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Should Minnesota Recognize a State Constitutional Right to a Criminal Appeal?

Stan Keillor
lawreview@hamline.edu

SHOULD MINNESOTA RECOGNIZE A STATE CONSTITUTIONAL RIGHT TO A CRIMINAL APPEAL?

Stan Keillor[*]

> If one looked at the matter with no knowledge of its history and as something to be established de novo on the basis of modern conceptions of social control, it would seem that where life or liberty is at stake, as in a criminal prosecution, a rational re-examination of the whole case after trial, at least at the instance of a convicted accused, to be made by a tribunal insuring the best judicial power in the jurisdiction,

[*] Stan Keillor completed twenty-five years as a staff attorney specializing in criminal law at the Minnesota Court of Appeals, ending with the title of Deputy Chief Staff Attorney – Criminal. He is currently serving as a consulting attorney at Access Justice PSC, a non-profit, public interest law firm in Minneapolis, doing criminal defense at the trial and appellate levels, and working in his own appellate practice.

> in order to insure that justice has been done, would be a matter of course.[1]
>
> [A] convicted defendant does not have a constitutional right to appeal under either the United States Constitution or the Minnesota Constitution . . . .[2]

I. INTRODUCTION

In January 1860, less than two years after the adoption of the Minnesota Constitution, Michael Dugan, a tavern owner in Anoka, "was brutally murdered by two lumberjacks from St. Paul who were passing through Anoka on their way to a hunting expedition."[3] For this crime, Charlie Dumphey was convicted of first-degree murder and sentenced to death by hanging.[4] Before he was sentenced, however, Dumphey sought relief in the Minnesota Supreme Court, which heard argument on several claims, including an inadequate indictment, juror bias, and evidentiary error.[5] The court's opinion reads like a decision of an appeal, but Dumphey had moved the court for a new trial, as he was allowed to do by statute, although the court denied his motion.[6] Nonetheless, "the opinion was erudite and logical enough to sustain a sound decision."[7] Despite citing relatively little authority, "Justice Charles E. Flandreau dismissed the defendant's arguments with admirable clarity, Holmesian brevity, and some unusually graceful legal writing."[8]

Dumphey illustrates the process of appellate review existing shortly after the Minnesota Constitution was adopted. Although the *Dumphey* court did not label it an "appeal," the process provided plenary appellate review of a criminal conviction.

Minnesota rules, and previously statutes, have provided criminal defendants a right to appellate review of conviction throughout the state's history.[9] Minnesota appellate courts, nevertheless, reciting language from

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[1] Roscoe Pound, *Introduction* to LESTER B. ORFIELD, CRIMINAL APPEALS IN AMERICA 3 (Little, Brown & Co. 1939).

[2] Spann v. State, 704 N.W.2d 486, 491 (Minn. 2005) (but noting that the right to at least one review by direct appeal or postconviction review has been recognized in Minnesota).

[3] Joel Samaha, *A Case of Murder: Criminal Justice in Early Minnesota*, 60 MINN. L. REV. 1219, 1219 (1975–76).

[4] *Id.* at 1220.

[5] *Id.* at 1222 n.11; *see* State v. Dumphey, 4 Minn. 438 (1860).

[6] *Dumphey*, 4 Minn. at 449.

[7] *See* Samaha, *supra* note 3, at 1223.

[8] *Id.*

[9] MINN. R. CRIM. P. 28.02, subd. 2(1); *see* Pub. St. 1863 ch. 117, § 1 (providing for removal to the supreme court within six months of conviction); *cf.* MINN. STAT. § 632.01 (1978) (providing, before repeal in 1979 following adoption of the rules of criminal procedure, for removal of "criminal cases" to the supreme court following judgment by appeal

United States Supreme Court opinions dating back to 1894, have repeatedly stated that a criminal defendant has no constitutional right to appeal.[10]

The "no constitutional right to appeal" rule has been criticized as ill-founded dictum by several commentators, who not that the right is commonly granted by court rule or statute, and argue that the rule ignores the expansion of traditional common law forms of review.[11] Justice Brennan, in a 1983 dissent, noted that "a case presenting this question [of a constitutional right to appeal] is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions."[12]

This article will examine the history of the treatment of claims to a right to appeal a criminal conviction, with specific reference to Minnesota.[13] It will explore whether the statements in appellate opinions that no such constitutional right exists are dicta, and examine the opinions in which the Minnesota Supreme Court has approached the point of declaring a right to a criminal appeal.[14] It will examine the possible sources for a constitutional right to appeal a criminal conviction, and look at the possible consequences of recognizing such a right.[15] Finally, this article will argue that saying "there

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or writ of error). Minnesota statutes do not currently confer a right to appeal a criminal conviction, other than a first-degree murder conviction, although they do establish a right to appeal a criminal sentence. *See* MINN. STAT. § 244.11, subd. 1 (2012) (providing the right to appeal a sentence); *id.* § 632.14 (2012) (providing the right to appeal a first-degree murder sentence to the supreme court). The supreme court has indicated that the court, not the legislature, has the authority to grant or withhold a right to appeal. State v. Wingo, 266 N.W.2d 508, 512 (Minn. 1978).

[10] McKane v. Durston, 153 U.S. 684, 687 (1894); *see* Deegan v. State, 711 N.W.2d 89, 95 (Minn. 2006) (noting that the right to one review may be a "tradition unique to Minnesota" that is "arguably . . . grounded in the Minnesota Constitution," but declining to decide whether there is a state constitutional right to an appeal). *But see* Larson v. State, 801 N.W.2d 222, 227 (Minn. Ct. App. 2011) (rejecting the argument that *Deegan* recognizes a constitutional right to appeal).

[11] *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 511–12 (1992); David Rossman, *Were There No Appeal: The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 548 (1990); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 102–03 (1985); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 384–86 (1991); *cf.* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 5–10 (1994) (discussing the "revisionist" view of the "no constitutional right to appeal" rule and arguing that at least one view of the federal" harmless error" rule cannot be reconciled with the lack of a constitutional right to appeal).

[12] Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting). Brennan also predicted that the Court, if squarely presented with the question, would recognize a constitutional right to appeal, or require the states to "afford at least some opportunity for review of convictions." *Id.*

[13] *See infra* notes 17–48 and accompanying text (examining the history of claims to a constitutional right to appeal a criminal conviction in America and Minnesota).

[14] *See infra* notes 51–66 and accompanying text (exploring the dictum recited by the Minnesota Supreme Court regarding a constitutional right to appeal a criminal conviction).

[15] *See infra* notes 70–164 and accompany text (identifying the sources of a constitutional right to appeal and the consequences of recognizing the right).

is no constitutional right to appeal" in criminal cases is a shibboleth.[16] The frequent repetition of that statement has served only to obscure historical developments and constitutional logic that amply support recognizing the right.

II. HISTORY

Despite the refusal to recognize a constitutional right to a criminal appeal, there is a rich history of review by appellate courts that functioned as "appellate" review of criminal convictions. These traditional forms of review were more appropriate for the common law traditions and the limited technology of the times than the full-record "appeal" that developed later. Thus, the omission from the Minnesota and United States Constitutions of a right to appeal may simply have reflected the ubiquity of the common law appeal equivalents and the unfamiliarity of the modern appeal process. In this regard, Minnesota's history mirrored that of the rest of the country.

A. Law in America

The law in America, following that of England, was slow to incorporate a right to appeal into either its civil or criminal jurisprudence. The United States Constitution conferred on the United States Supreme Court "appellate Jurisdiction, both as to Law and Fact."[17]he form of review that would be recognizable today as an "appeal," however, did not yet exist.[18]

"Appeals, through which a higher court reviews the entire case . . . and has the power to render a judgment based on an overall assessment of the quality of the verdict, were not part of the common law tradition."[19] In the nation's early days however, there were procedures that approximated, or functioned as, criminal appellate review. Writs of error, the common law corrective remedy, were available in most of the original thirteen states.[20] Questions that arose during a criminal trial were often certified to a higher

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[16] "Shibboleth" is defined as "[a] moral formula held tenaciously and unreflectingly, esp. a prohibitive one; a taboo." OXFORD ENGLISH DICTIONARY (2d ed., 2012).

[17] U.S. CONST. art. III, § 2, cl. 2. In England, there were three "modes of procedure" that were "more or less analogous" to a criminal appeal before that right was recognized—a writ of error, reservation of a case for a higher court at the discretion of the trial judge, and, in misdemeanors tried in the civil division, a motion for a new trial. JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 171–72 (2d ed. 1890).

[18] In the 18th and 19th centuries, in England and America, the courts used various "procedures that served some of the functions of the modern appeal." These included circuit riding by the high court justices, post-conviction motions, trials before multi-judge panels, "executive and legislative review of criminal convictions," trial de novo in a higher court, and writs of error. Meltzer, *supra* note 11, at 7.

[19] Rossman, *supra* note 11, at 525.

