

# A COMPARATIVE ANALYSIS OF THE RIGHT TO APPEAL

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## INTRODUCTION

Trials are commonly treated as the embodiment of the criminal justice system. Public interest, reflected in—or driven by—media coverage, reaches its zenith at trial; verdicts command headlines. A casual observer could be forgiven for thinking that criminal proceedings invariably end with the entry of verdict and imposition of punishment. But where a defendant is convicted, the trial is often not the final stage in the criminal process. A convicted person generally has the right to appeal against, or seek review of,<sup>1</sup> conviction and sentence.<sup>2</sup> And there is no reason to think that a person who has elected to defend charges will not exercise this right.<sup>3</sup> Criminal appeals are thus a crucially important feature of the modern criminal process. Convictions cannot be treated as final until appeal rights have been either exhausted or waived.

Rights of appeal are increasingly ubiquitous. The ability to appeal against conviction and sentence is, in most jurisdictions, a matter of right, either statutory or constitutional. But this has not always been the case. The right to appeal is a comparatively recent addition to the common law criminal process. For centuries, these legal systems, in stark contrast to those of continental Europe, did not provide a means by which defendants could effectively challenge their convictions.

Despite being both important and prevalent, however, very little scholarly attention has been given to the subject of criminal appeals.<sup>4</sup> Texts

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1. In this article, appeal and review are used as general, synonymous terms.

2. I recognize, of course, the possibility of post-conviction collateral attack that exists in certain jurisdictions. While such proceedings are connected to the criminal process, their very designation as *collateral* attacks indicates that they are not themselves part of the ordinary criminal process.

3. The criminal process has been characterized as a struggle, with most people charged with crimes doing everything in their power to avoid punishment. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 2 (1964).

4. Andrew Ashworth, *General Editor's Introduction* to ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS: 1844-1994, at v (1996).

on domestic criminal procedure often deal with appeals almost as an afterthought. Comparative studies are virtually non-existent.

This article applies a comparative lens to the modern right to appeal against conviction and sentence.<sup>5</sup> It argues first that, despite very different historical foundations and institutional structures, there has been considerable convergence in how criminal appeals are conceptualized in common law and European civil law jurisdictions. A number of explanations for this convergence are apparent, including the emergence of modern human rights law, changes in trial processes, and technological advances. Second, the article's focus turns to the substance of the right, particularly the scope of review. It goes on to argue that, although certain differences remain, the jurisdictions covered reveal the development of a shared understanding of the substance of the right. In particular, this article submits that the right to appeal is best understood as requiring a state to provide criminal defendants with the opportunity to access a fair process that permits adequate and effective review of one's conviction.

After setting out the functions of criminal appeals in Part I, Part II considers the origins of the right to appeal at common law and in continental Europe. Part III then explains the contrasting institutional frameworks within which appeals exist. In Part IV, the ways in which different jurisdictions, both national and multilateral, conceive of the right are surveyed. Potential reasons for the convergence in how the right to appeal is conceptualized are then discussed in Part V. Finally, Part VI addresses the extent of this convergence, and examines the substance of the modern right to appeal.

## I. THE FUNCTIONS OF CRIMINAL APPEALS

At the broadest level of generality, appeals are concerned with correcting error. Mechanisms for error correction are an important feature of developed legal systems: "Developed legal systems make provision for correcting error. Error—in the sense of good faith differences of opinion about finding the facts or about formulating or applying rules of law—is expected as a regular occurrence."<sup>6</sup> Error correction, as an overarching value, in turn serves a number of distinct functions.

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5. For convenience, this article will speak of the right to appeal against conviction as encompassing the ability also to challenge the sentence imposed. It is beyond the scope of this article to consider prosecutorial rights of appeal, which raise distinct issues.

6. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 416 (2009).

The primary function of the modern right of appeal is to protect against miscarriages of justice. As will be seen, the driving force behind the establishment of this right in England was concern over the incidence of wrongful convictions. Miscarriages arise in at least two ways. First, an innocent defendant may be wrongly convicted. There are many possible reasons for such errors. The fact-finder may fail to assess the evidence properly; may be misled by irrelevant, prejudicial or fabricated evidence; or exculpatory evidence may not be produced at trial. Second, a defendant may not have received a fair trial for a myriad of potential reasons. Appeals provide a forum in which defendants may have these concerns addressed.

The prevention of miscarriages of justice is an individualized concern: appeals are crucial for ensuring that justice is done in each case. This function of appeals explains their inclusion in modern human rights instruments. Trechsel has argued that it is the only justification that is of any relevance to the individual.<sup>7</sup> Concerns over equality of treatment may, however, also be relevant: a criminal defendant has an expectation that he or she will be treated, both procedurally and substantively, in the same manner as any other defendant. Appellate courts have an important role to play in ensuring that equality of treatment.

A second function of criminal appeals is to maintain consistency in trial courts.<sup>8</sup> Appellate courts achieve this through two, linked mechanisms. Most obviously, the courts correct anomalous applications of the law in particular cases. Clarification and guidance are given, leading to greater consistency in the future application of the law.<sup>9</sup> In addition, the very existence of the right renders appellate oversight likely, which in turn encourages consistency (and better decision-making) among trial judges, who know that their decisions may be subject to challenge.<sup>10</sup>

Third, appeals serve important institutional functions. They provide legitimacy to the criminal justice system as a whole. Public confidence in the administration of justice increases when miscarriages do not occur and when courts dispense criminal justice consistently and fairly.<sup>11</sup> More

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7. STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 362 (2005) (“[I]nternational human-rights law is not concerned with the uniform and correct application of national law . . .”).

8. Lester B. Orfield, *The Right of Appeal in Criminal Cases*, 34 MICH. L. REV. 937, 938 (1936).

9. A good example is sentencing guideline judgments, in which an appellate court sets out appropriate sentencing “bands” and the proper factors to be considered in placing an individual case within a band. *E.g.*, *R. v A.M. (CA27/2009)* [2010] NZCA 114 at para [6-16] William Young P & Ellen France J for the Court (N.Z.).

10. Patrick David Hansen, *Stacking Appellate Dissents: Due Process in the Appellate Arena*, 18 VAL. U. L. REV. 141, 144 (1983); Nathan A. Smyth, *The Limitation of the Right of Appeal in Criminal Cases*, 17 HARV. L. REV. 317, 317 (1903).

11. Hansen, *supra* note 10, at 144.

basically, appeals are the primary way in which judges, as public officials subject to oversight, are held accountable for their performance.<sup>12</sup>

Finally, appeals allow questions of law to be settled.<sup>13</sup> They provide a forum for ensuring the proper interpretation, development and application of the criminal law. Appeals have been the context in which the content of defendants' rights, the proper application of rules of evidence, and the scope of substantive offenses and defenses have all been developed.

## II. THE HISTORY OF THE RIGHT TO APPEAL

Today, criminal appeals are a feature of both common law and civil law jurisdictions. However, this contemporary situation belies the very different streams of development that flowed in each system. In order to appreciate the extent to which modern appellate review in these systems has converged and the reasons for this phenomenon, it is necessary to trace the differing historical foundations of the right to appeal in the common law world and in the civil law systems of continental Europe.

### A. The Origins of the Right to Appeal in Common Law Jurisdictions

The criminal appeal, in the common law world, is of recent origin. In England, the United States, and Canada, the proposition that those convicted of crimes should have the right to challenge their convictions only took root around the turn of the twentieth century. In order to understand the place the criminal appeal now occupies in common law jurisdictions, this section focuses predominantly on its development in England, although some mention is made of the United States and Canada.

While criminal appeals were unknown to the common law for centuries, various archaic forms of review were available to defendants.<sup>14</sup> Some appreciation of these methods of control—and their flaws—provides crucial context for the eventual creation of a right to appeal.

The earliest methods of review directly targeted the jury itself. Indeed, Langbein has argued that a desire to control juries drove much of the common law's development.<sup>15</sup> During the medieval period, jury verdicts

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12. For further discussion, see Part III.

13. Orfield, *supra* note 8, at 938-39; Hansen, *supra* note 10, at 146-49.

14. Although certain differences existed between the English and American practices, these are not of sufficient importance to justify separate treatment. *See, e.g.*, Benjamin L. Berger, *Criminal Appeals as Jury Control: Anglo-Canadian Historical Perspectives on the Rise of Criminal Appeals*, 10 CAN. CRIM. L. REV. 1, 34 (2005) (observing that the new trial procedure was used far more extensively during the nineteenth century in the United States than in England).

15. LANGBEIN ET AL., *supra* note 6, at ch. 7.

could be quashed through a process known as attain. <sup>16</sup> A second jury, with twice as many members, was empanelled to review the verdict. <sup>17</sup> If reversed, members of the original jury received “savage penalties.” <sup>18</sup> This process was, however, not available to criminal defendants and was very rarely used in criminal cases. <sup>19</sup>

During the late fifteenth and sixteenth centuries, the practice of fining jurors became common. The Star Chamber, which was responsible for protecting against abuse of the legal system, <sup>20</sup> regularly fined jurors for bringing in acquittals against the weight of the evidence. <sup>21</sup> The presumption seems to have been that such findings could only be the result of bribery or corruption. <sup>22</sup> In *Bushell’s Case*, following the abolition of the Star Chamber, the courts ended this practice. <sup>23</sup>

In the seventeenth century, the discretion to order a new trial—already well established for civil cases <sup>24</sup>—became available in certain criminal cases. The process for deciding whether to order a new trial permitted review on broad grounds, which included misdirection and that the verdict was against the evidence. <sup>25</sup> However, a new trial could only be sought in a very narrow range of cases. <sup>26</sup> Felonies were entirely excluded. And for misdemeanors, the process was restricted to the small number of cases heard *nisi prius*. <sup>27</sup>

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16. *Id.* at 418.

17. *Id.*

18. They were accounted forever infamous; they forfeited all their chattels; their lands and tenements were seized; their wives and children were thrown out; their houses were razed; their trees were uprooted; their meadows were ploughed; and they were imprisoned. LANGBEIN ET AL., *supra* note 6, at 417 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 402-404 (Oxford 1756-1757)). Jury members “lost their chattels, were jailed for at least a year, and were accounted infamous.” Lester B. Orfield, *History of Criminal Appeal in England*, 1 MO. L. REV. 326, 327 (1936).

19. LANGBEIN ET AL., *supra* note 6, at 418. Attaints were abolished in 1825. Orfield, *supra* note 18, at 328.

20. LANGBEIN ET AL., *supra* note 6, at 420.

21. Orfield, *supra* note 18, at 328.

22. LANGBEIN ET AL., *supra* note 6, at 421 (quoting from THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 140-43 (1985)).

23. *Bushell’s Case*, (1670) 124 Eng. Rep. 1006 (CP).

24. Berger, *supra* note 14, at 7-8.

25. *Id.* at 8.

26. Orfield, *supra* note 18, at 328-29. *See also* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 532-33 (1991) (arguing that, in the United States, the motion for a new trial was closely analogous to the modern appeal).

27. In civil cases, pleaded questions of fact could only be answered by local juries. But by the fourteenth century, all three common law courts, together with the Chancery department, sat in Westminster. The court in which the case was pleaded would therefore issue a writ to the local sheriff, ordering him to summon a jury and have them empanelled in Westminster. In practice, however, the

The writ of error was a further, but “disappointingly impotent,”<sup>28</sup> method of review. It was the only means by which the record in a criminal case could be considered by a higher court after judgment.<sup>29</sup> The writ of error, a close relation of certiorari, issued from a superior court for the purpose of “reviewing and correcting the record of proceedings in an inferior court.”<sup>30</sup> The greatest limitation was that review was restricted to errors appearing on the face of the trial record, a sparse collection of formalistic documents: the judge’s commission, the indictment, the defendant’s plea, the verdict and any entries made in the minute book.<sup>31</sup> Review was thus effectively restricted to procedural errors and errors in the indictment.<sup>32</sup> It was not possible to challenge evidentiary rulings, jury instructions, or the factual basis for conviction.<sup>33</sup> This is not to say that verdicts were inevitably upheld: in the United States, for example, courts sometimes adopted a very strict approach, overturning convictions for minor, technical errors on the record.<sup>34</sup> Nevertheless, as Stephen lamented, “the grossest errors of fact or of law [could] occur without being in any way brought upon the record” and were thus not capable of being challenged.<sup>35</sup>

The writ of error became all but obsolete in 1848,<sup>36</sup> with the establishment of the Court for Crown Cases Reserved.<sup>37</sup> This Court formalized an ancient custom that had developed whereby the judges of the superior courts met informally at the Serjeant’s Inn to consider questions of

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trial would be conducted locally in front of a circuit judge, who would then report the verdict back to the central court to enter judgment. LANGBEIN ET AL., *supra* note 6, at 122-23. A motion for a new trial was therefore only possible because “judgment was not formally given by the trial judge.” Berger, *supra* note 24, at 8-9 (internal quotation omitted).

28. Berger, *supra* note 24, at 6.

29. Orfield, *supra* note 18, at 332.

30. LANGBEIN ET AL., *supra* note 6, at 418-19.

31. Orfield, *supra* note 18, at 332 (noting that the minute book was a private notebook that did not have to be kept).

32. Berger, *supra* note 24, at 6-7.

33. Orfield, *supra* note 18, at 333.

34. Arkin, *supra* note 26, at 528 (“[I]n one notorious North Carolina case from the early 1800s, the appeals court overturned the defendant’s conviction because the indictment did not ‘set forth the length and the depth of the mortal wounds.’”) (quoting *State v. Owen*, 5 N.C. 307, 308, 1 Mur. 452, 453 (1810)).

35. Berger, *supra* note 14, at 6 (quoting JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 309 (London, Macmillan 1883)).

36. Because the Court had the ability to hear cases that could be the subject of the writ, it was thereafter rarely used. PATTENDEN, *supra* note 4, at 9 and n.34 (citing M. FRIEDLAND, DOUBLE JEOPARDY 242 (1969)).

