trial judges may be incompetent and negligent. The standards of admission to the bar may be very low. The impoverished intellectual climate of the state involved may be an all-determining factor.

Technical Decisions in Fact on the Merits

In further defense of the appellate courts a decision is not necessarily a technical one merely because it appears to be such. That is to say, the appellate court may assign technical reasons for reversal where reasons on the merits exist. This is likely to occur

¹¹ Grant Foreman, *The Law's Delays* (1914) 13 Mich. L. Rev. 100, 111.

¹² England has long kept such statistics in yearly reports entitled Criminal Statistics issued by the Home Office.

¹³ The failure to take this into account explains criticism of the English Court of Criminal Appeals. See for example, William N. Gemmill, *Procedure in Criminal Courts* (1912) 3 J. of Crim. L. 175, 178; William N. Gemmill, *What Is Wrong With the Administration of Our Criminal Laws* (1914) 4 J. of Crim. L. 698.

when the court is not permitted to review the facts.¹⁴ It may occur because the court wishes to dispose of the case quickly without going through any elaborate reasoning process.¹⁵ Such decisions, however, carry a number of evils in their train. They constitute no contribution to the development of the law, in fact throw it into a chaotic condition. And they may be vehicles for releasing defendants out of improper motives of sympathy and charity rather than justice.¹⁶

Functions of Appellate Court

Finally, it is worthy of observation that a review of the functional decisions are not always so. One function of an appellate court is to do justice in the individual case.¹⁷ An innocent defendant ought to be released. On the other hand a guilty defendant should not escape punishment. If this were the only function the appellate court would merely have to ascertain whether or not the defendant was guilty. If he was guilty the judgment would necessarily be affirmed. It should be noted that the extreme technicality in earlier decisions is explainable partly on the basis of doing justice to individual defendants who were subject to the death penalty for very slight offenses. Unfortunately this attitude of technicality continued into modern times when penalties had been made more proportionate to the offenses committed.¹⁸

But unfortunately other necessary functions of an appellate court under existing legal systems prevent this simple solution of appeals. The appellate court has the supervisory function of maintaining the standards of the trial courts. If the trial court need only concern itself with the guilt of defendants in one case it is likely to do so in other cases. And if one trial court can adjudicate in this fashion other trial courts may take the course of least resistance

¹⁴ "An appellate court may be denied the right of reviewing the merits of a case, but a reading of the record convinces the judges that substantial injustice has been done. A decision is handed down that looks as if technical considerations are paramount, but really a substantial injustice is being remedied by a technical gesture. It has never been hard for appellate courts to wear the livery of legalism in serving the substantial ends of justice." Raymond Moley, *Our Criminal Courts* (1930) 104.

¹⁵ F. N. Judson, *The Judiciary and the People* (1913) 219. Harlan F. Stone, J., has pointed out that a mere discussion of practice points does not mean that the final result on the merits is always affected, but rather that too much time of the court is spent in deciding them. *Law and Its Administration* (1915) 120.

¹⁶ John B. Waite, *Criminal Law in Action* (1934) 211.

¹⁷ "A court of justice should be a temple—nor should justice be expelled from the appellate, any more than from the trial courts." Seymour D. Thompson, *More Justice and Less Technicality* (1889) Ga. Bar Assn. 107, 143.

¹⁸ John B. Waite, *Criminal Law in Action* (1934) 212.

and follow suit. As a consequence in any jurisdiction there would be everything from Cadi justice to justice with every legal safeguard. The weakness of such a system was demonstrated in the first half of the nineteenth century in Georgia. It was one of the causes which brought about the creation of an appellate court in that state. The Continental appellate courts exercise a marked degree of supervision over the trial courts.

One of the modes of exercising such supervision is to reverse the judgment below when a trial has not been conducted according to the proper standards. Such reversal pulls up the trial judge as sharply as perhaps could any action of the appellate court. It gives the particular defendant another opportunity to be fairly tried. It serves notice on all the trial courts within the jurisdiction that other defendants must be fairly tried. Although the particular defendant may clearly have been guilty he is to be tried all over again in order that standards be maintained. That the judicial system must permit this waste in order to serve a larger interest, is the theory.¹⁹ That some organ must perform this function is clear. That it must necessarily be performed by the appellate courts is possibly open to question and will be considered later.

A third function of the appellate court under existing legal systems is to develop the law of the jurisdiction.²⁰ It is not enough that the defendant be an undesirable citizen. He must have committed some act which the law of the jurisdiction makes a crime. He must have been accorded certain fundamental procedural safeguards. Inevitably the courts in deciding certain points of substantive criminal law must lay down distinctions, which on first appearance may seem technical. There is no automatic easily discernible test of what is criminal and what is not criminal. But the line must be drawn somewhere and who under our present legal system can draw it better or interpret statutes better than the appellate courts? Particularly was this true in the early days when the English common law was being adapted to American conditions.²¹ Today the function is of far less importance and may be performed at least in part by other bodies.

¹⁹ Carter, C. J. (1921) Ill. State Bar Assn. 342, 344; (1922) 26 Law Notes 143; Hewart, L. C. J. (1927) 12 Proc. Can. Bar Assn. 127, 131; Walter F. Dodd, *The Problems of Appellate Courts* (1929) 6 Am. L. Sch. Rev. 681, 685; W. F. Dodd & P. D. Edmunds, *Illinois Appellate Practice* (1929) 373; Paul M. Hebert, *The Problem of Reversible Error in Louisiana* (1932) 6 Tul. L. Rev. 169.

²⁰ E. R. Sunderland, Note, *Appeal by the State in Criminal Cases* (1920) 19 Mich. L. Rev. 79.

²¹ Pound, *Criminal Justice in the American City—A Summary*, *Criminal Justice in Cleveland*, Part 7, p. 38.

Similarly in deciding what procedural rights of a defendant cannot be dispensed with it is inevitable that to some the appellate decision will look over technical and over refined. The standard may be accepted of reversing for violation of rules intended to secure a fair trial as distinguished from rules intended for orderly dispatch of business.²² But ideas have differed and perhaps always will differ as to what elements are necessary to a fair trial. Due process has never been completely and exhaustively defined; neither has a fair trial. This can be seen in such recent decisions of the United States Supreme Court as the *Snyder Case* where the court divided five to four on the effect of a view by the jury without the presence of the defendant.²³

Insistence of Certainty in the Law

This insistence is another cause of technicality. As in the law of property and of contracts it is strongly urged that the lines between criminal and non-criminal conduct be sharply drawn so that persons may know the consequences of their acts.²⁴ This demand for certainty means that the court in arriving at its decision must consider not only the merits of the particular case but the effect of the case on the body of the law.²⁵ There must be no slipping back and forth between contrary rules. Human life or liberty is at stake and it must not be trifled with. Hence the appellant presses every possible precedent upon the court and the court feels that it cannot get away from it. So far is this carried that even as the courts will protect a man from prosecution under a statute making his act criminal after his act was committed so they often protect him from

²² Report of Committee E of American Institute of Criminal Law and Criminology (1910) 1 J. of Crim. L. 584, 590.

²³ *Snyder v. Commonwealth of Massachusetts* (1934) 54 Sup. Ct. 330, noted (1934) 19 Corn. L. Quart. 477; (1934) 12 N. C. L. Rev. 267; (1934) 24 J. of Crim. Law 1102. Compare *Powell v. State of Alabama* (1932) 287 U. S. 45, 53 Sup. Ct. 55.