[20] *See id.* at 541–43.

court.[21] Cases were often tried before multi-judge panels, providing an exchange of views similar to that on an appellate court.[22] As with criminal trials conducted by United States Supreme Court justices, these panels often included members of the highest state court.[23] Thus, trials were presided over, in part, by the most skilled and learned judges, the very judges who would otherwise have sat in review of them.[24]

The common law writ of error provided only for review of "the record," which, unlike the present-day appellate "record," focused on the pleadings and other written submissions and did not include a transcript of the trial.[25] The error had to be apparent on the face of the record, and, therefore, review did not fully extend to evidentiary rulings, jury instructions, or the sufficiency of the evidence.[26] Review by writ of error was less thorough than in a modern appeal, but the present-day conception of an appeal based on a thorough review of a record that includes a transcript of the proceedings and extends to errors of both fact and law, had not been established. In general, even when appellate review included an examination going beyond the face of the record, it extended only to errors of law, not to errors of fact.[27]

Thus, the significance of the noun "appeal" was less firmly established than that of the adjective "appellate" derived from it.[28] At an

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[21] *See id.* at 563.

[22] *Id.* at 560.

[23] *Id.*

[24] The trial of Aaron Burr on treason charges, for example, was presided over by Chief Justice John Marshall, not because of the extraordinary nature of the charges, but as part of Marshall's circuit-riding duties. *See* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 183 (La. State Univ. Press. 2001). Marshall sat with a federal district court judge but was the presiding judge. *Id.* at 190. In the course of the trial, he wrote fifteen opinions "on a variety of procedural, evidentiary, and doctrinal matters." *Id.* Marshall wrote to his fellow justices and solicited their opinions on critical questions, such as the doctrine of constructive treason. *Id.* at 197.

[25] *See* Orfield, *supra* note 1, at 23–24. "Writs of error were the traditional format the common law provided for reviewing a lower court's judgment. The writ was an independent action in a higher court, conceptually quite unlike a contemporary appeal." Rossman, *supra* note 12, at 522 n.8.

[26] Orfield, *supra* note 1, at 24. In a New Mexico case, a defendant convicted of murder had been shot before the fatal shot and could not have participated in the crime, but was held on a proceeding in error to be entitled only to a new trial. Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 140–41 (1927).

[27] Orfield, *supra* note 1, at 78–79 (describing the gradual evolution of state appellate practice).

[28] An 1893 legal dictionary did not define the noun "appeal," and defined the verb form as a removal "to a higher court for review *and retrial*." WILLIAM C. ANDERSON, A DICTIONARY OF LAW 64 (Flood and Co. 1893) (emphasis added). One commentator theorizes that there was a "culture of appeal" in colonial America that carried over from English law at the time, although in the common law there was no legal form that embodied the cultural concept. Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L. J. 913, 922–23 (1997).

early stage, the United States Supreme Court deferred to Congress's definition of "appellate jurisdiction," beginning in the Judiciary Act of 1789.[29] Courts did not infer a constitutional right to an appeal from the grant of a jurisdiction labeled "appellate."

A statutory right to an appeal in a federal criminal case was not established until 1889, and the Judiciary Act of that year limited that right to capital cases.[30] In 1891, the right was extended to other criminal cases, and the courts of appeal were established to handle this, as well as the civil, appellate caseload.[31]

B. Practice in America

Not only was the law slow to recognize a process of appellate review based on a full record, but the means of presenting even the common law forms of appellate review were laborious. The deficiencies of writs of error, and other such forms, were destined to be disclosed by practical developments.

One commentator noted the difficulties of preparing a bill of exceptions in Missouri:

> Filing an appeal on a bill of exceptions required getting someone to write out, in longhand, a record of the evidence adduced at trial and of all the objections and motions and the court's ruling on them . . . , as well as making copies, in longhand, of the indictment, the jury instructions, the final judgment, and any other official documents that were part of the trial record.[32]

The first typewriter produced on a large scale was introduced in 1873.[33] Official trial court reporters did not begin appearing in state courts until the late 19th century.[34] Thus, it would have been difficult, if not

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[29] *See* Barry v. Mercein, 46 U.S. 103, 119 (1847) ("[b]y the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress . . . .").

[30] Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656, 656.

[31] Mar. 3, 1891, ch. 517, § 5; 26 Stat. 826, 827–28.

[32] Frank O. Bowman, III, *Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349, 365 (2009–10).

[33] *See* WILFRED A. BEECHING, CENTURY OF THE TYPEWRITER 32 (St. Martin's Press 1974). The QWERTY keyboard was developed by 1874. *Typing in Tompkins*, THE HISTORY CENTER IN TOMPKINS COUNTY, http://ergo.human.cornell.edu/ergoprojects/dea4702005/hctwebsite/sholes.html (last visited Oct. 5, 2012) Use of the typewriter did not spread widely until 1881, when the New York YWCA introduced typing classes. BRUCE BLIVEN, JR., THE WONDERFUL WRITING MACHINE 58 (Random House 1954).

[34] Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 433 (1993). Gregg's shorthand, the system that eventually predominated, was not introduced until 1888. DORIS H. CRANK, ET AL., METHODS OF TEACHING SHORTHAND AND TRANSCRIPTION 7 (McGraw-Hill

impossible, to provide for an appeal based on a full record until that time. Moreover, although appellate court decisions were published in individual states from the early days of the republic, no national reporting system existed to facilitate the broader integration of judge-made law until the West Reporter System began in 1879.[35] At the time, appellate practice before the United States Supreme Court relied far more on oral argument than on written briefs, which were not even required until 1884.[36]

Soon after these advances eased the practical barriers to modern appellate review, in 1889, the state of Washington became the first state to incorporate a right of appeal into its constitution.[37] Soon thereafter, Congress began the process of enacting a federal statutory right to appeal with the Judiciary Act of 1889.[38]

C. Minnesota Law

The law in Minnesota followed a path similar to that of the rest of the country.[39] The Minnesota Constitution bestowed on the Minnesota Supreme Court "appellate jurisdiction in all cases."[40] The term "appeal" does not appear in the state constitution or in the debates at the constitutional conventions.[41] The term "appellate jurisdiction" was soon held to refer to the nature of the jurisdiction conferred, not to the mode by which it was exercised.[42] The term appears to have been copied from the United States Constitution's grant of "appellate jurisdiction" to the United States Supreme

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1982). "[I]n old Missouri, there was no cadre of court reporters routinely taking notes of everything that transpired in every case." Bowman, *supra* note 32, at 365.

[35] *See* James H. Wyman, *Freeing the Law: Case Reporter Copyright and the Universal Citation System*, 24 FLA. ST. U. L. REV. 217, 228 (1996). "States tended to publish their high court decisions very slowly; West published them fast . . . ." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 306 (Simon & Schuster, 3d ed. 2005).

[36] William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRACT. & PROC. 1, 2 (1999).

[37] James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction,* 8 U. PUGET SOUND L. REV. 375, 376 (1985).

[38] *See supra* note 31.

[39] *See supra* notes 17–37 and accompanying text (looking at the law and practice of the United States regarding the constitutional right to appeal a criminal conviction).

[40] MINN. CONST. art. VI, § 2.

[41] The term was used in discussing whether justices of the peace are officers of the judicial branch. DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION (DEMOCRATIC) 198 (Goodrich, 1857) ("Appeals may be taken from the [Justice of the Peace's] Court to the District Court, in the same manner as they may be taken from the District Court to the Supreme Court."). This, however, was merely a recognition of existing statutory procedures. In general, the reports of the constitutional debates "are quite barren of discussions on the merits of the various provisions." John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 239 (1994).

[42] Tierney v. Dodge, 9 Minn. 166, 170 (1864).

Court.[43] As with the members of the Supreme Court, the Minnesota justices, beginning in territorial days, "held trials and heard motions individually as district court judges and then re-assembled 'en banc' to sit as a supreme court."[44]

A statutory right to appeal existed in territorial days.[45] A similar provision for removal "by the defendant to the supreme court by appeal or writ of error at any time within six months after conviction" existed at and following statehood.[46]

D. Minnesota Practice

Many practical difficulties attended a mid-19th century appeal in Minnesota, as elsewhere. The briefs in *Dumphey*, and other appeals of the Civil War era, written out in longhand and alleging, or denying, in formalistic fashion the existence of error below, confirm how cumbersome the appeals process was.[47] Due in part to the practical problems of preserving the record and presenting the arguments in legible written form, the appellate process moved slowly; although the Minnesota Supreme Court produced 504 majority opinions from 1858 to 1865, this was only a pace of about ten opinions per justice per year.[48]

III. "NO CONSTITUTIONAL RIGHT TO APPEAL" – DICTUM OFTEN ECHOED

These primitive conditions were eased by new legal and technological developments ushering in the modern age of appellate review based on a full record.[49] At the same time, however, the highest courts of the

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[43] The United States Constitution conferred on the Supreme Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

[44] Robert J. Sheran and Timothy J. Baland, *The Law, Courts, and Lawyers in the Frontier Days of Minnesota: An Informal Legal History of the Years 1835 to 1865*, 2 WM. MITCHELL L. REV. 1, 19 (1976).

[45] 1851 Terr. Laws ch. 129 §§ 213 (appeals from justice-of-the-peace courts to district court), 220 (appeal upon conviction to the Supreme Court).

