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Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal

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BETTER OFF DEAD: ABATEMENT, INNOCENCE, AND THE EVOLVING RIGHT OF APPEAL

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INTRODUCTION

Just before New Year's in 1994, John Salvi attacked two abortion clinics in Brookline, Massachusetts, firing dozens of shots that left two women dead and five others wounded.[1] A Massachusetts jury rejected his insanity defense—he did not contest having committed the murders—and sentenced him to two consecutive life terms.[2] Salvi appealed the convictions, but in a remarkable reversal, those convictions were erased before the appeal was heard. They were abated *ab initio* following his suicide in prison. Adhering to a rule that exists in both the federal system and the plurality of states, the appellate court not only dismissed Salvi's appeal, but also instructed the trial court to vacate the conviction and dismiss the indictment because Salvi's appeal had not been, and now could not be, resolved.[3]

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1. John Kifner, *Gunman Kills 2 at Abortion Clinics in Boston Suburb*, N.Y. TIMES, Dec. 31, 1994, at A1. Shannon Lowney and Lee Ann Nichols, workers at the two Brookline clinics half a mile apart, were killed when Salvi opened fire with a ten-shot, .22 caliber rifle that he had loaded with two fifty-round clips taped together. An anti-abortion zealot, Salvi was captured a day later after firing on a third clinic in Norfolk, Virginia. John Kifner, *Suspect in Clinic Killings Eludes Hunt But Is Caught in 3rd Attack in Virginia*, N.Y. TIMES, Jan. 1, 1995, at A1.

2. John Ellement, *Guilty Verdict Sends Salvi to Prison for Life; Jury Rejects Insanity Plea in Slayings at Two Clinics*, BOSTON GLOBE, Mar. 19, 1996, at 1.

3. Commonwealth v. Salvi, Nos. 99518–24 (Mass. Super. Ct.); *see also* Commonwealth v. De La Zerda, 619 N.E.2d 617 (Mass. 1993) ("When a defendant dies while his case is on direct review, it is our practice to vacate the judgment and remand the case with a direction to dismiss the complaint or indictment, thus abating the entire prosecution."); *see generally* John H. Derrick, Annotation, *Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal*

The effect of that procedural sleight-of-hand was to reinstate Salvi's pre-indictment presumption of innocence, an outcome more favorable than he could have hoped for on appeal.[4] Nothing about Salvi's defense at trial or on appeal had suggested he was innocent of the crimes charged. His lawyers challenged only his criminal responsibility for the assaults.[5]

Conviction, 80 A.L.R. FED. 446 (1986); Tim A. Thomas, Annotation, *Abatement of State Criminal Cases by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R. 4th 189 (1990) (collecting cases); *see also* Ellement, *supra* note 2.

4. In the ordinary course, a successful appeal results in a remand for a new trial. Unless the errors found require dismissal, the indictment remains intact. Moreover, the rule of abatement *ab initio*, unreflectingly applied in *Salvi* and a host of other cases, reaches well beyond settled rules pertaining to mootness. Those rules would have required the appellate court to do no more than dismiss the appeal; it would not have taken further action to *undo* the judgment of the trial court, the verdict of the jury that convicted him, or the vote of the grand jury that had indicted him. If, for example, Salvi had been a party to a civil action pending appeal at the time of his death, and no one sought to be substituted for the decedent, the appellate court would merely dismiss the appeal as moot. The trial court's judgment would remain intact and valid. FED. R. APP. P. 43(a)(1) ("If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party . . . . If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.").

The practical consequences of an abatement, particularly in a homicide case, are several: a defendant whose conviction has been abated can inherit under a homicide victim's will or benefit from a victim's life insurance policy where he might otherwise have been barred; can receive a victim's interest in property held by joint tenancy; and can avoid the preclusive effect of a criminal conviction in a subsequent civil proceeding arising out of the same events. *See, e.g.*, State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988) (explaining collateral proceedings that might be affected by abatement of a defendant's conviction, and citing relevant statutes).

5. Such a defense would have resulted in a verdict of not guilty by reason of insanity, an outcome that usually results in involuntary commitment to a psychiatric facility and is, accordingly, also much less favorable than that achieved through abatement.

Indeed, Salvi himself struggled against efforts by his counsel to raise a mental illness defense, refusing to permit counsel to argue competence and thereby provoking the appointment of counsel *amicus curiae* to avoid a conflict of interest between Salvi and his counsel on those issues. Gregory Brown, Note, *The Case of John Salvi: Ethical Binds When Representing the Incompetent Defendant*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 49, 64 n.69 (1999) (quoting Salvi's writings, including, *inter alia*, "[w]ritten from Norfolk City Jail on 1/4/95 after refusing to eat tampered food for 4 days"). Salvi himself acknowledged and sought to justify the shootings based upon his religious beliefs, among other contentions. Sara Rimer, *Killer of Two Abortion Clinic Workers is Found Dead of Asphyxiation in Prison Cell*, N.Y. TIMES, Nov. 30, 1996, at A9 (noting that "Mr. Salvi, who was Roman Catholic, believed that the Freemasons, the Mafia, and the Ku Klux Klan were conspiring to persecute Catholics").

Yet, by virtue of suicide, Salvi is now immutably deemed as guiltless as he had been before the shootings.[6]

An often unstated premise underlies the remedy of abatement *ab initio*: that appellate review of a conviction is so integral to the array of procedural safeguards due a criminal defendant that incapacity to obtain such review nullifies the jury verdict. No other rationale explains the reversal that occurs through abatement *ab initio*.[7] The remedy resurrects the convicted defendant as an innocent person.[8] The conception of the

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6. In the wake of public outcry that met abatement of Salvi's convictions, the Massachusetts Legislature nearly enacted a measure to preclude abatement in the future. That legislation, still pending, would place Massachusetts in a small group of states that stop short of abatement, instead of merely dismissing the appeal. *See, e.g.*, People v. Peters, 537 N.W.2d 160, 163 (Mich. 1995) (dismissing appeal but retaining conviction on the theory that "[t]he conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right"); People v. Robinson, 699 N.E.2d 1086, 1092 (Ill. App. Ct. 1998) (relying on state Victims' Rights Act to decline to abate convictions where crime has identifiable victim, or at most allowing substitution of a party to pursue the appeal). *See, e.g.*, State v. Makaila, 897 P.2d 967, 972 (Haw. 1995) (allowing substitution of party to carry on with decedent's appeal, rather than abatement).

7. Concerns about the defendant's absence precluding the imposition of a penal sanction do not compel anything beyond dismissal of the appeal. *See, e.g.*, United States v. Dudley, 739 F.2d 175, 177 (4th Cir. 1984) ("[P]unishment, incarceration, or rehabilitation have heretofore largely been the exclusive purposes of sentences and so ordinarily should be abated upon death for shuffling off the mortal coil completely forecloses punishment, incarceration, or rehabilitation, this side of the grave at any rate.").

Nor do concerns that sound in standing doctrine explain the retrospective reach of the abatement remedy. *See, e.g.*, *id.* at 176 n.1 ("No one would have a litigable interest in substituting for the decedent to seek, through appeal, reversal of the conviction.").

And the abatement remedy is not a mere variation on the theme of *Griffin v. Illinois*, 351 U.S. 12 (1956), that, once granted, the right of appeal cannot be withheld or diminished on impermissible grounds. *See infra* Part IV. (summarizing authority as to right of appeal in counsel, bail, and preclusion cases). As is set out more fully below, the rhetoric surrounding abatement decisions goes deeper than this conditional rights talk. *See, e.g.*, United States v. Pomeroy, 152 F. 279, 282 (C.C.S.D.N.Y. 1907) (noting "as a right of appeal in any case is a favor afforded by the government, it might be, *if there were no other ground for abatement*, that the death of the party appealing would simply deprive him of that right") (emphasis added).

8. *See, e.g.*, *Dudley*, 739 F.2d at 176 n.1 ("The total, permanent and unalterable absence of the defendant prevents prosecution of the appeal which in the interests of justice an accused must be allowed to follow through to conclusion."); United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983) (a defendant who dies after a notice of appeal is filed "is denied the resolution of the merits of the case on appeal"); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (stating that "when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the inter-

right of appeal found in the abatement context is striking because, everywhere else in the law, the appeal of a felony conviction[9] is regarded as a dispensable component of that conviction's validity. Appeal of a criminal conviction is *not* constitutionally compelled.[10] In the federal system as well as in most states, appeal is merely a statutory right[11] and one of relatively recent origin at that.[12] The right of appeal has al-

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ests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence'") (quoting *Griffin*, 351 U.S. at 18).

As is set out more fully, *infra* Part III.B., *Griffin* is indeed the touchstone for a series of decisions regarding indigent appellants' access to the equipment necessary to pursue an appeal. But unlike the rule of abatement *ab initio*, the decisions springing from *Griffin* do not characterize these appellate rights as "integral" to the system for adjudicating guilt or innocence, nor do they put those rights on an equal footing with similar rights at the trial stage. *See infra* Part IV. It is somewhat ironic, then, that *Griffin* is a source of authority for the abatement remedy.

9. Every state and the federal system guarantee some form of appellate review as a matter of constitution or statute, but only for felony convictions. There is no similar right of review for misdemeanors. *See infra* note 12 (citing state and federal statutes and constitutions).

10. McKane v. Durston, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal . . . and is not now a necessary element of due process of law."). Neither the Constitution nor the Bill of Rights makes any mention of the right of appellate review. *But see* Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 943, 956–57 (1997) (arguing that the "culture of appeal" at the time of the Constitution was already well-established, but that a full appeal, rather than a narrower review by writ of error, "signaled the acceptance of authority—whether of God, the Governor, or the more questionable claim of the English—in return for the promise of a just decision" and that "the American colonists employed the legal meaning of the appeal as a literary device to signal the rejection or acceptance of authority"); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 519–20 (1990) (arguing that the framers did not intend that the Constitution limit a criminal defendant to an unreviewed trial by a single judge, since criminal trial procedure at the time of the framers contained many of the safeguards that have since evolved into the present appellate process).

11. 28 U.S.C. §§ 1291–1293 (1986).

12. 28 U.S.C. §§ 1291–1292 were enacted in 1911; 28 U.S.C. § 1293 was enacted in 1978. *See Pomeroy*, 152 F. at 279, 281–82 (C.C.S.D.N.Y. 1907) (noting that "[n]o appeal in criminal cases was allowed in the United States courts till 1879," and that "as a right of appeal in any case is a favor afforded by the government, it might be, if there were no other ground for abatement, that the death of the party appealing would simply deprive him of that right").

Eleven states have provided in their constitutions for an appeal as of right of a felony conviction. *See* ARIZ. CONST. art. II, § 24; CAL. CONST. art. VI, § 11; DEL. CONST. art. IV, § 28; ILL. CONST. art. VI, § 6; IND. CONST. art. VII, § 6; KY. CONST. § 115; NEB. CONST. art. I, § 23; N.M. CONST. art. VI, § 2; OHIO CONST. art.

ways been accorded less stature than rights attaching in the investigatory and trial stages of a criminal proceeding. This hierarchy is apparent from the array of rules that presuppose that the right of appeal is contingent, and that its curtailment in no way vitiates the judgment of conviction entered by a trial court. Yet, with regard to the remedy of abatement, the appeal is described as an indispensable guarantor of both adjudicatory finality and rectitude.

This Article explores the remedy of abatement following the death of an appellant as a fresh source of insight into the status of the right of appeal. Part I examines the abatement remedy, highlighting its breadth and the vigorous rhetoric that has sustained it for so long. Part I also examines trends within the doctrine, including federal and state decisions that break with the majority approach of abatement *ab initio*. A minority of courts reject abatement either in its entirety or only as to financial and other collateral aspects of a sentence, in an effort to "compromise" between the rights of the defendant and the

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IV, § 3; UTAH CONST. art. I, § 12; WASH. CONST. art. I, § 22. Texas provides in its constitution for appellate review of capital sentences. TEX. CONST. art. V, § 5.

Thirty-five other states and the District of Columbia guarantee such review by statute. *See* ALA. CODE § 12-22-130 (1995); ALASKA STAT. §§ 22.05.010(a), 22.07.020(d) (Michie 2000); ARK. CODE ANN. § 16-91-101 (Michie 1987); COLO. REV. STAT. § 16-12-101 (2001); CONN. GEN. STAT. ANN. § 54-95(a) (West 2001); D.C. CODE ANN. § 11-721 (b) (2001); FLA. STAT. ANN. § 924.05 (West 2001); HAW. REV. STAT. §§ 641-11, 641-12 (Michie 1993); IDAHO CODE § 19-2801 (Michie 1997); IOWA CODE ANN. § 602.4102(4) (West 1996); KAN. STAT. ANN. § 22-3602(a) (1995); LA. CODE. CRIM. PROC. ANN. art. 911 (West. 1997); ME. REV. STAT. ANN. tit. 15, § 2115 (West 1964); MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (1998); MASS. ANN. LAWS ch. 278, § 28 (Law. Co-op 1992); MICH. COMP. LAWS. ANN. § 770.3 (West 2000); MINN. R. CRIM. P. 28.02 Subd. 2(1); MISS. CODE ANN. § 99-35-101 (1972); MO. ANN. STAT. § 547.070 (West 1987); MONT. CODE ANN. § 46-20-104 (2001); NEV. REV. STAT. ANN. 177.015(1)(b) (Michie 2001); N.Y. CRIM. PRO. LAW § 450.10(1) (McKinney 1994); N.C. GEN. STAT. § 7A-27(b) (1999); N.D. CENT. CODE §§ 29-28-03, 29-28-06 (1991); OKLA. STAT. ANN. tit. 22, § 1051(a) (West 1986); ORE. REV. STAT. § 138.040 (2001); 42 PA. CONS. STAT. ANN. § 5105(a) (West 1981); R.I. GEN. LAWS §§ 9-24-1, 9-24-11, 9-24-32 (1997); S.C. CODE ANN. § 18-9-20 (Law. Co-op 1976); S.D. CODIFIED LAWS § 23A-32-2 (Michie 1998); TENN. CODE ANN. § 16-5-108(a) (1994); TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 2002); VT. STAT. ANN. tit. 13, § 7401 (1998); WIS. STAT. ANN. § 809.30 (West 1994); WYO. STAT. ANN. § 7-12-101 (Michie 2001).