²⁴ Francis B. Sayre, *Crime and Punishment*, Atlantic Monthly, June, 1929, pp. 3, 5. Professor Arthur Goodhart objects that a criminal cannot be supposed to have relied on the law. *Essays in Jurisprudence and the Common Law* (1931) 55. He therefore assigns certainty as the ground of the rule. See also Arthur Goodhart, *Precedent in English and Continental Law* (1934) 50 L. Quart. Rev. 40; W. S. Holdsworth, *Case Law* (1934) 50 L. Quart. Rev. 180; Arthur Goodhart, *Case Law: A Replication* (1934) 50 L. Quart. Rev. 196.

²⁵ Roscoe Pound, *The Theory of Judicial Decision*, 4 Lectures on Legal Topics, 145, 146, 36 Harv. L. Rev. 940. Pound says: "Indeed the necessity of weighing not merely the grounds of the decision, but the exact words in which those grounds are expressed with reference to their possible use in other cases and thus of preserving within limits the potential analogical application thereof, is perhaps the gravest of the burdens involved in the crowded dockets of modern appellate courts."

prosecution where there is a judicial change in the law.²⁶ On the other hand it has been asserted that when an act is *malum in se*, an appellate court should never subsequently treat the act as non-criminal while it might reverse a statutory construction where the act is merely *malum prohibitum*.²⁷ While such cases would obviously be rare in practice it is submitted that a court should in the interests of humanity be permitted to reverse itself. The criminal law has become largely statutory so that there is little field for judicial development.²⁸ Statutes are construed strictly although about one-fourth of the state legislatures have expressly repudiated the common law rule of strict construction.^{28a}

In recent years there has been a considerable degree of criticism of certainty as the great goal of the law. It has been claimed that judges devote too much of their time to studying past precedents and considering the effect of the decision of the particular case on the body of the law.²⁹ As a result the merits of the particular case, it is asserted, are lost sight of. The free judicial decision movement developed on the Continent emphasizes the just solution of the particular case as the great desideratum. The Report of the Illinois Crime Commission suggests that less attention be paid to the rule of *stare decisis*; that theoretically the court should wait for the legislature to change the rule, but that practically the court should change the rules itself.³⁰

The decisions of the Court of Criminal Appeals in England are not absolutely binding on it as are the decisions of the House of Lords. Professor Kenny, a leading English writer on criminal law says:³¹ "Indeed of all the forms of English judiciary law, whilst real property law is the most stable, criminal law is the least so. 'Criminal law,' says Sir Harry Poland, 'is an essentially fluctuating thing . . . since our judges interpret it in accordance with the spirit of the age.' For 'the static mind of the lawyer', as Sir Clifford Abbott puts it, 'must perforce come to terms with the dynamics of the biologist'; or we may add, of the sociologist." The reversals, however, cited by

²⁶ Note, Retroactive Effect of Judicial Change of Existing Law in Criminal Proceedings (1928) 28 Col. L. Rev. 963.

²⁷ Orrin N. Carter, C. J. Rule of *stare decisis*. 8 A. B. A. J. 51.

²⁸ Roscoe Pound, Criminal Justice in America (1929) 209.

^{28a} Note, Criminal Law and Procedure—Statutory Construction (1934) 32 Mich. L. Rev. 976.

²⁹ Roscoe Pound, Criminal Justice in the American City—A Summary, Criminal Justice in Cleveland, Part 7. p. 38. Jerome Frank, Law and the Modern Mind (1930) 153, 277. James M. Morton, Jr., *Some Suggestions About First Instance Courts of General Jurisdiction* (1924) 49 A. B. A. 595, 605.

³⁰ (1929) 19 J. of Crim. L., No. 4, Part II, 49, 55.

³¹ Outlines of Criminal Law (1926) 12th ed., 501 note.

Professor Kenny were on points of procedural law. His statement more properly applies to the science of criminology than it does to the rules of substantive or even procedural law.

If *stare decisis* is to be the guiding principle as to the substantive criminal law, it by no means follows that the same rule should apply to criminal procedure.³² No one could object very strenuously to the act of the Missouri Supreme Court in overruling six former decisions in which it was held fatal to the validity of an indictment to leave out the word "the" before "State of Missouri".

Reversal for Nonprejudicial Error

Having considered some of the defenses of the disposition of criminal appeals by the appellate courts with respect to technicality let us now turn to some of their defects. One of the most serious has been the attitude of reversing for any error as to evidence occurring at the trial irrespective of whether or not such error was prejudicial. This was not the historical attitude of the English appellate courts.³³ It was introduced into England by a decision of Baron Parke in the 1830s.³⁴ Fortunately it was uprooted there with the passage of the Judicature Acts. But in the United States like so many judicial doctrines long since abandoned in England it remained the prevalent doctrine of the state and federal courts right up until recent times.

Lack of Power To Deal With and Dispose of Cases

Another defect has been one for which the judges are not themselves wholly responsible. They have been unable, or have thought themselves unable, to dispose of the appeal as a whole. They have regarded themselves as not having power to review the weight of the evidence or to hear the defendant or the witnesses or to hear evidence discovered after the trial. They have deemed themselves limited to ordering a new trial even though the defendant was clearly guilty of some other count charged in the indictment or of some offense of which the defendant could have been convicted under the indictment. As a consequence many cases where new

³² Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power* (1925) 11 A. B. A. J. 217, 223.

³³ 1 Wigmore on Evidence (1915) 2nd ed., sec. 21. Wigmore says that the Exchequer rule "has done more than any other rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling."

³⁴ Goldwin Smith prepared the following epitaph for Baron Parke: "With a powerful intellect, extensive learning, and most subtle acuteness, he cleverly reduced the laws of England to an absurdity."

trials are awarded are never tried. And in a considerable number of cases there have been several appeals and new trials.

Technicality may in large part be eliminated by giving the appellate court all the necessary power to deal with a case and the employment of such power by the court. In the absence of an express contrary constitutional provision the courts should themselves assume such power without waiting for a legislative or constitutional grant thereof. They should be given the power to review the facts. They should be permitted to re-examine the witnesses or the defendant without being bound by formal rules of evidence. They should have the power to hear new evidence discovered after the trial below. They should exercise their power to examine errors not raised below nor assigned on appeal where not to do so would work injustice. They should have the power to correct an illegal sentence or to direct the trial court to correct it. In the absence of a disposition tribunal they should have the power to decrease the sentence. Furthermore they should have the power to increase the sentence and that whether the appeal be from sentence or conviction. They should have the power to alter the verdict within certain limits. That is to say they should have the power to change the verdict to guilty of some other count or part alleged in the indictment or to some other degree of an offense charged in the indictment.³⁵

Suppose, however, that the indictment or information charged the defendant with the robbery of a certain person at a certain place at a certain time. It could scarcely be contended that the appellate court might now consider whether this defendant committed rape on a certain other person at another place and another time. To do this would be turning the appellate court into another trial court. It would deprive the defendant of his right to be formally accused by information or indictment and to have a preliminary examination. Unless there was a full examination of witnesses he would be deprived of his right to a trial itself. Even then he would be deprived of his right to trial by jury,³⁶ since juries do not sit with

³⁵ Raymond Moley, *Our Criminal Courts* (1930) 95, states this to be one of the most frequently urged appellate reforms. Compare the English Criminal Appeal Act, Sec. 5. The offense was reduced to a lesser degree by the Supreme Court of Oregon in *State v. Ragan* (1923) 123 Ore. 521, 262 Pac. 954, noted in (1923) 7 Ore. L. Rev. 349. In *State v. Sorrentino* (1923) 31 Wyo. 129, 222 Pac. 420 the court reduced a conviction for murder in the second degree to manslaughter, but gave the state the option of a new trial or a reversal if it chose. The Minnesota Crime Commission Report (1926-27) 35, recommends giving such power to the appellate court, pointing out that existing practice calls for a new trial. See (1927) 11 Minn. L. Rev. 660.