[46] 1863 Gen. Laws ch. 117, § 1. Professor Joel Samaha describes the even-handed pretrial and trial procedures accorded the defendant in Anoka County following a brutal, drunken homicide, and the supreme court's "erudite" appellate opinion in response to the defendant's request to that court for a new trial. Samaha, *supra* note 3, at 1222–23 (citing State v. Dumphey, 4 Minn. 340 (Minn. 1860)).

[47] The briefs are available in the Minnesota State Law Library.

[48] Sheran and Baland, *supra* note 44, at 40.

[49] *See supra* notes 34–39 and accompanying text (describing the introduction of the typewriter and other practical developments, as well as the establishment of the federal courts of appeal).

state and the nation were taking their most decisive steps in rejecting a constitutional right to appeal.[50]

In 1894, the United States Supreme Court abruptly stated, without citation or analysis, that an appeal from a criminal conviction "was not at common law, and it is not now, a necessary element of due process of law."[51] This statement could be traced back to 1805, although the Supreme Court then, in *United States v. More*, was construing the Judiciary Act, not the Constitution.[52] In 1894, the *McKane* Court, whose opinion did not refer to the Constitution or any developments in the law since its enactment, appeared to be reciting the state of the common law, which did not recognize an "appeal."[53] Moreover, at the time *McKane* was decided, the parameters of "due process of law" had hardly been defined.[54]

In 1883, Justice William Mitchell declared in *City of Minneapolis v. Wilkin* that there was no right to appeal, except "where, as in this case, the right of review on a writ of *certiorari* exists."[55] *Wilkin* preceded the United States Supreme Court's opinion in *McKane*, but it involved a civil condemnation matter.[56] Perhaps for that reason, Minnesota courts have cited *McKane*, not *Wilkin*, in stating the "no constitutional right to appeal" rule in criminal cases.[57]

The "no constitutional right to appeal" statement, as applied to criminal cases, arises out of dictum.[58] In *McKane*, the United States Supreme Court was deciding only a question of bail pending appeal.[59] The tenuous

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[50] Judge Jack Nordby has argued that in some areas, such as the right to privacy, constitutional law "must adapt to rapid technological developments." Jack Nordby, *Thirty-two Reflections on the Birth, Slumber, and Reawakening of the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 245, 261 (1994).

[51] McKane v. Durston, 153 U.S. 684, 687 (1894).

[52] *See* United States v. More, 7 U.S. 159, 171 (1805).

[53] *See supra* text accompanying note 51 (explaining the United States Supreme Court's statement that a right to appeal criminal convictions was not part of the common law).

[54] *See* Davidson v. New Orleans, 96 U.S. 97, 102–04 (1877) (noting that the Fifth Amendment Due Process Clause "has rarely been invoked," protesting that the Fourteenth Amendment due process guarantee was being invoked much too often, and stating that the meaning of the term would have to be developed "by the gradual process of judicial inclusion and exclusion"). In the late 19th century, the concept of "due process" still generally followed "settled English usage at common law," at least to the extent that any common law usage would not be held to be in violation of due process. RODNEY L. MOTT, DUE PROCESS OF LAW 246–48 (BOBBS-MERRILL 1926).

[55] City of Minneapolis v. Wilkin, 14 N.W. 581, 583 (Minn. 1883).

[56] *Id.* at 581.

[57] *See* State v. Osborne, 715 N.W.2d 436, 449 (Minn. 2006) (Anderson, J., concurring); State v. Seifert, 423 N.W.2d 368, 375 (Minn. 1988) (Wahl, J., dissenting), *superseded by rule*, Francis v. State, 781 N.W.2d 892 (Minn. 2010); State v. Meyer, 37 N.W.2d 3, 15 n.12 (Minn. 1949). There appear to be no Minnesota criminal cases citing *Wilkin* for this principle in a criminal case.

[58] *See supra* text accompanying notes 53–54 (providing the cases to which the "no constitutional right to appeal" rule is cited).

[59] *See McKane*, 153 U.S. at 686.

origins of this rejection of a constitutional right to appeal, however, have not prevented courts from frequently citing *McKane*.[60]

The "no constitutional right to appeal" rule was not only born as dictum, but reflected the customs and practices of a time that was already passing.[61] A decade before the *McKane* Court stated that a right to appeal "was not at common law, and it is not now, a necessary element of due process of law," the Supreme Court itself had rejected the argument that due process was defined by "settled usage."[62] As the Court characterized it, to do so would be "to deny every quality of the law but its age, and to render it incapable of progress or improvement."[63] The *McKane* rule was heavily dependent on "settled usage" that was rapidly outmoded by developing technology. The *McKane* rule, however, became so engrained and the availability of statutory and rule-based appeals so ubiquitous that the rule was merely repeated.[64] When the Minnesota Supreme Court has occasionally been confronted with an argument that a right to appeal has been violated, it has responded with the *McKane* rule that denial of an appeal does not violate due process or any other constitutional right.[65] The court, in citing *McKane* in criminal cases, usually on a tangential point, has always done so without analysis.[66]

These frequent repetitions cannot obscure the doubtful origins of the "no constitutional right to appeal" rule. Minnesota's lockstep reliance on the *McKane* rule is ripe for reexamination.[67] The reexamination offered here will

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[60] *See, e.g.*, Carlton v. State, 816 N.W.2d 590, 611 (Minn. 2012); Rickert v. State, 795 N.W.2d 236, 246–47 (Minn. 2011).

[61] *See supra* notes 51–58 and accompanying text (looking at the type of language cited by Minnesota courts when stating that there is no constitutional right to appeal).

[62] *McKane*, 153 U.S. at 687; Hurtado v. California, 110 U.S. 516, 528 (1884).

[63] *Id.* at 529.

[64] *See infra* note 65 and accompanying text (listing cases in which the Minnesota Supreme Court has cited *McKane*).

[65] *See* State v. Seifert, 423 N.W.2d 368, 375 (Minn. 1988) (Wahl, J., dissenting) (right to self-representation on appeal); State *ex rel.* Mastrian v. Tahash, 152 N.W.2d 786, 789 n.2 (1967) (three-year delay in completing trial transcript); State v. Lorenz, 50 N.W.2d 270, 271 (1951) (denying payment of expenses of indigent's appeal); State v. Meyer, 37 N.W.2d 3, 15 n.12 (1949) (Youth Conservation Act).

[66] *See Seifert*, 423 N.W.2d at 375 (Wahl, J., dissenting); *Mastrian*, 152 N.W.2d at 789 n.2; *Lorenz*, 50 N.W.2d at 271; *Meyer*, 37 N.W.2d at 15 n.12. The court in *O'Rourke* analyzes the issue at some length, including its due process ramifications, and quotes at length from the discussion in Griffin v. Illinois, 351 U.S. 12 (1956). In re O'Rourke, 220 N.W.2d 811, 822–23 (1974). However, there is no analysis of *McKane*, the genesis of the rule, in *O'Rourke*, and, although *Griffin* is a criminal case, the majority opinion and Justice Frankfurter's concurrence, supplemented by history rather than precedent, cite *McKane* without analysis. *Griffin*, 351 U.S. at 20–21.

[67] One commentator on state constitutionalism describes a process of "path dependence," in which state courts depend on the direction federal constitutional law has taken, without exploring alternatives. Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism,* 115 PENN ST. L. REV. 783, 803–04 (2011). Friedman states that "[e]xperience shows that a state court is likely, more often than not, to rely upon a doctrinal framework developed by the federal courts." *Id.* at 804.

go beyond the criticism of *McKane* and explore whether, despite *McKane*'s precedential sway, a *state* constitutional right to appeal should be recognized under the Minnesota Supreme Court's standards for departing from federal precedent.[68]

IV. RECOGZNIZING THE RIGHT – OR AT LEAST TAKING A FRESH LOOK

A. Difficulties

The "no constitutional right to appeal" rule, at a minimum, is supported by the lack of an explicit constitutional provision of the right. The right may have a "textual hook" in article VI, section 2 of the Minnesota Constitution, which confers "appellate jurisdiction" on the Minnesota Supreme Court.[69] That language, however, has been rejected as a source for a constitutional right to an appeal.[70] The right cannot be established merely by the ubiquity of the procedure or its familiarity.[71]

In 1974, the Minnesota Supreme Court rejected article VI, section 2's grant of "appellate jurisdiction" as a basis of a constitutional right to appeal. Although it involved a civil appeal, *O'Rourke* held that "[t]he Minnesota Constitution does not by express word or by necessary implication impose on this court the duty to hear an appeal in all cases."[72]

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[68] In *Kahn v. Griffin*, the Minnesota Supreme Court set out the standards for departure from federal constitutional precedents. Some of these standards, such as whether there has been a federal departure from precedent, clearly do not apply here. In the "decision tree" established by *Kahn*, the question of a constitutional right to appeal comes down to whether "federal precedent does not adequately protect our citizens' basic rights and liberties." *Kahn*, 701 N.W.2d at 828. *See* Paul H. Anderson & Julie Oseid, *A Decision Tree Takes Root In the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 868 (2007) (describing the "decision tree" created by *Kahn*).

[69] *See* MINN. CONST. art. VI, § 2.

[70] A. Christopher Bryant, *What* McDonald *Means for Unenumerated Rights*, 45 GA. L. REV. 1073, 1091 (2010) (distinguishing rights enumerated in the Bill of Rights and those "lacking such a textual hook").

