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APPEALING CHANGES: A CASE FOR EXPANDING APPELLATE REVIEW IN WEST VIRGINIA'S JUDICIARY

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James Madison wrote that "[t]he merit of the founders of our republics lies in the more accurate views and the practical applications of the doctrines of [self-government]. The rights of man as the foundation of just Government had been long understood; but the superstructures projected had been sadly defective."[1] So much for planning ahead. In the wake of West Virginia's founding, the architects of its court system in the 19th Century likewise did not anticipate the ever-expanding web of laws, the rise of the regulatory state and the volume and complexity of consumer and commercial relationships and conflicts in the 21st Century.

The superstructure of West Virginia's judicial branch has failed to develop concomitantly with the economic, social and regulatory demands that society now places on them. When it becomes clear that the courts have insufficient capacity to properly resolve conflicts and to dispense justice, it is our obligation to evaluate and, when the case is demonstrated, to modify our judicial superstructure to meet current demands and to plan for future ones.

In this chapter, we argue that West Virginia's sole appellate court, the Supreme Court of Appeals of West Virginia, simply does not have sufficient capacity in personnel and resources to perform its critical functions within the judicial branch. This is particularly true in relation to the important roles that are expected of a court system in the American tradition.

We call for the creation of an intermediate appellate court in West Virginia in conjunction with the creation of an appeal of right for most civil and criminal matters.[2] The

[1] Letter to N. P. Trist, February—, 1830, Madison, James. 1865. IV, page 58, Letters and Other Writings of James Madison, Published by order of Congress. 4 volumes. Edited by Philip R. Fendall. Philadelphia: Lippincott.

[2] Currently, West Virginia is almost alone among the States in that it has only discretionary appellate review of alleged lower court error. When we use the term "appeal of right," we mean a litigant's absolute right to have his

first part of this article will draw a blueprint for reinforcing the State's judicial superstructure. The second part of this article will highlight some shortcomings that are inherent in the judicial branch in West Virginia relative to and as a consequence of the complexities of modern government and life. Finally, the third part of this article will articulate the need for an intermediate appellate court in West Virginia and the creation of an appeal of right by demonstrating that these additions to the judiciary's superstructure will redress the present shortcomings and promote stability and effective government.

This article seeks to frame an argument for thinking about fundamental changes to West Virginia's judiciary and to suggest a point of departure for public debate to fortify the judicial system as a critical superstructure of the State's government.[3]

PART I: FOLLOWING THE BLUEPRINT

We have come to expect judges, courts and the judiciary to fulfill essential functions in society. By design and convention the judiciary is viewed as the last resort for the protection of civil liberties, including free speech, religious practice and property rights. The courts are often the last venue for ensuring public access to the executive and legislative branches and challenging public corruption and the usurpation or abuse of power by public institutions and officers. The judiciary is entrusted with the dispensation of criminal and civil justice in accordance with evolving social norms. The courts have vast dominion and power over a wide range of issues – legal, political, economic and otherwise. The judicial branch is arguably the most powerful coordinate in the tripartite system of government.

Despite its preeminence, the judiciary is, for all practical purposes, solely responsible for reviewing and correcting its own work. This is accomplished, if it is accomplished at all, principally through appellate review. If error occurs in a civil or criminal proceeding in the circuit courts, it is only in West Virginia's sole appellate court, the Supreme Court of Appeals, that the judiciary is able to correct it.[4]

It is not the judiciary's functions but rather its systemic efficacy that is the subject of this article. Does the judiciary perform its critical functions to their greatest potential? If its performance is satisfactory, how does it improve or excel?[5] For while the other more political branches of government in the American tradition regularly check the exercise of power of each other, the checks exercised against the judicial branch are only narrowly and infrequently exercised. Governors do not pardon wrongly convicted citizens very often and

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case and the court's adjudication of it reviewed on the merits at least once in an appellate court, thus, an appeal of right on the merits.

[3] Our readers will note that we have used statistics gathered from various sources and that we have attempted to uniformly use numbers from 2006 because that year is the last year of widely reported statistics on these issues. However, we note that the *West Virginia Supreme Court of Appeals 2007 Annual Report* has already been released and is available online. We would invite our readers to compare these to the 2007 numbers of the Supreme Court of Appeals.