Three states, Virginia, West Virginia, and New Hampshire, have a statutory scheme for discretionary appellate review of felony convictions, but no review as of right. *See* N.H. SUP. CT. R. 7(1), 25; VA. CODE ANN. § 17.1-405 (Michie 1999); W. VA. CODE ANN. § 58-5-1(j) (Michie 1997); W. VA. R. APP. P. 7.

"rights" of victims.[13] Part II argues that the minority decisions can only be justified if we ignore the importance of accuracy in the adjudicatory process to any coherent theory of punishment, even a purportedly victim-centered one.

Part III measures the notion of the appellate right upon which abatement *ab initio* stands against articulations of the right of appeal within the contexts of the right to counsel on appeal, the right to bail pending appeal, and the preclusive effect of a criminal conviction in related proceedings. The abatement remedy and surrounding discourse cannot be reconciled with the treatment of appeal in these other contexts, and Part III contends that the generally accepted account—that there is no constitutional right to appeal—should yield to the account that is implicit in the remedy of abatement. The presumptive importance of appeal in the abatement cases is a powerful argument in the evolving due process assessment of the status of appeal.[14] Part IV contends that a meaningful re-

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13. *See, e.g.*, People v. Makaila, 897 P.2d 967, 972 (Haw. 1995) (characterizing newly adopted rule permitting substitution of a party to pursue decedent's appeal rather than abatement *ab initio* as "a fair compromise between the competing interests"); People v. Robinson, 699 N.E.2d 1086, 1091 (Ill. App. Ct. 1998) (characterizing recent abatement decisions as manifesting a "trend" away from abatement *ab initio*, driven by public recognition of "the callous impact such a procedure necessarily has on the surviving victims of violent crime").

14. *See infra* CONCLUSION (looking to the Supreme Court's recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000), regarding the constitutional underpinnings of the rule from *Miranda v. Arizona*, 384 U.S. 436 (1966), as well as the *Penry* case regarding the constitutionality of executing a mentally retarded defendant, for support).

There have been periodic scholarly efforts to cull from the cases bits of language and inference that might demonstrate a transformation of the right of appeal to a right of constitutional stature. Some of these are: Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (reconsidering the historical argument against a constitutional right to an appeal, as well as evaluating the due process claim respecting appeals from "historicist," "positivist," and "fairness" models); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985) (evaluating the rationales for appeal as of right and advocating a mixed regime of discretionary and as of right appeals); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373 (1991) (arguing that the right of appeal is guaranteed by the due process clause); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1 (1994) (reevaluating the argument against a constitutional right of appeal in the context of harmless error analysis).

Even without the additional proof supplied by the rule of abatement, the mere passage of time since the last critical evaluation, in 1994, of the evolving due process claim in favor of a constitutional right of appeal would warrant its reevaluation. *See, e.g.*, McCarver v. North Carolina, 532 U.S. 941 (2001) (granting

view of all felony convictions is an essential component of the legitimacy of any process imposing punishment on offenders, irrespective of the theoretical foundations that are said to justify that process. For this additional reason, appellate review should be elevated to constitutional stature. The Article concludes that the characterization of criminal appeal as indispensable not only conforms to the historical understanding of the role of appeal in the adjudication of offenders,[15] but also reflects norms of contemporary political culture, as manifested in state constitutions, statutory and decisional law, as well as international law. For all these reasons, the treatment of the right of appeal in the abatement cases should be integrated into the dominant discourse about the nature of the right of appeal. We should recognize, at last, that the right has evolved to one of constitutional stature.

I. THE ABATEMENT REMEDY: THE CONTOURS OF THE RULE

This section reviews the decisions of the last century, both state and federal, that have implemented and shaped the rule of abatement *ab initio*.

A. The Abatement Remedy in Federal Court

Since the creation of a statutory regime for appellate review of federal criminal convictions,[16] there has been an unre-

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certiorari on the question of whether execution of mentally retarded defendant violates Eighth Amendment); Penry v. Lynaugh, 492 U.S. 302, 334–35 (1989) (rejecting identical claim, finding that "at present [with two states prohibiting execution of the retarded and 14 others prohibiting all executions], there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for use to conclude that it is categorically prohibited by the Eighth Amendment"); *see also* Linda Greenhouse, *Justices to Review Issue of Executing Retarded Killers*, N.Y. TIMES, Mar. 27, 2001, at A1 (noting that, since *Penry*, "11 more states have rejected the death penalty for retarded killers, and others are considering legislation to do so," and that "[w]hen states without the death penalty are included in the count, half the states no longer execute mentally retarded killers").

15. *See* Rossman, *supra* note 10.

16. *See* 28 U.S.C.S. §§ 1291–1293 (1986). The right of review of a federal criminal conviction is of relatively recent statutory pedigree and fills what many regard as a constitutional oversight. Prior to the enactment of 28 U.S.C. § 1291 (creating federal appellate jurisdiction of capital appeals), there was no such review and, hence, no issue as to the consequences of a defendant-appellant's death pending such review. The relatively late date of enactment of a federal appeal

flecting and—until quite recently—unanimous approach by the United States Supreme Court and federal circuits to determining the status of a defendant-appellant who dies.[17] Courts have characterized the status of a decedent's appeal by observing that "the appeal" has abated,[18] "the cause has abated,"[19] "the

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statute can perhaps be attributed, in part, to the fact that criminal law was nearly exclusively the province of the states for much of the eighteenth and nineteenth centuries. Not until the Supreme Court's New Deal interpretation of the Commerce Clause was federal prosecution of most crime possible. *See* Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 458–61 (1994) (tracing development of commerce clause power as it affected federal criminal law).

State appellate review was similarly late in coming, perhaps because the colonial criminal trial process replicated the critical aspects of what is now the appellate process. Rossman, *supra* note 10, at 529–31 (noting that the circuit courts drew judges from the colonies' highest courts to preside in panels at trials, that these judges had the power to reserve and report questions of law to the appellate courts, and that "[o]ne is struck by the degree to which the opinions decided in the context of such a referral system resemble those of contemporary appellate courts").

The continuing expansion of federal criminal power increases the urgency of recognizing the irrevocable nature of the right of appeal of a criminal conviction. As the number and complexity of federal prosecutions rises, the capacity of federal trial courts to process those cases with the care needed to ensure accurate outcomes diminishes. *See, e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 986 (1995) (noting that "[t]he number of federal criminal trials is at an all-time high," that "federal criminal trials are getting longer," and that "increased judicial time [is] being devoted to sentencing"); Chippendale, *supra*, at 456 (noting that "[c]riminal cases now consume half of the federal judiciary's total time, and criminal trials account for eighty percent of the caseload in some districts") (citations omitted); William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, Kastemeir Lecture at the University of Wisconsin Law School (Sept. 15, 1992), *in* 1993 WIS. L. REV. 1, 6 ("[F]ederalization of crimes has had enormous political appeal over the past decade, and hardly a congressional session goes by without an attempt to add new sections to the federal criminal code."). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997) (arguing in support of a significant federal role in criminal punishment).

For a catalog of state constitutional and statutory sources of a right to appellate review of felony convictions, see *supra* note 12.

17. This unanimity persisted until 1988. In that year, the Third Circuit departed from the lockstep and stopped short of remanding a decedent's appeal for dismissal of the indictment, choosing instead simply to dismiss the appeal for want of standing by the attorney who had sought abatement after the client's death. United States v. Dwyer, 855 F.2d 144, 145 (3d Cir. 1988). In *Dwyer*, although the death preceded even the imposition of sentence, the trial court had permitted the motion to abate based upon the well-settled federal rule. *Id.*

18. Durham v. United States, 401 U.S. 481, 482 (1971) (citing Johnson v. Tennessee, 214 U.S. 485 (1909)).

criminal action has abated,"[20] and "the judgment is abated."[21] Irrespective of nomenclature, however, all abating courts concur that "the death of a defendant produces an abatement of the 'cause', the 'action', the 'judgment', and the 'penalty', and not simply of the status . . . which has been reached in the case at the time of death."[22] Accordingly, federal appellate courts have not only dismissed cases pending before them but have also entered orders remanding those cases to the district courts with instructions to vacate the judgment and to dismiss the indictment or information.[23]

For a five-year period,[24] the Supreme Court itself adopted the odd practice of dismissing writs of certiorari when a petitioner died during the writs' pendency—although a court of appeals had already affirmed the conviction—and remanding to a district court for the issuance of orders effecting a complete abatement.[25] In a *per curiam* decision, the Court noted that instances when a petitioner dies pending review of certiorari "are not free of ambiguity," but that the practice was to dismiss the writ and then to "allow[] the scope of the abatement to be determined by the lower federal courts."[26] Recognizing the "impressive" unanimity of the lower federal courts, all of whom applied the rule that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings

19. Menken v. Atlanta, 131 U.S. 405, 405 (1889) ("it appearing to the court that this is a criminal case, it is considered by the court that this cause has abated"); List v. Pennsylvania, 131 U.S. 396 (1888) (discussing reasoning similar to *Menken*); Crooker v. United States, 325 F.2d 318, 319–20 (8th Cir. 1963) (summarizing terms used by different courts to describe the procedural consequence of an accused's death pending appeal).

20. Baldwin v. United States, 72 F.2d 810, 812 (9th Cir. 1934).

21. Pino v. United States, 278 F. 479, 483 (7th Cir. 1921).

22. *Crooker*, 325 F.2d at 320.

23. *See, e.g.*, United States v. Pogue, 19 F.3d 663, 666 (D.C. Cir. 1994); United States v. Mollica, 849 F.2d 723, 726 (2d Cir. 1988); United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983); United States v. Pauline, 625 F.2d 684 (5th Cir. 1980); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977).

24. The five-year period spans the period from *Durham v. United States*, 401 U.S. 481 (1971), until the decision in *Dove v. United States*, 423 U.S. 325 (1976).

25. *Durham*, 401 U.S. at 483 (vacating judgment below and remanding "to the District Court with directions to dismiss the indictment"); United States v. Edwards, 415 U.S. 800, 801 n.1 (1974) (vacating judgment of correspondent and remanding to District Court with directions to dismiss); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 400 n.11 (1972) (vacating judgment of correspondent and remanding to District Court with directions to dismiss).

26. *Durham*, 401 U.S. at 482. The Court noted that its "practice in cases on direct review from state convictions [was] to dismiss the proceedings." *Id.*

had in the prosecution from its inception," the Court announced that "[w]e believe [that] the[se lower federal courts] have adopted the correct rule."[27]

Despite its earlier conflation of appeals of right and petitions for discretionary review, the Court reversed itself in 1976 in an opaque one paragraph *per curiam* opinion, ending its brief practice of abating convictions that had already been affirmed by a court of appeals.[28] Still, for a five-year period, a

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27. *Id.* at 483. Most importantly, the Court rejected the suggestion that *Crooker*, on which it had relied, was "different because it involved a right of appeal, while here we deal with a petition for a writ of certiorari." *Id.* at n.*. The Court explained:

> Congress, however, has given a right to petition for certiorari and petitioner exercised that right. No decision had been made on that petition prior to his death. Since death will prevent any review on the merits, whether the situation is an appeal or certiorari, the distinction between the two would not seem to be important for present purposes.

Id. Justice Blackmun, the lone dissenter, found this distinction dispositive. Observing that "the situation is not one where the decedent possessed, and had exercised, a right of appeal to this Court," a "contrasting and very different situation" than that which typically confronts federal courts of appeals, Justice Blackmun disapproved dismissal of the indictment. *Id.* at 484 (Blackmun, J., dissenting). Instead he would have limited the Court's action to dismissal of the decedent's petition and would not have "wipe[d] the slate . . . clean of a federal conviction which was unsuccessfully appealed throughout the entire appeal process to which the petitioner was entitled as of right." *Id.* at 484–85 (Blackmun, J., dissenting).

28. *Dove*, 423 U.S. at 325 ("The Court is advised that the petitioner died . . . [t]he petition for certiorari is therefore dismissed. To the extent that *Durham v. United States* . . . may be inconsistent with this ruling, *Durham* is overruled.").

Since 1976, all but one courts of appeals, the Third Circuit, confronted with a dead appellant has determined that *Dove* is limited to petitions for certiorari and has no effect on the pre-*Dove* rule of abatement *ab initio* in effect nationwide. *See supra* note 17 (discussing *United States v. Dwyer*, 855 F.2d 144 (3d Cir. 1988), which dismissed the appeal because the attorney lacked authority to move to abate conviction after appellant's suicide). *But see Oberlin*, 718 F.2d at 896 (ordering abatement *ab initio* where counsel filed notice of appeal after defendant's suicide).

The remaining circuits that have addressed *Dove* have "unanimously concluded that *Dove* applies only to petitions for certiorari, not appeals of right." *Pauline*, 625 F.2d at 685; *see also Oberlin*, 718 F.2d at 896 ("[T]he death of a criminal defendant pending an appeal of right will abate the prosecution *ab initio*, although death pending the Supreme Court's discretionary determination on a petition for a writ of certiorari will not."); *Moehlenkamp*, 557 F.2d at 128 ("We do not believe that the Court's cryptic statement in *Dove* was meant to alter the long-standing and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him.").

