Error Correction[†]

CHAD M. OLDFATHER[*]

INTRODUCTION

A few years ago, I had a conversation with a senior judge on the intermediate appeals court of a relatively large state. In the course of our discussion, I mentioned my sense that a frequent source of lawyer frustration with appellate courts arises from the phenomenon of a court issuing an opinion that does not engage well with the arguments the lawyer has made.[1] I expected the response to be some version of "we do the best we can." Instead, the judge said something along these lines: "Why should we? We review the case for error, and if we don't find any we move on to the next one."

The judge's reference to reviewing for error was an invocation of one of the institutional functions of appellate courts, and his comments endorsed a conception of that function that this Article will challenge. But first, some background. Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error.[2] The first of these, whether directly or indirectly, is the subject of a vast amount of legal scholarship. Debates over

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* Associate Professor, Marquette University Law School. A.B., Harvard University; J.D., University of Virginia Law School. Thanks to participants at workshops at Marquette and the University of St. Thomas for their constructive feedback, to Michael O'Hear for reviewing an earlier draft, and to Emily Bell, Rachel Delaney, Mike Smith, and Daniel Van Slett for research assistance.

1. For a thoughtful explication of what appellate lawyers expect from courts, see Mary M. Ross, *Reflections on Appellate Courts: An Appellate Advocate's Thoughts for Judges*, 8 J. APP. PRAC. & PROCESS 355 (2006). As Ross diplomatically puts it:

> Appellate advocates hope that the appellate court will address, somewhere in the opinion, all issues that the parties have raised. The failure to do so suggests that the court reviewed the matter so quickly that it missed an issue or saw the issue but then forgot to address it in the written opinion. This apparent lack of care undermines confidence in the outcome. It does so for both sides, although it is particularly difficult for the losing side to accept a decision when the court failed to discuss all issues.

Id. at 362.

2. *See infra* Part I.B.

interpretive approaches,[3] decisional minimalism,[4] the proper role of precedent,[5] and the like are ultimately addressed to the question of how and to what extent courts ought to exercise their lawmaking authority. The second function—error correction—receives comparatively little attention. The judge's remark suggests a certain understanding of what the function entails and a confidence that it is a shared understanding. To the limited extent that commentary addresses this point, the commentary creates the same impression of error correction as something that is straightforward and settled. Consistent with this impression, discussions of the function's purpose, scope, and application are often both cursory and conclusory.[6]

One of the aims of this Article is to establish that the nature of the error-correction function in civil appeals[7] is neither straightforward nor settled. An exploration of doctrine and commentary reveals that there is no uniform conception of what error correction entails.[8] To a considerable degree, this nonuniformity results from our inability to define the notion of "error," which in turn stems from the fact that, as the cliché has it, "we are all realists now."[9] That is, most everyone accepts some version of

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3. The processes of statutory and constitutional interpretation and construction, for example, require courts to make law interstitially by assigning a meaning to the words of the authority and then to go beyond that meaning as necessary to ascertain the legal standard applicable to the given dispute. *See, e.g.*, Lawrence B. Solum, *Semantic Originalism* 67–69 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. The methodology by which a court goes about those processes will often have dramatic effects on the identity of the law that is thereby generated. *Cf.* Robert J. Lipkin, *Which Constitution? Who Decides?*, 28 CARDOZO L. REV. 1055, 1074 (2006) ("[T]he perennial debate over the correct interpretive methodology is the search for which constitution is *our* Constitution. Among the candidates are: the living Constitution, the strictly constructed Constitution, the perfect Constitution, the strategic Constitution, the modest Constitution, the interpretable Constitution, the dynamic Constitution, the settled (or unsettled) Constitution, the sedimentary Constitution, the partial Constitution, the emergency Constitution, and the Constitution in exile." (emphasis in original)).

4. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999) ("A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions.").

5. Arguments from precedent look "forward as well [as backward], asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit [to] the future before we get there." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–73 (1987).

6. *See infra* Part I.A.

7. I suspect that this proposition is also true with respect to criminal appeals. Because of the different aims (and, to some extent, different processes) of the two systems, I have limited the discussion here to the civil system.

8. *See infra* Part I.A.

9. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 177 (3d ed. 2003) ("[T]he phrase, 'we are all realists now', has become a kind of legal-academic cliché." (citation omitted)); Michael S. Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (suggesting that the observation has been made so often "that it has become a cliché to

the claim that law is indeterminate.[10] The architecture of the American appellate process, however, rests on what Paul Carrington has characterized as "simple-minded formalism."[11] That is, the very structure of our judiciary assumes the possibility of a "mechanical jurisprudence."[12] Under such an outlook, the error-correction function would seem to be simple in operation—the appellate court merely considers whether the trial court erred in its determination of what legal standard applies to the dispute before it, in its application of a legal standard to the facts of the case before it, or even, in some situations, in its determination of the facts in the case before it.[13] Failure to do any of these things would be error, requiring correction. The recognition of indeterminacy tends to undermine such a regime. If some questions do not have obviously correct answers, it follows naturally that some of the potential answers to those questions are not clearly wrong, and the process of identifying error is not straightforward.

The erosion of this version of formalism—which minimized, if it did not altogether deny, the role of judicial discretion, judgment, and idiosyncrasy—is not the only pertinent development. The doctrine of harmless error legitimizes the notion that there is a category of errors that are not significant enough to warrant correction and thus encourages an appellate focus on consequence rather than on compliance with doctrine.[14] Meanwhile, appellate courts have modified their processes—such as by

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call it a 'cliché'").

10. Bix notes that realism entailed the following:

> [A] critique of legal reasoning: that beneath a veneer of scientific and deductive reasoning, legal rules and concepts were in fact often indeterminate and rarely as neutral as they were presented as being. It was the indeterminacy of legal concepts that led to the need to explain judicial decisions in other terms.

BIX, *supra* note 9, at 178. I have explored the relationship between the recognition of indeterminacy and the exercise of the lawmaking function elsewhere. Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308 (2009).

11. Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 416 (1987). In describing the simple-minded formalism that characterized the jurisprudential view underlying the Evarts Act, which in 1891 established the current federal appellate system, Carrington writes:

> A chief concern of the time seems to have been a mistrust of the professionalism of the judiciary and of the capacity of individual judges to apply correctly law that was presumed clear and, thus, amenable to application. . . .
>
> Such a legal system required an effective appellate system for one reason: The perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts.

Id.

12. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

13. Perhaps the most prominent example of such an approach is Justice Owen Roberts's opinion for the Court in *United States v. Butler*:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty, [sic]—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.

United States v. Butler, 297 U.S. 1, 62–63 (1936).

14. *See infra* Part I.C.1.

reducing the availability of oral argument and making increased use of so-called "unpublished opinions" and other forms of truncated disposition—in ways that have led to the perception that cases proceed along two distinct tracks and that those involving "mere error correction" have second-class status.[15]

All of this leaves us in a quandary when it comes to fulfilling the error-correction function. Despite the apparent confidence with which doctrine and commentary on the exercise of the function depict its nature,[16] careful consideration reveals fundamental uncertainty regarding the nature of error and the manner in which appellate courts are to go about implementing the error-correction function.

The underlying difficulty may be irremediable. It is unrealistic to expect that law will become fully determinate or that the factors that led to the development of harmless error and the two-track system of review will disappear. It is consequently just as unrealistic to expect that the appellate process can function in a manner consistent with the vision of mechanical jurisprudence on which it was designed. Charging appellate courts with a general duty to determine whether there was error in the proceedings below, then, tends to collapse into, or at the very least to encourage, a relatively broad and unconstrained focus on the justness of the trial court's overall resolution of the case.

This Article's second aim is to suggest an alternative approach. Rather than attempting to define what we mean by "error," we might profitably focus on better delineating what the process of error correction ought to look like. In place of a regime in which the appellate role is conceived of as simply a quest to monitor for error (whatever "error" may be), we should regard the process of appellate review as involving a mechanism for resolving a distinct, derivative dispute between the parties to the appeal. This approach, which we might call "error correction as derivative dispute resolution," follows naturally from the logic of the adversarial system.[17] On this view, the appellate court should view its primary task as resolving a secondary dispute between the parties. The primary dispute is of course the larger suit between the parties. The appeal represents a distinct, derivative dispute in which the appellant asserts a claim of right—that it was deprived by the trial court of something to which it was entitled (or perhaps that the other party was given something to which it was not entitled)—that the respondent disputes.

These two approaches represent contrasting conceptions of the appellate role, which are illustrated by the conversation with which I began this Article. The judge's comments evinced what we might call a *case-based* understanding of his role. By "case-based understanding," I mean a vision of the appellate role as involving a loosely conceived search for error, perhaps even so broadly that it involves merely an inquiry into whether the wrong party prevailed in the trial court. The judge's conception of the appellate role should not surprise us. Intermediate appellate courts—especially in state judicial systems—are often referred to as "error-correcting courts."[18] It is thus (perhaps) unremarkable that a judge on such a court would regard his role as more or less beginning and ending with a search for error committed by the trial court. On this view, the decision whether there is reversible error is the key judicial product; the

15. *See infra* Part I.C.2.
16. *See infra* Part I.A.
17. *See infra* Part II.
18. *See infra* note 34 and accompanying text.

procedures for reaching and justifying that decision have, at best, secondary significance.

The lawyer, in contrast, has more of an *issue-based* orientation. She has asserted that the trial court erred (or did not err) in specific ways, and has backed those assertions with what she regards as appropriate authority. What is more, she is likely to believe in the strength of her arguments.[19] If she loses, she wants more than the simple assurance that the appeals court found no error. She wants to know why and to know that her arguments received serious consideration. The ultimate result of the appeal no doubt matters to her a great deal. But so does the process by which the court reached that result.[20] Her expectations are thus in line with the derivative dispute resolution model.

At first glance, it might seem as though both of these visions of the appellate role will lead to the same results. Error is error, we might imagine, and will manifest itself however a reviewing court goes about approaching its task, just as a mathematical problem has the same answer regardless of how one approaches it. On this view, while it would be nice if the lawyer could get all the feedback she seeks, anything beyond the court's decision itself might strike us as something of a luxury that can be dispensed with as exigencies require. But the analogy to mathematical problem solving fails in two respects.

First, law is not math. The exercise of judgment pervades the creation and application of legal standards in a way that is not true of math. There are indisputably correct answers in math, but not (or at least not always) in law. A court's choice of orientation represents a generalized jurisprudential commitment that can, in turn, influence the conclusions the court reaches. The court that orients itself to the case adopts what we might somewhat imprecisely characterize as a relatively more realist approach, in the sense of regarding the court's task as less governed by conventional legal materials. This approach will affect process as well. A court taking a case-based approach will view the search for error as its core function. The remainder of the appellate process—oral argument, opinion writing, and the like—will take a back seat. An orientation toward the issues, in contrast, entails a relatively more formalist approach, in the sense of setting up a decisional calculus in which the court is more likely to undertake a circumscribed analysis in which it feels constrained by legal rules. An alternative, and perhaps better, way to describe the difference is to suggest that the issue-oriented judge will tend to be more of a technician as contrasted with a judge who decides based on general principles.[21] To the issue-focused court, the entirety of the process will be significant. For example, imagine a court reviewing a trial court's grant of summary judgment. An appellate court with an orientation toward the issues is

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19. *See* Ross, *supra* note 1, at 356 ("[T]he issues selected and the arguments presented by the advocate are, or should be, grounded on a respect for the law. The advocate seeks to persuade the appellate court that professional principles of decisionmaking that are accepted in the jurisdiction support the advocate's position.").

20. For a comprehensive articulation of the lawyer's perspective, see *id*. *See also* Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 139–42 (2005).

