CIVIL APPEALS: ARE THEY USEFUL IN THE ADMINISTRATION OF JUSTICE?

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After tracing the history of the modern appellate court system, Mr. Wilner suggests that the justifications most often given for civil appeals are neither theoretically valid nor practically attainable. The present system, the author concludes, fails to provide the legal guidance and quick termination of conflicts required by a complex society and should be abolished in civil cases not raising constitutional questions or involving primary administrative jurisdiction.

In an age which has seen the growth of entirely new fields of law, a rapidly growing fusion of law and equity, and a nearly thorough overhaul of civil procedure, the permanence of civil appeals has remained remarkably unchallenged. Few of the technological and normative girders sustaining our legal edifice can rival the appellate procedure in importance or effect. Yet, it has successfully avoided any inquiry into its utility or theory. With but rare exceptions,[1] legal writing concerned with appeals, voluminous as it is both in the judicial and extra-judicial sectors, is of a technical nature, addressed to the mechanics of practice and procedure.[2] Basically, there continues in this country a general, matter-of-course acceptance of the right of a nonprevailing party to civil litigation to have one or more appeals.

It might be profitable to look into the current vitality of some of the traditional premises underlying the appellate process. Such a reexamination assumes particular significance from the precedent-generating function of appellate tribunals and is, therefore, not without relevance to some of the central issues dominating the current crisis in the law.[3]

Whatever its *ultima ratio*, the existence of courts of review or appeal presupposes that tribunals ranking lower in the hierarchical scale are not infallible. Although the appellate process is the great ambient in

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1 *See, e.g.*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

2 *See, e.g.*, Holtzoff, *Interlocutory Appeal in the Federal Courts*, 47 GEO. L.J. 474 (1959); Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403 (1955); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

3 *See* Address by Chief Justice Warren before the Annual Meeting of the American Law Institute, N.Y. Times, May 19, 1965, at 23, col. 3; K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3-4 (1960); F. RODELL, WOE UNTO YOU, LAWYERS! (1939).

the law, there is no objective criterion, either theoretical or practical, whereby it may be demonstrated that the pronouncement of the reviewing court is necessarily the "correct" legal evaluation of the transaction or occurrence upon which it passes judgment. All that can be claimed for it is that it is the *authoritative* opinion or expression of a legal value judgment upon the matter inquired into. This authoritativeness is founded on some constitutional or statutory fiat, and not upon any intrinsic superior authenticity of legal formulations of appellate judges as such. It may not, for example, be assumed that appellate judges are necessarily superior in legal learning, legal experience, or general knowledge to their colleagues in "inferior" courts, even though it has been suggested that a lessened efficiency in the performance of trial courts in England contributed to the increasing importance of appellate courts.[4] The established practice in the federal system of assigning district judges to sit on panels in courts of appeal[5] refutes such an assumption.

Constitutional or statutory provision for appeal is in recognition of an assumed need to correct errors committed by trial courts or by reviewing courts of lower rank.[6] The province of an appellate court, described by the term of art, "jurisdiction in error," is generally limited to an inquiry as to whether a judgment, when rendered, was erroneous or not. A judgment may, however, be reversed on appeal even if not erroneous when entered: "[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."[7] Review of the finding of applicable law does not, however, adequately sum up the full scope of the work of appellate courts. Dean Pound adds "review of the process of ascertaining the facts, . . . review of the finding of the applicable law, and . . . the authoritative ascertainment and declaration of a legal precept for such cases as the one in hand, where none has been clearly promulgated."[8]

This theory of appeal has been enlarged by an increasing willingness of reviewing courts to pronounce judgment on activity of lower courts which was not even complained of by the appealing party, *i.e.*, not assigned as error. This expansion was achieved by cataloging error into

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[4] Veeder, *A Century of English Judicature, 1800-1900*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 730, 755 (1907).

[5] 28 U.S.C. § 292(a) (1964).

[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

[7] United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102, 108 (1801).

[8] R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941).

"plain" error of a fundamental nature,[9] "egregious" error,[10] or the more common "prejudicial" or "material" error.[11] At its widest, the theory of appeal becomes less and less concerned with the existence of actual error—as the term becomes synonymous with unfairness or injustice. An unfair or unjust judgment below is error, and the object of the appellate procedure becomes that of correcting unfairness[12] and of doing practical justice between the parties.[13]

Thus, it is quite apparent that modern statutory terminology providing for "jurisdiction of appeals"[14] has little in common with the highly technical writ-in-error proceeding at common law. In constitutional and statutory interpretation and in the application of common-law principles, reversals of the decisions of lower courts result rarely for error. As Karl Llewellyn observed, most reversals occur because the rule applied, sound enough in its day, is no longer deemed to be of utility.[15] Judgments are set aside not because they fail to apply existing rules, but because they do. Confusing to lawyers, this situation is bewildering to their clients and to the public. A pragmatic evaluation of our system of administering justice can be constructive only if it questions the need for courts to hear appeals in civil cases.[16]

I. HISTORICAL BACKGROUND OF APPEALS

The unquestioning acceptance of appellate review in civil cases[17] is

[9] *E.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 16 (1940); *see* Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 503 (1959).

[10] Fisher v. United States, 328 U.S. 463, 476 (1946).

[11] *Id.* at 467.

[12] *Cf.* R. POUND, *supra* note 8, at 3.

[13] *See, e.g.*, Murdock v. Ward, 178 U.S. 139, 149 (1900); Commercial Nat'l Bank v. Parsons, 144 F.2d 231, 240 (5th Cir. 1944), *cert. denied*, 323 U.S. 796 (1945) (appellate courts sit "to do justice between the parties, not merely to decide points in a tilt between lawyers").

[14] *E.g.*, 28 U.S.C. § 1291 (1964). This statute, which provides for the jurisdiction of the United States Circuit Courts of Appeals, succeeds § 22 of the Judiciary Act of 1789, which allowed review of lower court decisions by writ of error, *i.e.*, only to the extent that rigidly identifiable errors of law appeared on the record.

[15] K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 305 (1960).

[16] Judicial review of decisions of administrative bodies is outside the scope of this article. Whether denominated "judicial" or not, a review of administrative decisions or orders is not, properly speaking, a "review," but, due to the party-judge identity in the administrative body, really the first determination by an impartial tribunal.

Because of the inherent disparity of power, prestige, and financial means between the "People" and an accused, appeals in criminal proceedings involve considerations not present in ordinary civil appeals and are therefore likewise excluded from the present discussion.

[17] Judicial review of legislation to determine its constitutionality is outside the scope of this paper. For an interesting appraisal of this type of review and its compatibility with democratic processes, see Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

especially remarkable in view of the relative recency of appeals and their admitted constitutional nonessentiality in the administration of justice.[18]

As late as 1907 the right of appeal was spoken of as "a modern conception. Down to very recent times it was rigidly withheld save in a strictly limited class of cases . . . ."[19] Before the enactment of the Judicature Act of 1873 there was no reasonably common true appeal from one court to another in England.[20] In fact, even a relatively recent edition of an authoritative history of English law contains hardly any reference to appeals in the customary sense.[21] What we now call appeals are the descendants of the common-law proceeding in error—for errors appearing on the record. The "in error" mode of review itself succeeded the more primitive writ of "attaint," an accusation of perjury against the jury with possible penal consequences.[22] Allegation of error by writ of false judgment against a judge was the logical extension of this practice of complaining against a jury for a false verdict. It imposed upon the judge, rather than upon the winning party, the burden of defending and maintaining the judgment.[23]

In this country likewise, the general availability of one or more review levels to every disappointed party to a trial is of rather recent origin. In the federal judicial system, though certain appeals were afforded by the First Judiciary Act,[24] the circuit courts of appeal did not come into being until 1891,[25] and not until 1889 had there been an appeal of right in criminal cases.[26] Availability of a forum for review resulted in a proliferation of appeals, a phenomenon by no means peculiar to this

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[18] *See* note 28 *infra* and accompanying text.

[19] Veeder, *supra* note 4, at 754; *see* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 664 (2d ed. 1898).

[20] Sanderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7 (1940).

[21] The index volume of W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (E. Potton ed. 1932) cites under the heading of "appeals" references to the Statute of Appeals of 1533, a statute that brought to the King ultimate appeals from matters within the competence of ecclesiastical courts. Another reference compares the unlimited license of appeal in the Court of Chancery with the restricted "in error" proceeding in the common-law court; still another reference uses "appeal" in the unaccustomed sense of a procedure whereby one subject could accuse another of a crime before the King. Appeal in the latter sense is also noted in 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 572 (2d ed. 1898).

[22] 2 W. HOLDSWORTH, *supra* note 21, at 337-42.

[23] *Id.* at 213-14; R. POUND, *supra* note 8, at 25-27. The transition from impeachment of judgment-finder, with "appeal" sometimes taking the form of wager of battle, to the modern impeachment of judgment had a parallel development in France during the fourteenth century. A. ENGELMANN, *A History of Continental Civil Procedure*, in 7 CONTINENTAL LEGAL HISTORY SERIES 685-88 (R. Millar ed. 1927).

[24] Act of Sept. 24, 1789, ch. 20, §§ 21, 22, 1 Stat. 83.

[25] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[26] Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655; *see* Cobbledick v. United States, 309 U.S. 323, 325 (1940).

country.[27] Significantly, as the general public increasingly utilized these extended facilities in a sporting quest for a favorable verdict, there developed in some of the highest echelons of the legal profession outside of the trial bar an attitude of sophisticated restraint toward the whole reviewing process. The Supreme Court of the United States decided that the constitutional requirement of due process did not require the affording of an opportunity for an appeal in civil or criminal cases.[28] Earlier, Alexander Hamilton had not been at all optimistic about granting substantial appellate power to the United States courts. He said he would consider "everything calculated to give, in practice, an unrestrained course to appeals as a source of public and private inconvenience."[29]

All the present and historic forms of court review had their genesis in the ancient custom of addressing a plea to the supreme political authority for relief from unfavorable action of his officials, including judges.[30] The medieval church adapted this review system to its ecclesiastical courts, and this is where English lawyers got "their first sight of appeals being carried from court to court."[31] The extent to which this tradition is of continuing value deserves consideration.