Many state courts have read *Dove* to signify that abatement need not apply to an appeal that has once been reviewed by direct appeal to an intermediate appellate court, but is either pending before an appellate court whose review is discre-

statutory right to petition for review that was only discretionarily available and, as a matter of practice, rarely granted,[29] provided the basis for abating a conviction that had already been reviewed and affirmed on the merits.

Thus, with one exception,[30] the unanimous rule in the federal system is one of abatement *ab initio*. Some courts have even extended the rule to include appellants who have died prior to filing a notice of appeal,[31] who have entered a plea of

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tionary, like that of the United States Supreme Court, or is collateral in nature, like an application for writ of habeas corpus. *See, e.g.*, People v. Valdez, 911 P.2d 703, 704 (Colo. Ct. App. 1996) (holding that "collateral appeals should be subject to dismissal but not abatement *ab initio* upon the defendant's death"); West v. United States, 659 A.2d 1260, 1261 (D.C. 1995) (holding no abatement after defendant has "had the benefit of his appeal of right before he died and was left at the time of his death with only the opportunity to petition for discretionary further review"); Commonwealth v. De La Zerda, 619 N.E. 2d 617, 619 (Mass. 1993) (refusing to abate conviction when petitioner died during pendency of petition for further appellate review of a motion for new trial that had already been reviewed by the Appeals Court). *But see* Berry v. Judges of Army Court of Military Review, 37 M.J. 158, 160 (C.A.A.F. 1993) (refusing to analogize the United States Court of Military Appeals to the United States Supreme Court for the purpose of cutting off access to an abatement remedy for a petitioner whose court-martial had been reviewed by the Court of Military Review).

29. *See* David O. Stewart, *An Inside Peek at How the Court Picks Its Cases*, 71 A.B.A. J. 110 (Feb. 1985) (estimating that the Supreme Court "declin[es] to review almost 5,000 cases a year as it chooses the 180 or so cases it will hear and decide each term").

30. *See supra* note 17 (citing *Dwyer*, 855 F.2d at 144).

31. *Oberlin*, 718 F.2d at 896 (abating conviction *ab initio* where defendant committed suicide hours after sentencing, and prior to the filing of a notice of appeal, noting that "at the time of his death, [defendant] possessed an appeal of right from his conviction"). The Ninth Circuit explained that it saw "no reason to treat a criminal defendant who dies before judgment is entered any differently from one who dies after a notice of appeal has been filed. In either case, he is denied the resolution of the merits of the case on appeal." *Id.*

Although some courts are willing to suppose that a dead defendant would have pursued an appeal, others are reluctant to presume that, having filed an appeal, he or she would then choose to withdraw it, although each approach suffers from the same degree of speculation. In *United States v. Pogue*, 19 F.3d 663, 666 (D.C. Cir. 1994), the District of Columbia Circuit applied the usual abatement remedy to a defendant although, after defendant's death, counsel had filed a Motion for Voluntary Dismissal of Appeal together with an undated signed Consent form, on the grounds that "[w]e do not know what the appellant may have done had he lived, and we have no authority to speculate on this matter." *Id.*

At least one court has given significance to the cause of death of a defendant-appellant, making a factual determination of the intent of the decedent as to taking an appeal as a condition of applying the rule of abatement. In *United States v. Chin*, 633 F. Supp. 624, 627 (E.D. Va. 1986), *rev'd*, 848 F.2d 55 (4th Cir. 1988), the trial court refused to abate a conviction of a defendant who committed suicide prior to filing a notice of appeal, reasoning that "a criminal proceeding will not be

guilty,[32] and who have died while collateral aspects of their sentence remain unfulfilled.[33]

The rationale for applying an abatement remedy often fails to explain the extent of the relief afforded. In one early case, the court stated that "all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."[34] Yet, this personal characteristic of criminal punishment would seem to require only dismissal of a deceased's appeal. It should not compel the further step taken by those courts that abate the penalty *ab initio*. In other opinions on the topic, there is no discussion of any justification for reviving the offender's presumption of innocence or voiding the jury's considered verdict.[35]

The abatement remedy relies significantly on a larger premise: a conviction that cannot be tested by appellate review is both unreliable and illegitimate; the constitutionally guaranteed trial right must include some form of appellate review.[36] As set out below in Part IV, courts rightly acknowledge that

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abated if the Court finds that the criminal defendant did not intend to file an appeal," and that "Chin's suicide indicates to this Court that he chose to take his life instead of pursuing the appeals procedure which he knew would have been available to him." *See also* People v. Robinson, 699 N.E.2d 1086, 1093 (Ill. App. Ct. 1998) (Quinn, J., concurring) (noting that if the "rationale for voiding a defendant's conviction *ab initio* is that 'death has deprived the accused of his right to appeal,' . . . [then by committing suicide] the accused deprived themselves of that right by their own hand," and analogizing such an appellant to one who becomes a fugitive pending appeal) (quoting *Moehlenkamp*, 557 F.2d at 128); *see infra* note 45 (discussing State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988)).

32. *Pogue*, 19 F.3d at 665 (abating conviction where defendant pleaded guilty, noting that appellant's "right to appeal was not foreclosed when he entered a guilty plea," but that "had he lived, appellant could have challenged the plea agreement and underlying conviction, his sentence and/or the terms of restitution").

33. *See infra* Part IV for discussion of the collateral aspects of punishment, such as fines, forfeiture, and restitutionary orders.

34. United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909) (quoting United States v. Daniel, 47 U.S. 11, 14 (1848)).

35. *See, e.g.*, United States v. Dudley, 739 F.2d 175, 176 n.2 (4th Cir. 1984) ("A decedent can hardly serve a prison sentence.").

36. *See, e.g., Moehlenkamp*, 557 F.2d at 128 ("When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, *the interests of justice ordinarily require* that he not stand convicted without resolution of the merits of his appeal, which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.'") (emphasis added) (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)). *See also Dudley*, 739 F.2d at 176 n.1 ("The total, permanent and unalterable absence of the defendant prevents prosecution of the appeal *which in the interests of justice* an accused must be allowed to follow through to conclusion.") (emphasis added).

appellate review provides both actual and perceived error correction, and serves as an important guarantor of accuracy as a predicate to imposition of criminal punishment.

B. The Abatement Remedy in State Court

As in eleven of twelve federal courts of appeal, a plurality of state courts have adopted the doctrine of abatement *ab initio*.[37] There are, however, several states that have either not adopted, or else abandoned, the remedy of abatement *ab initio*. These states choose to dismiss the appeal and preserve the conviction.[38] In between these poles stand a number of states that have moderated the abatement remedy, stopping short of complete abatement, but permitting substitution of a party to

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37. *See* Hartwell v. State, 423 P.2d 282, 284 (Alaska 1967); State v. Griffin, 592 P.2d 372, 373 (Ariz. 1979); Dixon v. Superior Court, 240 Cal. Rptr. 897 (Cal. Ct. App. 1987) (following rule of abatement *ab initio*, except where defendant pled guilty and began restitutionary payments but died prior to sentencing); People v. Lipira, 621 P.2d 1389, 1390 (Colo. Ct. App. 1980); Howell v. United States, 455 A.2d 1371, 1373 (D.C. 1983); Bagley. v. State, 122 So. 2d 789 (Fla. Dist. Ct. App. 1960); State v. Stotter, 175 P.2d 402, 404 (Idaho 1946); State v. Kriechbaum, 258 N.W. 110, 113 (Iowa 1934); State v. Thom, 438 So. 2d 208 (La. 1983); State v. Carter, 299 A.2d 891, 895 (Me. 1973); State v. West, 630 S.W.2d 271 (Mo. Ct. App. 1982); State v. Campbell, 193 N.W.2d 571, 572 (Neb. 1972); State v. Poulos, 88 A.2d 860, 861 (N.H. 1952); People. v. Craig, 585 N.E.2d 783, 788 (N.Y. 1991); State v. Boyette, 211 S.E.2d 547 (N.C. Ct. App. 1975); State v. Dalman, 520 N.W.2d 860 (N.D. 1994); Johnson v. State, 392 P.2d 767 (Okla. Crim. App. 1964); State v. Marzilli, 303 A.2d 367, 368 (R.I. 1973); State v. Hoxsie, 570 N.W.2d 379, 382 (S.D. 1997) (following rule of abatement except where defendant pled guilty); Carver v. State, 398 S.W.2d 719, 721 (Tenn. 1966); Perry v. State, 821 P.2d 1284 (Wyo. 1992).

38. Ulmer v. State, 104 So. 2d 766 (Ala. 1958); State v. Trantolo, 549 A.2d 1074 (Conn. 1988) (dismissing appeal as moot); State v. Dodelin, 319 S.E.2d 911 (Ga. Ct. App. 1984) (dismissing appeal); State v. Robinson, 699 N.E.2d 1086, 1092 (Ill. App. Ct. 1998); Whitehouse v. State, 364 N.E. 2d 1015 (Ind. 1977) (dismissing appeal, explaining that "I may no more appeal my brother's conviction than I may enter his guilty plea."); Royce v. Commonwealth, 577 S.W.2d 615, 616 (Ky. 1979) ("The fact of the conviction, whether it be regarded as legally final or not, is history, and as such it cannot be expunged."); People v. Peters, 537 N.W.2d 160 (Mich. 1995); In Re Carlton, 171 N.W.2d 727 (Minn. 1969); Gollott v. State, 646 So. 2d 1297 (Miss. 1994); State v. Clark-Kotarski, 486 P.2d 876 (Mont. 1971) (dismissing appeal, although relying on case that abated *ab initio*); State v. Kaiser, 683 P.2d 1004, 1006 (Or. 1984) (dismissing appeal since no other person had standing and attorney/client relationship ended with client's death); Mojica v. State, 653 S.W.2d 121, 122 (Tex. Ct. App. 1983) (dismissing appeal on state's motion); State v. Christensen, 866 P. 2d 533, 535 (Utah 1993) (refusing to abate conviction or restitution order, describing abatement *ab initio* as an "extreme and now discredited theory").

pursue the pending appeal upon a defendant's death.[39] Thus, the landscape of the state courts' treatment of abatement lacks the relative uniformity of the federal system.

In those states that grant abatement *ab initio*, the rationale offered is not only that punishment is impossible without the body of the defendant,[40] but that punishment is illegitimate without appellate review of the trial court conviction.[41] In these cases, the discourse surrounding the abatement remedy presumes not only an irrevocable individual right of appeal, but

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39. *See* State v. Makaila, 897 P.2d 967, 972 (Haw. 1995); State v. Jones, 551 P.2d 801 (Kan. 1976); Gollott v. State, 646 So. 2d 1297, 1304 (Miss. 1994); New Jersey State Parole Bd. v. Boulden, 384 A.2d 167 (N.J. Super. 1953) (approving rule of substitution of a party); State v. Salazar, 945 P.2d 996, 1004 (N.M. 1997) (substituting defense counsel to pursue appeal); State v. McGettrick, 509 N.E.2d 378, 381 (Ohio 1987) (permitting substitution of a party and, in the event that the decedent has no representative, permitting the state to move for substitution of a party and allowing the court to appoint any proper person, including defense counsel, in order to proceed with appeal); State v. McDonald, 424 N.W.2d 411, 415 (Wis. 1988).

40. *See e.g., Hartwell*, 423 P.2d at 284 ("The underlying principles of penal administration in Alaska are reformation and protection of the public. The removal of appellant by death has prevented the execution of any sentence adhering to these principles."); *Griffin*, 592 P.2d at 373 (abating conviction because "the imposition of punishment is impossible"); *Kriechbaum*, 258 N.W. at 113 ("Death withdrew the defendant from the jurisdiction of the court."); State v. Stotter, 175 P.2d 402 (Idaho 1946); *Carter*, 299 A.2d at 894 (abating conviction "because of loss of an indispensable party to the proceeding"); People v Santiago, 413 NYS.2d 7 (N.Y. App. Div. 1979); *Johnson*, 392 P.2d at 767 (apparently recognizing rule); *Carver*, 398 S.W.2d at 720 ("The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs.").