21. Stephen B. Burbank, *Making Progress the Old-Fashioned Way*, 149 U. PA. L. REV. 1231, 1232 (2001).

more likely to assess the evidence in light of the applicable standard, while an appellate court with a case orientation will be more inclined to resolve the appeal with reference to its sense of whether the trial court's disposition of the larger controversy between the parties seems appropriate.[22]

Second, even if we posit the existence of correct answers to the legal questions involved in a given case, the two approaches I have outlined are not asking the same question. That is, the correct answer to the question whether the appropriate party prevailed in the trial court (assessed according to the broader substantive law governing the dispute) will not always be the same as the correct answer to the question whether the trial court misapplied some subsidiary legal standard in a way that may have been prejudicial to the nonprevailing party. Consider again an appeal from a grant of summary judgment. The appellate court may have a strong view of the appropriate answer to the question whether the plaintiff ought to succeed on the underlying claim. But a firm belief that the defendant should ultimately prevail on the merits does not compel the conclusion that the defendant should be successful on a motion for summary judgment. Among the reasons for this difference is that the system serves ends in addition to the correct (judged in some global sense via the governing substantive legal standards) resolution of disputes. There is independent value in adhering to prescribed processes, in respecting the plaintiff's right to a trial by jury, and so on, such that an improperly focused appellate court can subvert this value.

As this discussion suggests, there is more at stake here than the resolution of a relatively discrete question of judicial process. Our conception of error—and our processes for addressing allegations of error—tell us something about our understanding of what law is and how legal systems should operate. Questions about how the appellate process should work in this context raise subsidiary questions about the extent to which we want law, in the form of relatively rigid legal rules, to constrain courts, and the extent to which we want the adjudicative process to be oriented primarily toward deciding cases in a manner that is responsive to the parties' contentions.[23]

Part I of this Article explores the conceptions of the error-correction function apparent in doctrine and commentary, situates the function in terms of its relationship to the institutional role of appellate courts, and outlines the ways in which courts' ability to perform the function as it was initially conceived have eroded. Part II outlines the notion of error correction as derivative dispute resolution, and offers some suggestions regarding what that conception of the error-correction function might entail and how it might be implemented.

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22. Note that I have been careful to frame the point in terms of tendencies. Even then, of course, the assertions lack systematic empirical support simply because of the difficulties that would be involved in testing the underlying hypothesis. As I discuss more fully below, however, there is convincing anecdotal evidence of the point, which consists primarily of sitting judges asserting that the phenomenon is real. *See infra* text accompanying notes 92–94.

23. I have considered the question of responsiveness elsewhere. *See* Oldfather, *supra* note 20, at 161–74; Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 754–56 (2006).

I. THE ERROR-CORRECTION FUNCTION OF APPELLATE COURTS

The idea of error seems intuitive. The role of the trial judge is to adjudicate a dispute in a manner consistent with applicable legal standards. We might therefore think of error as arising whenever the trial court fails to implement governing law correctly. On this view, fulfillment of the institutional error-correction function would seemingly require reversal whenever the trial court made such an error. But such a conception fails the test of descriptive accuracy. Not all such errors trigger corrective action by appellate courts. For example, allegations of error that were not properly preserved cannot, in general, form the basis of an appeal.[24] Moreover, the deferential standards of review that govern review of many trial court decisions—and indeed the practical exclusion of many trial court decisions from any sort of appellate review[25]—mean that reversal often does not follow from an appellate court's conclusion that it would have implemented the applicable law differently were it the decision maker in the first instance. And then there is the harmless-error doctrine, which condones appellate affirmance in the case of legal rulings that, while erroneous, are not serious enough to have affected the substantial rights of the parties.[26] Error correction as an institutional function, then, involves more than merely testing for error in this rudimentary sense.

A. Different Conceptions of Error

To this point I have suggested primarily that we might draw a distinction between two conceptions of error. The first is an issue-focused conception, in which the analysis remains largely tethered to the correctness and consequences of some specific act or ruling in the trial court. The second is a case-focused conception, in which the inquiry is more global and equitable in nature and is driven as much by the court's assessment of the overall outcome below as by the relatively technical inquiry I have ascribed to an issue focus. Those two formulations represent alternatives that are both extreme and imprecise. This Part attempts to drill deeper into the problem and to conceptualize somewhat more precisely the different ways in which a judge might conceive of her role in fulfilling the error-correction function.

Doctrine sheds very little light on the question of what the institutional error-correction function entails. Federal Rule of Civil Procedure 61, for example, provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for

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24. *E.g.*, DANIEL J. MEADOR, THOMAS E. BAKER & JOAN E. STEINMAN, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 189 (2d ed. 2006) ("Subject to exceptions for issues of the trial and appellate courts' jurisdiction and for some issues of law . . . , courts of appeals—whether federal or state—generally will not address issues that were not presented to the trial court or rulings that the litigant did not challenge in a timely fashion and in a prescribed manner . . . .").

25. *See, e.g.*, STEPHEN C. YEAZELL, CIVIL PROCEDURE 625 (7th ed. 2008) ("Understanding the barriers to appellate review helps one to comprehend that, as a practical matter, the trial court's decision on most procedural and substantive matters will likely be the only decision.").

26. *See infra* Part I.C.1.

> setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.[27]

The rule sets up a two-step inquiry. In the first step, the court must determine whether there was error; in the second, it must determine whether an error was sufficiently consequential to require appellate action. The standard is indefinite at both stages. First, the term "error" is undefined. This lack of a definition is problematic in that the term suggests a level of formalistic precision in the assessment of trial court rulings that is generally, if not universally, unattainable.[28] This lack of definition is yet another vestige of the "simple-minded formalism" that persists in the DNA of our judicial hierarchy. It is the case, nonetheless, that a trial court may have made an "imprudent deviation from an accepted norm" that will not be regarded as an error of the sort necessary to trigger appellate consideration in the first instance.[29] Second, the standard calls for a second-level, harmless-error analysis that provides very little formal constraint. "Substantial rights" is a term the elasticity of which is perhaps best demonstrated by the fact that it is used to invoke the same function in both the civil and criminal contexts.[30] The interests at stake in the two contexts are different enough that we have developed two more or less distinct justice systems to deal with each interest. One might accordingly expect an approach that is linguistically as well as functionally distinct, much the same way the two systems address burdens of proof.

This lack of doctrinal specificity is unsurprising. As Justice Roger Traynor put it, "There are countless possible variations of error."[31] Some are relatively easy to spot, as

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27. FED. R. CIV. P. 61.

28. One could also generate a critique on a more formalist ground. Consider, for example, an appeal based on an evidentiary issue. The Federal Rules of Evidence seemingly require consideration of the substantial rights of the party in the initial determination of whether something constitutes error: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." FED. R. EVID. 103(a). It is undoubtedly best to regard this rule as simply duplicative—a way of underscoring to courts that there are to be no reversals in cases where substantial rights are unaffected. But it would not be doing undue violence to the language of the rules to suggest that one cannot have an evidentiary error when the ruling in question did not go to substantial rights, that such an error, in turn, cannot provide the basis for reversal unless it affects substantial rights, and that this sort of dual assessment of substantial rights might require slightly different inquiries in the two contexts. No doubt the two inquiries would almost always collapse into one another. My point is simply to underscore the ambiguity that results and to suggest that courts are to assess substantial rights in the initial assessment of error.

29. "[N]on-reversible error" constitutes an act or condition of imprudent deviation from an accepted norm. In lay terms, it is an error. In jurisprudence, however, it does not rise to a quality or magnitude that would require reversing or vacating the judgment of the trial court or granting a petition for review of an agency final order. It is, therefore, not described as an error. In this respect, however, it must not be confused with the doctrine of "harmless error," which has become a term of art.

RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES 732 (2d ed. 1996).

30. *Compare* FED. R. CIV. P. 61, *with* FED. R. CRIM. P. 52 (authorizing courts to take action only with respect to errors that "affect substantial rights").

31. ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 16 (1970).

when a lower court has missed the mandate of a precise rule, such as a rule setting a deadline (though even here there is less certainty than one might imagine).[32] Compliance with a less precise legal rule, however, presents a different situation. The limits of language and the inability to measure the facts against the rule using a single metric require a different sort of reasoning. It is one thing to ask whether a deadline was satisfied, and quite another to ask whether on a given set of facts one party owed a duty to another, acted reasonably, and so forth. And then there are situations where the law expressly grants discretion to the lower court, which requires an appellate court to engage in yet another sort of analysis.[33] Not only is the initial question of whether there was error incapable of precise measurement, but the subsequent question of whether any such error had the requisite effect in the context of the case is inherently fact based and thus context specific. The analysis simply does not lend itself to mechanical jurisprudence.

None of this uncertainty becomes any clearer when one examines case law and commentary concerning the nature of error correction. Although some state intermediate appellate courts consistently emphasize their status as error-correcting courts,[34] one rarely sees much discussion in judicial opinions regarding precisely what that role entails. Most often error correction is simply contrasted with the law-development role assigned to the corresponding court of discretionary jurisdiction.[35] Occasionally one finds—often in a dissent—a slightly more expansive characterization

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32. *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 515 (1988) (discussing the Vermont case of *Hunter v. Norman*, which involved the missing of a deadline by three minutes).

33. Many decisions made by the district judge in orchestrating a bench or jury trial before him—or in more broadly supervising his docket, the litigation process, and the general operation of the district court—involve a certain measure of judgment or on-the-scene presence. These decisions are classified generally as discretionary and are deferred to, within limits, on appeal.

1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.01, at 4-2 (3d ed. 1999).

34. *See, e.g.*, Highlands Ins. Co. v. Patrons Ins. Co., No. 94,601, 2006 WL 1379854, at *4 (Kan. Ct. App. May 19, 2006) (unpublished table decision) ("Because we ordinarily function as an error-correcting court, we are hesitant to be the first tribunal to rule upon a hypothetical summary judgment motion without the benefit of the parties' compliance with the rules associated with such motions."); *In re* Grand Jury Subpoena, 2002-Ohio-5600U, ¶ 22 ("By and large, courts of appeal in Ohio function in an error correction capacity. We leave the creation of public policy to the legislature and the Supreme Court.").

35. *See, e.g.*, State v. Rodriguez, 738 N.W.2d 422, 432 (Minn. Ct. App. 2007) ("The task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court. Therefore, we decline the invitation to extend the Minnesota Constitution's Confrontation Clause to sentencing-jury proceedings. Our analysis is consistent with our role as an error-correcting court and describes what we believe to be the current state of the law." (citation omitted)), *aff'd*, 754 N.W.2d 672 (Minn. 2008). Such courts will also contrast their role with the trial court's fact-finding role. *See, e.g.*, *In re* Children of N.R.M & J.S.H., Nos. C6-00-2128, C6-00-2140, 2001 WL 569030, at *4 (Minn. Ct. App. May 29, 2001) ("The county asks us to correct this deficiency by reviewing the issue of the county's efforts de novo and ruling that the county's efforts were reasonable. While we are tempted to do so, we ultimately are constrained by our role as an error-correcting court, and will not usurp the fact-finding functions of the trial judge.").

of the function, though these opinions rarely if ever purport to be more comprehensive.[36] Thus, for example, a court or a dissenting judge will invoke the error-correction mission as justification for engaging in sua sponte review of issues not raised by the parties.[37] One dissenting judge argued that this sua sponte review is necessary "so that we do not condone the establishment of an incorrect precedent, thereby preventing confusion for the bench and the bar that would ultimately ensue should we allow such errors to stand."[38] But conceptions of the role are malleable enough to support nearly the opposite reasoning: courts have also cited the error-correction function as justification for the requirement that errors be preserved at the trial court,[39] and that proper appellate review requires an adequately developed record.[40]

As the remainder of the discussion in this Part will demonstrate, scholarly commentators have proven somewhat more likely to offer general characterizations of what error correction entails. Even these depictions, however, tend to be relatively brief and undeveloped. What is more, they confirm the suggestion that there is no consensus regarding the precise nature of the error-correction function. Instead, commentators offer varying formulations of what review for error entails. Indeed, one sometimes finds strains of these various conceptions within the same commentary. What follows is a brief taxonomy of possible conceptions. The point is not to be comprehensive, but rather to illustrate some of the differing conceptions of error and

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36. *See supra* note 35.

37. *See supra* note 35.

