The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation

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THE CORRECTNESS FUNCTION OF
APPELLATE DECISION-MAKING: JUDICIAL
OBLIGATION IN AN ERA OF
FRAGMENTATION

by David P. Leonard*

I. INTRODUCTION

Appellate courts have grave and exciting responsibilities in our
common law system of adjudication. In each case, they have a twofold
task: on the one hand, to provide guidance to lower courts, legislatures,
and future litigants concerning the boundaries of the law;¹ and on the
other hand, to assure that the lower courts acted correctly with regard
to the particular litigants involved in that dispute.² In a very real sense,
then, appellate courts must be both forward-looking, as they participate
in the development of the common law,³ and attentive to the means by
which the matter at issue was handled prior to reaching the appellate
level.

In pursuit of their task of providing guidance to lower courts, leg-
islatures, and future litigants, appellate courts have developed a pattern
of decision-making that is more careful and limited than bold. The
goal of appellate judges has historically been to reach conclusions sup-
ported as much as possible by clear and agreed upon reasoning. This is
a complicated process requiring great judicial cooperation, and is made
more problematic by the fact that appellate courts are multi-judge bod-
ies staffed by people from different backgrounds and possessing differ-

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I wish to thank Professors Helen Garfield, William Hodes, and James Torke for their assist-
ance, as well as third-year law student Philip Thompson.
1. See infra notes 22-24 and accompanying text.
2. This function has been termed the “review for correctness.” P. CARRINGTON, D.
MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 2 (1976) [hereinafter cited as JUSTICE ON
APPEAL].
3. This process of legal development through judicial decision-making, of course, dif-
ers from civil law systems such as that found in France. See R. CROSS, PRECEDENT IN
ent legal philosophies. However, until the last few decades, American appellate courts, including the United States Supreme Court, were relatively successful at garnering majority support for interpretations of the law. Recently, though, appellate courts have become far less able to reach majority consensus on the rationale which supports a particular decision, and this had led to a partial breakdown in the performance of the guidance function. This breakdown has been the source of much concern.

The other function of appellate courts, that of assuring the correctness of lower court action, has received little attention. Perhaps the function is simply taken for granted, or perhaps there has heretofore been little reason to doubt that appellate courts have been adequately performing this important task. Whatever the reason for prior lack of attention, however, the correctness function now deserves a closer look. This is because the general splintering of appellate decisions has apparently begun to take its toll not only on appellate courts' performance of their guidance function, but also on their proper discharge of the correctness function. The potential for a breakdown in the performance of the correctness function is particularly great in multi-issue cases in which a majority of the divided appellate court can agree that some reversible error was committed in the lower court, but in which no majority can agree on the precise ground on which to reverse. If, as has recently occurred, the appellate court decides to affirm because no majority agrees on the ground on which the trial court erred, a serious question arises as to whether that court has performed its function of

4. For a model which describes the framework within which appellate judges operate, see W. Murphy, Elements of Judicial Strategy 31-36 (1964).
5. See infra notes 69-70 and accompanying text.
7. But see Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 779 (1957). Still, although Wright questions whether appellate judges are any better equipped than trial judges to serve the correctness function, he does not deny outright that the performance of this function is at least to some degree a part of an appellate court's work.
assuring correctness in the trial process. In this kind of case, it is not lower courts, legislatures, or even future litigants who are the potential victims of the court's splintered decision-making process; the litigants are the victims of these decisions.

This article will address the problem of breakdown in the appellate function of assuring correctness. First, the two tasks of appellate decision-making will be reviewed. Then, the impact of an appellate court's failure to perform its guidance function will be compared with the impact of its nonperformance of the correctness function. Next, it will be argued that our concept of due process requires that an appellate court reverse the judgment of a trial court when a majority of the appellate judges—for whatever reason—supports that disposition of the case. Support for this proposition will be found not only in basic due process theory, but also in the practice—usually silent but sometimes explicit—of appellate courts. Finally, the consequences of accepting this theory will be examined.

II. THE DUAL FUNCTIONS OF APPELLATE COURTS

Even in an environment increasingly dominated by legislation, our system is still controlled by common law. Courts are the primary interpreters of the limits of the law, and are the final arbiters of the rights of individuals under the federal and state constitutions. But courts are themselves hierarchically structured, and their functions at the various levels differ.

Trial courts are at the front lines of fact-finding. Their task is to determine the facts, and apply those facts to existing legal principles. Their ability to observe first-hand the demeanor of witnesses makes the trial courts especially suited for this role. Trial courts, therefore, do not exist for the purpose of making law; rather, their primary function is most often to apply established rules to the myriad factual situations which are brought before them. In performing this function, trial

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9. See infra notes 14-52 and accompanying text.
10. See infra notes 53-143 and accompanying text.
11. See infra notes 145-86 and accompanying text.
12. See infra notes 187-236 and accompanying text.
13. See infra notes 237-52 and accompanying text.
16. This does not mean, of course, that trial courts are not engaged in interpreting the law. On the contrary, every factual pattern differs from every other to a degree which makes it necessary for trial judges to constantly determine the scope and reach of the principles laid down in prior appellate cases.
courts are seeing that justice is being done among the parties. In criminal matters, this includes assuring that the constitutional rights of the defendant are protected. Trial courts, therefore, are the primary doers of justice, and the first line of defense of the parties’ constitutional rights.

The functions of appellate courts differ. They have two fundamental tasks. First, they must set forth principles of law to guide the lower courts, legislatures, and individuals. For purposes of simplicity, this role will be called the “guidance” function. It has been the subject of a great deal of attention, particularly when commentators have believed that courts have ceased to perform the function to the degree thought necessary. 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. For simplicity, this role will be referred to as the “correctness” function of appellate courts.

The guidance function is obviously very important, and it is understandable that commentators would pay closer attention to it. Since the structure of American court systems places trial courts at the front lines of fact-finding, too much appellate review of the correctness of trial court action might signal an unwarranted appellate invasion upon the primary fact-finding function of the trial courts. Greater attention would therefore naturally be paid to the appellate court’s role of formulating standards which trial courts can apply to individual cases. That formulation process is a delicate and complex one, involving a “varied mix of value judgments about conflicting social policies and procedural practices . . . .” By expending their energies on a careful evaluation of all of these factors, appellate judges will produce consis-

17. Referring to the functions of the Supreme Court, see Davis & Reynolds, supra note 6, at 61; Harvard Note, supra note 6, at 1128.

18. This function has also been called “institutional review.” Justice on Appeal, supra note 2, at 2-3.

19. See supra note 6.

20. The precise test to be applied depends on the jurisdiction and on the kind of case being reviewed. In California, the appellate court will review trial court actions in criminal cases to determine whether the trial court committed error which “affected the substantial rights of the defendant.” Cal. Penal Code § 1259 (West 1982).

21. See supra note 2. The function might also be termed a “justice” function, though that term is perhaps more suited to criminal cases. Therefore, the term “correctness” will be used here.

22. See Wright, supra note 7, at 781-82.

tent rules which help to assure both fairness and uniformity in the law's application to individual cases. This guidance function is perhaps more important in courts of last resort than in intermediate appellate courts.24

If the sole function of appellate courts were that of guidance, one would expect that rules would often permit them to render advisory opinions. This, however, is seldom true. The Constitution requires that a case or controversy exist before the federal courts can assert jurisdiction,25 and the Supreme Court has made it clear that the Court cannot render advisory opinions.26 On the state level, moreover, a provision allowing state courts to issue advisory opinions is quite unusual.27 Appellate courts must serve a function directly related to the particular controversy and parties involved in the cases before them. That function is assuring correctness. The precise degree to which appellate courts should scrutinize the efforts of trial courts has been the source of some controversy,28 but there is no doubt that to some extent,

24. Ultimately, the highest court of a state must serve, within its own jurisdiction, a role analogous to that of the United States Supreme Court. It must guide not only the trial courts, but also the intermediate appellate courts, often resolving differences among those intermediate courts.
26. The Court once stated:
[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.
Herb v. Pitcairn, 324 U.S. 117, 126 (1945). See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), in which Justice Rehnquist, writing for the Court, wrote that the power of federal courts "has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'" (citing Liverpool S.S. Co. v. Comm'r of Emigration, 113 U.S. 33, 39 (1885)). Id. at 471. He went on to say that the requirement of an actual injury suffered by a party "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Id. at 472.
27. Some state constitutions do provide for the issuance of advisory opinions. See, e.g., COLO. CONST. art. VI, § 3; MASS. CONST. Pt. 2, ch. 3, Art. II; N.H. CONST. Pt. 2, Art. 74. However, courts tend to strictly construe their authority under these provisions. See In re House Resolution No. 12, 88 Colo. 569, 298 P. 960 (1931). The Massachusetts high court once wrote that advisory opinions "given by the justice as individuals in their capacity as constitutional advisers of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis." Commonwealth v. Welosky, 276 Mass. 398, 400, 177 N.E. 656, 658 (1931).
28. Leon Green was dismayed at the practice of appellate courts of "draw[ing] unto themselves practically all the power of the judicial system." L. GREEN, JUDGE AND JURY 280 (1930). Writing a quarter of a century later, Charles Alan Wright bitterly complained of this practice, which he characterized as "the transmutation of specific circumstances into questions of law." Wright, supra note 7, at 751. Carrington, however, disagreed with
appellate courts "serve as the instrument of accountability of those who make the basic decisions in trial courts. . . ."29 While they can seldom effectively or appropriately sit as second or third triers of fact, they must nevertheless subject the trial court's fact-finding process to particular tests of correctness laid out by prior practice and, often, by rule.30 Even though the standards by which trial court judgments are tested are quite deferential to the processes of the trial courts,31 appellate courts would not be doing their full jobs if they did not use their power to exercise this review function.

Even the United States Supreme Court, whose primary function is often thought to be that of guidance, exercises a correctness function:

[O]nce the Court does decide that a case fits its criteria for certiorari or appeal and takes that case, the Justices have an obligation not merely to lay down wise policy to cover all similar situations, but also to guard, to the extent they are able, the rights of the litigants. Protection of the legal rights of litigants is not the only concern of the Court, but it must be a major concern as long as this institution functions as a court of law as well as a policy-making branch of the national government and not solely in the latter capacity.32 These are strong terms, and they suggest that assuring correctness is more than a mere technical matter. It involves a crucial judgment about whether the trial court has properly protected the rights of the

Wright's analysis, and responded with his own article some years later. Carrington, supra note 15.

29. JUSTICE ON APPEAL, supra note 2, at 2.
30. See supra note 20 and accompanying text.
31. Outside of the particular procedural setting of a case, it is not possible to speak of a standard which an appellate court will use to review the actions of a trial court. However, with respect to those decisions of a trial court which rest in its own discretion (and this encompasses a vast number of trial court actions), it has been noted that "the appellate court will supersede only when it is satisfied that the trial judge was clearly wrong." F. JAMES & G. HAZARD, CIVIL PROCEDURE 680 (2d ed., 1977) (footnote omitted). Moreover, even if a trial court has erred in some respect, the appellate court will not reverse unless it "concludes that [the error] materially affected the outcome or involved an important issue of procedural justice." Id. (This is the so-called "prejudicial error" rule.) See also FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ") These standards show much deference to the trial court.

Of course, in certain situations, an appellate court will more closely scrutinize a trial court's actions. As to situations in which an appellate court finds error of constitutional proportion, for example, the Supreme Court has held that the court must reverse unless it is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). See also note 20 supra.

parties, and as such, the correctness function assumes constitutional dimension. This point will be more fully explored later.\textsuperscript{33}

An example of the Supreme Court's exercise of its correctness function is \textit{Bridges v. Wixon}.\textsuperscript{34} Harry Bridges was a resident alien who became active in the trade union movement during the 1930's while working as a longshoreman in San Francisco. His activities were despised by many in Congress and in the Executive, and efforts were undertaken to deport him. In 1938 a deportation proceeding was initiated, but federal law then in effect would not have permitted deportation on the grounds asserted, and the hearing examiner dismissed the proceedings. Congress reacted within a few months by amending the statute with the explicit purpose of assuring the deportation of Bridges.\textsuperscript{35} A new deportation proceeding was instituted, and the Attorney General eventually ordered Bridges deported. Bridges then brought a petition for writ of habeas corpus, and following decisions in the district court\textsuperscript{36} and the court of appeals\textsuperscript{37} denying the petition, the matter eventually reached the Supreme Court, which granted certiorari.

It became clear during the Supreme Court's deliberation on the case that a majority favored reversal, but there was much disagreement as to the precise grounds.\textsuperscript{38} At least one Justice doubted the constitutionality of the statute.\textsuperscript{39} Others favored reversal on grounds not related to the constitutionality of the statute itself. Finally, one Justice warned of the possible implications of a decision in favor of Bridges. He feared that if the Court's decision posed a constitutional limit on Congress' power to expel aliens, Congress might react by further limit-

\textsuperscript{33} See infra notes 145-86 and accompanying text.
\textsuperscript{34} 326 U.S. 135 (1945).
\textsuperscript{35} One Congressman, discussing the bill before the House of Representatives, declared: "It is my joy to announce that this bill . . . changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of similar ilk." 86 CONG. REC. 9031 (1940). The new statute was enacted in 1940. 54 Stat. 673, 8 U.S.C. § 137. It has since been repealed, and is partly covered elsewhere in the Code. 8 U.S.C. §§ 1101, 1182 (1976). For a more detailed discussion of \textit{Bridges} and the Congressional activity, see W. MURPHY, \textit{supra} note 4, at 189-92.
\textsuperscript{36} Ex parte Bridges, 49 F. Supp. 292 (N.D. Cal. 1943).
\textsuperscript{37} Bridges v. Wixon, 144 F.2d 927 (9th Cir. 1944).
\textsuperscript{38} W. MURPHY, \textit{supra} note 4, at 190, citing to Justice Murphy's notes of the conference. Box 6, Bridges v. Wixon file, Frank Murphy Papers, Michigan Historical Collections, Ann Arbor, Mich.
\textsuperscript{39} One Justice believed the act was unconstitutional as an ex post facto law. W. MURPHY, \textit{supra} note 4, at 190.
ing or even cutting off immigration.\textsuperscript{40} This, of course, would hurt others in the future. This fear apparently took hold, and Justice Douglas’ majority opinion reversing the lower courts was not based on constitutional grounds. Rather, he held that the lower courts had construed the terms of the statute too broadly,\textsuperscript{41} and that the admission of certain unsworn statements was prejudicial error.\textsuperscript{42}

By disposing of the case without declaring the deportation statute unconstitutional, the Supreme Court exhibited a strong recognition of both its general policy-making function and its correctness function. With regard to the former, the Court acted in a manner calculated to assure that what is believed to be an unwise development—congressional restriction of future immigration—would not occur. Also, through its majority opinion and a concurring opinion by Justice Murphy, the Court offered guidance to lower courts and administrative officials by implicitly criticizing the manner in which Bridges’ case had been handled.\textsuperscript{43} At the same time, the Court performed its correctness function by derailing the deportation proceedings against Bridges. The Court had acted with an eye to both functions.\textsuperscript{44}

Of course, other considerations might well have been involved in the Court’s determination of how to dispose of Bridges. But there can be no doubt that the Court’s strong language in cases dealing with the case or controversy requirement evidences its position that it is the actual case before it, and not other considerations such as future guidance, which most govern the Court’s actions.\textsuperscript{45} If the Court perceived its role differently, it could certainly have rendered an interpretation of the case or controversy requirement that permitted it to hear more cases purely in order to clarify the law and thus provide more guidance.