[4] We acknowledge the appearance of the opportunity for a litigant to seek a circuit court's reconsideration of what it believes is a mistaken prior ruling or decision; but, self-reversals or changed minds are not common in the State's circuit courts.

[5] Peter Drucker (2004), the management genius and consultant, wrote: "Checking the results of a decision against its expectations shows executives what their strengths are, where they need to improve, and where they lack knowledge or information."

have throughout American history enforced the rulings of courts in all but the most extreme circumstances without much question and even less resistance. The legislative branch, thankfully, does not often react to rulings of the judicial branch by cutting funding or reducing the number of judges or courts. The judiciary in the American tradition is left largely to police itself. Its *de facto* obligation to self-regulate is principally moral and only underscores the ever-increasing importance of appellate courts in the American tradition.

For this reason we have chosen to evaluate the need for changes to the superstructure of the appellate level of the judiciary in West Virginia. Commentators have variously emphasized attributes of the appellate level of the American judicial system; however, it is our view that appellate courts should serve three principal purposes.

A. The Correction of Prejudicial Error by the Judicial Branch

One principal purpose of any appellate system is to provide the opportunity for sufficient review and correction of error by the courts of original jurisdiction.[6] Despite their best efforts, which often include long hours and few resources, circuit courts and other courts of original jurisdiction cannot achieve perfect resolutions of conflicts or deliver perfect opinions in each and every case. Error and mistake will occur. Exactly when, where and how often such error occurs is unknown, underscoring the importance of sufficient review.

Identifying and calculating the kind and incidence of error in any judicial system would be highly difficult to undertake with any satisfactory degree of accuracy. As to frequency, there are numbers that might purport to measure instances in which appellate courts reversed lower court decisions. These likely would represent only a small fraction of the instances in which litigants would have appealed error but for countervailing factors, such as time, money and the evaluation of success, each of which has nothing to do with the legal merits of an appeal. The cost of pursuing an appeal as measured in legal fees alone might be (and usually is) significant. The direct cost, as significant as it might be, does not accurately represent the whole cost to an aggrieved party. A litigant who believes that he is a victim of judicial error must also consider the business, political and emotional costs of pursuing an appeal within a context of uncertainty and risk. This is especially true in West Virginia, which, unlike most other states, does not afford an appeal of right to litigants. It is certainly plausible that uncertainty, risk, cost and the lack of appeal of right all discourage appeals by disgruntled litigants. For the same reasons that many cases settle before trial, we postulate that many, and perhaps most, litigants do not pursue appellate review even where they believe that a lower court committed substantial error.

A look at some emblematic statistics is instructive. In June 2006 the Bureau of Justice Statistics in the Office of Justice Programs within the United States Department of Justice published a report of data on appeals from civil trials conducted in 46 large counties.[7] The study found, among other things, that in 2001 about 15 percent of verdicts in civil trials were appealed to an intermediate appellate court. Of these appeals, 43 percent were withdrawn, dismissed or transferred and 57 percent were decided on the merits.[8] Of those cases decided

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[6] *Appellate Court Performance Standards and Measures*, National Center for State Courts and the Appellate Court Performance Standards Commission, Roger A. Hanson, Project Director. June 1999, at 3.

[7] Cohen, Thomas H., Bureau of Justice Statistics *Appeals from General Civil Trials in 46 Large Counties* 2001-2005, NCJ , June 2006, 212979 at 1.

[8] Cohen, Thomas H., *supra* Note 8, NCJ 212979 at 1.

on the merits, about one third were reversed, modified or remanded.[9] Thus, for every 100 cases decided by trial in the counties covered by the study, 15 were appealed, 8.5 were decided by an appellate court on the merits and 2.8 were reversed, remanded or modified. Even where the parties had already incurred the initial expenses and external costs of a trial and then an appeal, 60 percent of those appeals that were not decided on the merits were withdrawn by one or both of the parties. This suggests powerful influences, other than direct costs, on the decisions of many litigants in pursuing appeals.[10]

Various states have reported reversal numbers even higher than the Department of Justice found. For instance, the Supreme Court of Mississippi reported in its 2006 Annual Report that of the 585 general civil appeals resulting in decisions on the merits in Mississippi Appellate Courts that year, 163 or 28 percent were reversed.[11] The State of Texas reported that in 2006 its appellate courts reversed, modified or remanded 768 cases, affirmed 1,463, dismissed 1,985, disposed of 1,150 and consolidated 74 cases.[12] Assuming that every case that was dismissed, disposed of or consolidated was free of error (some of these cases were likely voluntary dismissals or withdraws) the first level appellate courts in Texas had a reversal rate in 2006 of roughly 14.1 percent.