II. THEORY AND PRACTICE IN APPELLATE REVIEW

The law concerning appeals is replete with contradictions. For example, it is incongruous to observe a practice so prevalent and far-reaching in its effect as appellate review persevere against an unbroken line of decisions of the highest authority declaring it unnecessary for due

[27] Baldwin tells of a series of seven trials and eight appeals in one case, extending from 1882 to 1902. S. BALDWIN, THE AMERICAN JUDICIARY 366-67 (1905). To his statement concerning the "rather excessive penchant for appeal in Victorian England," R.C.K. Ensor adds the quaint comment: "for the jurisprudence of case law, the more appeals the merrier." R. ENSOR, COURTS AND JUDGES IN FRANCE, GERMANY, AND ENGLAND 704 (1933). In France, during the two and one-half centuries preceding the Revolution, the royal officials "when they first assumed complete control of the courts, multiplied largely both the possibility and forms of appeal," due in some measure to a realization "of the ease with which error may enter judicial decision" and to the fact that conduct of cases came to lie "wholly in the hands of lawyers." A. ENGELMANN, *supra* note 23, at 728.

[28] Dohany v. Rogers, 281 U.S. 362, 369 (1929); Reetz v. Michigan, 188 U.S. 505, 507 (1903); McKane v. Durston, 153 U.S. 684, 687 (1894); *see* Griffin v. Illinois, 351 U.S. 12, 18 (1955).

[29] THE FEDERALIST No. 81, at 415 (Everyman ed. 1911). Sir Charles Bowen expressed the same view in England over one hundred years later. Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516 (1907).

[30] Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 214 (1907); *see* A. ENGELMANN, *supra* note 23, at 367-68.

[31] T. PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW 367 (4th ed. 1948); A. ENGELMANN, *supra* note 23, at 487.

process.[32] This contradiction is not overcome merely by stating that appeals are creatures of legislative enactments. If constitutionally valid and civilized standards of judicial administration are attainable without such appeals, it is hard to appreciate their ultimate purpose.

While insisting that their concern is with questions of law, not of fact, courts of appeal are equally insistent that legal questions be presented in the context of a live case or controversy. Moot cases are beyond appellate scrutiny even if their vitality is terminated for mere technical reasons and the question involved survives the technical impediment not only for the parties but for the public.[33]

It is not self-evident why law stands in greater need of corrective action than fact. Much has been said to cast doubt upon the validity of the fact-law dichotomy.[34] Nevertheless, it is the law, rather than the facts, which is assumed to require a double check by an appellate court. It may be granted that "matching," or the application of law to fact, accounts for the major part of the activity of appellate courts, but, at the point of application, the law applied is supposedly a principle derived from a reasoned analysis of past combinations of facts. This contradicts the assumed premises, for if the sole concern of the appellate courts is with correct exposition of legal principle, why is it essential that the pronouncement of this principle be made only in the context of the facts of an actual case? On the other hand, if case-directed appeals are the only mode of review, how does this requirement comport with reversals of judgments on theories upon which cases have not been tried and which have not been assigned as error before the reviewing court? In ruling out the existence of a federal common law in diversity-of-citizenship jurisdiction, *Erie R.R. v. Tompkins*[35] was certainly of momentous significance. But, since all the parties to that action had assumed throughout the entire litigation, including the argument before the Supreme Court, that the contrary view set forth in *Swift v. Tyson*[36] governed their case, why was the vehicle of an actual case deemed indispensable for a sua sponte pronouncement of legal principle?

Courts of appeal also assert that they will review only final judg-

[32] *E.g.*, *Ex parte* Abdu, 247 U.S. 27, 30 (1918); McKane v. Durston, 153 U.S. 684, 687 (1894).

[33] Williams v. Simons, 355 U.S. 49, 57 (1957); Amalgamated Street Employees v. Wisconsin Bd., 340 U.S. 416, 418 (1951); Shaffer v. Howard, 249 U.S. 200, 201 (1919); Mills v. Green, 159 U.S. 651, 653 (1895).

However, the fact that a claim is uncontested does not prevent the action to collect it from being a "case or controversy." A judgment upon consent is a "judicial act." Pope v. United States, 323 U.S. 1, 12 (1944).

[34] *See* notes 82-91 *infra* and accompanying text.

[35] 304 U.S. 64 (1938).

[36] 41 U.S. (16 Pet.) 1 (1842).

ments.[37] Only in a highly relative sense can one attribute finality to a judgment under review, with the possibility of reversal as the motive for seeking review in the first place. Increasingly, appellate courts are tending to direct their review toward furtherance of their conception (generally not even unanimous) of substantive justice rather than the correction of specified error.[38] When providing guidance to the inferior courts is asserted as the principal function of review, the requirement of a final judgment frustrates and contradicts that purpose. For if appellate courts sit to guide inferior courts, why must the guidance be delayed until after the trial has run its course? Technical definitions aside, a trial is a method for the marshalling and asserting of legally significant facts.[39] It would seem, therefore, that to be truly effective the guidance should be given when the legal significance of adduced facts is about to be weighed and determined, *i.e.*, during, or even before, the trial.[40]

Under existing practice, there is not only an absolute lack of specific guidance in advance of final decision, but the guidance upon review is often niggardly and inadequate. Motivated by a narrow interpretation of *ratio decidendi*,[41] or by a deliberate effort to avoid even the appearance of intervention,[42] appellate courts often give considerably less than a total disposition to the litigation under review.[43]

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[37] *See* notes 47-65 *infra* and accompanying text.

[38] *See, e.g.*, Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 500, 524-48 (1957) (Frankfurter, J., dissenting); Murdock v. Ward, 178 U.S. 139, 149 (1900); Wright, *supra* note 1.

[39] This is suggested as a more concise substitute for the customary definition: (1) finding the facts, (2) finding the law, and (3) applying the law to the facts.

[40] The advance guidance permitted by certification of specified questions from the circuit courts of appeal to the Supreme Court is an excellent example of the intelligent substitution of appellate preview for review. 28 U.S.C. § 1254(3) (1964). However, the Supreme Court views this procedure with disfavor and seldom uses it. Wisniewski v. United States, 353 U.S. 901 (1957); *see* 43 IOWA L. REV. 432 (1958).

The Judicial Code also permits a discretionary accelerated appeal of an otherwise non-appealable interlocutory order from the district courts to the courts of appeal. 28 U.S.C. § 1294(4)(b) (1964); *see* Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 45 (1949).

There is evidence that such a guidance system existed in England and in the civil-law countries. Veeder, *supra* note 4, at 755; *cf.* A. ENGELMANN, *supra* note 23, at 796-97.

[41] *See, e.g.*, Lawlor v. National Screen Servs., 352 U.S. 992 (1957), in which, despite the circuit court's proper decision on the question appealed from, the Supreme Court reversed to insure that the district court would not consider itself bound by the considerations the circuit court gave to the remaining issues. Three justices dissented, saying: "It is a customary practice for the Court of Appeals, in sending a case back to the District Court for trial, to give guidance on issues that may arise in the course of the trial in order to avoid needless appeals and retrials." *Id.* at 994 (Frankfurter, Burton, & Harlan, JJ., dissenting).

[42] *See, e.g.*, Gold v. United States, 352 U.S. 985 (1957).

[43] Daisey v. Colonial Parking, Inc., 118 U.S. App. D.C. 31, 331 F.2d 777 (1963), is an apt illustration of the unreality of much of our appellate procedure. In a case based on negli-

Finally, though appeals are not required by due process,[44] there remain some serious questions concerning equal protection, despite decisions which have confused the two constitutional concepts.[45] For even if it is conceded that no one is constitutionally entitled to an appeal, the increasingly activist attitude of courts of appeal[46] makes the basis of classification in extending or withholding the right of appeal an important inquiry.

III. THE REQUIREMENT OF FINALITY

Finality of judgment has traditionally been the "polestar of . . . appellate procedure."[47] It has been a jurisdictional requirement[48] in the federal system since the appeals provisions of the Judiciary Act of 1789.[49] It has been codified by providing for appeals to the United States circuit courts of appeal only "from all final decisions" of the district courts.[50] The Supreme Court read the intent of this code provision to be "to disallow appeals from any decision which is tentative, informal, or incomplete."[51]

Legal history affords a basis for speculating that the insistence upon finality derives from the fact that until the fifteenth century appeals were directed against the judge rather than the judgment.[52] The accusation of false judgment sounded in tort and, as Holdsworth suggests, could not be maintained until the action of the judge was "settled by judgment," *i.e.*, finalized.[53] However, history cannot account for the rigor with which this requirement has been enforced.[54] It results more from

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gence in maintaining real premises, the trial judge directed a verdict at the close of the opening statement by plaintiff's counsel. On appeal the court reversed and remanded by a two-to-one vote. Of the two judges who voted for reversal, one considered it unnecessary to consider the substantive law involved because of the narrow and technical reason that he did not favor directed verdicts upon an opening statement. Upon remand, the trial judge confessed his inability to instruct the jury, for lack of an authoritative opinion from the court of appeals.

[44] *See* note 28 *supra* and accompanying text.

[45] *See, e.g.*, Pittsburgh, C., C. & St. L. Ry. v. Backus, 154 U.S. 421, 427 (1894).

[46] *See* notes 9-16 *supra* and accompanying text.

[47] LaBuy v. Howes Leather Co., 352 U.S. 249, 268 (1957) (Brennan, J., dissenting).

[48] Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 29-30 (1943).

[49] Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84; *see* Note, *Discretionary Appeals of District Court Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1958).

[50] 28 U.S.C. § 1291 (1964).

[51] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

[52] *See* note 23 *supra* and accompanying text.

[53] 1 W. HOLDSWORTH, *supra* note 21, at 214.

[54] *See, e.g.*, Collins v. Miller, 252 U.S. 364, 368 (1920). Original Rule 54(b) of the Federal Rules of Civil Procedure relaxed the finality requirement somewhat in cases involving multiple parties or claims, and substituted for the requirement of absolute finality, a require-

the feeling that piecemeal disposition on appeal tends to enfeeble judicial administration. A prohibition of such practice, said the Supreme Court in *Cobbledick v. United States*, avoids "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."[55]

Plausible as these reasons are for a finality requirement, there are equally compelling pressures which have forced courts and legislatures to carve out exceptions to it. For example, Congress had provided for certain interlocutory appeals,[56] and the Supreme Court has allowed others on the basis of a purportedly "practical rather than technical" construction of the finality requirement.[57] This is a somewhat confusing development. The Supreme Court itself in a subsequent case found it difficult to determine "whether interlocutory appeals are of advantage to an efficient administration of justice."[58]

Even a hasty look at the relevant source material shows that the seemingly rigid principle of finality has been greatly distorted by ad hoc pressures. It is important to note some of these inroads here because they accurately mirror the unrealistic entanglements that result from the inherent inconsistency of a reviewing court system.