\textsuperscript{40} Id. Congress has broad powers in the area of naturalization. U.S. CONST. art. I, § 8, cl. 4.
\textsuperscript{41} 326 U.S. at 141-49.
\textsuperscript{42} Id. at 150-56.

\textsuperscript{43} Justice Murphy wrote: “Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution.” Id. at 157 (Murphy, J., concurring).

\textsuperscript{44} Because of the secrecy of Supreme Court deliberations, it is not often that the public can learn the underlying basis of the Court’s actions. Nevertheless, there are times when Justices will specifically indicate that they are compromising. See infra notes 206-34 and accompanying text. And the popular literature contains at least one detailed attempt to get behind the scenes of Supreme Court deliberations. R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

\textsuperscript{45} See supra notes 25-26 and accompanying text.
The last few decades have witnessed increasing awareness of the correctness function by intermediate federal courts and state appellate courts. This trend can perhaps be seen most clearly in the increasingly broad appellate review of such questions as the size of verdicts and whether the verdict was contrary to the clear weight of the evidence.\footnote{Wright, \textit{supra} note 7, at 752-63.} Although some scholars, including Charles Alan Wright, have bemoaned this development as an unwarranted intrusion into the functions of trial court and jury,\footnote{Id.} even these critics of broad appellate review have difficulty entirely dismissing the correctness function of appellate courts.\footnote{Wright ultimately rested his attack on broadened appellate review on the concern that this development would not lead to greater justice. \textit{Id.} at 779-82.} Moreover, the instances of broadened appellate review of which Wright complained seem to fall largely into the category of disturbing trial court findings of fact which, given the argument that trial courts are generally in a better position to determine and weigh facts, is a fairly easy target.\footnote{In fairness, Wright does not base his argument solely on the trial court’s superior ability to judge the demeanor of witnesses. He also attacks broad appellate review of factual determinations based on documentary evidence. \textit{Id.} at 764-71. There, trial courts may not have any special advantage over appellate courts. Still, Wright’s main point amounts to concern about whether the appellate court is better able than a trial court to assure that justice is done. Although he is not convinced of this even as to documentary evidence matters, his argument in that kind of case is weaker than it is with respect to issues which depend upon the credibility of witnesses.} Not all exercises of an appellate court’s correctness function, however, amount to overturning findings of fact. When the Supreme Court invalidated the deportation proceedings brought against Harry Bridges, it did so without second-guessing the fact finders. The Supreme Court truly was, in that case, Harry Bridges’ last line of defense against capricious governmental action.

Appellate courts, then, must serve a correctness function, and performance of that function inures most directly to the benefit of the litigants in the particular case being reviewed. But assurance of review of the actions of trial courts also has an indirect benefit to society in general: it helps to build public confidence in the institutions of government including, of course, the courts themselves.\footnote{\textit{JUSTICE ON APPEAL}, \textit{supra} note 2, at 3; Carrington, \textit{supra} note 15, at 519.} Charles Alan Wright himself said, quoting Blackstone: “‘[N]ext to doing right, the great object in the administration of public justice should be to give public satisfaction.’”\footnote{Wright, \textit{supra} note 7, at 780 (quoting 3 W. BLACKSTONE, COMMENTARIES *391).} Wright believed that the particular assertion of broadened review power to which he addressed his article would lead
to less public satisfaction. At the same time it is hard to doubt that, in general, public confidence in government will be improved by appellate decisions which correct miscarriages of justice.

Thus, though there may not be an inherent constitutional right to appellate review of trial court actions, it is clear that once provision for such review is made, it must be undertaken with attention to both the guidance and the correctness functions of the court. Perhaps the most effective way to demonstrate the vital nature of both functions of appellate review is to consider the consequences, both to the litigants in particular cases and institutionally, of a failure to serve those functions.

III. BREAKDOWN IN PERFORMANCE OF APPELLATE COURTS' FUNCTIONS

A. The Guidance Function

Appellate courts best perform their function of clarifying the law when they are able to garner majority support in each case not only for the disposition, but also for the reasoning which supports that result. This does not mean, of course, that appellate courts should always speak with one voice. It does mean, however, that if they are to truly guide the lower courts, and help individuals and legislators to understand the demands of the law, appellate courts must work to prevent serious splintering of opinions.

The American practice of writing majority, concurring, and dissenting opinions in appellate cases differs sharply from the English practice of issuing seriatim opinions whereby, particularly in the court of appeals, each justice traditionally gives his view of the case. This is usually done orally, immediately after oral argument, and therefore without much collective deliberation by the justices. While it is not uncommon for a particular justice to state simply that he concurs with the views of the preceding justices, the very practice of rendering oral opinions without significant collective deliberation increases the possi-

52. See infra note 146 and accompanying text.
53. On the contrary, American courts have developed a strong tradition of tolerating dissent among their members. See infra note 99. This was despite Chief Justice Marshall's view that in each case, there should be but one opinion of the Court. See infra notes 57-68 and accompanying text.
55. Id. See also Lawson, Comparative Judicial Style, 25 AM. J. COMP. L. 364, 365 (1977).
56. D. Karlen, supra note 54, at 98; Lawson, supra note 55, at 365.
bility that justices will state divergent rationales, and that no clear reasoning will emerge from the court's consideration of the case.

When John Marshall became Chief Justice of the United States Supreme Court in 1801, he inherited a system of deciding cases derived chiefly from the English practice. Marshall, however, believed that the Supreme Court should play an important role in the federal system. At the time he assumed his place on the Court, though, the Court was viewed with distrust by some politicians, and indifference by the general public. In his years on the Court, Marshall not only assured the enduring power of the Court through substantive decisions, but he also began a practice of issuing opinions for the entire Court. His hope was to achieve an appearance of harmony and unity, and this hope seems to have been realized since, by 1819, the Court "stood at a pinnacle of public veneration." Although Thomas Jefferson vigorously opposed this new practice, characterizing it as "convenient for the lazy, the modest and the incompetent," Marshall's practice set a tone for Supreme Court decision-making which still has its vestiges today, and which serves as the model for multi-judge courts in all American jurisdictions.

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58. D. Morgan, supra note 57, at 173.
59. Id. at 173-74. When the federal government moved to its new site at Washington, D.C. in 1800, no arrangement had even been made for a building to house the Supreme Court. For its sessions from 1801-08, the Court was assigned a "small and undignified chamber" in the Capitol. C. Warren, The Supreme Court in United States History 168-71 (1937).
61. L. Friedman, supra note 57, at 117.
62. D. Morgan, supra note 57, at 175-76.
63. Jefferson wrote:

The judges holding their offices for life are under two responsibilities only.
1. Impeachment. 2. Individual reputation. But this practice completely withdraws them from both. For nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself. . .

The practice is certainly convenient for the lazy, the modest & the incompetent.

Letter to Justice William Johnson, Oct. 27, 1822, cited in D. Morgan, supra note 57, at 169. Jefferson was probably correct to a great degree. The practice instituted by Marshall was one of stifling dissent, and thus achieving a sort of artificial unanimity which presented the appearance, rather than the reality, of unity. D. Morgan, supra note 57, at 175-76.
64. The practice of issuing opinions of the court also grew in some state courts in the early 19th century. James Kent, for example, developed a practice of issuing per curiam
It may have been Marshall's hope that in each case the Court would issue only a single opinion, but it was not long before voices of dissent came to be heard. Justice William Johnson, who has been called the "first dissenter," found it necessary as early as 1809 to submit a separate opinion laying out his own reasoning and stating that he was doing so in order that he not be associated with an "ambiguous decision." Marshall himself was to write a dissenting opinion one year later, and a number of others during his tenure on the Court.

Despite the emergence of dissent, the Supreme Court continued in almost every case to render decisions subscribed by a majority of the Justices. From the time Marshall instituted his practice of rendering a single opinion until 1955, there were only forty-five cases in which the Court could not muster a clear majority for its reasoning. Thus, although Marshall may not have succeeded in creating an atmosphere in which the Court would always speak with one voice, it was clear that the precedent set by his decision-making process had a lasting impact on the Court. Obtaining a majority in each case is at least the goal of the Court, and this undoubtedly leads to lengthy deliberations in many cases in an effort to achieve this objective.

Until the middle of this century, the divergence from English practice was sharp and constant. At that point, however, a serious breakdown of the tradition established by Marshall began to appear in the Court's process. From 1955 until the end of Earl Warren's tenure, there were forty-two additional plurality decisions. And from the be-

opinions on the New York high court, and noted that in one term, all the opinions were per curiam. W. KENT, MEMOIRS AND LETTERS OF JAMES KENT 118 (1898), cited in L. FRIEDMAN, supra note 57, at 118.

65. This, of course, was part of the title of Morgan's biography of Justice Johnson, supra note 57.


67. Hudson and Smith v. Guestier, 10 U.S. 161, 164, 6 Cranch 281, 286 (1810). Interestingly, Marshall's dissent in this case was necessitated by his misreading of the majority's sentiments in Rose v. Himley, 8 U.S. 143, 4 Cranch 241 (1808). While Marshall believed his opinion in that case was supported by a majority, it was not. Hudson and Smith overruled Rose, and Marshall found it necessary to dissent. See D. MORGAN, supra note 57, at 176-77.


69. Chicago Comment, supra note 6, at 99 n.4. Cases in which no majority joins in an opinion are usually referred to as "plurality" decisions.

70. Referring to the Supreme Court's lengthy deliberations over its decision in Brown v. Bd. of Education, 347 U.S. 483 (1954), see Davis & Reynolds, supra note 6, at 63-64. See generally R. WOODWARD & S. ARMSTRONG, supra note 44. Some form of bargaining may also occur in an effort to reach consensus in a given case. See W. MURPHY, supra note 4, at 56-68.

71. Harvard Note, supra note 6, at 1127 n.1.
beginning of the Burger Court until 1981, there were approximately eighty-eight plurality decisions.\textsuperscript{72} There is, moreover, no sign of a slow-down in the plurality decision-making in the Supreme Court,\textsuperscript{73} or in state courts.\textsuperscript{74}

When appellate courts are unable to render majority opinions, their guidance and clarification functions suffer. Unaided by majority reasoning supporting the prior decisions of a higher court, litigants and lower court judges are unable to discern the limits of the enunciated rules. Legislatures are similarly disadvantaged as they are unable to determine whether pending legislation will withstand attacks brought through the courts. As already indicated, a number of commentators have expressed great concern about the increasing inability of the United States Supreme Court to render majority decisions on important social issues.\textsuperscript{75} Two illustrations should suffice to clarify the kind of problem created by a court's failure to reach majority reasoning to support its result. Although the examples draw from the United States Supreme Court, the point is equally applicable to state appellate courts, particularly those of last resort.

In 1949, the Supreme Court decided \textit{National Mutual Insurance Co. v. Tidewater Co.}\textsuperscript{76} A District of Columbia corporation filed an action against a Virginia corporation in the federal district court for Maryland. Jurisdiction was founded upon a 1940 federal statute providing for diversity jurisdiction in the federal courts for civil actions not involving federal questions brought between citizens of the District of Columbia and citizens of a state.\textsuperscript{77} Defendant challenged the constitutionality of this diversity statute, claiming that it contravened the diversity requirements of the Constitution as to federal jurisdiction. The district court agreed, and dismissed the action. A divided court of appeals affirmed. In the Supreme Court, there were four opinions. Justice Jackson wrote the opinion announcing the judgment of the Court, but was joined only by Justices Black and Burton. Justices Rutledge and Murphy concurred, while Justices Vincent and Douglas joined in

\textsuperscript{72} \textit{Id.}


\textsuperscript{74} In the California Supreme Court, for example, at least 20 plurality decisions were found in criminal cases alone for the ten-year period 1973 to 1983. For a description of the search method employed, see infra note 203 and accompanying text.

\textsuperscript{75} See supra note 6.

\textsuperscript{76} 337 U.S. 582 (1949).

\textsuperscript{77} 54 Stat. 143 (1940) (current version at 28 U.S.C. § 1332 (1976)).
one dissent, and Justice Frankfurter, joined by Justice Reed, dissented separately. In his opinion upholding the constitutionality of the federal statute, Justice Jackson stated that the District of Columbia was not a state for diversity purposes under Article III of the Constitution.\textsuperscript{78} However, although the statute could not therefore be upheld under Article III, Jackson stated that Congress has power under Article I to legislate for the District of Columbia, and could confer jurisdiction upon Article III courts in order to provide a forum for citizens of the District of Columbia.\textsuperscript{79} Three Justices had therefore upheld the constitutionality of the statute under Article I of the Constitution.

As already indicated, Justices Rutledge and Murphy concurred in the judgment of the Court. However, they expressly rejected the reasoning set forth by Justice Jackson. They believed that jurisdiction could be conferred under Article III by overruling Chief Justice Marshall's decision in \textit{Hepburn & Dundas v. Ellzey},\textsuperscript{80} and declaring the District of Columbia a state for purposes of Article III.\textsuperscript{81} Therefore, two Justices concurred in the result, but expressly rejected the rationale set forth by Justice Jackson.