[71] Justice Frankfurter repeated de Tocqueville's warning against confusing the familiar with the necessary. *Griffin*, 351 U.S. at 20 (Frankfurter, J., concurring) ("The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is . . . a necessary ingredient of due process of law.").

[72] *O'Rourke*, 220 N.W.2d at 812, 815. The *O'Rourke* court did not address whether the Minnesota Constitution, by extending "appellate jurisdiction" to "all cases," had conferred a right to appeal, but it distinguished between its own *power* of review and any *duty* to hear a particular type of appeal. *Id.* at 817–18. The State Public Defender's Office (SPDO) wrote an amicus brief in *O'Rourke* arguing that there was a state constitutional right to appeal. Without referring specifically to criminal appeals, the SPDO brief argued that statements in case law to the contrary were dictum or were belied by their actual holdings. The *O'Rourke* court read the brief as admitting that there was no case on point recognizing a constitutional right to appeal. *Id. O'Rourke* adopted a construction of the phrase "appellate jurisdiction" that

In contrast to this lack of explicit constitutional language recognizing a right to appeal, the "no constitutional right to appeal" rule has been stated explicitly, even categorically, in *McKane, Wilkin*, and succeeding cases.[73] On the surface, the quest for recognition of the right, therefore, might appear hopeless. Yet, a mere citation to dictum, however categorically stated, does not prevent a fresh look based on sound principles.

Although the absence of explicit constitutional language warrants caution, it does not rule out the recognition of such a right to appeal. The right to appeal does not necessitate resorting to the "penumbra" of other constitutional provisions, as with other unenumerated constitutional rights.[74] Some of the most prominent "rights" within the criminal process are not grounded in explicit constitutional language.[75] For instance, the United States Constitution makes no mention of proof beyond a reasonable doubt or the presumption of innocence.[76] In *Winship*, the United States Supreme Court traced the progress of these principles from legal axioms to recognized requirements of due process.[77] Similarly, the Minnesota Supreme Court has found a limited state constitutional right to counsel before submitting to chemical testing and a right to a jury of twelve without explicit bases in the state constitution for either right.[78]

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was consistent with the United States Supreme Court's construction of the same phrase in the United States Constitution. In *Marbury v. Madison*, Chief Justice Marshall held that issuing a writ of mandamus did not fall within the Supreme Court's "appellate jurisdiction" because "the essential criterion of appellate jurisdiction . . . [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Marbury v. Madison, 5 U.S. 137, 175 (1803). Under this broad definition, a writ of error or a writ of certiorari could be viewed as an exercise of "appellate jurisdiction." The term had no necessary relationship to modern notions of an appeal.

[73] *See McKane*, 153 N.W.2d at 687; *Wilkin*, 14 N.W. at 583; *Spann*, 704 N.W.2d at 491 (stating that "[a]lthough a convicted defendant does not have a constitutional right to appeal under either the United States Constitution or the Minnesota Constitution," in Minnesota there is a right to one review).

[74] *See* Roe v. Wade, 410 U.S. 113, 152 (1973) (citing cases in which the right to privacy has been found in the "penumbras" of the Bill of Rights); Griswold v. Connecticut, 381 U.S. 484–85, (1965) (citing cases "suggest[ing] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"). An appeal is a legal process of a type not completely unknown to the common law. It is not an abstract idea, like the right to privacy, needing to be discovered within another abstraction. "Appellate jurisdiction" was a concept known to the framers of both the Minnesota and United States Constitutions.

[75] Many of the unenumerated rights that have been recognized have been at least partially derived from the Ninth Amendment, which provides that the enumeration of certain rights in the Constitution is not meant to exclude other, unenumerated rights not included in that document. U.S. CONST. amend. IX. There is no direct counterpart to that amendment in the Minnesota Constitution.

[76] *See* U.S. CONST.

[77] In re Winship, 397 U.S. 358, 361–64 (1970).

[78] Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 836–37 (Minn. 1991) (finding that drivers had a right to counsel, despite conflicting precedent, based in part on Minnesota's history of "procedural protection for the rights of the criminally accused"); State v. Hamm, 423 N.W.2d 379, 382 (Minn. 1988) (holding, based in part on 1869 decision, that

B. Staring Down Stare Decisis

Even assuming there are adequate implicit sources for a state constitutional right to appeal, the principle of judicial restraint, reflected in the tradition of *stare decisis*, "directs that [the courts] adhere to former decisions in order that there might be stability in the law."[79] This doctrine is to be taken even more seriously in matters of constitutional law.[80] The doctrine of stare decisis, however, does not bind the court to unsound principles. "[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment."[81] Accordingly, stare decisis does not require adherence to the *McKane* dictum, despite its long tenure.[82]

V. SOUND PRINCIPLES

A. Public Policy Favoring "One Corrective Review"

A widely acknowledged public policy argument supports recognizing a constitutional right to a criminal appeal. This argument goes much further than policy arguments generally could because it has already yielded a quasi-constitutional right to "one corrective review."[83]

In July and August of 1913, Leo Frank was tried in Fulton County, Georgia, for the murder of Mary Phagan. The trial was attended by a throng so hostile that, before beginning the final instructions to the jury, the trial judge told Frank and his attorney, in the words of the dissenting Justice Oliver Wendell Holmes, that there would be a "'probable danger of violence' if there should be an acquittal or a [hung jury]."[84] The Georgia Supreme

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drafters of the state constitution assumed a trial by jury meant a jury of twelve people), *superseded by constitutional amendment*, U.S. CONST. amend. VI, *as recognized in* Danforth v. State, 761 N.W.2d 493 (2009).

[79] Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000).

[80] Simonett, *supra* note 41, at 239 (stating that constitutional law "professes to take stare decisis more seriously than the common law").

[81] *Id.* (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921)).

[82] *See* State v. Lessley, 779 N.W.2d 825, 836 (Minn. 2010) (concluding that the jury-trial waiver provision in article I, section 4 of the state constitution did not apply to criminal cases, and so a waiver would not require the prosecution's consent, citing what had been described as "considered dictum"). The dissent, however, concluded that the prior "dictum" had been offered with substantial support. *Id.* at 840–41 n.1.

[83] *See infra* notes 86–97 and accompanying text (explaining how the United States Supreme Court and the Minnesota Supreme Court acknowledge the "one corrective review" right).

[84] Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Frank and defense counsel agreed and were absent when the guilty verdict was read.

Court affirmed the conviction, and on appeal from the denial of a federal habeas corpus petition, the United States Supreme Court acknowledged that "if the state, *supplying no corrective process*, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law."[85]

Georgia's state appellate review in *Frank* was ineffectual. The public policy served by affording review of a criminal conviction, however, has since been recognized in case law as supporting the right to "one corrective process" to review a criminal conviction.[86] That right is embodied in Minnesota's postconviction review statute.[87]

In *Case v. Nebraska*, the United States Supreme Court acknowledged the principle that convicted criminals have a right to one "corrective process."[88] Only Justice Clark's concurring opinion suggested the Court adopt it as a rule.[89] Justice Brennan's concurrence argued for a "sufficiently comprehensive" state postconviction remedy that would "embrace all federal constitutional claims," but the per curiam majority opinion expressed no view on this point.[90]

In the 1976 *Knaffla* decision, the Minnesota Supreme Court followed *Case* in acknowledging a right to one review of a criminal conviction, whether by direct appeal or postconviction review.[91] With the Minnesota postconviction statute already vindicating such a right, however, it was unnecessary to explore its constitutional roots.[92] *Knaffla* recognized that

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[85] *Id.* at 335 (emphasis added). The majority opinion relied heavily on the fact that the Georgia Supreme Court had reviewed the conviction. Justice Holmes' dissent argued that the working of a "state corrective procedure" did not resolve the constitutional question that confronted the federal courts. *Id.* at 347. Holmes' view later prevailed in Moore v. Dempsey, 261 U.S. 86 (1923).

[86] *See* Deegan v. State, 711 N.W.2d 89, 95 (recognizing the right to one review, if not constitutional in nature, as a "tradition unique to Minnesota." (citing Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005)).

[87] MINN. STAT. ch. 590.

[88] Case v. Nebraska, 381 U.S. 336, 337 (1965). In *Case*, the Supreme Court granted review to address the lack of a corrective process in Nebraska, a deficiency that, as in other states, had made federal habeas corpus the only means of obtaining review of claims of federal constitutional violations in a state criminal proceeding. *Id.* Before the Court decided *Case*, however, the Nebraska legislature had enacted a postconviction-remedy statute. *Id.* Thus, it was unnecessary for the Court to decide whether such a remedy was constitutionally required. The Court's per curiam opinion merely remanded for reconsideration in light of the new postconviction statute. *See id.* at 337–40 (possibly suggesting a positive answer to the question on which certiorari had been granted—whether the Fourteenth Amendment required the states to provide "some adequate corrective process").

[89] *Case*, 381 U.S. at 337–40 (suggesting a positive answer to the question of whether the Fourteenth Amendment required the states to provide "some adequate corrective process," the question on which the Court granted certiorari).

[90] *Id.* at 347.