Appeals are allowed by statute from interlocutory orders granting, refusing, or dissolving injunctions, orders governing receiverships, and to some extent actions in admiralty and patent litigation.[59] The Court itself has allowed appeals from interlocutory orders "which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,"[60] or interlocutory orders of such a

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ment that the district court have fully determined a "judicial unit" of a civil action involving multiple claims or parties. New rule 54(b) makes the appealability of part of a civil action depend entirely upon the district court's determination that a "judicial unit" of a multiple action is final and appealable. 6 J. MOORE, FEDERAL PRACTICE ¶¶ 54.19-54.43 (2d ed. 1953).

[55] 309 U.S. 323, 325 (1940).

[56] *See, e.g.*, 28 U.S.C. §§ 1291, 1292 (1964).

[57] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

[58] Baltimore Contractors, Inc. v. Brodinger, 348 U.S. 176, 185 (1955). Appeals from interlocutory orders in England are largely governed by the Supreme Court of Judicature Act of 1925, 15 & 16 Geo. 5, ch. 49, § 31(i). *See* 5 HALSBURY'S STATUTES OF ENGLAND 360 (2d ed. R. Burrows 1948). Generally, such appeals require leave of the trial judge or of the court of appeal.

[59] 28 U.S.C. § 1292 (1964).

[60] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); *cf.* Toledo Ry. & Light Co. v. Hill, 244 U.S. 49, 51-52 (1917). *But cf. Ex parte* American Steel Barrel Co., 230 U.S. 35, 45 (1913).

nature as to lead the court to conclude that a denial of review from such order would practically defeat the right to review altogether.[61]

These unstructured patterns resulting from ad hoc pressures to circumvent the final judgment rule are also observable in methods of review procedurally outside the main federal appeals channel, such as the All-Writs Act,[62] habeas corpus,[63] and the certification of questions of law by inferior courts to reviewing courts in advance of final judgment.[64] Furthermore, in the federal and state appellate systems some courts "intimate" their view on the substantive question raised by an appeal, while refusing to entertain the appeal because of the absence of a final judgment.[65]

Essentially, these departures reveal an underlying uncertainty about the scope and function of appellate courts in our adjudicatory system, although preoccupation with endless details allows no more than an occasional hint of the true dimensions of the problem to appear in appellate opinions.

IV. UNIFORMITY

The often articulated claim that appeals tend to promote uniformity and evenhanded justice is not easily substantiated. Uniformity is no more guaranteed by the equal protection clause of the fourteenth amendment than is the right to appeal by the due process clause.[66] Neither amendment assures immunity from judicial error or inconsistency, and a claim of departure from precedent is not a basis for claiming a denial of equal protection, regardless of the actual inequality inevitably produced by the change of applicable rule.[67]

The assumption that litigants expect uniform decisions does not rest on any firmer foundations. It is simply not verifiable that citizen *A* is passionately addicted to the proposition that judge *C* must give the identical instruction to the jury in his lawsuit against *B* as that which judge

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61 Cobbledick v. United States, 309 U.S. 323, 324 (1940) (dictum).

62 28 U.S.C. § 1651(a) (1964); *see, e.g.*, LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

63 28 U.S.C. §§ 2241-55 (1964); *see* Fay v. Noia, 372 U.S. 391 (1963).

64 28 U.S.C. §§ 1254(3), 1255, 1292(4)(b); *see* note 40 *supra* and accompanying text.

65 *See, e.g.*, Southern Ry. v. Madden, 224 F.2d 320, 321 (4th Cir. 1955), *cert. denied*, 352 U.S. 953 (1956). *See also* 58 COLUM. L. REV. 1306 (1958).

66 "[T]he fourteenth amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decisions . . . any more than in guaranteeing due process it assures immunity from judicial error . . . ." Milwaukee Elec. Co. v. Wisconsin, 252 U.S. 100, 106 (1920).

67 *Id.*; *see* Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54, 59-60 (1917); Lombard v. West Chicago Park Comm'rs, 181 U.S. 33, 44 (1901).

X gave under "identical facts" in a lawsuit between *K* and *L* five years earlier in a courthouse located hundreds of miles away from the one where *A* lodged his complaint. More likely, *A* knows nothing of the difficulties which beset *K* and *L* and is not even aware of their existence. *A* is not interested in the supposed uniformity of a legal principle which he neither knows nor understands, and as to the correctness and application of which his and his opponent's lawyers are at loggerheads. He is keenly interested only in that he be dealt with fairly—that he have a reasonable opportunity to state his claim or defense, to call witnesses and present evidence, to cross-examine, and, foremost, that he be heard by a fair and impartial tribunal.

Whatever the validity of rules, as a practical matter they and the degree of uniformity with which they are applied are only of *professional* concern to judges and lawyers. For the public, doing of justice can by no means be equated with pronouncing rules. Furthermore, to the extent that the public becomes aware of inconsistency of decisions, it will probably accept them with the same understanding with which it accepts the extreme diversification of sanctions in criminal law. There is nothing unique to civil claims arising out of contracts or real estate transactions which necessarily demands a more stultified uniformity in application of principle than does criminal law, where the popular motto used to be equal punishment for equal crimes. The ultimate impact of criminal sanctions is certainly no less significant than the assessment of civil damages. Since no serious complaint is heard of the modern practice of indeterminate sentencing[68]—even when based largely upon evidence contained in probation reports which do not form part of the record proper —one is hard put to explain why formalized and uniformly applicable rules as to measure of damages in civil cases are indispensable.

Furthermore, the methodology of the appellate process itself makes the practical attainment of this theoretical uniformity a near impossibility. For example, each time an appellate court overrules a precedent, it necessarily dispels whatever uniformity may have existed: the announced change is usually only prospective.[69] Where retroactive effect is accorded to such an overruling decision,[70] the scope of that effect is,

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[68] *See, e.g.*, 18 U.S.C. §§ 4208, 4209 (1964). In fact, the conventional rule-orientation of the judiciary required that training programs in the social sciences be instituted to educate judges in the use of their new wide discretion. *See* Parker, *The Education of the Sentencing Judge*, 14 INT. & COMP. L.Q. 206, 222 (1965).

[69] *See, e.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959); Parker v. Port Huron Hosp., 361 Mich. 1, 26-29, 105 N.W.2d 1, 13-15 (1960). *See generally* Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965).

[70] *See, e.g.*, Center School Township v. State, 150 Ind. 168, 173, 49 N.E. 961, 962

of course, determined by numerous extra-legal circumstances, such as the financial ability of a potential litigant, which lead to arbitrarily different consequences. Thus even a retroactive decision provides only minimal uniformity and can be rationalized only by disregarding Mr. Justice Frankfurter's wise admonition that "we should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights."[71] In fact, the very freedom of an appellate court to choose between a prospective or retroactive application of its precedents produces uncertainty rather than uniformity.[72]

There is a certain element of chance involved in the pronouncement of a supposedly uniform rule. Many contradictory decisions are handed down by inferior tribunals of equal jurisdiction, many individuals thus presumably being victimized by incorrect application of rules or by the application of the wrong rules. Only in those cases which happen to be appealed can the court of last resort announce the authoritative rule which is to govern them, but the mere exercise of the normal initiative to seek a review of a given case does not always suffice to set the reviewing process in motion. The declaration of the authoritative pronouncement thus often depends completely upon events not subject to the control of the parties immediately concerned.[73] Unstructured criteria employed by reviewing courts for the granting or denial of rehearings or hearings en banc then further weaken the extent of uniformity in the application of a rule of law.[74] An additional element of chance is in-

(1898); *cf.* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting); Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950).

[71] Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring).

[72] A state is free to choose between the prospective or retroactive effect of its decisions without violating equal protection of the laws. Great Northern Ry. v. Sunburst Co., 287 U.S. 358 (1932). In criminal cases the Supreme Court has granted itself a wide discretion in deciding whether a particular decision will apply prospectively or retroactively. *Compare* Linkletter v. Walker, 381 U.S. 618 (1965), *with* Eskridge v. Washington, 357 U.S. 214 (1958). Mr. Justice Black, however, has accused the Court of "grossly invidious and unfair discrimination" in failing to apply the fourth amendment exclusionary rule to the states retroactively. Linkletter v. Walker, *supra*, at 642 (Black, J., dissenting).

[73] *See, e.g.*, Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965). The Supreme Court denied both certiorari and rehearing after the First Circuit's denial of the plaintiff's claim. 370 U.S. 918, *petition for rehearing denied*, 371 U.S. 856 (1962). Subsequently the Fourth Circuit upheld an award to another Pan American employee in the same accident. Pan American World Airways, Inc. v. O'Hearne, 335 F.2d 70 (4th Cir. 1963). The Fifth Circuit then upheld an award to still another employee arising out of the same accident. O'Keefe v. Pan American World Airways, Inc., 338 F.2d 319 (5th Cir. 1964). The Supreme Court, on its own motion, reopened *Gondeck* and reversed. 382 U.S. 25 (1965). Thus it was only the fortuitous occurrence of similar claims arising out of the same accident which permitted the Court to finally review and settle the case. *See also* United States v. Ohio Power Co., 353 U.S. 98 (1957).

[74] *See* Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 897-908 (1963).

jected when the appeals court chooses to exercise its initiative and decide a question which was not even considered below, in disregard of the procedural uniformity provided by normal appellate rules.[75]

In the face of all these contradictions, the unrelenting pursuit of uniformity by our appellate courts can be rationalized only by insisting that uniformity fosters equality and is inherently democratic. However, the equality the law seeks is not a "disembodied equality,"[76] for it does not demand things which are different "to be treated in law as though they were the same."[77] It prohibits only arbitrary discrimination; it does not prohibit discrimination based on intelligent grounds. The specifics of each situation prescribe the limits of "equal treatment," for we know of many situations where uniformity in the guise of equality is not only unattainable but even undesirable.[78] Although this leaves much that is uncertain, it is a condition to which the profession can readily adjust.[79]

The problem of civil appeals is not identical with the problem of stare decisis. Appeals are, however, traditionally looked to as a source for generating generalized principles, which, in turn, are considered useful not alone for their inherent force but also "to assure that like cases be decided alike."[80] In this context, the relation between stare decisis and uniformity is apparent. However, the deterioration which the doctrine of stare decisis has undergone during recent decades[81] tends to weaken, if not altogether eliminate, an alleged requirement of uniformity as a reason for preserving the practice of civil appeals.

