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APPELLATE REMEDY: THE ANCIENT PRECEDENTS OF A MODERN RIGHT

Peter S. Poland*

Recourse to appeal, in both civil and criminal matters, is a fixture of our modern state and federal legal systems.¹ While the American right of appeal does not rise to the level of a constitutional right, it is not a doctrinal abstraction. Rather, it is statutorily established,² and referenced explicitly in the Federal Rules of Appellate Procedure.³ As most appellate judges are aware, litigants began exercising this right in increasing numbers in what could be termed an appellate explosion ignited in the early 1960s that lasted for decades.⁴ Because of the

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1. See, e.g., Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985) (characterizing right to at least one appeal as “nearly universal” in the United States).

2. An early reference to a right approaching the modern appeal appeared in the Evarts Act, 26 Stat. 826 (1891), which established the Circuit Courts of Appeals. *Id.* at § 4 (providing that “all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established”); see also Dalton, *supra* note 1, at 62 n.4 (citing McKane v. Durston, 153 U.S. 684, 687 (1894), for the proposition that right to appeal is “statutory, . . . not constitutionally compelled”).

3. FED. R. APP. P. 3 (“Appeal as of Right—How Taken”); FED. R. APP. P. 4 (“Appeal as of Right—When Taken”).

4. E.g., Ben F. Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U. L. REV. 205, 205 (1984). But at least some courts began to experience a decrease in filings after the turn of the twenty-first century. See, e.g., *Federal Judicial Caseload Statistics 2015*, U.S. CTS. (2016), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (noting that in the year ended March 31, 2015, “filings declined 2.5 percent” in the federal courts of appeals); *Federal Judicial Caseload Statistics 2014*, U.S. CTS. (2015), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> (noting that in the year ended March 31, 2014, “filings . . . fell 1.5 percent” in the federal courts of appeals); *Federal Judicial Caseload Statistics 2013*, U.S. CTS. (2014), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013>

proliferation of appeals in the recent past, some perceive the appeal⁵ as a modern creation. But tradition holds, albeit vaguely, that the antecedents of our modern American appellate system lie in the ancient world.⁶ This essay begins with short summaries of ancient Near Eastern and Mediterranean legal procedures that constitute or resemble appellate systems, and then briefly explores which of their components endure in modern American appellate procedure.

I. ANCIENT APPELLATE PRECEDENT

A. Mesopotamia

The most reliable evidence with which to reconstruct ancient Mesopotamian legal procedure dates to around the turn of the Second Millennium, B.C.E., when Sumer enjoyed a final resurgence before its rapid decline. Courts of this era rendered their final judgments on clay tablets of “no complaining,” and evidence suggests that unsuccessful plaintiffs were required to

(noting that in the year ended March 31, 2013, filings in the federal courts of appeals fell by “less than 1 percent”); *see also* *Judicial Caseload Indicators*, U.S. CTS. (2013), <http://www.uscourts.gov/statistics-reports/judicial-caseload-indicators-federal-judicial-caseload-statistics-2013> (noting that filings in the federal courts of appeals declined by 6.7 percent between 2004 and 2012); *cf.*, *e.g.*, Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume,”* 8 J. APP. PRAC. & PROCESS 101, 102, 113–14 (2006) (pointing out that despite the “doomsday clamor” prevalent from the 1960s through the 1990s, “the courts of appeals [were] not hopelessly backlogged” in 2005, and were by then “manag[ing] to decide about as many appeals as [were] filed each year”).

5. “Appeal” as used throughout this essay refers to the modern definition of the term: “[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp[ecially], the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.” BLACK’S LAW DICTIONARY 117 (Bryan A. Garner ed., 10th ed. 2014). This article does not address other definitions of appeal peculiar to past eras and unrelated to the modern term, such as the “appeal of felony” introduced to England after the Norman Conquest, which consisted of the victim’s oral accusation of serious crime. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 573 (3d ed. 1990) (indicating that this “appeal” might also be made by “approvers”—accomplices of the accused who could avoid punishment if they agreed to prosecute their fellows); HAROLD J. BERMAN, LAW AND REVOLUTION 450 (1983) (explaining that “appeal” as used in medieval England “had no such connotations as it has today”).