³⁶ Compare (1927) 36 Yale L. J. 570.

appellate courts.³⁷ If he were examined against his will, his privilege against self-incrimination would be violated. He could not be said to have waived any of these by appealing since he was appealing from a conviction of an entirely distinct crime.³⁸ There seems no good reason, however, why the appellate court should not have all the powers of a trial court to accept a plea of guilty.

As to other crimes committed at the time and place the crime charged in the accusation was committed an intermediate solution might be worked out. The appellate court might give the defendant this option: a finding of guilt and the imposition of a penalty by the appellate court, or remanding the defendant to the lower court for trial. The defendant could not then claim his constitutional rights were taken from him and the need of another judicial proceeding would be avoided.

The appellate court should be empowered to grant a new trial.³⁹ The Court of Criminal Appeals in England has been criticized for its lack of power to do so, and the court itself has expressed its own regret at not being able to do so.⁴⁰ The result of an inability to order a new trial is that a defendant against whom substantial error was committed goes free even though he may have been guilty of the crime charged. It is somewhat to be doubted, however, whether the lack of this power results in any great difference in practice. In the United States where new trials can be ordered many cases are never brought to trial again.⁴¹ The final outcome is much delayed.⁴² It is possible, too, that American courts are more prone to find prejudicial error since the defendant *can* be tried again. On the

³⁷ In the earlier days, however, some courts such as the Massachusetts Supreme Judicial Court sat with a jury. Thomas W. Powell, *The Law of Appellate Proceedings* (1872) 345.

³⁸ Frank E. Dunn, *Delay in Courts of Review in Criminal Cases* (1912) 2 J. of Crim. L. 843, 848. Compare John W. Wigmore, Comment (1909) 4 Ill. L. Rev. 353.

³⁹ National Commission on Law Observance and Enforcement, Report on Procedure (1931) 44. In (1919) 19 Col. L. Rev. 503 is criticized *State v. Ricks* (1919) 32 Idaho 232, 180 Pac. 257, 13 A. L. R. 99, where the court refused to grant a new trial though the appellant was unable to get a transcript up because the reporter had died. The court held it could grant a new trial only after a review.

⁴⁰ *Rex v. Dyson* [1908] 2 K. B. 454. Some of the colonies which have copied the act allow the appellate court to award a new trial. See Section 8 of Criminal Appeal Act of 1912 of the New South Wales, Hamilton & Addison, *Criminal Law and Procedure New South Wales* (3rd ed.) 527.

⁴¹ To Facilitate the Administration of Justice (1929) Ill. State Bar Assn. 269. From 1917 to 1927 of 217 cases reversed and remanded only 67 were prosecuted further. See Report of the Illinois Crime Commission (1929) 19 J. of Crim. L., No. 4, Part II, p. 49; *Some Aspects of Appeals* (1934) compiled by the New York Law Society, p. 6.

⁴² In New York State the average time elapsing in civil cases between decision on appeal and final outcome is nine months. *Some Aspects of Appeals* (1934) published by the New York Law Society, p. 6.

other hand in England since the defendant must go free if the case is reversed it is not improbable that the Court of Criminal Appeal is rather cautious before it finds that an error was prejudicial to a defendant whom it regards as clearly guilty.⁴³

The power to order a new trial may be wise from another point of view. It will help to maintain the standards of the trial court. Of course an outright reversal without another trial is the most emphatic possible repudiation of what happened below to the world in general. But to have to retry the case may be more of a lesson to trial courts themselves. One may ask, why not have the appellate court retry the case itself and hold the appellant? There are a number of answers. If there were no reversal by the appellate court not quite as much could be done to maintain trial court standards. Something severe such as a reversal, whether with or without a new trial, may be necessary to check the trial courts. Without such possibilities it would not be clear that defendants are entitled to fair trials below. The impression might easily get about that what happens below is of little import since all errors may be corrected on appeal. The trial of the case might come almost to be viewed as a preliminary process. It has been suggested that instead of reversing for error the appellate court decrease the sentence.⁴⁴ This would not dispose of the cases, however, where the appellate court found error but could not conveniently inquire into the guilt of the defendant. The American appellate courts as now constituted cannot conveniently retry criminals; hence where there is substantial error a new trial seems to be the only way out. It may also be suggested that a severe rebuke of the trial judge is alone enough.⁴⁵ It is to be doubted, however, that this will have the same efficacious result as a reversal.

The efficacy of reversals may of course be easily overrated. The trial judges are not best where there are most reversals. In fact too many reversals are likely to result in a feeling of futility and a spirit of indifference in the trial of cases. Judges rarely intentionally

⁴³ Moreover in civil appeals where new trials can be granted they were granted in only three and one-half per cent of the cases appealed during the decade from 1890 to 1900. Amidon, *The Quest for Error and the Doing of Justice* (1906) 40 Am. L. Rev. 681.

⁴⁴ National Commission on Law Observance and Enforcement, Report on Unfairness in Prosecution (1931) 345. One of the few cases where this was done is *Haynes v. State* (1929) 45 Okla. Cr. 172, 284 Pac. 74. It has also been suggested that where there is misconduct by the prosecuting attorney instead of reversing he should be penalized. Carter, *The Texas Court of Criminal Appeals* (1933) 11 Tex. L. Rev. 455, 473.

⁴⁵ John B. Waite, *Criminal Law in Action* (1934) 208.

commit error. If they do they ought to be removed for misconduct. Far better than reversing is the removal of causes of error.

The granting of a new trial of course carries with it the possibility of a second appeal and a second new trial.⁴⁶ Thus theoretically a case might never be disposed of. This had led someone to suggest that if a conviction be had on a third trial no further appeal should lie.⁴⁷ Perhaps it may seem purely arbitrary to stop at any such point. A defendant is entitled to a fair trial no matter how many trials are necessary. Instead of cutting down the number of trials he may have, efforts should be made to improve the judicial machinery so that only one trial is necessary. In England in civil cases there was no second appeal for a period of over thirty years.⁴⁸ If the machinery cannot be improved so that only one or at the most two trials are necessary, it seems an outrage toward an innocent or even a guilty defendant to compel him to stand the cost and suspense of more than one trial and appeal. There is much to be said for the English rule of no new trial even though the defendant may be guilty.

Reversal for Substantial Error

Reversal for substantial error is perhaps the most common mode of attack on technicality in appellate court decisions has been statutes providing that cases be reversed only for substantial error. Such statutes have been passed in many states⁴⁹ and Congress finally passed a statute in 1919 after considerable agitation. The American Law Institute Code of Criminal Procedure provides:⁵⁰

"No judgment shall be reversed or modified unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall be presumed that error injuriously affected the substantial rights of the appellant."

⁴⁶ In one case a defendant was found guilty five times. Five appeals were taken, the first four resulting in a reversal. O'Neal, *The Strange Case of Erwin Pope* (1922) 56 Am. L. Rev. 552. See the account of the Kling case (1883) 17 Am. L. Rev. 607.