If the votes of these five members of the Supreme Court are tallied, the result is that a five-member majority upheld the constitutionality of the federal diversity statute as it relates to actions brought by citizens of the District of Columbia against citizens of a state. Each of the decisions, however, expressly rejected the reasoning of the other. The four dissenters, of course, rejected both the concept that jurisdiction could be founded on Article I and that jurisdiction could be founded on Article III. This leads to an anomalous result, as noted by Justice Frankfurter in his dissent:

\begin{quote}
A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.\textsuperscript{82}
\end{quote}

\textsuperscript{78} 337 U.S. at 588 (Jackson, J., joined by Black and Burton, JJ.).
\textsuperscript{79} \textit{Id.} at 600 (Rutledge, J., joined by Murphy, J., concurring).
\textsuperscript{80} 6 U.S. 265, 2 Cranch 445 (1805).
\textsuperscript{81} 337 U.S. 617-26 (Rutledge, J., joined by Murphy, J., concurring).
\textsuperscript{82} \textit{Id.} at 655 (Frankfurter, J., dissenting). A brief case note published shortly after \textit{Tidewater} was handed down called the various opinions a “rather startling set.” Note, 35 \textit{Cornell L. Rev.} 198, 200 (1949).
The problem created by *Tidewater* is that the Court, by its inability to reach majority reasoning, has not provided significant guidance concerning the contours of the law. After *Tidewater*, for example, the lower courts, future litigants, and Congress only knew that Congress had the power to confer jurisdiction upon federal courts to hear non-federal question actions between citizens of the District of Columbia and those of a state. No guidance was provided as to the source of this power or its limits. Lower court decisions rendered after *Tidewater* illustrate the difficulty of applying that case. In *Siegmund v. General Commodities Corp.*, the Court of Appeals for the Ninth Circuit faced the question of whether Congress had the power to confer jurisdiction upon the federal courts to hear actions between citizens of the Territory of Hawaii and those of a state. The court held that under *Tidewater*, Congress did have the power to confer such jurisdiction upon the federal courts. However, given the lack of majority reasoning in *Tidewater*, this conclusion was not self-evident. The court admitted, for example, that Article I does not expressly provide for Congressional power over the territories as it does for power over the District of Columbia. Nevertheless, quoting from both of the Supreme Court opinions in *Tidewater* which asserted the constitutionality of the jurisdictional statute, the Circuit Court determined that jurisdiction could be conferred in the case before it.

Another interesting illustration of the uncertainty created by the lack of majority reasoning in *Tidewater* is provided by *Greene v. Tefjeteller*. There, the citizenship of the parties was precisely analogous to that of the parties in *Tidewater*, with the plaintiffs being citizens of the District of Columbia, and defendants being citizens of a state. Despite the disposition of *Tidewater* which had the effect of upholding the constitutionality of Congress' grant of jurisdiction in this situation, defendants still moved to dismiss for lack of jurisdiction, arguing that the lack of majority reasoning in *Tidewater* left the basic question open. The district court noted the fact that each group of Justices comprising the *Tidewater* majority expressly rejected the other group's rationale, but nevertheless held that "precedent is established by the votes of the justices, not by the reasons given for their votes." It therefore denied defendant's motion to dismiss.

83. 175 F.2d 952 (9th Cir. 1949).
84. Id. at 954.
85. Id.
86. 90 F. Supp. 387 (E.D. Tenn. 1950).
87. Id. at 388.
Even given the difficulties faced by lower courts in the wake of Tidewater, the guidance problems created by the specific context of that case are not too great. The issue was reasonably narrow and, once the Court had resolved it (even without majority reasoning), there were few questions left for future application. Thus, although Tidewater does exemplify the basic problem created by a high court's inability to reach majority consensus on reasoning, it does not effectively demonstrate the chaos which can truly result when a court is faced with enunciating a test that lower courts must thereafter apply to myriad factual situations. That kind of problem is better exemplified by the Supreme Court's tortured progress in dealing with obscenity cases in the period preceding 1973.

In 1957, a majority of the Court stated that obscenity is not constitutionally protected speech. However, the Warren Court was never able to develop a lasting test to be applied to determine what constitutes obscenity. The various Justices continued to hold different views of the appropriate test. After many failed attempts, the Court finally resorted to the practice of summarily reversing convictions for disseminating materials that according to the various tests which a majority of the Justices would have applied, were protected by the Constitution. It was not until 1973 when the Burger Court decided Miller v. California that a single test for obscenity was agreed upon by a majority. Even that test, however, has required some clarification.

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88. For other decisions which illustrate the difficulty of applying the Tidewater decision, see Chicago Comment, supra note 6, at 109.
90. See Davis & Reynolds, supra note 6, at 64-66, 69-70.
91. For example, Justices Black and Douglas believed the first amendment fully protected obscenity. Id. at 69-70. Justice Brennan believed the first amendment would permit banning of "'hard core pornography,' sales to the young, and 'pandering.'" Id. at 70. Justice Harlan believed that the states should be given much discretion in the matter. Id.
92. Id. at 70 (citing Miller v. California, 413 U.S. 15, 22 n.3 (1973)). See also Redrup v. New York, 386 U.S. 767 (1967), a per curiam decision which noted the divergent views of the Justices as to the proper test, and then concluded: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand. Accordingly, the judgment in each case is reversed." 386 U.S. at 771. See also F. Schauer, THE LAW OF OBSCENITY 44 (1976), noting that between 1967 and 1973, the Court decided 31 obscenity cases by summarily reversing convictions.
94. The majority stated a three-pronged test:
   (a) whether, "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . .
   (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
   Id. at 24.
As long as the Court had not provided guidance to local and state legislatures as to the kind of speech protected by the Constitution, it was not performing its function of informing them of the limits of their Constitutional powers. Also, the Court’s failure to develop a majority-supported test for determining what constitutes obscenity left lower courts unable to make initial determinations of the constitutionality of challenged legislation. Even accepting the difficulty of applying the test eventually enunciated in Miller v. California, at least the Court had finally provided some standards by which state legislatures could act, lower courts could judge challenged material, and individuals could measure their own conduct.

The problems created by a court’s inability to agree on reasoning in cases involving important social issues are therefore serious, and the solutions are not immediately apparent. Surely, it would not be appropriate to stifle dissent on high courts, nor could it be expected that such attempts would meet with any success. In an increasingly complex society in which the courts have assumed an active role as agents


96. See supra notes 94-95. The Miller test itself used undefined, vague terms to which only experience will give fuller meaning. Interestingly, one study concluded that after Miller, “neither the total number of obscenity prosecutions nor the nationwide conviction rate in cases actually brought has substantially changed . . . .” Project, An Empirical Inquiry Into the Effects of Miller v. California on the Control of Obscenity, 52 N.Y.U. L. REV. 810, 928 (1977). The study noted that while Miller broadened the scope of regulable matter, the number of jurisdictions prosecuting obscenity had actually declined, despite the availability of increasingly explicit materials. Id. at 928.

97. The Supreme Court’s struggle with the death penalty provides another example of its inability to derive a test which was clear enough to serve its guidance function, particularly as to the constitutional limits of state power. In Furman v. Georgia, 408 U.S. 238 (1972), for example, there were no fewer than ten opinions (one by each Justice plus one per curiam), and the question of the per se constitutionality of the death penalty remained unresolved. Gregg v. Georgia, 428 U.S. 153 (1976) held that the death penalty was not per se unconstitutional, but the decision holding the Georgia statute constitutional was based at least in part on the particular procedural safeguards built into the statute. The precise nature of the safeguards required in order for a statute to pass constitutional muster, and of the crimes for which the death penalty can be inflicted, remains somewhat unsettled.

98. Some suggestions, such as for a reduced caseload for the Supreme Court and more attempts to reach “highest common denominator” reasoning, have been made. See, e.g., Davis & Reynolds, supra note 6, at 81-82.

99. On the contrary, a number of commentators have noted the importance of the right to dissent. William O. Douglas once wrote that “[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court.” W.O. DOUGLAS, AMERICA CHALLENGED 14 (1960). See also Rehnquist, “All Discord, Harmony Not Understood”: The Performance of the Supreme Court of the United States, 22 ARIZ. L. REV. 973 (1980); Fuld, The Voices of Dissent, 62 COLUM. L. REV. 923 (1962).
for change and control, it is to be expected that judges will differ and that they will feel compelled to set out their views in separate opinions. The more far-reaching a judge believes a particular case to be, the greater will be the desire to set out any disagreements in detail, often in the hope of offering some limitations on the scope of that decision. Appellate judges are therefore constantly faced with difficult decisions regarding when it is important enough to set out their views separately, and when, on the other hand, they should suppress this desire in order to better serve the guidance function of an appellate tribunal.

Although in *Tidewater* and in the obscenity cases, the Supreme Court did not fully serve its guidance function because it could not muster a majority rationale for disposition of the cases, one thing is clear about the results of those cases: in each case the Court disposed of the case consistently with the wishes of the majority. In *Tidewater*, for example, a majority wished to permit the plaintiff to go forward in the forum of its choice, and this was the disposition of the case. In the obscenity cases prior to 1973, the inability of the Court to reach majority consensus on the reasoning to support the majority's view that the prosecution could not go forward did not prevent the Court from overturning those convictions.

Suppose, however, that in *Redrup v. New York*, in which the Court summarily reversed convictions for selling allegedly obscene books and magazines, the Court had instead determined that its inability to reach majority consensus as to the test to be applied made it necessary to affirm the convictions. Or suppose that an appellant raises a series of separate issues each of which allegedly necessitates reversal, and although a majority of the appellate judges agree that some reversible error was committed, they affirm because they cannot agree as to which ground constituted the error. In neither case would the decision to affirm have an effect on the degree to which the appellate court performs its guidance function. But what about the correctness function? Arguably, a decision to affirm in the face of majority support for

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100. 386 U.S. 767 (1967). *See supra* note 92.

101. Note that in *Redrup*, because the majority held that the materials could not constitutionally be found obscene, no new trial was ordered. If, however, the Court had rendered a decision which necessitated the holding of a new trial, it would not have provided sufficient guidance to the lower court as to the standard to be applied to the allegedly obscene materials. In that sense, a decision to reverse and remand would have created a situation in which the Court would have served its guidance function even less effectively than in the actual case. The problems of a remand when an appellate court's divided justices cannot provide such guidance to the lower court will be considered later. *See infra* notes 243-52 and accompanying text.
reversal would, in both cases, represent a serious breakdown in the court's service of this second, and vital, function of appellate review. For reasons which are not entirely clear, the Supreme Court has never rendered a disposition which is contrary to the majority vote of the Justices. But there are certain kinds of cases routinely faced by all appellate courts, including the Supreme Court, in which there is great potential for the emergence of this breakdown should the court find itself seriously divided on the issues. Two recent decisions of a state court indeed represent examples of cases in which a majority favored reversal, but because no majority existed on the particular ground on which to reverse, the court affirmed. The article will now turn to an analysis of the problems created by a court's decision to affirm under such circumstances.

B. The Correctness Function

On May 7, 1980, Martin Bryan abducted a clerk at a convenience store, drove with her in her car, and raped her repeatedly. He then made the victim get into the trunk of the car, and cut her throat. The woman, however, possessed enormous presence of mind and pretended that she had passed out, and finally, that she was dead. Believing she was dead, Bryan drove around for a while, and eventually abandoned the car. The victim managed to free herself from the trunk of the car, and escaped. Bryan was later convicted in an Indiana state court of attempted murder, rape, and confinement, and sentenced to concurrent terms of 45, 20, and 4 years.

On direct appeal to the state supreme court, Bryan raised five errors: (1) that the trial court failed to follow a statutory procedure in determining his competency to stand trial; (2) that the trial court abused its discretion in overruling his pre-trial motions for continuances; (3) that his Miranda rights had been violated in the taking of his statement; (4) that the jury selection process was not in compliance with statute; and (5) that his sentence was manifestly unreasonable.

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102. See infra note 204 and accompanying text. This is not to say that the Justices have not at times compromised their views about the disposition of the case. Indeed, there are some notable examples of explicit compromise. See infra notes 206-34 and accompanying text.

103. See infra notes 187-202 and accompanying text.


106. Id. at 711.

107. Id.
The first opinion in the state supreme court was subscribed by only two of the five justices. These justices reviewed and rejected each ground asserted by Bryan.\textsuperscript{108} Two other justices wrote an opinion characterized as a dissent in which they agreed with the prior justices' resolution of all issues except the question of the admissibility of defendant's statement. As to that ground, these justices believed that reversible error had been committed. They would have remanded the case for a new trial to be conducted without introducing defendant's statement.\textsuperscript{109} The final justice wrote an opinion, also characterized as a dissent, in which he agreed with the first opinion's resolution of all issues except that involving the determination of defendant's competency to stand trial. As to that ground, the final justice would have held that the case should be remanded and a new determination of defendant's competency made.\textsuperscript{110}

Thus, only two of the five justices believed that the conviction should be affirmed. The remaining three justices, splitting two to one as to the precise ground, believed that reversible error had occurred at the trial. Despite this apparent three to two vote for reversal, the court, without discussing the propriety of doing so, affirmed. In an interview with the press, Chief Justice Givan, one of the two justices who voted to affirm, stated that it was "very unusual" to reach such a disposition, but that "it is in keeping with the system."\textsuperscript{111} He went on to say: "The majority is saying [defendant] has a right to a new trial, but you have to take one point at a time and you have to have a majority on every one. There were no more than two voting for any one reason."\textsuperscript{112}

Chief Justice Givan's comments suggest that he believes the result reached by the court was required by the workings of the judicial system. Specifically, the view is that unless a majority of the justices can agree as to a particular error, the actions of the trial court must be affirmed.\textsuperscript{113} This is despite the belief of a majority of the justices that some reversible error was committed by the trial court. Nevertheless, there is surface appeal to the justice's view, as can be demonstrated by considering what might happen in Bryan were the court to reverse the conviction.

\textsuperscript{108} Id. at 711-19 (opinion of Pivarnik, J., joined by Givan, C.J.).
\textsuperscript{109} Id. at 719-22 (opinion of DeBruler, J., joined by Hunter, J.).
\textsuperscript{110} Id. at 722 (opinion of Prentice, J.).
\textsuperscript{111} Defendant Loses Despite Court's Majority Rule, Indianapolis Star, Aug. 12, 1982, at 17, col. 1.
\textsuperscript{112} Id.
\textsuperscript{113} It is interesting, however, that Chief Justice Givan referred to the three justices who voted for reversal as the "majority." Id.
Given the errors asserted by the defendant, reversal of the conviction in this case would normally require a retrial. However, when it retries the case, the court will once again be faced with at least some of the same issues which formed the basis of the appeal. For example, the prosecution will almost certainly again offer into evidence the statement of defendant which he alleged was taken in violation of his Miranda rights. Because a majority of the state supreme court already determined that the admission of that evidence did not constitute error, the trial court would be free once again to admit the evidence. If this occurred as to each item on which the appeal was founded, holding a new trial could be a futile exercise. But as will be more fully argued later, it is actually unlikely that in most cases, the second trial would proceed in the same manner as the first. Indeed, the implicit effect of the reversal of the conviction, even without a majority vote on any one ground, might be a change of heart by the trial judge as to certain discretionary rulings.