38. Simmons v. Cordell (*In re* J.L.C.), No. M2004-00538-COA-R3-CV, 2005 WL 3555583, at *4 (Tenn. Ct. App. Dec. 28, 2005) (Highers, J., dissenting); *see also* Tyler v. City of Manhattan, 118 F.3d 1400, 1416 (10th Cir. 1997) (Jenkins, J., dissenting) ("A doubtful proposition should not become the law of this case merely because the parties may assume it to be so, either before the district court or in framing their arguments on appeal. By affirming the district court's legal ruling . . . we would appear to be abdicating an appellate court's crucial role in the correction of legal error.").

39. *E.g.*, State v. Bailey, 924 P.2d 833, 836 (Or. Ct. App. 1996) ("We are an error-correcting court; we reverse or modify trial court rulings only if those rulings are erroneous as asserted by the party assigning or cross-assigning error."); Ozaukee County v. Scott, 2008 WI App 64U, ¶ 7 ("Finally, the court of appeals' primary function is error correcting. We cannot review for error an action the trial court was not given a chance to take." (citation omitted)).

40. *E.g.*, Alstom Caribe, Inc. v. Geo. P. Reintjes Co., 484 F.3d 106, 117 (1st Cir. 2007) ("Given the peculiar circumstances of this case, our error-correction function must operate under severe constraints. There is simply no way that we can replicate exactly the situation that existed on July 27, 2006."); Clay v. Equifax, Inc., 762 F.2d 952, 957 (11th Cir. 1985) ("In the final analysis appellate review of what the district court did is largely an error-correcting function. Ordinarily the appellate court is given the tools to determine if the trial court acted correctly. The unexplained summary judgment order not only denies to the appellate court the tools of review but conceals what the court did and why and leaves the appeals court, like the proverbial blind hog, scrambling through the record in search of an acorn. This is antithetical to proper performance of the review function."); Highlands Ins. Co. v. Patrons Ins. Co., No. 94,601, 2006 WL 1379854, at *4 (Kan. Ct. App. May 19, 2006) (unpublished table decision) ("Because we ordinarily function as an error-correcting court, we are hesitant to be the first tribunal to rule upon a hypothetical summary judgment motion without the benefit of the parties' compliance with the rules associated with such motions.").

how a court's selection of one conception or another might impact the way in which that court goes about its task.

1. Correcting "Injustice"

One version of the error-correction role would be to police trial-level adjudication for injustice. On this view, the appellate court would orient itself to the underlying dispute between the parties rather than to the specific issues presented on appeal, and seek to ensure a "just" result. Taken seriously, such an approach represents a pure form of the case-based judging discussed above and places virtually no limitations on the scope of the appellate court's analysis. A court might, for example, calibrate its implementation of the standard of review and harmless error based on its sense of whether the appropriate party prevailed in the trial court (which might in turn be governed by a relatively rigorous analysis of the apparent facts in light of the governing substantive law or a looser, more equitable assessment). Thus a court convinced that the proper party prevailed below would be less inclined to aggressively implement standards of review to find error and more inclined to deem an error harmless. On the whole, a court that sees its error-correction role as monitoring for injustice would likely be less inclined to reverse in certain sorts of cases, and more likely to make something of a holistic assessment of the merits that is hostile to technicalities. Conversely, a court looking to resolve injustice would feel it appropriate to reverse regardless of what the parties had put before it, to aggressively implement standards of review, and even to engage in sua sponte review.

Of course, one rarely sees a formulation of the error-correction role that calls solely for the correction of injustice. Still, the notion does appear in depictions of the error-correction function,[41] and it is not difficult to imagine a court conceiving of the only

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41. *See, e.g.*, Corcoran v. Universal Guardian Corp., 140 Cal. Rptr. 421, 424 (Ct. App. 1977) ("An appeal to the superior court is for the purpose of correcting errors of the small claims court, thereby improving the quality of justice as between the parties."); Vollmer v. Luety, 456 N.W.2d 797, 806 (Wis. 1990) ("[T]he court of appeals has the same broad discretion under sec. 752.35, as does this court under sec. 751.06. This broad discretion enables it to achieve justice in individual cases, which is consistent with its role as an error-correcting court."); ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS § 1.10 (1983) (suggesting that doing justice in the individual case is a function of appellate courts); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME, at 1–3 (1974) (describing the error-correction function as requiring courts "[t]o correct error in the trial proceedings and to insure justice under law to the litigants"); Comm. on Appellate Skills Training, Am. Bar Ass'n, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129, 137 (1985) ("Fundamental questions such as the functions of the appellate court (error correction and law development), the goal of the appellate judge (to do justice between the parties in accordance with law), and the difference in functions between an intermediate appellate court and a supreme court are ignored in the education of most law students."); Jonathan D. Varat, *Determining the Mission and Size of the Federal Judiciary via a Three-Branch Process: The Judges' Debate and a Reform Menu*, 27 CONN. L. REV. 885, 906 (1995) ("By contrast, emphasizing the error-correcting function of appellate courts points toward a larger number of judges who can undertake the intensive fact and application of law to fact reviews that are needed to do justice in each case.").

errors that need correcting as those occurring at the broader level of the outcome of the case.

2. Correcting Legal and Factual Mistakes

A perhaps more limited conception of the error-correction function would entail the correction of legal and factual mistakes.[42] The primary difference between this limited conception and an injustice-based conception lies in the breadth of the court's focus. A court that regards its institutional mission as correcting injustice will be more inclined to take a case-based approach to its disposition of a case. A court devoted to correcting legal and factual mistakes will, in contrast, focus its analysis at the issue level.

Consider, for example, how this shift could affect the implementation of the harmless-error doctrine. Viewed in the holistic, looking-for-injustice sense, an error will appear harmless unless the result at the case level strikes the reviewing court as wrong. An inquiry directed at a specific mistake, in contrast, will require analysis of the possible connection between that mistake and the verdict. Suppose the appellant alleges that a piece of evidence was wrongfully admitted. A court oriented toward injustice in the larger sense is likely to be unmoved by this allegation unless it is inclined to believe that the verdict was wrong in the sense that the wrong party prevailed. A court taking this narrower view of its role, in contrast, would consider first whether it agrees that the trial court's ruling was mistaken, and next whether the erroneously admitted evidence likely had an effect on the jury's analysis.[43] The court would not, in other words, ask merely whether it thinks the appropriate party prevailed below, or even whether the remaining evidence in favor of the verdict is sufficient to support that verdict.

Although this sounds like a somewhat more constrained view of the appellate role than the correcting-injustice view, it is not necessarily so. One could easily equate "injustice" with "legally and/or factually incorrect," and vice versa. Moreover, a license to look for legal or factual error likewise places little constraint on the breadth of the court's inquiry. As a result, the difference between the two approaches need not be that large in operation. That said, one could imagine a judge acting according to this conception of her role to be less likely to affirm (relative to a judge looking to correct injustice) in the marginal case in which there appears to be an error but the equities weigh in favor of the party that won below. The point is not so much to articulate precisely any difference in scope as to demonstrate the malleability of the approach.

3. Ensuring Uniform Application of Law

One often sees commentators suggesting that the purpose of error correction is to ensure uniformity in the application of law: "With respect to error correction, appellate courts see to it that inferior tribunals obey the law, thereby promoting the perception of

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42. "The second function of appellate courts is one of assuring correctness—to determine, by whatever test is applicable to that particular kind of case, that the trial court correctly decided the questions which were presented in the case." David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 302 (1984).

43. TRAYNOR, *supra* note 31, at 16.

legitimacy by ensuring that the ultimate outcome of litigation is based on impersonal and reasoned judgments."[44] This idea is also a somewhat malleable notion. A concern with uniformity seemingly invokes the core component of the rule of law—the idea that like cases should be treated alike, and that those who are similarly situated ought to be treated similarly.[45] The basic proposition that follows is relatively uncontroversial: an appellate court's role is to ensure that different judges within the jurisdiction apply a given legal standard consistently with respect to one another and across the range of cases that each of them sees.

As with a concept like "justice," uniformity lacks agreed-upon boundaries. No two cases are alike, and no two parties are similarly situated in all their particulars. Doctrine takes care of much of this nonuniformity, making only certain facts relevant for purposes of triggering a rule's application, and thus defining the basic parameters of uniformity. Within those parameters, however, courts are free to emphasize certain facts to support ruling in a particular direction. Here, then, the emphasis need not be on justice in the individual case or on the presence of any kind of error. Instead, courts would strive to achieve uniformity with respect to treatment of the significant, rule-triggering facts that the courts choose to emphasize. Uniformity thus provides a promising constraint on the notion of error, but it is one with limitations. Because of individual factual variation (and thus variation in the competing policy considerations that will come into play in different cases, as well as in their respective strength), the assessment of uniformity will often involve an apples-to-oranges comparison of incommensurable factors. What is more, uniformity becomes meaningful only when an issue arises frequently enough to establish some baseline of treatment. Finally, a focus on uniformity tells us little about the content or processes of review. A court could be uniformly lax or aggressive in its conception of error, focusing broadly on the dispute as a whole or narrowly on specific questions.

4. Review of Lower-Court Processes

Another potential definition of error would focus on the appropriateness of the trial court's processes in adjudicating the case.[46] At least with respect to fact finding, the

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44. David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 75 (2003).

45. *E.g.*, Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185, 192 (2008) ("The requirement that like cases be treated alike is one of the key elements of the Rule of Law.").

46. One set of commentators states the ideal of review for error as follows: "[T]he reviewing court should systematically scrutinize the entire trial record to identify procedural mistakes. Substantive mistakes should not be considered." Anna-Rose Mathieson & Samuel R. Gross, *Review for Error*, 2 LAW PROBABILITY & RISK 259, 260 (2003). Mathieson's and Gross's conception of procedural mistakes is somewhat more expansive than my definition, however. One also sees shades of a process-based approach in this definition:

> In review for error, the governing legal rules are assumed to be clear, and the only issues are whether the factual findings of the tribunal below are supportable under the appropriate standard of review, whether the law was correctly applied to the facts, and whether the procedures followed were improper or unfair.

Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 796 (1983).

application of law to facts, and more managerial aspects of the trial court's handling of the case, the focus would be not on the trial court's conclusions, but instead on the manner in which it performed those tasks. The inquiry might center on such considerations as whether the trial court appeared to give due regard to the arguments of the parties, whether it provided reasons for its decision, or whether the lower court's adjudication was sufficiently impartial and reasoned.[47]

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The alternative formulations of the error-correction role outlined in the preceding Part represent only a partial list of the possible ways in which an appellate court could conceive of this mission. A court might also seek to foster the perception of legitimacy,[48] ensure accountability,[49] or reinforce the idea that the resolution of a case is a product of a legal system rather than of an isolated decision maker.[50] Of course, none of these conceptions of the error-correction role is descriptively accurate in the sense that error correction alone can fully account for the realities of appellate adjudication. In reality, for example, not even a trial court's clear legal error will necessarily be corrected. First, the issue must have been appropriately preserved for appeal—unless of course it is plain error[51] or the appellate court decides on its own motion to review an issue that no one raised.[52] Second, the trial court's error must be,

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47. With respect to error correction, appellate courts see to it that inferior tribunals obey the law, thereby promoting the perception of legitimacy by ensuring that the ultimate outcome of litigation is based on impersonal and reasoned judgments. Further, the expectation by lower court judges that many, though not all, of their decisions will be reviewed, can help to prevent error by encouraging those judges to exercise greater caution in performing their duties.

Frisch, *supra* note 44, at 75.

48. *Id.*

49. [A]ppellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies. The traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decision-maker.

PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2 (1976).

50. The availability of the appellate process assures the decision-makers at the first level that their correct judgments will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and it assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system. Thus, the review for correctness serves to reinforce the dignity, authority, and acceptability of the trial, and to control the adverse effects of any personal shortcomings of the basic decision-makers.

Id.

51. *But see* MEADOR, ET AL., *supra* note 24, at 210 ("It is controversial whether the plain error doctrine even applies to civil cases.").