V. FACT-LAW DISTINCTION

Important to the main question—whether the appellate system is

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[75] *See* notes 35-36 *supra* and accompanying text.

[76] Tigner v. Texas, 310 U.S. 141, 147 (1940); *see* Griffin v. Illinois, 351 U.S. 12, 21 (1956).

[77] Tigner v. Texas, 310 U.S. 141, 147 (1940).

[78] For example, intelligent and creative governmental planning may result in various areas being treated differently within a comprehensive set of zoning regulations. If a court condemns such heterogeneity as unequal treatment to property holders because it did not treat all property uniformly, it imposes a distressing conformity upon an entire community. *See* Lyold, *A Developer Looks at Planned-Unit Development*, 114 U. PA. L. REV. 1, 6 (1965).

[79] Of this condition of uncertainty in the law, Cardozo said: "I have become reconciled to the uncertainty, because I have grown to see it as inevitable." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

[80] E. ROSTOW, THE SOVEREIGN PREROGATIVE 26 (1952).

[81] *See, e.g.*, Green v. United States, 356 U.S. 165, 195-96 (1958) (Black, J., dissenting); Smith v. Allwright, 321 U.S. 649, 665 (1944); Helvering v. Hallock, 309 U.S. 106, 118-19 (1940). Significantly, the House of Lords has recently announced its departure from the view that its erroneous decisions can be set aright only by Act of Parliament. N.Y. Times, July 27, 1966, at 1, col. 5.

worth retaining for the ordinary civil case—is a clear understanding of the relationship of the appellate courts to the trial courts. However, though the appellate courts purportedly exist to insure certainty and predictability in the trial courts, the present relation between them is itself difficult to analyze and state in certain terms. The existing confusion arises when one compares judicial pronouncements that appeals courts sit only to review specified questions of law[82] with decisions that strongly suggest that the appeals courts are the final stage of the trial system's adjudication of the entire case and have an obligation to intervene, if necessary, and give the findings of fact de novo review.[83] For example, when a trial judge sitting without a jury bases his findings solely on documentary evidence, the appellate court will often reverse when it disagrees with the inferences he drew from the evidence.[84]

This enlargement of the authority of reviewing courts has been explained as the outgrowth of the merger of law and equity, which brought into the law courts the de novo review of the chancery and admiralty courts.[85] Such integration of judicial review into the trial process had the advocacy of the late Dean Pound,[86] who suggested appeals before a bench of judges in the lower court, or through appellate terms. But this conception does not clearly suggest any distinct function for the appellate process, and necessarily draws its very purpose into question.

The pronounced tendency of appellate courts to review the facts weakens the conventional fact-law distinction, which is the purported foundation of appellate review, the archpremise which has woven review into the fabric of the administration of justice since the fifteenth century.[87] The intervening centuries have witnessed some serious questioning of the theoretical soundness and practical utility of the supposedly clear division between finding facts and deciding law.[88] Professor Thayer would have no more quarreled with Professor Bohlen's statement that "juries do, under the guise of passing on matters of fact, often lay down the law as it is applicable to the actual facts of the case

82 *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

83 "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Gypsum Co., 333 U.S. 364, 395 (1948); *see* Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950).

84 *See, e.g.*, American Tobacco Co. v. The Katingo Hadjipateras, 194 F.2d 449, 451 (2d Cir.), *cert. denied*, 343 U.S. 978 (1952).

85 R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 71 (1941); *see* United States v. Gypsum Co., 333 U.S. 364, 395 (1948).

86 R. POUND, *supra* note 8, at 33; R. POUND, ORGANIZATION OF THE COURTS 287-88 (1940).

87 R. POUND, *supra* note 8, at 4.

88 *See, e.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 547-55 (1965).

before them,"[89] than Bohlen would have disagreed with Thayer's contention that "the judges have always answered a multitude of questions of ultimate fact. . . . It is true that this is often disguised by calling them questions of law."[90] It requires a good deal of pretending to suppose that the theory of appellate review, presupposing a relatively tight segregation of fact from law, is as valid today as it was a century ago when the Supreme Court decided that the adjudication of issues of fact by a court to which the case was submitted by agreement of the parties was not an exercise of judicial authority, but the mere act of an arbitrator.[91]

While the reports still abound with expressions exemplifying fact shyness on the part of courts,[92] the current of professional thinking flows in the opposite direction. Courts are manifesting an increased awareness of the wider ramifications of fact determination. They now allocate the burden of proof by considering which party can more clearly elucidate the facts.[93] They consider historical or sociological data.[94] Aided by scientific methodology in discovery and appraisal of the facts,[95] the trial courts have found an independent function. An appellate court must admit that the same factual question may be decided differently by two different inferior tribunals with neither of them being in error.[96]

These developments, while not incompatible with review procedure as such, do highlight the inadequacy and futility of civil appeals, bottomed as they are upon a commitment to an autonomous existence of fact structures on the one hand and rules on the other.[97] They also raise the question of whether the inordinate cultivation of the review

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[89] Bohlen, *The Reality of What Courts are Doing*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 39, 40 (1935).

[90] J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 202 (1888); *cf.* Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147, 171 (1890).

[91] Campbell v. Boyreau, 62 U.S. (21 How.) 223, 226 (1858).

[92] For example, by electing to be tried by a court without a jury, a party bars himself from complaining on appeal about the effect of evidence admitted over objection, as it would be presumed that the court accorded no weight to such evidence. Snyder v. Lincoln, 156 Neb. 190, 55 N.W.2d 614 (1952).

[93] *See, e.g.*, Mangaoang v. Boyd, 186 F.2d 191, 195 (9th Cir. 1950). *See generally* 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940).

[94] *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

[95] *See, e.g.*, 1 J. WIGMORE, EVIDENCE §§ 163-65 (3d ed. 1940) (chromosome tests to prove paternity).

[96] *E.g.*, Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937); NLRB v. Pacific Intermountain Express Co., 228 F.2d 170, 176 (8th Cir. 1955). Nor is inconsistency a denial of equal protection. Worcester County Trust Co. v. Riley, *supra.*

[97] Lord Holt's illustration in London v. Wood, 88 Eng. Rep. 1592 (K.B. 1702), affords a beautiful illustration of this artificial distinction. Parliament, he said, cannot make adultery lawful, "that is, it cannot make it lawful for A to lie with the wife of B, but it may make the wife of A to be the wife of B, and dissolve her marriage with A." *Id.* at 1602.

mystique is not diverting attention from the vital nisi prius hearing[98] of cases and controversies. There is even warrant for inquiry whether our modern version of trial by combat, in which precedents are substituted for lethal weapons, with its attendant assumptions of inexorable rights and wrongs, victors and vanquished, and of justice as an indivisible monolith, is indeed the highest dispensation attainable. One scholar has suggested a possible alternative: "We must strive to penetrate into the needs of parties who come before the judge as patients come before the physician, so that we may not offer the stone of bald reasoning but the bread of sympathetic relief."[99]

VI. SCIENTISM—PRINCIPLED DECISION MAKING

When one attempts a revaluation of civil appeals and, particularly, the general acceptance they enjoy despite the admitted absence of a constitutional basis for the right, the path of rationale leads to our psychological commitment to the rule of law.[100] By asserting that lawyers are sworn to uphold the rule of law[101] and that the stereotype of the "Cadi at the Gate"[102] is the inevitable alternative to the rule of law,[103] or by admonishing judges to apply "general" law,[104] we uncritically affirm the essentiality of the appellate process. This is an unquestioned and unwarranted commitment, for it is just as possible to have a "rule of law" without courts of appeal[105] as it is to have a "law" without them. However, the fact remains that both within and without the legal profession, an identification has been formed between "rule of law" and courts of appeal, with the latter the supposed generators and guarantors of the former.

Merely to demonstrate the error in this identification would, however, solve nothing. Beyond being incorrect, there is evidence that the continued dominance of appellate practice in the administration of jus-

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98 *See, e.g.*, Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 488 n.2 (1956).

99 Gmelin, *Dialecticism and Technicality: The Need of Sociological Method*, in SCIENCE OF LEGAL METHOD, 9 MODERN LEGAL PHILOSOPHY SERIES 85, 100 (1917).

100 *See* Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963).

101 *See* note 1 *supra.*

102 A "cadi" (also "quadi") is a Muslim judge who interprets the Law of Islam and sees to its administration. His decisions are *not* based on precedent.

103 J. ULMAN, A JUDGE TAKES THE STAND 25 (1933); *see* Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

104 ABA CANONS OF JUDICIAL ETHICS NO. 20.

105 For a discussion of the relative value of the "rule of law" as against free decision, and the possibility of fashioning rules of law, see J. FRANK, LAW AND THE MODERN MIND (1935).

tice contributes substantially to the present weakening of confidence in the law itself by fostering illusions of certainty, equality, and generality. By insisting that the specific case be treated "as an instance of a more inclusive class of cases,"[106] appellate procedure infringes upon that crucial area of primary adjudication where individuation could contribute most to the redressing of balance in society. Moreover, the mere existence of a "higher" reviewing tribunal detracts from the authority and freedom of the basic trial court, the only forum where the public has any role at all in the administration of justice.