37. *Id.* at 8-9.

law reserved by trial judges.<sup>38</sup> Because those judges were not sitting as a court, their decision was treated as that of the trial judge, and reasons were not required.<sup>39</sup> In contrast, the Court of Crown Cases Reserved sat in public and issued reasoned decisions. Recourse, however, remained at the discretion of the trial judge, who had to decide to state a case for the Court's opinion,<sup>40</sup> and review remained restricted to questions of law and could not encompass the reasonableness of the verdict.<sup>41</sup> Because of these limitations, the Court was sparingly used,<sup>42</sup> averaging only eight cases per year.<sup>43</sup>

During the second half of the nineteenth century, pressure began to build for a right to appeal in criminal cases. Between 1844 and 1906, thirty-one bills concerning appeals were introduced to Parliament, but only one, limited to appeals on questions of law, was enacted.<sup>44</sup> Calls for change came from a number of quarters. Jeremy Bentham, the influential English reformer, advocated extending the right to appeal to criminal cases as part of his mission to rationalize the common law.<sup>45</sup> Members of the profession supported this proposal, but for different reasons. Their primary concern was that wrongful convictions were not rare occurrences. Bentham's rationale also appeared, with reformers frequently pointing out the absurdity of appeals being permitted in civil cases, where only money was at stake, but not in criminal cases, where life and liberty were in jeopardy.<sup>46</sup>

There was also significant opposition to a right of appeal. English judges were the most influential opponents.<sup>47</sup> The central pillar of their opposition was the assertion that wrongful convictions were extremely rare.<sup>48</sup> This empirical claim underpinned further arguments about the costs

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38. Orfield, *supra* note 18, at 335.

39. *Id.*

40. Indeed, because references were made by the trial judge himself, those most in need of correction were often the most reluctant to expose themselves to reversal. PATTENDEN, *supra* note 4, at 9.

41. *See id.*; Orfield, *supra* note 18, at 336. In 1802, Congress established a similar procedure—"the certificate of division"—whereby the circuit court could certify questions to the Supreme Court, but only when they were unable to agree on a point of law. The practice fell into disuse because two-judge circuit courts became increasingly rare and the Supreme Court was strictly limited to considering the question of law that had been certified. Arkin, *supra* note 26, at 531.

42. Berger, *supra* note 14, at 12.

43. Orfield, *supra* note 18, at 336.

44. PATTENDEN, *supra* note 4, at 6.

45. Berger, *supra* note 24, at 13.

46. *Id.* at 17-18.

47. PATTENDEN, *supra* note 4, at 22-25.

48. Berger, *supra* note 24, at 24 (quoting Baron Park, who submitted that "the Cases in which the Innocent are improperly convicted [were] extremely rare").

and benefits of criminal appeals. A number of these arguments are discussed in more detail in Part II.B.

Around the turn of the twentieth century, the central pillar of the judicial opposition to a right of appeal was fractured by two notorious miscarriages of justice: the wrongful convictions of Adolf Beck and George Edalji.<sup>49</sup> In 1891, Beck was convicted of, and served seven years' penal servitude for, frauds committed by another man, Thomas Smith. At trial, the prosecution relied on the assertion that, fourteen years earlier, Beck had committed similar frauds. The trial judge prevented the defense from challenging this plank of the prosecution case, despite the reality that it was Smith who had been convicted of those crimes. The judge also refused to reserve this question of law for the Court for Crown Cases Reserved. While in prison, Beck unsuccessfully petitioned the Home Office sixteen times to reexamine the convictions, even presenting potentially exculpatory fresh evidence. Three years after being released, Beck was again wrongly convicted of Smith's frauds. His misfortune eventually ended when, prior to sentencing, Smith was arrested attempting to pawn a stolen ring and confessed to all of the crimes. Beck finally obtained pardons and compensation from the Government.<sup>50</sup>

A few years later, a second miscarriage of justice came to public prominence. In 1903, George Edalji, long a target of racial prejudice, was convicted, on the basis of anonymous letters, of disemboweling a horse. Despite substantial evidence suggesting his innocence, he served three years in prison. Pleas to the Home Office were unsuccessful, including a petition signed by 10,000 people. Public pressure, however, continued to swell. Sir Arthur Conan Doyle took up the case, publishing two long articles arguing for Edalji's innocence. Finally, in 1907, after a special inquiry and further pressure, Edalji was pardoned.<sup>51</sup>

The Beck and Edalji debacles, together with other controversial convictions, finally produced the necessary political support for a right of criminal appeal.<sup>52</sup> By this point in history, Pattenden observes, "[r]etrial by newspaper had become so prevalent that public confidence in the courts was being undermined."<sup>53</sup> An appeal on questions of fact was seen as urgently required. Petitions to the Home Office and ad hoc committees of inquiry had proved ineffective.<sup>54</sup>

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49. For full discussion of the Beck and Edalji cases, see PATTENDEN, *supra* note 4, at 28-30.

50. *Id.*

51. *Id.*

52. *Id.* at 30-31.

53. *Id.* at 31.

54. *Id.*

In 1907, the Criminal Appeal Act was passed.<sup>55</sup> The Act established the Court of Criminal Appeal, which absorbed the jurisdiction of the Court for Crown Cases Reserved, and it abolished both writs of error and the High Court's power to grant new trials.<sup>56</sup> Unlike previous review mechanisms, appeals under the Act were broad in both scope and jurisdiction: appeals were available to all persons convicted on indictment, information or inquisition; review of one's conviction was permitted as of right on questions of law and with leave on questions of fact and mixed questions of law and fact; review was permitted, with leave, of the propriety of the sentence imposed; and, finally, trial judges retained the power to state cases for the opinion of the Court.<sup>57</sup>

Although a system of appellate review in Canada was enacted prior to that in England, it was heavily influenced by the debates on the issue that were taking place in the second half of the nineteenth century. The Criminal Code of 1892, which established "a system for broad means of appeal on questions of both law and fact," drew heavily from proposals submitted to the English Parliament by the Criminal Code Bill Commission in 1879.<sup>58</sup>

In the United States, as in England, a civil right of appeal existed long before a parallel criminal right. Indeed, the explicit grant of civil appellate jurisdiction in the Judiciary Act of 1789 was held to exclude review of criminal cases by implication.<sup>59</sup> It was not until 1879 that Congress permitted circuit courts to issue, on a discretionary basis, writs of error in criminal cases.<sup>60</sup> Then, in 1889 and 1891, Congress granted defendants convicted in a range of cases a right of direct appeal to the United States Supreme Court.<sup>61</sup> Resourcing concerns resulted in the transfer of this jurisdiction to the circuit courts, which, by 1911, possessed intermediate appellate jurisdiction for all federal criminal cases.<sup>62</sup>

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55. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 20(1) (Eng.).

56. *Id.*

57. CHARLES L. ATTENBOROUGH, PRINCIPLES OF THE CRIMINAL LAW 485-86, 493 (12th ed. 1912).

58. *See Berger, supra* note 24, at 31-32.

59. *United States v. More*, 7 U.S. (3 Cranch.) 159, 173-74 (1805).

60. Francis A. Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 154 (1957). Allen does point out, however, that developments began somewhat earlier in the states. *Id.* *See also* Arkin, *supra* note 26, at 527-28.

61. Arkin, *supra* note 26, at 523.

62. *Id.* at 523-24.

## B. Opposition to a Right to Appeal in Common Law Jurisdictions

The development of a right to appeal in England was strongly contested. While the debate centered on the prevalence of wrongful convictions, many other reasons were deployed in response to calls for reform.<sup>63</sup> While these arguments did not ultimately hold sway, some of the concerns expressed remain relevant today.

A common argument was that appeals undermined finality in the criminal process. A final determination, it was asserted, must be made somewhere. The jury was regarded as the appropriate body to make such a determination:<sup>64</sup> juries hear the evidence and witnesses first-hand, and are therefore best positioned to arrive at the truth. Appellate courts, in contrast, are composed of “judges schooled more in abstract law than in human nature, studying not the living witnesses but printed records.”<sup>65</sup> Traces of this objection lingered. Long after rights to appeal were firmly established in the United States, Chief Justice Burger bemoaned the harm done to the principle of finality by such appeals: “Few things have so plagued the administration of criminal justice, or contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality.”<sup>66</sup>

Sometimes linked with the finality argument was the misguided suggestion that jury trials were, in a sense, analogous to an appeal: a trial, so the reasoning went, only occurred after there had first been a preliminary hearing or grand jury indictment.<sup>67</sup> Neither of those procedures could, of course, be fairly characterized as even approaching the protections afforded by a trial.

Criminal appeals as of right were seen as producing a number of further costs. Most obviously, a system of appeals as of right is expensive to resource.<sup>68</sup> Additional appellate judges need to be appointed and support staff employed. Expensive changes are also necessary at the trial court level, particularly those associated with producing transcripts.

Delay was seen as a further significant cost. In the nineteenth century, when the criminal justice system operated at a break-neck speed, delay was

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63. Some of the arguments were patently absurd. PATTENDEN, *supra* note 4, at 22. Lord Denman, for example, attributed the support for a right of appeal to lawyers eager for another forum to show their skills and to criminals who desired to plead guilty to crimes that they did not commit in order to thumb their noses at the authorities. *Id.*; N. W. SIBLEY, CRIMINAL APPEAL AND EVIDENCE 19 n.2 (1908).

64. Smyth, *supra* note 10, at 317-18.

65. *Id.*

66. *Evitts v. Lucey*, 469 U.S. 387, 405-06 (1985) (Burger, C.J. dissenting).

67. PATTENDEN, *supra* note 4, at 16; Orfield, *supra* note 8, at 944.

68. SIBLEY, *supra* note 63, at 23.

regarded as a “great evil.”<sup>69</sup> Any delay in the imposition of punishment risked lessening the deterrent effect of the criminal law, especially where appellants were released on bail.<sup>70</sup> Systemic delay also undermined confidence in the reliability of verdicts.<sup>71</sup> And, if bail pending appeal is uncommon, there is the risk that large volumes of frivolous appeals may overwhelm the determination of meritorious ones: “The cause of fairness is hardly served when judicial rolls are crammed with futile appeals which delay the hearings of better ones, to the detriment of the appellants awaiting their determination, often in gaol.”<sup>72</sup>

A final argument made during the nineteenth century was that introducing a right of appeal would make juries *more* inclined to error.<sup>73</sup> Appeals, so the logic went, would undermine the sense of responsibility felt by jury members. Lord Bougham, for example, suggested that the prospect of errors being remedied on appeal would reduce “that sort of awful feeling of responsibility under which both judge, prosecutor’s and prisoner’s counsel, and jury act” and result in very frequent errors.<sup>74</sup> Similarly, Sir William Grantham, in 1907, expressed concern that the Criminal Appeal Act would make juries “less mindful of giving prisoners the benefit of the doubt.”<sup>75</sup>

### C. The Origins of the Right to Appeal in Continental Europe

The criminal appeal in continental Europe has its origins in the inquisitorial procedure.<sup>76</sup> It emerged much earlier than in England and has remained a persistent feature of continental criminal procedure. Indeed appeals are now commonly regarded as a fundamental right.<sup>77</sup>

Antecedents of the continental criminal appeal are found in Roman law.<sup>78</sup> Development was interrupted by the middle ages,<sup>79</sup> only to re-

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69. Smyth, *supra* note 10, at 321; Orfield, *supra* note 8, at 946. *See also* Berger, *supra* note 14, at 25-26.

70. PATTENDEN, *supra* note 4, at 23; Orfield, *supra* note 8, at 946.

71. SIBLEY, *supra* note 63, at 23.

72. *S v. Ntuli* 1996 (1) SA 1207 (CC) para. 24 (S. Afr.).

73. *See* PATTENDEN, *supra* note 4, at 23.

74. SIBLEY, *supra* note 63, at 21 n.3 (internal quotations omitted).

75. *Id.*

76. François Garraud, *The Different Types of Criminal Procedure*, in A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 9 (John Simpson trans., Little, Brown, and Company 1913) (1882) (describing the appeal as one of two institutions, the other being “legal proofs,” characteristic of the inquisitorial procedure and destined to limit the power of the judge).

77. *See* Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 490 (1974).

78. Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana’s Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions*, 17 TUL. EUR. &

emerge after 1100 A.D. with the revival of Roman law studies.<sup>80</sup> This re-emergence was primarily for institutional reasons, being intertwined with the modern state and continental rulers' desire to "build bureaucracies to establish their control over previously independent provincial and local authorities."<sup>81</sup>

During the feudal period and middle ages, justice in France was patrimonial, with the right to administer justice dispersed among feudal lords.<sup>82</sup> Judicial administration was the most important—and pervasive—function of government and means of control.<sup>83</sup> Reestablishing a royal system of justice was therefore a fundamental component of a broader effort of the Crown "to recapture powers of government that had been fragmented and dispersed."<sup>84</sup> As the power of the royalty increased, the jurisdiction of the royal courts steadily expanded,<sup>85</sup> and the king began to assert "a preeminent right of justice throughout the whole kingdom."<sup>86</sup>

"[B]y the middle of the fourteenth century," Dawson observes, "the private jurisdictions almost everywhere had come under the wide umbrella of royal appellate review."<sup>87</sup> Over time, the royal courts eventually absorbed both the secular (i.e. seigniorial and municipal) and ecclesiastical courts. This expansion of royal jurisdiction was achieved through two interrelated methods. The first was the creation of royal causes—certain proceedings over which crown officers had exclusive jurisdiction.<sup>88</sup> The list of royal causes expanded rapidly, enlarging the judicial powers of inferior royal officers.<sup>89</sup> By the end of the thirteenth century, all secular jurisdictions were seen as emanating from the king.<sup>90</sup>

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CIV. L.F. 151, 175 (2002) (observing that criminal appeals took the form of an action known as the *provocatio*). *But cf.* Garraud, *supra* note 76, at 10 ("[T]he appeal, as we understand it nowadays, did not exist under the Roman Republic; it made its appearance under the Empire.").

79. During the feudal period and the Middle Ages, justice was decentralized. Under the feudal system, the lord had jurisdiction over the fiefs and manors of his domain. All feudal courts were courts of last resort. A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 48-51 (John Simpson trans., Little, Brown, and Company 1913) (1882).

80. JOHN P. DAWSON, A HISTORY OF LAY JUDGES 45 (1960). *See also* ESMEIN, *supra* note 769, at 51.

81. Damaska, *supra* note 77, at 489.

82. ESMEIN, *supra* note 769, at 48.

83. DAWSON, *supra* note 80, at 42-43.

84. *Id.* at 43.

85. *Id.* at 50-51.

86. *Id.* at 51.

87. DAWSON, *supra* note 80, at 55.

88. ESMEIN, *supra* note 769, at 51; DAWSON, *supra* note 80, at 54-55.

89. *See* ESMEIN, *supra* note 769, at 51; DAWSON, *supra* note 80, at 54.