52. Such sua sponte decision making by appellate courts is controversial. *See generally* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002); Barry A. Miller, *Sua Sponte Appellate Rulings:*

in the appellate court's judgment, "substantial."[53] An appellate court's failure to correct an unquestionably wrong legal ruling following such an analysis does not necessarily represent an abandonment of its error-correction role so much as a conclusion that, in that particular case, other systemic ends should govern the result.

To put the point somewhat more broadly, it simply is not possible to extract a single, coherent justification, and hence definition, of the error-correction function from among the alternatives. All of the various possibilities identified, and undoubtedly others, are at least potentially part of a broader mix of goals of appellate review. At least when stated with some generality, none of these possibilities is objectionable. The difficulty comes in the lack of consensus regarding the proper aims of review for error and the consequent malleability of the practice. By emphasizing a preference for one vision over others, or by implementing these visions more or less expansively from one case to the next, a court can find justification for exercising or not exercising the error-correction function in just about any case. By privileging all of these visions, we effectively privilege none of them, and what results is a world in which courts can pick and choose from one case to the next.

B. Foundation, Purpose, and Two Conceptions of Error

Most discussions of the functions of appellate courts suggest that there are two functions: error correction and law declaration.[54] Of these functions, the first—error correction—is seemingly the most straightforward and, consequently, has received

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When Courts Deprive Litigants of an Opportunity to Be Heard, 39 SAN DIEGO L. REV. 1253 (2002).

53. The question of when an error is "substantial" introduces its own uncertainties. *See* TRAYNOR, *supra* note 31, at 15–16.

54. *See, e.g.*, ROBERT J. MARTINEAU, KENT SINCLAIR, MICHAEL E. SOLIMINE & RANDY J. HOLLAND, APPELLATE PRACTICE AND PROCEDURE: CASES AND MATERIALS 6–31 (2d ed. 2005); MEADOR ET AL., *supra* note 24, at 4–9. This listing is not to suggest that these are the exclusive functions of appellate courts, but just the most prominent; some commentators have identified others. *E.g.*, Robert J. Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63 MARQ. L. REV. 163, 167 n.15 (1979) (citing authorities identifying other functions and identifying the additional function of "doing justice" between the parties).

Steven Shavell has questioned the suggestion that there are legitimacy benefits that flow from the appellate process that are distinct from error correction. In his view,

> 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. Hence, the goal of legitimating the legal system should not be taken as a ground for the appeals process distinct from error correction.

Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 426 (1995). Where Shavell seems to go astray is in his failure to recognize that there appear to be psychological benefits that flow from the opportunity to meaningfully state one's case apart from whether one is successful. There are process values apart from correctness that can be vindicated. *See generally* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1992) (analyzing the public's low confidence in lawyers, judges, and the American jurisprudential system as a whole). An appeal may satisfy those values not because the litigant has won—in other words, not because the litigant perceives an error to have been corrected—but because the litigant comes away from the process feeling that he or she was given an audience. *Id.* at 887–89.

relatively little attention in the scholarly literature on appellate courts.[55] Law development, in contrast, is the focus of a somewhat greater range of scholarship.[56] Indeed, to a greater or lesser extent, virtually all discussions of judicial lawmaking are discussions of how appellate courts ought to go about exercising their law-declaration function.[57] This focus is understandable. Law declaration is the more visible of the two functions, and may be the function to which appellate judges themselves prefer to devote their energies.[58]

In operation, these two functions often work in tandem. Every appeal necessarily involves at least one claim that the trial court erred.[59] As a consequence, appellate courts can create or refine law only in the context of exercising the error-correction function. The nature of the claimed error will vary, and with it the opportunity for lawmaking. Sometimes the appellant will argue that the trial court wrongly applied established law. In other cases, the appellant will argue that the trial court answered an open question of law in the wrong way. In the former case, the error-correction role is apparent. In the latter, one could plausibly argue that it is inappropriate to characterize the trial court as having erred. Given the expectation that courts will decide the issues presented to them,[60] courts treat both situations as though each has a clear answer. As a result, no matter what the basis of the appellant's claim, a trial court's determination will be treated as erroneous by an appeals court that resolves it the other way.[61]

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55. This statement is true at least in the sense that discussions of the error-correction function itself tend to be quite perfunctory. *See supra* Part I.A. That is not to suggest that there are not works considering various components of the error-correction function, as the discussion herein will reveal.

56. This statement is not to suggest that the literature on the law-development function is as developed as it might be, as I have noted elsewhere. *See* Oldfather, *supra* note 10.

57. *See supra* notes 3–5.

58. Stephen Burbank suggests that, at least in the federal courts, some appellate judges may prefer current institutional arrangements, which, for the most part, allow them to focus on law declaration and off-load much of the work of error correction on staff lawyers and law clerks. Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 32–33 (2005).

59. "[I]n order to obtain an appellate decision, one must take and complete the appeal while the issues remain alive and the parties continue to have a legally cognizable interest in the outcome." MEADOR ET AL., *supra* note 24, at 36 (describing the application of mootness on appeal).

60. *See* Oldfather, *supra* note 20, at 164–81.

61. Karl Llewellyn referred to this idea as the "one single right answer" idea. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 24–25 (1960). As Dan Simon has put the point more recently:

> [M]uch of what was supposedly undone by the realist critique seems to persist until this day. The judicial opinion continues to be based largely on syllogistic forms of argumentation; judges maintain remarkably high levels of confidence in their decisions; and opinions portray the chosen decision as singularly correct. Opinions are overstated, rigid, seemingly inevitable. The rhetorical style is that of closure. The judge is depicted as having little choice in the matter: the decisions are strongly constrained by the legal materials.

Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 10–11 (1998) (citations omitted).

The converse is arguably not true. An appellate court's determination and declaration that a trial court did or did not commit error need not involve the declaration of law.[62] Suppose, for example, an "easy case" in which the trial court acted contrary to the prescriptions of a bright-line rule that it had no discretion to suspend. In such a situation, the appellate court could conclude that the trial court erred and, in doing so, add nothing to the body of law. In fact, by their actions, most appellate courts have taken the position that the category of cases in which it is possible to exercise the error-correction function without creating law extends well beyond the sort exemplified by my simple hypothetical. The device of the "unpublished," nonprecedential opinion, which accounts for over eighty percent of all appellate dispositions in the federal courts of appeals,[63] is, at least in theory, reserved for those cases that do not present a novel question of law and involve only error correction.[64]

Indeed, one of the assumptions underlying the creation of our current appellate structure is that the appellate role necessarily involves nothing but error correction. As Paul Carrington has suggested, it was a "simple-minded formalism" that reigned at the time of the passage of the Evarts Act,[65] which, in 1891, established the basic structure of the current federal appellate system.[66] The underlying jurisprudential view was one in which the law "was presumed clear and, thus, amenable to application."[67] Therefore, there was no reason to suppose that appellate courts could or should make law, and consequently no reason for appellate courts to exist other than as a means for ensuring that trial courts followed the law.[68]

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62. Those appellate courts that have spoken to the issue seem to regard this as more than mere possibility and claim to define their roles based on the distinction between cases involving law declaration and those involving only error correction. *See infra* note 90.

63. *See* OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 48 tbl.S-3 (2008), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

64. *See, e.g.*, 3 JUDICIAL ADMIN. DIV., AM. BAR ASS'N, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.37(b) (1994) [hereinafter STANDARDS RELATING TO APPELLATE COURTS] (proclaiming that formal publication should be reserved for opinions that establish a new rule of law, alter or modify an existing rule, apply an established rule to a novel fact situation, involve a legal issue of "continuing public interest," criticize existing law, or resolve an apparent conflict of authority). Not everyone shares the view that these cases do not involve law declaration. Judge Richard Arnold, for example, took the position that nearly every appellate disposition created at least some small increment of law, if only by lending additional credence to the continuing validity of the core legal proposition implicated and demonstrating that it applies to the unique facts of the case at hand. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222–23 (1999).

65. Circuit Court of Appeals Act (Evarts Act), ch. 517, 26 Stat. 826 (1891) (repealed 1948).

66. Carrington, *supra* note 11, at 416.

67. *Id.*

68. *See, e.g.*, CARRINGTON ET AL., *supra* note 49, at 3 ("Until recent decades, it was customary to conceal, even from ourselves, the creative and political aspects of this function; we were given to proclaiming that judges do not make law."); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 2 (1976) ("[J]udging was not regarded in the nineteenth century as an exercise in making law. Rather, law was conceived of as a mystical body of permanent truths, and the judge was seen as one who declared what those

In assessing the development of the error-correction function, it bears keeping the function's historical primacy in the appellate process in mind. It is likewise useful to pause to consider the role of appellate review for error in the larger functioning of the civil justice system. If we accept the proposition that the primary purpose of that system is to provide a peaceful means of dispute resolution,[69] then it seems to follow that the purpose of an error-correction mechanism would be to improve the quality of decision making within the system.[70] This conclusion is, in turn, based on the

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truths were and made them intelligible—as an oracle who 'found' and interpreted the law."); Carrington, *supra* note 11, at 416–17 ("Such a legal system required an effective appellate system for one reason: The perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts. No one thought appellate courts necessary or useful in making law or policy. . . . Certainly it was very far from the minds of those who adopted the Evarts Act that the intermediate courts of the United States would ever be taken seriously as sources of federal law." (citation omitted)).

Whether the participants in the system universally adhered to this view remains open to question. Recently, Brian Tamanaha has taken to calling the conventional understanding into question:

> Jurists in the formalist age held views of law and judging as realistic as we do today. Judges, lawyers, and theorists did not widely think of judging as a mechanical or deductive process. Just about everything the *realists* said about judging was said decades earlier by individuals who have been identified as important *formalist* thinkers, as well as by many others in legal circles, including accomplished judges.

Brian J. Tamanaha, *The Bogus Tale About the Legal Formalists* 5 (St. John's Sch. of Law Legal Studies Research Paper Series, Paper No. 08-0130, 2008), *available at* http://ssrn.com/abstract=1123498 (emphasis in original); *see also* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 154 (1998) (arguing that the legal literature of the nineteenth century "demonstrates that the creative power of the judge was not only acknowledged but celebrated well before the emergence of legal realism").

Regardless of whether the realists uncovered something that was not previously apparent, or merely made more of a show of it, it does not strike me as an overstatement to suggest that judges, then and today, purported to act under Llewellyn's "one single right answer" ideology. *See* LLEWELLYN, *supra* note 61, at 24. Whether the recognition of indeterminacy predated realism or not, what seems clear is that the design of the system rests on the understanding that judges are more constrained by rules than they actually regard themselves to be (or at least to portray judges as acting on this understanding). This understanding is understandable. As Judge Posner recently wrote:

> [J]udges (most of them, anyway) talk a deferential game even when they are playing a discretionary one. They do this today, and it is understandable why they did it even more emphatically in [the pre-Constitution era]. For the less secure a judge's authority—and judicial authority was far less secure then than it is in the United States today—the greater his need to represent himself as merely an oracle of the law. He does not decide cases; it is the law, speaking through him, that decides them. Rather than being a "decider," he is merely a "discerner." To criticize a judicial decision is to criticize the law itself.

Richard A. Posner, *Modesty and Power*, THE NEW REPUBLIC, Dec. 31, 2008, at 38, 40 (reviewing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008)).

69. *E.g.*, Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–38 (1975); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 303–06 (1989).

70. *See* Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE

supposition that one of the subsidiary aims of the civil justice system is to resolve disputes accurately, with accuracy for this purpose being defined along the lines of "in the manner most consistent with the governing substantive law."[71] This vision of appellate review for error is consistent with the empty formalism underlying the Evarts Act and thus, not surprisingly, works well as an explanation of the general contours of our system of appellate review. Consider, for example, the basic division of responsibility between trial and appellate courts, which allocates authority based primarily on perceived advantages of institutional competency. By and large, trial courts retain responsibility for factual determinations while appellate courts have the power of plenary review over questions of law. This division reflects an understanding of the comparative institutional competencies of the two types of courts, with trial courts having greater access to the information needed to resolve factual disputes and appellate courts presumed to have superior skills in resolving questions of law.[72] If this understanding is correct, and certainly the phrase "error correction" suggests an understanding that improved accuracy is the goal, then it also follows that courts' ability to perform the function will depend on their ability to assess accuracy in the sense suggested above.