41. *See, e.g., Gollott*, 646 So. 2d at 1304 ("Leaving convictions intact without review by this Court potentially leaves errors uncorrected which will ultimately work to the detriment of our justice system," and, accordingly "full review of the appeal, provided the proper motion(s) have been made, is the only fair path to follow."); Dixon v. Superior Court, 240 Cal Rptr. 897 (Cal. Ct. App. 1987); *Howell*, 455 A.2d at 1372 ("A trial and an appeal of right are two components of the judicial process. A judgment of conviction is not considered final until any appeal of right which is filed has been resolved because the possibility of reversal endures until that point."); Williams v. State, 602 So. 2d 676 (Fla. Dist. Ct. App. 1992); *Jones*, 486 A.2d at 186 (appeal as "'integral part of [our] system for finally adjudicating . . . guilt or innocence'") (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)); *Carter*, 299 A.2d at 894 (recognizing "interests . . . of sufficient legal significance to require that a judgment of conviction, in fact left under a cloud as to its validity . . . when the defendant's death causes a pending appeal to be dismissed, should not be permitted to become a final and definitive judgment of record—thereby to operate as an effective adjudication that defendant was guilty as charged"); *Campbell*, 193 N.W.2d at 572 ("[A]t the time of the decedent's death there was no final judgment of conviction."); *Santiago*, 413 NYS.2d at 7; *Marzilli*, 303 A.2d at 368; *Carver*, 398 S.W.2d at 719; *Hoxsie*, 570 N.W.2d at 382.

also a societal need for certitude that is dependent upon appellate review. As in the federal cases, those state courts ordering abatement seem to be, unwittingly, elevating the appellate right to a stature that it does not enjoy in other contexts.[42] As one state court put it:

> [T]he surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation. This interest is of sufficient legal significance to require that a judgment of conviction not be permitted to become a final and definitive judgment of record *when its validity or correctness has not been finally determined* because the defendant's death has caused a pending appeal to be dismissed.[43]

Even those states choosing the intermediate course of permitting continuation of the appeal through the substitution of a party have employed language broadly endorsing the notion that appellate review is essential to the legitimacy of any criminal adjudication.[44] The Wisconsin Supreme Court, for example, explained that the right to appeal

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42. This stature does not necessarily correlate with whether the state has afforded the appellate right as a matter of statute or state constitutional amendment. Only thirteen states have made the right of appeal a part of their constitutions, *see supra* note 12, and more than half of those states do not abate convictions upon death of the appellant. *Dodelin*, 319 S.E.2d at 911; *Whitehouse*, 364 N.E. 2d at 1015; *Royce*, 577 S.W.2d at 615; *McGettrick*, 509 N.E.2d at 381; Commonwealth v. Walker, 288 A.2d 741 (Pa. 1972); *Mojica*, 653 S.W.2d at 122. Conversely, of the thirty-four states that have made appeal merely a statutory right, eighteen apply the remedy of abatement: Hartwell v. Alaska, 423 P.2d 282 (1967); *Lipira*, 621 P.2d at 1389; *Howell*, 455 A.2d at 1371; *Williams*, 602 So. 2d at 676; *Stotter*, 175 P.2d at 404; *Kriechbaum*, 258 N.W. at 113; *Thom*, 438 So. 2d at 208; *Carter*, 299 A.2d at 895; Commonwealth v. Latour, 493 N.E.2d 500 (Mass. 1986); *Gollott*, 646 So. 2d at 1304; *Santiago*, 413 NYS.2d at 7; *Boyette*, 211 S.E.2d at 547; *Johnson*, 392 P.2d at 767; *Marzilli*, 303 A.2d at 368; *Hoxsie*, 570 N.W.2d at 382; *Carver*, 398 S.W.2d at 721; *Perry*, 821 P.2d at 1284.

43. State v. Morris, 328 So. 2d 65, 67 (La. 1976) (emphasis added). *See also Hartwell*, 423 P.2d at 282 (applying abatement remedy, reasoning that the presumption of innocence stands until the conclusion of the appeal); *Griffin*, 592 P.2d at 373 (abatement applied because public interest in protection ends with defendant's death); Bagley v. State, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960) ("The obliterative effect of abatement *ab initio* necessarily leaves undetermined the question of the appellant's guilt. For whatever comfort or benefit derivable therefrom, the legal presumption of innocence of the crime with which she was charged abides *now in no less degree* than before the criminal proceedings were instituted.") (emphasis added).

44. *See, e.g.*, State v. Makaila, 897 P.2d 967, 970 (Haw. 1995) (noting that not only the defendant but also "the public [has an interest] in the final determi-

> is an integral part of a defendant's right to final determination of the merits of the case. It serves as a safeguard to protect a defendant against errors in the criminal proceedings. A defendant who dies pending appeal, irrespective of the cause of death, is no less entitled to those safeguards.[45]

Such language cannot be reconciled with the dominant discourse surrounding the right of appeal of felony convictions. Yet, this rhetoric has pervaded the decisions of the states that abate convictions and vacate indictments upon which they were obtained, as well as the seven additional states that allow the curiosity of a criminal appeal with no living defendant. These courts accept the integral nature of the appeal to the entirety of a criminal adjudication.

In recent years, however, there has been some resistance to the remedy of abatement and to what abatement implies about the right of criminal appeal. A number of state appellate courts have rejected the "impressive" unanimity[46] of federal law in the area, accepting prosecutorial arguments in favor of preserva-

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nation of a criminal case"), *citing Jones*, 551 P.2d at 801; N.J. State Parole Bd. v. Boulden, 384 A.2d 167 (N.J. Super. 1953) (approving rule of substitution of a party to pursue decedent's appeal because of "collateral legal disadvantages, civil disabilities, or the public stigma which attend upon or attach to a person as a result of such conviction and the record thereof"); State v. McGettrick, 509 N.E.2d 378, 381 (Ohio 1987) (noting that it is "in the interests of the defendant, the defendant's estate, *and society* that any challenge initiated by a defendant to the regularity of a criminal proceeding be fully reviewed and decided by the appellate process") (emphasis added); State v. Salazar, 945 P.2d 996, 1004 (N.M. 1997) ("concluding this appeal would be in the best interests of society," clarifying important issues of law presented on appeal and resolving issues that affect "substantial collateral rights"); Commonwealth v. Walker, 288 A.2d 741, 742 n.* (Pa. 1972) ("[I]t is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process."); Gollott v. State, 646 So. 2d 1297, 1300 (Miss. 1994) (noting that the three purposes of punishment are incapacitation, rehabilitation, and deterrence, and that "[f]ollowing the abatement *ab initio* rule does not undermine any of these purposes").

45. State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988). The court had rejected abatement *ab initio* in part because of a concern that such a rule could "justify the public and the victim, or the victim's family, in believing that the defendant succeeded in vacating the judgment of conviction through suicide when he would have lost the appeal on the merits." *Id.* at 413. *See generally* Lynn Johnston Splitek, Note, State v. McDonald: *Death of a Criminal Defendant Pending Appeal in Wisconsin—The Appeal Survives*, 1989 WIS. L. REV. 811. *See also* State v. Trantolo, 549 A.2d 1074, 1075 (Conn. 1988) ("A judgment of conviction is not final until any appeal of right, filed before a defendant's death, has been resolved because the potential of reversal persists to that point.").

46. *See* Durham v. United States, 401 U.S. 481, 483 (1971).

tion of unreviewed convictions.[47] Some states have emphasized the loss of the presumption of innocence that follows a trial court conviction, finding that death, even pending appeal, does not alter a defendant's status as a guilty person.[48] Other states, relying on the shibboleth of victims' rights, have departed from their own established precedents, abandoning the abatement remedy and simply freezing the status quo of a trial court conviction upon the death of a defendant-appellant.[49] As the Illinois Supreme Court explained, "there are recently recognized public policy interests in preserving the lower courts' judgments and . . . these interests must include consideration of the victims' rights to fairness and dignity before the defendants' convictions may be vacated as a matter of routine procedure." These dissenting states reflect a trend toward reliance on victims' rights as a basis not merely for abandoning the remedy of abatement, but as the justification for a broader move toward a more victim-centered system of criminal punishment.[50]

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47. *See infra* notes 48–49.

48. *See* Whitehouse v. State, 364 N.E.2d 1015, 1016 (Ind. 1977) ("The presumption of innocence falls with a guilty verdict. At that point in time, although preserving all of the rights of the defendant to an appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown."); State v. Peters, 537 N.W.2d 160, 163 (Mich. 1995) ("The conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appellate right."); State v. McGettrick, 509 N.E.2d 378, 380 (Ohio 1987) ("[t]o accept appellee's position would require us to ignore the fact that the defendant has been convicted and, therefore, no longer stands cloaked with the presumption of innocence during the appellate process").

49. *See, e.g.*, State v. Robinson, 699 N.E.2d 1086, 1089 (Ill. 1998) (relying on state Rights of Crime Victims and Witnesses Act to characterize recent abatement decisions as manifesting a "trend" away from abatement *ab initio*, driven by public recognition of "the callous impact such a procedure necessarily has on the surviving victim of violent crime"); State v. Makaila, 897 P.2d 967, 972 (Haw. 1995) (characterizing newly adopted rule permitting substitution of a party to pursue decedent's appeal rather than abatement *ab initio* as "a fair compromise between the competing interests"); *Peters*, 537 N.W.2d at 163 (relying on Michigan Crime Victim's Rights Act as well as amendment to Michigan Constitution to enforce order of restitution after death of defendant appellant).

50. For examples of other legal reforms manifesting this shift toward the victim, see, e.g., Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) (describing and critiquing proposed victims' rights constitutional amendment); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 (advocating for victims' rights through state legislative action).

As demonstrated below in Parts II and III, an examination of courts' rationales for abandoning the abatement remedy reveals a fundamental misunderstanding of two critical concepts. First, any theory of punishment, even one that is victim-centered, must demand accuracy from the process used to determine criminal culpability. Second, appellate review acts as an essential guarantee of that accuracy.[51] For these reasons, the recent state court trend away from abatement should be rejected in favor of not only retaining the remedy but also embracing its underpinning: a constitutional right of appeal of felony convictions.

II. COLLATERAL ASPECTS OF FELONY CONVICTION: ABATEMENT OF FINES, COSTS, AND FORFEITURES

The rationale for application of the abatement remedy becomes more equivocal when courts consider some of abatement's corollaries. There are cases in which the penalty imposed upon a convicted appellant has financial components, such as fines, forfeiture, and court costs. While maintaining approaches to the conviction and indictment themselves that are internally consistent, federal and state courts have treated incidental financial penalties with puzzling inconsistency.[52]

For discussions of the victims' rights movement generally, see Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1985); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991); ANNE M. HEINZ & WAINE A. KERSTATTER, U.S. DEPT. OF JUSTICE, PRETRIAL SETTLEMENT CONFERENCE: AN EVALUATION (1979).

In addition to state and federal legislative reforms in the area of victims' rights, the United States Supreme Court has reversed itself on the issue of the admissibility of victim impact statements in the sentencing phase of capital cases, accepting such statements as a proper factor for a sentencing jury. *See* Payne v. Tennessee, 501 U.S. 808 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987)). For critical assessments of *Payne*, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 408 (1996); Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992).

51. A punishment regime that does not zealously safeguard the accuracy of its determinations of guilt cannot enjoy or aspire to either theoretical integrity or popular support. *See infra* Part IV.

52. Prior to *Dove*, when the Supreme Court ceased abating convictions that had been affirmed by a court of appeals, the Court followed the practice of leaving the disposition of any fine to the lower courts. Wetzel v. Ohio, 371 U.S. 62, 63 (1962). But on at least one occasion, the Court allowed an administratrix to be substituted as a party in an appeal of a criminal conviction. In *Wetzel*, the rele-

Some courts erase all collateral aspects of a conviction as having no independent force absent the convicted offender.[53] This seems to be the soundest approach because all aspects of the punishment are contingent upon the single determination of guilt, and ought to stand or fall together. An abated conviction means a vacated judgment and a dismissed indictment; it leaves the defendant-appellant in a pre-indictment posture of innocence.[54]

Nevertheless, other courts allow a paid fine or order of restitution to remain unabated even after death and abatement of the conviction. These courts reason that the restitutive goals of punishment outlive the offender; that a defendant "might die with a wealthy estate leaving the victims of his crime uncom-

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vant state rule provided that, upon the death of an appellant, the appeal was moot but the judgment (including costs collectible against the estate) remained intact. *Id.* For this reason, the Court allowed substitution. Justices Clark, Harlan, and Stewart dissented, observing that the case should have been dismissed and that the Court lacked jurisdiction to inquire into the merits of the controversy, even as to costs assessed. *Id.* at 66.

For a general discussion of varying treatments of fines and restitutionary orders, see Joseph Sauder, Comment, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement ab initio Doctrine*, 71 TEMPLE L. REV. 347, 354–59 (1998) (summarizing cases).

53. *See, e.g.*, United States v. Logal, 106 F.3d 1547 (11th Cir. 1997) (denying $21 million in restitution for murder upon suicide of defendant); Crooker v. United States, 325 F.2d 318, 321 (8th Cir. 1963) (abating uncollected fine, explaining "[i]f, while [defendant] had lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but, upon his death, there is no justice in punishing his family for his offense"); United States v. Dudley, 739 F.2d 175, 176 (4th Cir. 1984) (noting the rule that "If [a] sentence include[s] a fine, this rule of abatement *ab initio* prevents recovery against the estate."), *citing* United States v. Pauline, 625 F.2d 684, 684 (5th Cir. 1980); United States v. Knetzer, 117 F. Supp. 917, 918 (S.D. Ill. 1954) (abating fine and costs as "a part and parcel of the judgment" that "was not a debt of the deceased"); United States v. Pomeroy, 152 F. 279, 282 (S.D.N.Y. 1907) (refusing to allow criminal fine to be collected against estate of decedent since "the fundamental principle applicable to this case is that the object of criminal punishment is to punish the criminal, and not to punish his family").