Given that these numbers widely vary and that, for the reasons already mentioned, they might not reflect all instances of error because of the pressures against pursuing an appeal, estimating the average error rate for courts of original jurisdiction is educated guesswork at best. But, what is difficult to dispute is that any judicial system, including West Virginia's, has a substantial error rate. It would be foolish to suggest otherwise.[13] The inherent error involved in the administration of justice in lower courts reveals the corresponding need for an appellate court (or courts) to ensure these errors are corrected and that justice is as perfectly achieved as is possible.

B. Ensuring the Even, Fair and Consistent Application of the Law

Ensuring the just application of the law begins in the courts of original jurisdiction. Multiple courts of original jurisdiction over the same subject matter, sitting in different venues within a jurisdiction governed by the same law, with different presiding judges, will often reach different conclusions on the same issues. This is an unsurprising outcome. Some people think differently than others. Democrat judges sometimes think differently than Republican judges. Religious judges sometimes think differently than irreligious ones and so on. West Virginia has 31 circuit courts and more than 60 circuit court judges. No two of them think exactly alike. Thus, another primary purpose of an appellate system, often little appreciated, is the unification of the law within a jurisdiction through the correction of departures from a standard or norm of law.

The development of common law has been the traditional means to unify the reading and application of the law within a jurisdiction. Common law is expressed in opinions of an appellate court that result from real cases and controversies. Therefore, the critical elements in

[9] *Id*. at 1.
[10] *Id*. at 4. We acknowledge that some losers in trial courts pursue appeals merely as settlement leverage against the prevailing parties.
[11] As of 1/1/2009, report available online at: http://www.mssc.state.ms.us/reports/SCTAnnRep2006.pdf.
[12] As of 1/1/2009, report available online at: http://www.courts.state.tx/pubs/AR2006/toc.htm.
[13] "The history of human opinion is scarcely anything more than the history of human error." Voltaire, quoted in Krieger (2002).

creating an adequate body of common law are, first, appeals pursued by litigants on issues where the rule of law is unclear or misapplied, and, second, published opinions that future litigants and judges may rely on.

It might be presumed, perhaps incorrectly, that losing litigants with legitimate concerns will fill the appellate pipeline with cases that will generate guidance, interpretation and common law for others who come after them. However, as mentioned before, a number of circumstances weigh against a litigant's decision to appeal when he believes a lower court has committed one or more errors. In addition to the internal factors mentioned above (business, political and emotional) that influence a litigant's decision to appeal, there also might be external factors. These external factors include the litigant's perception of and confidence in his lawyer, the litigant's perception of his chances to prevail on the merits and the litigant's perception of the political or jurisprudential leanings of an appellate court. Some of these factors might, depending on the circumstances, increase or decrease the likelihood of a litigant to seek an appeal. But we postulate that one external factor will almost always decrease the likelihood of an appeal: Whether the appeal itself is discretionary or available by right. Since 2004 West Virginia remains the only state to provide an appeal solely at the discretion of its appellate court in 100 percent of cases decided in its lower courts.[14] Thus, we further postulate that litigants in West Virginia, as a matter of course, will be less likely to appeal error because of the uncertainty that these appeals will actually be heard.

In addition to hearing a sufficient number of appeals, the second key to achieving the goal of ensuring the even, fair and consistent application of the law is the volume and value of written appellate opinions. In discussing the importance of written opinions, two commentators have stated:

> … fully reasoned written opinion[s] serve[] a number of vital functions. For instance, a published opinion enhances predictability. Even if the opinion does no more than restate existing legal doctrine, it can show how the doctrine applies to different facts. Publication thus increases certainty by increasing the stock of precedents. Publication also hardens precedents because it is easier for a court to ignore one inconvenient precedent than ten.[15]

Many of West Virginia's sister states have realized and emphasized the importance of building a foundation of published jurisprudence to promote certainty and uniformity with regard to the application of the law. When Nebraska created an intermediate appellate court in 1991 to serve its citizens and relieve pressure on its overburdened supreme court, its legislature did not require that its judges issue opinions.[16] For a time the judges of that intermediate appellate court issued only orders to dispose of cases.[17] After the first month of oral argument the six judges "concluded that written opinions were beneficial for the attorneys, the parties, and citizens of Nebraska." They stated that they believed that "opinions assist the attorneys and the parties in understanding the reasoning behind the judges'

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[14] Murray, Peter L., *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?* 52 Me. L. Rev. 43 at 69 (2000). Please see footnotes 48 and 49 *infra* dealing with New Hampshire's adoption of mandatory appeals.