What, then, did Chief Justice Givan mean when he asserted that it was “in keeping with the system” that the court should affirm unless a majority has agreed on a particular error committed by the trial court? If he meant that without such agreement, holding a second trial would be meaningless, he is not likely correct in most cases. If he meant that the result reached by the case is required by some inherent attribute of appellate decisionmaking, he is again probably incorrect; “the system” is not applied the same way in all common law jurisdictions. For example, if Bryan had arisen in England, where the general practice is to issue seriatim opinions, the appellate determination that some reversible error had occurred at trial would result in a reversal without

114. A retrial, however, would not be required in all cases. If, for example, defendant argued that the facts sought to be proved by the prosecution could not as a matter of law constitute a crime, no new trial would be called for if the appellate court were to accept the argument. See, e.g., Redrup v. New York, 386 U.S. 767 (1967). In Redrup, because a majority of the Justices believed that the materials sold by defendant could not constitutionally be found obscene, there was no need for a new trial. The Court simply reversed the convictions. See supra note 92 and accompanying text. Bryan, however, did not raise any issues of this type. See supra text accompanying note 107.

115. This does not necessarily mean that the trial court would be forced to rule the same way at the second trial. With certain kinds of errors, the appellate court would only be holding that it was not an abuse of the trial court’s discretion to admit the evidence, or that although error was committed, it was not prejudicial. For issues of that type, it would be within the trial court’s power to refuse to admit the evidence at the second trial. See infra notes 249-52 and accompanying text.

116. See infra note 252 and accompanying text.

117. See supra notes 54-56 and accompanying text. The modern English practice in criminal cases might vary somewhat. D. Karlen, supra note 54, at 115.
new trial.\textsuperscript{118} Perhaps, therefore, the result reached by the Indiana court is more an outgrowth of a particular style of decision-making than of the needs of the judicial process itself. The question which then must be faced is whether the disposition of \textit{Bryan} can be supported in the larger sense; that is, whether it serves the appellate court's function of assuring correctness in the trial courts. As will be argued later,\textsuperscript{119} it does not.

Another decision of the Indiana Supreme Court raises the same questions about the discharge of an appellate court's correctness function. \textit{Peoples Bank & Trust Co. v. Stock}\textsuperscript{120} was a malicious prosecution action brought by Sonja Stock, the former lover of Michael Canada, now deceased. A few months before he died, Canada designated "Sonja Stock—fiancée" as the beneficiary of an $11,500 life insurance policy. Two months later, he changed the designation to "Sonja Canada—wife." The two, however, were never married. Following consultation with Canada's former wife, who wondered if there was any possibility that their two children might be entitled to the proceeds of the life insurance policy, an attorney brought a declaratory judgment action on behalf of Peoples Bank, which was designated personal representative of Canada's estate. Sonja Stock and Metropolitan Life Insurance Company were named as defendants in the action, which essentially sought to prevent Metropolitan from paying over the proceeds of the policy to Stock.\textsuperscript{121} The trial court, however, found that "Sonja Stock—fiancée" and "Sonja Canada—wife" were the same person, and that Stock was therefore the legally designated beneficiary. The court entered judgment ordering that the proceeds of the policy be paid over to Stock. Stock had spent almost $4,000 defending this action, which under the law had very little, if any, merit.

Stock then brought the malicious prosecution action against Peoples Bank, and, following a jury verdict awarding her $70,000, judgment was entered in her favor in that amount. Peoples Bank appealed to the Indiana Court of Appeals, alleging numerous errors including misapplication of the law of malicious prosecution. The appellate court, however, unanimously affirmed.\textsuperscript{122} Peoples Bank then sought review by the Indiana Supreme Court by way of a petition to trans-

\begin{itemize}
\item \textsuperscript{118} D. Karlen, \textit{supra} note 54, at 100.
\item \textsuperscript{119} See \textit{infra} notes 145-86 and accompanying text.
\item \textsuperscript{120} 403 N.E.2d 1077 (Ind. 1980).
\item \textsuperscript{121} The suit specifically alleged that Stock was "an imposter alleging to be 'Sonja Canada—Wife.'" There was, of course, no Sonja Canada—wife. \textit{Id.} at 1080.
\item \textsuperscript{122} Peoples Bank & Trust Co. v. Stock, 392 N.E.2d 505 (Ind. App. 1979).
\end{itemize}
fer. Three of the five justices of the Indiana high court wished to grant the petition and assume jurisdiction over the case, but the three justices were split two-to-one as to the grounds for granting the petition. Apparently following a theory later to be used in Bryan, the court denied the petition. This had the effect of terminating the matter in the supreme court.

There was sharp disagreement among the three justices who were, despite their collective majority, designated as dissenters. Two believed that the court of appeals had “misconstrued the law set out in decisions on malicious prosecution, and effectively and drastically changed that cause of action as it originated and as it was understood to exist up to this point.” The third justice believed that the court of appeals’ decision could be supported except insofar as it had let stand the $70,000 judgment. This justice would have granted transfer “for the limited purpose of affirming the judgment conditioned upon a remittitur.”

There was no opinion by the two remaining justices who voted to deny transfer. Neither of the “dissenting” opinions discussed the propriety of affirming the appellate court’s decision in the face of a three-to-two majority asserting that some error had been committed below.

The factual and procedural context of Peoples Bank differs markedly from Bryan. First, this was a civil action. Second, review in this case by the Indiana Supreme Court was discretionary; in Bryan, the supreme court’s jurisdiction was mandatory. Despite these differences, however, the court’s handling of the transfer petition raised the

123. Ind. R. App. P. 11(B) (West 1982).
125. 403 N.E.2d at 1078 (opinion of Pivarnik, J., joined by Givan, C.J.).
126. 403 N.E.2d at 1088 (opinion of Prentice, J.). Justice Prentice did state that if his reason for granting transfer was not agreed upon, he would vote in the alternative to deny transfer. Id. Arguably, this alternative vote would create a majority in favor of denying transfer.
127. The usual Indiana practice of not issuing opinions in support of a decision to deny transfer is analogous to the practice of the United States Supreme Court when it decides to deny a petition for writ of certiorari.
129. “[A]ppeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than ten years shall be taken directly to the Supreme Court.” Ind. Const. art. VII, § 4. Bryan was sentenced to three concurrent terms of 45, 20, and 4 years. See supra note 106 and accompanying text. Since the Indiana Constitution grants an absolute right to one appeal in all cases, supreme court jurisdiction in Bryan was therefore mandatory. Ind. Const. art. VII, § 6.
same basic issues about the court's functions as those involved in Bryan.

By deciding to deny the transfer petition, the court was upholding the disposition reached by the appellate court, if not its reasoning. Were a petition to transfer under Indiana procedure closely analogous to a petition for writ of certiorari in the United States Supreme Court, it could be strongly argued that denial of the petition was unfair because a majority wished to grant it. The argument would be that the petitioner was denied a chance to fully brief and argue its claim in the supreme court even though a majority of the justices wished to hear the case. But peculiarities in the Indiana procedure weaken this argument, since under that procedure, even the decision to grant transfer often carries with it no opportunity to further brief or argue the case. Indeed, the decision whether to grant or deny the petition is not typically made known until the supreme court's final disposition of the case.

Still, the effects of the court's handling of Peoples Bank demon-

131. Indeed, in the United States Supreme Court, certiorari will be granted if only four of the nine Justices vote to grant. R. Stern, & E. Gressman, Supreme Court Practice 346 (5th ed. 1978).
132. IND. R. APP. P. 11 (West 1982) specifies the following procedure with regard to petitions to transfer: the petition cannot be brought until the court of appeals has first denied a petition for rehearing. Rule 11(B). Once that has occurred, the transfer petition can be filed, and it is limited to grounds previously set forth in the petition for rehearing. Id. The supreme court then decides whether to grant or deny the transfer petition. If the petition is denied, that ends the matter in the supreme court. Rule 11(B)(4). If the petition is granted, "the Supreme Court shall have jurisdiction of the appeal as if originally filed therein, and all the records, briefs and files of said cause on appeal shall be transferred to the Supreme Court." Rule 11(B)(3).

Briefs may be filed in support of and opposing the transfer petition. Rule 11(B)(6). It would therefore appear that there are two steps to the procedure on grants of petitions to transfer: the court first decides to grant the petition, and then the documents from the court of appeals are transferred to the supreme court. This would appear to give the litigants
strate its similarity to *Bryan*. The court was letting stand a trial court judgment which a majority felt was defective in ways important enough to require alteration. As in *Bryan*, it was the fact that the "dissenting" justices could not agree on the *nature* of the trial court error which prevented the court from reversing. Moreover, had the court granted transfer, that action might have meant only that the two justices who did not wish to assert jurisdiction over the case would have written an opinion in which they laid out their reasons for finding no error in the trial court.\(^{133}\) If the justices then acted as they were later to do in *Bryan*, they would have affirmed the decision of the trial court. The case would then look exactly like *Bryan*. Again, the question is whether such a disposition would be in accord with an appellate court's correctness function, or whether, on the other hand, the disposition runs counter to fundamental principles and purposes of appellate review.

Before that question is addressed, however, the essential difference between the problem raised by *Tidewater* and the obscenity cases, on the one hand, and by *Bryan* and *Peoples Bank* on the other, must be stressed. The differences which divided the Justices in the obscenity cases before *Miller* had to do with the particular tests which each would apply to the allegedly obscene materials.\(^{134}\) The various Justices who in each case made up a majority for reversal of the convictions were interpreting the demands of the Constitution in different ways to reach their common conclusion. By their failure to reach consensus on the test to be applied to the facts of each of these cases, the Justices were not providing needed guidance to legislators and the lower courts in opportunities to further brief and perhaps orally argue the matter, once they have learned that the court has granted the petition.

In practice, the rules are effectuated somewhat differently. At the time of filing of the petition to transfer, the papers from the court of appeals are also sent along to the supreme court. The supreme court's decision to grant or deny the petition is not made public until the decision on the case itself is final. Thus, when a petition is granted, that information will be included in the same opinion in which the merits of the case are decided. Even the decision by the court to hear oral argument does not assure that the petition to transfer will be granted; at times, argument will be ordered and held, and the court will nevertheless decide to deny transfer. Telephone interview with Karl L. Mulvaney, Indiana Assistant Supreme Court Administrator (July 14, 1983).

It thus appears that in Indiana, litigants are best advised to make all their arguments at the same time they file the petition to transfer. Unless this is done, there is some chance that the supreme court will assert jurisdiction over the case and decide the merits without further opportunity for briefing or even oral argument.

\(^{133}\) The decision to grant transfer vacates and entirely nullifies the decision of the court of appeals. *IND. R. APP. P. 11(B)(3)* (West 1982). The two justices voting to affirm the trial court's action would then certainly issue an opinion supportig that disposition.

\(^{134}\) *See supra* note 91 and accompanying text.
particular, and to society in general, concerning the limits of the first amendment's protections. However, it was only those who might become involved in future cases, and those charged with enacting legislation regulating obscenity, who were hurt by the Court's failings. This is not to minimize the scope of the problem created during this period of uncertainty. Nevertheless, in each of the cases decided by the Court, the failure to muster majority support for a test had no direct impact on the litigants themselves. The litigants in those cases were presumably more concerned with the result reached by the Court—the disposition—than with the means by which the Court reached that result. The interests of the litigants, then, were properly served in the pre-Miller obscenity cases, even if the Court perpetuated confusion in the more general sense.

The situation in Bryan and in Peoples Bank is just the opposite. In both a general sense and specifically in regard to these cases, the state court performed its guidance function. For example, the court in Bryan faced five issues and decided each by a majority vote of no less than three-to-two. Future litigants will have no unusual problems understanding the test applied by a majority of the justices as to each of the issues, or the manner in which the majority applied the tests to the facts of the case. Indeed, the particular issues raised by Bryan's appeal were in themselves rather unremarkable; none of the alleged trial court errors offered direct challenges to reasonably well-established law.

135. Seven years after the Court decided that obscenity could be the subject of regulation in Roth v. United States, 354 U.S. 476 (1957), Justice Stewart wrote that obscenity may be "indefinable." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). He then noted that the Court seemed to be holding that only "hard-core pornography" could be regulated, and he continued:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. The frustration implied in Stewart's statement mirrors the difficulties being faced by people throughout the nation as they tried to come to terms with the different problems created by attempts to regulate obscenity.

136. In the obscenity cases, this would not have been true if the Court reversed and remanded for new trial. In that situation, the litigants would be quite concerned about the Court's rationale in reversing, particularly in determining the appropriate test to be applied by the trial court on the obscenity question. The fact that the Court could not reach consensus on the appropriate test, of course, helps to explain why in so many of the pre-Miller obscenity cases, the Court simply reversed, ordering no new trial. See supra note 92 and accompanying text.

137. Recall that the "dissenters" explicitly joined their colleagues on each of the issues other than the ones with which they disagreed. See supra notes 109-10 and accompanying text.

138. For a list of the alleged errors raised in Bryan, see supra text accompanying note 107.
The *Bryan* court, then, was not facing the kind of important and unresolved social issues which were raised in, for example, the obscenity cases. And the court's resolution of the individual issues which it did face was clear. The court, therefore, served its general guidance function.

By the manner in which it disposed of *Bryan*, the Indiana court also served its more specific guidance function in that case. Affirming the conviction leaves nothing for the trial court to do. The consequences of a reversal under the circumstances of the case will be explored in depth later.

Although the Indiana court served its guidance function in *Bryan* and in *Peoples Bank*, it did not serve its correctness function in those cases. Recall that in *Bryan* the court upheld a lengthy prison term, despite the view of a majority of the court that Bryan was entitled to a new trial. This result seems wrong not only from the perspective of the defendant himself, but also from the point of view of the prosecution, since the state's interests in a criminal case are to seek justice as well as to convict. In *Peoples Bank*, the defendant-appellant was forced to pay a judgment of $70,000 which one justice believed was "so excessive as to demonstrate prejudice, bias and irrationality," and which two justices believed was based on a seriously erroneous reading of the law of malicious prosecution. It is not self-evident, however, that a miscarriage of justice has occurred in either case. In order to make that determination, a number of issues must be addressed, beginning with the question of exactly what a litigant, and especially a criminal defendant, has a right to expect from an appellate court. The next section of the article will address these issues.