90. ESMEIN, *supra* note 769, at 51.

The appeal was the second method associated with the growth of royal power. As this power expanded, it was necessary to ensure it remained subject to central control.<sup>91</sup> Appeals provided the ideal mechanism. Thus, from early on, the judicial powers of subordinate royal officers were subject to appellate oversight.<sup>92</sup> This system of royal appellate procedure in turn influenced the widespread development of appeals within feudal systems.<sup>93</sup> Gradually, the royal courts began to exercise direct appellate control over the seigniorial courts.<sup>94</sup>

Roman-canon procedure also had a significant influence.<sup>95</sup> Within the strict hierarchy of the ecclesiastical courts, a system of appeals was standard.<sup>96</sup> By the time monarchical reconstruction began, this procedure had developed to the point where it presented as a viable model for the royal courts. Canonist appeals were characterized by full-scale *de novo* review<sup>97</sup> and the use of examining commissions and written evidence. As Dawson observes, “[t]he canonist appeal, with its full rehearing on both law and facts, was an efficient instrument of direct control.”<sup>98</sup> This type of review ideally suited the political ends of the Crown, by subjecting seigniorial courts to royal oversight.<sup>99</sup>

By 1670, and probably considerably earlier,<sup>100</sup> a generous system of criminal appeals was established in France.<sup>101</sup> In many cases, appeals were automatic.<sup>102</sup> Lodging an appeal suspended the execution of sentence, and the prosecution had the right to appeal against either an acquittal or the sentence imposed.<sup>103</sup>

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91. DAWSON, *supra* note 80, at 55.

92. *Id.* at 54.

93. *Id.* at 55-56.

94. ESMEIN, *supra* note 769, at 51-52.

95. JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 211 (1974) (arguing that the “main element” in the development of French criminal procedure was the adoption of Roman-canon procedure).

96. ESMEIN, *supra* note 769, at 50 (observing that appeals were taken from the official to the archbishop, then to the primate, and, finally, to the Pope, as head and supreme judge of Christendom).

97. DAWSON, *supra* note 80, at 107.

98. *Id.* at 108.

99. LANGBEIN, *supra* note 95, at 214.

100. Indeed the ordinance of Villers-Cotterets, promulgated in 1539, despite its focus on expediting proceedings, acknowledged the possibility of appeals. For example, examination of an accused under torture was to be promptly executed, *if there was no appeal*; similarly, sentences were to be executed on the day of communication, *unless the accused appealed*. *Id.* at 223-43.

101. ESMEIN, *supra* note 769, at 239 (noting the accused person’s ability to appeal preliminary and interlocutory judgments of examination as well as judgments on the merits).

102. *Id.*; Damaska, *supra* note 77, at 489 n.11.

103. ESMEIN, *supra* note 769, at 241 (noting that civil parties also had the ability to appeal).

Similar developments occurred in other parts of Europe. By the late fifteenth century, full-scale canonist review was well established in Germany, also driven by its potential for exerting political power.<sup>104</sup> In Italy, as Damaska explains, the roots of the right to appeal go similarly deep:

Italian medieval lawyers who struck the foundation of continental *jus commune* maintained that an appeal must be permitted both from interlocutory decisions (e.g., a decision to extract a confession by torture) and from final determination of the trial court. Many authorities claimed that custom or statutes could not abolish appeals in criminal matters. . . . The judge who refused to transmit an appeal to the superior court was liable to punishment.<sup>105</sup>

### III. THE INSTITUTIONAL ROLES OF THE RIGHT TO APPEAL

We have seen that criminal appeals developed in common law and civil law systems for entirely different reasons and at very different times. For centuries, continental legal systems permitted intensive review in criminal cases, while at the same time appellate oversight in England was extraordinarily limited. These historical differences are in part illuminated by the fundamentally differing roles that appeals occupy in continental and common law systems.

The most profitable way of analyzing the roles that appeals occupy within these legal systems is through what Damaska describes as the hierarchical and coordinate models of authority.<sup>106</sup> These models, with their focus on the way in which a legal system conceives of the proper organization of authority, help explain many of the differences not illuminated by the trial-centric inquisitorial/adversarial dichotomy.

Continental systems tend to adopt a hierarchical model of authority. The pre-eminent goal of such a system is certainty in decision-making, rather than individualized justice.<sup>107</sup> Continental systems achieve this goal through uniform policies that are administered by a centralized authority via a rigid hierarchical structure. Decision-makers are technical experts with carefully delineated spheres of exclusive jurisdiction. The application of precise guidelines is favored over the exercise of official discretion.

Within this model, a key method of ensuring uniformity is comprehensive appellate review. Thus, the development of criminal

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104. See DAWSON, *supra* note 80, at 107.

105. Damaska, *supra* note 77, at 489 n.11 (internal citations omitted).

106. *Id.* at 481-82.

107. *Id.* at 483.

appeals in continental legal systems was closely associated with the rebuilding of the monarchy and the associated need for centralized control over the administration of justice.

Control is most effectively exercised where appeals are broad in scope, involving complete reconsideration of the case: thus canonist procedure, under which questions of law, factual findings and the sentence imposed are all reviewable, was an ideal fit.<sup>108</sup> The strict record-keeping requirements in hierarchical systems further facilitates comprehensive review: the written dossier is “the backbone of criminal proceedings.”<sup>109</sup>

Given the importance of appellate review to exerting hierarchical control, it is not surprising that appeals are generally as of right and, in many countries, are regarded as a constitutional right.<sup>110</sup> Furthermore, appeals are encouraged: the process is inexpensive and without risk to the appellant. The combination of appeals being as of right and wide in scope necessitates considerable judicial resources. Thus, by the beginning of the seventeenth century in France, Dawson estimates that there were approximately 1,200 judges in supreme appellate courts alone—many more would have occupied intermediate appellate courts.<sup>111</sup>

Because reconsideration of first instance decisions is standard, appeals in hierarchical systems are regarded as a continuation of the trial process.<sup>112</sup> This explains why appeals against acquittals do not violate the rule against double jeopardy and why the execution of judgments is automatically stayed pending determination of an appeal.

Standing in contradistinction is the coordinate model, which characterizes common law systems. Under this model, the primary objective is to “reach[] the decision most appropriate to the circumstances of each case.”<sup>113</sup> Coordinate systems are decentralized, made up of loosely connected webs of autonomous decision-makers.<sup>114</sup> Official discretion and flexible standards are common. Particularized justice is valued over certainty. Crucial decisions may be entrusted to bodies of independent laypeople, because decisions are to be tailored to unique circumstances as

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108. *See id.* at 490.

109. *Id.* at 507.

110. *Id.* at 490.

111. DAWSON, *supra* note 80, at 71.

112. Damaska, *supra* note 77, at 491.

113. *Id.* at 509.

114. *See* DAWSON, *supra* note 80, at 274 (arguing that the English central government adopted a “general policy of abstention”).

they arise, rather than reached through the technical application of strict rules.<sup>115</sup>

Even coordinate systems recognize the need for a degree of uniformity. Mild hierarchical structures of authority may therefore be erected when necessary. Such developments are characteristically difficult. Historically, criminal cases involved one-level, local adjudication; review by the central courts was rare.<sup>116</sup> The trial became the embodiment of the entire criminal process, and its conclusion ended the proceedings.<sup>117</sup> Thus, appellate review was a comparatively recent development in the English-speaking world. Even today, it can be relatively limited in scope: acquittals often cannot be appealed, and challenges to factual findings or the sentence imposed are comparatively difficult. Moreover, appellate courts do not approach their task *de novo*, instead restricting their search to identifiable errors.<sup>118</sup> Perhaps even more fundamentally, appellate courts consider only the propriety of the material submitted to the decision-maker and the instructions given for its use; it is considered illegitimate to ask whether “correct” use was made of the material or the correct result reached.<sup>119</sup>

#### IV. THE MODERN APPROACH TO THE RIGHT TO APPEAL

The foregoing discussion has traced the origins of the right to appeal in two separate systems. It has demonstrated that the historical foundations and institutional roles of appeals in these systems are largely distinct.

During the twentieth century, the picture changes. Increasingly, the right to appeal is conceptualized as a right possessed by individuals. In many jurisdictions, it is regarded as fundamental; in others, where the right

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115. Damaska, *supra* note 77, at 510.

116. See DAWSON, *supra* note 80, at 71 (noting that from 1300 to 1800 the judges of the English central courts of common law and Chancery, who conducted all of the appellate review that English central courts undertook, rarely exceeded fifteen. By the beginning of the seventeenth century, there were probably more than 5,000 French royal judges. Even allowing for the fact that France’s population was probably four or five times that of England, the difference is vast.).

117. See *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162 (2000) (“In the appellate context, . . . [t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process changes dramatically when a jury returns a guilty verdict.”). See also *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (“[T]here are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. . . . By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State’s prosecutor but rather to overturn a finding of guilt made by a judge or a jury below.”) (internal citations omitted).

118. See Damaska, *supra* note 77, at 515.

119. *Id.*

does not reach that status, its ubiquity nevertheless suggests that it is regarded as a highly important feature of a fair criminal justice system.

This Part considers the ways in which the courts in a diverse range of jurisdictions now conceptualize the right of appeal. The primary focus is on appeals as a *right* of criminal procedure, rather than on differences in appellate structures, standards, or rules. That focus guides the selection of jurisdictions. The Part begins by discussing the jurisprudence of two multilateral bodies, the United Nations Human Rights Committee and the European Court of Human Rights, which respectively oversee the implementation of the right in the International Covenant on Civil and Political Rights (hereinafter the ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention). The jurisprudence of these bodies is of direct application to the right of appeal as guaranteed in both continental Europe and in common law countries. However, before discussing the European Convention jurisprudence, which is superior law in Europe, this Part considers the right of appeal in contemporary France, Germany, and Italy. Next, the Part surveys the domestic jurisprudence of two nations in which the right of appeal is recognized as a fundamental human right, South Africa and New Zealand. Finally, the Part considers the right in the context of the federal jurisdictions of the United States and Canada, in which statutory rights of appeal are ubiquitous but not constitutionally guaranteed.<sup>120</sup>

#### A. The Right to Appeal under the ICCPR

Article 14(5) of the ICCPR guarantees a right of appeal in broad and unequivocal terms: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”<sup>121</sup>

This right was proposed relatively late in the gestation of the ICCPR. It was seen primarily as a mechanism for examining whether the right to a fair trial had been respected. The initial proponent of the right, the Israeli Delegate, Mr. Baror, did not have a specific remedy in mind, such as an appeal at which new evidence could be presented. He instead envisaged a more general right of review.<sup>122</sup>

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120. The United Kingdom is not discussed because it does not currently have any jurisprudence on the appeal as a right of criminal procedure. It is one of only five members of the Council of Europe not to have ratified Protocol No. 7 of the European Convention. *See infra*, note 173.

121. Int’l Covenant on Civil and Political Rights, art. 14(5), Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 175 [hereinafter ICCPR].

122. TRECHSEL, *supra* note 7, at 361.

The right to appeal is situated within article 14, which guarantees the right to a fair trial and aims at “ensuring the proper administration of justice.”<sup>123</sup> A number of the fair trial rights in article 14 are directly applicable to appeals. The right to be tried without undue delay, for example, can be violated by appellate delay.<sup>124</sup> Similarly, the requirements that hearings be both fair and public apply equally on appeal.<sup>125</sup>

States parties to the ICCPR are given considerable latitude in determining the “modalities” by which they secure article 14(5).<sup>126</sup> The United Nations Human Rights Committee (hereinafter the Committee) has, however, delineated, in fairly robust terms, the essential features of this right: substantive review of conviction and sentence; and effective access to the appellate system.

The first core feature of the right to appeal concerns the nature of the review. The Committee has repeatedly emphasized that, in order for there to be compliance with article 14(5), the conviction and sentence must be “review[ed] substantively, both on the basis of sufficiency of the evidence and of the law, . . . such that the procedure allows for due consideration of the nature of the case.”<sup>127</sup> The Committee’s focus is always on the substance or adequacy of the review, not the name given to the remedy.<sup>128</sup>

It should be noted at this point that although the Committee’s decisions are often not treated as strictly binding by domestic courts, its interpretation of the ICCPR is influential. For example, in *Vazquez v.*

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123. U.N. Human Rights Comm., General Comment 32, para. 2, U.N. Doc. No. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment 32].

124. See *id.* para. 49; *Siewpersaud v. Trinidad and Tobago*, Views, Human Rights Comm. 81st Sess., July 5-30, 2004, para. 6.2, U.N. Doc. CCPR/C/81/D/938/2000 (July 29, 2004); *Evans v. Trinidad and Tobago*, Views, Human Rights Comm. 77th Sess., Mar.17-Apr. 4, 2003, para. 6.3, U.N. Doc. CCPR/C/77/D/908/2000 (Mar. 21, 2003); *Kennedy v. Trinidad and Tobago*, Views, Human Rights Comm. 74th Sess., Oct. 18-Nov. 5, 1999, para. 6.5, U.N. Doc. CCPR/C/67/D/845/1999 (Mar. 26, 2002); *Sextus v. Trinidad and Tobago*, Views, Human Rights Comm. 72d Sess., July 9-27, 2001, para. 7.3, U.N. Doc. CCPR/C/72/D/818/1998 (July 16, 2001); *Daley v. Jamaica*, Views, Human Rights Comm. 63d Sess., July 13-31, 1998, para. 7.4, U.N. Doc. CCPR/C/63/D/750/1997 (July 31, 1998); *Fuenzalida v. Ecuador*, Views, Human Rights Comm. 57th Sess., July 8-26, 1996, para. 9.6, U.N. Doc. CCPR/C/57/D/480/1991 (July 12, 1996).

125. U.N. Human Rights Comm., General Comment 13, para. 17, U.N. Doc. No. CCPR/C/21/Rev.1 (Apr. 13, 1984).

126. General Comment 32, *supra* note 123, para. 45; *Sanchez v. Spain*, Views, Human Rights Comm. 88th Sess., Oct. 16-Nov. 3, 2006, para. 7.2, U.N. Doc. CCPR/C/88/D/1332/2004 (Oct. 31, 2006).

127. General Comment 32, *supra* note 123, para. 48; *Bandajevsky v. Belarus*, Views, Human Rights Comm. 86th Sess., Mar. 13-31, 2006, para. 10.13, U.N. Doc. CCPR/C/86/D/1100/2002 (Mar. 28, 2006); *Aboushanif v. Norway*, Views, Human Rights Comm. 93d Sess., July 7-25, 2008, para. 7.2, U.N. Doc. CCPR/C/93/D/1542/2007 (July 17, 2008).