[91] State v. Knaffla, 243 N.W.2d 737, 741 (Minn. 1976).

[92] *Id.* at 740–41.

Case did not provide "clear direction," only an "implication," of a right to one review.[93]

The *Case*-based right to one corrective process, whether by direct appeal or postconviction collateral attack, recognizes how essential review is to the fair administration of criminal justice. It suffers, however, from two flaws: (1) its constitutional basis is not clearly established, and (2) it can be satisfied by a postconviction collateral proceeding that is more limited than a direct appeal. The right *Case* recognized was only quasi-constitutional, as the Minnesota Supreme Court recognized in *Deegan*.[94] It was developed only in concurring opinions, leaving its precedential authority unclear.[95]

The *Case* right to one corrective process is also deficient because it may be satisfied by a state postconviction process of narrow scope and questionable efficacy when compared to direct appeal. In Minnesota, the postconviction petitioner is not statutorily entitled to a hearing, only a presumption in favor of a hearing.[96] The petition is frequently assigned to the same judge who presided over the trial or guilty plea.[97] Thus, a postconviction proceeding is often a paper review of trial or guilty plea proceedings conducted by the same decision-maker. Furthermore, if the defendant had directly appealed, he has no right to counsel in postconviction proceedings.[98]

Thus, the Minnesota postconviction remedy is a limited one. Although it serves as a strong reflection of the public policy supporting a constitutional right to appeal, the postconviction remedy is not an adequate substitute for an appeal.

B. Procedural Due Process

Another prominent source for a state constitutional right to appeal a criminal conviction dwells in the Minnesota Constitution's Due Process Clause.[99] Due process requires certain minimal procedures before a liberty or property interest can be infringed by state action.[100] A criminal defendant

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[93] *Id.* at 740 (citing Case v. Nebraska, 381 U.S. 336 (Minn. 1965)) (noting that there was no clear majority in *Case*, and that it did not provide clear direction as to the right of review, but that its implication was that there was a right to one corrective process of review).

[94] *Deegan*, 711 N.W.2d at 93 (stating that "the Court never issued a decision on the issue for which it granted certiorari," but the opinion implied that convicted criminals have a right to at least one state corrective process to determine claims of violations of federal constitutional rights).

[95] *See supra* text accompanying note 89 (showing that the concurring opinion pushed for the one "corrective process" right be adopted as a rule).

[96] MINN. STAT. § 590.04, subd. 1 (2012).

[97] *Cf.* Johnson v. State, 486 N.W.2d 825, 827 (Minn. Ct. App. 1992) (holding that postconviction petitioners are not entitled to automatically judge who presided over the trial).

[98] MINN. STAT. § 590.05 (2010).

[99] *See* MINN. CONST. art 1, sec. 7.

[100] *See* State v. LeDoux, 770 N.W.2d 504, 512 (Minn. 2009) (discussing what process is due to a criminal defendant facing pretrial detention).

facing incarceration has the most fundamental liberty interest at stake in avoiding conviction.[101]

In determining what minimal procedures are due, Minnesota follows the *Mathews* balancing test, which considers: (1) the private interest affected by official action, (2) the risk of erroneous deprivation of that interest under existing procedures and the probable value of other procedures, and (3) the governmental interest, including the burdens that would be imposed by the alternative procedures.[102]

The private interest in personal liberty affected by a criminal conviction is of a high order.[103] The risk of erroneous deprivation of the right to personal liberty through trial proceedings conducted by trained judicial officers, where there is a recognized right to counsel and other constitutional safeguards, may not be as high as with, for example, administrative decisions.[104] The rate of reversal of criminal convictions provides some guideline for estimating the risk of erroneous deprivation of liberty. In Minnesota, that rate has not been high, but it has been significant.[105]

Thus, the benefits of appeal as an additional procedure have been proven over time.[106] Due process, of course, does not require procedures that

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[101] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (recognizing the fundamental nature of the freedom from restraint, particularly from restraint by one's own government); c*f. LeDoux*, 770 N.W.2d at 512 (holding that even pretrial detention under conditions of release implicates a liberty interest).

[102] Fosselman v. Comm'r of Human Servs., 612 N.W.2d 456, 462 (Minn. Ct. App. 2000) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). The United States Supreme Court has declined to apply the *Mathews* balancing test to assess state procedural rules in criminal prosecutions. Medina v. California, 505 U.S. 437, 443 (1992). Still, a state could use the test to assess whether its own procedures satisfy the state constitution's due process guarantee.

[103] *See* Speiser v. Randall, 357 U.S. 513, 525–26 (1958) (describing a criminal defendant's liberty interest as "an interest of transcending value"); *LeDoux*, 770 N.W.2d at 512 (stating that a defendant before trial "has a strong liberty interest in not being confined.").

[104] *See generally* Bell v. Burson, 402 U.S. 535, 540 (1971) (noting that "procedures adequate to determine a welfare claim may not suffice to try a felony charge.").

[105] In the Minnesota Court of Appeals, the reversal rate in defense appeals (primarily appeals from conviction) for the last five years has ranged from 7.1% (2011) to 12.2 % (2009). E-mail from Craig Hagensick, Research Analyst II, Court Services, Minnesota Supreme Court (Nov. 29, 2012). These figures exclude sentencing relief but include some reversals that do not affect the conviction. One commentator estimates that in non-capital cases the national "error rate" in state court is "certainly less than 15% and probably far less than 10%." James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2053 n. 90 (2000). Justice Brennan, in a dissent, has commented that the reversal rate of state criminal convictions, "while not overwhelming, is certainly high enough to suggest that depriving criminal defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction." Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J., dissenting).

[106] Appeals provide a benefit not only to defendants in the reversal of erroneous convictions, but also to society in enhancing the public confidence in criminal convictions, and in the development of law, particularly procedural protections at the pretrial and trial stages that reduce the risk of erroneous convictions. *See Spann*, 704 N.W.2d at 493 (noting that when the defendant's interest in challenging his conviction is put aside, "institutional

eliminate all possibility of error.[107] The adversarial process already afforded at the trial stage is recognized as the best means of minimizing the risk of error.[108] Yet adversarial trials may be fundamentally flawed, as when the defendant represents himself, or when structural error occurs. Moreover, if conviction is based on proof that fails to meet the "beyond a reasonable doubt" standard, even a fair trial violates due process.[109]

Finally, the governmental cost of providing an appeal to criminal defendants is relatively low. The constitutional amendment establishing the court of appeals was promoted based on the large volume of appeals that burdened the supreme court.[110] The appellate court's establishment has expanded the capacity of the judicial system for efficient appellate review. In addition, the government itself has an interest in ensuring that criminal judgments have widespread public respect, an interest served by appellate review.[111]

As a source for a state constitutional right to appeal, however, procedural due process faces at least two difficulties: (1) the supreme court has not expanded on federal due process protections, and (2) Minnesota's Due Process Clause is considerably less specific than the constitutional provisions to which courts are accustomed to looking for criminal procedural rights.[112]

Going beyond federal due process. The Minnesota Supreme Court has held that the due process protections under the Minnesota Constitution

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concerns that the conviction was fair and proper become paramount" and that allowing a defendant to waive his right to appeal would "foster a judicial system that discourages development of the law while encouraging the preservation of unfair trials").

[107] Mackey v. Montrym, 443 U.S. 1, 13 (1979).

[108] *Id.*

[109] State v. Clow, 600 N.W.2d 724, 726 (Minn. Ct. App. 1999) (addressing the sufficiency of the evidence for the first time on appeal because due process prevents conviction based on proof that does not meet the beyond-a-reasonable-doubt standard).

[110] Judge Harriet Lansing, *Twenty-Five Years of Doing Minnesota Justice*, 35 WM. MITCHELL L. REV. 1244, 1246 (2009) (noting that the "precipitating cause" for the court's creation was "an overwhelming deluge of appellate filings"). Of course, the creation of the court eliminated the system of district court appeal panels that had handled appeals from county courts, but this applied only to misdemeanor cases. *See* MINN. R. CRIM. P. 28.01, subd. 2 (1980).

[111] Lester Orfield identifies two other functions of an appeal in addition to ensuring that justice is done to the individual defendant: (1) ensuring that consistent standards are maintained in the trial courts, and (2) developing the law of the jurisdiction. Orfield, *supra* note 1, at 33–34. These benefits accrue to the judicial system rather than to the individual defendant, and so are properly viewed as an offset of the governmental costs in the *Mathews* balancing test. *See supra* note 102 and accompanying text (explaining the *Mathews* balancing test for adequate procedural due process).

[112] *See* Medina v. California, 505 U.S. 437, 443 (1992) (noting the United States Supreme Court's reluctance to expand due process in criminal prosecutions beyond specific Bill of Rights guarantees).

are identical to those provided under the United States Constitution.[113] That rule may not be ironclad, as it is difficult to accept that in the wide realm of procedural due process there are no "language, concerns, or traditions unique to Minnesota" that would justify a different application of the state provision.[114] One of those exceptions should be the right to one review, described as a "tradition unique to Minnesota." [115] Still, adherence to federal law poses a barrier to relying on the state Due Process Clause alone to support a right to appeal.