⁴⁷ Judge A. J. Dittenhoefer of New York City (1913) 4 J. of Crim. L. 565, 567,

⁴⁸ Charles F. Amidon, *The Quest for Error and the Doing of Justice* (1906) 40 Am. L. Rev. 681.

⁴⁹ Eighteen states have abolished the rule by statute; nine or ten by judicial decision. About twelve states cling to the old rule, E. R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 1466.

⁵⁰ Section 461. This section is criticized by Sir William Brunyate, *The American Draft Code of Criminal Procedure*, 1930 (1933) 49 L. Quart. Rev. 192, 204. He prefers the English rule which he states to be that before condoning an irregularity of procedure the court should be able to satisfy itself affirmatively that no substantial miscarriage of justice has resulted therefrom. Wigmore says

It is simple enough to pass such a statute. But it is by no means easy to determine what is prejudicial error. Very likely no court would regard such a statute as doing away with the constitutional rights of the defendant, such as his right to a jury trial where he did not waive it, even though no injury to the defendant was shown.⁵¹ As to other errors committed, whether or not they will be regarded as prejudicial will depend on the training and temperament of the court. A court which worships precedent for its own sake is likely to find almost any kind of error to be prejudicial, whereas a more liberal court would easily pass over it.

It is further to be noted that even though the appellate court falls in with the spirit of a statute providing against reversal except for substantial error this does not prevent an appeal from being taken merely to delay.⁵² To abolish such appeals the time it takes to appeal must be cut down so far as to make them unprofitable, and the court must have the power to penalize frivolous appeals.

Obviously then relief from technicality must not be hoped for simply by the passage of statutes. Something much subtler is involved. The attitude of the courts must be changed.⁵³ The courts must be persuaded to take an attitude midway between two extremes. They must not on the one hand apply the Exchequer rule of reversing for all errors whether prejudicial or not. They must not on the other hand affirm merely on a showing that the defendant was guilty irrespective of how unfairly he was tried.⁵⁴ The latter would seem almost to amount to judicial lynch law.⁵⁵ The test rather should be, did the defendant have a fair trial? If he did not, the court should reverse and its reversal should not be regarded as technical. As Mr. Justice Cardozo has said: "A criminal however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law."⁵⁶ Rules of

there should be no reversal unless the error ought to have affected the verdict. 1 Wigmore on Evidence, 2nd ed., sec. 21(3). That the court should consider whether the jury was misled, and not whether it might have been is asserted by R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932) 42 Yale L. J. 194, 224.

⁵¹ *State v. Cluff* (1916) 48 Utah 102, 158 Pac. 701.

⁵² Note, Penalties for Frivolous Appeals (1929) 43 Harv. L. Rev. 113.

⁵³ 1 Wigmore on Evidence (1915) 2nd ed., sec. 21(3); E. R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 146; Felix Frankfurter & Henry M. Hart, *The Business of the Supreme Court at October Term, 1932* (1933) 47 Harv. L. Rev. 245, 281; John B. Waite, *Criminal Law in Action* (1934) 228.

⁵⁴ John W. Wigmore seems almost to favor affirmances in such cases. Comment (1909) 4 Ill. L. Rev. 353.

⁵⁵ "Carried to its logical limits this view would seem to justify trial by mob frenzy, provided only that the right man was hanged." William M. Cain, Note, *Error Without Prejudice Rule* (1931) 6 Notre Dame Lawyer, 383.

⁵⁶ *People v. Nuran* (1927) 246 N. Y. 100, 106, 158 N. E. 35.

procedure intended solely for the orderly dispatch of business should be distinguished from rules intended to secure a fair trial for the accused.⁵⁷ In the past too often the courts have failed to draw any such distinction.⁵⁸

Trial of Cases by Appellate Judges

How can judges adopt such an attitude? One possibility is to have appellate judges serve as trial judges as well.⁵⁹ The judges would then be confronted with the difficulties of trying cases and would not expect the impossible of trial judges. As Dean Wigmore has said, the present system has tended to make the appellate judge "more and more of a legal monk, immured in a Carthusian cell and cultivating his little plot of the law's barren logic."⁶⁰ The trial court hears witnesses, it acts with a jury, it must act promptly, it has to act under the excitement of a trial, and it has no opportunity to study printed abstracts of all the evidence or briefs on the legal issues. An appellate court if made up of judges without trial experience either as lawyers or judges is likely to overlook these things and technical decisions then emerge.⁶¹

In the early American appellate courts the appellate and trial functions were not sharply differentiated.⁶² Even today some of the New England appellate courts try certain types of civil cases. The Court of Criminal Appeals in England is made up of the judges of the King's Bench Division which spends more than half of its time trying civil cases and only about forty days a year in hearing criminal appeals. The trend in the United States has been towards a sharp separation. There has even been agitation in recent years in Massachusetts to remove what little *nisi prius* jurisdiction the appellate court has left. The cause of this separation, however, has

⁵⁷ Report of Committee E of American Institute of Criminal Law and Criminology (1910) 1 J. of Crim. L. 584, 590.

⁵⁸ "To a large extent they exist as bodies for the enforcement of all the numerous details of procedure that have been developed to control the trial of cases." Walter F. Dodd, *State Government* (1929) 320.

⁵⁹ Moorfield Storey, President's Address (1915) 5th Ann. Rep. Mass. Bar Assn. 23, 35. See Walter F. Dodd, *The Problems of Appellate Courts* (1929) 6 Am. L. Sch. Rev. 681, 685.

⁶⁰ The Qualities of Current Judicial Decisions (1915) 9 Ill. L. Rev. 529, 534.

⁶¹ Frank H. Hiscock, C. J., *The Court of Appeals of New York: Some Features of Its Organization and Work* (1929) 14 Corn. L. Quart. 131, 134; 4 Works of Bentham (1843) 351.

⁶² During the years 1814 to 1852 the General Court made up of trial judges was the highest criminal appellate court in Virginia. Francis H. McGuire, *The General Court of Virginia* (1895) 8 Va. State Bar Assn. 222; Kean, *Our Judicial System: Some of Its History and Some of Its Defects* (1889) 22 Va. Bar Assn. 139, 143.

not been so much because it was thought that such jurisdictions weakened the appellate work but because the appellate courts became congested, and hence some functions had to be sloughed off.

Assigning trial work to the appellate courts seems impracticable for two reasons. In the first place as has been seen, the appellate courts already have too much work to do. More work would simply swamp them. In the second place there is the possibility of what amounts to judicial log-rolling.⁶³ When a case tried by an appellate judge came up on appeal the appellate court would be more reluctant to reverse out of respect for their colleague and also having in mind that their own decisions might be reversed. The second objection is not a strong one, however, and the amount of good done by such a system would probably far outweigh any harm done in occasional cases. The plan has worked well in England. Doubtless one of the reasons that the English Court of Criminal Appeal is superior to the Oklahoma and Texas criminal courts is that its judges are trial judges, trying important civil cases as well.

Unified Court

It may be possible that the closest thing to a union of trial and appellate functions are the various proposals for a unified court in each jurisdiction. Under such a plan the chief justice of the state or the judicial council or some similar authority would co-ordinate the judicial organization of the state and judges from the appellate court might be shifted to the trial court and judges from the trial court to the appellate court. Appeals would become as simple as applications for a new trial or a rehearing.⁶⁴ In view of the general congestion of appellate courts the adoption of a unified court system would, however, likely result merely in the calling in of trial judges to aid the appellate court in disposing of its cases. It has been argued in favor of a unified court that duplication and certification of the records are then done away with since both the trial court and appellate court are branches of the same court.⁶⁵ However, it

⁶³ Twenty-One Years of Criminal Appeal (1929) 93 Justice of the Peace 200.