6. *See, e.g.*, FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 17 (1980) (observing that our modern appellate system can be traced, at least in part, to the ancient Near East).

swear oaths not to litigate the same issue.⁷ However, if new evidence emerged, or if a material error occurred in the first trial, a litigant could bring a second proceeding in either the same court or a different horizontally situated court.⁸ There is no evidence of a vertical hierarchy of Mesopotamian courts, and litigants lacked the means to appeal to a higher authority.⁹ Despite this absence of vertical appeal, some experts have come to believe that at least some evidence suggests that “an appellate process of some kind was practiced” in ancient Mesopotamia based upon the availability to litigants, in certain circumstances, of the second proceeding.¹⁰

B. Egypt

In its deeper past, Egypt’s judicial system resembled that of Mesopotamia: horizontal courts and the availability of a new trial if certain conditions—such as the discovery of new evidence—were met.¹¹ But by the Twenty-second Dynasty (945–715 B.C.E.), Egypt employed an appellate system¹² that included a right of appeal in both civil and minor criminal cases.¹³ Yet this appeal was not to a higher court of trained judges, but to the mystical jurisprudence of an oracle.¹⁴

Litigants likely approached the oracle with an even greater degree of solemnity and procedural formality than they would

7. RUSS VERSTEEG, *EARLY MESOPOTAMIAN LAW* 58 (2000) (indicating that this “document of no (further) contest” showed “that the case was essentially *res judicata*”).

8. *Id.* (noting that “[i]n many cases . . . parties were not permitted any opportunity to a higher authority” (footnote omitted)).

9. *Id.*

10. Ronald Veenker & J. Cale Johnson, *The Appellate Process in a Legal Record {di til-la} from Ur III Umma*, 36 *ALTORIENTAL. FORSCH.* 349, 349 (2009) (discussing an inscription on a tablet in which “an initial legal ruling adjudicated some aspects of the slave sale in question, but other aspects such as the purchase price were appealed [sic] to the court of the provincial governor,” while also noting that scholars hesitate to “accept the existence of any formal process of appeal” or “a hierarchically organized system of appellate courts” in ancient Mesopotamia).

11. Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* 291, 310 (J.R. Harris ed., 1971).

12. RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 89 (2002).

13. *Id.*

14. *Id.* The oracle was not only an intermediate appellate forum, it also had original jurisdiction over real-property disputes, and was a frequent forum for identification of thieves. *Id.* at 59–60.

have brought to a court of justice; indeed, the ruling of the oracle was perceived as a literal epiphany.¹⁵ Litigants could petition for trial by oracle in either a written document or orally, and evidence suggests that the petitions were carefully and thoughtfully composed.¹⁶

The oracle as appellate decisionmaker was in its physical manifestation a statue of a deity (sometimes but not always a deceased and deified pharaoh) carried on a litter by several priests who interpreted the will of the god by moving the litter forward or backward in response to questions. Backward movement indicated “no,” and historians speculate that forward meant “yes.”¹⁷ Ancient sources also state that the deity “spoke,” likely when directional movement could not adequately render a judgment.¹⁸ Logic suggests that the god’s speech was uttered by the priests, who briefly became de facto appellate justices before returning to their priestly duties.

Despite the evidence supporting a role for the oracle in the legal system, it bears noting that we have relatively little confirmation of the oracle’s status as an intermediate appellate forum. That conclusion is contingent on the accuracy of the theory of some Egyptologists that a final appeal could, under certain circumstances, be made to the reigning pharaoh himself.¹⁹ In other situations, the decision of the oracle was final.

C. Athens

Aristotle credits Solon, the sixth century B.C.E. Athenian politician and poet, with giving the power of appeal to the popular law courts.²⁰ Although there are varying interpretations among classicists as to the precise scope of the appellate system created by Solon, the most probable construction—indeed, the one supported by Plutarch’s writings—maintains that a litigant

15. *Id.* at 58–59 (indicating that the oracle was believed to be the manifestation of a deity, and its ruling a revelation of the deity’s will).