In this regard, it is significant that most observers of the legal system no longer accept the version of formalism held by the creators of the appellate structure.[73] Instead, as the saying goes, "we are all realists,"[74] at least in the sense that most of us accept some version of the indeterminacy thesis. Whether it is because law simply does not provide a single, correct answer to some category of legal questions, or because we lack the capacity to determine what those answers are,[75] we acknowledge our inability to state with certainty in all cases what the law is and how it ought to be applied in a given case. We likewise appreciate the difficulties inherent in determining the facts to

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L.J. 62, 66–67 (1985) (discussing the goal of correctness in attempting to find the justifications for the availability of a right of appeal in every case). For an overview of the "truth-finding theory" of the adversarial process, see Martin P. Golding, *On the Adversary System and Justice*, *in* PHILOSOPHICAL LAW 98, 106–12 (Richard Bronaugh ed., 1978).

71. That is, of course, a supposition on which not everyone would agree. Even without buying into the suggestion that the legal system generally generates results that bear little relation to governing legal standards, one might conclude that it is at least occasionally desirable for courts to reach results inconsistent with articulated law. It might be, for example, desirable to maintain an absolute formulation of a legal standard on the theory that such a formulation will do a better job of protecting core values than would a more flexible statement of the rule, even while understanding that courts will occasionally have to manipulate the standard to reach acceptable results. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172–77 (1982). Still, it seems appropriate to conclude that, at least as a general matter, the system is designed to achieve accuracy in the sense suggested.

72. I have considered comparative institutional competence in the context of appellate review of factual and legal questions elsewhere. Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2004) (factual questions); Oldfather, *supra* note 10 (legal questions).

73. Indeed, I have probably understated the matter. It is probably more accurate to say that no informed observer accepts this vision of formalism. *See* Martin Stone, *Formalism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166, 166–68 (Jules Coleman & Scott Shapiro eds., 2002).

74. *See supra* note 9.

75. *See* Oldfather, *supra* note 10, at 324–25.

which the law is to be applied.[76] Thus, the present institutional design of our appellate courts rests on an outmoded understanding of how the law works. It should not surprise us that this transformation has affected the ways in which error correction is implemented by impacting our conception of error. Much of the remainder of this Part will explore both the potential effects of this jurisprudential shift on our conceptions and the implementation of the error-correction function. As we will see, the notion of error now lacks the ready-made content that followed from the formalist vision of the law. We no longer conceive of legal questions as having black-and-white answers, and, as a result, we are less able to know when an answer is erroneous.

Our conception of error is variable in another respect, which depends in part on whether one accepts the normative desirability of formalism as an ideal toward which the system should strive, regardless of the unlikelihood of its full attainment. An acceptance of the virtues of formalism suggests a commitment to viewing error from a systemic perspective rather than within the context of the individual case. That is to say that formalism entails decision according to rules, and that rules, because they necessarily involve generalization, are both under- and overinclusive.[77] From the systemic vantage point, the most desirable definition of error is one that comes as close as possible to attaining consistent compliance with the articulated legal standards applicable to the dispute. This definition is desirable simply because any approach to error that is not sensitive to compliance with rules will tend to undermine the rules. From this broader perspective, then, some version of formalism is desirable.

But formalism—viewed as some version of a commitment to decision according to rules—will not always generate results that we would naturally conclude are accurate or, at least, not erroneous in the context of individual cases. This means that a result that is "correct" in a legal sense, when viewed from the systemic perspective, may well appear to be incorrect in the sense of being unjust on the facts of the case. Viewed within the context of the individual case, then, one might be more attracted to a conception of error that is more global and equitable in nature. Rather than asking, for example, whether the trial court's grant of summary judgment to a defendant was appropriate under the governing standard and spending the time to carefully assess the nonmoving party's evidence in light of applicable law, an appellate court might ask the slightly different question of whether it thinks, in practical terms, the plaintiff will be able to convince a jury to reach a verdict in its favor[78] or whether it thinks a jury should reach such a verdict. Or a court reviewing an argument that the trial court erroneously

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76. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 73–74 (1949) (distinguishing between those realists who were "rule-skeptics" and those who were "fact-skeptics").

77. *See, e.g.*, Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 847 (1987) (reviewing RONALD DWORKIN, LAW'S EMPIRE (1986)) (noting that the goal of getting any given case right "and the tradition embracing it are in tension with the very idea of a rule, for implicit in rule-based adjudication is a tolerance for some proportion of wrong results, results other than the results that would be reached, all things other than the rule considered, for the case at hand").

78. *Cf.* Johnson v. Rogers Mem'l Hosp. Inc., 616 N.W.2d 903, 909–10 (Wis. Ct. App. 2000) (Dykman, J., dissenting) ("It seems, therefore, that the majority has invented a seventh policy factor: 'the plaintiff will be unable to prove a negligence case.' To me, that goes far beyond the error-correcting function of this court."), *rev'd*, 627 N.W.2d 890 (Wis. 2001).

admitted or excluded a piece of evidence might reach its conclusion based on its assessment of prejudice or fairness without first considering threshold admissibility requirements.

To some extent this dichotomy may be a false dichotomy. There is a sense in which this conflict between the generalized demands of a legal rule and the equities of its application in a given case is accounted for via standards of review. Sometimes a reviewing court is expressly charged with determining whether the lower court reached the "right" answer in a relatively precise sense, as is most often the case with questions of law.[79] Other times, however, the appellate task is better characterized as checking to see whether the trial court's decision was not obviously wrong, as in abuse-of-discretion review,[80] or was rendered via the appropriate process. For purposes of this Article, at least, I am not critiquing this sort of review when it is doctrinally sanctioned. My focus is instead on situations where the reviewing court takes the equitable approach beyond the limits of doctrine, such as, for example, adjudicating an abuse-of-discretion issue not with respect to the specific decision under review but rather with an eye toward the overall equities of the lawsuit as a whole.

C. The Erosion of Error

The problem posed by the implementation of the error-correction function is not merely a product of the fundamental tension that sometimes arises between judging a case according to law and judging it based on its particular facts. Things have been complicated by our recognition that judging according to law is not as straightforward as it might once have appeared. Predominant jurisprudential understandings have evolved in ways that have rendered judges more attuned to the difficulties and pitfalls of issue-focused error assessment while at the same time making case-based error assessment seem less transgressive. From the perspective of Evarts Act era formalism, issue-focused error correction is, at least in theory, a relatively straightforward undertaking. If the correct answer merely awaits discovery within the existing legal materials, then the appellate court's task is set. It can measure the trial court's determination of the issue in question against the applicable legal materials and reason its way to the "correct" conclusion. The task is entirely retrospective in nature, and the fit between resolving individual cases and enhancing systemic accuracy is thus relatively tight.

The relationship takes on a different cast once one recognizes the essential incompleteness of a rigidly formalistic approach. If correct answers do not always exist and mechanical jurisprudence is not workable, then the notion of systemic accuracy has less content. The judicial task does not merely involve a backward-looking assessment of the fit between the legal standard and the trial court decision. A court must instead make an initial determination regarding how to characterize the applicable rule of law, which requires an additional, forward-looking consideration of the likely effects of alternative formulations. The extent to which this initial determination is necessary will, of course, vary from case to case. The essential point, however, is that, in some

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79. *See* Oldfather, *supra* note 10, at 312–16.

80. *See* Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 412–14 (1984) (discussing the abuse-of-discretion standard).

substantial set of cases, there is no predetermined correct answer. Given that starting point, it may not seem as wrong (or even wrong at all) to allow equitable factors to drive a decision to a greater extent.

I do not mean to suggest that legal questions once had correct, ascertainable answers, or even that judges and lawyers were once uniformly blind to the occasional inconclusiveness of legal rules. To be sure, it would not be implausible to suggest that there was a time in our nation's history when a significantly larger portion of legal questions had clear answers simply because there was less law and more consensus concerning the goals of what law there was.[81] But there has always been indeterminacy, and courts have always been susceptible to the pull of equitable considerations. Now, however, there appears to be a greater recognition of this dynamic.[82] While that change may not be apparent on the face of judicial opinions (which, as noted above, still read as products of formalism), its existence is suggested by two sets of developments that, while undoubtedly the product of other factors as well, are consistent with the realization that systemic accuracy is difficult to achieve. The first development is the rise of the harmless-error doctrine. The second is the relegation, at least in the federal court system and probably more broadly, of cases involving mere error-correction to "second class" treatment. Both developments roughly coincided with widespread acceptance of the indeterminacy of law. The developments are not, as I have suggested, surprising. If we accept the proposition that there are not right answers to legal questions or that determination of what the right answers are would require effort out of proportion to the stakes in a given case, then we are likely to regard error correction as either impossible or not worth doing.

1. The Rise of Harmless Error

The concept of harmless error is less than a century old. Prior to the Judiciary Act of 1919,[83] American courts followed the English rule that an appellate court's determination that a trial court erred required reversal no matter how inconsequential the error.[84] The justification was grounded in notions of institutional competence; the thinking was that an inquiry into the harmfulness of an error required appellate courts to engage in the type of factual assessment for which they are unsuited.[85] Procedurally, one could describe the approach as one of institutional perfectionism. It contemplates a

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81. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 98 (1996) [hereinafter POSNER, FEDERAL COURTS] (discussing the increase in the number of federal rights, and thus potential claims, in the period since the 1960s). Less law increases the likelihood of consensus with respect to the goals of law, which, in turn, increases the extent to which judges will view themselves constrained by law. *See* RICHARD A. POSNER, HOW JUDGES THINK 85–87 (2008) [hereinafter POSNER, HOW JUDGES THINK].

82. As Paul Carrington has observed, judges of an earlier era were trained as formalists, and thus less inclined to recognize indeterminacy. *See* Carrington, *supra* note 11, at 423–25.

83. Judicial Code of Feb. 26 1919, ch. 48, Pub. L. No. 65-251,§ 269, 40 Stat. 1181 (repealed 1948).

84. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 9–10 (2002); John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 398 (1997).

85. *See* Walker, *supra* note 84, at 398.

solely issue-focused analysis, with no room for consideration of how the asserted error relates to the case of which it is a part.

It is not difficult to appreciate how such a regime could easily lead to something other than "justice," in a broad sense, between the parties.[86] Indeed, the Judiciary Act's modifications are attributable largely to the sense that appellate courts were "impregnable citadels of technicality."[87] In response to this perception, the Judiciary Act specifically authorized courts to reverse only based on errors that "affect the substantial rights of the parties."[88] Among the primary motivations for the change was "[t]o substitute judgment for automatic application of rules."[89] This substitution marked the beginning of the implementation of harmless error.

The genesis of harmless error also introduced a decoupling of the two concepts of error that I have identified. Perhaps more accurately, it created the potential for the case-based conception of error, which it in turn decoupled from issue-based error. In a world with the harmless-error doctrine, the mere existence of issue error, in the sense that the trial court did not accurately apply some legal standard in a specific context, no longer automatically triggers the institutional error-correction function. In theory, this decoupling need not entail a different overall conception of error for purposes of implementing the error-correction function. The appellate court should still be policing the trial court's application of law. But in a world in which error is not so easily defined, and in which error is only consequential if it had a substantial effect on the rights of the parties, it is easy to imagine a court succumbing to the temptation to cut corners. This corner cutting could begin with a simple decision to forego looking for issue error and jumping straight to the question of whether the asserted issue error, assuming it exists, was substantial.[90] That, in turn, could lead to the sort of analysis in which the reviewing court assesses not the potential effect of any asserted issue error on the judgment, but rather whether it is satisfied with the overall result below.

Note that I have been careful to outline this scenario in terms more suggestive of possibility rather than reality. It is difficult to assess empirically whether this slippage has actually taken place and, if so, to what extent. But there is compelling, albeit

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86. *See supra* note 78 and accompanying text.