⁶⁴ "The ideal of appellate procedure should be not a separate proceeding in a district tribunal but an application for rehearing, new trial, vacation or modification, as the case may require, made in the same cause before another branch of the same tribunal." Roscoe Pound, *Canons of Procedural Reform* (1926) 51 Am. Bar Assn. Rep. 290. See Charles T. McCormick, *A Proposed Reorganization of the Illinois Judiciary* (1934) 29 Ill. L. Rev. 31, 37.

⁶⁵ Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice* (1906) 29 Am. Bar Assn. Rep. 395, 409; Pound, *The Organization of Courts*, Bull. VI, American Judicature Society 1, 25 (1914).

would seem simple enough to provide for sending up the original records without any such unification.

Procedural Reform. a) By Statute

Many reversals are for slips in procedure.⁶⁶ If it were simpler fewer grounds for reversal would be presented. Such procedural changes may be brought about in either or both of two ways: by statute or by rule of court. Past experience has indicated that legislatures engage in tinkering, patching up small defects and paying no attention to serious ones. Judiciary committees may have no lawyers on them, or mediocre country lawyers, or city lawyers, who may themselves have a criminal practice or for other reasons disapprove of reform. Other legislative business is likely to crowd out bills which serve no selfish interest. The American Law Institute Code of Criminal Procedure adopted in 1930 offers an invaluable model for legislatures. It is, however, far from perfect.⁶⁷ Many parts of it simply represent the prevalent rule in a majority of jurisdictions without laying down what ought to be the rule. Other parts represent merely a compromise—a step in the right direction without going the whole way. Furthermore its adoption might in some jurisdictions result in a static condition of the law as it might be felt that no further changes could be necessary. Hence if it is to be adopted it should preferably be by rules of court.⁶⁸

b) By Rules of Court

This is a more promising method of obtaining reform in procedure. Dean Pound and a number of others have been urging such reform in civil cases for the last quarter of a century.⁶⁹ It is only recently that it has been suggested that this be done in the criminal law.⁷⁰ The Supreme Court of

⁶⁶ James W. Garner asserts that perhaps as much as a third of litigation has to do with procedural error much of which is error in taking appeals. (1910) 1 J. of Crim. L. 469. In California more than four-fifths of the reversals have been for errors of procedure. Chester G. Vernier and Philip Selig, Jr., *The Reversal of Criminal Cases in the Supreme Court of California* (1929) 20 J. of Crim. L. 60, 65. It is to be borne in mind, however, that an error with respect to instructions may be an error concerning rules of substantive law.

⁶⁷ A criticism from an English viewpoint is that by Sir William Brunyate, *The American Draft Code of Criminal Procedure*, 1930 (1933) 49 L. Quart. Rev. 192.

⁶⁸ Report of Section on Criminal Law (1933) 19 A. B. A. J. 558; Report of Committee to Examine and Report on the Code of Criminal Procedure Drafted by the American Law Institute (1933) 58 Am. Bar Assn. Rep. 520, 524.

⁶⁹ (1909) 34 A. B. A. Rep. 578; Taft, *The Delays of the Law* (1908) 18 Yale L. J. 28, 32; Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 Ill. L. Rev. 172; (1934) 82 U. of Pa. L. Rev. 651.

⁷⁰ Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice*

Washington was one of the first to exercise the power.⁷¹ The attention of the American Bar Association was drawn to it in 1933⁷² Change by rule of court rather than by statutes has several advantages. Statutes are passed by persons many of whom have no training in the law. Legislatures are usually in session only every two years or every four years. Reform in judicial procedure is only one item of their business and often a small one. Action by the legislature is likely to be spasmodic, so that a reform much needed may be brought about very slowly if at all. On the other hand rules of court are drawn by judges and lawyers with special qualifications. They may be assembled at any time. Making rules together with the decision of cases and the administration of the judicial organization is the chief business of the courts. Rules of court are flexible as they can be changed whenever the need is felt. They would tend to discourage reliance on technical questions of procedure to defeat substantive rights, since the courts would be more likely to interpret the rules with a view to accomplishing the result for which they were intended, namely, to facilitate the work of the courts.⁷³ Making rules need not result in taking too much of the appellate court's time since a judicial council or some similar group might draw them for the court and submit them to it for approval.

It would seem that there is no phase of criminal procedure which might better be dealt with by rules of court than appeals.⁷⁴ No phase of criminal procedure is perhaps as mystifying to the lay-

by *Exercising of Judicial Power* (1925) 11 A. B. A. J. 217; Harley (1928) 14 A. B. A. J. 621; *Who Shall Control Criminal Procedure?* (1930) 13 J. Am. Jud. Soc. 107; *Why Wait on Legislatures?* (1930) 16 A. B. A. J. 440; (1930) 16 A. B. A. J. 765, 766; National Commission on Law Observance and Enforcement; Report of Procedure 31, criticized by Justin Miller, *The Report on Criminal Procedure* (1932) 189 A. B. A. J. 453, 455.

⁷¹ It laid down the rule that where the accused does not testify there may be an inference of guilt and also that there may be a tacit amendment of an information to conform to the proof. Herbert Harley, Conference of Bar Association Delegates Has Record of Accomplishment (1928) 14 A. B. A. J. 616, 621. In 1929 the Superior Court of Connecticut adopted rules as to indictments and informations.

⁷² Report of the Section on Criminal Law (1933) 19 A. B. A. J. 558; Report of Committee to Examine and Report on the Code of Criminal Procedure Drafted by the American Law Institute (1933) 58 Am. Bar Assn. Rep. 520, 524.

⁷³ Walter F. Dodd, *The Problems of Appellate Courts* (1930) 6 Am. L. Sch. Rev. 681, 685.

⁷⁴ Four per cent of American cases turn on points of appellate practice. Roscoe Pound, *The Etiquette of Justice* (1908) Neb. State Bar Assn. 231, 242. Appellate decisions in Missouri in over twenty per cent of the cases have involved either in whole or in part the mere technique of obtaining a review. John D. Lawson, *Technicalities in Procedure, Civil and Criminal* (1910) 1 J. of Crim. L. 63, 73. The number of errors in appellate procedure has been increasing in Connecticut. John K. Beach, *Observations on Connecticut Procedure* (1927) 1 Conn. Bar. J. 15, 18.

man as appeals. If an appellate court is to lay down rules of procedure certainly it ought to lay down rules as to proceedings before itself. Congress by an act approved February 24, 1933, permitted the Supreme Court of the United States to prescribe rules of practice and procedure as to federal appeals.⁷⁵ Such rules were adopted on May 7, 1934.⁷⁶ The California Judicial Council has established rules governing the record on appeal in criminal cases.⁷⁷ The Superior Court of Connecticut in 1930 adopted rules of appellate procedure.⁷⁸ The Court of Criminal Appeals in England has the power to prescribe rules. Procedure in general is determined by rules in England.⁷⁹ On June 19, 1934, President Roosevelt signed a bill authorizing the Supreme Court to prescribe rules of practice and procedure for all federal courts.^{79a}

Discretionary Appeals

Making all appeals discretionary would produce the effect of a strong tendency to do away with technicality.⁸⁰ The case would then go before the appellate court only after a preliminary sifting. The cases thus merging would have much more likelihood of having some merit in them than the unselected mass of cases which now come before the courts.