There is no doubt that rules are useful. If, in its functional aspect, law is the sanctioned application of social, economic, or political norms to specific situations, some mediating principle,[107] whether called a rule of law, a definition, or a premise, is inevitable in the process of applying the norm.[108] But a distinction is to be drawn between the employment of a principle as an integrating standard in the decisional work of a trial court, and what Professor Radin has aptly described as the "veneration of dialectic"[109] predominant in appellate opinions. What renders the latter cumbersome is the vogue of endless articulation of the guiding norm as a visible pattern superimposed upon countless other patterns and configurations. The norm should, rather, be an *awareness* which must be subsumed. If we are at all literate, our speech reflects a consonance with certain grammatical forms, but we do not deliberately structure our verbs, nouns, and prepositions for the sole purpose of endowing the transient and casual of the everyday world with an artificial cosmic or universal significance.[110]

Having become particularized in a considered judgment of a trial court, the function of the legal principle has been fully exhausted. There is no requirement that anything survive the decision either in the form of precedent or otherwise. In the context of a specific case, "law" ends with the adjudication. What the appellate methodology does, however, is to enshrine the episodic in a posited continuum called legal reasoning. There is no purpose to this, for if the decision comports with principle in terms of the needs of the specific situation, it is quite irrele-

106 Golding, *supra* note 100, at 40.

107 The question of the extent to which legal principles are actually "controlling" is not involved here. *See* F. RODELL, WOE UNTO YOU, LAWYERS! 149-54 (1939).

108 The problem seems to be that there are "two different things called . . . law . . . ." Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 359 (1931).

109 Radin, *Legal Realism*, 31 COLUM. L. REV. 824, 826 (1931).

110 *See* J. MARITAIN, INTRODUCTION TO PHILOSOPHY 155-59 (1947). Nominalism, by insisting that the universals or ideas are outside the field of reality, may be quite inconsistent with a recognition of science as something more than a figment of the mind. *Id.* at 159-60. It is not, however, inconsistent with a recognition that, as applied to law in its market-place connotation, the vitality of the universal depends upon individuated particularism.

vant whether that result can be verified by matching it with an antecedent.

Perhaps the crux of the problem is uncertainty as to the qualitative content of the term "legal principle." Most lawyers will agree that the negligence formula in the field of torts possesses the weight of principle.[111] Is this equally true of contributory negligence, last clear chance, or attractive nuisance? That a person may not unduly postpone the institution of legal proceedings to establish a claimed right may similarly be regarded as a principle. Can the same be said of the numerous rules and exceptions governing statutes of limitations?

Admittedly there is value in the modulating force of "principle," but it is important to recognize that this value diminishes as fragmentation and extension progress. The impact of its guidance is most effective when it is clearly identifiable with the ethical and moral standards which dominate the given situation. We are sensitive to promises as putative sources of obligation, but the role of "consideration" is not an inherent element of that sensitivity any more than the right to a jury in a particular type of litigation is requisite to its being a civilized proceeding.

VII. LAW AS A SCIENCE

The overcommitment to a conception of law as a science[112] is another facet of the shifting balance in the judicial system from the arena of individual view to the domain of appellate review. In light of this notion, quite flattering to many in the profession, one is able to comprehend the unremitting pursuit of legal "knowledge" and the cult of legal research which result in the interminable accumulation of irrelevant detail and redundancy. The cataloging of fact patterns in their inexhaustible variations is persevered in for the sake of maintaining a symmetry comprehensive enough to qualify as a scientific method appropriate only to natural science. Due to the affinity of law to the humanities, a recent comment on the obsession with methodology and classification in modern humanistic scholarship is quite appropriate here: "[I]n its effort to elucidate and clarify, it has somehow managed to interpose between us and the texts we study a barrier of knowledge more lush and

[111] The general consensus is that no civil liability is to be imposed for conduct causing harm without some showing of unreasonableness of conduct in view of relevant circumstances.

[112] Law has been long referred to as a science. In Jones v. Randall, 98 Eng. Rep. 954 (K.B. 1774), Lord Mansfield expressed the opinion that "the law of England would be a strange science indeed if it were decided upon precedent only." *Id.* at 955. Lord Parke echoed this belief when he spoke of the importance of precedents "not merely for the determination of the particular case, but for the interests of *law as a science.*" Mirehouse v. Rennell, 6 Eng. Rep. 1015, 1023 (H.L. 1833) (emphasis added).

impenetrable than our earlier ignorance."[113] The claim to scientific legitimacy for the law is even more pathetic in view of the dominance of nonscientific elements in its physiognomy: purposiveness, subjectivism, validation by conscious preference of values, and a concern for fairness and decency. A more "unscientific" complexion would indeed be difficult to conceive.

In the past few decades law has presented itself to the American public as a manifestation of evolving public policy. Whether one looks to the area of civil rights,[114] sovereign immunity,[115] electoral apportionment,[116] or labor standards,[117] there is no shred of scientific determinism or progression to support the changes which have occurred and still are occurring in that "externalized conscience" which Paul Tillich equated with law. No amount of authority or precedent can "scientifically" explain why "separate but equal" public schools, assumed legal in 1896,[118] were declared illegal in 1954,[119] or identify the legal "knowledge" which made it possible for the Supreme Court to declare in 1941 that Congress could constitutionally keep products of child labor out of the channels of interstate commerce,[120] whereas the same body had been deemed powerless to act two decades earlier.[121] It is obvious that a "scientific" conception of the "rule of law" does not adequately account for the dynamics of ever-changing public policy.[122]

Pretense to the aura of scientific orderliness and exactitude cannot be dismissed as mere harmless affectation. The relentless zeal of the law for systematization has been manifested countless times.[123] The results have been anything but satisfactory even in the realm of intramural procedure.[124] The cultivation of rules of law through the appellate

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113 Arrowsmith, *The Shame of the Graduate Schools*, HARPER'S MAGAZINE, Mar. 1966, at 51.

114 Brown v. Board of Educ., 347 U.S. 483 (1954).

115 National City Bank v. Republic of China, 348 U.S. 356 (1955).

116 Baker v. Carr, 369 U.S. 186 (1962).

117 United States v. Darby, 312 U.S. 100 (1941).

118 Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

119 Brown v. Board of Educ., 347 U.S. 483 (1954).

120 United States v. Darby, 312 U.S. 100, 117-23 (1941).

121 Hammer v. Dagenhart, 247 U.S. 251 (1918).

122 Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958).

123 The most obvious example is the production within thirty years of 39 volumes of judicial interpretative material for the Federal Rules of Civil Procedure.

124 In Swift & Co. v. Wickham, 382 U.S. 111 (1965), the Supreme Court demonstrated the futility of judicial rulemaking. The case involved the right to a three-judge court under 28 U.S.C. § 2281 (1964). Overruling a fairly recent precedent that such a right should be granted "only when the Supremacy Clause . . . is immediately drawn in question," the Court

process is self-contradictory. It is both unsophisticated and unscientific to proclaim the objective existence of rules of law while nurturing a dependence upon some ultimate reviewing tribunal for their enunciation. Certainly from the viewpoint of the uninitiated public it is difficult to conceive of a procedure more inimical to the maintenance of confidence in a rule of law than the postponement of its discovery until the appellate "end zone" of the legal contest. The admitted tentativeness of the outcome of the trial process contradicts the existence of a rule of law that, *ex hypothesi*, is unknown and apparently *unknowable* to the trial judge.

Even if considered desired and attainable, the quest for a scientific systematization of law is frustrated by the counterpressures exerted by the doctrine of separation of powers. Free judicial evolution is aborted when a reviewing court must abruptly halt its activity in midstream, at the border of the legislative or executive domain. This is the result regardless of how far the court has proceeded in the judicial rulemaking process. Likewise in derogation of scientific idealism is the expressed belief that a given matter is properly one for legislative consideration and, therefore, cannot adequately or appropriately be dealt with by the judiciary—even when supported by intrinsic reason.[125] This is especially true since there is no objective criterion for determining when the highest judicial organ will acknowledge the superior legislative competence in the area under consideration and declare its willingness to defer to its authority. A relatively recent illustration of a judicial cul-de-sac, created without benefit of any pretense at principled decision making, is the inability of the Supreme Court to harmonize the applicability of the Sherman and Clayton Acts to various types of professional sports.[126]

The means by which our appellate system operates is clearly not irrelevant to any inquiry concerning its claimed scientific character. Nearly thirty years ago, the view was expressed that "spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full

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pronounced that "a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice . . . ." *Id.* at 115-16.

[125] The Supreme Court in United Steel Workers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965), refused to hold that for purposes of diversity of citizenship an unincorporated labor union is a citizen of the state where its principal office is located "regardless of our views as to the intrinsic merits [of such an interpretation] . . . ." *Id.* at 153.

[126] In Radovich v. National Football League, 352 U.S. 445 (1957), the earlier cases—Federal Baseball Club v. National League, 259 U.S. 200 (1922), and Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)—were arbitrarily confined to the sports activity involved in each particular case.

protection for interstate commerce intended by the Constitution."[127] Nevertheless, today the entire structure of our appellate system, whether viewed as a process or a repository of authoritative law, rests on nothing but "spasmodic and unrelated instances of litigation," which may be characterized as Holmes characterized general historical works—unquantified.[128] This is the product of the many elements of chance traceable to the action or non-action of parties and their counsel, or flowing from the control by courts of their dockets through the devices of certiorari, rehearings, or hearings en banc.[129]

Another factor of significance to the concept of law as a science involves the problem of judicial personnel. While the bar becomes ever more specialized, the judiciary remains a body of general practitioners. The result is a nonspecialist judge in a position which obliges him to lay down guidelines to an increasingly specialized group of practitioners. Without detracting from the extreme value of broad scholarship—the tradition of the common law "in all its plentitude"—it may seriously be questioned whether the traditional nonspecialist judge is able to function satisfactorily, with any claim to scientific adequacy, in all areas of judicial concern.[130]

The quality of scientific substance claimed for the appellate process must be considered in the light of the increasing boldness with which courts venture into the area of fashioning public policy. It was one thing to speak of the body of legal principles expressed by appellate courts as a "science" when Blackstone spoke of law as the perfection of reason[131] or when Chief Justice Marshall declared that the judicial "department has no will, in any case";[132] it is something quite different under the present dispensation, which treats law less as a brooding omnipotence and more as the work product of judges.[133] The not too in-

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127 McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 189 (1940) (Black, Frankfurter, & Douglas, JJ., dissenting).

128 1 THE CONTINENTAL LEGAL HISTORY SERIES xlv (1912). "We readily admit their assumption that such and such a previous fact tended to produce such and such a later one; but how much of the first would be necessary to produce how much of the last, and how much there actually was of either, we are not told." *Id.*

129 Judge Clark dissented in Walters v. Moore-McCormack Lines, Inc., 312 F.2d 893, 896 (2d Cir. 1963), when the majority denied an en banc hearing. He found fault with such a decision for, among other things, "overlooking the human element." *Id.* at 899.