128. *Vazquez v. Spain*, Views, Human Rights Comm. 69th Sess., July 10-28, 2000, para. 11.1, U.N. Doc. CCPR/C/69/D/701/1996 (July 20, 2000).

*Spain*, the Committee found that the Spanish appellate remedy in issue violated article 14(5) because it was limited to the formal or legal aspects of the conviction.<sup>129</sup> In response to this decision and others like it, Spain introduced legislative amendments expanding the number of cases in which full appellate review is available.<sup>130</sup> Further, in *Rodriguez v. Spain*, the Committee quoted the Supreme Court acknowledging that the right to an appeal in cassation had “broadened to an extraordinary degree” such that “a decision on evidence can be corrected . . . when the court that heard the case departed from the rules of logic, the axioms of experience or scientific knowledge.”<sup>131</sup>

Article 14(5) is concerned with substance rather than form. A sharp focus on the actual scope of the review is thus balanced by a much less intrusive approach to the modalities of review. It is not necessary for a full retrial to be conducted,<sup>132</sup> let alone an oral hearing held.<sup>133</sup> Systems whereby an appeal is only with leave are not per se incompatible with article 14(5), provided that the application for leave entails a full review of the conviction and sentence.<sup>134</sup> It is thus essential that the particular remedy in question provide the opportunity for an adequate review: it may not, for example, be limited to the grounds of arbitrariness or denial of justice<sup>135</sup> or to points of law.<sup>136</sup> It is also crucial that convicted people have the *right* to seek review; a process that is discretionary violates article 14(5).<sup>137</sup>

It should be emphasized that the adequacy of review depends on the “nature of the case” in issue. An appellate tribunal is only required to

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129. *Id.*

130. INT’L HUMAN RIGHTS LAW AND PRACTICE COMMITTEE, FINAL REPORT ON THE IMPACT OF THE FINDINGS OF UNITED NATIONS HUMAN RIGHTS TREATY BODIES, para. 38 (2004), available at <http://www.ila-hq.org/download.cfm/docid/3B0BF58A-C096-4113-830E8E1B5BC6DEC5>.

131. *Rodriguez v. Spain*, Views, Human Rights Comm. 94th Sess., Oct. 13-31, 2009, para. 2.3, U.N. Doc. CCPR/C/94/D/1489/2006 (Oct. 30, 2008) (internal quotations omitted).

132. *Sama v. Germany*, Views, Human Rights Comm. 96th Sess., July 13-31, 2009, para. 6.8, U.N. Doc. CCPR/C/96/D/1771/2008 (July 28, 2009); *Ucles v. Spain*, Views, Human Rights Comm. 96th Sess., July 13-31, 2009, para. 11.3, U.N. Doc. CCPR/C/96/D/1364/2005 (July 22, 2009); *Martinez v. Spain*, Views, Human Rights Comm. 97th Sess., Oct. 12-30, 2009, para. 9.3, U.N. Doc. CCPR/C/97/D/1363/2005 (Oct. 19, 2009).

133. *Bryhn v. Norway*, Views, Human Rights Comm. 67th Sess., Oct. 18-Nov. 5, 1999, para. 4.6, U.N. Doc. CCPR/C/67/D/789/1997 (Oct. 29, 1999).

134. *Lumley v. Jamaica*, Views, Human Rights Comm. 65th Sess., Mar. 22-Apr. 9, 1999, para. 7.3, U.N. Doc. CCPR/C/65/D/662/1995 (Mar. 31, 1999).

135. *Cabriada v. Spain*, Views, Human Rights Comm. 82nd Sess., Oct. 18-Nov. 5, 2004, para. 7.3, U.N. Doc. CCPR/C/82/D/1101/2002 (Nov. 1, 2004).

136. *Domukovsky v. Georgia*, Views, Human Rights Comm. 62d Sess., Mar. 23-Apr. 9, 1998, para. 18.11, U.N. Doc. No. CCPR/C/62/D/623/1995 (Apr. 6, 1988).

137. *Ratiani v. Georgia*, Views, Human Rights Comm. 84th Sess., July 11-29, 2005, paras. 11.2-11.3, U.N. Doc. No. CCPR/C/84/D/975/2001 (July 21, 2005).

address “those issues that are pertinent.”<sup>138</sup> Thus, when examining communications, the Committee’s inquiry is case-specific, concerning the adequacy of the particular review in issue, not the technical jurisdictional limits of the proceedings. In a raft of communications in respect of Spain, the Committee has rejected arguments that proceedings seeking cassation, an extraordinary remedy that can only be invoked on specific grounds defined by law, necessarily violate article 14(5).<sup>139</sup> The crucial issue is whether the tribunal adequately considered *the grounds that were raised by the appellant*, including challenges on the facts.

The Committee’s jurisprudence in relation to the scope of appeals displays a troubling tendency to consider only whether the grounds of appeal raised by the appellant were adequately appraised. The problem with this reasoning is illustrated by *Lovell v. Australia*.<sup>140</sup> Lovell was convicted by the Supreme Court of Western Australia of contempt of court for his use of documents that had been disclosed for the purposes of industrial proceedings. A large fine was imposed. Because an appellate

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138. Kharkhal v. Belarus, Decision, Human Rights Comm. 91st Sess., Oct. 15-Nov. 2, 2007, para. 6.5, U.N. Doc. No. CCPR/C/91/D/1161/2003 (Oct. 31, 2007).

139. In a large number of cases, the Committee found article 14(5) had not been violated because, in cassation proceedings, the grounds of appeal had been considered thoroughly: *Martinez v. Spain*, Decision, Human Rights Comm. 94th Sess., Oct. 13-31, 2008, para. 6.5, U.N. Doc. No. CCPR/C/94/D/1490/2006 (Oct. 30, 2008); *Rodriguez v. Spain*, Decision, Human Rights Comm. 94th Sess., Oct. 12-30, 2009, para. 6.4, U.N. Doc. No. CCPR/C/94/D/1489/2006 (Oct. 30, 2008); *Dominguez v. Spain*, Decision, Human Rights Comm. 97th Sess., Oct. 12-30, 2009, para. 6.4, U.N. Doc. No. CCPR/C/97/D/1471/2006 (Oct. 27, 2009); *Gonzalez v. Spain*, Decision, Human Rights Comm. 87th Sess., July 10-28, 2006, para. 4.3, U.N. Doc. No. CCPR/C/87/D/1441/2005 (July 25, 2006); *Casado v. Spain*, Decision, Human Rights Comm. 84th Sess., July 11-29, 2005, para. 4.4, U.N. Doc. No. CCPR/C/84/D/1399/2005 (July 25, 2005); *Alonso v. Spain*, Decision, Human Rights Comm. 90th Sess., July 9-27, 2007, para. 6.6, U.N. Doc. No. CCPR/C/90/D/1391/2005 (July 24, 2007); *Galvez v. Spain*, Decision, Human Rights Comm. 84th Sess., July 11-29, 2005, para. 4.5, U.N. Doc. No. CCPR/C/84/D/1389/2005 (July 25, 2005); *Castro v. Spain*, Views, Human Rights Comm. 95th Sess., Mar. 16-Apr. 3, 2009, para. 9.2, U.N. Doc. No. CCPR/C/95/D/1388/2005 (Mar. 19, 2009); *Piñeiro v. Spain*, Decision, Human Rights Comm. 87th Sess., July 10-28, 2006, para. 6.2, U.N. Doc. No. CCPR/C/87/D/1387/2005 (July 25, 2006); *Gueorguiev v. Spain*, Decision, Human Rights Comm. 90th Sess., June 9-27, 2007, para. 6.6, U.N. Doc. No. CCPR/C/90/D/1386/2005 (July 24, 2007); *Beisti v. Spain*, Decision, Human Rights Comm. 92d Sess., Mar. 17-Apr. 4, 2008, para. 6.4, U.N. Doc. No. CCPR/C/92/D/1375/2005 (Apr. 1, 2008); *Roche v. Spain* Decision, Human Rights Comm. 90th Sess., July 9-27, 2007, para. 6.5, U.N. Doc. No. CCPR/C/90/D/1370/2005 (July 24, 2007); *Piscioneri v. Spain*, Views, Human Rights Comm. 96th Sess., July 13-31, 2009, para. 9.2, U.N. Doc. No. CCPR/C/96/D/1366/2005 (July 22, 2009). However, in *Ucles v. Spain*, Views, Human Rights Comm. 96th Sess., July 13-31, 2009, para. 11.2-11.3, U.N. Doc. No. CCPR/C/96/D/1364/2005 (July 22, 2009) and *Martinez v. Spain*, Views, Human Rights Comm. 97th Sess., Oct. 12-31, 2009, paras. 9.2-9.3, U.N. Doc. No. CCPR/C/97/D/1363/2005 (Oct. 19, 2009) the Committee found that article 14(5) had been violated because the Supreme Court of Spain, in cassation proceedings, had held that it was not able to reassess the evidence evaluated by the trial judge.

140. *Lovell v. Australia*, Views, Human Rights Comm. 80th Sess., Mar. 15-Apr. 2, U.N. Doc. No. CCPR/C/80/D/920/2000 (Mar. 24, 2003).

court had determined the case at first instance, Lovell's only avenue for review was an application for special leave to appeal to the High Court of Australia. He filed an application challenging his conviction and sentence. Special leave, available only on questions of law of public importance, was refused. Lovell complained to the Committee, which found that article 14(5) had not been violated. It avoided considering the narrow jurisdictional limitations imposed on the applications to the High Court, instead holding that Lovell had "raised only certain specific questions of law and did not seek a full review of the conviction."<sup>141</sup> But this reasoning misses the crucial point that Lovell had no legal right to seek a full review of his conviction: he was legally *required* to restrict his grounds for leave to questions of law that were of "public importance."<sup>142</sup> By ignoring this institutional restriction, the Committee failed to address the real complaint.

The second core feature of the right to appeal is the obligation to ensure effective access to the right. This feature of the Committee's jurisprudence clarifies an ambiguity latent in the text of article 14(5). The right to appeal is framed in passive terms: it is a right to "have . . . [one's] conviction and sentence . . . reviewed." On its face, this could suggest an obligation to review every conviction and sentence that is imposed. This is not, however, the proper interpretation. The right to appeal is an opportunity right,<sup>143</sup> which must be asserted personally by a convicted person. The state's obligation is to establish a system that allows the right to be exercised effectively, when a person so desires.

Providing effective access to the appellate system imposes certain specific obligations on the state. A convicted person is entitled to access all the documents necessary to pursue an effective appeal. This includes a "duly reasoned, written judgment of the trial court" and a transcript of the trial.<sup>144</sup>

Finally, the Committee accepts that reasonable conditions may be imposed on appeals. In *Kharkhal v. Belarus*, the author complained that the Supreme Court had rejected his grounds of appeal without any

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141. *Id.* para. 8.4.

142. *Id.* para. 3.3. Note also that it is difficult to accept that Lovell had the right to challenge his sentence, given the requirement of *public* importance.

143. See discussion below in Part VI.C.

144. General Comment 32, *supra* note 123, para. 49. See also *Lumley v Jamaica*, Views, Human Rights Comm. 65th Sess., Mar. 22-Apr. 9, 1999, para. 7.5, U.N. Doc. No. CCPR/C/65/D/662/1995 (Mar. 31, 1999) ("[T]he State party should provide the convicted person with access to the judgments and documents necessary to enjoy the effective exercise of the right to appeal."). Clearly, when trial is by jury, reasons for conviction are not articulated. In such cases, it is likely that a copy of the trial judge's instructions to the jury would be a substitute.

consideration of their merit.<sup>145</sup> In holding the communication inadmissible, the Committee observed that:

the right to a review of a criminal conviction by a higher tribunal, as secured by article 14, paragraph 5, implies that the tribunal of review adequately addresses those issues that are pertinent, *having regard to such reasonable conditions as are applicable to appeals under the State party's laws*. Where, as in the present case, the review allows for a re-examination of facts and evidence, the same principle guides the Committee as in other proceedings, namely that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was clearly arbitrary or amounted to a denial of justice.<sup>146</sup>

#### B. The Right to Appeal in France, Germany, and Italy

Before considering the substance of the right to appeal under the European Convention, it is useful to sketch briefly the rights of appeal currently applying in the three European jurisdictions that were mentioned in our historical survey: France, Germany, and Italy. It should be apparent, and unsurprising, that appellate systems differ considerably within Europe. The supremacy of the European Convention, however, reduces the significance of these differences, allowing a brief survey to suffice.

In France, appeals often proceed *de novo*.<sup>147</sup> The particular scope of an appeal depends on the court from which the appeal is taken. The overwhelming majority of appeals are from correctional or contravention courts (in which all but the most serious of felonies are tried). While these appeals may be heard *de novo*, the hearing begins with an oral report of the case from one of the two associate appeals judges, and the court may refuse to hear witnesses who gave evidence in the first trial (other than the accused).<sup>148</sup> In contrast, appeals from the Assize Court (a specialist court in which only major felonies are tried)<sup>149</sup> are entirely *de novo*; they do not begin with an oral report, although the lower court's verdict and judgment

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145. Kharkhal v. Belarus, Decision, Human Rights Comm. 91st Sess., Oct. 15-Nov. 2, 2007, para. 2.4, U.N. Doc. No. CCPR/C/95/D/1161/2005 (Oct. 31, 2007).

146. *Id.* para. 6.5 (emphasis added).

147. Richard S. Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 201, 235 (Craig M. Bradley ed., 2d ed. 2007).

148. *Id.* at 236.