The public policy statements noted previously demonstrate that the right to appeal is an essential element of our criminal justice system. Unfortunately, because the statutory and rule-based right to appeal is so longstanding, statements as to the constitutional basis for a right to appeal have fallen far behind the public policy statements that would support them.

Yet, the United States Supreme Court, in determining what procedures the Constitution's Due Process Clause requires, has frequently looked to the procedures provided by the states.[116] The Court has acknowledged "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require."[117] Because interpretation of the United States Constitution's Due Process Clause itself looks to some degree to state practice, Minnesota should not ignore its own traditions in construing the Minnesota Constitution's Due Process Clause.

Generality of the due process right. The second difficulty with relying on procedural due process is judicial reluctance to rely on so general a right in this area. The United States Supreme Court has been particularly reluctant to use procedural due process generally—and the *Mathews* balancing test specifically—to supplement the explicit criminal procedural safeguards in the Bill of Rights. In 1992, the Court in *Medina v. California*

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[113] McCollum v. State, 640 N.W.2d 610, 618 (Minn. 2002) (citing Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988)).

[114] *Cf.* Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005). The tradition in Minnesota, for example, of providing a right to appeal by statute, and of carefully safeguarding that right, offers a reason to recognize such a right. The Minnesota Supreme Court has looked to state tradition when deciding to give criminal defendants more expansive protection under the Minnesota Constitution than they have been afforded under the United States Constitution. *Id.* For example, in recognizing a stricter standard for a *Miranda* waiver of the right to counsel than that applied by the United States Supreme Court, the Minnesota Supreme Court has cited Minnesota's "long tradition of assuring the right to counsel." State v. Risk, 598 N.W.2d 642, 649 (Minn. 1999) (quoting Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 831 (Minn. 1991)). *Friedman*, in turn, recognized a greater right to counsel under the Minnesota Constitution than had been afforded by the United States Constitution. *Friedman*, 473 N.W.2d at 833. Of course, extending the right to appeal to criminal defendants is not unique to Minnesota.

[115] Deegan v. State, 711 N.W.2d 89, 95 (Minn. 2006) (citing *Kahn*, 701 N.W.2d at 825).

[116] *See* Corinna Barrett Lain, *The Unexceptionalism of 'Evolving Standards'*, 57 UCLA L. REV. 365, 380–81 (2009).

[117] Schad v. Arizona, 501 U.S. 624, 640 (1991).

held that so-called "free-standing due process," exemplified by *Mathews*, has only a limited operation in criminal procedure.[118] The Court relied heavily on the need for federal deference to the "considerable expertise [of the states] in matters of criminal procedure."[119] It noted that "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental."[120]

Federal deference to states' expertise, in preference to "freestanding due process," should not deter Minnesota from recognizing a state constitutional right to a criminal appeal. State expertise, as reflected by "[h]istorical practice" in Minnesota and other states dating back to the 19th century, would favor recognizing the right to appeal as an essential element of due process.[121]

As the United States Supreme Court has recognized, due process is "perhaps . . . the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[122] The *McKane* rule, however, perpetuates the forms and practices of the common law in early America.[123] The longstanding Minnesota practice of providing an appeal adds some justification for departing from the *McKane* "no constitutional right to appeal" rule.

C. Structural Error and Sufficiency Review

The procedural due process argument finds strong support in the doctrine of structural error, which presupposes an appeal in which such error can be discovered and addressed.[124] Similarly, the incorporation of the "beyond a reasonable doubt" proof standard into appellate review emphasizes how intrinsic appellate review is to a fair trial process. The doctrine of structural error, in holding that some types of error can never be

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[118] *Medina*, 505 U.S. at 443. The majority opinion acknowledged that the Supreme Court had applied *Mathews* in two criminal cases, but held that reliance on the "open-ended rubric" of the Due Process Clause would invite undue interference with the legislative judgments of the states and threaten to undo the "careful balance that the Constitution strikes between liberty and order." *Id.*

[119] *Id.* at 445.

[120] *Id.* at 446.

[121] The right to a criminal appeal does not have "deep roots in our common law heritage," but it does have longstanding (although more recent), universal recognition, whether by statute, rule, or state constitutional provision, in almost all fifty states. *Id.* at 447.

[122] Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring) (quoted in *Medina*, 505 U.S. at 454 (O'Connor, J., concurring)). Ironically, however, Justice Frankfurter wrote these words in the course of rejecting the claim that due process required the states to provide review of criminal judgments.

[123] *See supra* text accompanying notes 58–59 (detailing the *McKane* "no constitutional right to review" rule).

[124] The doctrine of structural error is most fully developed in Arizona v. Fulminante, 499 U.S. 279, 290–92 (1991). Minnesota has applied the doctrine to a number of different types of error. *See* State v. Dorsey, 701 N.W.2d 238, 253 (Minn. 2005) (biased factfinder); State v. McRae, 494 N.W.2d 252, 260 (Minn. 1992) (closure of courtroom).

harmless, illustrates the degree to which appellate review is essential to the fair trial guarantee.[125] Appellate review is essential to discover error that is structural, absent an admission of error by the trial court and the grant of a new trial. The doctrine therefore presupposes the availability of appellate review.[126]

The presumption of appellate review is also built into the federal case law on the burden of proof beyond a reasonable doubt. The United States Supreme Court has recognized that the *Winship* due process right to be convicted only upon proof beyond a reasonable doubt requires more than a "trial ritual" in which the jury is instructed on the reasonable doubt standard.[127] Due process also requires that a post-trial review of the sufficiency of the evidence incorporate the "beyond a reasonable doubt" standard.[128] Further, if the sufficiency of the evidence must be reviewed in light of the *Winship* "beyond a reasonable doubt" standard, by implication there is a right of review of the conviction. The Supreme Court implied as much in *Jackson v. Virginia*, stating that "when such a conviction [based on proof not satisfying the *Winship* standard] occurs in a state trial, it cannot constitutionally stand."[129]

Of course, a criminal defendant may waive the right to a trial altogether. Nevertheless, there is a public interest in the fair determination of guilt or innocence.[130] There is also a public interest in the rational and consistent development of the law.[131] That interest is served by a constitutional right to appellate review of structural error and sufficiency of

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[125] In *Fulminante*, the Supreme Court took an appellate perspective on structural error by focusing on defects in the trial process "which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. It contrasted these with errors that could be "quantitatively assessed in the context of other evidence," again from an appellate perspective. *Id.* at 308.

[126] Of course, any doctrine applied only, or mainly, on appellate review presupposes the availability of that review. The doctrine of harmless error, however, may be applied by the district court in ruling on a new-trial motion. *See* State v. French, 402 N.W.2d 805, 809 (Minn. Ct. App. 1987). Structural error "undermines the structural integrity of the criminal tribunal itself." Vasquez v. Hillery, 474 U.S. 254, 263 (1986). It may involve error, such as bias in the factfinder, that only an appellate court could realistically review. *See Dorsey*, 701 N.W.2d at 253.

[127] Jackson v. Virginia, 443 U.S. 307, 316–17 (1979).

[128] *Id.* at 318.

[129] *Id.* at 317–18.

[130] *See* Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 386 (1991) ("[T]he right to appeal to a certain degree assures defendants, as well as the rest of the populace, that individuals will be treated fairly by the justice system.").

[131] *See* Rossman, *supra* note 11, at 518 (noting that "[a] great deal of the force that drives the 'terrible engine' of the criminal law is supplied by courts that consider cases on review after a defendant has been convicted"). *See also* Note, *supra* note 130, at 386 ("On a more systemic level, appellate courts develop and refine legal principles and ensure that these principles are applied consistently.").

the evidence.[132] Only the decisions of appellate courts can ensure uniform application of the law.[133]

D. A "Privileged" Right

The right to a criminal appeal is not only an implicit component of procedural due process and the doctrines of structural error and sufficiency of the evidence review. Its constitutional stature is also implied by the holding that a criminal defendant cannot, by agreement with the state following trial, waive his right to appeal.[134]

In *Spann*, the Minnesota Supreme Court recognized that "[t]he right to appeal implicates not only matters personal to the defendant, but broader issues as well. Once the defendant is convicted, institutional concerns that the conviction was fair and proper become paramount."[135] *Spann* held that the right to appeal, although not constitutional in nature, is of sufficient importance that criminal defendants cannot waive it by agreement with the state following trial.[136]

By contrast, some of the most fundamental constitutional rights, such as the right to a jury trial, and the right of confrontation, may be freely waived, assuming an adequate on-the-record inquiry.[137] In the federal

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[132] This public interest is also exemplified by the seldom-used doctrine of abatement ab initio, which is applied in many states when the defendant dies during the pendency of an appeal. *See* State v. Carlin, 249 P.3d 752, 760 (Alaska 2011). The doctrine is based on the notion that a defendant whose death has deprived him of an appeal should have his conviction vacated because the validity of the conviction has not been fully tested. *See* Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction – Modern Cases*, 80 A.L.R. 4th 189 (1990). Even some courts that reject the doctrine acknowledge "that an appeal plays an integral part in the judicial system for a final adjudication of guilt or innocence and . . . a defendant who dies pending appeal should not be deprived of the safeguards that an appeal provides." State v. McDonald, 424 N.W.2d 411, 413 (Wis. 1988).