[15] Richman, William M. & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*. 81 Cornell L. Rev. 273, 282 (1996).

[16] Miller-Lerman, Lindsey, *The Nebraska Court of Appeals*, 27 Creighton L. Rev. 146, 154 (1993).

[17] 27 Creighton L. Rev. at 154.

decisions and offer guidance to future litigants."[18] It is this idea that an opinion serves to guide future litigants and citizens, recognized by Nebraska as an important reason for the issuance of appellate opinions, that is critical when considering the importance of appellate opinions to the judicial branch as a whole and not simply to the litigants presently involved.

Countless factual situations are possible that are beyond the ability of any law-making body to anticipate. Many situations that boil over into litigation are likely to be repeated, either because they represent an economically important issue or because a litigant demonstrates a means by which a particular statute or regulation may be molded to his objectives.[19] Some of these repeating issues are famous for their longevity and, because they have been the subject of litigation for so long, the rules governing the application of the law to them are considered to be cornerstones of common law: *Hadley v. Baxendale* for the foundations of consequential damages; *Palsgraf v. Long Island Railroad Co*. for duty and proximate cause; *Pennoyer v. Neff* and *International Shoe Co.* for personal jurisdiction. Leaving aside first year law school lessons, it becomes apparent that all laws go through the same processes by which they are issued, then prodded, poked and challenged upon a variety of facts until it becomes settled, altered or negated. Although a statute controls from the first day it becomes law, the law becomes settled only through the gauntlet of litigation that reduces the uncertainty that undermines its reliability. When considered in light of both internal and external costs of litigation, it is this stage of settled law that brings predictability to the system of rules on which citizens and businesses rely.

Commentators have decried the paucity of published opinions at the Federal level and suggested that it is exactly a lack of well-reasoned opinions that adds uncertainty to the law. "[W]hat makes for an unpredictable outcome [in litigation] is not an oversupply of circuit decisions, but the absence of a circuit precedent that is closely on point or, less commonly a fact-specific rule of law that by its nature requires case-by-case evaluation."[20] The fair application of the law is dependent upon the consistency with which similar facts produce similar outcomes. This consistency is built by a clear common law that covers an adequate number of issues and the continued and repetitive enforcement of the elements of the common law. We also argue that a sufficient body of appellate opinions on a variety of issues is the only means to ensure the consistent application of the law over time and throughout a jurisdiction such as a state. Ensuring this kind of consistency and reliability is a primary purpose of a judicial branch.

C. To Inspire and Maintain Public Confidence in the Justice System

It is true that an appellate court system must be consistent and apply a predictable collection of jurisprudence. It is also true that an appellate court system must appear upright and just to serve as a basis for public confidence that wrongs will be redressed and that litigants will have a fair opportunity for a hearing. Former Chief Justice Warren Burger said that "[a] sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people."[21] Some commentators have suggested that furthering such a public image is

[18] *Id*.
[19] Lawyers are paid, in part, to use the language of the law to achieve the greatest results for their clients.
[20] 81 Cornell L. Rev. at 310.
[21] See North Dakota Judicial System Annual Report 2007, available, as of 1/1/2009, online at http://www.court.state.nd.us/court/news/ndcourts2007a.pdf.

dependent upon the issuance of written opinions by appellate courts. Others have hinted that public confidence is maintained by continuing the tradition of oral arguments at the appellate level. Whatever the means, as the State Justice Institute has explained, preserving the public's confidence and belief in the justice system should be an important goal in any court system.[22]