54. As one state court explained, "In case[s] where a fine is imposed as a punishment, no principle of compensation is involved. A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment. There could be no justice in enforcing a fine against the estate of an offender, for such a course would punish only the family or those otherwise interested in the estate." Blackwell v. State, 113 N.E. 723, 723 (Ind. 1916); *see also* People v. Peters, 537 N.W.2d 160 (Mich. 1995) (Cavanaugh, J., dissenting) ("[I]f the conviction is void, then the restitution order also becomes void because a victim's right to restitution remains dependent on a conviction.") (quoting People v. Peters, 517 N.W.2d 773, 777 (Mich. App. 1994)).

pensated, and his heirs the recipients of wrongly obtained funds."[55] Relying on this limited understanding of the abatement remedy, courts such as the Fourth and Ninth Circuits have segregated the unserved portion of the penal sanction—either incarceration or a fine—from the remaining aspects of the sentences at issue, preserving restitution while simultaneously abating unpaid fines and orders of forfeiture. In *United States v. Dudley*, for example, the Fourth Circuit refused to abate an order of restitution entered pursuant to the Victim and Witness Protection Act upon the death of the defendant-appellant, although the court abated the conviction.[56] The court noted "the substantial difference between *restitution* to the person victimized by the crime . . . and *forfeiture*, collectible only by the avenging United States government bent on punishing an offender."[57] Yet, the same court had no difficulty

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55. United States v. Cloud, 921 F.2d 225, 227 (9th Cir. 1990) (refusing to abate unpaid portion of restitutionary order entered pursuant to Victim and Witness Protection Act). For restitutionary payments, *see, e.g.*, United States v. Asset, 990 F.2d 208, 211 (5th Cir. 1993) (declining to abate voluntary restitutionary payments after death of appellant while also holding that uncollected fines would abate). For fines, *see, e.g.*, United States v. Schumann, 861 F.2d 1234, 1236 (11th Cir. 1988) (refusing to allow collection of paid fine by estate of decedent since "the penalty operated as a punishment to [decedent] rather than to his estate"); United States v. Morton, 635 F.2d 723, 725 n.3 (8th Cir. 1980) (refusing to construe abatement as requiring the return of fine paid by a defendant before his death and "refus[ing] to speculate on the outcome of cases involving partially enforced fines"); United States v. Bowler, 537 F. Supp. 933, 936 (N.D. Ill. 1982) (abating uncollected portion of fine and refusing to abate collected portion).

56. United States v. Dudley, 739 F.2d 175 (4th Cir. 1984).

57. *Id.* at 177. The forfeiture cases have been treated differently from those involving restitutionary payments, although forfeiture is, arguably, a kind of restitution to the prosecuting authority, state or federal. *See, e.g.*, United States v. Mollica, 849 F.2d 723 (2d Cir. 1988) (abating conviction of defendant appellant, but "leaving for another day what disposition should be made of cases involving different factual circumstances, such as cases implicating forfeiture provisions"); United States v. Romano, 755 F.2d 1401, 1402 (11th Cir. 1985) (vacating, without objection, forfeiture order together with abatement); United States v. Theurer, 213 F. 964, 965 (5th Cir. 1914) (refusing to compel forfeiture to government of value of fifty barrels of whisky upon the death of defendant pending appeal of libel judgment, reasoning that there was "no difference between the forfeiture in this case . . . and a fine imposed after trial on indictment").

For a discussion of the nature of forfeiture, see generally *United States v. Austin*, 509 U.S. 602 (1993). *See also* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 102 (1998) (noting that the Supreme Court has held that forfeiture is punishment for purposes of Eight Amendment analysis, regardless of whether it is civil or criminal in nature, citing *Austin*, 509 U.S. at 621 (noting that although forfeiture is designed in part to reimburse the government and others, there is "forfeiture of

abating the fine, holding that "[i]f [a] sentence include[s] a fine, this rule of abatement *ab initio* prevents recovery against the estate."[58] The inconsistency suggests that the physical absence of the defendant is the exclusive rationale for application of the abatement remedy.[59] As demonstrated above, however, that explanation is insufficient to compel abatement *ab initio* of the conviction, as distinguished from mere dismissal of the appeal.[60]

These cases, using terms that connote an adjudication of guilt, such as "victim,"[61] "punish[],"[62] and "crime,"[63] ignore the dissonance of such language with a vacated conviction and dismissed indictment. If the indictment itself is dismissed, then what is the justification for exacting a fine from a person once again presumed innocent?[64] Treating payments pursuant to a victim compensation regime differently from fines, sentences of imprisonment, or judgments of conviction ignores the restitutionary aspect of *all* components of punishment. It also implicitly limits the victims' interest in the punishment of an

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property . . . is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law")).

58. *Dudley*, 739 F.2d at 176. *But see Bowler*, 537 F. Supp at 936 n.5 (refusing to abate collected portion of fine, holding that rationale for abatement "does not apply to fines already paid, since the purposes of the fines were served insofar as they denied defendant some of his resources before his death").

59. *See, e.g., Bowler*, 537 F. Supp. at 936 ("[T]he rationale of the principal of abatement is that an indictment, conviction and sentence are charges against and punishment of the defendant and if the defendant is dead, there no longer is a justification for them.").

60. *See, e.g.*, United States v. Dwyer, 855 F.2d 144, 145 (3d Cir. 1988) (holding that since the death and consequent physical absence of the defendant eliminated the only party with standing to challenge the conviction, dismissal rather than abatement *ab initio* was proper).

61. *See, e.g.*, United States v. Cloud, 921 F.2d 225, 227 (9th Cir. 1990).

62. *See, e.g., Dudley*, 739 F.2d at 177.

63. *See, e.g., Cloud*, 921 F.2d at 227.

64. The Supreme Court has refused to permit restitutionary payments to a "victim" in the absence of a conviction. Hughey v. United States, 495 U.S. 411, 413 (1990) (construing the Victim and Witness Protection Act as "authoriz[ing] an award of restitution only for the loss caused by the specific conduct that is the basis of the conviction," and denying restitution based upon other conduct charged in a multiple count indictment); *see also* United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (refusing to order restitution when defendant committed suicide while direct appeal was pending).

Nevertheless, some states have ordered restitution even when a defendant is acquitted of the charge that is the basis of the payment. *See, e.g.*, People v. Lent, 541 P.2d 545 (Cal. 1975), *cited in* Sauder, *supra* note 52, at 364 n.119.

offender to mere economic compensation.[65] Moreover, when courts recognize the impropriety of a fine or prison term based upon a conviction's unreviewability but still compel restitution, they ignore the fact that abatement transforms an individual's status as a victim as fully as it does the defendant's status as an offender.[66]

These fine and restitution cases underscore the poverty of the restitutionary or victim-centered argument that courts have found persuasive when abandoning the abatement remedy in its entirety. Courts that have abandoned abatement out of deference to victims' interests in a prosecution, as manifested in state Victim's Rights Acts or constitutional amendments, are as wrong-headed as courts who try to split the punishment baby, abating the conviction itself but enforcing a restitutionary payment. A victim's interest in the outcome of the criminal process—whether through restitutionary payments or through an awareness that the defendant is being made to suffer—cannot override the innocence of another person.[67] The abatement remedy recognizes that appeal is a nec-

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65. In their description of what is owed to a victim of a crime, restitution theorists attempt to go beyond mere economic compensation, to include other process interests such as being heard, participating in a plea or sentencing, as well as, more broadly, being "made whole" or "raised up" to the level he or she was at prior to the crime. *See, e.g.*, Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 159 (1996) (summarizing the restitutive theory of criminal justice); Lawrence P. Fletcher, Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505, 508 n.11 (1984).

Certainly there are also those who focus exclusively on the economic compensation and/or incenting of victims as the central goal of a restitutive criminal regime. *See, e.g.*, BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 228–29, 298–99 (1998) (arguing that criminals should pay restitution or forfeit "all civil and economic rights").

It is most unlikely that the courts considering these questions had such an intent, yet decisions that deny the government the right to forfeiture due to defendant's death but nevertheless refuse to abate orders of restitution are otherwise incoherent. *See, e.g., Dudley*, 739 F.2d at 177 ("forfeiture has an exclusively punitive, *i.e.*, penal character.... [A]n order of restitution, even if in some respects penal, also, has the predominantly compensatory purpose of reducing the adverse impact on the victim.").

66. My argument, of course, does nothing to diminish the rights of victims to seek the private remedies of tort compensation and other equitable relief, where appropriate. But it does repudiate the transformation of the criminal public law regime into a quasi-private system of victim compensation or victim satisfaction.

67. Whether the individual's innocence is based upon an acquittal at trial, a reversal on appeal, or an unreviewed conviction, all such dispositions are equally inconsistent with the imposition of a sanction by the state.

essary part of the adjudicatory process and is as central to a restitutionary regime as to any other.[68]

III. DISCOURSE ABOUT THE RIGHT OF APPEAL: THE DOMINANT ACCOUNT

Having set out the contours of the abatement remedy at the federal and state levels, as well as its implications for the right of appeal, this Part contrasts abatement with other areas of the law in which the right of appeal is described. The contrast between the right of appeal in the abatement setting and the dominant discourse on the right of appeal compels some resolution, as proposed in the Conclusion.[69]

The right to appeal in a criminal case is described in far more parsimonious and contingent terms elsewhere in the law. Simply put, the Supreme Court has held that there is no constitutional right to an appeal.[70] Yet, compelling arguments are

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68. If these dissenting courts are really saying that appeal is not necessary because, on balance, the interests of the victims of crimes outweigh defendants' interest in the additional guarantee of legitimacy achieved through appeal, then that position counsels not just in favor of abandoning abatement, but of eliminating appellate review in its entirety. Abating convictions while compelling restitution makes no more sense than reviewing some convictions but not others, based upon the vagaries of which defendant-appellants survive the full adjudicatory process.

69. Briefly, I propose the elevation of the right of appeal to constitutional stature. *See infra* Part IV and the CONCLUSION.

70. As recently as the 1999–2000 term, the United States Supreme Court reiterated the maxim that "[t]he Constitution does not . . . require States to create appellate review in the first place." Smith v. Robbins, 528 U.S. 259, 271 n.5 (2000) (as to the procedures due an indigent defendant whose appeal was deemed frivolous), in which both the majority and dissenting opinions reasoned from that unassailable premise. *Id.* at 768 (Souter, J., dissenting) ("there being no obligation to provide review at all") (citing Ross v. Moffitt, 417 U.S. 600, 606 (1974)); *see also* Evitts v. Lucy, 469 U.S. 387, 393 (1985) (no constitutional right to appeal).

There has been some discussion of the likely outcome of a legislative retraction of a statutory right of appeal, and at least one court has held that even an appellate remedy that is entirely discretionary must comport with certain due process minima. Bundy v. Wilson, 815 F.2d 125, 135 (1st Cir. 1987) (holding that "the New Hampshire Supreme Court is still free to decline to accept cases," but that the state's system of discretionary appellate review was constitutionally inadequate in its failure to permit a defendant-appellant access to transcripts and other record evidence that might provide the basis for demonstrating the need for appellate review).

being made for a constitutional basis for appellate review, paving the way for a reassessment of the right of appeal.[71]

The fountainhead of the dominant account about the nature of the right of appeal is the 1894 United States Supreme Court case of *McKane v. Durston*,[72] in which a state criminal defendant sought bail pending appeal. In determining whether or not habeas relief was available where the state in which the conviction was entered and the appeal was pending did not grant bail as of right, the Court held:

> 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. A citation of authorities upon the point is unnecessary.[73]

McKane has been the consistent authority for the nonconstitutional, but rather, statutory, status of the right.[74] Yet, since *McKane*, the Court has never had to confront a state statute that purports to eliminate any mechanism for appellate review. It is not entirely clear that the Court would permit such an abridgment: Justice Stevens and some of the Court's critics have asserted that it would be constitutionally unacceptable not to offer any appellate review, at least in capital

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71. *See* Arkin, *supra* note 14, at 552–57 (arguing that there is support in the Eighth Amendment cases for rejection of *McKane v. Durston*, 153 U.S. 684 (1894), at least in capital cases); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 376–86 (1991) (culling support for constitutional right from Supreme Court holdings).

72. 153 U.S. 684 (1894) (Harlan, J.).

73. *Id.* at 687.

74. *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 271 n.5 (2000) (citing *Moffitt*, 417 U.S. at 606); Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 31 (1986) (quoting *McKane*, 153 U.S. at 687–88). One commentator has characterized the Court's use of this precedent as "genuflection at the altar of *McKane v. Durston*." Arkin, *supra* note 14, at 554 (describing dissenting opinion of Justice Marshall in *Whitemore v. Arkansas*, 495 U.S. 149, 166 (1990), as one in which he "admitt[ed] that the Constitution does not require states to provide appellate review of noncapital cases," but also "emphasized that the 'unique, irrevocable nature of the death penalty necessitates safeguards not required for other punishments'").

cases.[75] The precise analytic foundation for such a conclusion, however, remains vague.[76]

A. Capital Cases

The nose under the tent in this area has been the treatment of appeals in capital cases. Post-*Furman* decisions—which approve and disapprove various capital sentencing regimes—suggest that appellate review is such an important piece of the package of procedural safeguards that it makes some capital sentencing regimes constitutional and others inadequate.[77] It might be fanciful to expect that the Court could easily move from this dictum in capital cases to a constitutional rule governing all criminal cases. The Court would first have to embrace the minority's view that some appellate review is "an integral component of a State's 'constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.'"[78] The next move would be from acceptance of a right of appellate review in capital cases to the extension of that right to noncapital cases, despite post-*Furman* decisional law that has consistently underscored the fact that "death is different."[79] But if

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75. *See* discussion *infra* note 78 and accompanying text.

76. *See, e.g.*, Ellerson, *supra* note 71 (arguing that the "rule" of *McKane* was "eviscerated" by the Court in *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80 (1930) (holding that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance")).

77. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) ("As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court."). One commentator has suggested that the appellate review of death cases is constitutionally required, relying upon *Parker v. Duggan*, 498 U.S. 308, 320–22 (1991). *See* Ellerson, *supra* note 71, at 380 n.33; *see also* Arkin, *supra* note 14, at 552–58 & n.201–04 (highlighting Court's approval of appellate review in post-*Furman v. Georgia*, 408 U.S. 238 (1972) death penalty statutes as a basis for a due process argument for constitutional right of appeal) (citing *Whitemore*, 495 U.S. at 149; Pulley v. Harris, 465 U.S. 37, 55 (1984) (Stevens, J., concurring) (stating that *Gregg* stands for the proposition "that some form of meaningful appellate review is required" in capital cases).