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

88. § 269, 40 Stat. at 1181 ("On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.").

89. Kotteakos v. United States, 328 U.S. 750, 760 (1946).

90. *See, e.g.*, Mfrs. Hanover Trust Co. v. Drysdale Sec. Corp., 801 F.2d 13, 19 (2d Cir. 1986) ("We need not resolve this question to hold, as we do today, that even assuming repos are not securities, the district court's instruction that they are securities, if erroneous, constitutes mere harmless error."); W. Spring Serv. Co. v. Andrew, 229 F.2d 413, 420 (10th Cir. 1956) ("In any event and assuming without deciding that the partnership was improperly joined, it is harmless error which does not require reversal of the judgment."); Frym v. Ramsey, 243 So. 2d 23, 26 (Ala. 1971) ("Therefore, even assuming without deciding that the register committed error in determining that the unwithdrawn profits (if there were any) became capital, then this holding would be harmless error."); Hernandez v. Atieh, No. 14-06-00582-CV, 2008 Tex. App. LEXIS 3727, at *9–10 (Tex. App. May 20, 2008) ("Assuming, without deciding, that inclusion of the question of Sisa's negligence was error, we conclude the error was harmless.").

anecdotal, evidence nonetheless. Anna-Rose Mathieson and Samuel Gross report from their interviews with Michigan state trial judges that the judges "all believed that the Michigan appellate courts engaged in result-oriented review on appeal."[91] Judge Harry Edwards has spoken to this issue in the context of criminal appeals. He wrote of the danger arising "when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt. This approach is dangerously seductive, for our natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence."[92] The bottom line, he suggests, is that "more often than not, we review the record to determine how we might have decided the case; the judgment as to whether an error is harmless is therefore dependent on our judgment about the factual guilt of the defendant."[93] There is no reason to believe that appellate judges might take these sorts of analytical shortcuts in criminal cases but not civil cases. Indeed, one ought to expect that judges ought to feel even less constrained in civil cases simply as a function of the different standards of proof in the two types of cases.[94]

The doctrine of harmless error thus has two potential habituation effects that might impact the manner in which the error-correction function is implemented. First, it encourages an appellate court to undertake a holistic view of the dispute before it and allows its focus to drift from the particular contested legal issue. Second, and relatedly, it encourages those courts to stray beyond their core institutional competencies. Consistent with the pre–Judiciary Act understanding, it is difficult for an appellate court to assess the extent to which an error might have affected a decision under review without engaging in some weighing of evidence and making credibility determinations.[95] Both of these effects bring the potential of transforming the reviewing court from an error-correcting court into an error-creating court, at least under the formalistic, oriented-toward-systemic-accuracy conception of error correction outlined above.[96] This transformation occurs not only in the sense that the courts will be led to perpetuate issue errors by ignoring them in favor of case-level assessments, but also case errors due to appellate courts' relative competency deficit in assessing facts.

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91. Mathieson & Gross, *supra* note 46, at 264.

92. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995).

93. *Id.* at 1171.

94. Given that the government must establish a criminal defendant's guilt by proof beyond a reasonable doubt, it seems reasonable to believe that an appellate court ought to be relatively more hesitant to conclude that an error did not affect a defendant's rights than in the context of a civil case, where a plaintiff is required merely to prevail by a preponderance of the evidence. *See* Oldfather, *supra* note 72, at 502–04.

95. *See id.* at 488–89 (discussing contentions that harmless-error review requires appellate courts to act as "a super jury" (citation omitted)).

96. *See supra* note 78 and accompanying text. If we assume that appellate courts are generally inferior to trial courts and juries when it comes to the finding of historical facts, then an appellate court substituting its judgment for that of the lower-level fact finder is likely to reach a conclusion further from that which is objectively appropriate, and thus "create" error by, over the run of cases, reaching results that depart from what the dispassionate application of law to fact would generate.

2. The Two-Track Review System

It should not surprise us that more open recognition of indeterminacy would have an effect on the manner in which courts exercise the error-correction function. If one believes that there are correct, ascertainable answers to legal questions, then one will be inclined to regard the process of error correction as something that is worth doing. Indeed, one is likely to regard error correction as the only task that it is possible for appellate courts to engage in.[97] We might accordingly expect appellate courts operating under that worldview to have accorded similar treatment to all the cases on their docket. No doubt there were differences among cases in terms of newsworthiness that continues to differentiate cases, as well as in terms of the difficulty involved in ascertaining the right answer. But, at bottom, all involved the same fundamental task—that of determining whether the trial court erred.

Once one accepts the related propositions that some legal questions do not have preordained answers, and that, as a consequence, courts necessarily make law in the course of resolving legal disputes, one acknowledges that all cases are not fundamentally the same. There continue to be "easy cases" with correct, ascertainable answers.[98] And there are some that require only an incremental amount of law to be made.[99] But others much more clearly require the court to engage in law declaration. In a broad sense, then, the perceived appellate docket is transformed from one involving cases falling into a single type to one presenting two fundamentally different types of cases.

Just as the introduction of harmless-error analysis facilitated the decoupling of issue error and case error, the recognition of indeterminacy and the lawmaking role of appellate courts revealed a basic distinction based on which cases might be treated differently. Consistent with this distinction, appellate courts have de-emphasized the work of error correction over the past several decades. What has emerged is what some commentators have described as a "two-track" system of appellate review[100] where only a relatively small subset of all the cases that come before appellate courts get what we might regard as the "full" treatment. Under this approach, which some commentators have termed the "Learned Hand model" of appellate review, judges engage in relatively leisurely study of the cases that come before them—they spend time with the briefs, hold oral arguments, deliberate amongst themselves, and produce

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97. *See supra* text accompanying notes 67–69.

98. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (addressing particular clauses, articles, and amendments which consistently receive a very small fraction of the comprehensive literature on constitutional theory).

99. The idea is captured by Justice Holmes in *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

100. *See, e.g.*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275–76 (1996). Richman and Reynolds posit two factors to determine the track a litigant will travel in the appellate court system: "[I]mportant cases (usually measured by monetary value) and powerful litigants receive greater judicial attention than less important cases and weaker litigants." *Id.* at 275.

an opinion written by one of the members of the panel that has been carefully reviewed and vetted by the other members.[101] This depiction of the appellate process may not be entirely accurate as a description of how every case was treated, including those which made their way to Learned Hand's Second Circuit.[102] Regardless of its accuracy in that sense, it is certainly not accurate as to most of today's cases. In the federal courts, and most state appellate systems, a majority of appeals are disposed of without oral argument and via "unpublished" opinions drafted by law clerks with perhaps only cursory review by a judge. These cases tend to be those involving mere error correction. That is, it is the "interesting" cases presenting novel issues—the ones in which law declaration predominates—that continue to receive something like the "Learned Hand" treatment.

This disparity in treatment is, to a large degree, officially sanctioned. Most visibly, appellate courts dispose of a substantial portion of their dockets via so-called "unpublished" opinions, which are typically deemed not to have precedential effect.[103] The justification for the practice is, quite simply, that some cases are not consequential enough to merit a full opinion. Complaints about the need to control the proliferation of law books began at least as far back as 1831,[104] which in turn led to the suggestion that some cases could be disposed of via something short of a full opinion. In 1941, Roscoe Pound argued that "[m]uch time and energy are spent in writing opinions in cases which involve no new questions or new phases of old questions. This is a prime source of waste of judicial power in our higher courts."[105] In 1964, the Judicial Conference of the United States resolved "[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."[106] Nowadays most appellate courts have a standard akin to that offered by the American Bar Association, which recommends the issuance of a published opinion only when a decision "(i) [e]stablishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation; (ii) [i]nvolves a legal issue of continuing public interest; (iii) [c]riticizes existing law; or (iv) [r]esolves an apparent conflict of authority."[107] Reduced to its essence, this standard suggests that appellate courts should issue published opinions only with respect to cases that implicate their law-declaration function. Cases involving mere error correction require something less.

I do not mean to suggest that the rise of the two-track system is entirely, or even primarily, attributable to a shift in jurisprudential attitudes.[108] Observers generally

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101. *See id.* at 278.

102. *Id.* at 278 n.14.

103. *See* John P. Borger & Chad M. Oldfather, Anastasoff v. United States *and the Debate over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 901 (2001).

104. *Id.* at 900–01.

105. ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 390 (1941).

106. DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

107. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 64, § 3.37.

108. There is likely something of a feedback loop at work here. Recognition of indeterminacy brings along with it recognition of different classes of cases, which can then be slotted on different procedural tracks, in which those involving mere error correction receive something less than full treatment. This slotting, in turn, makes it easier for a court to engage in

agree that the proximate cause of two-track appellate judging is the massive increase in appellate caseloads that began in 1960.[109] Simply put, today's appellate judges are responsible for considerably more cases than their counterparts from a half century ago, and can not possibly devote the time required for full, Learned Hand treatment to each case. Something had to give, and the result is that these less significant, error-correction cases not only are not resolved via published opinion, but they also typically receive no oral argument and are often handled primarily by central court staff rather than by judges or their personal clerks. Without minimizing the explanatory power of this increase in volume, these developments are also consistent with the view that error correction is difficult work. Put differently, if the law does not provide clear answers even in some portion of seemingly routine cases, then there is a natural tendency for appellate courts to regard the work of lower courts as "good enough" and leave it undisturbed. That could explain things like the rise of unpublished opinions and the delegation of much of the work of error correction to others.[110]

D. The Difficulties of Post-Realist Error Correction

What I have described is, in effect, a regime that allows judges to choose between two jurisprudential viewpoints that are, if not fundamentally opposed, in significant tension with one another.[111] Stated more strongly, an appellate court enjoys the

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a case-based error analysis with respect to those cases deemed to involve only error correction. There are fewer institutional checks in place—there is no oral argument; any opinion issued is deemed good for one time and place only, and, in general, because the case will not generate any sort of rule of law that the court might have to confront in the future, it is regarded as an "unimportant" case not worthy of a great deal of attention.

109. For an overview of the increase in volume and its effects, see Oldfather, *supra* note 23, at 768–79.

110. There is, of course, a rejoinder to this suggestion, which is that these really are easy cases that involve nothing more than the application of settled legal standards to specific facts, in which case it is not that error correction is hard but rather that it is easy. *But see* Burbank, *supra* note 21. What is more, there seem clearly to be some cases where judges use unpublished opinions, et cetera, to resolve hard cases via easy means. *See, e.g.*, POSNER, FEDERAL COURTS, *supra* note 81, at 165 (noting that "the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty"); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) ("I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls.").

111. As Judge Posner has put it:

> There is almost always a zone of reasonableness within which a decision either way can be defended persuasively . . . using the resources of judicial rhetoric. But the zone can be narrow or wide—narrow when formalist analysis provides a satisfactory solution, wide when it does not. Within the zone, a decision cannot be labeled "right" or "wrong"; truth just is not in the picture.

Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1053 (2006); *see also* Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 751 (1957) ("Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.").

flexibility to elect to judge a case via a relatively formalist, rule-based analysis, in which case the equities of the specific case play little role, or under a more holistic, justice-focused analysis that gives relatively little play to the formal requirements of legal rules and places great significance on equitable considerations. These are, of course, points on a spectrum rather than distinct alternatives. The point remains that such a system stands in obvious tension with the basic idea of a legal system based on generalizable law. If appellate review were routinely undertaken with reference primarily to the equities of the overall resolution of the dispute between the parties, then legal standards would lose much of their bite. More precisely to the point of the analysis in this Article, appellate courts would fail to fulfill their (at least formerly) primary function of furthering systemic accuracy.

This statement is not to suggest a lack of alternatives on the spectrum between rigid formalism and a system of ad hoc, case-by-case judging. Judge Richard Posner, for example, is a proponent of "pragmatic adjudication," in which judges are "boxed in . . . by norms that require of judges impartiality, awareness of the importance of law's being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes."[112] Even apart from comprehensive theories of judging, we can rely on practical constraints—Llewellyn's "major steadying factors" being the most prominent articulation[113]—to provide some discipline on decision making and thus produce consistency at some relatively broad level.