Courts of last resort have an important role to play in maintaining the public confidence. By design, most courts of last resort in the states are not intended to decide cases in the volume needed to build and maintain public confidence in the system as a whole. This is because courts of last resort take up most cases, not because of the individual litigants or facts involved, but because the issues are likely to be repeated and the case offers a good opportunity to issue guidance on an issue. Advocating for more written opinions from the intermediate federal courts in their article, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, authors William Richman and William Reynolds argue that published opinions play an important role, not just in the development of common law but in the maintenance of public confidence in the judicial branch. Published opinions, they suggest, enhance predictability, hold judges accountable for their reasoning, increase accessibility regarding the law and further the social goal of "assuring that the complaints of every litigant – small or large, rich or poor – are given equal treatment" by the most powerful officials in the judicial branch.[23] A court of last resort, in most instances, does not have the resources, nor was it intended, to provide each and every litigant equal treatment or an equal review of each and every case.

The need for accessibility, openness and accountability of the court system, for all litigants, has also been advanced as an argument for increasing the number of cases heard during oral argument by appellate courts with commentators arguing that "from an institutional standpoint, it is important for the appellate process to be public and for the parties to feel that they have had a chance to interact directly with the judges and to be heard."[24]

The same reasoning may also be applied in an argument advancing the need for an appeal of right. It might be argued that a discretionary decision not to hear an appeal involves some review of a case and at least tacit approval of the outcome by an appellate court. But such denial of requests for appeal do not inspire confidence that any serious consideration was given by appellate judges on the merits of the issues. We suggest that access to an appeal on the merits is one characteristic that is essential to maintain public confidence in the judiciary. "Making appellate court systems accessible to the public and to attorneys protects and promotes the rule of law. Confidence in the review of the decisions of lower tribunals occurs when the appellate process is open to those who seek or are affected by this review or wish to observe it."[25]

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[22] See Generally *Appellate Court Performance Standards and Measures*, State Justice Institute and the Appellate Court Performance Standards Commission, Roger A. Hanson, Project Director. June 1999, at 10-13.
[23] 81 Cornell L. Rev. at 281, 296 (1996).
[24] 52 Me. L. Rev. 43, 58.
[25] *Appellate Court Performance Standards and Measures* at 10.

PART II: THE SYSTEMIC SHORTCOMINGS OF WEST VIRGINIA'S JUDICIAL SUPERSTRUCTURE

We suggest that the combination of a system using 100 percent discretionary review and a single appellate court shouldering the appellate responsibility for the entire jurisdiction of West Virginia has led to unappealing (pun intended) circumstances: (i) a litigant in West Virginia is less likely to appeal even where a tribunal has committed substantial error; (ii) the litigant is less likely to have his appeal heard on the merits; and, (iii) on the whole, West Virginians, relative to other jurisdictions, have insufficient expressions of common law for guidance in the myriad of complex economic and social issues that they confront. To be clear, it is the system under which West Virginia uses a single appellate court that must undertake to complete all of the functions and objectives of a sufficient judicial superstructure that hamstrings the Supreme Court of Appeals. The Supreme Court of Appeals, irrespective of the effort or work ethic of its justices, does not have the resources to address the variety of important functions required of the judicial branch.

A. Nearly Complete Lack of Error-Correction Review

A primary purpose of any appellate court system must be the provision for sufficient review to correct prejudicial error by the courts of original jurisdiction.[26] As discussed earlier, even the best trial court judges cannot be expected to deliver perfect rulings in each and every case that comes before them. Because no other branch of government is involved with the correction of judicial error, it is all the more important that the appellate level of the judicial branch hear and consider cases to correct error to the extent possible in the administration of justice. This point should be obvious.

The Supreme Court of Appeals, according to its own statistics, heard only approximately 179 appeals of roughly 1,222 considered in 2006[27] or less than 15 percent (workers compensation appeals have been excluded on both sides of this statistic because circuit courts do not exercise original jurisdiction over these matters). According to the summary of the circuit court filings in 2006, available as a portion of the Supreme Court's 2006 Annual Report, 47,998 cases were filed in circuit court in 2006.[28] That means that only approximately 179 cases of 47,998 heard by West Virginia circuit courts in 2006, or less than one half of one percent, enjoyed the benefits of an appeal on the merits.[29]

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[26] *Appellate Court Performance Standards and Measures,* at 3.