130 It has been suggested that appellate determinations before another branch of the trial court would permit greater specialization than is now available. *See* R. POUND, ORGANIZATION OF THE COURTS 288 (1940). *See generally* R. POUND, *supra* note 8, at 377-93.

131 1 BLACKSTONE, COMMENTARIES *70. "[I]f it be found that the former decision is manifestly absurd or unjust, it is declared, not . . . *bad law*, but that it was *not law* . . . ." *Id.*

132 Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737, 866 (1824). *See generally* M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 67 (1779).

133 The Fifth Circuit, in Griffin v. McCoach, 123 F.2d 550 (5th Cir. 1941), *cert. denied*,

frequent insistence by courts that they are ill equipped to deal with anything other than "legal issues"[134] results in an additional blurring of scientific guidelines. The existence of "legal" issues which are neither economic, political, nor social is difficult to conceive under a regime which has succeeded in dethroning law as a pure abstraction and in which it must function as a normative force. *Brown v. Board of Education*[135] and *Minersville District v. Gobitis*[136] are significant examples of the stress caused by the dichotomous stance of courts concerning the nature and limitations of their activity. The Supreme Court in both cases was concerned with the question of the conflict between a well-established local public policy and the equal protection clause of the fourteenth amendment.[137] In *Brown* the Court felt that it had to "consider public education in the light of its full development and its present place in American life throughout the Nation."[138] This was a complete about-face from its position in *Minersville* less than two decades earlier: "the courtroom is not the arena for debating issues of educational policy."[139]

The phenomena under consideration undoubtedly have their constitutional implications under the doctrine of separation of powers. Important is the problem of allocation of official power. The question of marking out the precise bounds for the legislative and judicial segments, however, is essentially a formal question, for "to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties."[140] More immediate, and probably of a more crucial significance, is the necessity for narrowing the ambit of supposedly autonomous legal conceptualism by broadening the arbitral function of judges in the various affairs of a dynamic society. In this function, law should pretend to no greater determinism or other scientific characteristic than

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316 U.S. 683 (1942), held that "the public policy of the state does not depend exclusively upon legislation, but may be the result of judicial construction and announcement." *Id.* at 551. *See generally* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). "You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy . . . ." *Id.* at 466.

134 "The establishment of political or economic policies is not for the courts. Such action would be an abuse of judicial power." National City Bank v. Republic of China, 348 U.S. 356, 371 (1955) (dissenting opinion).

135 347 U.S. 483 (1954).

136 310 U.S. 586 (1940), *overruled*, Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

137 In *Brown* the Court was concerned with "separate but equal" public education. The issue in *Minersville* was the constitutionality of a state statute requiring school children to recite the pledge of allegiance to the national flag.

138 347 U.S. at 492-93.

139 310 U.S. at 598.

140 *Id.* at 600.

is possessed by the social, political, or economic forces upon which it operates.[141]

VIII. ACCESSIBILITY OF LEGAL SERVICES

Both within and without the legal profession, there is a discernible awareness of crisis in the law. Essentially, the crisis involves confidence in the adequacy of our legal processes rather than in the substantive law itself. It seems fair to say that the crisis is a manifestation of the problems resulting from the inaccessibility of the law. The appellate process is necessarily in the center of this problem. A reasoned solution is inconceivable without first taking account of the ingredients which constitute the appellate review process. Conversely, the solution will profoundly affect judicial review as presently applied.

Inaccessibility, as used here, is multidimensional. It involves an intangible Kafkian aloofness,[142] a cost factor, the nonexistence of adequate and available judicial forums, the problem of legal representation, and, principally, the difficulty of identifying useful legal knowledge. In its most rudimentary sense, inaccessibility of law is due to the spiraling complexity of legal materials.

Assuming that the importance of rules has not been grossly exaggerated, it is rather disconcerting to observe that after decades of procedural reform the federal judiciary is still earnestly debating a unified system of rules for appellate procedure, admission of evidence, and pretrial.[143] Even with legislative intervention attempting to make legal materials in the field of administrative law more readily available,[144] supply and demand are still a long way from a reasonable balance.[145]

Paradoxically, the greatest obstruction in access to law is caused by the proliferation of the very precedents that are intended to point the way to the safe haven of certainty and predictability. A problem not unknown to common-law jurisdictions,[146] its magnitude is evident from

[141] Not without interest is part of a resolution adopted by the Conference of Chief Justices, August 23, 1958, reprinted in *Civil Rights Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 156 (1966), which refers disapprovingly to the Supreme Court of the United States as "not merely the final arbiter of the *law* . . . [but] the maker of policy in many major social and economic fields." (Emphasis added.)

[142] "[B]efore the law stands a door-keeper on guard." F. KAFKA, THE TRIAL 268 (1950).

[143] *See generally* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT at 37, 38, 54 (1965); Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L.J. 431 (1966).

[144] *E.g.*, Administrative Procedure Act § 3, 5 U.S.C.A. § 552 (1967).

[145] *See* United States v. Public Util. Comm'n, 345 U.S. 295 (1953), where neither the counsel for the Public Utilities Commission nor the lower court "had access to the material used by the Court to decide the case . . . ." *Id.* at 319 (Jackson, J., concurring).

[146] *See generally* C. ALLEN, LAW IN THE MAKING 274-75 (3d ed. 1939); Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1040 (1961).

a quick perusal of the lengthy section on appeal and error in any digest or encyclopedia.[147] There is no need to emphasize the immediate and direct effect which the clogging up of channels of information has upon administration in an area of social control so uniquely language-oriented as law.[148]

IX. ACCESSIBILITY OF EFFECTIVE LEGAL GUIDANCE

Whether or not one accepts in the abstract the well-known view of Mr. Justice Holmes that law consists of "prophecies of what the courts will do in fact and nothing more pretentious,"[149] there should be no doubt as to its empirical validity. It is paradoxical that while certainty is the cherished virtue asserted to justify the rule of precedent, this is the area where appellate procedure is most patently inadequate and unreliable. Of course, much of the uncertainty does not even remotely touch the substantive merits of judicial business. This is illustrated by the complexities involved in determining the appropriate judicial forum,[150] choosing the proper law or form of remedy,[151] and allocating responsibility between judge, jury, parties, and counsel.[152] As to substantive lawmaking, if the predictive ingredient is as important as is claimed, it is crucial to ask why we should be satisfied with merely a tentative prediction, or why our specific, transaction-related prediction must be guided by nothing stronger than a divination of a judicial trend. When it is asserted that precedents may be employed in sixty-four ways,[153] is it not just another way of saying that precedents cannot safely be employed as a guidance factor in any one way?

The question answers itself. If law is to be truly accessible, it must

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147 "[T]he evergrowing mass of legal literature which contains 'the law,' " has led to both criticism and solutions from the various sectors of the legal profession. Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with the Law*, 71 YALE L.J. 239, 250-52 (1961); *see* Special Committee to Study and Report Upon the Duplication of Legal Publications, *Report*, 63 A.B.A. REP. 464 (1938).

148 In finding a state appeals court correct in rejecting as law a decision of a county court, the Supreme Court considered the "practical significance" of a litigant's having to "laboriously [search] the judgment rolls in all of [the state's] forty-six counties." King v. Order of United Commercial Travelers, 333 U.S. 153, 161 (1948).

149 Holmes, *The Path of the Law*, 10 HARV. L .REV. 457, 460-61 (1897). *See also* Radin, *Case Law and Stare Decisis*, 33 COLUM. L. REV. 199 (1933). "[L]aw essentially is an expectation. It is a conjecture of what a court would do . . . ." *Id.* at 211.

150 *See, e.g.*, Williams v. United States, 289 U.S. 553 (1933).

151 *See, e.g.*, Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320 (1909).

152 Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), involved the question of whether an employee must allow his union an opportunity to act on his behalf through contract grievance procedure before he can proceed with a judicial remedy. The Court answered affirmatively, believing Congress "preferred" the former. *Id.* at 653.

153 K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 77-91 (1960).

be available in a manner which provides for authoritative predictability in areas lending themselves to such treatment. This goal can be attained principally through severing the lawmaking from the decisional function in judicial proceedings and by expanding the use of advance opinions on an administrative level.

There is ample logical support for not having courts decide hypothetical or moot cases. However, there are equally cogent reasons against an actual case or controversy being the only vehicle for pronouncement of legal principles or rules where such pronouncement is desirable and appropriate. Pragmatically speaking, the explanation of the rationale of a decision upon issues disclosed by a particular record is quite futile even if the formal opinion really explains the result—something it rarely does.[154] Courts have uniformly held that a decision under review, otherwise correct, will not be disturbed merely because "the authority below relied on erroneous reasoning."[155] The usefulness to future cases of the rules or principles thus laid down would seem to be the same as that of principles enunciated in a hypothetical or moot case. In fact, the very insistence by courts of appeal that their duty is to review only the decision of the actual case tried below refutes the possibility that the presence of an actual controversy might give any additional force to past reasoning when it is applied to later facts, however analogous.

If there is any substance to this observation, there is no reason to consider the decisional and the lawmaking functions of courts as inseparable. Confining judges to the sole task of deciding cases would make possible the orderly development of a body of law on a given subject, thus enhancing its prospective availability, and would provide the added guarantee that the architects of that body of law will be individuals of general, as well as special, scholarship and experience, whether they be judges or not. There is no objective reason why a legislative body may not confer authoritative character upon legal principles thus formulated, with or without the aid of a constitutional adjustment.[156] Even if it be

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[154] It is often said that the opinion gives the "reason" for the decision. In the vast majority of cases, it does not really do that, but . . . it is a brief essay, or series of essays on points of law. . . . But there ought to be no question that it is not the opinion that is binding. The rule is *stare decisis*, not *stare opinionibus* or even *stare responsis*.

Radin, *supra* note 149, at 210.

[155] Sunray Mid-Continent Oil Co. v. FPC, 239 F.2d 97, 101 (10th Cir. 1956), *rev'd on other grounds*, 353 U.S. 944 (1957).