Selection of Appellate Judges

The mode of selection is likely to affect the quality of opinions.⁸¹ More important than either the procedure or the organization of the court is its personnel. There is relatively little complaint of technicality with respect to the decisions of appointive courts such as that of Massachusetts.⁸² Similarly in states like New York where

⁷⁵ Public—No. 371—72d Congress, S. 4020.

⁷⁶ Volume 291 U. S.—Number 3, Official Reports of the Supreme Court, Preliminary Print, Pages I to X.

⁷⁷ (1928) 14 A. B. A. J. 622.

⁷⁸ Second Report of Judicial Council of Connecticut (1930). The First Report of the Judicial Council of Connecticut (1929) 46, suggested that the Superior Court lay down rules to govern indictments and informations.

⁷⁹ See the discussion in Samuel Rosenbaum, *The Rule Making Authority in the English Supreme Court* (1917).

^{79a} See the discussion by Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 Michigan Law Review 1116.

⁸⁰ R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932) 42 Yale L. J. 194, 224.

⁸¹ Roscoe Pound, *The Work of the American Appellate Court* (1926) 51 Am. Bar Assn. Rep. 764, 772; Joseph R. Carroll (1920) 21 La. Bar Assn. Rep. 34, 42; R. Pugh (1920) 21 La. Bar Assn. Rep. 74, 81. Orrin N. Carter, C. J., *Methods of Work in Courts of Review* (1917) 12 Ill. L. Rev. 231.

⁸² For an attempted rating of the various state appellate courts see Rodney L. Mott, *Judicial Personnel*, May, 1933, 167 Ann. Am. Acad. Pol. Sc. 143. The judges

in practice selection of the highest appellate judges is non-partisan and based on a real effort to nominate able men the results are excellent. The decisions of the United States Supreme Court and the lower federal courts doubtless owe much of their excellence to the fact that the judges are appointed. On the other hand where judges are selected on partisan tickets by popular vote with the bar taking little interest it is not strange that the quality of judicial opinions within the jurisdiction is not high.⁸³ It is of course to be borne in mind that the mode of selection is but a single and not the most important factor bearing on technicality of decision.

Mode of Writing Opinion

This may result in technical decisions particularly where judges attempt to write dissertations on points involved.⁸⁴ Laying down principles on points not raised nor argued may embarrass the court at some future date. Judges do not have the time nor the training to expound the law in general.⁸⁵ When they decide points not argued by counsel they are likely to overlook important considerations.⁸⁶ This gap should perhaps be filled in by the creation of a ministry of justice.

The Trial Court. a) Lack of Power

Reversal for technical reasons is perhaps more the fault of the trial court judges than of the appellate judges. This is true for two reasons. In the first place the trial courts are shorn of the authority necessary to try cases in the most effective manner. The trial judge of most American jurisdictions is little more than an umpire with the real management of the case in the hands of the attorneys.⁸⁷

are rated in the following order of excellence: United States Supreme Court, Federal Circuit Courts of Appeals, Federal District Courts and State Appellate Courts. See also the rating by Wigmore in the April, 1936, issue of the American Bar Association Journal XXII:227.

⁸³ For an excellent description of the usual type of state appellate judge see Wigmore, *The Qualities of Current Judicial Decisions* (1915) 9 Ill. L. Rev. 529.

⁸⁴ "One of the former Justices of this Court, George Ramsey, came to this Court with the avowed purpose of setting an example of brevity. (This he decries.) Brevity he said was the pride of his life. Then he wrote *Pettis v. Johnston*, 78 Okla. 277 (here he demands strict proof), with its 34 paragraph syllabus and its twenty page treatise on collateral attack and extrinsic evidence. So that now every lawyer upon every side of every question finds comfort in the remarkable text of Ramsey's work." Fletcher Riley, *A Long Appeal for Brevity* (1932) 3 Okla. State Bar J. 116. See also William L. Carpenter, *Courts of Last Resort* (1910) 19 Yale L. J. 280, 290.

⁸⁵ Compare the view of John S. Dawson, J., *Rationale of Appellate Review* (1926) 51 Am. Bar Assn. Rep. 778, 782.

⁸⁶ One of the few contrary opinions is that of Dean John W. Wigmore (1921) 16 Ill. L. Rev. 247.

⁸⁷ Roscoe Pound, *The American Attitude Towards the Trial Judge* (1928) 2 Dak. L. Rev. 5; John B. Waite, *Criminal Law in Action* (1934) 199.

Days may be spent in the selection of a jury as compared with a few minutes in England. Technical objections to the admission or exclusion of evidence are constantly presented to the court. Innumerable and contradictory instructions may be asked. The court in most jurisdictions is not permitted to comment on the evidence or testimony of the witnesses. The jury is given too much and the trial judge too little power. The jury may not only decide issues of fact but issues of law and apply what it deems to be the law to the facts, since the whole matter is lumped together in the shape of a general verdict. To offset this weakness of the trial court in relation to the jury, the appellate courts, as Dean Green has so interestingly pointed out, assumed to themselves an ever increasing degree of control.⁸⁸ But this control comes too late in the judicial process. The control should be exercised in the trial process so as to avoid the waste and delay of an additional judicial process. A strong trial court exercising real authority over the jury and respected by the lawyers can reduce the need for appeals and simplify the appellate process.⁸⁹ The trial court should not be so far behind the appellate court.⁹⁰ To some extent the appellate courts themselves are to blame. A courageous appellate court might itself prescribe rules of trial procedure and treat legislative restrictions as unconstitutional interference with inherent judicial power. An enlightened bar is a necessary prerequisite to so wide a departure from existing practice.

b) Selection

Merely to confer additional powers of any sort on trial judges is not to usher in the millenium, however. The judges must be of a kind which deserve to have such powers.⁹¹ The present opposition among lawyers in many states against allowing the trial judge to comment on the evidence may be justified to the extent that poor trial judges are chosen. Too often at the present time judges are selected not for judicial ability and temperament but because they know how to advertise themselves. The ordinary voter cannot distinguish between a good and a poor candidate. If by chance a good

⁸⁸ Jury Trial and the Appellate Court (1930) Ill. Bar Assn. Rep. 261, 267; Judge and Jury (1930) 375, 380.

⁸⁹ Moorfield Storey, President's Address (1915) 5 Assn. Rep. Mass. Bar Assn. 23, 31.

⁹⁰ Roscoe Pound, *The Judicial Office in America* (1929) 41 Va. State Bar Assn. 406, 417; James G. Gantt, J., *The Nisi Prius Judge in Our Judicial System* (1902) 15 Va. Bar Assn. Proc. 169, 171; Leon Green, *The Duty Problem in Negligence Cases* (1928) 28 Col. L. Rev. 1014, 1037.

⁹¹ Note, *Reversals in Illinois Criminal Cases* (1929) 42 Harv. L. Rev. 566; E. R. Sunderland, *The Problem of Appellate Review* (1927) 5 Tex. L. Rev. 126, 127.

candidate is elected he soon has to begin to think about being re-elected. Appointment by the executive or by the executive together with an advisory group such as a judicial council, for a period limited only by good behavior, seems essential if better judges are to be obtained.

c) Supervision

Now having conferred the requisite degree of authority on trial judges and provided for a proper mode of selection little remains to be done except to provide for their supervision. This can perhaps best be accomplished through a unified court system. If a unified court for the whole state cannot be obtained it may still be feasible to get one in large metropolitan centers.⁹² The judicial personnel can then be employed so that the more important criminal cases will be tried by skilled trial judges who know how to avoid prejudicial error. The "superintending control" given in some states to the appellate courts may be made the basis of a certain amount of supervision.⁹³ Under this power appellate courts have compelled a change of venue and ordered an inferior court to go on with a criminal proceeding when it has wrongfully quashed a complaint. The development of an adequate plan of supervision will do much to eliminate the need of reversing to secure uniformity of standards.