[27] The 2006 Annual Report of the Supreme Court of Appeals, is available, as of January 1, 2009, on the Office of the Clerk of the Supreme Court of Appeals of West Virginia's website: http://www.state.wv.us/wvsca/clerk.htm The report provides both the number of filed appeals (at pages 1 and 2), and the number of petitions reviewed or considered in 2006 (at page 5). The chart on page 5 reports that 2006 saw 2,589 petitions reviewed, leaving 1,222 (after excluding the 1367 workers compensation cases). The Supreme Court reports on the same chart, on page 5, the percentage of cases in each category it accepted for appeal. By converting the percentages into real numbers, adding each category and rounding to the nearest whole number – we arrived at approximately 179 cases granted appeal in 2006.

[28] Report available online at: http://www.state.wv.us/wvsca/circuits.pdf.

[29] Although we are mindful that not all cases are filed in circuit court and appealed, or given the opportunity to request an appeal, in the same calendar year we cite the 2006 numbers purely as an example and would point our readers to the very similar number of filed circuit court cases since the creation of the Family Courts in January 2002. This information is also available in the Circuit Court Summary.

With such an exceedingly low rate of review, circuit court judges in West Virginia do not need to seriously worry about being corrected or reversed. Any such concern of circuit court judges is perhaps overwhelmed by the odds against the event of such an outcome. The initiative and willingness of a litigant to pursue justice are also likely weakened in a system that forces his interests to be largely determined by a single trial judge with little oversight. In sum, a trial court outcome in West Virginia is virtually unassailable.

The impact on a litigant's opportunity to appeal has direct implications for the individual litigants in addition to the societal impacts of an inactive judiciary. Statistics provided by the State Justice Institute in their final report issued November 17, 2006, entitled *West Virginia Circuit Court Judicial Workload Assessment*, bring the direct impact on litigants into focus.[30] This study, used in part to determine the sufficiency of judicial resources, assigns "case weights" to each type of action heard by West Virginia circuit courts. Case weights are intended to measure the number of minutes that a judge needs to dispose of an average case of a particular type and are calculated either by actual surveys of circuit court judges or estimates by an expert panel.[31] According to the State Justice Institute, the case weight is an accurate reflection of the typical amount of time judges take to resolve cases of a specific type.[32] A look at the case weights in West Virginia circuit courts is eye-opening: Felony cases are disposed of, on average, in 166 minutes.[33] General civil matters are disposed of in 174 minutes.[34] Additionally, the State Justice Institute concludes that in the majority of West Virginia's judicial circuits, judges are handling more than a single judge should be expected to handle.[35]

When considered together, the short period of time spent by circuit court judges in West Virginia on the average case, the excessive workloads of the average circuit court judge, and the systemic lack of opportunity for appeal means that the case of the average litigant in West Virginia was adjudicated by a judge who spent mere minutes on the matter and was overworked in so doing. The icing on this unpalatable cake is that the litigant has a razor-thin chance to obtain relief or even review in an appellate court.

B. Petitions Reviewed and Denied Do Not Advance Any Discernable Goal of a Meaningful Judicial Superstructure

Litigants in West Virginia are entitled to pursue an appeal to the Supreme Court of Appeals, but unlike other states, are not guaranteed to have that appeal heard on the merits. Thus, it is unsurprising that West Virginia's high court has one of the highest petition rates for discretionary review in the United States. We argue that the simple petition for review is wholly inadequate to advance any of the goals of a sound judiciary.

Although a petition for review involves some briefing of the facts in and the law applicable to a case, it is unclear whether the justices give substantial attention to those cases that they refuse to accept. Commentators looking into matters of judicial expediency in other states have found that "[t]he task of determining whether to exercise discretionary review is

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[30] Report available online at: http://www.state.wv.us/wvsca/circuits/CircuitFinalReport.pdf.
[31] State Justice Institute, *West Virginia Circuit Court Judicial Workload Assessment, Final Report*, Nov. 17, 2006. Brenda K. Uekert Project Director at 6-7.
[32] *West Virginia Circuit Court Judicial Workload Assessment* at 7.
[33] *Id*. at 3.
[34] *Id*. at 3.
[35] *Id*. at 4.

an important element of the supreme court's workload, but the time expended per individual case is very small[.]"[36]

Even if one would argue that each petition for appeal receives a thorough review, it would be an assumption that would be difficult to verify. It would also be doubtful given that the Supreme Court of Appeals itself regularly claims that it is one of the busiest appellate courts in the nation.[37] Moreover, a denial of a particular petition for appeal does not advance any of the articulated purposes of the judiciary because (i) it does not build confidence in the system by assuring the litigants that the matter was given a full review; (ii) it does not explain the reviewing court's reasoning in refusing to hear the matter so that the parties feel confident that their arguments were addressed; and (iii) it does not provide any sense or guidance for future litigants to rely on or on which citizens, government agencies and businesses may pattern their future behavior.