16. *Id.* at 58.

17. *Id.* at 59.

18. *Id.*

19. *Id.* at 88.

20. MICHAEL GAGARIN, *EARLY GREEK LAW* 73 (1989).

dissatisfied with the judgment of a magistrate could appeal to the Eliaia, which was the assembly of Athenian citizens convened for judicial purposes (a “jury,” in the modern sense).²¹ The Eliaia heard the case *de novo* and had the power to affirm the magistrate’s judgment or reverse it and render a new judgment.²² The Athenian appeal was limited to correction of the magistrate’s judgment; the jury was the authoritative pinnacle of Athenian jurisprudence and its judgments could not be appealed. But by the fifth century B.C.E., magistrates no longer rendered judgments, and legal disputes originated in the Eliaia.²³

D. Rome

Classicists trisect Roman history into the monarchy, the republic, and the empire. Not until the empire—with implementation of a new legal procedure during the reign of the emperor Augustus—did the Roman legal system adopt a hierarchy of courts and an accompanying appellate system.²⁴ Under that Roman appellate procedure, new evidence could be presented in what essentially was a rehearing before a superior court.²⁵ Roman litigants were required to present oral or written notices of appeal to the courts whose judgment they sought to appeal.²⁶ By the time Constantinople had become the center of the empire, appellate volume had grown so great that the emperor Justinian decreed that a judgment could not be appealed more than twice.²⁷

21. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 30–33 (1978); RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* 214–15 (2002).

22. See MACDOWELL, *supra* note 21, at 30.

23. VERSTEEG, *supra* note 21, at 214.

24. H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 400, 400 n.8 (3d ed. 1972). But some appellate rights antedated the imperial hierarchy of courts, such as the right of a Roman citizen to appeal a death sentence rendered by a magistrate. See PAUL DU PLESSIS, *BORKOWSKI’S TEXTBOOK ON ROMAN LAW* 5, 79–82 (4th ed. 2010) (noting that the appeal was “to the people,” and discussing system of *cognitio*, or “investigation,” which included appeal).

25. See JOLOWICZ & NICHOLAS, *supra* note 24, at 444.

26. *Id.* at 400. Under certain circumstances, the emperor himself occasionally heard appeals as an appellate court of final resort. See DU PLESSIS, *supra* note 24, at 81 (noting that emperors’ jurisdiction became more “clearly delineated” over time).

27. DU PLESSIS, *supra* note 24, at 81.

II. ANCIENT APPELLATE LEGACY

*A. The Appeal in America**1. In the Beginning*

Contrary to popular belief, the United States did not seamlessly inherit its appellate system from England. In fact, English common law did not incorporate a formal appellate system until the nineteenth century.²⁸ The institution and vitality of the appellate process in the American colonies may have been a direct result of the preexisting corporate structure of the New England trading companies, whose internal regulations featured a vertical appellate system of remedy.²⁹ This culture of appeal³⁰—itself impacted by European civil law, a form of which was practiced in England’s ecclesiastical courts³¹—may have in some geographic areas moved into the public sphere during the transition from company-administered land grants to colonies.³²

28. GREGORY DURSTON, *CRIME AND JUSTICE IN EARLY MODERN ENGLAND 1500–1750*, at 627–28 (2004) (noting that “[h]istorically, common law lacked a mechanism allowing an already adjudicated case to be appealed to a higher tribunal” and that England’s “specialist Criminal Court of Appeal was only established in 1908,” and also pointing out that it remains “very difficult to go beyond a jury decision” in England today).

29. Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 *HASTINGS L.J.* 913, 944–50 (1997).

30. The term “culture of appeal” suggests that “the specialized technical usage of the word [appeal] in legal spheres was inseparable from its more colloquial usage in the political sphere and that the term, ‘the appeal,’ also referred to a set of broader meanings and practices” during the early colonial period. *Id.* at 922.