[156] Professor (later Chief Justice) Stone suggested that the Restatement of the Law receive "legislative recognition and sanction, not as a body of legal rules . . . , but as 'an aid and guide' to courts in formulating legal rules . . . ." Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 335 (1923). *But see* Friendly, *Reactions of a Lawyer —Newly Become Judge*, 71 YALE L.J. 218, 220-21 (1961).

considered that only judges may authoritatively formulate legal doctrine, it does not follow that such formulation must be wedded to actual cases and controversies. Judicial bodies can effectively evolve lawyer's law in a framework of detachment from specific cases as readily as administrative agencies engage in rulemaking and executive interpretation. Recent congressional activity on amendments to the Administrative Procedure Act lends support to this thesis.[157]

Administrative law affords the best illustration of access to an authoritative legal opinion in advance of a legally significant action. Before improving his land, a person may obtain an effective opinion concerning the conformity of his plan to the building code and to zoning regulations; he can receive reliable guidance concerning license requirements before starting a business. Recognition of a similar need for access to law prior to acting has been apparent also on the federal administrative level, *e.g.*, in the Internal Revenue Service[158] and the Federal Trade Commission.[159] Advisory opinions or interpretations issued by these agencies do not amount to a relinquishment of authority to act in the public interest, nor do they have the effect of abdicating the right of rescission upon proper notice. They do, however, represent a reliable statement of the agency's view on the legality of the action involved, subject to a paramount reservation of authority to act in the public interest.[160] Declaratory orders, likewise, are a valuable administrative device rendering law more readily accessible[161] at a time when effective private counseling is increasingly hazardous.

Similar access to authoritative guidance is not, however, available

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157 "In the committee's [the Senate Committee on the Judiciary] view the making of rules is a most important agency function .... No one can ... doubt the prudence of leaving certain issues to be dealt with as they rise in specific cases. Nevertheless, sound agency management should involve rulemaking to the greatest extent possible for informing the public and the agency's own staff of the agency's views and positions with respect to the law it administers." S. REP. NO. 1234, 89th Cong., 2d Sess. 10 (1966).

158 Rev. Proc. 62-28, 1962-2 CUM. BULL. 496 (informs taxpayers where and how to request rulings).

159 16 C.F.R. § 1.51 (1967) (anyone may request advice on a proposed course of action).

160 Dixon, *Federal Trade Commission Advisory Opinions*, 18 AD. L. REV. 65, 71-75 (1966). Stare decisis presents a distinct problem in administrative rulings. *See* Kentucky Broadcasting Corp. v. FCC, 84 U.S. App. D.C. 383, 385, 174 F.2d 38, 40 (1949).

"[R]es judicata and equitable estoppel do not ordinarily apply to administrative determinations." Maryland v. United States, 329 F.2d 722, 731 (3d Cir. 1964). *But see* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 17, 18 (Supp. 1965). Professor Davis believes that a trend has developed toward the acceptance of the principle of res judicata and estoppel as applied to administrative rulings. *Cf.* Pflueger v. United States, 73 App. D.C. 364, 121 F.2d 732, *cert. denied*, 314 U.S. 617 (1941).

161 The Senate Committee on the Judiciary suggested that "an agency ... [be] required to act on a request for a declaratory order ...." S. REP. NO. 1234, 89th Cong., 2d Sess. 17 (1966). By this the Committee intended "to make the declaratory order the useful and important instrument it should be in administrative practice." *Id.* at 16-17.

even to a limited degree in the more traditional fields of lawyer's law. To the extent to which an individual's personal affairs become the subject of judicial action, the law to him is "*ex post facto* law."[162] There is no forum where a citizen is able to go to find out whether continued use by the public of his land will mature into a prescriptive right or whether a contemplated employment agreement will entail exposure to personal liability. Here, too, the areas of plausible predictability have not yet been explored or marked out. Certain devices, such as auxiliary rulemaking by judicial bodies analogous to that of administrative bodies, may answer the need for accessibility if they can meet the essential requirement—priority to the transaction.

No one expects authoritative or binding advance advice as to whether operating an automobile in a given locality at a given time at a certain speed will or will not constitute negligence. In this, as in other areas, the individual must take the chance that the judgment of an impartial tribunal may overrule his estimate of what constitutes reasonable conduct under the circumstances. It is a different situation, however, when a citizen desires to be authoritatively informed in advance whether an insurance contract he is considering will be judged in violation of public policy or whether the legal consequences of a power of appointment in a contemplated trust instrument will be unsatisfactory. In order to avoid dogmatism, the existing situation and the reasonable expectations of the public require an eclectic approach by the legal profession in identifying the areas of law which by their nature, impact, and risk to the actor require a maximum of certainty and predictability. This approach would refuse guidance in matters which do not lend themselves to this treatment. On the other hand, it would substitute certainty *in fact*, where feasible, for a precedent-oriented system in which whatever certainty there is lies open to all manner of guessing and second-guessing.

X. ACCESSIBILITY OF JUDICIAL FORUMS

As now conceived and constituted, judicial forums do not meet the requirement of ready access. The result may be, and often is, the extinction of rights by inaction or the settlement of a claim on terms amounting to a denial of a right.[163] Statistics lead one to conclude that the problem of congestion of court dockets is chronic and promises to become even more aggravated.[164] Chief Justice Warren has publicly

162 J. GRAY, THE NATURE AND SOURCES OF LAW §§ 224-25 (1909).

163 R. ENSOR, COURTS AND JUDGES IN FRANCE, GERMANY, AND ENGLAND 102-03 (1933).

164 Of the 76,607 civil cases pending on June 30, 1966, 7427 had been pending three years or more (almost 10%). DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED

expressed the opinion that the problem of the mounting workload of courts cannot be solved by "pyramiding judgeships periodically without making our judicial system responsive to and part of the times in which we live."[165]

The existing problem of inaccessibility of judicial forums transcends the factor of judicial personnel in the conventional sense; it draws into question the traditional imbalance typified by confining judicial functions to less than one percent of the legal profession. It is an anomolous situation which has no parallel in any other learned profession. Much of the exclusiveness and caste orientation of our court (the word "court" is no accident) system is a survival of a period when judges were appointed officers of the Crown.[166] While there is still a need to insulate the modern lawyer-judge from relationships which might promote partiality, the judiciary has encouraged certain attitudes inconsistent with a pragmatic democratization of the administration of justice. These are reflected in an unsympathetic attitude toward contracts of arbitration,[167] an unwillingness to enlarge the numbers of judicial functionaries,[168] including masters,[169] and an atmosphere of suspicion and aloofness toward executive justice.[170]

An adequate and accessible administration of justice necessitates a reassessment of the efficacy of the current distribution of human resources in the legal profession. This must be predicated on the essential unity of the profession, while dividing it functionally into three major components: lawyer-judges, lawyer-administrators, and lawyer-counselors. Presumably, the training of all who are admitted to the

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STATES COURTS, ANNUAL REP. 191 (1966). The number of cases three years old or older is on the rise. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT 34-35 (1966). This trend is believed to be similar in state courts. *See* Breen, *Solutions for Appellate Court Congestion*, 47 J. AM. JUD. SOC'Y 228 (1964).

165 Address by Chief Justice Warren, American Law Institute Annual Meeting, May 18, 1965, *printed in* N.Y. Times, May 19, 1965, at 23, cols. 3-4.

166 *See generally* J. FRANK, COURTS ON TRIAL 222-24 (1949); W. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 74-76 (2d ed. 1932).

167 Contracts to arbitrate, to the exclusion of the courts, have been held void as against public policy when entered into before any dispute has arisen. *See* Meacham v. Jamestown F. & C. R.R. Co., 211 N.Y. 346, 105 N.E. 653 (1914); Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746); Vynior's Case, 77 Eng. Rep. 597 (K.B. 1609).

168 *See* note 166 *supra* and accompanying text.

169 In LaBuy v. Howes Leather Co., Inc., 352 U.S. 249 (1957), the Supreme Court restrictively construed Rule 53(b) of the Federal Rules of Civil Procedure, which provides for the designation of masters.

170 "The disappearance of the vast amount of litigation now carried on through workmen's compensation bureaus, the vanishing of entire industries from the courts through arbitration agreements are but shadows portending far more drastic changes in the courtroom, if we do not awaken to a sense of our responsibility for the efficient administration of justice." Vanderbilt, *A Unified Court System*, 9 F.R.D. 635, 636 (1949).

bar equips them to deal with legal materials and to properly evaluate the legal problems and public policies which shape the growth of law as it applies to the needs of society. Likewise, admission is granted only to those who have been found to qualify with respect to personal integrity and public responsibility. These are also the sole formal requirements for judicial office. It is not probable that an analysis of the average personal, academic, and experience factors of the judging and the nonjudging sectors of the legal profession will support a finding that the former is possessed of any unique competence. In fact, nothing but formal authority, conferred by appointment or election, distinguishes the one from the other.

For carrying out the purposes of society, the activities of the lawyer-counselor or the lawyer-administrator are as much involved in the administration of justice as are the activities of the lawyer-judge. To be sure, there are valid reasons for a differentiation of task performance, but that differentiation is merely functional and, as in the medical or engineering profession, must be answerable to the societal demand for services. The relative size of the individual groups within the legal profession should be governed by these needs. The current lopsided division of the profession is arbitrary and artificial and does not reflect the needs of the public as consumers of legal services. Whatever the complexity of a case, it is plainly absurd to find it pending in courts for as long as six to ten years after docketing.[171]

To make the law more accessible there is need to greatly increase the number of lawyer-judges both in the federal and local systems. The present cost of operating the courts is insignificant in comparison with other activities of government.[172] It is true that higher appropriations of public funds will be required if the number of persons discharging judicial functions is to be increased substantially, but such an increase is more illusory than real when the total cost of the administration of justice is taken into account. Fees paid to lawyers by corporations or individuals are clearly as much a part of the cost of justice as amounts appropriated from the public treasury for the maintenance of the judicial system, for ultimately the burden of these private fees is passed on

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[171] In one case three years of appellate litigation transpired between the filing of the complaint and the actual trial. Popkin v. Eastern Air Lines, Inc., 204 F. Supp. 426 (E.D. Pa. 1962), *rev'd sub nom.* Barrack v. Van Deusen, 309 F.2d 953 (3d Cir. 1962), *rev'd*, 376 U.S. 612 (1964), *on remand sub nom.* Popkin v. Eastern Air Lines, 236 F. Supp. 645 (E.D. Pa. 1964), *rev'd sub nom.* Rapp v. Van Deusen, 350 F.2d 806 (3d Cir. 1965).