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139. This is not to say that the state high courts never face the kinds of broad social policy questions with which the Supreme Court must grapple. The obscenity cases, for example, were usually litigated through the state courts before the convictions were challenged in the United States Supreme Court.

Nevertheless, it is doubtful that the Supreme Court would have granted certiorari based on the five issues raised by the appellant in *Bryan*. None was of the far-reaching, unsettled variety that the Court, given its enormous caseload, will normally choose. As already mentioned, the Indiana Supreme Court was *required* to hear the *Bryan* case. *See supra* note 129 and accompanying text.

140. *See infra* notes 243-52 and accompanying text.

141. *See Model Code of Professional Responsibility* EC 7-13 (1982) (a prosecutor's duty is to "seek justice, not merely to convict"); *Model Rules of Professional Conduct* Rule 3.8 comment (Final Draft 1982) ("[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate").

142. 403 N.E.2d at 1088 (Prentice, J., dissenting).

143. *Id.* at 1078 (Pivarnik, J., joined by Givan, C.J., dissenting).
IV. DISCHARGE OF THE CORRECTNESS FUNCTION BY A FRAGMENTED COURT

It already has been asserted that assuring the correctness of lower court action is a fundamental part of an appellate court's work. This, however, is only a general description of the correctness function, and an effort must be made to more precisely define it before it can be determined whether Bryan and Peoples Bank represent a true breakdown in appellate process. First, a theory according to which litigants are granted certain specific rights on appeal will be set forth and defended. Then, the implications of and possible problems raised by that theory will be explored, along with some possible solutions to the problems which adoption of the theory might entail.

A. The Due Process Implications of the Correctness Function

It is submitted that a litigant, and particularly a criminal defendant, has a right to an appellate disposition consistent with the majority vote of the judges. If, in deciding a case, a majority of judges believe that at base, the judgment of the trial court should be reversed, then the starting point should be that a reversal will be ordered based upon our concept of due process.

Although the Federal Constitution does not require that the states establish a system of appellate review of either criminal or civil actions, such review has become an integral part of our adjudicatory systems. Speaking for the Supreme Court, Justice Black once noted that all states provide for appeals from criminal convictions because they "[recognize] the importance of appellate review to a correct adjudication of guilt or innocence." Justice Black's opinion also indicated that once a state has adopted a system of appellate review, that system must operate within the bounds of both the due process and equal protection clauses of the fourteenth amendment. Thus, the

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144. See supra notes 25-52 and accompanying text.
145. The precise disposition — whether to simply reverse, to order a new trial, to modify a judgment, or other alternative — poses some problems which will be explored later. See infra notes 243-52 and accompanying text.
147. Some states even make appellate review a matter of constitutional right. See, e.g., IND. CONST. art. VII, § 6.
149. Id. at 18-19. The fourteenth amendment provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
freedom of a state to choose whether or not to establish a system of appellate review in the first instance does not grant the state unbridled discretion in its operation. A brief examination of some of the constitutional requirements in terms of access to the courts will lay the foundation for the dispositional right asserted here.

Fundamental fairness is at the root of our notions of due process. Particularly in criminal prosecutions, in which the government is using its power against an individual, "there is a right to a fair procedure to determine the basis for, and legality of, such action." The due process clause of the fourteenth amendment assures state criminal defendants that certain rights embedded in the Bill of Rights will be protected. But due process does not stop with protection of rights explicitly spelled out in the Constitution; it also embodies notions of fundamental fairness as to procedures which the states are not required to adopt, but have chosen to adopt nonetheless. One of these procedures is appellate review. The Supreme Court has made it clear that if a state chooses to establish a system of appellate review, it must administer that system in a manner which does not, without some compelling governmental reason, infringe on other fundamental rights of the individual. Thus, in Burns v. Ohio, the Court held unconstitutional a system of filing fees for criminal appeals because that system discriminated against indigent persons and thus effectively denied them equal access to the appellate courts. And, in Bounds v. Smith, the Court held that the fundamental right to access to the courts required that prisoners have access to adequate law library facilities or assistance from persons trained in the law. As the Court held in Griffin v. Illinois, which required that in criminal cases indigents be provided with free copies of their trial transcripts, or a functional equivalent:

It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Ap-

151. For example, the Supreme Court has specifically held that the fifth amendment's prohibition of double jeopardy applies to state criminal prosecutions. Benton v. Maryland, 395 U.S. 784, 793-96 (1969).
153. Id. at 257-58.
155. Id. at 828.
pellite review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioner from invidious discrimination.\(^\text{156}\)

This notion of due process which protects access to the courts is not limited to criminal cases. In \textit{Boddie v. Connecticut},\(^\text{157}\) for example, the Court held that the requirement of a filing fee in divorce actions could not be applied to indigents because it denied them access to the courts to exercise their constitutional right to freedom of choice in marital decisions.\(^\text{158}\) In any case in which access to the courts is necessary in order for one to exercise a fundamental right, the state must assure that the manner of providing for access does not operate unfairly.\(^\text{159}\)

The cases involving access to the courts do not of themselves establish that a criminal defendant or a party in a civil action has a right to a particular \textit{kind} of process once the case is actually before the appellate court. In neither \textit{Bryan} nor \textit{Peoples Bank} was access an issue. In \textit{Bryan} the court was obliged by the state constitution to hear the case.\(^\text{160}\) In \textit{Peoples Bank}, while the court ultimately declined to transfer the case, the litigants had the same opportunity to present their arguments to the court as did others involved in appeals the court was not required to hear. But these cases do strongly imply that once a state has established a system of appellate review, that system must be made available to all similarly situated parties on the same basis. Thus, though there may be nothing to prevent a state from establishing an appellate procedure which requires a two-thirds vote of the judges in order to reverse a judgment, once established, that system must be followed. An appellate court in that jurisdiction could not arbitrarily change the rules in a particular case and require a three-fourths vote in

\(^{156}\) 351 U.S. 12, 18 (1956) (citations omitted).

\(^{157}\) 401 U.S. 371 (1971). The Court said: "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." \textit{Id.} at 377.

\(^{158}\) \textit{Id.} at 383.

\(^{159}\) Admittedly, this argument is more difficult to make in civil cases, where access to judicial process is often not essential to the exercise of a fundamental right. Where no fundamental right is implicated, it would appear that states are free to allocate the use of their courts in any way they see fit short of irrationality or arbitrariness. See \textit{United States v. Kras}, 409 U.S. 434 (1973) (upholding $50 filing fee in bankruptcy proceeding); \textit{Ortwein v. Schwab}, 410 U.S. 656 (1973) (per curiam) (upholding $25 filing fee for appellate review of determination of non-eligibility for welfare). See generally, J. Nowak, supra note 150, at 513-14.

\(^{160}\) \textit{See supra} note 129 and accompanying text.
order to reverse; nor, for that matter, could it reverse on less than a two-thirds vote. So also, when the various states have established and long followed a system of reversing judgments upon a majority vote of the appellate judges, that system cannot be altered spontaneously, and with no notice, without raising serious due process implications. The concept of due process in the appellate context must mean more than simply a right of access. If due process is grounded in normative judgments about what is fair, then it certainly can be said that a litigant on appeal has a right to expect that his or her case will be adjudicated in accordance with a previously followed system of decision-making. It is fundamental fairness, therefore, which provides a litigant with a right to an appellate disposition consistent with the majority vote.

To support this position, the concept of "fairness" in the appellate process must be more fully explored. Recall, first, the central importance of the court's correctness function. Justice Black was referring to this appellate function when he wrote that states provide an appellate process in criminal cases in order to ensure correct adjudication of guilt.

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161. In this light, it is especially disconcerting that the Indiana court did not even discuss its departure from well established practice when it decided to affirm the conviction in Bryan and to deny transfer in Peoples Bank.

162. Recent Supreme Court decisions in the procedural due process context lend support to this analysis. The Court has at times looked to state law to determine whether a party has an interest which rises to a level which is protected by the due process clause. If state law has established such an interest, due process is implicated. In Vitek v. Jones, 445 U.S. 480 (1980), for example, an inmate was involuntarily transferred from a state prison to a mental hospital pursuant to a procedure established by a Nebraska statute which provides for such transfer if a designated physician finds that an inmate "suffers from a mental disease or defect" that "cannot be given proper treatment" in the prison. Neb. Rev. Stat. § 83-180(1) (1981). The inmate challenged the procedure under which he was transferred on due process grounds. The Supreme Court upheld a lower court finding that both the statutory procedure and the apparent practice of state authorities created a protectible interest.

This "objective expectation, firmly fixed in state law and official Penal Complex practice," that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital.

Vitek v. Jones, 445 U.S. at 489-90. The Court also found a protectible interest apart from the state statute, 445 U.S. at 491-94, but that finding was not required for the Court to review the constitutionality of the actual procedures used; the statutory and official practice basis would have been sufficient. The Court went on to hold that in a number of respects, the procedures used in petitioner's case did not satisfy the requirements of due process. Id. at 494-97.

This analysis can be extended to the present problem. The established practice of disposing of appeals by a majority vote of the judges arguably creates a protectible interest in having that practice followed in one's own case. Failure to do so violates due process.
or innocence. The central purpose of a criminal appeal is to insure that the trial court decision was reached fairly and accurately. . . . The appellate court's mission is to provide assurance that the defendant was convicted and sentenced on adequate evidence and without prejudicial error at trial or in the preliminary proceedings. In short, the chief function of a criminal appeal is to see that the appellant was not done an injustice.

Correctness may not be as essential a function in civil cases as in criminal cases, but the correctness function is certainly present in great force in civil cases as well. It has even been asserted that the test normally used to review fact finding in criminal cases is more deferential to the trial court, whether or not the case was tried before a jury, than in other kinds of cases. If assurance of correctness were not at least an important function in civil cases, one might expect that the test used to review the fact-finding process of the trial court in civil cases would be more deferential.

As a result, if the correctness function plays a central role in appellate review, and it is understood that performance of this function benefits both the litigants (through assuring proper adjudication of their case and protection of their rights) and society in general (through increasing confidence in the instruments of government), it follows that the method of performing the function should comport with basic concepts of fundamental fairness.

This conclusion can be reached from another direction which begins with an inquiry as to what is meant by saying the appellate court has a function of assuring "correctness." The answer might be that the

163. See supra note 148 and accompanying text.
164. JUSTICE ON APPEAL, supra note 2, at 58.
165. Carrington, supra note 15, at 520. Given the fundamental interests at stake in a criminal prosecution, this is a somewhat curious statement. The author notes immediately after making this assertion, that the differences between the various standards are "insubstantial." Id.
166. Although the precise standard of review always depends upon the kind of error alleged (e.g., review of trial court's admission of evidence versus review of decision to grant judgment notwithstanding the verdict), in most settings the standard of appellate review will be quite deferential to the trial court. For example, when reviewing the trial court's decision in Bryan to deny defendant's motions for continuances, the Indiana Supreme Court adopted an "abuse of discretion" standard. 438 N.E.2d at 714. And even with regard to defendant's argument that admission of his statements violated his Miranda rights, the court simply inquired whether there was "substantial evidence to support the trial court's finding." Id. at 718 (citing Works v. State, 266 Ind. 250, 362 N.E.2d 144 (1977)).
167. See supra notes 50-51 and accompanying text.
appellate court's task is to determine whether the trial court properly identified the legal standards to be applied and, given the facts found, whether there is support for the conclusions reached upon the application of those standards to the facts.\textsuperscript{168} If a majority of appellate judges believes that the trial court committed reversible error either in identifying the proper standards or in applying those standards to the facts, that majority is asserting that in a fundamental way, the trial court has not done its job. Appellate judges do not reach such conclusions lightly; the tests they utilize in measuring the actions of trial courts are generally quite deferential.\textsuperscript{169} A decision to reverse the judgment of the trial court, therefore, represents something more than a different view of the facts or of the law. It represents a conclusion that these particular litigants were denied the opportunity to have their cases decided correctly. It is a conclusion that losing this opportunity placed the parties in a position different from those who had the good fortune to be before a court which did not err in this manner.

Assuring correctness, then is assuring fairness. And it is fundamentally unfair for a court majority to declare, on the one hand, that there was unfairness below, but to refuse, on the other hand, to do anything about it. This point comes more clearly to light when the personal consequences to the defendant in Bryan are considered. He has done an act which society rightly condemns. But fundamental principles of our government declare that he shall have a fair trial. A trial is held, and errors are alleged to have occurred. A majority of the highest court of the state finds that there was, indeed, error of a serious enough nature to require reversal, even though the justices who make up that majority cannot agree as to the precise nature of that error. The decision handed down, however, affirms the conviction, and Bryan begins to serve concurrent prison terms of 45, 20, and 4 years. We, as members of the society, must ask whether it is fundamentally fair to force Bryan to serve these sentences knowing all the while that three of five members of the high court believed he was entitled to another trial. Whether this is "fair" or "unfair" is not a matter of abstract logic; it is a judgment we make based upon our collective experience as human beings, tempered by the demands of a social order. The society cannot exist without a mechanism for dealing with those who transgress its rules. But in order to so severely circumscribe the freedom of any of its members, society has a strong interest in assuring that such a fair set of

\textsuperscript{168} Here, of course, the precise test used in reviewing the trial court's actions will be quite important.

\textsuperscript{169} See supra note 166.
procedures is available to these people.\textsuperscript{170} Although this argument may seem somewhat weaker in the civil context of \textit{Peoples Bank}, it still must be remembered that the defendant was forced to pay a substantial sum of money despite a majority view that prejudicial error had been committed by the trial court.

Majoritarian rule lies at the very core of our concept of government. When voters cast their ballots in an election, the candidate with the most votes wins regardless of the myriad reasons why the individual votes were cast. When a majority of legislators vote in favor of a piece of legislation, the legislation is approved by that body regardless of the varied reasons why the votes were cast, or even the varied interpretations the members might place on the meaning or effect of the legislation itself. In appellate courts, the concept of majority rule also comes into play, as cases are traditionally disposed of in accordance with a majority vote. To do otherwise goes against the historical grain, deeply embedded in our concept of a fair government.

Perhaps the argument will be made that in \textit{Bryan}, the decision of the court was made in conformity with principles of majority rule. After all, a majority of the court explicitly voted against Bryan as to each of the alleged errors of the trial court.\textsuperscript{171} Therefore, the argument would run, Bryan's case is almost like five separate cases, and a majority will have agreed in each of the cases, by no less than a three to two vote, that the asserted error was indeed not an error.