31. *Id.* at 923. This culture of appeal traces back to imperial Roman legal procedure. *Id.*; see also JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 147 (2007) (noting that, while the origins of modern European civil law lie in ancient Rome, a variety of German, French, and pan-European influences have impacted its formation over the centuries). In keeping with the tradition of continental civil law, English ecclesiastical courts possessed an advanced vertical appellate system long before one appeared in English common law. R.B. OUTHWAITE, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500–1860* at 4 (2006) (noting that in the ecclesiastical courts, “[a]ppeals generally lay from lower to higher courts”).

32. Bilder, *supra* note 29, at 944–50 (discussing colonial Massachusetts and Rhode Island).

Some American colonists possessed a right of appeal to the Privy Council in London by the late seventeenth century.³³ And some of our oldest state supreme courts trace their histories back to colonial times.³⁴

2. *Under the Constitution*

The Constitution establishes the Supreme Court and grants Congress the power to create inferior courts, thus contemplating a judicial hierarchy,³⁵ which Congress established in 1891 by creating intermediate appellate courts.³⁶ Their successors, today's federal courts of appeals, review questions of law *de novo* and review findings of fact for substantial evidence in jury trials and for clear error in bench trials.³⁷

The Supreme Court exercises discretionary review.³⁸ But a civil litigant dissatisfied with the ruling of a federal district court may either move for a new trial or move to vacate the judgment based upon newly discovered evidence, and a criminal defendant is given a similar opportunity.³⁹ And of course a first

33. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 16 (2005) (referring to the Massachusetts Charter of 1691).

34. *See, e.g., The Supreme Court of Virginia*, VA. JUDICIAL SYS. (Sept. 2010), <http://www.courts.state.va.us/courts/scv/scvinfoinfo.pdf>; *Supreme Court of Pennsylvania—Overview*, UNIFIED JUDICIAL SYS. OF PA. (2016), <http://www.pacourts.us/learn?q=supreme>; *About the Supreme Judicial Court*, MASS. CT. SYS. (2016), <http://www.mass.gov/courts/sjc/supreme-judicial-court.html>.

35. U.S. CONST. art. III, § 1 (providing that “[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish”); U.S. CONST. art. I § 8, cl. 9 (empowering Congress to “constitute tribunals inferior to the Supreme Court”).

36. *See, e.g., Andrew T. Solomon, The Texas Supreme Court’s Petition System: A System in Need of Reexamination*, 53 S. TEX. L. REV. 695, 696 n.2 (2012) (referring to Evarts Act).

37. *E.g., FED. R. CIV. P. 52(a)(6)* (providing that “the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility”); *see Chen v. Mukasey*, 510 F.3d 797, 801–02 (8th Cir. 2007) (discussing differences between treatment of administrative-law judge’s findings and findings by jury); *Southex Exhibitions, Inc. v. R.I. Builders Ass’n, Inc.*, 279 F.3d 94, 98 (1st Cir. 2002) (noting that “pure legal issues, such as statutory interpretations, are reviewed *de novo*,” and that factual findings are reviewed “only for clear error”). These standards of review trace to “the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide.” *Ga. v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

38. *See, e.g., Solomon, supra* note 36, at 696 n.2 (discussing discretionary review).

39. *FED. R. CIV. P. 59* (“New Trial; Altering or Amending a Judgment”); *FED. R. CIV. P. 60* (“Relief From a Judgment or Order”); *FED. R. CRIM. P. 33* (“New Trial”).

appeal to the relevant federal court of appeals is a matter of right.⁴⁰

The Constitution does not mandate that states provide appellate review.⁴¹ While not compelled to implement appellate systems, every state has done so, and nearly every state offers access to its appellate system by right.⁴²

B. Our Ancient Appellate Inheritance

The organizing principle behind every appellate system in the United States is a vertical establishment of courts, with higher courts possessing express power to correct the errors of lower courts, and litigants in most states possessing a right to appeal.⁴³ Interestingly, there is a chronological trend toward this modern appellate structure among the ancients, with a progression from new trials in horizontally situated Mesopotamian courts to vertical appeals in Rome. But this progression probably did not involve the intercultural transmission of early notions of appellate law from Near Eastern to European civilizations: The majority of academics agree that the creation of Greek and Roman law was endogenous to Europe; only a minority point to Near Eastern influence.⁴⁴ The historical contribution and continuity of Rome's appellate system, alone, are the ancient characteristics most readily verifiable in the modern appellate law of the United States.