78. Murray v. Giarratano, 492 U.S. 1, 23 (1989) (Stevens, J., dissenting) (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)).

79. *See Furman*, 408 U.S. at 238; *see also Murray*, 492 U.S. at 22 (Stevens, J., dissenting) (acknowledging that protections and safeguards due in death penalty cases are not required in other criminal cases).

these moves were to occur, the area of capital criminal process would provide the most likely starting point.

B. Right to Counsel

Despite intimations in the death penalty area, courts have relied upon right to counsel cases in recent abatement decisions as the basis for the proposition that the appellate right is integral to the criminal adjudicatory process.[80] Yet, these decisions hardly suggest that a convicted defendant is denied a fundamental right if that conviction is never reviewed. Instead, the right to counsel cases leave little doubt that the right of appeal is *not* of constitutional stature.[81] From *Griffin v. Illinois*[82] through *Douglas v. California*,[83] right up to *Smith v. Robbins*,[84] the Court has announced a much more limited proposition: *if* a state—or the federal government—provides a mechanism of appellate review for a criminal conviction, *then*, and only then,

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80. *See, e.g.*, United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (citing Griffin v. Illinois, 351 U.S. 12, 18 (1956)); Dixon v. Superior Court of Orange County, 240 Cal. Rptr. 897, 899 (Cal. Dist. Ct. App. 1987); People v. Valdez, 911 P.2d 703, 704 (Colo. Ct. App. 1996); Jones v. State, 486 A.2d 184, 186 (Md. Ct. App. 1985).

81. The constitutional analysis, to the extent that there is any in the Sixth Amendment cases, comes under either equal protection or due process theories, the latter being conditioned on the creation of a right by statute or state constitution. As the Court recently observed, "the precise rationale for the *Griffin* and *Douglas v. California*, 372 U.S. 353 (1963), lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment." Smith v. Robbins, 528 U.S. 259, 276 (2000) (citing Evitts v. Lucy, 469 U.S. 387, 403 (1985) (quoting Ross v. Moffitt, 417 U.S. 600, 608–09 (1974))).

Importantly, the due process rationale referred to above is *not* that the due process clause itself requires at least one appeal of a criminal conviction, but is rather the more limited one that *if* an appeal is provided, the state cannot discriminate between rich and poor as to who enjoys it. *See Ross*, 417 U.S. at 612 ("The State cannot adopt procedures which leave an indigent defendant 'entirely cut off from any appeal at all,' by virtue of indigency, or extend to such indigents merely a 'meaningless ritual' while others in better economic circumstances have a meaningful appeal.") (quoting *Douglas*, 372 U.S. at 358). The broader due process claim has been advanced, but has not been embraced by the Court. *See infra* Part III.B.

82. 351 U.S. 12 (1956).

83. 372 U.S. 353 (1963).

84. 528 U.S. 259 (2000).

must the state give the assistance of counsel to indigent defendants pursuing that limited right.[85]

The discourse surrounding the right to counsel cases stands in sharp contrast to that found in the abatement decisions set out above in Part I. Where courts applying abatement as a remedy expressed concern about the legitimacy and fairness of preserving unreviewed judgments of trial courts, the Supreme Court, in the right to counsel cases, has emphasized the finality of those lower court judgments.[86] In *Ross v. Moffitt*, for example, Chief Justice Rehnquist wrote:

> [I]t 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 jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. The difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.[87]

Such language gives little support to abatement *ab initio*, as opposed to mere dismissal of an appeal, yet the remedy persists both on the federal level and in many states.

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85. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) ("The equal protection guarantee . . . only . . . assure[s] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.").

86. *But see* Murray v. Giarratano, 492 U.S. 1, 23 (Stevens, J. dissenting) (suggesting that it is not until "the process of direct review . . . comes to an end" that "a presumption of finality and legality attaches to the conviction and sentence") (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

The Court's opinions regarding the lack of a right to counsel on collateral review, in which the Court emphasizes the distinction between such post-conviction relief and statutorily granted direct review, inadvertently intimate that direct review enjoys a more central role in the adjudicatory process than the direct review decisions themselves admit. *See, e.g.*, *Finley*, 481 U.S. at 557–58 (quoting *Evitts*, 469 U.S. at 400–01 ("The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms.")).

87. 417 U.S. at 610–11 (citing McKane v. Durston, 153 U.S. 684 (1894)).

C. *Bail Pending Appeal*

In the law of bail pending appeal, the premise is similar to that in the right to counsel cases: having been convicted at trial, a defendant-appellant is stripped of the presumption of innocence. Thus, with respect to admission to bail, the convicted defendant stands in a posture entirely different from one awaiting trial.[88] Neither the language of the Bail Reform Act[89] nor the reported decisions on motions for bail pending appeal contain any discussion of the lack of finality of an unreviewed conviction, or of the integral role that appellate review plays in legitimating that conviction.[90] Here too, the discourse about the right of appeal is difficult to reconcile with the discussion in the abatement cases.

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88. *Compare* Stack v. Boyle, 342 U.S. 1, 4 (1951) (requiring that defendants be admitted to pretrial bail, and stating that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"), *with* 18 U.S.C. § 3134(b)(1)(B)(i–ii) (requiring detention of a convicted and sentenced defendant unless the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial").

But see United States v. Affleck, 765 F.2d 944, 955–56 (10th Cir. 1985) (McKay, J., dissenting) (construing *Evitts*, 469 U.S. at 387, to signify that "all rights that apply to protect a defendant at the trial stage also apply at the appellate level, provided the appeal is a matter of right" and that denial of bail pending appeal is therefore unconstitutional under the Eighth Amendment).

89. 18 U.S.C. §§ 3146, 3148 (1982) (repealed 1984).

90. A review of the history of the standard applied to applications for bail pending appeal reveals that there had once been some concern for the liberty interests of defendants pending appeal. The 1966 Bail Reform Act provided that defendants were entitled to release pending appeal unless "no one or more conditions of release would reasonably assure that they would not flee or pose a danger to any other person or to the community, or unless their appeal was frivolous or taken for purpose of delay." 18 U.S.C. §§ 3146, 3148 (1982) (repealed 1984); United States v. Provenzano, 605 F.2d 85, 90 (3d Cir. 1979). In 1984, however, there followed a shift toward public safety, in the form of both pretrial and post-conviction detention. 18 U.S.C. § 3143(b) (amended 1984). Where the standard had been that any nonfrivolous appeal should be granted bail, with the burden resting on the government to show that defendant was not entitled to bail, under the 1984 amendment, an application for post-conviction bail must be denied unless the defendant can show that the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C. § 3143(b)(2)(1)(B)(i–ii); *see generally* Debra L. Leibowitz, Note, *Release Pending Appeal: A Narrow Definition of "Substantial Question" Under the Bail Reform Act of 1984*, 54 FORDHAM L. REV. 1081, 1092–93 (1986) (setting out history and contending that "[t]he basic purpose of the B[ail] R[eform] A[ct] of 1984 was to discard the less restrictive position of the 1966 BRA, which no longer satisfied the perceived needs of the criminal justice system").

D. Preclusive Effect of an Unreviewed Criminal Conviction

Finally, in the area of issue preclusion, it is well-settled that the preclusive effect of a criminal conviction begins upon entry of the judgment and is not dependent upon the completion of appellate review.[91] Although the *availability* of appellate review is a required condition, such that preclusion would not apply to a conviction where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action,"[92] that condition does not impose any delay in the use of a trial court conviction in another, related proceeding.

In each of these areas, then, the discourse surrounding the nature of the appellate right gives little support either to the remedy of abatement or, more expansively, to the elevation of the right of appellate review to constitutional stature. Yet, abatement remains the rule of the federal courts as well as a majority of state courts. Rather than isolating this body of authority as an aberration, it should be combined with other strands of law and policy to transform the dominant discourse and doctrine regarding the right of appeal.[93]

IV. ERROR CORRECTION AND APPEAL

Appeal is, fundamentally, about error correction. Thus, our legal attitude toward the importance of error correction should determine the status of the right of appeal. Because innocence is a bar to punishment under any theory of punishment, appeal is a necessary and effective process of error correction that guarantees that the innocent will not be punished.

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91. JACK H. FRIEDENTHAL, MARY KAY KANE, & ARTHUR R. MILLER, CIVIL PROCEDURE 666 (3d ed. 1999) ("Most courts treat a judgment as final for res judicata purposes if it conclusively disposes of the lawsuit in the rendering court, notwithstanding that an appeal has been taken or the time to appeal has not expired.") (citing, *inter alia*, New Haven Inclusion Cases, 399 U.S. 392 (1970)); Allan D. Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857 (1966).

92. RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982) (listing exceptions to rule of preclusion). Accordingly, an acquittal in a criminal matter would have no preclusive effect in a related proceeding, in part because the prosecution, as a matter of law, is not permitted to appeal a verdict of acquittal. *See* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 65 (2001).

93. *See infra* CONCLUSION.

These propositions should inform the nature of the right of appeal.

A. Innocence as a Bar to Punishment

No system of punishment can or should tolerate conviction and punishment of innocent persons.[94] Any theory of punishment, then—be it retribution,[95] rehabilitation,[96] deterrence,[97] or

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94. As one commentator put it, "[N]o system of rules which generally provided for the application of punishment to the innocent would normally be called a system of punishment." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 80 (7th prtg. 1988).

The outcry that met the Supreme Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1992), affirming the refusal to grant collateral relief in a capital case despite proof of actual innocence because of a procedural default, is a good illustration of the importance we as a community attach to accuracy in the process we adopt to determine guilt. *See, e.g.*, Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 52 (1999) (criticizing decision in *Herrera* that "[e]ven if a person can prove that he or she is innocent of the crime, that is not enough to stop the execution unless there is proof of a constitutional violation"). Similarly, the recent series of news reports regarding exoneration of prisoners all over the country, either through DNA testing or other evidence, underscores the national intolerance for the peculiar injustice of a wrongly convicted person. *See, e.g.*, Caitlin Lovinger, *Life After Death Row*, N.Y. TIMES, Aug. 22, 1999, § 4 (Week in Review), at 4 (noting that "[s]ince capital punishment was reinstated by the United States Supreme Court in 1976, 566 convicts have been executed. Eighty-two awaiting execution have been exonerated, about half of them during this decade," and cataloging their convictions and exonerations); Jo Thomas, *New Death Penalty Rules Are Issued in Illinois*, N.Y. TIMES, Jan. 24, 2001, at A17 (noting that new court rules regulating capital appeals "come at a time of wide national interest in death penalty fairness, particularly in Illinois, where the governor put a moratorium on executions a year ago").

95. Michael Moore defines the "retributivist principal proper" as the notion "that the function of the criminal law is to exact retribution in proportion to desert." MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 71 (1997). Retribution has also been seen as a corollary of a more general theory of fairness, as well as an expressive or denunciatory theory. *See, e.g.*, Herbert Morris, *Persons and Punishment, in* ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 33–34 (1976) ("[F]airness dictates that a system in which benefits and burdens are equally distributed have a mechanism designed to prevent a maldistribution in the benefits and burdens. . . . [I]t is just to punish those who have violated the rules and caused unfair distribution of benefits and burdens."); HART, *supra* note 94, at 235 (describing modern retribution theory as an "authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offense"); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 370 (1981) (explaining that "the message" of retributivism is "this is how wrong what you did was"); *see also* Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

restitution[98]—must include a method for accurately and reliably determining guilt as a predicate to the imposition of punishment. To the extent that appellate review serves the function of error correction,[99] its place in the adjudicatory process should be irrevocable regardless of the particular theory of punishment.

Taking each of the major theories of punishment in turn, this Part demonstrates how an accurate determination of guilt, that is, a *just* outcome, is central to the imposition of punishment on an individual. Attitudes toward the right of appellate

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96. There are, it has been said, two distinct rehabilitative ideals. In the first, "we make criminals safe to return to the streets." MOORE, *supra* note 95, at 85. In this mode, rehabilitation is a variation on incapacitation, since it justifies punishment "as a cost-effective means of shortening the expensive incarceration that would otherwise be necessary to protect everyone against crime." *Id.* The second ideal "seeks to rehabilitate the offender, not just so that he can be returned safe to the streets, but so that he can lead a flourishing and successful life." *Id.* In this mode, rehabilitation is paternalistic in character since it purports to punish "in [the offender's own] name, but contrary to his own expressed wishes." *Id.*

97. The utilitarian, or deterrence, theory "treats the welfare of society as the justification of punishment." HART, *supra* note 94, at 73.

98. Professor Randy Barnett defines restitution as follows, distinguishing retribution along the way:

> A restitutive approach shares the following in common with the standard retributivist account of criminal law: A crime creates an imbalance between a criminal and his victim, or, according to some accounts, between a criminal and an aggregation referred to as "society." Justice consists of "getting even"—that is, restoring the balance between the offender and either the victim, society or both. Where restitution and retribution differ is with respect to how this balance should be obtained. According to a retributivist approach, we get even by *punishing* a criminal according to his desert, thereby, in effect, lowering him to the level at which he placed his victim. In contrast, a restitutive account focuses not on the desert and punishment of the criminal, but on the right of the victim to be made whole. It would compel a criminal to make reparations—often, but not necessarily, consisting of monetary compensation—to raise the victim up to some semblance of her *ex ante* position. In sum, according to the retributive approach, any benefits that improve the condition of the victim are incidental to our punishing the criminal in proportion to his desert; according to the restitutive approach, any punishment to the criminal is incidental to improving the lot of the victim.

Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 159 (1996); *see generally* Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977); Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 64 (1982) (defining "restitution" more narrowly as "either the defendant's return or repair of property, or the defendant's provision of monetary value for compensable losses").