Precisely where a legal system should fall on the spectrum I have identified is a highly contestable matter and beyond the scope of this Article. The important point for now is the potential for tension between the demands of a legal system (which will privilege rule following) and the equities of an individual case (which will often suggest that something other than strict compliance with rules is appropriate). Judicial institutions and processes that fail to keep the concepts appropriately separate will at the very least create a temptation for courts to implement the latter approach to error. Courts' job, after all, is to resolve the specific cases that come before them. Because of both the prominence of the facts of the dispute before the court relative to the universe of fact patterns that might present the issue and the related desire to get *this* case right,[114] it may even be that such institutions and processes will foster an affirmative tendency toward a more equitable form of review.

I have suggested that the insights of legal realism, and in particular our acceptance of indeterminacy, might have something to do with this tendency, and might have had the additional effect of leading courts to the position where they view the task of error correction as not worth the effort. As Harlon Dalton has argued:

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112. POSNER, HOW JUDGES THINK, *supra* note 81, at 13; *see also id.* at 230–65 (elaborating on the model).

113. *See* LLEWELLYN, *supra* note 61, at 19–61.

114. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 3, 38 (2006) (discussing "the distorting force of particulars" (emphasis omitted)); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (suggesting that judges are impeded in the task of lawmaking by "the *this-ness*" of the cases before them (emphasis in original)).

> It is meaningless to talk about error correction if we cannot, at least theoretically, isolate correct and incorrect outcomes. If the vast majority of outcomes are hopelessly ambiguous, or if we view the criteria for judging correctness as impossibly subjective, the error correction rationale for appeal of right is perforce dubious.[115]

This point, of course, holds only if judges perceive the world in these terms. That is, if judges view themselves as still engaged in the work of formalism, they are unlikely to perceive hopeless ambiguity or impossible subjectivity, and will go about the work of judging in much the same way that we imagine judges always have.

The discussion in the preceding subsections demonstrates, at the very least, that there is good reason to be skeptical of the claim that judges continue to take a rigidly formalistic view of their task.[116] Courts' recognition of the existence of the relatively distinct categories of law-declaration and error-correction cases stands as the most explicit acknowledgement of this dynamic.[117] There is additional, though somewhat more speculative evidence. Judge Posner suggests, for example, that "pragmatism" (as contrasted with "legalism") is the most accurate descriptive label for the approach that most American judges take.[118] By this suggestion he means that most judges recognize that traditional legal authorities fail to guide decisions in a not insignificant portion of their cases, and in these cases judges resort to something of a wide-ranging (yet constrained) consequentialism as a basis for resolving cases.[119]

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115. Dalton, *supra* note 70, at 74. Although this argument has a ring of plausibility to it, I wonder if it brings an insufficiently fine-grained focus to the problem. The problem of indeterminacy can be broken up in different ways, not all of which implicate this argument to the same extent. We might speak of an inability to isolate correct outcomes at two levels, that of the larger dispute between the parties and that of the specific issue as to which one of the parties claims the trial court made an erroneous ruling. Moreover, indeterminacy might result from the ambiguity of the governing legal standard or the difficulty of establishing conclusively the historical facts to which the standard must apply. Dalton's point seems stronger if taken to apply at the level of the lawsuit. He supports his claim with the fundamentally correct assertion that the cases that make it to trial (which constitute at least a substantial portion of those cases that are appealed) tend to be those in which there are no clear-cut winners. *See id.* More generally, selection effects are likely to make it the case that some substantial portion of the cases that make it to the appellate stage will be "close cases" in some general sense of it not being clear at the outset of the litigation who the rightful winner is.

116. *See supra* Part I.B.

117. *See supra* Part I.B.

118. POSNER, HOW JUDGES THINK, *supra* note 81, at 230 ("The word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is 'pragmatist' . . . .").

119. *See supra* note 109 and accompanying text. Describing that "[t]he pragmatic judge is a *constrained* pragmatist," POSNER, HOW JUDGES THINK, *supra* note 81, at 13, Judge Posner discusses the degree of constraint as follows:

> The box is not so small that it precludes his being a political judge, at least in a nonpartisan sense. But he need not be one unless 'political' is given the broadest of its possible meanings . . . in which the 'political' is anything that has the slightest whiff of concern for policy. A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it.

Other commentators have similarly suggested the possibility of a relationship between the widespread judicial recognition of the insights of realism and less constrained lawmaking.[120] Consider, for example, the following excerpt from a recent paper by Anthony D'Amato:

> But far more important than the impact of legal realism upon attorneys and law professors was its psychological impact upon judges. Every judge in the United States is a former law student. A future judge, sitting in a classroom in the 1920s or 1930s, might have experienced a rush of empowerment upon realizing that all his classmates are studying the law in the hopes that someday they might influence *him*. Better yet, once he becomes a judge, he will not have to pay much attention to what the lawyers say about the law (any more than he did in the classroom). For the "law" will be whatever he proclaims it to be.
>
> Because professors knew that some of their students would become judges, their decision to offer peripheral subjects served to legitimize those offerings. Thus a course in law and social policy, which before legal realism would have been deemed irrelevant to studying law, became relevant because future judges would look back on their legal training and assume that social policy was part of the law. Thus legal realism in the curriculum became a self-fulfilling prophecy—surely not the kind of prophecy Holmes had in mind.[121]

Professor Scott Altman has argued, based on similar reasoning, that judges should be "candid but not introspective" in their decision making. He posits that it may be beneficial, from a systemic perspective, for judges to perceive themselves as more constrained by law than they actually are, for the simple reason that judges who believe they are constrained will act as if they are constrained.[122]

Of course, the question of whether realism's uncovering of indeterminacy begets irresponsible decision making and thus even more indeterminacy is ultimately empirical and not one as to which conclusive evidence exists. Certainly there has not been unanimity amongst observers' intuitions. Judge Posner, for example, insists that just the opposite is true, and that only through making the policy choices inherent in their decision making apparent to them can we expect judges to take full account of what is at stake.[123]

My intent is not to take a position in that debate; my goal is more modest. However the causal relationship runs, the growth of realism coincided with the rise of a vigorous conception of harmless error, and the emergence of a two-track system of appellate

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> But it need not be policy chosen by him on political grounds as normally understood.

Id.

120. *E.g.*, Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

121. Anthony D'Amato, *A New (and Better) Interpretation of Holmes's Prediction Theory of Law* 4 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-28, 2008), *available at* http://ssrn.com/abstract=1255522 (emphasis in original).

122. Altman, *supra* note 120, at 303–04.

123. *See* POSNER, HOW JUDGES THINK, *supra* note 81, at 252 ("Judges are less likely to be drunk with power if they realize they are exercising discretion than if they think they are just a transmission belt for decisions made elsewhere and so bear no responsibility for any ugly consequences of those decisions."); *see also* POSNER, FEDERAL COURTS, *supra* note 81, at 331 (hypothesizing a positive relationship between judicial candor and judicial self-restraint).

review in which some cases implicate the law-declaration function and the rest involve "mere" error correction. Collectively, these developments led to a world in which the error correction function no longer has clearly defined content. To the adherent of Evarts Act formalism, the appellate judicial function was to further institutional perfectionism and a court's task in any given case was clear: find the law, measure the trial court ruling under appeal against that law, and reverse unless there is a match between the two. Modern judges, in contrast, might have widely divergent conceptions of what the error-correction role is meant to accomplish, and consequently of how they are to orient themselves toward the cases that come before them. The next Part takes up the question of how we might respond.

II. ERROR CORRECTION AS DERIVATIVE DISPUTE RESOLUTION

The analysis to this point has revealed that appellate review for error turns out to be considerably more amorphous than typical discussions suggest. The institutional design of our appellate courts reflects an understanding of mechanical jurisprudence as an achievable ideal. So conceived, the concept of error and the process of error correction are largely self-defining.

The problem arises from our recognition that mechanical jurisprudence in the guise of Evarts Act formalism fails to accurately describe the process of appellate adjudication. Determining whether a trial court erred involves something more than the mechanical application of a determinate rule to a fixed set of facts, and because of that something more, "error" is a concept without fixed content. Indeterminacy not only rendered the prescriptions of legal materials less certain, but may also have fostered another level of indeterminacy by encouraging a regime in which appellate courts ask not merely whether a lower court reached the wrong answer, but also—because "wrong" is now an openly elastic concept—whether the answer is, in effect, "wrong enough" to warrant reversal. This level of indeterminacy may be the instantiation of what some regard as a central failing of legal realism—that its open acknowledgement of the extent to which judicial decisions are the product of nonlegal factors had as its primary effect the partial legitimization of such decision making.[124] Regardless of whether that view is correct, it seems clear that the initial insight of realism, coupled with the systemic developments that followed in its wake, led to a world in which an appellate judge seeking to fulfill her error-correction function will have no necessary conception of what that function entails.

One response to this state of affairs would be to attempt a more precise definition of "error." We might, for example, choose one of the conceptions outlined in the

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124. Anthony D'Amato suggests:

> [L]egal realism was a disastrous setback for American law. It seemed to justify as an uncontestable fact of empiricism that judges may make all kinds of decisions based upon a wide range of factors: emotions, prejudices (unless they amount to a conflict of interest), party affiliation, rewarding campaign contributors, facile study of the law, liking or disliking the attorneys arguing a case, mere whim, and other bells and whistles. Law-school curriculums are then skewed to prepare students to argue successfully before judges who may only care minimally about what the law says.

D'Amato, *supra* note 121, at 14–15; *see also supra* note 119 and accompanying text.

preceding Part,[125] or some other definition, and deem it to be the standard that appellate courts must apply. This choice seems unrealistic, primarily because of the difficulty of attaining consensus on how to prioritize the possible ends of error correction. The differences among the various conceptions of the function outlined above reflect fundamental disagreements regarding the proper nature of the judicial role. Just as one person's "judicial activism" is another's prime example of the value of judicial independence,[126] the question of whether any given case presents an error in need of correction will depend, to some degree, on the observer's sense of the appropriate answers to more general questions such as which institutional actor[127] should have primary authority to render a decision on the matter.

There is another reason to think that such an effort to more precisely define "error" would have only limited success. With the realist genie already out of the bottle, any underlying indeterminacy in the legal rule in question in a given case would be unaffected by the adoption of a uniform standard. What is more, with appellate standards of review (and, one imagines, prescriptions for the finding of error) being effective only at the broad level of orienting the court toward a dispute, it is unclear precisely how much additional discipline the adoption of a specific standard would engender. As Judge Posner has frequently pointed out, it is very difficult to conclude any given judicial decision "good" or "bad" in an objective sense,[128] at least with respect to that subset of decisions relating to the sorts of issues that are contested on appeal. Put somewhat differently, if legal rules are as malleable as many perceive them to be,[129] then the further definition of those rules (or the addition of more rules) will not cure the underlying problem.[130] We simply may not be able to define our way out

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125. *See supra* Part I.A.

126. For an overview of the various ways in which the phrase "judicial activism" is used, see Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004). On the relationship between judicial independence and judicial accountability, see Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 330–32 (2003).

127. The primary question of institutional allocation here, of course, concerns the relative power of appellate versus trial-level decision makers (i.e., trial judges and juries). But separation of powers questions can also inform viewpoints in the context of many asserted errors, such as those involving statutory construction.

128. POSNER, HOW JUDGES THINK, *supra* note 81, at 3.

129. Michael Dorf describes the general phenomenon as follows:

> For over a generation, the fields of jurisprudence and constitutional theory have struggled to reconcile the fact of considerable legal indeterminacy with, respectively, law generally and constitutional legitimacy in particular. In its bare essentials, the problem can be formulated as follows: If the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require; similarly, if the content of a constitutional right (or other constitutional provision) can only be determined by extensive deliberation, then the Constitution does not entrench rights (or other principles) in the sense of providing foundational assurances.

Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003).

130. Dorf reaches a similar conclusion. *Id.* at 877 ("This Article denies that much progress can be made by further theorizing about the nature of law and constitutions as they are.").

of indeterminacy, at least when the definition must relate to the appellate review of any case that may arise in the civil justice system. In any case, this view is not the approach I will consider further here.