Three components of ancient appellate law, millennia later, are fundamental to our state and federal appellate systems: the new trial, the right to appeal, and the vertical hierarchy of appellate courts. Appellate systems of the ancient world appear

40. See *supra* notes 2 & 3.

41. E.g., *Griffin v. Ill.*, 351 U.S. 12, 18 (1956).

42. Dalton, *supra* note 1, at 62 n.2 (noting that only Virginia and West Virginia do not provide a right of appeal, but describing access to appellate courts available in those states).

43. See, e.g., Solomon, *supra* note 36, at 695–96; Peter D. Marshall, *A Comparative Analysis Of The Right To Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 2–3 (2011) (pointing out that primary purpose of appeal is correction of error); *contra* Dalton, *supra* note 1 (indicating that Virginia and West Virginia are exceptions).

44. See, e.g., GAGARIN, *supra* note 20, at 126–29 (advancing majority view); *but see generally* RAYMOND WESTBROOK, *EX ORIENTE LEX: NEAR EASTERN INFLUENCES ON ANCIENT GREEK & ROMAN LAW* (Deborah Lyons & Kurt Raaflaub eds., 2015) (advancing minority view).

to have originated as an equitable response to the post-trial discovery of new evidence and the occurrence of error in the application of law or in the findings of fact. These ancient appellate systems first implemented horizontal new trials to account for new evidence or error, and this implementation later transitioned to a more sophisticated system of vertical appeal. Thus, the ancients could obtain new trials if new evidence emerged or if the original court materially erred;⁴⁵ these precedents endure.⁴⁶ Indeed, a motion for new trial still precedes and complements vertical appeal, a noteworthy procedural integration of this ancient inheritance into a modern system.⁴⁷

Origin of the right of appeal lies in the ancient world.⁴⁸ Much as in the modern era, ancient litigants generally had a right to intermediate appeal, but further appeal was discretionary. Of course, the discretion of final appeal in the ancient world ultimately resided with pharaoh or emperor, not a federal or state court of last resort.

Among the ancient legal systems, Rome's appellate system most resembles our own. This resemblance not only is evidenced in vertical appellate hierarchy and the staffing of appellate courts with judges rather than jurors or priests, but also in functional procedure such as the Roman notice of appeal.⁴⁹ But the Athenian appellate system also cannot be overlooked; vertical appeal to an appellate assembly of jurors satisfies the modern definition of appeal, and may have been an intellectual antecedent for Rome's more developed system of vertical appeals.

Sources available to reconstruct ancient appellate law are scant, short, and fittingly delphic. Notwithstanding their evidentiary shortcomings, they offer sufficient substance to support an analysis that goes beyond the frequently encountered generalization that appellate law originated in the ancient world. Even with our limited access to the laws and legal records of the

45. See, e.g., VERSTEEG, *supra* note 7, at 58 (Mesopotamia); Theodorides, *supra* note 11, at 310 (Egypt).

46. FED. R. CIV. P. 59 (addressing new trial); FED. R. CRIM. P. 33 (same).

47. A timely motion for new trial extends the deadline for filing a notice of appeal. FED. R. APP. P. 4(a)(4)(A)(v).

48. See, e.g., VERSTEEG, *supra* note 12, at 89; VERSTEEG, *supra* note 21, at 214.

49. JOLOWICZ & NICHOLAS, *supra* note 24, at 400.

world's oldest civilizations, we can trace the origins of appellate law and practice. Their antiquity and continuing development suggest in humanity an immemorial awareness of the fallibility of human judgment, a yearning for the infallible judgment of divinity, and—lacking this divine judgment—the desire to implement a procedure to remedy our human error.