99. *See infra* notes 114–124 and accompanying text.

review should not vary depending upon which theory of punishment predominates.[100]

Retributivists advocate imposing punishment on those who deserve it, based upon violation of a social norm.[101] Of course, there must first be an accurate assessment of who deserves punishment before it can properly be meted out.[102] Accordingly, the substantive criminal law places great emphasis on the voluntariness of the offender's act, the causal nexus between the act and the harm, and the intent that accompanies the harm-producing conduct.[103] Further, the procedural law

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100. I say "predominates" because it is plain that our present system of punishment is a pastiche of multiple theories, no one of which alone explains all the procedures or substance of the criminal law. *See* Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1361 (2000) (contending that retribution is the central justification, but that "[n]onretributive purposes are tolerated as features that strengthen the coalition that drives criminal punishment," or "the purpose of criminal punishment is retribution, and other incidental purposes may be served only so long as they do not interfere with or subordinate the achievement of retribution"); HART, *supra* note 94, at 3 ("[W]hat is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles . . . are relevant at different points in any morally acceptable account of punishment."). *But see* MOORE, *supra* note 95, at 28–29 (rejecting "mixed" theories and contending that retributivism is "*the* intrinsic good that is the function of Anglo-American criminal law"); NOZICK, *supra* note 95, at 366, 734 n.74 (describing how punishment based upon retribution, independent of the deterrent effect of such punishment is "lexical" in structure in that it "gives absolute priority to one principle over another").

101. *See supra* note 95.

102. *See, e.g.*, IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., 1965) (observing that "punishment can never be used merely as a means to promote some other good . . . but . . . must in all cases be imposed on him only on the ground that he committed a crime"); Michael S. Moore, *The Moral Worth of Retribution, in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 181 (Ferdinand Schoeman ed., 1987) ("Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it."). *See generally* MOORE, *supra* note 95. *But see* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632 (1992) ("[S]ince any actual criminal justice system is inherently fallible, any such system will inevitably inflict punishment on some people who are actually innocent and thus do not deserve it. Unless the retributivist rejects all possible systems of legal punishment, therefore, she is endorsing a system that she knows will condemn and punish innocent people.").

103. *See* MODEL PENAL CODE § 2.01 (actus reus), § 2.02 (mens rea), § 2.03 (causation) (Proposed Official Draft 1962); *see also* Morissette v. United States, 342 U.S. 246 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I

contains such safeguards as the presumption of innocence and the rights to compel and cross-examine witnesses;[104] to obtain exculpatory evidence in the possession of the state;[105] and to a jury verdict that must be supported by a finding of guilt beyond a reasonable doubt.[106] Because appellate review is a relatively effective mode of error correction, both the existing safeguards against punishment of the innocent and appellate review should be maintained.

While the touchstone of retributivism is that only upon a determination of culpability should punishment follow,[107] other theories of punishment depend equally for their persuasive force on an accurate determination of culpability. Incapacitation, for example, would be ineffectual if the individual selected for confinement were not, in fact, a danger to others. This is especially true if the corollary of confining an innocent is that the guilty person is the one who poses the danger, and he remains at large.

Similarly, a rehabilitative model purports to identify those in need of treatment by determining that they, due to their illness, have caused some social harm.[108] Thus, innocence would preclude the need for, and receipt of, treatment. Even if we were to say that any randomly selected individual could benefit, to some degree, from a rehabilitative mode of punishment, her innocence would suggest that as a matter of distributive justice, she should not receive treatment ahead of those whose illnesses pose greater dangers. Moreover, we would still be left with the accompanying failure to treat the person whom the

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didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (considering the Model Penal Code's emphasis on result in the grading of attempts and completed crimes).

104. U.S. CONST. amend. VI; Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (duty to make subpoena power available to defendant); Davis v. Alaska, 415 U.S. 308 (1974) (right to cross-examine witnesses).

105. Brady v. Maryland, 373 U.S. 83 (1963).

106. *In re* Winship, 397 U.S. 358, 364 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.").

107. *See supra* note 95.

108. *See supra* note 96.

system did not correctly identify, through adjudication of some social harm, as in need of treatment. Thus, these utilitarian theories also require accuracy in adjudication as a condition of punishment.[109]

Restitution poses some problems for the punishment of innocents as well.[110] If the goal of such a regime is to make the victim whole through the punishment of the offender,[111] then it would seem to be important to accurately determine the offender's identity. A restitutionary system might be said to tolerate inaccurate adjudications, but only so long as the victim of an offense remains ignorant of the actual innocence of the person whose suffering was a source of relief or satisfaction. The knowledge that the wrong person was suffering, however, would not only *not* satisfy the victim but might well cause two additional harms: the victim would, in some degree, bear responsibility for imposing suffering on an innocent and the victim would suffer in the knowledge that the true offender remained at large. Thus, the choice in a restitutionary regime would be either to determine guilt accurately, or to carefully and permanently paper over any errors in the system of adjudication so that the victim remained ignorant of systemic errors like wrongful convictions. The former is far more palatable than the latter.

The most difficult case to be made as to the need for accuracy in adjudication is for pure deterrence. We could, theoretically, justify punishment based upon utilitarian goals even if we were to select the wrong person as the object of such punishment.[112] There are several responses to this. First, as H.L.A. Hart has written, to the question "Why not punish the innocent if in a given case it promotes the welfare of society?",

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109. *See* Dolinko, *supra* note 102, at 1626 ("Deterrence and rehabilitation are *consequentialist* theories: they claim that what makes punishment morally proper are its good or desirable consequences.").

110. *See generally* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995); Barnett, *supra* note 98.

111. *See* Barnett, *supra* note 98.

112. Hart, for example, acknowledges, "No doubt . . . the individual's claim not to be sacrificed to society except where he has broken laws is not itself absolute. Given enough misery to be avoided by the sacrifice of an innocent person, there may be situations in which it might be thought morally permissible to take this step." HART, *supra* note 94, at 81. He goes on to recognize that such a step would be a sacrifice of the "principle of fairness designed to protect the individual from society to the principle that an overwhelming advantage to society should be secured at any cost." *Id.*

the "qualification to be made is the admission that the individual has a valid claim not to be made the instrument of society's welfare unless he has broken its laws."[113] Second, to the extent that members of a community perceive that punishment is possible regardless of their own autonomous choices or culpability, the system is doomed to failure. The maxim "I'd as soon be hanged for a sheep as for a lamb" would kick in, with citizens acting in defiance of social norms once they had decided that their prospects for evading or receiving punishment were independent of their moral choices or voluntary acts. Finally, even in a pure consequentialist model, we would still need some mechanism for identifying persons to subject to punishment for the betterment of society. It seems incoherent to create a system of trial adjudication if in fact the objects of punishment could as easily be randomly selected.

Given that an accurate determination of guilt is the linchpin of any theoretical justification of punishment, support for or repudiation of procedures that ensure accuracy should not turn on which theory of punishment one espouses. Moreover, those components of the adjudicatory process that advance the central goal of accuracy should be irrevocable. By this standard, appellate review is essential.

B. Appellate Review: Actual and Perceived Error Correction

While much constitutional criminal rulemaking is addressed to the legitimacy of the trial process,[114] there has been inadequate judicial attention to the role of appellate review as a guarantor against trial error. Recent empirical research re-

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113. *Id.* at 82. Hart finishes the sentence as follows: "[B]ut to recognize this qualification of utilitarianism is not to recognize a different basis or justification for the practice of punishment." *Id.* He explains that the utilitarian need not embrace retributivism as the sole rationale for limiting punishment to those who have actually offended, but instead that an individual's "breach of the law is, as it were, a condition or a license showing us when there is liability to punishment. It is not an alternative basis for the system and could not (as a retributive or reprobative theory could) justify our using penalties more severe than would be required on utilitarian grounds." *Id.* at 81.

114. Examples include rules relating to the voluntariness of a confession, the propriety of law enforcement conduct in seizing or producing evidence against a defendant, and the body of evidence rules governing the introduction of evidence at trial.

garding capital cases demonstrates a troublingly high rate of error at the trial level—approaching fifty percent—as demonstrated by the reversal rate on direct review.[115] In non-capital cases, the error rate has been estimated at five percent.[116]

Moreover, it is likely that these studies significantly undercount the incidence of error in the trial system, for several reasons. First, the vast majority of felony cases are resolved by plea agreements, which are rarely reviewed for error.[117] Although many of these dispositions are based upon the actual guilt of a defendant, some are the result of factors other than factual guilt. Such factors include risk-averse defendants facing long minimum mandatory sentences, as well as the pressure on appointed counsel to resolve cases without a trial be-

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115. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052–56 (2000) (citing statistics from his own and others' studies indicating error rates as high as sixty-eight percent in capital cases and, in non-capital cases, five percent); JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS: FINAL REPORT 5 (1989).

But see Dalton, *supra* note 14, at 85 (arguing that there is "empirical support for the unsurprising proposition that a substantial percentage of the appellants in *criminal* cases have no legitimate . . . cause to complain about the decision below"); Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 569 (suggesting "no doubt" as to factual guilt in seventy-eight percent of criminal appeals); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1198 n.30 (1978) (noting that, for the period from 1870–1970, the aggregate reversal rate for all cases, civil and criminal, was 38.5%).

Even those attempting to minimize concerns about error in the adjudication of capital cases recognize the extraordinarily high rate of reversal in such cases. *See, e.g.*, Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 17 & n.73 (1995) (characterizing one study's 7.4% reversal rate on direct appeal of state and federal criminal cases as "a tiny percentage," but acknowledging that "the rate of reversal in death cases approaches 50%") (citing STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES, 6 tbl. B-5 (Dec. 31, 1993)). *See also* Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals: Wide Reaching Study: Reversals are Attributed to Errors by Defense Lawyers, Police, and Prosecutors*, N.Y. TIMES, June 12, 2000, at A1 (reporting on a Columbia University study of appeals of all death penalty cases since the reinstatement of that penalty in 1973, which "found that 75 percent of the people whose death sentences were set aside [on appeal] were later given lesser sentences after retrial, . . . [while] 7 percent were found not guilty on retrial").

116. *See supra* note 114.

117. *See* Liebman, *supra* note 115, at 2053. *Bureau of Justice Statistics, at* http://www.ojp.usdoj.gov/bjs/ (last revised Nov. 14, 2001).

cause of poor compensation and unmanageable caseloads.[118] Second, common sense dictates that the likelihood that appellate review will result in correction of trial error depends in part upon the quality of appellate counsel. As with trial counsel,[119] there are deep concerns about the adequacy of appellate counsel, particularly those appointed to represent the poor in larger urban centers.[120] If counsel are ineffective, then trial errors will not be framed in a clear or persuasive way, and appellate courts may affirm convictions despite trial error.[121] Finally, a growing array of procedural doctrines have recently either emerged or been greatly expanded with the cumulative effect of precluding relief at the appellate level, even where there was error at the trial level.[122]

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118. *See, e.g.*, Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992) (summarizing some of the "powerful incentives" that defense attorneys have to avoid trial, which produce conflicted agency relationships that make the plea process unreliable); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948 (1992) (arguing that "[r]isk averse defendants, meaning in part innocent ones, might well avoid [trials] even at the cost of accepting a deal that treats them as though they were certain to be convicted at trial"); *see also* North Carolina v. Alford, 400 U.S. 25, 38 (1970) (permitting guilty plea even where defendant maintained innocence, in part because the evidence "substantially negated" defendant's claim); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278–80 (1975); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1151 (1998) (noting criticism that "the bargaining system is deficient in identifying which defendants are guilty of the crimes charged and that, as a result, many innocent defendants plead guilty").

119. *See supra* text accompanying notes 113–117.

120. *See* Jane Fritsch & David Rohde, *For Poor, Appeals Are Luck of the Draw*, N.Y. TIMES, April 10, 2001, at A1 (noting that appointed appellate counsel in New York City are paid an average of $2,000 per case, which allows for a maximum of fifty hours, at forty dollars per hour, on everything from review of trial transcripts to investigation of witnesses and evidence, legal research, and writing the briefs and related motions).

121. It is unlikely that ineffective counsel would inadvertently succeed in persuading an appellate court that there was error in an error-free trial; it is far more likely that poor counsel would result in an overall diminution of the reversal rate.

122. *See* Rosanna Cavallaro, *Police and Thieves*, 96 MICH. L. REV. 1435, 1450 n.77 (1988) (reviewing H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996)); Liebman, *supra* note 115, at 2055 n.90 (noting that error rates may be underestimated as a result of forgiveness of trial court errors through "harmless error" doctrine); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468–69 (1996); *see also* Meltzer, *supra* note 14, at 10 (noting that if there were indeed a constitutional right of appeal, it "would have to include some limits on what errors a state can deem harmless"). Relying on Chapman v. California, 386 U.S. 18, 23–24 (1967), Professor Meltzer contends that "[I]f

Studies suggest that appellate review of a trial court's determination is an essential component of systemic accuracy.[123] The degree of error reported, if left *uncorrected* because of the elimination of a right of appeal that is merely statutory, would be intolerably high and would delegitimate any punishment imposed through such an adjudicatory process.[124]

In addition to serving the vital function of actual error correction, the appellate process also satisfies the ancillary function of *perceived* error correction, thereby affording legitimacy to the adjudicatory process—an example of the maxim that "justice must not only be done but must be seen to be done."[125]

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the goal of a right to an appeal is to avoid erroneous convictions, the correction of a state trial court's errors in applying local evidence rules or in instructing the jury on the elements of a criminal offense can be just as important as the correction of constitutional errors. Thus, federal limits on harmless error drawn from a right to appeal would seem to encompass all errors, not just those of federal constitutional law." Meltzer, *supra* note 14, at 11.