Waiver of Jury Trial. a) Instructions

Provision for waiver would do much to eliminate technical reversals. Statistics indicate that most reversals are for errors in instructions to the jury or in admission or exclusion of evidence.⁹⁴ Jury trials have been assigned the chief blame for the necessity of appeals, new trials, and a host of other evils.^{94a} Where there is no jury trial there are of course no instructions as the court itself passes on the facts. Theoretically the function of instructions is to enlighten the jury on the law. But in practice the charge to the jury has been a favorite trap of the defendant and a convenient vehicle for the

⁹² Herbert Harley, *The Need for a Criminal Court* (1919) 28 Yale L. J. 567.

⁹³ (1921) 30 Yale L. J. 755; 20 L. R. A. (n. s.) 942; *Lowe v. District Court*, (1921) 48 N. D. 1, 181 N. W. 92.

⁹⁴ Joseph Green and Thomas J. Connors, *Causes for Reversals of Cook County Convictions 1924-1928* (1932) 27 Ill. L. Rev. 100; *Missouri Crime Survey* (1926) 223; Keith Carter, *The Texas Court of Criminal Appeals* (1933) 11 Tex. L. Rev. 185, 198. Chester G. Vernier and Philip Selig, Jr., *The Reversal of Criminal Cases in the Supreme Court of California* (1929) 20 J. of Crim. L. 60, 65; G. A. Sherrill, *Criminal Procedure in North Carolina* (1930) 67.

^{94a} "The difficulties of evidence, instructions, new trials, appellate review, and the abuses which arise from crowded dockets, excessive costs, unethical practices, and most of the other troublesome incidents of the judicial process result primarily from jury trial." Leon Green, *Judge and Jury* (1930) 375.

appellate court's exercising control over the trial court.⁹⁵ It is not hard to demonstrate that a technically perfect instruction is almost impossible, hence a reversal may be made to depend on the discretion of the appellate court. A trial court presented with a mass of confusing and contradictory instructions by the lawyers on both sides, with little time to ponder over them, can hardly be blamed if it falls into error. If a jury is used the trial court should not be confined to giving only the instructions asked for as it is in Mississippi.⁹⁶ The federal rule of discretion in the trial court seems preferable. Instructions should be simple.⁹⁷ Prejudicial errors may in large part be avoided by the giving of cautionary instructions. Since the appellate courts developed the rules of misdirection for their own benefit, they should employ them for their own benefit, too, and not reverse for mere technical error.

b) Evidence

The other serious defect many times associated with jury trials is the large proportion of reversals for errors in admitting or excluding evidence.⁹⁸ Any student of the law of evidence knows that many of its rules developed as they did because cases were tried by a judge and a jury and not by a judge alone. Where cases are tried in our courts today without a jury, lawyers raise relatively few objections to evidence. If there is any uncertainty the judge hears the evidence and states that if it appears to be inadmissible he will ignore it in his findings. From the point of view of appeals trials by jury are doubly objectionable. They result in the necessity of technical rules of evidence at the trial. They clog not only the trial courts but the appellate courts.⁹⁹ They make review of the facts upon appeal more difficult as a judge can make a statement of his findings of fact while what the jury found is concealed within

⁹⁵ R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932) 42 Yale L. J. 194, 204.

⁹⁶ G. E. Osborne, *Some Problems of Procedural Reform* (1921) 7 A. B. A. J. 245, 249.

⁹⁷ Raymond Moley, *Our Criminal Courts* (1930) 95. This is recommended by the California Crime Commission, 1929 and the Illinois Crime Survey.

⁹⁸ Judge Joseph N. Ulman points out that in a single criminal case tried by him he made 830 rulings on evidence, 615 being adverse to the defendant. *A Judge Takes the Stand* (1933) 266.

⁹⁹ In a survey of 8800 civil cases disposed of by the Superior Courts of Connecticut during 1925 and 1926, 26 per cent of jury cases and 8 per cent of court cases were appealed. Leon Green, *Judge and Jury* (1930) 410. The Louisiana Supreme Court is less strict on matters of evidence when trial is by the court. Paul M. Hebert, *The Problem of Reversible Error in Louisiana* (1932) 6 Tul. L. Rev. 169, 191; *State v. Williams* (1926) 160 La. 435, 107 So. 296.

the folds of a general verdict. The supremacy of the jury was long used as an argument against letting the appellate court review the facts.

In cases where a jury trial is had some relief against technicality as to evidence may be obtained provided the appellate court assumes the right attitude.¹⁰⁰ In deciding whether a given rule should be enforced or not the court should inquire into the need for so doing. What end is to be served? More discretion might be given to the trial courts in the application of the principles of evidence. Decisions that the trial judge cannot comment on the evidence should be reversed.

A recent New York study of civil appeals to the first department of the appellate division in 1930 taken by the defendant against money judgments secured against him indicates that a larger proportion of court cases are reversed than are jury cases.¹⁰¹ This, of course, proves very little either as to the general run of civil cases and even less as to criminal cases. Is it not likely that the more difficult cases were tried by the court? If the cases were more difficult more reversals might be expected.

Prosecuting Attorney

Reversals can occur for no other reason than the mistakes of the prosecuting attorney as the state cannot appeal from an acquittal. It goes without saying then that improvement in the work of the prosecuting attorney will mean fewer reversals.¹⁰² At present he is usually elected and holds office but for a short term. He may be over-anxious to secure convictions so as to make such a name for himself to obtain a better office. The public has its eye on the trial so that he can afford to risk the danger of an appeal. He may be young and inexperienced with the result that he draws an indictment improperly, or secures the admission of improper evidence, or secures exclusion of proper evidence, or the giving of prejudicial instructions. He may fail to co-operate with the attorney general when that official is charged with the duty of defending appeals.¹⁰³

¹⁰⁰ John W. Wigmore, *The Qualities of Current Judicial Decisions* (1915) 9 III. L. Rev. 529, 534.

¹⁰¹ *Some Aspects of Appeals* (1934), published by the New York Law Society, p. 3. For a contrary result, see Charles E. Clark and Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration* (1934) 43 Yale L. J. 867, 882.

¹⁰² Numerous cases of reversal are discussed by William M. Cain, *Sensational Prosecutions and Reversals* (1931) 7 Notre Dame Lawyer 1.