[172] The expenses for the federal judiciary, exclusive of the Supreme Court, for the fiscal year 1966 totaled approximately $80,000,000. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REP. 111 (1966).

to the public in the form of higher prices of products or services to the consumer.

XI. INACCESSIBILITY OF LEGAL REPRESENTATION

Within the compass of present-day adjudicatory technology, access to the law is hampered by inaccessibility of legal representation. Representation is an essential vehicle in any law forum even though a citizen theoretically may sue or defend without an attorney. Complex substantive and procedural rules render an individual's right to sue or defend in proper person just as nugatory as would an outright withdrawal of such right.

The very circumstances which make the lawyer-attorney an indispensable instrument in the administration of justice also make him a barrier to the vindication of rights because of the substantial economic cost of obtaining his services. This, of course, is nothing new. Legal fees were an oft-debated issue in ancient Rome,[173] at least after the passing of the era in which "the patron defended his client . . . without reward, . . . [as] part of the general system of protection which he was bound by the nature of the tie between them to afford."[174] Juvenal's stinging question to the professional advocate—"What will you get?"[175] —not only focuses attention upon an economic fact of life, but also subtly suggests the possibility of questionable propriety. Whatever its rationale, "there is one peculiarity which distinguishes . . . [the legal profession] from all others, and that is the disfavor with which men regard . . . [its] presumed readiness to espouse and support by argument either side of a question" *for a fee.*[176]

Overshadowing the question of ethical squeamishness is the problem of the financial burden imposed, by the necessity to retain counsel, upon individuals asserting or defending against a claim. The problem is especially exacerbating for the poor. In Victorian England it was said that conditions prevailing in equity courts and the expense entailed made it possible for an honest suitor to "emerge . . . from the ordeal victorious rather than triumphant."[177] Those conditions were said to give "every advantage to a wealthy suitor."[178] The situation is the same today.

Compared to the recent efforts to provide counsel for indigents in

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173 W. FORSYTH, THE HISTORY OF LAWYERS 353-65 (1875).

174 *Id.* at 354.

175 THE SATIRES OF JUVENAL 95 (R. Humphries transl. 1958).

176 W. FORSYTH, *supra* note 173, at 353.

177 Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 516 (1907).

178 W. WALSH, *supra* note 166, at 411.

criminal cases, nothing more than a faint stirring is identifiable in the broader area of affording legal services in civil litigation. To be sure, legal service programs for the poor have been in existence for some time in many urban areas and have met with limited success. Measures of this description do not, however, reach the essence of the problem: the need of the citizen, *qua* citizen, for ready access to the administration of justice regardless of his economic status.[179] Unlike essentially private disciplines such as medicine, law involves the interaction of the rights and duties of persons or groups. As a normative force shaping the relationships of individuals to society and to each other, it is, in a democracy, inevitably an expression of politics. Commitment to the law is, consequently, inherent in citizenship, and the availability of legal representation must be commensurate with that commitment.

Admittedly, any effort in this direction will result in a radical change in the complexion of the bar as we know it. There will be a need for far-reaching adjustments in the relationships between the counseling and executive sectors of the legal profession on the one hand and the adjudicative branch on the other. Such reorientation is, however, urgently needed to respond to the intricate, complex relationships between the individual and modern society and to the dynamics of a developing democratic process. There is an inherent relationship between the type of law administered and the nature of the bar. To point out an inadequacy in that relationship is not to deny its potential for growth, but rather to affirm its essential validity.[180] But the interest of the public in open access to legal services, including representation, must be held paramount to any private vested interest the bar might assume to have in conducting the practice of law.[181]

The basis for a transition from a truly private bar to one dominated by public interest may be found in the judicial change of viewpoint about the lawyer-client relationship. From attitudes such as "B loses his money because he hadn't a good lawyer,"[182] courts have leaned in-

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[179] *But see* Griffin v. Illinois, 351 U.S. 12 (1956). "Of course, a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of the poor man's purse." *Id.* at 23 (Frankfurter, J., concurring).

[180] *See generally* Hurst, *Changing Popular Views About Law and Lawyers*, 287 ANNALS 1, 3-6 (1953).

[181] In Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957), Justice Frankfurter dissented, suggesting that the absence of an adequate system of workmen's compensation was due to "the opposition of lawyers who resist change of the familiar, particularly when they have thriven under some outworn doctrine of law." *Id.* at 539.

[182] Zane, *The Five Ages of the Bench and Bar of England*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 625, 646 (1907) (a statement credited to a chief justice at common law).

creasingly toward a minimization of the lawyer-client identity whereby the client was considered concluded by the action or inaction of his lawyer. Examples of this attitude are decisions in which courts give due consideration and application to a rule of law unrecognized or unurged by counsel[183] or when they take notice of "plain error" not assigned as such.[184] This shift of attitude is based on the recognition that the judicial establishment seeks to do substantial justice rather than "merely to decide points in a tilt between lawyers."[185]

XII. CONCLUSION

With the exception of cases raising constitutional issues or involving primacy of administrative adjudication, judicial review in the area of civil appeals should be abolished.

For the most part, appeals are regarded as meliorators of nisi prius decisions or, on a broader level, as the ordering force in the law—the guarantor of certainty and uniformity. Nevertheless, experience affords no basis for the conviction that the appellate process results in specific decisions which are particularly sure to be "just" or consonant with "law" (except in the tautological sense that the judgment of the reviewing court *is* the "law"). Neither is there any support for crediting appeals with achieving integrated guiding principles.

The "correctness" of the legal principle applied in a given case by an appellate court is no more objectively determinable than the claimed "error" of the court below. In the ultimate, the authority of the reviewing process rests on nothing but a formal, whether constitutional or statutory, fiat. Nothing essential would be withheld if, by the same formal process, final authority were to be bestowed upon the original judicial forum. This reasoning is reflected by the uniform trend of decisions holding that due process does not require the granting of judicial review.[186]

Neither do ideals of certainty and uniformity dictate the indispens-

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[183] Trapp v. Metropolitan Life Ins. Co., 70 F.2d 976, 981 (8th Cir. 1934).

[184] Commercial Nat'l Bank v. Parsons, 144 F.2d 231, 240 (5th Cir. 1944), *cert. denied*, 323 U.S. 796 (1945); *cf.* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). "A rational system of jurisprudence should not attach inexorable consequences to failure to guess right on a legal question for the solution of which neither statutes nor court opinions have provided even a reasonably certain guide." *Id.* at 517 (Black, J., dissenting).

[185] Commercial Nat'l Bank v. Parsons, 144 F.2d 231, 240 (5th Cir. 1944), *cert. denied*, 323 U.S. 796 (1945).

[186] *See* note 28 *supra* and accompanying text. It should be noted that Congress has not provided for appeal, as of right, from the decisions of the United States Court of Claims. There seems, however, no discernable sentiment to the effect that litigants before this court obtain less "due process" than those before courts whose decisions are appealable.

ability of an appellate process to insure freedom from errors of law in the administration of justice. Uniformity of decision is not a virtue in itself; it is meaningful only as fostering equality and is, essentially, an antithesis to arbitrary discrimination. Equal protection of the law has uniformly been recognized not to require uniformity of legal decisions. No statistical evidence is necessary to suggest that both uniformity and certainty are just as jeopardized by an erroneous finding of fact as by an incorrect application of a principle. Yet, despite our heightened awareness of the importance of fact determinations, neither equality nor certainty are urged as grounds for their regular reviewability in jury or non-jury cases.

From the viewpoint of uniformity and certainty, appeals are to some extent self-defeating. The clarification of a doubtful specific in an appellate decision necessarily involves the reification of multiple theoretical considerations, a process which potentially converts the thus clarified specific into a spectrum of totally new uncertainties.

Appeals are predicated upon a number of doubtful premises. Among these are: (1) that there is a clear distinction between fact and law; (2) that appellate review is an efficient method for assuring just results; (3) that legal principles enunciated by reviewing tribunals are scientific pronouncements, partaking of the qualities of determinism, objectivity, and causality; and (4) that there exists an identifiable line of demarcation between issues which are legal and those which are social, economic, or political.

Judicial review is internally contradictory. The process presupposes the independent existence of "correct" principles of law which are not, however, ascertainable until the exhaustion of laborious and involved procedures encompassing a hierarchy of tribunals. While review procedure assumes that trial judges are capable of "error," it generally does not permit an examination of their activity until the final judgment. When the judgment is reviewed, the guidance afforded is usually limited to that phase of the matter which is found to be affected with error, leaving the proceeding open to the possibility of further error upon remand. There is also the anomaly that while courts of appeal will at times utilize a case as an occasion for announcing a new doctrine, though not requested by either party to do so, they continue to insist that only an "actual case or controversy" is an acceptable instrument for generating legal principles.

Appellate procedures should likewise be scrutinized in the context of the current crisis of confidence in the administration of justice. Our unquestioning acceptance of judicial review in civil matters contributes

to that crisis, for the resultant proliferation of pronouncements bewilders the legal profession and utterly baffles the public. Since many appellate opinions are by divided courts and constitute reversals of precedent, appellate courts themselves are a factor in engendering a sense of frustration in the public by conveying an impression of arbitrariness and factitiousness. A not insignificant by-product of the review process is a detraction from the authority of the trial court—the only judicial forum with which the public comes into personal contact and in which citizens may participate as litigants, jurors, experts, or witnesses.

The continued adherence to our review procedure is ineffective in meeting the overriding problem facing our system of administering justice—the making of readily *accessible* law in a truly *authoritative* manner, at a point of time when its normative function will be most truly felt. In place of appeals, which at best are mere ex post facto declarations of legal norms, methods should be devised for making authoritative legal information available as a guide to conduct. No administration of justice can rest on an assumed knowledge of law without making the means for obtaining such knowledge readily available. To the extent to which they are truly serviceable, legal rules should be authoritatively set forth by appropriately constituted public bodies unrelated to the making of decisions in actual court cases. Such formulations will have the advantages of continuity, orderliness, and expertise—qualities not found in the necessarily haphazard functioning of appellate courts. A reform of this magnitude will, however, make great demands upon the legal profession, for greater accessibility of the law and of legal processes will likewise require a rethinking of the function of the bar, a utilization of all its resources, and a thorough restructuring and reallocation of its administrative and adjudicative responsibilities.