The concept of "summary affirmance," or affirming a lower court's actions without opinion is similar to a denial of discretionary review and has been criticized in the Federal system for just such failure to advance the purposes of that judiciary. "Summary affirmance without oral argument is indistinguishable from a denial of certiorari. In each case there is no argument, no opinion, no precedent, no accountability, and no assurance that any … judge has devoted enough time to the case to determine whether the decision is correct…"[38] Similarly even under the unlikely scenario that the review of a petition could be considered meaningful error correction review by a justice or more than one justice (as opposed to by their law clerks), such review and denial of the petition would not promote the perception of adequate error correction because it is issued without stated reasoning.[39] Therefore, petitions filed and not accepted for appeal do nothing to advance the purposes of the judicial system in West Virginia.

C. Inadequate Number of Published Opinions

According to its 2006 Annual Report, the Supreme Court of Appeals disposed of 2,721 cases in 2006.[40] Of these 2,304, or roughly 85 percent, were disposed by the high court's refusing to grant the petition for appeal. Four other categories, counted separately by the Supreme Court under the heading of "disposal", including dismissal, withdraw of petition, mootness, or disposed by order, total another 174 cases, leaving 243 cases spread over three categories.

We, thus far, have argued that written opinions of an appellate court are not only important to improve the fairness of a judicial system and to increase confidence of the public in the outcomes it produces, but necessary to provide future litigants and the public at large with guidance as to the law on various issues that regularly arise. The 243 cases in 2006, remaining after eliminating those petitions that were refused, dismissed, withdrawn, moot and disposed by order, represent those instances worth examining to determine their potential for fulfilling the goals of a sound judicial branch.

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[36] Cope, Gerald B. Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with those of the other State and the Federal System*, 45 Fla. L. Rev. 21, 30 (1993).
[37] See generally *Supreme Court of Appeals of West Virginia – 2006 Statistical Report*, at 5.
[38] 81 Cornell L. Rev. at 294.
[39] "Often, the less there is to justify a traditional custom, the harder it is to get rid of it." Mark Twain, cited in Holms and Baji (1998).
[40] *Supreme Court of Appeals of West Virginia – 2006 Statistical Report*, at 4. Note again the discrepancy in language, "disposed" in 2006 as opposed to "considered" or "reviewed."

First: Memorandum Orders. In 2006, the Supreme Court of Appeals reports that it issued 122 "Memorandum Order[s]" without providing much, if any, data or summary of the typical contents or issue disposition of a memorandum order. In 2007, the Annual Report of the Supreme Court of Appeals relates that most of the workers compensation appeals that the Supreme Court of Appeals accepts are disposed of by memorandum orders.[41] Looking at the petitions reviewed in 2006, we see that 1,367 workers compensation petitions were considered and approximately 109, or 8 percent as reported by the Court, were granted review. Based on the Supreme Court of Appeals' reporting of its own habits in 2007, we can surmise that the vast majority of the 122 memorandum orders issued by the Court in 2006 were related to workers compensation. We have not considered workers compensation appeals throughout this treatment because they are not heard by the circuit courts; therefore, we cannot consider these 122 memorandum orders as sufficient expressions of the opinion of the Supreme Court of Appeals that would fulfill any of the judiciary's goals we have identified.

Of the 243 cases that the Supreme Court of Appeals disposed of in 2006, then, we are now reduced to 121 that are available to fulfill the substantive goals.

Second: Per Curiam Opinions. In 2006 the Supreme Court of Appeals issued 61 *per curiam* opinions. The extent to which these opinions serve the goals of a judiciary is debatable and worth discussing, if only because they represent nearly half of the remaining cases.