149. In French law, major felonies carry a maximum penalty of either life imprisonment or imprisonment for ten years or more. *See id.* at 202.

are read.<sup>150</sup> Further recourse may be had to the Court of Cassation on issues of law,<sup>151</sup> review at this level is entirely on the record.<sup>152</sup>

In Germany, appeals are as of right against all trial judgments.<sup>153</sup> Like France, the scope of review depends on the court from which the appeal is taken. The pattern described above is, however, reversed, with narrower review applying to convictions for more serious offences: appeals against judgments of the local court (in which less serious trials occur) may be brought on questions of both fact and law, resulting in *de novo* review; appeals from the district court (in which more serious criminal cases are tried) are only on questions of law.<sup>154</sup> General appeals (i.e. on questions of fact and law) result in a new trial on issues of guilt and sentence. The court is required to collect and present all the evidence (including new evidence) necessary to reach its judgment.<sup>155</sup> Indeed, it is unnecessary for the appellant to raise any concerns with the first instance judgment at all, and doing so does not affect the court's duty to re-investigate the entire case.<sup>156</sup>

Appeals on legal grounds are more limited, involving an examination of the lower court's decision.<sup>157</sup> Relatively thorough review is, however, still possible, because all first-instance judgments are supported by written reasons that include findings of fact and explain how the law was applied to those facts.<sup>158</sup> Nevertheless, the appellant must identify and explain the grounds of appeal.<sup>159</sup> Few such appeals proceed to an oral hearing, with

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150. *Id.* at 236.

151. *Id.* at 237 (noting that recognized grounds for reversal include insufficient reasoning or lack of legal basis).

152. *Id.* at 241.

153. Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 147, at 243, 268.

154. Gerhard Dannecker & Julian Roberts, *The Law of German Criminal Procedure*, in *INTRODUCTION TO GERMAN LAW* 419, 446-47 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005) (noting that the propriety of having a simpler appellate process for more serious criminal cases has been a matter of debate for some time). Langbein gives two explanations for the fact that more liberal appellate review is available for the least serious cases. First, the procedure in the lower courts is more summary in nature, with the accused often unrepresented, and there is a greater danger that the prosecution and the court may be less thorough. Second, because the convictions are imposed "according to the subjective persuasion of its members" (compared with an objectively required "quantum of proof") and lower court proceedings only involve one professional judge, there is a sense that "conviction ought not to turn upon the persuasion of a single professional judge if a litigant is dissatisfied with the result." JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 78-79, 83-84 (1977).

155. Weigend, *supra* note 153, at 269.

156. *Id.* at 268.

157. Dannecker & Roberts, *supra* note 154, at 447.

158. LANGBEIN, *supra* note 154, at 84.

159. Weigend, *supra* note 153, at 269.

most rejected on the papers as “obviously unfounded.”<sup>160</sup> No inquiry is ordinarily made into the trial court’s fact-finding,<sup>161</sup> largely because the formal minutes of the trial usually say nothing about the evidence given.<sup>162</sup>

In Italy, appeals remain an integral part of the criminal process and are as of right from any court of first instance.<sup>163</sup> They are conceived of as a continuation of the trial.<sup>164</sup> At the first appellate level, full de novo review will take place, if sought,<sup>165</sup> involving a second complete adjudication of all factual and legal issues and the hearing of new evidence.<sup>166</sup> No deference is given to the lower court’s decision. Further, the Italian Constitution guarantees a right of review in all cases affecting personal liberty to the final criminal court of appeal, the *Corte di Cassazione* (Court of Cassation), comprising over three hundred judges.<sup>167</sup> Review at this second tier is limited to questions of law.<sup>168</sup>

### C. The Right to Appeal under the European Convention

The European Convention does not require states to provide a system of appellate review.<sup>169</sup> However, if a right of appeal is granted, article 6, guaranteeing the right to a fair trial, applies to the proceedings.<sup>170</sup>

The right to appeal is instead found in article 2 of Protocol No. 7 to the European Convention.<sup>171</sup> This Protocol is a relatively recent addition to

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160. *Id.* at 268.

161. *But see id.* at 270-71 (arguing that recently the scope of review has expanded to allow various challenges to the substantive correctness of the lower court judgment).

162. *Id.* at 270. Although if the formal minutes do contain substantive information, the appellant may challenge the trial court’s fact-finding by showing that the judgment contained factual errors.

163. In 1988, a new code of criminal procedure was enacted, reframing criminal proceedings as adversarial contests rather than inquisitions. Despite this radical change, it is notable that criminal appeals remained significantly hierarchical in nature. Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 346-49 (1994) (outlining the 1988 reforms); *see generally* Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 AM. J. CRIM. L. 489 (2004).

164. Rachel A. Van Cleave, *Italy*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 147, at 303, 330-31.

165. Freccero, *supra* note 163, at 380 (observing that the parties may narrow the scope of the appeal by selecting particular issues).

166. *Id.* at 379 (comparing Italian appeals with American appellate review).

167. Art. 111 Costituzione [Cost.] (It.); Freccero, *supra* note 163, at 350.

168. Freccero, *supra* note 163, at 381.

169. TRECHSEL, *supra* note 7, at 363.

170. Poulsen v. Denmark, App. No. 32092/96, Section II, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 5 (June 29, 2000), <http://echr.coe.int/echr/en/hudoc> (“As far as Article 6 is concerned the Court recalls that this provision does not compel the Contracting States to set up courts of appeal but where such courts do exist, the guarantees of Article 6 must be complied with”).

the Convention, having only opened for signature in 1984. Although it was not initially met with great enthusiasm,<sup>172</sup> almost every member state of the Council of Europe has now ratified the Protocol.<sup>173</sup> And membership of the Council of Europe is currently contingent on ratification of the entire “parcel” of rights in the European Convention and its protocols.<sup>174</sup> Article 2 of Protocol No. 7 has thus brought the appellate systems of almost all of continental Europe under the oversight of the European Court of Human Rights. It is to that Court’s jurisprudence we now turn.

Under the European Convention, states have a significant degree of discretion as to the modalities of appellate review as well as the grounds on which it may be exercised.<sup>175</sup> This “wide margin of appreciation”<sup>176</sup> has been attributed to the large variety of types of appeal that exist in Europe.<sup>177</sup> Thus, a state will have complied with article 2 of Protocol No. 7 where it grants defendants the right to apply for leave to appeal<sup>178</sup> or even when review is restricted to points of law.<sup>179</sup> Moreover, states are entitled to impose restrictions that regulate access to appellate review. These restrictions must, however, pursue a legitimate aim and not infringe the very essence of the right.<sup>180</sup>

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171. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 22, 1984, E.T.S. No. 117 [hereinafter Protocol No. 7 to the ECHR] (“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”) [hereinafter Protocol No. 7 to the ECHR].

172. TRECHSEL, *supra* note 7, at 362 (explaining that it took four years to collect the seven signatures required for the Protocol to enter into force).

173. The only exceptions are Belgium, Germany, Netherlands, Turkey and the United Kingdom. Treaty Office, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.:117*, COUNCIL OF EUROPE, <http://conventions.coe.int> (click “Full List,” then click document no. 117, “Protocol 7 . . . ,” then click “Chart of signatures and ratifications”) (last visited Sept. 21, 2011).

174. TRECHSEL, *supra* note 7, at 362.

175. Poulsen v. Denmark, App. No. 32092/96, Section II, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 5 (June 29, 2000), <http://echr.coe.int/echr/en/hudoc>.

176. Krombach v. France, App. No. 29731/96, Section III, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, para. 96 (Feb. 13, 2001), <http://echr.coe.int/echr/en/hudoc>.

177. See Protocol No. 7 to the ECHR (explanatory report), *supra* note 171, para. 18, available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/117.htm>.

178. Lantto v. Finland, App. No. 27665/95, Section IV, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 14-15 (July 12, 1999), <http://echr.coe.int/echr/en/hudoc>.

179. *Krombach*, App. No. 29731/96, paras. 96-97.

180. Gurepka v. Ukraine, App. No. 61406/00, Section II, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, para. 59 (Sept. 6, 2005), <http://echr.coe.int/echr/en/hudoc>.

It is difficult to determine precisely what constitutes “the very essence” of the right to appeal. It does not appear to relate closely to the scope of review: as has been noted, states are not required to extend appellate review to the merits of a conviction,<sup>181</sup> similarly, appeals may be dismissed without consideration of the merits for procedural non-compliance.<sup>182</sup>

Instead, the essence of the right is best conceived of as the *opportunity* to access a fair appellate process. As a minimum, this obviously requires that a convicted person possess a legal right to appeal. Thus, in *Krombach*, article 2 of Protocol No. 7 was violated because a person convicted *in absentia* had no right to appeal.<sup>183</sup> In addition, while a state may require a person to obtain permission to appeal, the process must be “clear and accessible,”<sup>184</sup> and it “must be independent of any discretionary action by the authorities.”<sup>185</sup> Thus a system requiring leave of the court is permissible, but one requiring the consent of the prosecutor is not.

The opportunity to appeal must be capable of being exercised by the convicted person.<sup>186</sup> *Gurepka v. Ukraine* establishes this point.<sup>187</sup> Gurepka, who worked in a prosecutors’ office, was sentenced to administrative detention for contempt of court. His employer (i.e., a prosecutor) brought an “extraordinary appeal,” which was unsuccessful. Only a prosecutor or the president of the higher court could initiate this procedure. The European Court held that Gurepka’s right to appeal had been violated: the

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181. *Loewenguth v. France*, App. No. 53183/99, Section III, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 3 (May 30, 2000), <http://echr.coe.int/echr/en/hudoc>. Note, however, that France filed a reservation to article 2 of Protocol No. 7 to the ECHR, stating “the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court.” However, in *Pesti & Frodl v. Austria*, App. No. 27618/95, Section III, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC (Jan. 18, 2000), <http://echr.coe.int/echr/en/hudoc>, the Court rejected as manifestly ill-founded an argument that an appeal restricted to procedural defects at the trial did not comply with article 2 of Protocol No. 7. *Id.* at 12.

182. *Sjöö v. Sweden*, App. No. 37604/97, Second Chamber, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 5 (Oct. 21, 1998), <http://echr.coe.int/echr/en/hudoc> (upholding the dismissal of an appeal due to the appellant’s failure to appear at the hearing without lawful excuse).

183. *Krombach*, App. No. 29731/96, paras. 96-100 (Feb. 13, 2001).

184. *Galstyan v. Armenia*, App. No. 26986/03, Section III, EUROPEAN COURT OF HUMAN RIGHTS, paras. 125-26 (Nov. 15, 2007), <http://echr.coe.int/echr/en/hudoc> (upholding the dismissal of an appeal due to the appellant’s failure to appear at the hearing without lawful excuse and finding a violation where there was only a power of discretionary review that lacked “any clearly defined procedure or time-limits and consistent application in practice”).

185. *Gurepka*, App. No. 61406/00, para. 59.

186. *See Lantto v. Finland*, App. No. 27665/95, Section IV, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 14 (July 12, 1999), <http://echr.coe.int/echr/en/hudoc> (noting that the applicants had “exercised their right of appeal”).

187. *Gurepka*, App. No. 61406/00, para. 59.

procedure was deficient because an appeal “was not directly accessible to a party to the proceedings and did not depend on his or her motion and arguments.”<sup>188</sup> The requirement that review be on the defendant’s motion and allow for him or her to present arguments on the issues arising was central to the decision.<sup>189</sup> Review on a third party’s initiative, particularly where the convicted person is not involved in the process, is not sufficient.

Finally, it should be observed that states are not required to provide infinite opportunities to appeal. Reasonable conditions can be imposed on the exercise of the right, including time limits for lodging appeals after which the appeal need not be accepted.<sup>190</sup> Similarly, where an appellant fails to attend the hearing, the appeal may legitimately be dismissed without considering its merits. Such a rule, the Court has explained, does not breach article 2 of Protocol No. 7 because it serves “the good administration of justice in that it . . . aim[s] at securing the parties’ presence in court and the prompt and thorough examination of the case.”<sup>191</sup>

#### D. The Right to Appeal in South Africa

In South Africa,<sup>192</sup> the right to appeal is guaranteed—as a component of the right to a fair trial—by section 35(3)(o) of the Constitution.<sup>193</sup> In a series of cases since 1996, the Constitutional Court has considered the content of this right.

The essence of the right is the provision of an “opportunity to have [one’s] conviction and sentence ‘adequately reappraised.’”<sup>194</sup> The purpose

188. *Id.* para. 60. See also *Galstyan*, App. No. 26986/03, para. 126 (finding a violation where the state did not provide “a clear and accessible right to appeal”).

189. *Gurepka*, App. No. 61406/00, para. 61.

190. *Laaksonen v. Finland*, App. No. 36321/97, Section IV, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 3 (Sept. 7, 1999), <http://echr.coe.int/echr/en/hudoc>.

191. *Poulsen v. Denmark*, App. No. 32092/96, Section II, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 5 (June 29, 2000), <http://echr.coe.int/echr/en/hudoc>; *Sjöö v. Sweden*, App. No. 37604/97, Second Chamber, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 5 (Oct. 21, 1998), <http://echr.coe.int/echr/en/hudoc>.

192. Although technically a hybrid of Roman-Dutch and common law, criminal procedure in South Africa was heavily influenced by English law during the twentieth century and is best viewed as a predominantly adversarial/common law system. J.R.L. Milton, *Criminal Law in South Africa 1976 - 1986*, CILSA 34, 36-37 (1987); Lirieka Meintjes-Van der Walt, *A Historical Overview of the Expert in the Criminal Justice Process in South Africa, the Netherlands and England and Wales*, 8 TILBURG FOREIGN L. REV. 217, 227-29 (1999-2000). Substantive criminal law is more in the nature of a hybrid. See Fracois du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 593, 618 (2003) (arguing that post-WWII South African criminal law was “recast . . . in a civilian mode after a century and a half of anglicization”).

193. S. AFR. CONST., 1996 s. 35(3) (“Every accused person has a right to a fair trial, which includes the right . . . (o) of appeal to, or review by, a higher court.”)

194. *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 40 (S. Afr.).

of this reappraisal is error correction.<sup>195</sup> Like fair trial rights generally, appeals are intended “to minimise the risk of wrong convictions and the consequent failure of justice.”<sup>196</sup>

Resourcing the appellate system is a significant concern in South Africa.<sup>197</sup> Numerous efforts have been made by the Government to reduce the costs associated with criminal appeals by imposing procedural restrictions. Invariably these efforts have resulted in constitutional challenges. Resolution has forced the Court to address the very real tension between full appellate review and the conservation of limited state resources. In the process, the scope of the right to appeal has been elaborated.