¹⁰³ Report of the National Commission Law Observance and Enforcement on Prosecution (1931) 10, 14. Until recently in Missouri a defendant convicted in a trial court might get immunity by obtaining release on bail pending appeal

In many cases he has failed to file any brief on behalf of the state.¹⁰⁴

The way out seems to be to require the selection of prosecuting officials for long terms by the same authority which selects the judges.¹⁰⁵ All the reasons which demand the abolition of popular election of judges do so in the case of prosecuting officials. Furthermore they should be made subject to central supervision. They should be required to make reports to the attorney general.¹⁰⁶ Partial relief may be secured if trial judges will promptly admonish prosecutors guilty of misconduct.¹⁰⁷

The Bar

Improvement in the character of the bar is also plainly needed.¹⁰⁸ The appellate judges, the trial judges, and the prosecuting attorney all come from the bar. The attorneys who take appeals also are members of the bar. An incompetent lawyer can render but little assistance to the appellate court in deciding the appeal. If the briefs and arguments of the lawyers stress technical considerations the decision is likely to be permeated by them.¹⁰⁹ An ignorant bar and an over-contentious bar will take exceptions to rulings on evidence which would pass unnoticed in England. An unethical lawyer will appeal merely for delay.¹¹⁰ On the other hand where counsel is properly trained and has the proper professional spirit he will present the case properly in both courts on the merits with clarity and brevity. To secure such a bar the standards for

and the failing to prosecute the appeal. Then the appeal having been taken, local officers paid no further attention to the matter; and not being prosecuted the appellate court knew nothing of the matter. Missouri Crime Survey (1926) 151, 358. M. C. Sloss, Reform of Criminal Procedure (1911) 1 J. of Crim. L. 705, 713. The state of the law as to the duties of the prosecuting attorney on appeal is discussed in De Long and Baker, The Prosecuting Attorney, Powers and Duties in Criminal Prosecution (1934) 24 J. of Crim. L. 1025, 1029.

¹⁰⁴ Criminal Justice in Cleveland (1909) 139, 187, 687.

¹⁰⁵ Bruce, The American Judge (1924) 87.

¹⁰⁶ De Long and Baker, The Prosecuting Attorney; Provisions of Law Organizing the Office (1933) 23 J. Crim. L. 926, 957; Earl H. De Long, Powers and Duties of the State Attorney-General in Criminal Prosecutions (1934) 25 Journal of Criminal Law and Criminology, 358, 372; W. F. Willoughby, Principles of Judicial Administration (1929) Chap. 11.

¹⁰⁷ William M. Cain, *Sensational Prosecutions and Reversals* (1931) 7 Notre Dame Lawyer 1, 2.

¹⁰⁸ For a good description of lawyers for the defense in practice, see John B. Waite, *Criminal Law in Action* (1934) 171.

¹⁰⁹ John W. Wigmore, *The Qualities of Current Judicial Decisions* (1915) 9 Ill. L. Rev. 529; Roscoe Pound, *Criminal Justice in America* (1929) 219; Roscoe Pound, *What Is a Good Legal Education* (1933) 19 A. B. A. J. 627, 628.

¹¹⁰ These seem to be no cases where an attorney prosecuting a criminal appeal was disbarred, suspended, fined, or more severely punished than being censured by the court in delivering its opinion. (1929) 28 Mich. L. Rev. 70.

admission to the bar must be elevated. Possibly it may be necessary to limit the appellant to choice from a panel of lawyers. A better type of lawyer for the defense would result in less temptation to the prosecuting attorney to resort to wrong practices.¹¹¹

The present mass of judicial decisions makes it hard even for good lawyers to render the proper assistance to the appellate courts. Is it any wonder that the amount of time that must be spent in finding the law prevents the court from giving the careful thought and deliberation necessary to secure a well-balanced decision? An easy door is opened to going off on some technical ground rather than on the merits. The combination of a welter of decisions with congestion in the appellate court is bound to have its effect. It is therefore imperative that for standards be so improved that lawyers who represent appellants be wise enough to know how to pick and choose with nice discrimination.¹¹² Without such improvement the victory is likely to go to those industrious lawyers who spend days and nights seeking for a case on all fours with their own. A separate appellate bar would improve matters but would be impractical in democratic United States.¹¹³

The Law Schools

If it is true that appellate courts received inadequate assistance from the lawyers it is equally true that they have received until recent years almost no assistance from legal scholars.¹¹⁴ The leading treatise on Criminal Law in the United States, that by Bishop, has remained practically unchanged for the past sixty years. There is nothing in criminal law to correspond to Wigmore on Evidence or Williston on Contracts. It has been customary in many American law schools to assign the subject of criminal law to the most inexperienced professor. In only two or three law schools are there professors who devote their whole time to the subject. Criminal procedure is usually not taught in any but the larger schools; and criminology is usually relegated to the sociology department of the arts college.

The past decade or two has seen a change of attitude, however,

¹¹¹ Alexander A. Bruce, *The American Judge* (1924) 83.

¹¹² John W. Davis, *The Case for the Case Lawyer* (1916) 41 A. B. A. Ky. 757; (1917) 3 Mass. L. Quart. 99, 103.

¹¹³ Carter, Orrin N., C. J., *Preparation and Presentation of Cases in Courts of Review* (1917) 12 Ill. L. Rev. 147, 159.

¹¹⁴ Roscoe Pound, *Criminal Justice in America* (1929) 210; Roscoe Pound, *The Future of the Criminal Law* (1921) 21 Col. L. Rev. 15; Roscoe Pound, *What Can Law Schools Do for Criminal Justice?* (1927) 12 Iowa L. Rev. 105.

on the part of the law schools. The law schools have played the leading part in the drafting by the American Law Institute of a Code of Criminal Procedure. They will doubtless play a leading part when the Institute takes up the restatement of the substantive law of crime. The work of the National Commission on Law Observance and Enforcement was substantially assisted by the law schools. The Harvard University Law School has established an Institute of Criminal Law and undertaken a comprehensive survey of crime in Boston. The indications are that the law schools are awaking to the importance of research in criminal law. The law reviews are publishing articles of a more critical nature than was earlier the case.¹¹⁵

A Ministry of Justice

It is evident that the law schools and the bar can do much to assist the appellate courts. But they alone cannot do everything. The bar is busy with its private practice. It has little time to devote to reforming the law. Its most successful practitioners are usually the least interested in securing improvements since it is but human to feel that a system under which one has attained success does not need to be improved. Law teachers except in a few law schools must devote most of their time to their classes. Some other agency is therefore required.¹¹⁶ The judicial councils which have been established in an increasing number of states during the past decade help to meet the need.¹¹⁷ In Europe there are ministries of justice. The proper development of these organs can do much to relieve the appellate court of all but the function of doing justice in particular appeals. They could supervise the trial courts so that reversals become less necessary. They could carry the burden of developing the law.

A ministry of justice could do a great many things for the improvement of the administration of the criminal law. It could do much to resolve the conflict of aims, attitudes and techniques which now exist on every hand. It could promote co-ordination of effort

¹¹⁵ Unfortunately as Dean Wigmore has well pointed out, however, many appellate judges fail to use the law reviews and prefer to cite hack writers. *The Qualities of Current Judicial Decisions* (1915) 9 Ill. L. Rev. 529.

¹¹⁶ Hessel E. Yntema, *Legal Science and Reform* (1934) 34 Col. L. Rev. 207, 221; Roscoe Pound, *Juristic Problems of National Progress*, 22 Am. J. of Soc. 721; Roscoe Pound, *Anachronisms in Law* (1930) 3 J. Am. Jud. Soc. 143; Benjamin Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113; Sheldon Glueck, *The Ministry of Justice and the Problem of Crime* (1926) 4 Am. Rev. 139; Claud Mullins, *In Quest of Justice* (1931) 149.

¹¹⁷ E. R. Sunderland, *The Function and Organization of a Judicial Council* (1934) 9 Ind. L. Jour. 479.

as well of aim between prosecutors, counsel, judges, clerks of court, probation officers and other social workers. It could bring about a scientific, systematized plan of record-keeping. It could study the law in active rules and institutions which are antiquated might be brought up to date. It should engage in scholarly research. It should offer advice to the legislature. Starting out with the correction of the existing legal system it might later expand so as to initiate more far-reaching reforms.

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