Instead, I am going to suggest an approach suggestive of the primary academic response to legal realism—that of the legal-process school.[131] The primary component of the process theorists' response to the problem of indeterminacy was to focus on institutional competence and related questions of institutional purpose, design, and process.[132] Rather than attempting to constrain courts' exercise of the error-correction function by refining the definition of error, I propose that we focus on our conception of the process of appellate review for error. Although the two questions are hardly distinct—especially given that the definition of error is one designed to govern the process of the review—the emphasis will be less on what appellate review for error should accomplish and more on how it should look in operation.

At present, our understanding of the process aspects of review for error is as muddled as our understanding of the definition of error. Courts and judges disagree over such matters as the extent to which they should issue opinions justifying their decisions[133] and, as exemplified by the exchange with which I opened this Article, whether courts should feel obligated to address the arguments the parties have made. More broadly, the distinction between case-based versus issue-based orientation that has run through the discussion has a significant process component.

My argument is that courts should adopt something of an issue-based conception of the appellate role, and more specifically that the error-correction function should be reconceived as the "derivative dispute resolution function." The ultimate aim would still be to review trial court decision making for some degree of accuracy, and it would still be appropriate to regard error correction as one of the institutional functions of appellate review. With respect to any individual appeal, however, courts should not view themselves as engaged in a search for error. Instead, a court should regard what is before it as a distinct dispute between the parties, albeit one that is derived from the underlying dispute between them. Thus the dispute before the appellate court is not, for example, whether A committed a tort against B, but rather whether the trial judge wronged B by ruling that B was not entitled to introduce certain evidence. Such a focus would reduce the likelihood that a court would allow its resolution of the case to turn on its assessment of the merits of the case or some other factors that are external to B's specific contentions.

This conception of the process is consistent with the fundamental aims of the civil justice system. By most accounts, civil adjudication serves two purposes—dispute resolution and law creation.[134] Of these, dispute resolution is primary. Indeed, the basic reason we have the civil justice system is to provide a peaceful mechanism for the resolution of disputes.[135] The primacy of dispute resolution entails placing a priority on party participation in the process. Lon Fuller, in his depiction of the classic model of

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131. In this sense, as well, the analysis here is consistent with Dorf's approach, though the analyses vary considerably in their focus and particulars. *See id.* at 876–88.

132. *See* BIX, *supra* note 9, at 84–85.

133. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1288–97 (2008).

134. *See supra* notes 66–69 and accompanying text.

135. *See supra* notes 66–69 and accompanying text.

adjudication, suggested that "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[136] In Fuller's view: "Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself."[137] I have argued elsewhere that courts should accordingly view themselves as under an obligation to be at least "weakly responsive" to the arguments of the parties, "which would require the court to consider and respond to the parties' arguments, but not to confine the raw materials of its decision process to those arguments."[138]

This view is based on the logic of the adversary system. We credit participation, and Fuller argued for the significance of participation, not based on some sense that participation simply inheres in the adjudicative process, but rather because party participation plays a crucial instrumental role in making the process effective both as a means of dispute resolution and law creation.[139] It is the parties, after all, who have the best access to the information necessary to resolve the dispute in the best way as well as the incentive to put the relevant information before the court.[140] Participation is thus crucial to the functioning of the system.

Participation is likewise critical to systemic legitimacy. In part, this legitimacy is tied to the instrumental value of participation. Over time, if courts do not consistently credit parties' participation, then litigants and the public will come to perceive the courts as less attractive venues for dispute resolution. The reason is simply that courts resolving cases without being sufficiently responsive to the parties are not resolving the *parties*' dispute, but instead some more or less rough facsimile of it.[141] Relatedly, research has demonstrated that litigants are more satisfied with processes in which they feel their voices have been heard and their positions given meaningful consideration even if they end up losing.[142]

There are a number of ways in which to implement a conception of error correction as derivative dispute resolution. Appellate courts operate under various sets of rules—including the statutes that create the courts,[143] the codes of judicial ethics,[144] and the courts' own internal operating procedures[145]—that might be modified to make explicit

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136. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

137. *Id.*

138. Oldfather, *supra* note 20, at 164.

139. *See* Fuller, *supra*, note 136, at 364.

140. I have expanded on these ideas elsewhere. *See* Oldfather, *supra* note 20, at 152–53; Oldfather, *supra* note 23, at 754–56.

141. *See* Oldfather, *supra* note 20, at 140.

142. *See, e.g.*, Tyler, *supra* note 54, at 887–89.

143. *E.g.*, 28 U.S.C. §§ 1–4001 (2006).

144. Most such codes are based on the ABA MODEL CODE OF JUDICIAL CONDUCT (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

145. *E.g.*, MICH. COURT OF APPEALS CLERK'S OFFICE, INTERNAL OPERATING PROCEDURES (2009), *available at* http://coa.courts.mi.gov/pdf/clerkiops.pdf; U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, INTERNAL OPERATING PROCEDURES (2002), *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf.

the expectation that the courts' responsibility is to decide the derivative dispute. The resulting norm would be strengthened to the extent that courts of last resort themselves assumed responsibility for monitoring this aspect of intermediate appellate courts' performance. Such enforcement would occur primarily by way of remand in cases where the lower appellate court failed to be appropriately attentive to the parties' arguments. Alternative forms of enforcement are also possible. We might harness the capacity of judicial opinions to function as a form of informational regulation to achieve greater judicial responsiveness.[146] For example, we could require that opinions specifically reference, or even include, the parties' statements of the issues before the court.[147] While such an approach would not preclude courts from resolving cases in whatever manner they deem appropriate, it would increase the likelihood that they would at least begin the analysis focused on the appropriate derivative dispute.[148]

Of course, conceiving of the appellate role as involving derivative dispute resolution provides no substantive content to the notion of error. While the court will focus its analysis in the proper place—on the question of whether B should have been allowed to introduce its evidence—it knows nothing more about how it is supposed to measure the correctness of the trial court's ruling. This lack of knowledge is perhaps a shortcoming of the approach, in that it does not combat all of the slipperiness and imprecision that inheres in the current arrangement. On the other hand, it might be regarded as a virtue in the sense that it allows courts to approach the assessment of the underlying allegation of error with some flexibility.

That is not to suggest that an orientation toward derivative dispute resolution would have no substantive effect on decision making. A court with such an orientation would be less likely to engage in an untethered assessment of whether there was error, and more likely to focus its efforts on resolving the specific dispute brought before it by the appellant. This focus is likely to foster greater technical proficiency in appellate adjudication,[149] as an orientation toward a specific dispute will require more intensive engagement with arguments, facts, and cases. An appellate court that views its job as resolving the dispute between A and B over whether the trial court wrongly excluded evidence is less likely to jump to the larger question of whether it believes that A (or B) ought to prevail in the underlying lawsuit from which the appeal derives. In addition, an issue-focused approach would tend to discipline courts' exercise of the law-declaration function by encouraging decisional minimalism.[150] If courts are expected to confront the precise dispute put before them by the parties, they are more likely to engage with and resolve that dispute, and less likely to engage in more maximalist, rulemaking-type activity. B's argument may occasionally be that it is entitled to the benefit of a categorical rule that permits it to introduce the sort of evidence that it sought to introduce, but it is more likely to be an argument tied to the facts of the specific lawsuit. Here again, a court committed to the resolution of the derivative dispute between A and B is less likely to resolve the dispute via the adoption of a general rule.

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146. *See* Oldfather, *supra* note 23, at 779–93.
147. *See id.* at 794–801.
148. *Id.* at 796.
149. *See* Burbank, *supra* note 21, at 1233–34.
150. *See supra* note 4.

Neither result is guaranteed, of course, in any given case. Viewing the central feature of the appellate role as derivative dispute resolution only provides a court with a starting point for its analysis. Beginning with a focus on B's specific contentions regarding the trial court's ruling, and A's responses to them, does not preclude the court from moving past those arguments. This flexibility is more of a virtue than a limitation. Decisional minimalism is not always desirable.[151] There will often be situations where prudence counsels in favor of a decision the logic of which extends beyond the particular dispute before the court. Of course, the very existence of this flexibility means that conceiving of the appellate task as primarily concerned with derivative dispute resolution does not offer a complete solution to the problems of the current regime. Nevertheless, it promises to advance the practice in two respects. First, it reorients the judicial mindset. As Judge Richard Posner has, with characteristic eloquence, pointed out, much of appellate review is a function of the appellate court's orientation to a problem.[152] There is little utility, Posner suggests, in articulating precise formulas for appellate judges to follow.[153] The derivative dispute resolution model avoids that pitfall by underscoring the suggestion that the appropriate judicial orientation is to the particular dispute before it. It provides a more appropriate starting point, which should lead, in general, to more appropriate results whether measured in terms of substance or process. Second, a focus on derivative dispute resolution will narrow the scope of judicial inquiry and thus tend to discourage or reduce some of the problems that arise when appellate courts stray beyond their core institutional competencies.[154] Judge Posner's points about the imprecision of appellate review counsel in favor of this conclusion: although concededly still somewhat imprecise, this inquiry is at least guided by the arguments of counsel (and if not, the court can rightfully decline to engage with the question[155]). Whereas if the court takes a more broad view of its error-correction role it will be implementing an imprecise analysis without the benefit of the procedural mechanisms designed to give it some reckonability.

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151. For the case in favor of rule generation by courts, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

152. Judge Posner writes:

> Appellate review is likewise intuitive, though judges pretend otherwise. Opinions recite a variety of standards of review—plenary, clearly erroneous, substantial evidence, some evidence, a modicum of evidence, reasonableness, arbitrary and capricious, abuse of discretion, *Chevron*, *Skidmore*, and so forth—but the gradations of deference that these distinctions mark are finer than judges want, can discern, or need. The only distinction the judicial intellect actually makes is between deferential and nondeferential review. . . .
>
> So what is involved in appellate review is, at bottom, simply confidence or lack thereof in another person's decision. That is an intuitive response informed by experience with similar decisions. It is not rule- or even standard-driven, except in the clearest cases, but it is not mindless guesswork either.

POSNER, HOW JUDGES THINK, *supra* note 81, at 113–14.

153. *See id.*

154. *See supra* notes 95–96 and accompanying text.

155. *See, e.g.*, Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1235–41 (10th Cir. 1999).

CONCLUSION

I have focused my efforts in this Article primarily on the task of achieving greater conceptual clarity with regard to appellate courts' error-correction function. The analysis suggests that such clarity, at least insofar as it relates to the question of what it means for a trial court to have committed error, is unattainable in a world that is open to the indeterminacy of many legal questions. I have further suggested that a focus on process can lead to something like a second-best solution. Conceiving of the error-correction function as derivative dispute resolution provides a way to harness the instrumental genius of the adversarial process to ensure that appellate courts address the errors actually alleged by the appealing party, as well as ensure that both parties are more likely to perceive the process as having been legitimate. As Judge Posner has noted,

> Many of the decisions that constitute the output of a court system cannot be shown to be either 'good' or 'bad,' whether in terms of consequences or of other criteria, so it is natural to ask whether there are grounds for confidence in the design of the institution and in the competence and integrity of the judges who operate it.[156]

The inquiry and analysis in this Article is consistent with that charge.

The benefits of conceiving of error correction as derivative dispute resolution would likely extend beyond the error-correction context. More properly conceiving of the error-correction function will ultimately help to discipline appellate courts as they go about the task of creating and refining legal standards. In a fundamental sense, the notion of error correction as derivative dispute resolution, like any process-based reform, is agnostic not only as to questions of substantive law but also as to questions of judicial methodology, such as that between formalist and realist approaches. That is, a commitment to resolving a derivative dispute does not entail a commitment to a broader jurisprudential perspective. Judges can, for example, still be differently inclined to feel bound to precedent and statutory language. The difference is not that judges would be precluded from answering the questions before them in particular ways, but rather that they would be precluded from not answering them at all.

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156. POSNER, HOW JUDGES THINK, *supra* note 81, at 3.