This argument has surface appeal, and in fact was basically the argument raised by the Chief Justice of the Indiana Supreme Court when he was interviewed about the case.\textsuperscript{172} But closer analysis will demonstrate that the argument is flawed. First, this was not in fact five separate cases, but one case involving one defendant. The asserted errors may have been independent of each other,\textsuperscript{173} but they were connected in at least one important way: they were all part of a single trial process. It was that one process which was under review, not five separate processes as would be true if this were indeed five different cases.

If the concept underlying due process in the evaluation of the trial is to determine whether the trial was conducted fairly, then it is the whole trial, and not small pieces of it viewed independently, which must stand

\textsuperscript{170} Cf. Leff, \textit{Law and}, 87 \textit{Yale L.J.} 989, 1003-05 (1978) (asserting that a trial is certainly a vehicle for determining fact; but as a form of game, it also carries and serves certain values such as formal equality of opportunity).

\textsuperscript{171} See supra notes 107-10 and accompanying text.

\textsuperscript{172} See supra notes 111-12 and accompanying text.

\textsuperscript{173} There may be some connection between the alleged errors. See infra note 183.
up to scrutiny. Viewed as a whole, Bryan's trial did not withstand the scrutiny of a majority of the justices. The problem is that the justices who believed that some prejudicial error was committed could not convince each other to join in their reasoning. They should not, however, have stopped at that point.

It is true that appellate judges owe to themselves and their office a solemn duty of intellectual honesty. That duty requires them to stand by their firmly held views and, when they think it necessary, to set out those views in separate opinions. But the judges are also engaged in a collective enterprise. They comprise a single court with the dual task of offering guidance and assuring the correctness of lower court action. When a majority of the justices are convinced that prejudicial error occurred in the trial court, they have at least some duty to seek a way to resolve their differences and assure that the result reached by their collective body is in accord with their most basic view—in Bryan, that the conviction could not stand. This process broke down in both Bryan and Peoples Bank, and the result in each case is that, while each justice remained steadfast in asserting his views of the law and thus could comfortably feel that he had helped the court to serve its guidance function, the individual defendant whose case made possible the very performance of that guidance function was, arguably, forgotten.

There are times when members of an appellate court are unable to collectively identify the precise act which rendered the proceedings below unconstitutional. Yet the solution is not to stop there and place that court's imprimatur on those proceedings. Instead, where no consensus can be reached as to the precise nature of the error, the court's first job should be to render the basic disposition agreed upon by a majority. Then, the judges should set forth their reasons for supporting or opposing the general conclusion. In this regard, the Supreme Court's handling of Fikes v. Alabama is instructive. The defendant, a twenty-seven-year-old uneducated and possibly mentally ill black man, was brought to trial in an Alabama state court for burglary with intent to commit rape. He was convicted and sentenced to death, and eventually sought a hearing in the Supreme Court. The Court reversed his conviction on the ground that confessions extracted from him and offered against him at trial were involuntary or coerced. The basis of

174. See supra note 99 and accompanying text.
176. Id. at 196-98. Defendant had also asserted two other errors: (1) that he should have been allowed to testify at his trial concerning the confessions without subjecting himself to unlimited cross-examination; and (2) that the selection of the grand jury which indicted him
this reversal was due process.\textsuperscript{177}

Chief Justice Warren's majority opinion did not identify a precise element of defendant's interrogation which made his confession involuntary. Indeed, the dissenters pointed out that none of the individual circumstances of the case rose to the level of circumstances in other cases in which the Court had found coercion or involuntariness.\textsuperscript{178} Despite this, the Court majority was able to conclude that the \textit{totality} of the circumstances resulted in a denial of due process.

There is no evidence of physical brutality, and particular elements that were present in other cases in which this Court ruled that a confession was coerced do not appear here. On the other hand, some of the elements in this case were not present in all of the prior cases. . . . The totality of the circumstances that preceded the confessions in this case goes beyond the allowable limits. The use of the confessions secured in this setting was a denial of due process.\textsuperscript{179}

Although he joined the majority opinion, Justice Frankfurter, speaking for himself and Justice Brennan, felt the need to set forth his own views briefly, and he made the same point somewhat more artfully. "No single one of these circumstances alone would in my opinion justify a reversal. I cannot escape the conclusion, however, that in combination they bring the result below the Plimsoll line of 'due process.' "\textsuperscript{180}

In \textit{Fikes}, a majority of the Supreme Court believed that there was something fundamentally wrong with the method by which the statements were elicited from the defendant, and despite its inability to identify in what precise way the facts made it possible to reach this conclusion, the Court rendered a judgment in accord with the basic belief of the majority. The analogy between the problems faced by the Supreme Court in \textit{Fikes} and that faced by the Indiana court in \textit{Bryan} may not be perfect. A "totality of the circumstances" line of reasoning would not work as well where the errors asserted by the defendant are

\textsuperscript{177} Id. at 197. This case, of course, was decided before Miranda v. Arizona, 384 U.S. 436 (1966).

\textsuperscript{178} 352 U.S. at 200 (Harlan, J., joined by Reed, J., and Burton, J., dissenting). There was some disagreement on this issue. The majority opinion did say that the circumstances here were in some sense worse than those in Turner v. Pennsylvania, 338 U.S. 62 (1949), in that defendant here was "weaker and more susceptible" than was the defendant in \textit{Turner}.

\textsuperscript{179} 352 U.S. at 197.

\textsuperscript{180} Id. at 199 (Frankfurter, J., joined by Brennan, J., concurring).
truly independent. There is some possibility that the two errors found to exist by a majority of the Indiana court—that the defendant's *Miranda* rights were violated because he had not knowingly and intelligently waived his right to consult with counsel before giving a statement;¹⁸¹ and that the procedure under which he was found competent to stand trial violated a statute¹⁸²—were not truly independent.¹⁸³ But even if the errors were completely independent, the fact remains that if the trial is taken as a whole, it can be said that a majority of the court believed that there was serious enough error to require reversal.

This view of the decision-making process on appeals posits that the basic task of the court is to determine whether there was error at the trial level substantial enough to meet the particular standard for determining whether a reversal is required. This does not mean that the court’s discussion of the particular ground of error is mere dictum; on the contrary, to call it so would be to invalidate large portions of what is considered “law.”¹⁸⁴ What it does mean is that on appeal, the case

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¹⁸¹ 438 N.E.2d at 719-22 (opinion of DeBruler, J., joined by Hunter, J.).
¹⁸² Id. at 722 (opinion of Prentice, J.).
¹⁸³ There was much testimony at trial concerning the taking of defendant's statement, which was alleged to have been in violation of his *Miranda* rights. Both the main opinion and the opinion of Justice DeBruler, contain large portions of both the transcripts of this statement and the testimony at the suppression hearing concerning the taking of the statement. Defendant's statement itself reflects great confusion about his rights, as noted in Justice DeBruler's opinion. Id. at 721.
¹⁸⁴ R. Cross, *supra* note 3, at 84-85. Cross' point is that when an appellate court determines that there has not been a substantial miscarriage of justice, it would be wrong to call its discussion of the alleged errors dictum.
must be seen as a whole; the primary question before the court is whether to affirm or reverse. To render an answer to that question which does not comport with the wishes of a majority is defective decision-making.

This point is highlighted by once more referring to the English practice of rendering seriatim opinions.\(^{185}\) Had *Bryan* arisen in England, the result would have been a reversal because the individual opinions, added together, would have mandated that result.\(^{186}\) It simply does not seem appropriate that differences in the particular methods by which decisions are reached should govern the *substance* of the cases. Once again, this offends our notion of fairness and suggests a violation of due process.

In sum, as appellate courts become increasingly divided in their attempts to deal with the cases which come before them, their members must be aware not only of the possibility that the courts might be failing in their guidance function, but also of the possibility that the interests of the litigants in those cases might not be adequately served. Assuring correctness in the trial court cannot stop when each judge individually applies appropriate tests to what transpired below. Assuring correctness also requires the appellate court to act as a single entity, with the judges cooperating as much as possible to reach a result which at the very least is consistent with the views of a majority. To fail to render a disposition which has majority support runs so counter to our ingrained concepts of fairness that it is arguably a violation of due process.

**B. Conduct of Appellate Judges as Support for the Theory**

An admittedly speculative way of supporting the proposition that a litigant has a right to an appellate disposition consistent with the basic view of a majority of the court is to examine what appellate courts actually do. Such an examination reveals that despite both the great potential for results such as those reached in *Bryan* and *Peoples Bank*, and despite deep divisions in the views of appellate judges, courts almost never dispose of cases contrary to the wishes of the majority. It would seem quite possible that appellate judges sense the impropriety of that result, and take steps to assure that it does not occur.\(^{187}\)

The possibility that judges will be divided not only as to the rea-

\(^{185}\) See supra notes 54-56 and accompanying text.

\(^{186}\) An analogous result would have occurred in *Peoples Bank*. The court would have granted the petition to transfer and reversed the judgment of the trial court.

\(^{187}\) This is largely a subject for speculation because the behind-the-scenes deliberations
soning which supports the decision to affirm or reverse, but also as to the ground on which that result rests, is always present. The most obvious kind of case which harbors such potential is one in which an appellant raises a number of mutually independent issues, any one of which, if resolved in that party's favor, would require a reversal of the judgment rendered by the trial court.\textsuperscript{188} \textit{Bryan} is basically that kind of case.\textsuperscript{189} Criminal appeals in general quite often pose a series of independent points for appellate review, and since in many criminal cases, state high courts are required to hear the appeals,\textsuperscript{190} the reporters contain countless examples of multi-issue criminal decisions rendered by state supreme courts. In any one of those cases, there lurks the possibility that a majority of the judges would wish to reverse the conviction, but that no majority would agree as to the particular error committed by the trial court.\textsuperscript{191}

\textit{People v. Robertson},\textsuperscript{192} a recent decision of the California Supreme Court, is a good example of a multi-issue criminal appeal in which the potential for disagreement about the ground on which to reverse was clearly present. Defendant was convicted of two counts of first degree murder. Pursuant to the state's death penalty legislation, nine "special circumstances" were found which formed the basis of the jury's decision to impose the death penalty.\textsuperscript{193} On appeal and by way of a petition for writ of habeas corpus, defendant made numerous claims which he asserted warranted reversal. No fewer than eight of the claims re-

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\textsuperscript{188} See R. Cross, \textit{supra} note 3, at 82.

\textsuperscript{189} But see \textit{supra} note 183 and accompanying text.

\textsuperscript{190} See \textit{supra} note 129 and accompanying text (Indiana provision). See, e.g., \textit{Cal. Const.} art. VI, § 11; \textit{Cal. Penal Code} § 1239(b) (West 1982) (automatic appeal to California Supreme Court where trial court has imposed death penalty).

\textsuperscript{191} This situation is not limited to criminal appeals, though the assignment of numerous independent errors might be somewhat greater in criminal cases in part because of an attorney's ethical obligations. In \textit{Anders v. California}, 386 U.S. 738 (1967), the Supreme Court held that the appointed lawyer's role as advocate requires that he support the client's appeal to the best of his ability as long as the appeal is not frivolous. If after conscientious examination of the record, the lawyer believes the appeal is frivolous, he can seek permission to withdraw, but must accompany the request with "a brief referring to anything in the record that might arguably support the appeal." \textit{Id.} at 744. The court is then obligated to furnish the indigent defendant with counsel's brief and a chance to raise any points he chooses. Finally, the court must itself fully examine the proceedings to determine if the appeal is wholly frivolous. \textit{Id.} These procedures help make the raising of multiple, independent issues a common occurrence in criminal appeals.

\textsuperscript{192} 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).

\textsuperscript{193} The "special circumstances" are now listed in \textit{Cal. Penal Code} § 190.2 (West Supp. 1983).
lated to the question of guilt, including a claim that defendant was provided with constitutionally ineffective assistance of counsel. 194 Defendant also made five claims of error concerning the finding of special circumstances, 195 and another series of claims concerning the penalty phase of the trial. 196 In total, therefore, defendant raised more than sixteen claims of error, divided into three classes. Any one of the claims, if accepted by the court and found to have affected a substantial right of the defendant, 197 would have warranted reversal. A three-justice bloc, joined by a single concurring justice, formed a bare majority for reversal. 198 The decision to reverse was formally made on a single ground, 199 and the concurring justice joined the plurality by agreeing that there had been error in this respect. 200 However, given the close vote on the matter of whether to affirm or reverse the conviction, and the large number of errors raised by the defendant, there was a substantial possibility that the concurring justice might have believed that reversal was warranted for a completely different reason than that found by the other justices. 201

Therefore, there is a question as to the proper disposition of multi-issue cases. As a result, the problem which this article addresses is lurking in countless cases. Indeed, whenever appellate judges disagree about the precise error committed below so that they cannot give clear instructions on remand, the potential for confusion is present. 202

194. 33 Cal. 3d at 36-45, 655 P.2d at 285-92, 188 Cal. Rptr. at 83-90.
195. Id. at 45-52, 655 P.2d at 292-97, 188 Cal. Rptr. at 90-95.
196. It is difficult to determine the exact number of claims made concerning the penalty phase because the court reversed as to one and only discussed two of the other alleged errors. Id. at 53-60, 655 P.2d at 297-302, 188 Cal. Rptr. at 95-101.
197. CAL. PENAL CODE § 1258 (West 1982).
198. Seven justices sit on the California Supreme Court.
199. The court held that since it was reversible error for the trial court to fail to instruct the jury sua sponte in deciding on the death penalty, the court could not consider evidence of other crimes as aggravating circumstances unless it first found that those crimes had been proven beyond a reasonable doubt. 33 Cal. 3d at 53-55, 655 P.2d at 297-99, 188 Cal. Rptr. at 95-97. The court remanded for a new trial on the penalty issue.
200. Id. at 60-63, 655 P.2d at 302-05, 188 Cal. Rptr. at 101-03 (Broussard, J., concurring).
201. As it stood, the concurring justice did not join the main opinion largely because he felt its reasoning was too broad. Id.
202. The obscenity cases decided by the Supreme Court prior to its decision in Miller v. California, 413 U.S. 15 (1973), could provide examples. Suppose that the only alleged ground for reversal was a failure to use the appropriate test for determining whether the material was obscene. If a majority of the Court believed the trial court did not use the correct test, but no majority could be reached as to what test was appropriate, the potential for a problem analogous to that of Bryan and Peoples Bank would arise. This might help explain the Court's pre-Miller practice of summarily reversing convictions. See supra note 92 and accompanying text.
A sampling of high court criminal decisions from four different states over a ten-year period, however, has uncovered no other instances in which a court disposed of a case contrary to the wishes of a majority.\textsuperscript{203} Obviously, the search method does not permit ruling out the possibility that some such decisions do exist, particularly in the civil context. However, the methodology certainly permits the conclusion that such occurrences are extremely rare. Further, no United States Supreme Court decisions could be found in which such a result occurred.\textsuperscript{204}

Why haven’t more courts reached the same conclusion as that reached twice by the Indiana court, when there is so much division among appellate judges? The reason for this, as stated at the beginning of this section, is subject to speculation. One possibility, however, is that appellate judges simply perceive that to reach a result contrary to the most basic point on which a majority of the members of the court agree, is improper. Believing this, the judges compromise, perhaps finding the highest common denominator in their views and disposing of the case accordingly.\textsuperscript{205} Indeed, to assure that justice has been done, judges will at times take action contrary to their views if they believe

\textsuperscript{203} The sampling was conducted in the following manner: all criminal decisions of the highest courts of California, New York, Alabama, and Indiana for the period 1973 to 1983 were reviewed. Each case was scrutinized first to determine whether there was a majority opinion. If there was a majority opinion, there was no reason to look further. However, if there was no majority opinion, the case was further scrutinized to determine whether it was disposed of in conformity with the wishes of those judges who made up the plurality. Despite the fact that over nine hundred appellate decisions in all were examined, scores of which were plurality decisions, no other instances could be found. California and New York were chosen because of their size and reputation as leading courts, as well as for the strong possibility that many of the decisions of their highest courts would contain dissents. Alabama was chosen as a representative of a different region of the country, and Indiana was selected for this reason as well as the reason that it was the Indiana Supreme Court which decided \textit{Bryan} and \textit{Peoples Bank}. The search was made possible by using the key word capabilities of Lexis. Criminal cases were searched because their case names are denoted by “People” or “State,” terms easily recognized by Lexis. Criminal cases, it was believed, also held greater potential for producing the kind of split vote found in \textit{Bryan}. See \textit{supra} notes 190-91 and accompanying text. Although over nine hundred cases were reviewed, the actual number of criminal cases for the four states during the ten year period was larger. This was because the Lexis search disposed of those cases in which no dissenting opinion appeared.