The Constitutional Court has held that a system requiring leave to appeal is not unconstitutional. Such a system may provide for an adequate reappraisal of a person’s conviction and sentence. This mirrors the approach taken under the European Convention and the ICCPR. In *Rens*, the Court upheld a leave-to-appeal procedure on the basis that it afforded the opportunity for a “reassessment of the disputed issues . . . [and] an informed decision . . . as to the prospects of success.”<sup>198</sup> Similarly, in *Shinga*, the Court observed that, in certain circumstances, an application for leave might allow “an adequate reappraisal of whether the applicant . . . was correctly convicted and whether the sentence is appropriate.”<sup>199</sup>

The Court has identified a number of preconditions to obtaining an adequate reappraisal. The first is that a record of the trial must be considered.<sup>200</sup> Without the record, it is not possible to make an informed

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195. *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 23 (S. Afr.) (holding that there must be “a reasonable procedure for correcting errors that may have occurred at the trial stage”).

196. *S. v. Twala* 2000 (1) SA 879 (CC) para. 9 (S. Afr.).

197. The leave to appeal system in issue in *Steyn* was enacted “to prevent the clogging of appeal rolls and to ensure that hopeless appeals did not waste valuable court time.” *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 31 (S. Afr.).

198. *S. v. Rens* 1996 (1) SA 1218 (CC) para. 26 (S. Afr.).

199. *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 52 (S. Afr.); see also *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 36 (S. Afr.) (“A leave to appeal procedure which does not enable an appeal court to make an informed decision on the application, and which does not adequately protect against the possibility of wrong convictions and inappropriate sentences constitutes a serious limitation of the right to appeal.”).

200. In *Shinga*, the Court considered a system whereby the record was required to be provided to the court considering an application for leave to appeal, except in four situations: where the accused was legally represented at the trial; where the accused and the prosecution agree; where the appeal is only against sentence; and where the application is for condonation (meaning that due to some procedural error, permission is required before the application will be considered). *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 45 (S. Afr.). The Court held that in each of these situations the absence of the trial record constituted “an unjustifiable barrier to the right of review or appeal” and was therefore unconstitutional. *Id.*

decision on the appeal's prospects of success.<sup>201</sup> the court cannot evaluate either the sufficiency of the evidence presented or whether the trial was marred by procedural errors.<sup>202</sup> Second, the lower court's reasoned judgment should be made available. Third, and unusually, the Court has held that applications for leave to appeal must be considered by at least two judges of the appellate court.<sup>203</sup> This requirement is difficult to explain, given that judges sitting alone routinely impose convictions. If one judge can adequately appraise the evidence presented at trial, there would appear to be nothing inherent in the process of *reappraisal* that necessitates the attention of two judges. Collegial discussion may, as the Court suggests, enhance the quality of a decision, but this does not establish that more than one judge is a constitutional necessity.<sup>204</sup> Finally, dicta of the Court suggest that counsel may be necessary at the appellate stage, including when preparing an application for leave to appeal.<sup>205</sup>

An oral hearing is not treated as a fundamental component of the right to appeal. Although oral argument is regarded as the best method for ensuring errors are corrected,<sup>206</sup> section 35(3)(o) sets a baseline. It is accordingly permissible to determine "frivolous and unmeritorious appeals" on the papers.<sup>207</sup> Appeals that fall outside this narrow category must, however, be afforded an oral hearing. Thus a provision requiring that appeals *ordinarily* be determined on the papers was held to breach section 35(3)(o).<sup>208</sup>

South African jurisprudence conceives of the right to appeal as an opportunity right. It is a right that must be exercised by a convicted person, who is responsible for prosecuting his or her case. The state's obligation is to ensure that each person convicted of a crime has the opportunity to advance an appeal.

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201. *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 11 (S. Afr.); *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 44 (S. Afr.).

202. *S. v. Ntuli* 1996 (1) SA 1207 (CC) para. 15 (S. Afr.).

203. *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 48 (S. Afr.).

204. It is doubtful that this requirement would apply to "full" appeal, given the Court's reliance on this factor was principally seen as necessary to balance the other restrictions inherent in applications for leave to appeal that are determined on the papers. *Id.* para. 46 (observing that in previous cases "this Court regarded the fact that applications for leave to appeal from the High Court to the Supreme Court of Appeal are, in the first place, considered by two judges as an important pillar in the process of finding the application for leave-to-appeal procedure constitutionally valid").

205. *See id.* para. 58 (observing that it would be "a matter of grave concern" if counsel is often not provided to enable people to prepare applications for leave to appeal).

206. *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 24 (S. Afr.).

207. *Id.* para. 23.

208. *See S. v. Shinga* 2007 (2) SACR 28 (CC) para. 31 (S. Afr.) (holding that such a procedure "renders the process of appeal or review unfair and unjust").

### E. The Right to Appeal in New Zealand

New Zealand's obligations under the ICCPR are affirmed in the New Zealand Bill of Rights Act 1990. Section 25(h) of that Act provides, as a component of the "minimum standards of criminal procedure," that everyone convicted of an offence has the right to appeal against the conviction or sentence.<sup>209</sup>

Unlike the other instruments discussed so far, the Bill of Rights Act is neither entrenched nor supreme. However, wherever an enactment can be interpreted consistently with the enumerated rights, that meaning is to be preferred.<sup>210</sup> If an enactment cannot be interpreted in this manner, courts are required to apply the statute despite its inconsistency with the Bill of Rights Act.<sup>211</sup> This model of a non-entrenched, statutory bill of rights is also found in the United Kingdom<sup>212</sup> and in two Australian jurisdictions.<sup>213</sup>

In the leading case, *R v. Taito*, the Privy Council held that the right to appeal requires provision of "an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process."<sup>214</sup> Most fundamentally, the court must consider the merits of an appeal.<sup>215</sup> Unless the appeal is abandoned, it cannot be disposed of without assessing whether the grounds of appeal raised meet the statutory criteria for allowing the appeal; there is no power to dismiss an appeal on procedural grounds, even where an appellant fails to comply with rules of court.<sup>216</sup> It is also necessary for the scope of the appeal to extend to permit challenges to matters of fact.<sup>217</sup> Under New Zealand law, a conviction must be set aside if it is "unreasonable," which necessitates a review of the

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209. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 190, § 25(h).

210. *Id.* § 6.

211. *Id.* § 4.

212. See Human Rights Act, 1998, c. 42 (U.K.).

213. See *Charter of Human Rights and Responsibilities Act 2006* (Vict.) (Austl.); *Human Rights Act 2004* (Austl. Cap. Terr.) (Austl.). Although the Australian statutes both contain a right to appeal, neither jurisdiction has yet considered the content of the right. *Id.*

214. *R v Taito* [2002] 3 NZLR 577 (P.C.) 596-97. See also *Petryszick v R* [2010] NZSC 105 at para [2].

215. *Petryszick v R* [2010] NZSC 105 at para [2, 32]; *R v Taito* [2002] 3 NZLR 577 (P.C.) 597-98.

216. *Petryszick v R* [2010] NZSC 105 at para [35]. See also *Petryszick v R* [2011] NZSC 72 (refusing leave to appeal on the basis that the Court of Appeal had addressed the merits of the appellant's grounds of appeal "as best as it could in the circumstances," given his failure to provide written or oral submissions).

217. See *R v Owen* [2008] 2 NZLR 37 (SC) 45 (referring to article 14(5) of the ICCPR and noting that "[t]here is no suggestion in the international jurisprudence that the right of appeal mandated by our s. 25(h) and corresponding international provisions should, in the case of factual issues, be different in character or more extensive than that provided by s 385(1)(a) [of the Crimes Act 1961]").

evidence presented.<sup>218</sup> An appeal is not, however, “a retrial on the written record,” and it is the appellant’s responsibility to demonstrate precisely why the verdict is unreasonable.<sup>219</sup>

Appellate processes must also be fair, as this “help[s] to ensure correct decisions on the substance of cases.”<sup>220</sup> Proper consideration of the merits of an appeal cannot therefore occur unless due process is observed.<sup>221</sup> A number of procedural requirements have been identified. First, appellants are entitled to the materials that are necessary for them to advance their grounds of appeal.<sup>222</sup> Where relevant, they are entitled to trial transcripts, the judge’s instruction to the jury and any rulings made in relation to the trial. In this context, the court cannot discriminate by providing these documents only to appellants who are legally represented.<sup>223</sup> Second, appellants are entitled to an oral hearing and, when unrepresented, to be present at the hearing.<sup>224</sup> This is not, however, an absolute requirement: an appeal may be determined without an oral hearing where it “can fairly be dealt with on the papers” and “either has no realistic prospect of success or clearly should be allowed.”<sup>225</sup> Similarly, appellants who willfully fail to comply with rules of court may be prevented from participating in an appeal.<sup>226</sup> Third, appellants must have access to an unbiased court.<sup>227</sup> Finally, where appeals are to be determined by more than one judge,<sup>228</sup> it is necessary for the judges to meet, in order to “grapple collectively with the issues” that are raised.<sup>229</sup>

A final feature of the New Zealand jurisprudence is the suggestion that it would be inconsistent with the right of appeal to require that leave first

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218. *Id.* at 44-45.

219. *Id.* (noting that the appellate court is not entitled to substitute its own view of the evidence, and it should not lightly interfere with the verdict).

220. *R v Taito* [2002] 3 NZLR 577 (P.C.) 600.

221. *Id.* at 597.

222. *Id.* at 600.

223. *Id.*

224. *See id.* at 599; *R v Smith* [2003] 3 NZLR 617 (CA) 633.

225. Crimes Act 1961, § 392A(1) (N.Z.). This power is rarely exercised: in 2008 (the most recent year for which statistics are available), only five appeals against conviction or sentence were determined on the papers, compared with 307 that received oral hearings. *See Judicial Reports, COURTS OF NEW ZEALAND*, <http://www.courtsofnewzealand.govt.nz/from/judicial-reports>.

226. *Petryszick v R* [2010] NZSC 105 at para [31] Elias CJ for the Court.

227. *See R v Taito* [2002] 3 NZLR 577 (P.C.) 597-98 (holding that it was inappropriate for a judge who had previously considered that the merits of an appeal did not justify a grant of legal aid to then sit on the appeal itself).

228. Certain criminal appeals in New Zealand are, however, routinely heard by a High Court judge sitting alone. Summary Proceedings Act 1957, 1957 S.N.Z. No. 87, § 115.

229. *R v Taito* [2002] 3 NZLR at 599.

be obtained. After the Bill of Rights was enacted, leave to appeal requirements were repealed by Parliament, a decision that received dicta approval from the Privy Council in *Taito*.<sup>230</sup> It is, however, acceptable to subject second appeals to a leave process.<sup>231</sup>

#### F. The Right to Appeal in the United States

The United States Constitution does not guarantee a right to an appeal in criminal cases.<sup>232</sup> Nor is such a right a necessary element of due process:

An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.<sup>233</sup>

States are not required to provide any system of appellate review at all.<sup>234</sup> If a system is provided, the form it takes is entirely at the state's discretion: a state would hypothetically be entitled to establish a process of "nonadversarial reexamination of convictions by a panel of government experts."<sup>235</sup>

Notwithstanding these statements, this article has shown that, during the twentieth century, the right to appeal became ubiquitous in both federal and state criminal justice systems.<sup>236</sup> In the federal system, and in most

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230. *See id.* (observing that leave to appeal requirements were repealed in response to the enactment of the New Zealand Bill of Rights Act 1990).

231. *See R v Slater* [1997] 1 NZLR 211 (CA) 217.

232. The United States has ratified the ICCPR, including article 14(5), but has declared that it is non-self-executing. *E.g.*, 138 CONG. REC. S4784 (1992) (the Senate's "advice and consent" to ratification was subject to a declaration that "Articles 1 through 27 of the Covenant are not self-executing"); *White House Statement on Signing the International Covenant on Civil and Political Rights*, 28 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1008, 1008-09 (June 5, 1992) (declaring the ratification of the ICCPR).

233. *McKane v. Durston*, 153 U.S. 684, 687 (1894) (holding that the Fourteenth Amendment did not require states to provide a right of appeal in criminal cases).

234. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

235. *See Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165-66 (2000) (Scalia, J., concurring).

236. Indeed, in 1956, the Supreme Court observed that every state provided "some method of appeal from criminal convictions." *Griffin*, 351 U.S. at 18.

states, this right is purely statutory in nature.<sup>237</sup> However, where granted, it is subject to the constitutional guarantees of due process and equal protection.<sup>238</sup> It is therefore possible to get a picture of the minimum requirements of a criminal appeal.

*Griffin v. Illinois* was a watershed case. Under Illinois law, every person convicted of a crime had the right to appeal.<sup>239</sup> However, in order to get full review of all alleged errors, the appellant was required to purchase a transcript of the trial proceedings.<sup>240</sup> The Court struck down this requirement as unconstitutional. The plurality reasoned that, although not required by the Constitution, appellate review had “become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant” and was subject to the protections of the Due Process and Equal Protection Clauses.<sup>241</sup> Because the system denied “adequate and effective appellate review”<sup>242</sup> to those who could not afford transcripts, it breached the Fourteenth Amendment. Justice Frankfurter concurred in the result, focusing on the Equal Protection Clause and emphasizing that although states were entitled to regulate the appeal process, they could not in doing so produce “squalid discrimination.”<sup>243</sup>

In the decades following *Griffin*, the Supreme Court expanded the protections that applied to appellate proceedings. In *Douglas v. California*, the Court held that criminal defendants were entitled to legal representation on first appeals as of right.<sup>244</sup> In *Halbert v. Michigan*, this right was extended to encompass applications for leave to bring a first appeal.<sup>245</sup> Further, the right to counsel implies the right to the *effective* assistance of counsel,<sup>246</sup> who must act as an advocate rather than an amicus.<sup>247</sup> The right

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237. Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 946 (2002) (noting that only eleven states provide in their constitutions for an appeal as of right against felony convictions).

238. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

239. *Griffin*, 351 U.S. at 13 (quoting Illinois law, which provided that “[w]rits of error in all criminal cases are writs of right and shall issue as a matter of course.”).

240. *See id.* at 13-14. In practice, full appellate review is only possible by writ of error when accompanied by bill of exceptions or report of proceedings at the trial certified by the trial judge. Without either of these documents, the writ can only be prosecuted on the basis of the record kept by the clerk, which is limited to the indictment, arraignment, plea, verdict and sentence. *See id.* at 13 & n.2.

241. *Id.* at 18.

242. *Id.* at 20.

243. *See id.* at 21-24 (Frankfurter, J., concurring).

244. *Douglas v. California*, 372 U.S. 353, 357 (1963).

245. *See Halbert v. Michigan*, 545 U.S. 605 (2005).

246. *See Evitts v. Lucey*, 469 U.S. 387 (1985).