[133] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441, 453 (1963) ("In a unitary jurisdiction appellate review provides authoritative and uniform pronouncements on the law of that jurisdiction."). "Appeal, then, serves that aspect of justice which tells us that the same law ought to apply to different people similarly circumstanced . . . ." *Id.* at 454.

[134] *Spann*, 704 N.W.2d at 493 (concluding that "based on public policy and due process considerations, that a defendant may not, after conviction at trial and sentencing, waive the right to appeal"). The court acknowledged, however, that a defendant may waive the right to appeal by failing to file an appeal, or by failing to object to an error at trial. *Id.* at 491.

[135] *Id.* at 492.

[136] *Id.* at 494–95. Few other rights, even those of constitutional dimension, have been similarly elevated to the status where they cannot in certain circumstances be waived. The *Spann* court recognized that it had previously held that sentencing under the guidelines, although not a right of the defendant, was so essential to public policy that it could not be waived. *Id.* at 494 (citing State v. Misquadace, 644 N.W.2d 65 (Minn. 2002)).

[137] *Spann*, 704 N.W.2d at 494.

system, statutory provisions are presumed subject to waiver, and the rules of criminal procedure are "presumptively waivable."[138]

This evidences that the right to appeal, although not recognized as constitutional, is intrinsically privileged. There are other ways in which the right to appeal has been accorded a privileged status. The right to appeal has been privileged indirectly, by application of the due process doctrine of prosecutorial vindictiveness to a prosecutor's re-charging after a successful appeal, when that doctrine has not been applied as strictly in the pretrial context.[139]

The United States Supreme Court's recognition of an indigent defendant's right to appointed counsel on appeal, and the right to a transcript at public expense, while based on equal protection and due process grounds, have effectively elevated the right to appeal to at least quasi-constitutional status.[140] Further, the American Bar Association Standards recognize that criminal defendants should have a right to appeal from a final judgment.[141] The standards imply that appellate review is essential to the fair administration of the criminal law: "The possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable."[142]

Thus, an interrelated set of principles, including public policy statements and basic principles of procedural due process, the doctrines of structural error and *Winship* sufficiency of the evidence review, and appeal-waiver limitations, strongly suggests that a right to appeal is so engrained in our expectations of the administration of criminal justice that it has achieved constitutional status.

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[138] United States v. Mezzanatto, 513 U.S. 196, 201 (1995).

[139] Blackledge v. Perry, 417 U.S. 21, 28 (1974); *see* Cuypers v. State, 711 N.W.2d 100, 104 (Minn. 2006) (noting that there is no presumption of prosecutorial vindictiveness in the pretrial context). Thus, if a defendant exercises his right to seek suppression of evidence on Fourth Amendment grounds, the prosecutor may increase the charges without facing a presumption of vindictiveness. *U.S. v. Goodwin*, 457 U.S. 368, 381 (1982). On the other hand, if a defendant exercises his non-constitutional right to an appeal, due process requires that the prosecutor overcome a presumption of vindictiveness. *Blackledge*, 417 U.S. at 28.

[140] *See* Douglas v. California, 372 U.S. 353, 355 (1963) (recognizing an indigent appellant's right to appointed counsel on appeal); Griffin v. Illinois, 351 U.S. 12, 19–20 (1956) (recognizing an indigent appellant's right to transcript at public expense). It may be telling that the Supreme Court recognized an indigent defendant's right to an attorney on appeal in *Douglas* on the same day it recognized the right to counsel at trial in *Gideon v. Wainwright*, although the constitutional right to a trial is not matched by a similar right to appeal. *Compare* Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (decided Mar. 18, 1963), *with Douglas*, 372 U.S. at 353 (decided Mar. 18, 1963).

[141] 4 ABA STANDARDS OF CRIMINAL JUSTICE § 21-1.3(a) (2d ed. 1980).

[142] *Id.* at § 21-1.1(a).

E. Applying Kahn v. Griffin

The Minnesota Supreme Court will decline to depart from federal precedent based "on some slight implication and vague conjecture."[143] The court will provide greater protection under the state constitution, however, if there is "a principled basis to do so."[144] Applying the *Kahn* "decision tree," the right to appeal involves "concerns [] and traditions unique to Minnesota."[145] These are the "right to one review," which *Deegan* suggests may be a "tradition unique to Minnesota," the limited *Spann* rule against waiver of the right to appeal, and the exacting Minnesota standard for appellate review of the sufficiency of circumstantial evidence to support a conviction.[146]

It could be argued that these are not sufficient "concerns[] and traditions unique to Minnesota" to justify departing from the *McKane* "no constitutional right to appeal" rule. The *Kahn* court, however, indicated its willingness to depart from federal constitutional precedent "if we determine that federal precedent does not adequately protect our citizens' basic rights and liberties."[147]

The Leo Frank case may exaggerate any current need for appellate correction, but public opinion can infect the trial of factual questions of guilt or innocence in less overt ways. It is doubtful whether, absent an appeal, Riley Housley, who shot a plainclothes police officer who, along with two other plainclothes officers, broke down Housley's door while trying to execute a search warrant, would have obtained a careful review of the sufficiency of the evidence to convict him of first-degree assault without an appeal. [148] Similarly, without an appeal it is doubtful whether Roger Caldwell's conviction for a highly publicized double murder in Duluth would have been reversed based on an error in the fingerprint evidence and other trial error.[149]

The *McKane* rule leaves the citizens' appellate rights at the mercy of the state legislature and the rules committee. It is demonstrably inadequate to protect the basic rights and liberties of Minnesota citizens.

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143 *Kahn*, 701 N.W.2d at 828.

144 *Id.* at 824.

145 *See supra* note 68 and accompanying text (explicating the *Kahn* decision tree).

146 *See supra* notes 91–98 (describing Minnesota's right to one review); *supra* notes 134–136 (detailing *Spann*'s limitation on waiving the right to appeal).

147 *Kahn*, 701 N.W.2d at 828.

148 State v. Housley, 322 N.W.2d 746, 751 (Minn. 1982) (reversing the conviction for lack of proof that Housley's "concern for his safety was unreasonable"). The state conceded that Housley was "extremely frightened" when he fired the shots and that he "did not hear the warnings given by police" before entry. *Id*.

149 State v. Caldwell, 322 N.W.2d 574, 592 (Minn. 1982).

VI. CONSEQUENCES OF RECOGNIZING THE RIGHT

A final argument against recognizing the constitutional right to a criminal appeal is based on the consequences of recognizing such a right. Recognizing a constitutional right would prevent any legislation or rule changes that would deny the right of appeal to any class of criminal defendant, such as misdemeanants or defendants who have pleaded guilty.[150] Would it do so at the cost of cumbersome restrictions on the existing appellate process?

In 1985, the United States Supreme Court held that when a state, although not constitutionally required to do so, provides an appeal as of right, the conduct of that appeal must "accord with the dictates of the Constitution, and in particular, in accord with the Due Process Clause."[151] Thus, due process already limits the procedural restrictions Minnesota can impose on its criminal appeals.[152]

The First Circuit Court of Appeals in 1987 addressed several changes to New Hampshire's rules of appellate procedure that limited the appellate review afforded to criminal defendants.[153] The First Circuit applied the *Mathews* balancing test and determined that the new rules allowing the New Hampshire Supreme Court to reject a criminal appeal by order (in the form of a petition for review), without allowing the appellant access to the trial transcript or an opportunity to brief the issues, denied the appellant due process.[154] Other decisions have similarly emphasized the appellant's right to a transcript, and to some vehicle for presenting argument on the issue(s).[155]

Minnesota provides the indigent criminal defendant the right to a transcript.[156] Also, Minnesota provides an appeal as of right to all defendants, without a screening process similar to New Hampshire's, in which the appellate court can reject an appeal without briefing or review of the

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[150] *See infra* notes 169–171 and accompanying text.

[151] Evitts v. Lucey, 469 U.S. 387, 401 (1985).

[152] Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[153] *See, e.g.*, Bundy v. Wilson, 815 F.2d 125, 130–31 (1st Cir. 1987).

[154] *See supra* text accompanying note 102 (detailing the factors of the *Mathews* balancing test); *Bundy*, 815 F.2d at 132.

[155] *See* Billotti v. Legursky, 975 F.2d 113, 116–19 (4th Cir. 1992) (holding that West Virginia's discretionary appeal procedure did not violate due process because the defendant was afforded an attorney and access to the transcript, and the attorney made an oral presentation on the case); Wood v. State, 990 P.2d 786, 791 (Nev. 1999) (holding that Nevada's Fast Track System, which provided an automatic right to appeal, access to a transcript, and briefing on the substantive arguments, although in shorter briefs, did not violate due process).

[156] State v. Pederson, 600 N.W.2d 451, 454 (Minn. 1999) (holding that an indigent defendant appealing his conviction has the right to a transcript at the public expense even if he retains private counsel).

transcript.[157] The Minnesota Court of Appeals does not use a screening process like New Hampshire's, in which the appellate court could reject an appeal without briefing or review of the transcript.[158] The court does not generally limit the availability of oral argument, except when one party is self-represented.[159] The court could face a due process challenge to the use of unpublished and order opinions.[160] Still, these features of Minnesota appellate practice affect the public interest in the development of the law more than the individual appellant's interest in appellate review.