\textsuperscript{204} For this conclusion, articles discussing Supreme Court plurality decisions were the main source of information. See, e.g., \textit{Chicago Comment}, supra note 6; \textit{Harvard Note}, supra note 6.

\textsuperscript{205} For a discussion of the “highest common denominator” method of avoiding overly splintered decision-making, see Davis & Reynolds, supra note 6, at 82. See also \textit{Harvard Note}, supra note 6, at 1131-32 (referring to a “common ground” approach and noting where it might and might not work).
that the correctness function will be better served by such action. In those instances, the judge will engage in compromise in order to assure that the court's action will both serve the interests of the parties and satisfy the court's desire to reach consensus. There is direct and indirect evidence that such a process does indeed take place on appellate courts.

The manner in which the United States Supreme Court dealt with a serious split in views as to the proper disposition of *Maryland Casualty Co. v. Cushing* presents one explicit example of compromise. A towboat navigating a Louisiana river attempted to pass under a bridge. It collided with a concrete pier and capsized. Five seamen drowned in the accident. The owner and charterer of the towboat filed petitions in admiralty in the United States District Court in Louisiana to limit their liability under provisions of the Limited Liability Act. The district court then issued an injunction prohibiting suit against the owner and charterer elsewhere than in that limitation proceeding. However, the representatives of the five seamen who had drowned subsequently brought this action in the same district court against the owner of the bridge and the liability insurers of the towboat's owner and charterer. Federal jurisdiction was based on diversity of citizenship and on the Jones Act and the plaintiffs relied on a provision of the Louisiana Insurance Code permitting direct suit against the insurer within the policy's terms and limits. The insurers moved for summary judgment on the ground that the state statute did not apply to marine insurance, and that in any case, application of the statute would go against general maritime law and the essential purpose of federal law in that field. The district court granted the motion and dismissed the action. The Court of Appeals for the Fifth Circuit reversed, holding that the district court had read the state statute too restrictively, and that the statute was no more than a permissible regulation of insurance authorized by federal law, and not in conflict with any feature of admiralty law. The Supreme Court agreed to hear the case.

The question which the Court agreed to decide was whether the

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207. 46 U.S.C. §§ 183, 186 (1976). These sections limit the liability of an owner or charterer, except in certain cases, to the amount or value of the interest of the owner.
211. Cushing v. Maryland Casualty Co., 198 F.2d 536, 539 (5th Cir. 1952).
application of the Louisiana statute would violate the Jones Act, the Limited Liability Act, or the Constitution's grant to the federal government of exclusive jurisdiction in maritime matters. All nine Justices agreed that the Louisiana statute, insofar as it permitted direct actions against the insurers of shipowners and charterers who instituted limitation proceedings, was not in violation of the Jones Act. The Court, however, split down the middle on the question of whether the Limited Liability Act foreclosed the actions against the insurers. Justice Frankfurter, joined by Justices Reed, Jackson, and Burton, asserted that the federal law did indeed foreclose the actions under the state statute, and that therefore the judgment of the district court dismissing the plaintiff's action against the insurers should be reinstated.\(^{213}\) Justice Black, joined by Chief Justice Warren and Justices Douglas and Minton, concluded that the action under state law was not foreclosed by the Limited Liability Act.\(^{214}\) These eight Justices split the same way on the question of whether the application of the state statute could be justified by a provision of federal law\(^{215}\) which states that no act of Congress, except under limited circumstances, could invalidate a state law that tries to regulate business insurance. Justice Clark took a middle position, stating that the Limited Liability Act did not prevent an action against insurers under the state statute, but that the action against the insurers could not be decided before the limitation proceeding was brought to a close and the liability of the owners determined.\(^{216}\)

The Court was therefore deadlocked. In cases in which the Supreme Court is evenly split, it will affirm the decision of the highest previous court.\(^{217}\) In this case, that would have meant the decision of the court of appeals permitting the action against the insurers to proceed would have been validated despite the views of five of the Justices either that the action was precluded, or that it could not proceed until the limitation action had been brought to a conclusion.\(^{218}\) Justice

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\(^{213}\) 347 U.S. at 421-22.
\(^{214}\) Id. at 436-37.
\(^{216}\) 347 U.S. at 423-25.

\(^{217}\) The Court will usually affirm per curiam, without opinion. See, e.g., United States v. Klinger, 345 U.S. 979 (1953); Haliburton Oil Well Cementing Co. v. Walker, 326 U.S. 696 (1946).

\(^{218}\) Viewed from a different perspective, it is true that a majority of the Court (Justices Clark, Black, Douglas, Minton, and Chief Justice Warren) did believe that the action could proceed, but not on the same terms, since Justice Clark believed it could not go forward until the limitation proceeding was concluded. Thus, even viewed from the other perspective, it is still true that disposing of the case by a straight affirmance of the court of appeals would have been against the express views of a majority of the Court.
Frankfurter and those who joined his opinion perceived that such a result would be wrong, and therefore decided to compromise their views to permit a disposition consistent with the views of Justice Clark:

In order to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation, we vacate the judgment of the Court of Appeals and order the case to be remanded to the District Court to be continued until after the completion of the limitation proceeding.219

Maryland Casualty Co., therefore, was a case in which the Justices of a deadlocked Supreme Court took appropriate action to assure that the ultimate disposition accorded as nearly as possible with the views of a majority of the Justices. True, Justice Frankfurter and his colleagues significantly compromised their position in order to assure such a result, but the point is that the Justices were not content to write their separate opinions and let the case go despite the disposition to which such action would have led. Instead, they noted the implications of their varied positions and reassessed.220 In doing so, they may not have provided clear guidance to future litigants about the limits of the states' power to permit such actions against maritime insurers, but they no more disserved their guidance function than would have been the case had they not compromised on the disposition. The result of the case, therefore, is that the litigants' interests were served to the best of the Court's ability without sacrificing any other significant function of the Court.

A second Supreme Court decision also exemplifies explicit compromise in order to reach results most in accord with the views of a majority. Screws v. United States221 was a federal prosecution of Georgia law enforcement officers arising out of the beating death of a black man. The defendants were convicted under provisions of the criminal code222 for violating the civil rights of the man. The court of appeals

219. 347 U.S. at 423.
220. In some sense, the Frankfurter group had to move further to compromise than the Black group would have had to move. The latter group could still have maintained that the Limited Liability Act did not foreclose the action under the state statute, but that the action should await the conclusion of the limitation proceeding. By its act of compromise, the Frankfurter group abandoned its basic view that the action under the state statute was completely foreclosed.
221. 325 U.S. 91 (1945).
222. 18 U.S.C. §§ 52, 88 (current version at 18 U.S.C. § 242 (1976)). The current version provides:
Whatever, under color of any law . . . willfully subjects any inhabitant of any state, Territory, or District to the deprivation of any rights, privileges, or immunities
affirmed the conviction,223 and the Supreme Court granted
certiorari.224

The Court was badly divided. Justice Douglas, in an opinion
joined by Chief Justice Stone and Justices Black and Reed, stated that
a new trial was required primarily because the trial court had not in-
structed the jury that in order to convict the defendants under the stat-
ute, they must find a specific intent to deprive a person of a right
specifically provided for in the Constitution or laws, or decisions inter-
preting them.225 Justices Roberts, Frankfurter, and Jackson wished to
reverse the convictions outright on the ground that the federal law was
not intended to be applied to defendants’ conduct.226 Justice Murphy
believed that the convictions could stand, and that no new trial was
needed.227 Finally, Justice Rutledge separately reached the same con-
clusion.228 The vote, therefore, was as follows: four Justices favored
reversal for new trial; three favored outright reversal with no new trial;
and two, for different reasons, favored affirming the convictions. There
was thus no majority supporting any particular disposition of the case.
Once again, had no Justice compromised, the Court would have con-
sidered itself deadlocked and automatically affirmed the action of the
court of appeals.229 This would have required sustaining the convic-
tions, a result desired by only two Justices.

Justice Rutledge, however, believed that such a result would not
be proper, and he decided that, despite his own views, he would join
the opinion of those of his brethren with whose views he was most in
accord, and thereby create a majority:

My convictions are as I have stated them. Were it possi-
ble for me to adhere to them in my vote, and for the Court at
the same time to dispose of the cause, I would act accordingly.
The Court, however, is divided in opinion. If each member
accords his vote to his belief, the case cannot have disposition.
Stalemate should not prevail for any reason, however compell-
ing, in a criminal cause or, if avoidable, in any other. My

secured or protected by the Constitution or laws of the United States . . . shall be
fined not more than $1,000 or imprisoned not more than one year, or both . . . .
223. 140 F.2d 662 (5th Cir. 1944).
224. 322 U.S. 718 (1944).
225. 325 U.S. at 103-07 (opinion of Douglas, J., joined by Stone, C.J., and Black and
Reed, JJ.). The opinion also held that defendants did act under color of law. Id. at 107.
226. Id. at 138-39 (Roberts, Frankfurter, and Jackson, JJ., dissenting).
227. Id. at 137-38 (Murphy, J., dissenting).
228. Id. at 113, 134 (Rutledge, J., concurring).
229. See supra note 217 and accompanying text.
views concerning appropriate disposition are more nearly in accord with those stated by MR. JUSTICE DOUGLAS . . . . Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse . . . . 230

Here, then, was a situation in which a particular Justice believed that despite his own views as to the proper disposition of the case, it was necessary to enter into some form of compromise. Ironically, had Justice Rutledge adhered to his views, the case would have been disposed of in the manner he most wanted. 231 But he believed this would be an improper result. Although his opinion is not explicit regarding why he held this belief, Justice Rutledge certainly felt that, particularly in criminal cases, it is improper to affirm a conviction without the concurrence of a majority of the Justices. 232

The point here is not that the Justices of the Supreme Court will always compromise rather than permit the fortuity of a deadlock to dictate their disposition. Indeed, the Court has on occasion completed its work on a case evenly divided. 233 There are also occasions on which the Supreme Court disposes of cases in a manner which does not fully meet the views of a majority of its Justices. 234 The point, rather, is that explicit compromise occurs on the Court for reasons which are not fully enunciated, but which seem clearly to include some notion that it

230. 325 U.S. at 134 (Rutledge, J., concurring).
231. At least one author has criticized Justice Rutledge's action: "A desire that courts should always decide a case is understandable, but to take a position contrary to personal belief to achieve this result seems to be an undesirable and unnecessary concession to form at the expense of substance." Comment, Constitutional Law, 44 Mich. L. Rev. 814, 816 (1946). This criticism seems unduly harsh, particularly when viewed in light of a seven-member majority whose highest common denominator was the belief that the convictions could not stand.
232. Another instance in which a Supreme Court Justice voted with an eye to avoiding a deadlock can be found in Spinelli v. United States, 393 U.S. 410 (1969). There, Justice White, concurring, wrote: "Pending full-scale reconsiderations of [Draper v. United States], 358 U.S. 307 (1959), on the one hand, or of the Nathanson-Aguilar cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an evenly divided court." Id. at 429.
233. See supra note 217.
234. See, e.g., Apodaca v. Oregon, 406 U.S. 404 (1972), in which the issue was whether a unanimous jury verdict was constitutionally required in state criminal trials. Eight Justices agreed that Duncan v. Louisiana, 391 U.S. 145 (1968), which had held that the sixth amendment right to jury trial was fully incorporated into the fourteenth amendment, was still good law. However, these eight Justices split four-to-four on whether the sixth amendment required a unanimous jury verdict in criminal cases. Justice Powell believed that unanimity was required for federal, but not for state, trials. Thus, eight Justices believed that the same standard was applicable to state as to federal criminal trials, and five believed that unanimity was required for federal criminal trials. Nevertheless, the Court held that unanimity was not required for state criminal trials. See Harvard Note, supra note 6, at 1133-34.
would be improper to dispose of the case without compromise. This suggests an awareness that the Court may be failing to serve one of its functions by disposing of cases in a manner which is fundamentally inconsistent with the views of a majority of the Justices.