247. *Ellis v. United States*, 356 U.S. 674, 675 (1958).

to counsel does not, however, apply outside of a first appeal: there is no right to legal representation for further appeals,<sup>248</sup> petitions for certiorari,<sup>249</sup> or collateral attacks.<sup>250</sup>

Appeals, like trials, are conceived of as fundamentally adversarial:

In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding.<sup>251</sup>

Moreover, because they are adversarial, appeals provide “the opportunity to prove a conviction wrong.”<sup>252</sup> This opportunity need only be “fair,” however, and “fairness does not require either counsel or a full appeal once it is properly determined that an appeal is frivolous.”<sup>253</sup> Moreover, a defendant will have been afforded adequate and effective review “so long as [the process] reasonably ensures that an . . . appeal will be resolved in a way that is related to the merit of that appeal.”<sup>254</sup>

#### G. The Right to Appeal in Canada

Like the United States Constitution, the Canadian Charter of Rights and Freedoms does not explicitly guarantee a right to appeal. Although the Supreme Court has never directly addressed whether the right is implicit in section 7 of the Charter, it has described rights of appeal as “exceptional”<sup>255</sup> and “solely creatures of statute.”<sup>256</sup> At this point, therefore, the right to appeal is not constitutionally guaranteed.<sup>257</sup>

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248. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

249. *Id.* at 617.

250. *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987).

251. *Evitts*, 469 U.S. at 387, 396.

252. *Griffin v. Illinois*, 351 U.S. 12, 24 (1956).

253. *Smith v. Robbins*, 528 U.S. 259, 278 (2000).

254. *Id.* at 276-77.

255. *Welch v. The King*, [1950] S.C.R. 412, 428 (Can.).

256. *Kourtesis v. Minister of Nat'l Revenue*, [1993] 2 S.C.R. 53, 69 (Can.). *See also* *R. v. Smith*, [2004] 1 S.C.R. 385, para. 21 (Can.).

257. The lower courts that have addressed this question directly have held that § 7 does not require a right of appellate review. *R. v. Robinson* (1989) 63 D.L.R.4th 289 (Can.) (holding that an accused person has never enjoyed an unqualified right to appeal against conviction); *Huynh v. Canada* (1996) 134 D.L.R.4th 612 (Can.) (holding in the immigration context that a right of appeal was not a requirement of fundamental justice).

Statutory rights to appeal against conviction and sentence are, however, commonplace.<sup>258</sup> A person convicted on indictment may appeal against his or her conviction on a question of law or, with leave, on a question of fact, a mixed question of law and fact, or any other ground.<sup>259</sup> In practice, however, all grounds of appeal are considered on their merits.<sup>260</sup>

Canadian appellate courts have only given limited consideration to the scope of appeals. In *R. v. Sheppard*, the Supreme Court held that “[w]here a party has a right of appeal, the law presupposes that the exercise of that right is to be meaningful.”<sup>261</sup> Thus, where a trial is by a judge alone, the verdict must be accompanied by sufficiently detailed written reasons, so as to “preserve and enhance meaningful appellate review of the correctness of the decision . . .”<sup>262</sup> Similarly, a meaningful right of appeal also may demand the assistance of counsel.<sup>263</sup>

It is clear that the onus is on appellants to exercise their rights of appeal. Courts may dismiss on procedural grounds appeals that are not pursued.<sup>264</sup>

## V. POTENTIAL REASONS FOR CONVERGENCE IN THE RIGHT TO APPEAL

The above survey reveals considerable agreement, across a wide range of jurisdictions, on the essential features of the right to appeal. These features, and the degree of convergence, are examined in Part VII.

This Part identifies a number of possible, and overlapping, reasons for convergence. Although there have been changes in the criminal procedures of both common law and continental systems, the most dramatic developments have been in the common law world. In postulating possible reasons for convergence, it is therefore sensible to focus primarily on the factors influencing common law systems.

Understanding modern convergence is best done against an historical backdrop. History also has explanatory power, illuminating institutional forces driving the development of the right to appeal. This article has shown that the right to appeal developed much earlier in continental

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258. *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, 69-70 (Can.).

259. Criminal Code, R.S.C. 1985, c. C-46, § 675 (Can.).

260. *R. v. Bernardo*, [1997] 121 C.C.C. 3d 123, para. 17 (Can. Ont. C.A.).

261. *R. v. Sheppard*, [2002] 1 S.C.R. 869, para. 66 (Can.).

262. *Id.* para. 25.

263. *Bernardo*, 121 C.C.C. 3d para. 21.

264. *R. v. Clarke*, 31 A.R. 147, 44 (1981); *R. v. Sopko*, [1994] 5 W.W.R. 117 (Can. Man. C.A.); *R. v. Peck*, 129 Man. R. 2d 111 (1998).

European systems than in their common law counterparts. More importantly, however, entirely distinct factors fueled the emergence of the right in these two systems. In continental Europe, appellate review was an important instrumentality for the centralization of political power and control. Continental criminal justice systems hence remain characterized by hierarchical distribution of authority, with criminal appeals facilitating the effective exercise of that authority through close supervision of lower courts.<sup>265</sup> In contrast, common law systems, with their emphasis on the dispersal of authority to the local level, rejected appellate oversight in criminal cases for hundreds of years. When a right of appeal was finally granted, it was driven by concerns over the factual correctness of particular verdicts rather than an institutional desire for central control and uniformity. There were, however, institutional concerns in play, particularly a desire to safeguard the legitimacy of the criminal justice system as a whole.

Technological advancements also probably facilitated convergence. A prerequisite to meaningful appellate review is a record of the trial. This requirement was easily satisfied in continental systems, given the centrality of the dossier as a complete written record of the investigation and the role of the trial as a verification of its contents.<sup>266</sup> By contrast, the common law's aversion to written evidence in favor of oral testimony meant that to the extent a written trial record existed, it was very limited and unhelpful. This proved to be a significant obstacle to appellate review in criminal cases.<sup>267</sup> In the absence of adequate technology, a written record of the evidence presented at trial could not easily be kept. The commercial production of typewriters and stencils,<sup>268</sup> as well as the development of modern stenographic systems,<sup>269</sup> were thus significant advances, which

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265. For a comparison of the importance of hierarchical supervision, primarily in the context of civil appeals, see Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated . . .*, 50 AM. J. COMP. L. 201 (2002).

266. See Nico Jörg, Steward Field & Chrisje Brants, *Are Inquisitorial and Adversarial Systems Converging?*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 41, 50 (Phil Fennell et al. eds., 1995).

267. PATTENDEN, *supra* note 4, at 19 (noting that the “absence of an accurate record of most trials” was an obstacle to the development of a criminal appeal); GREGORY J. DOWNEY, CLOSED CAPTIONING 5 (2008) (“[I]n the courtroom, a transcription of every word that was uttered by judge, witness, and counsel was crucial to ensure the legal right of appeal.”).

268. Elyce J. Rotella, *The Transformation of the American Office: Changes in Employment and Technology*, 41 J. OF ECON. HIST. 51, 53-54 (1981) (noting that typewriters were first produced in quantity in 1874, and that the next twenty years saw a “wave of invention of new office machines,” including the stenotype).

269. DOWNEY, *supra* note 2667, at 106. (2008) (outlining the rise of stenography during the nineteenth century, with one hundred systems being published between 1880 and 1890, including the

broadly coincided with the emergence of criminal appeals in common law systems.<sup>270</sup>

In the second half of the twentieth century, we find a third factor tending to produce convergence in criminal appeals: the adoption of human rights instruments. The right to have one's conviction and sentence reviewed by a higher tribunal was first identified as a fundamental human right in article 14(5) of the ICCPR, adopted by the General Assembly on 16 December 1966. Similar guarantees were later included in other multilateral rights instruments, including the American Convention on Human Rights<sup>271</sup> and Protocol No. 7 to the European Convention.

Conceiving of the right to appeal as a human right promoted convergence in three ways. First, the right's presence in the ICCPR influenced its later inclusion in the domestic rights instruments of a number of common law systems, including South Africa, New Zealand, and Australian jurisdictions.<sup>272</sup> The presence of this right has, as we have seen, significantly affected the nature of appeals in those countries. Leave to appeal restrictions were abolished, for example, in direct response to section 25(f) of the New Zealand Bill of Rights Act 1990.<sup>273</sup> This may be contrasted with the very limited recognition given to the right to appeal in Canada, which has not recognized the right as fundamental. Second, the right's presence in the European Convention has meant its adoption by almost every member of the Council of Europe, under the centralized oversight of the European Court. Finally, conceptualizing appellate review

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Gregg system in 1888, which remains widely taught in the United States); LESTER BERNHARDT ORFIELD, *CRIMINAL APPEALS IN AMERICA* 80 (1939). Section 16 of the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23 (Eng.) required shorthand notes of every trial to be taken and a transcript of them made available on appeal, if directed by the Registrar. Although provision of a transcript was construed as merely directory, the trial judge's notes and a report on the trial were available on appeal. *Id.* at 29-30.

270. Richard N. Current, *The Original Typewriter Enterprise 1867-1873*, 32 WIS. MAGAZINE OF HISTORY 391, 405 (observing that the early demand for typewriters came from court reporters). See also *History of Court Reporting*, NCRAONLINE.ORG, <http://ncraonline.org/NCRA/pressroom/History/History+of+Court+Reporting/> (last visited Sept. 23, 2011) (discussing the development of shorthand systems and linking the "explosion of technological advancements in the field of court reporting" during the late nineteenth century to an explosion in numbers of court reporters).

271. American Convention on Human Rights, art. 8(2)(h), Nov. 22, 1969, 1144 U.N.T.S. 123 ("Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: . . . (h) the right to appeal the judgment to a higher court.").

272. *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 25(4) (Austl.); *Human Rights Act 2004* (Austl. Cap. Terr.) § 22(4) (Austl.).

273. Note that this statute is described in its long title as "An Act . . . to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." New Zealand Bill of Rights Act 1990.

as a human right has focused understanding of the right in terms of its utility to individuals. This individualized focus has installed the prevention of miscarriages of justice (i.e. error correction) as the principal objective of virtually every system of appellate review. Identifying a single, overarching rationale for criminal appeals is an effective means of converging on a common understanding of the right's substance, which, in turn, is likely to flow through to appellate standards and procedures.

A fourth and final factor that may have influenced convergence is the shift in a number of continental countries towards a greater emphasis on the trial phase of criminal proceedings and, in particular, on oral evidence:<sup>274</sup> “In many [European] countries restrictions on secondary evidence are rapidly increasing. Greater importance is being placed on oral evidence and confrontation between witnesses and the accused at the trial, while less reliance is placed on written forms of proof.”<sup>275</sup>

This shift in favor of the principles of orality and immediacy in trial proceedings can be traced to the nineteenth century, with the French *Code d'instruction criminelle* in 1808 and the first German federal Code of Criminal Procedure of 1877.<sup>276</sup> Unlike the other factors postulated, this change has driven convergence from the continental side of the equation. An increasing emphasis on oral evidence may tend to narrow the scope of review permitted on appeal. For example, following Italy's adversarial reforms in 1988, while appeals on both law and fact remained possible, complete de novo review was not required, with the parties given the ability to narrow the scope of an appeal.<sup>277</sup> The influence of this factor is, of course, considerably mitigated by the retention of reasoned, written judgments, which facilitate more extensive appellate oversight.

None of the factors postulated in this Part provides, on its own, a sufficient explanation for the convergence of the common law and continental conceptions of criminal appeals. Each factor is worthy of further study. When taken together, however, it appears that considerable pressure was exerted—and will continue to be exerted—in favor of an

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274. B.S. Markesinis, *Learning from Europe and Learning in Europe*, in *THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21<sup>ST</sup> CENTURY* 1, 30 (B.S. Markesinis ed., 1994) (noting that “there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position”).

275. Gordon Van Kessel, *European Trends towards Adversary Styles in Criminal Procedure and Evidence*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS* 225, 229 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002).

276. Stewart Field, *Fair Trials and Procedural Tradition in Europe*, 29 *O.J.L.S.* 365, 378 (2009).

277. Freccero, *supra* note 163, at 380.

emerging common understanding of both the importance of the right to appeal as well as its essential features.

## VI. THE SUBSTANCE OF THE RIGHT TO APPEAL

This Part synthesizes, in doctrinal terms, the convergence in contemporary formulations of the substance of the right to appeal. It argues that the right is best understood as requiring provision of an opportunity to access a fair appellate process that permits adequate review of conviction and sentence. The Part considers the common features of the right that emerge from the jurisdictions surveyed, as well as the differences that remain between the continental approach and that of common law jurisdictions.

### A. Appeals Must Be Adequate and Effective

The most significant area of agreement within the jurisdictions covered is with respect to the substance of appeals: they must be both adequate and effective. These requirements of adequacy and effectiveness are distinct, and are discussed in turn.

An appeal is only *adequate* where it allows for review of both the factual and legal basis of conviction. Under the ICCPR, the substance of convictions must be reviewable, including an assessment of the sufficiency of the evidence presented.<sup>278</sup> In South Africa, there must be an “adequate reappraisal” that is suited to correcting errors and thus minimizing the risk of wrongful convictions.<sup>279</sup> Similarly, in New Zealand,<sup>280</sup> Canada,<sup>281</sup> and the United States,<sup>282</sup> it is clear that appellate review is intended to extend to questions of both law and fact.

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278. General Comment 32, *supra* note 123, para. 48; *Aboushanif v Norway*, UNHRC, Decision of July 17, 2008, Commc’n No. 1542/2007, para. 7.2, U.N. Doc. CCPR/C/93/D/1542/2007; *Bandajevsky v Belarus*, UNHRC, Decision of Mar. 28, 2006, Commc’n No. 1100/2002, para. 10.13, U.N. Doc. CCPR/C/86/D/1100/2002.

279. *S. v. Shinga* 2007 (2) SACR (CC) 28 para. 40 (S. Afr.); *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 23 (S. Afr.); *S. v. Twala* 2000 (1) SA 879 (CC) para. 9 (S. Afr.).

280. Crimes Act 1961, § 385(1) (N.Z.) (providing that a court must allow an appeal against conviction if it is of the opinion that the verdict is unreasonable or there was a wrong decision on any question of law that justifies setting aside the conviction); *R v Owen*, [2008] 2 NZLR 37 (SC) 42 (observing that the criterion of unreasonableness incorporates “a limited right of appeal on fact”).

281. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 25 (Can.) (noting that meaningful appellate review involves the opportunity to challenge the “correctness” of the verdict in both law and fact); *R. v. Bernado* (1997), 121 C.C.C. 3d 123, para. 17 n.1 (Can. Ont. C.A.) (noting that, even though appeals on questions of fact are technically with leave, all grounds of appeal are, in practice, considered on their merits).

282. *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (noting that an appeal provides “the opportunity to prove a conviction wrong”).

Almost paradoxically, the European Convention is something of an outlier with respect to the necessary scope of appellate review. It does not require that appeals extend to the evidential basis for conviction. The explanatory report to Protocol No. 7 noted that the right to an appeal was not inconsistent with restricting appeals to questions of law. Trechsel suggests that this caveat was made necessary by the variety of types of appeal that were available in Europe.<sup>283</sup> Three other factors may also have been significant. First, continental appeals were historically more likely to extend to a complete reconsideration of the factual and legal basis for conviction. It may be presumed that nations who carved out exceptions to this general practice did so deliberately and for reasons that were entitled to respect. Second, even where *de novo* review is not possible and appeals are technically restricted to questions of law, the fact that trial court judgments are accompanied by detailed written reasons leaves considerable scope for a review of the factual basis for conviction.<sup>284</sup> Thus, Spanish cassation proceedings, which are technically restricted to questions of law, regularly allow challenges to the factual basis for conviction. Third, appellate review in Europe retains its historical association with a hierarchical model of control rather than with a concern to prevent miscarriages of justice from occurring. Thus the European Court's reluctance to set substantive requirements on appellate review may represent deference towards the ways in which states have arranged their judicial hierarchies.<sup>285</sup>

Nevertheless, when the scope of appeals in modern common and civil law jurisdictions is compared against their respective histories, considerable convergence is apparent. The greatest movement has been in common law systems.<sup>286</sup> Over the past century, the scope of appellate oversight has increased significantly, especially with respect to the factual basis for convictions. During the eighteenth century, the only possibility of review was for errors of law that either appeared on the record or were specifically reserved by the trial judge. Today, appellants have a vastly expanded arsenal of potential grounds for appeal, extending to the reasonableness of the verdict and many more identifiable errors of law.<sup>287</sup> If

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283. TRECHSEL, *supra* note 7, at 365-66.

284. *See, e.g.*, LANGBEIN, *supra* note 154, at 83-84 (discussing appeals in German courts).

285. It should also be noted that to the extent members of the Council of Europe have also ratified the ICCPR, the jurisprudence of the United Nations Human Rights Committee puts pressure on this aspect of the European Court's jurisprudence.

286. *See supra* Part II.A.

287. *See supra* Parts IV.D-G.

civil law jurisdictions have moved, it is in the opposite direction. De novo review, while common, is not an unwavering requirement.<sup>288</sup>

Appeal must also be *effective*. Many of the jurisdictions surveyed have identified certain necessary prerequisites to achieving meaningful appellate review. The concern is to ensure that appellants have the practical means to challenge their convictions.

Perhaps the most significant prerequisite is that certain documents must be available to putative appellants. This is a matter of logic. In order to pursue an appeal, particularly one concerned with demonstrating error at first instance, it is imperative to have access to a record of those proceedings. Thus a number of jurisdictions have emphasized the fundamental role that trial transcripts play.<sup>289</sup> The reasons for the trial court's verdict, where available, should also be provided.<sup>290</sup> This requirement is of particular significance to common law appeals, where review does not proceed de novo. By contrast, review in Europe generally focuses less on the trial proceedings; and, even where the review is more in the nature of a common law appeal, the centrality of the written dossier and reasoned judgments means that providing appellants with access to the necessary documents is not burdensome.<sup>291</sup>

Finally, it should be noted that the assistance of counsel will often be necessary in order to ensure that a defendant has effective access to appeal proceedings.<sup>292</sup> The particular scope of this requirement more closely aligns with the right to legal assistance in criminal proceedings generally, on which there is considerable jurisdictional variation.

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288. See *supra* Parts IV.B-C.

289. *E.g.*, Griffin v. Illinois, 351 U.S. 12, 19-20 (1956); *R v Taito* [2002] 3 NZLR 577 (P.C.) 600; *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 37 (S. Afr.) (holding that “the absence of a [trial] record does not provide an opportunity for adequate reappraisal”); *S. v. Steyn* 2001 (1) SA 1146 (CC) para. 23 (S. Afr.); General Comment 32, *supra* note 123, para. 49.

290. *R. v. Sheppard*, [2002] 1 S.C.R. 869 (Can.).

291. See *Damaska*, *supra* note 77, at 507 (observing that the written dossier is the “backbone of criminal proceedings”).

292. See, *e.g.*, *R. v. Bernardo*, [1997], 121 C.C.C. 3d 123 (Can. Ont. C.A.); *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 58 (S. Afr.); *Douglas v. California*, 372 U.S. 353, 355-56 (1963); *Shulepov v. Russia*, App. No. 15435/03, Section V, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, paras. 34-39 (June 26, 2008), <http://echr.coe.int/echr/en/hudoc> (click “HUDOC Database,” then select “HUDOC Collection” in “ECHR Document Collections” on left) (applying article 6(3)(c) of the European Convention to appellate proceedings); *Lumley v Jamaica*, UNHRC, Decision of Mar. 31, 1999, Comm’n No. 662/1995, para. 7.3, U.N. Doc. CCPR/C/65/D/662/1995 (holding that counsel must be provided where appellant has been sentenced to death).

## B. The Right to Appeal Is an Opportunity Right

A ubiquitous feature of the right to appeal is that it is conceived of as an opportunity right. Conceptually, opportunity rights fall between negative human rights, which impose limitations on state action, and positive rights, which, when asserted, require positive state action, often the provision of goods or resources.<sup>293</sup> Opportunity rights, in contrast, are concerned with the establishment of institutions and procedures—for example, jury trials, confrontation procedures<sup>294</sup> and elections<sup>295</sup>—that individuals are entitled to access and in which they may participate.<sup>296</sup> From the citizen's perspective, an opportunity right is not primarily a right to be free from state action or to receive a benefit; it is a right that lies dormant until the citizen chooses to exercise it at the designated time.

As an opportunity right, there is no obligation on states to ensure that convictions are always reviewed by higher courts. The obligation is to establish an appellate system, governed by fair procedures, that defendants have the opportunity to access. It is the individual's responsibility to exercise the right, in accordance with the rules governing the institution. Indeed, the European Court has held that a crucial component of the right is that it must be exercisable on the defendant's, rather than a third party's, initiative.<sup>297</sup>

Conceiving of the right to appeal as an opportunity right is of most significance when one considers the way in which appeal proceedings are conducted. It is essential that courts permit the appellant to participate actively in the proceedings. A procedure in which the appellant has no

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293. MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 23-24, 48 (2003).

294. See, e.g., *United States v. Owens*, 484 U.S. 554, 559 (1988) (holding that the Confrontation Clause guarantees provision of an opportunity to cross-examine witnesses, not the right to a “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish” (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987))); *Kostovski v. Netherlands*, App. No. 11454/85, Court (Plenary), EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, para. 41 (Nov. 20, 1989), <http://echr.coe.int/echr/en/hudoc> (holding that article 6(3)(d) of the European Convention requires “that an accused should be given an adequate and proper opportunity to challenge and question a witness against him”).

295. The holding of elections is one of the primary obligations imposed on the state by the right to vote.

296. Categorizing rights is, like categorizing legal systems, not an exact science. States undoubtedly have the obligation to respect, fulfill and protect all human rights; rights generally impose positive, negative and institutional obligations on states. NOWAK, *supra* note 293, at 48-51. Nevertheless, the *primary* feature of opportunity rights—the provision of a right to access an institution or procedure—is sufficiently distinct from other types of rights.

297. *Gurepka v. Ukraine*, App. No. 61406/00, Section II, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, paras. 59-60 (Sept. 6, 2005), <http://echr.coe.int/echr/en/hudoc>.

opportunity to identify the issues or present submissions will be defective.<sup>298</sup>

This requirement also cuts the other way. It is primarily for the appellant to demonstrate why a conviction should not have been imposed. A state is under no obligation to ensure the appellant makes the best possible use of this opportunity. Having provided access to appellate review of sufficient scope, the role of the court is to assess the merits of the appellant's factual and legal complaints.

### C. The Appellate Process Must Be Fair

The final feature of the right to appeal is that the appellate process must itself be fair. A fair process is difficult to define exhaustively. At a minimum, the procedure must be clear and accessible.<sup>299</sup> Fairness may be considered further at three different levels.

First, the process must be fair to the individual appellant. Procedural requirements must pursue legitimate aims, and they cannot be so onerous that, by restricting access, they impair the "very essence of the right."<sup>300</sup> This is a fact-specific inquiry. However, it appears clear that demanding onerous filing fees would impair the exercise of the appeal right. On the other hand, time limits for bringing an appeal "undoubtedly serve the purpose of assuring a proper administration of justice."<sup>301</sup> Provided the limit itself does not prevent a diligent appellant from lodging an appeal,<sup>302</sup> it may be strictly enforced.<sup>303</sup>

Second, the process must be fair as between groups of appellants. The process cannot discriminate between different classes of people. Cases from the United States, New Zealand, and South Africa make it clear that it

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298. *Id.* para. 61.

299. Galstyan v. Armenia, App. No. 26986/03, Section III, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, para. 126 (Nov. 15, 2007), <http://echr.coe.int/echr/en/hudoc> (finding a review system that "lack[ed] any clearly defined procedure or time limits and consistent application in practice" to breach article 2 of Protocol No. 7).

300. Poulsen v. Denmark, App. No. 32092/96, Section II, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 5 (June 29, 2000), <http://echr.coe.int/echr/en/hudoc>.

301. Laaksonen v. Finland, App. No. 36321/97, Section IV, EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, at 3 (Sept. 7, 1999), <http://echr.coe.int/echr/en/hudoc>.

302. Cavanilles v. Spain, No.116/1997/900/1112, Court (Chamber), EUROPEAN COURT OF HUMAN RIGHTS: HUDOC, para. 45 (Oct. 28, 1998), <http://echr.coe.int/echr/en/hudoc> (holding that a three-day time limit for bringing a civil appeal was, in the circumstances, unreasonable and violated article 6(1)).

303. *Laaksonen*, App. No. 36321/97, para. 1 (holding that the state was entitled to reject a notice of appeal received one day after the expiry of a thirty-day time limit for filing appeals).

is not permissible to impose more onerous conditions on appellants who are indigent or unrepresented.<sup>304</sup>

Third, one should consider the fairness of the process at the systemic level. Because appellate resources are always limited, it is legitimate for a process to seek to channel its resources into hearing arguable or meritorious appeals; frivolous or hopeless appeals may be disposed of expeditiously, provided they still receive adequate consideration of their merits.<sup>305</sup> Indeed, it is not in the interests of justice and fairness to allow unmeritorious appeals to prejudice the speedy resolution of those that have sufficient substance to justify a hearing.<sup>306</sup> Undoubtedly, a system that does not deal with appeals quickly is unfair to individual appellants, who may be imprisoned for substantial periods without the opportunity to challenge their convictions.<sup>307</sup> But it is also unfair for another reason: if an appeal is allowed, appellate delay risks prejudicing the fairness of any retrial that is ordered. Evidence may have degraded, and witnesses may be unavailable or their memories may have dimmed.<sup>308</sup>

#### D. The Modalities of Appeal

The most obvious differences between the European and common law jurisdictions discussed are with respect to the modalities of appeal. In general, appeals in Europe are heard *de novo*; evidence presented at the trial may be reassessed, and often supplemented, at second instance.<sup>309</sup> By contrast, appeals in common law jurisdictions are based on the trial record, with more deference given to the first-instance fact-finder.<sup>310</sup>

We have seen that these differences in the modalities of review have historical roots that go very deep, back to the European adoption, and English rejection, of Roman-canon procedure.<sup>311</sup> The extent to which these differences persist today should not, however, be overstated. In contemporary France, Germany, and Italy, appeals not uncommonly fall

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304. *Griffin v. Illinois*, 351 U.S. 12 (1956); *R v Taito* [2002] 3 NZLR 577 (P.C.); *S. v. Ntuli* 1996 (1) SA 1207 (CC) (S. Afr.).

305. *Smith v. Robbins*, 528 U.S. 259, 278 (2000); *S. v. Ntuli* 1996 (1) SA 1207 (CC) para. 24 (S. Afr.).

306. *S. v. Shinga* 2007 (2) SACR 28 (CC) para. 51 (S. Afr.).

307. In a number of communications, particularly from Caribbean nations, the Committee has found article 14(5) to have been violated due to significant delays between trial and the resolution of an appeal. *See supra* note 124.

308. *R. v. Sopko*, [1994] 5 W.W.R. 117, para. 10 (Can. Man. C.A.).

309. *See supra* Parts II.C, III, IV.B.

310. *See supra* Parts II.A, III.

311. *See supra* Part II.C.

short of full *de novo* review.<sup>312</sup> Further, European jurisprudence is remarkably tolerant of appeals that are limited in scope, for example, to questions of law.<sup>313</sup>

## VII. CONCLUSION

Appeals have become an increasingly important feature of common law criminal justice systems. Despite this trend, judicial and academic consideration of the right to appeal remains sparse. This article lays a foundation for further analysis of the right.

A survey of the modern jurisprudence, considered against the backdrop of history and wider institutional features, reveals considerable convergence in the understanding and practice of appeals. Common law jurisdictions, in particular, have shifted considerably over the past century. Appeals, unknown for many hundreds of years, are now an integral part of virtually every common law criminal justice system. What was once a chasm between the common law and continental European approach to appeals has narrowed considerably. This article has identified a number of potential explanations for this convergence, including historical events, technological changes, the emergence of the right to appeal as a human right, and the increasing emphasis on orality in continental criminal procedure. Each one of these factors could be explored in greater detail, and further factors may have been salient.

This paper has also synthesized the key features of the right to appeal in modern jurisprudence. Rights to appeal, it has argued, should be understood as opportunity rights: the state is required to provide those convicted of crimes with the opportunity to access a fair appellate process. While the exact form that an appeal takes may vary, all appeals must afford a convicted person the ability to access an adequate and effective review of conviction and sentence. Beyond these minimum requirements, the right to appeal does not mandate a particular standard of review.

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312. *See supra* Part IV.B.

313. *See supra* Part IV.C.