In states that have recognized a constitutional right to appeal, incorporating the right into the state's constitution has not led to significant restrictions on how appellate courts function.[161] These states generally recognize that the constitutional right to appeal may be waived, and that issues presented on appeal may be forfeited, if not preserved in the district court.[162] Oral argument is not deemed an essential element of a constitutionally guaranteed appeal.[163] Elevating the right to appeal to a constitutional status has had a procedural impact in broadening the right to a transcript and, less significantly, in limiting the application of the "fugitive disentitlement rule."[164]

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[157] MINN. R. CRIM. P. 28.02, subd. 2(1), *amended by* 2012 Minn. Ct. Order 0004 (2012).

[158] *See generally* 51 M.S.A., Ct. of App. R. 2 (providing that cases are scheduled on a panel calendar in order of filing, with defined exceptions, as soon as one responsive brief is filed).

[159] *Id.* The United States Supreme Court, however, has rejected the view that due process requires that oral argument be available in every case. FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 276 (1949).

[160] *See* MINN. STAT. § 484.08, subd. 3(b) (allowing the Minnesota Court of Appeals to issue unpublished decisions); MINN. R. CIV. APP. P. 136.01, subd. 1(a) (allowing issuance of unpublished or order opinions).

[161] *See* Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLO. L. REV. 373, 390–99 (1991) (discussing the due process implications of appellate procedures, such as staff screening and limits on oral argument).

[162] *See* State v. Clayton, 64 So. 3d 418, 421–24 (La. Ct. App. 2011) (applying the constitutional provision allowing waiver and holding that the right must be intelligently waived); State v. Neff, 181 P.3d 819, 822 (Wash. 2008) (holding that the defendant's signed statement waiving the right to appeal, and his admission that he understood the waiver, created a strong presumption that the waiver was valid); Leach v. State, 914 So. 2d 519, 521 (Fla. Dist. Ct. App. 2005) (holding that the defendant is not precluded from waiving the state constitutional right to appeal); *cf.* Montgomery v. Sheldon, 889 P.2d 614, 616 (Ariz. 1995) (noting that by rule a guilty plea waives right to direct appeal but not all appellate review), *superseded by statute as recognized in* State v. Smith 910 P.2d 1 (Ariz. 1996). State v. Williams, 206 P.3d 780, 785–86 (Ariz. Ct. App. 2008) (holding that the defendant forfeited his claim on appeal by failing to assert it in the trial court).

[163] *See* Wood v. State, 990 P.2d at 791 (holding that fast-track appeal system that allowed oral argument only at the court's discretion did not violate due process); *but see* Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1153 (1981) (arguing that that oral argument is essential to a meaningful appeal).

[164] *See* State v. Bright, 860 So. 2d 196, 202 (La. Ct. App. 2003) (holding that material omissions from the transcript require reversal); State v. Walker, 844 So. 2d 1060, 1066–67 (La. Ct. App. 2003) (holding that the failure to locate missing exhibits that were

Finally, recognizing a constitutional right would not necessarily require the courts to provide a more drastic remedy for the denial of the right. For example, in *Hoagland*, where the statutory right was impinged by the loss of trial transcripts, the Minnesota Supreme Court held that the defendant was entitled to a new trial—a significant remedy when a conviction is several years old—unless the state could show undue prejudice.[165]

VII. CONCLUSION

It is time for a fresh look at the "no constitutional right to appeal" rule in Minnesota. Statutory and rules-based rights to appeal, however longstanding, are not immune from change.[166] As one commentator has noted, "judicial review remains extremely vulnerable to democratic politics," particularly at the state level.[167]

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critical evidence at trial violated the defendant's constitutional right to appeal); State v. Thomas, 852 P.2d 1130, 1132 (Wash. Ct. App. 1993) (holding that a defendant is entitled to a record of sufficient completeness to permit effective review, but not necessarily a complete verbatim transcript); *cf.* State v. Schackart, 858 P.2d 639, 644 (Ariz. 1993) (holding that a reconstructed trial transcript was adequate for appeal, but record of the sentencing hearing did not permit proper review of a death sentence); State v. Ford, 650 So. 2d 808, 810 (La. Ct. App. 1995) (holding that the defendant was not entitled to a new trial where the unavailability of a transcript was due to his own laches in pursuing an appeal).

[165] Hoagland v. State, 518 N.W.2d 531, 536 (Minn. 1994).

[166] The 1997 Legislature limited defendants' rights granted under case law to appellate review of their sentences in probation-revocation proceedings. 1997 Minn. Laws ch. 96 § 2, subd. 3 (proposed to be codified at MINN. STAT. § 244.11, subd. 3 (2006)), *prior version invalidated by* State v. Losh, 721 N.W.2d 886 (Minn. 2006). The 2005 Legislature enacted a two-year limitations period on post-conviction filings with certain exceptions. 2005 Minn. Laws ch. 136, art. 14, §§ 12, 13 (codified at MINN. STAT. § 590.01, subd. 4). The constitutionality of the two-year limit has been upheld as not violating the right to one review. *See Larson*, 801 N.W.2d at 227.

[167] Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 465 (1996). Legal commentators in general have not advocated curtailing appellate review as a solution to crowded dockets. *See* Paul Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 568 (1969) (stating that the "crisis of congestion" did not yet justify curtailing review). A criminal rules committee, such as the one in Minnesota that now oversees Rule 28.02 and its grant of the right to appeal, may be immune to political pressure, but the criminal justice system faces caseload crunches and budgetary constraints. The rules committee has recently amended the criminal rules to allow gross misdemeanor defendants, as well as misdemeanants, to plead guilty by petition without making a personal appearance. MINN. R. CRIM. P. 15.02, subd. 3; 15.03, subd. 2 (amended 2012). Now that the Minnesota Supreme Court has clarified that misdemeanor appellants are entitled to representation, a similar cost-saving measure of limiting or eliminating the right to a misdemeanor appeal is not unforeseeable. *See* State v. Randolph, 800 N.W.2d 150, 158–59 (Minn. 2011) (concluding that in the absence of statutory authority placing financial responsibility for misdemeanor representation on the Board of Public Defense or the county, the cost should be borne by the state). The 2012 Legislature assigned responsibility for representation of misdemeanor appellants to the State Public Defender. 2012 Minn. Laws ch. 212, § 14.

In practice, the right to appeal homicide convictions will not disappear. It is the appellate rights of misdemeanants subject to local incarceration, defendants jailed for municipal ordinance violations, or defendants who have pleaded guilty, that need constitutional protection.[168] Removing the right to appeal misdemeanor convictions or convictions based on guilty pleas would shield from appellate review, for example, many First Amendment issues that arise in disorderly conduct, obstructing legal process, and indecent exposure cases, as well as the due process and Sixth Amendment issues posed by guilty plea-based convictions.[169]

The right to judicial review of a criminal conviction was provided by statute when the Minnesota Constitution was enacted, and may have been assumed by its drafters.[170] The notion of a right to an "appeal," although not recognized then, has become essential to the modern concept of procedural due process as applied to criminal defendants.[171]

The rule-based right of a criminal defendant to a direct appeal should be recognized as a constitutional right to protect the right against future encroachments. A right so essential should not be left in the hands of a rules committee or of the legislative body, which is subject to political pressures. The right to appeal a criminal conviction is worthy of state constitutional protection. Although the Minnesota Supreme Court is reluctant to depart from federal precedent, there is a "principled basis" for departing from the *McKane* rule based on "concerns and traditions unique to Minnesota," as well as the reality that the continued failure to recognize a constitutional right to appeal "does not adequately protect our citizens' basic rights and liberties."[172]

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[168] The states have established differing minimal thresholds for offense-level appealability. *See* Bundy v. Wilson, 815 F.2d 125, 136–42 (1st Cir. 1987) (surveying state provisions on the right to criminal appeal). IOWA CODE ANN. §§ 814.6(1)(a), 903.1(1)(a) (West 2003); DEL. CONST. art. IV, § 28.

[169] *See, e.g.*, State v. McCarthy, 659 N.W.2d 808, 810–11 (Minn. Ct. App. 2003) (concluding that the appellant's words fit within the "fighting words" limitation of breach of disorderly conduct prohibition as applied to verbal conduct); State v. Duncan, 605 N.W.2d 745, 749 (Minn. Ct. App. 2000) (concluding that the indecent exposure statute could constitutionally be enforced against nude dancers); State v. Foncesa, 505 N.W.2d 370, 373 (Minn. Ct. App. 1993) (holding that group advisory for misdemeanor defendants did not ensure adequate waiver of the right to counsel); State v. Krawsky, 426 N.W.2d 875, 878 (Minn. 1988) (concluding that obstructing the legal process statute was not facially overbroad or unconstitutionally vague).

[170] *See supra* notes 39–46 and accompanying text (exploring the history of Minnesota's Constitution and statutes enacted during the time it was drafted).

[171] *See supra* notes 99–123 and accompanying text (outlining the rights protected under state and federal procedural due process rules).

[172] *Kahn*, 701 N.W.2d at 824–25, 828.