Sometimes the acts of compromise by appellate judges are not made explicitly, but instead must be inferred from the way in which they vote in particular cases. Most especially, when a judge simply joins a plurality, indicating only that he "concurs in the judgment," that judge has assumed a pivotal role in the decision of the case. This has occurred a number of times on the Supreme Court.\textsuperscript{235} In cases of this type, the concurring Justice, by joining in the \textit{disposition} wished by the plurality, assures that his view about the case's disposition will prevail while at the same time avoiding having to join in the reasoning of the plurality. Of course, there can be numerous reasons for a judge's decision to concur without opinion, but one possibility is that the judge has decided to compromise rather than state a view that would make the case difficult to dispose of in a satisfactory way. Therefore, these may also be cases in which significant compromise occurs in order to best serve the interests of the litigants in the face of a divided court. Action of this type, of course, is not limited to the Supreme Court.\textsuperscript{236}

In sum, the conduct of appellate judges seems to suggest that they perceive some impropriety in disposing of cases in a manner which is fundamentally at odds with the views of a majority. First, dispositions analogous to those of \textit{Bryan} and \textit{Peoples Bank} rarely occur; and second, there is strong evidence that the reason that we rarely see such dispositions is that appellate judges take deliberate actions to avoid them. Once again, the mere conduct of appellate judges does not by itself prove that \textit{Bryan} and \textit{Peoples Bank} are constitutionally invalid. It does suggest, however, that judges—the individuals we have entrusted with devising rational and fair methods of decision-making—have themselves concluded that the practice is at least to be avoided, and is perhaps constitutionally defective.

\textbf{C. Implications of Adoption of the Theory}

Several possible consequences would attend acceptance of the theory that it is a violation of due process for an appellate court to render a disposition contrary to the vote taken by the judges. This subject has

\textsuperscript{235} See, e.g., cases cited in \textit{Chicago Comment, supra} note 6, at 124-34.

\textsuperscript{236} In California, for example, see People v. White, 16 Cal. 3d 791, 798, 549 P.2d 537, 541, 129 Cal. Rptr. 769, 773 (1976).
already been alluded to previously.\textsuperscript{237}

In approaching this issue, three assumptions will be made. First, it will be assumed that a majority of the appellate judges believes that some error was committed in the trial court which necessitates reversal. Second, it will be assumed that the judges are in disagreement about the precise ground on which reversal should occur. And third, it will be assumed that the judges are unwilling or unable to compromise their positions. Both \textit{Bryan} and \textit{Peoples Bank} satisfy each of these assumptions.

If it is accepted that the appellate court cannot, consistent with due process, affirm the decision of the trial court when a majority of the judges believes that some reversible error was committed, two options are available to the court. Unfortunately, each poses certain institutional or procedural problems which makes the solution problematic. However, because of the due process problem, an option which should \textit{not} be available to the court is to affirm, at least in all respects, the disposition of the lower court. Two options will be explored, together with their advantages and disadvantages: outright reversal (with no new trial), and reversal for a new trial.

1. Reversal without new trial

A first possibility would be simply to reverse and enter judgment for the appellant. This option, however, has its difficulties, though the disadvantages would be far greater for civil than for criminal cases.

In criminal matters, reversal without new trial would follow English procedure where retrial does not occur once an appellate court finds reversible error to have occurred at the trial.\textsuperscript{238} Although this would be contrary to American practice, the position is not without some support. Nevertheless, to reverse without new trial would surely provoke a strong reaction from some members of the public, who will perceive that the court system will have failed in at least two respects: it will have failed to punish a person already found guilty at one trial; and it will not have offered members of the society needed protection from dangerous individuals. Despite the possible availability in some cases (including perhaps \textit{Bryan}) of civil means of taking control over the individual,\textsuperscript{239} the public may nevertheless perceive that the court

\textsuperscript{237} See supra notes 114-16 and accompanying text.

\textsuperscript{238} D. KARLEN, supra note 54, at 110. The reason probably derives from the English view of the double jeopardy problem. \textit{Id}.

\textsuperscript{239} IND. CODE §§ 16-9.1-3 to 9.1-18 (West 1982) provide for involuntary commitment of individuals found to be suffering from a mental illness and who are either danger-
will not have performed two of its most important functions.

Still, there is support for outright reversal in criminal cases. Our constitutional system places a heavy burden on the state to conduct a trial which not only proves the defendant’s guilt beyond a reasonable doubt, but also assures that the defendant’s constitutional rights have been preserved. These are what our system considers to be the elements of justice in criminal proceedings, and judges play an important role in the drama which is the criminal process. That role is to assure that both aspects of the state’s burden have been satisfied before a person is subjected to punishment. Appellate courts, as have been shown, serve as a further check on the process. When, therefore, the courts have proven unable to perform their functions, punishment cannot be meted out. Arguably, this is what has occurred in cases such as Bryan. Unable to come to some agreement about the nature of the reversible error which occurred at trial, but nevertheless voting by a majority that such error did indeed occur, the appellate court has proven unable to perform its function fully. The criminal defendant cannot be held responsible for this breakdown in the adjudicatory system, and should not therefore be forced to suffer for that dysfunction.

In civil cases, the problem is quite different. In that context, the English and American practice is the same. Unless no purpose would be served by holding a new trial, the matter will be remanded upon reversal by the appellate court. That result seems justified. The prevailing party in the trial court is not in a position analogous to the state following a successful prosecution of a criminal defendant. Whereas assuring that justice is done is a fundamental part of the state’s function in any criminal prosecution, a civil party’s role is merely to present the strongest possible case consistent with an honest view of the facts and a reasonable reading of the law. If the appellate process fails to yield a

240. Recall that it has been asserted that correctness is the primary function of appellate courts in criminal cases. See supra note 164 and accompanying text.

241. If the appellate court holds that even given a particular party’s view of the facts, that party cannot prevail, there would of course be no reason to conduct a new trial. See supra note 114.

242. A lawyer’s general duty is to “represent his client zealously within the bounds of the law . . . .” Model Code of Professional Responsibility EC 7-1 (1982). If the position taken is “supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law,” the advocate is acting ethically. Id. at EC 7-4. Model Rules of Professional Conduct Rule 3.1 (Final Draft 1982) takes essentially the same position.

ously or gravely disabled. Ind. Code § 16-14-9.1-1 (West 1982) defines “dangerous” as “a condition in which a person as a result of mental illness presents a substantial risk that he will harm himself or others.”
clear reason for the error in the trial court, it has failed not only the appellant, but the prevailing party as well. It would therefore be grossly unfair not to grant the prevailing party another opportunity to present his case. Reversal without new trial in the civil context would therefore not appear to be a viable option in the event that the appellate court cannot agree on the nature of the error committed below.

2. Reversal and remand for new trial

The second option would be simply to reverse for new trial, even though the appellate judges wishing that result do not agree on the ground on which the trial court erred. This solution poses one problem: the trial court may be in a quandary about what action to take when, on retrial, the presentation of evidence poses the same problems which were alleged to have constituted error in the first trial and formed the basis for the appeal. Under some circumstances, a trial court might feel compelled to rule on each issue in precisely the same manner as at the first trial, and if that occurs, holding a second trial might be something of a futile exercise.

However, the extent to which a remand would be futile will depend to a great degree on the nature of the issues which formed the basis of the appeal. For present purposes, those issues can be classified into two categories: (1) those in which the trial court, on remand, will effectively have no choice but to repeat the ruling it made at the first trial; and (2) those in which the trial court would be acting within its discretion in reversing its prior ruling on remand. The Bryan case presents examples of both types of issues.

Defendant’s claim in Bryan that his statement to the police could not be admitted at trial because it was taken in violation of his Miranda rights is an example of the first kind of issue. Two of the justices agreed with defendant as to this ground. There is little doubt that given the inculpatory nature of the statements and the fact that they issued from the defendant himself, the prosecution will once again offer them at trial. It is also likely that defendant, encouraged by a two-member supreme court minority, will again object to their admission. But given the probative value of the statements and a three-to-two supreme court ruling that the statements were not taken in violation of

243. The model of the categories of issues presented here is rough, and could be the subject of further exploration which is beyond the scope of the present article.

244. Justices DeBruler and Hunter believed that admission of the statements was error, and that a new trial should be held, without admitting the statements. See supra note 109 and accompanying text.
defendant's *Miranda* rights, the trial court will almost certainly over-
rule defendant's objection and again admit the statements. Indeed, a
contrary decision might be the impetus of a prosecution petition for
writ of mandate to force the court to obey the majority holding of the
supreme court.245 This motion could well succeed even though a writ
of mandate is an extraordinary remedy which will seldom be ordered
unless a trial court has failed to act where it was under a duty to act.246
This would likely be such a case.247 The trial court would therefore be
in a corner. It would almost certainly have to admit the statement.
And if every ground forming the basis of the appeal falls into this cate-
gory, a remand would be a costly and worthless exercise.248

It is highly unlikely, however, that every ground of an appeal will
fall into this first category. More likely, at least some (and probably
most) of the issues raised on appeal will concern matters about which
the trial court had discretion. In those situations, an appellate court's
failure to reverse will not be a holding that the trial court had to take
the action it took, but only that such action was within its discretion.
An analogous situation for present purposes would be one in which the
appellate court affirms because although the trial court was in error, the
error was not prejudicial.249 In either situation, the trial court could
well decide to rule differently on remand, and a writ of mandate would

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246. *See* e.g., State v. Montgomery Circuit Court, 399 N.E.2d 375, 377 (Ind. 1980).

247. Defendant might perhaps argue that even if the statement was not inadmissible on
*Miranda* grounds, the trial court should nevertheless refuse to admit it on some other
ground, such as that the probative value of the statement is substantially outweighed by the
danger of unfair prejudice. *See Fed. R. Evid.* 403. However, given the great probative
value of a defendant's statement which was not taken in violation of his *Miranda* rights or
otherwise coerced, and the lack of any real danger of unfair prejudice, it would almost never
be appropriate to refuse to admit such a statement. If the trial court did so, a writ of man-
date may be in order.

248. In *Bryan*, if all the alleged errors were seen as falling into this first category, then
holding a second trial would indeed be futile. Defendant's only hope would be a more
favorable finding by the trier of fact on the question of guilt. Ironically, Bryan made no
argument on appeal that the jury had wrongly applied the facts and found him guilty of the
crimes; with regard to the jury's factfinding, Bryan's only argument was that some of the
evidence which the jury was permitted to hear was improperly admitted. *Bryan*, 438 N.E.2d
at 714-18. However, as will be argued shortly, not all of the alleged errors in *Bryan* were of
this first type. *See infra* notes 249-51 and accompanying text.

249. In People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982), for
example, one of the alleged errors was that the trial court should have instructed the jury
that in deciding the question of guilt, it should not consider the subject of the penalty. The
California Supreme Court held that it was indeed error not to so instruct the jury, but that
the error was nonprejudicial. *Id.* at 36-37, 655 P.2d at 285-86, 188 Cal. Rptr. at 83-84. *See
supra* notes 192-201 and accompanying text.
rarely if ever issue to reverse such action. An example in *Bryan* was defendant's assertion that the trial court should have granted his motion for a continuance made on the day of trial. On appeal, the court held only that the trial court "did not abuse its discretion" in denying the motion.\(^{250}\) Should it be faced with similar circumstances at the new trial, the court could certainly grant such a motion with no concern whatever that its action would be subject to a writ of mandate. Similarly, and perhaps more realistically, the trial court in *Bryan* will almost certainly have to undertake another inquiry into defendant's competency to stand trial.\(^{251}\) When making this determination, the court could well decide to follow the letter of the statutory procedure, thus heading off any new procedural challenge to its finding. No party would have cause to complain about such a decision.

Therefore, to the extent that the errors asserted by an appellant fall into the second category, the new trial might well look very different from the first one, as long as the court reconsidered the issues and handled them somewhat differently. And to the extent that the errors raised on appeal constitute a mixture of both types, the same conclusions would likely follow. In neither situation would a remand likely be futile.

But *would* the trial court see any reason to rule differently on these discretionary issues at the second trial? Arguably, it would. Certainly, by reversing, the appellate court will have sent a message to the trial court that even though no agreement could be reached as to the precise ground of the error, the first trial was, as a whole, defective. The mere fact of reversal makes clear that substantial error was committed. This might well create an incentive on the part of an alert trial court to handle the second trial somewhat differently, and its discretion with regard to a broad category of purported errors will make this task a feasible one.\(^{252}\)

Therefore, even when an appellate court cannot muster majority agreement on the particular error committed below, a reversal and re-

\(^{250}\) 438 N.E.2d at 714.

\(^{251}\) Recall that defendant claimed that the trial court erred in not adhering to a statutory procedure in making its finding that he was competent to stand trial, and that one justice agreed with him on appeal. *See supra* notes 107-10 and accompanying text.

\(^{252}\) It is also possible that the parties, and particularly the prosecution in a criminal case, will alter their manner of presenting their case. The desire in doing so would be the same as that of the trial court: to avoid raising at least some of the same issues which formed the basis of the appeal and the overturning of the judgment. However, proper representation of the interests of the respective clients will often make significant change unlikely.
mand for new trial will generally be a viable alternative. The correctness function can be appropriately performed.

V. Conclusion

Unfortunately, the due process violation attendant upon an appellate court's refusal to render a disposition consistent with the majority vote will not admit of easy solution in some cases. Each of the options discussed in the previous section provides a means by which the due process violation can be overcome, but itself poses other problems of varying levels of seriousness. However, it has not been the purpose of this article to explore fully the means by which appellate courts can remedy the problem once it has occurred. Rather, the article has had two primary purposes: first, to demonstrate the importance of the "correctness" function of appellate review; and second, to indicate the seriousness of at least one way in which courts sometimes do not serve that function.

The relatively rare occurrences of appellate dispositions similar to those in Bryan and Peoples Bank should not lead one to believe that the problem raised by those cases is not an urgent one. We are living in a society which poses increasingly complex and controversial issues of social policy and justice, and we require our appellate courts to become embroiled in these debates as they are faced with the decision of individual cases. The very complexity and controversial nature of the issues themselves have led to ever-widening divisions in the views of our appellate judges, and as those divisions become more and more apparent, great attention is focused on the courts' role of offering leadership and guidance to others who must both act in the society and create and enforce rules which apply to all of its members.

But through all of this, appellate courts must still decide the particular cases which come before them. They cannot function as legislatures unable to reach majority agreement as to the passage of a particular piece of legislation. Faced with divisive issues, legislatures can typically avoid the question by simply not acting at all.253 Courts, however, cannot do this. They can, of course, render decisions which are carefully circumscribed so as to have application to only a narrow range of problems, but they should not decide cases without regard to the interests of individuals before them. If courts are only permitted to

253. As to some matters, of course, legislatures must also take some affirmative action. An example would be the passage of budget measures.
act in the face of actual controversies, they must engage in their deliberations without losing sight of the very source which gives them the power to act in the first place.

254. See supra notes 25-27 and accompanying text.