123. *See generally* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) (exploring the social justifications for the appeals process, particularly the correction or error, and arguing that appeal is an economically efficient way to reduce the incidence of mistake in the adjudicatory process).

124. Of course, the reversal of a trial court conviction is not tantamount to a finding of innocence. Instead, more often than not, appellate reversal leads to a retrial, which might produce a second conviction. *See* Meltzer, *supra* note 14, at 8 n.40; Robert T. Roper & Albert P. Melone, *Does Procedural Due Process Make a Difference? A Study of Second Trials*, 65 JUDICATURE 136, 139 (1981) (noting a different outcome in only fifty-one percent of federal criminal cases reversed and remanded during the period from 1975 and 1979). Nevertheless, the possibility that retrial, with the corrections indicated by an appellate court, will produce an acquittal or determination of legal innocence is substantial enough to enjoy the heightened status of a constitutionally necessary component of the adjudicatory process.

125. *See* Shavell, *supra* note 123, at 425 (summarizing functions of the appellate process other than error correction, including harmonization of the law, error prevention, enhancement of the power of the central state authority, and legitimating the legal process). But, as Professor Shavell notes, "any need for legitimating the legal process must be rooted in the possibility that the process might result in error; otherwise, by definition, the legal process would be regarded as legitimate." *Id.* at 426. Accordingly, this supposedly secondary purpose of appeals is inextricably intertwined with the primary one of actual correction of error. *See also* Dalton, *supra* note 14, at 66 (noting that "quite apart from arriving at correct decisions, we are committed to arriving at decisions correctly, in a manner that assures that litigants are, and feel they are, treated fairly"); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172–75 (including an in-depth exploration of the values of litigation). *But see* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (arguing that the Su-

Even if the degree of error correction achieved through appellate review is deemed to be minimal or marginal, there is a significant value to communal acceptance of the adjudicatory process because acceptance requires accurate, and therefore just, outcomes. Accordingly, even those somewhat skeptical of the empirical proof of the efficacy of appeal in correcting error, such as Professor Dalton, are willing to acknowledge that "[r]egardless of whether appeal of right improves upon the efforts of trial court judges, it arguably serves to make them more acceptable."[126]

The need for appellate review as an essential guarantor of accuracy in determining guilt cannot fairly be evaluated without consideration of the collateral problem of the quality of appointed counsel in capital and other felony cases, a problem so "dire"[127] that it has raised academic, judicial, and public concern about the accuracy of the trial process.[128] Notwithstand-

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preme Court's "current approach to regulating the death penalty has the effect of legitimating the use of capital punishment as a penal sanction in the eyes of actors within the criminal justice system and the public at large" by maintaining a false perception of procedural protections against arbitrariness in administration of that sanction).

Of course, a cynic might respond that it is the appellate process itself that exposes the trial adjudication to doubts about legitimacy, by exposing errors committed below, and that the remedy for such doubt is to eliminate all appellate review. This "shoot the messenger" approach to institutional legitimacy does not bear close scrutiny, however.

126. Dalton, *supra* note 14, at 98. Accordingly, he argues that the right of appeal must be retained, at least in criminal cases

> because of our overriding commitment to the following principles: that the awesome power of the state must not be allowed to overwhelm individuals, especially individuals who are genuinely believed to have transgressed laws we hold dear; that in assigning blame the state must be scrupulously fair, lest in seeking to sanction those contemptuous of its rules it create even more contempt; that before it officially stigmatizes a citizen as standing outside the law and as deserving of society's condemnation, the state must satisfy itself several times over that such a judgment is warranted; and that before depriving an individual of liberty the state must act in a way that evidences and reaffirms respect for that liberty, lest we all be cheapened, diminished, and rendered more vulnerable.

Id. at 102.

127. Jane Fritsch & David Rohde, *For the Poor, a Lawyer With 1,600 Clients*, N.Y. TIMES, Apr. 9, 2001, at A1 (quoting Jonathan Lippman, Chief Administrative Judge of New York State).

128. *Id.* (noting that in 2000, "the 20 busiest private attorneys [in New York City] were assigned to represent more than 9,000 defendants whose cases went past arraignment, and hundreds more who agreed to plea bargains on the day

ing the Sixth Amendment guarantee of the right to effective assistance of counsel,[129] the practical reality of the criminal justice system, especially in large urban centers, is that counsel are "woefully unprepared, d[o] little to investigate, [are] ignorant of the applicable law, ha[ve] inadequate trial skills and d[o] not appear to be committed to their client's cause."[130] The result is that their representation cannot fairly be said to "justify reliance on the outcome of the proceeding[s]."[131] Were there not concern about the effectiveness of counsel in criminal trial proceedings, the urgency of appellate review would be correspondingly diminished. As it is, the problem of trial error is significantly exacerbated.

Today, appellate review plays a significant role in both actual and perceived error correction. The idea that such review can be revoked by a state or the United States should be unsettling to anyone who believes punishment is justified only where the person undergoing such punishment has violated a societal norm. Accordingly, the role of appeal in the determination of guilt or innocence merits the same permanence and inviolability as other procedural rights that attach to the trial stage of criminal process.

CONCLUSION: EVOLVING THE RIGHT OF APPEAL

The right of appeal is a critical piece of the procedural package afforded to anyone accused of a felony. This Article

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they were arrested"); Jane Fritsch & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at A1 (noting that "a defendant facing life in prison may get a lawyer who spends as little as 20 hours on the case—half a week's work—and is paid as little as $693, less than the cost of the average real estate closing").

Fritsch and Rohde reported that standards cited by the National Legal Aid and Defender Association establish a limit for attorneys of 150 felonies or 400 misdemeanors in a year, but that in New York City, 200 of the Legal Aid Society's lawyers have caseloads beyond the recommended limit. Fritsch & Rohde, *supra* note 127; *see also All Things Considered: Texas Death* (NPR radio broadcast, June 6, 2000) (reporting on argument to U.S.C.A. for the 5th Circuit on behalf of Calvin Burdine, sentenced to death after a trial at which his appointed counsel slept through significant portions).

129. U.S. CONST. amend. VI.

130. Fritsch & Rohde, *supra* note 127 (quoting "Richard M. Greenberg, the attorney in charge of the Office of the Appellate Defender, a nonprofit organization that handles appeals of criminal convictions").

131. Strickland v. Washington, 466 U.S. 668, 691 (1984) (establishing such "reliance" as the "purpose of the Sixth Amendment guarantee of counsel").

adds rationale and context drawn from abatement cases to strands that others have woven into the discourse surrounding the appellate right. Those strands are drawn from the history of the right;[132] the application of the due process clause to that right;[133] and from commentary, dicta, and dissent in cases considering the nature of appeal. Looking at these materials together, it becomes easier than ever before to recognize "a social consensus that [appellate] review is necessary."[134]

Two more strands—from international and domestic sources—also contribute to the discourse. Each, while not controlling as a matter of precedent, nevertheless provides support for the emerging proposition that our system of adjudication must include a right of appellate review.

The International Covenant on Civil and Political Rights, an ambitious contract to which the United States is a party, contains this language: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[135] To impose such norms

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132. *See* Rossman, *supra* note 10 (detailing the history of review in American criminal courts); Arkin, *supra* note 14, at 521–42 (examining history of colonial and early American trial process and concluding that "the conventional belief that, in criminal cases, the trial courts reigned supreme and unfettered by appellate review until the late nineteenth century is very much in error"). *See generally* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS (1987).

133. Professor Arkin offers several approaches to elevating the right of appeal to constitutional status via the due process clause. Under a "historicist" approach, he uses the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to weigh the appropriateness of invoking a new procedural right. *See* Arkin, *supra* note 14, at 542–50. He then also uses an Eighth Amendment approach, drawing on decisional law in capital cases for the proposition that appeal is required as a safeguard against cruel and unusual punishment. *Id.* at 552–58. Finally, he makes an argument under a "fairness model" of due process, drawing on Justice Brennan's opinion in *Jones v. Barnes*, 463 U.S. 745 (1983), for support for the position that "a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding." *Id.* at 756 n.1 (Brennan, J., dissenting). *See* Arkin, *supra* note 14, at 571–78.

134. Meltzer, *supra* note 14, at 8; *see also* ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.10, at 14 (1977) ("The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country.").

135. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). The Covenant was entered into force March 23, 1976, and entered into force in the United States on September 8, 1992. In ratifying the Covenant, Congress added a declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-

upon other nations, to subject them to international sanctions for noncompliance, without ourselves guaranteeing such norms to our own people is hypocrisy.[136] The Covenant provides important support for the stature of appellate review in the global community as well as in domestic law.

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executing." 138 CONG. REC. 8071 (1992). That declaration limits the enforceability of the Covenant within the United States through a private cause of action; *see also* SENATE COMM. ON FOREIGN RELATIONS REPORT TO ACCOMPANY EXEC. E, 95-2, S. EXEC. REP. NO. 102-23, at 19 (1992) (Bush Administration submission to Senate Foreign Relations Committee, explaining that purpose of the declaration that the Covenant is not self-executing "is to clarify that the Covenant will not create a private cause of action in U.S. courts, and that "implementing legislation is not contemplated" since "existing U.S. law generally complies with the Covenant"). Some human rights groups did not agree that there was no need for implementing legislation. *See, e.g.*, HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 2–3 (1993) (calling ratification "an empty act" since United States is not in compliance with the Covenant "[i]n the areas of racial and gender discrimination, prison conditions, immigrants rights, language discrimination, the death penalty, police brutality, freedom of expression and religious freedom"). As for the right of appellate review, at the time of ratification, every state did provide for some form of appellate review, but since states are free to abrogate those rights where they are statutory or to amend them where protected by state constitutions, federal implementing legislation may yet be necessary.

136. *Compare* Thompson v. Oklahoma, 487 U.S. 815, 830–31 & n.34 (1988) (Stevens, J.) (writing for four Justices, reasoning that permitting execution of juveniles "would offend civilized standards of decency," and citing the International Covenant on Civil and Political Rights, American Convention on Human Rights, and Geneva Convention Relative to Protection of Civilian Persons in Time of War), *with id.* at 868–69 n.4 (Scalia, J., dissenting) (contending that international norms should not be imposed through the Constitution of the United States); *see also* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.) (approving execution of defendant for crime committed when sixteen or seventeen years old, stating that "it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant"); *Id.* at 389 (Brennan, J., dissenting) (stating that "[o]ur cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis"). The Court in *Stanford v. Kentucky* went on to explain that:

> While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Id. at 369 n.1 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting) (citations omitted)).

At the opposite end of the telescope, decisional law from our own system demonstrates the possibility of the evolution of certain practices to the level of constitutional right. The recent Supreme Court decision in *Dickerson v. United States*[137] explains, albeit in a manner somewhat unmoored from doctrine, how the *Miranda* warnings could have evolved into rights of constitutional stature. Writing for the majority, Chief Justice Rehnquist explained the Court's reluctance to retreat from the *Miranda* rule, noting that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[138] In addition to the doctrinal bases upon which the Court relied for its characterization of *Miranda*'s prophylactic rules as constitutionally compelled, the Court recognized the role of social acceptance or even expectation in evaluating the constitutional status of a practice.

The fact that all fifty states as well as the federal courts have enacted a mode of appellate review of felony convictions, and that some thirteen of those states provide for such review in their constitutions,[139] is powerful proof of the stature of appeal in "our national culture."[140] Like *Miranda* warnings, the expectation of appellate review following a trial court conviction is deeply embedded in our national consciousness, as exemplified by fictional and filmic protagonists who cry out at the jury's verdict, "I'll appeal!" or who languish—perhaps temporarily—in prison while their destiny is in the hands of an appellate court. It would surprise many Americans to learn that

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137. 530 U.S. 428, 438 (2000).

138. *Id.* (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting) (stating that the fact that a rule has found "'wide acceptance in the legal culture'" is "adequate reason not to overrule" it)).

139. *See supra* note 12; *see also* S. EXEC. REP. NO. 102-23, *supra* note 135, at 19 (1992) (Bush Administration submission to Senate Foreign Relations Committee explaining that "implementing legislation [for the International Covenant on Civil and Political Rights] is not contemplated" since "existing U.S. law generally complies with the Covenant").

140. *Dickerson*, 530 U.S. at 443. The Supreme Court has consistently looked to state legislatures for insight into the popular support for various practices. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 179 (1976) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman v. Georgia*, 408 U.S. 238 (1972). The legislatures of at least thirty-five states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person."); *see also supra* note 14, summarizing post-*Penry* legislation prohibiting execution of mentally retarded persons. Penry v. Lynaugh, 492 U.S. 302 (1989).

there is, in fact, no right to such review as there is a right to trial by jury and a right not to incriminate oneself. By this admittedly imperfect measure of "national culture," the right of appeal deserves a loftier stature than it now enjoys.

While none of these strands would, alone, be sufficient to compel adoption of a new right of appellate review of felony convictions, together they are forceful arguments for formal, legal recognition of an evolution in criminal procedure. The right of appeal has been transformed, such that it cannot now be abrogated by any state or the federal government without inciting profound skepticism about the accuracy or fundamental fairness of the convictions produced in its absence.

While abatement is a mere corollary to this much larger principle, it is an important one. Its peculiar capacity to thrive within the larger legal landscape of a merely conditional right of appeal is the product of the broadly held expectation that appeal follows a conviction and is part of the adjudicatory process. For that reason, abatement plays a useful role in reassessing the debate about the appellate right, and, perhaps, nudges us past the tipping point to a place in which that right is irrevocable.