In their article "The West Virginia Supreme Court of Appeals" Richard Brisbin Jr., and John C. Kilwein, of the West Virginia University Department of Political Science, state that *per curiam* opinions of the Court are often issued in "less significant and routine cases" that "[n]ormally … raise no novel issues of law and … that demand no clarification of existing law."[42] The Supreme Court of Appeals has ruled that "[*p*]*er curiam* opinions have precedential value as an application of settled principles of law to fact necessarily differing from those at issue in signed opinions."[43] The Supreme Court of Appeals also has stated that when new points of law are announced, they will be announced in signed opinions, but that a *per curiam* opinion has value in guiding lower courts regarding the application of existing law to various facts and circumstances.[44]

Thus, *per curiam* opinions in West Virginia seem to be of mixed value in advancing the goals of a sound judicial system.

On one hand, the Supreme Court of Appeals recently announced that *per curiam* opinions can, and should, provide guidance to lower courts in the application of various points of law. This change from prior prohibitions certainly helps solidify existing precedent and, to the extent that it applies existing determinations of the meaning of the law to additional fact patterns, it helps to add certainty to the law. On the other hand, a *per curiam* opinion fails in adding certainty to the law in that it only deals with an already settled issue where presumably there was some existing basis for certainty. *Per curiam* opinions also fail to identify the author of the opinion and thus do not allow lawyers to gauge the leanings of

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[41] *Supreme Court of Appeals of West Virginia – 2007 Statistical Report*, at 4. Report available online at: http://www.state.wv.us/wvsca/clerk/statistics/2007StatRept.pdf.

[42] Brisbin, Richard A. Jr. Ph.D., and John C. Kilwein Ph.D, *The West Virginia Supreme Court of Appeals*. As of 1/1/2009 available online at: http://www.polsci.wvu.edu/ipa/par/report_10_2.html.

[43] Syl. Pt. 3, *Walker v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2001).

[44] Syl. Pt. 2-3, *Walker v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2001).

the high court on any particular issue. Because authorship is not claimed, a *per curiam* opinion serves as less assurance that a particular case was given the kind of careful consideration and well-reasoned drafting that would be assured if a particular justice was signing her name.

It is our position that *per curiam* opinions are better than every other means of disposition currently in use by the Supreme Court of Appeals, except signed opinions, and that these opinions do serve to promote some of the goals advocated here. But still they fail to well serve every goal of a sound judicial superstructure.

Third: Signed Opinions. Signed opinions are the gold standard of appellate disposition of cases. Signed opinions fulfill all of the goals of a judiciary. They increase the stock of precedent, guide future litigants, give certainty to the law, enhance predictability, harden precedent, increase access to the high court, hold lower court judges accountable for their decisions and encourage well-reasoned decisions.[45] Issuing signed opinions is perhaps the most important function of appellate courts.

The Supreme Court of Appeals issued 60 signed opinions in 2006 and 47 signed opinions in 2007.[46] Although the Annual Reports of the Supreme Court of Appeals emphasize the number of petitions compared to other states, the real comparison (in light of the relative lack of worth of a considered but rejected petition and the absolute necessity of published opinions in advancing the goals of a judiciary) should be the number of signed opinions in relation to those of other states.

The Supreme Court of New Hampshire, until recently, was arguably the most similar state judicial branch to that of West Virginia. New Hampshire also has no intermediate appellate court and, until 2004, heard a nearly completely discretionary docket.[47] That has changed. Since the beginning of 2004, New Hampshire's high court has accepted most appeals from the State's lower courts on a mandatory basis.[48] In 2003, the last year that New Hampshire had a primarily discretionary docket, the New Hampshire Supreme Court issued 186 written opinions despite processing fewer appeals and serving a population smaller than that of West Virginia.[49] In 2006, the New Hampshire Supreme Court issued 158 opinions, even as it accepted cases on a mandatory basis, and thereby increased the number of appeals accepted.[50]

In addition to New Hampshire, the Supreme Court of Appeals has compared itself, in both the 2006 and 2007 Annual Reports, to several other states that are among the few remaining states without intermediate appellate courts. These courts also report issuing a

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[45] 81 Cornell L. Rev. at 282-283.

[46] *Supreme Court of Appeals of West Virginia – 2006 Statistical Report*, Pg. 4; *Supreme Court of Appeals of West Virginia – 2007 Statistical Report*, at 4.

[47] See generally 52 Me. L. Rev. at 69.

[48] See New Hampshire Supreme Court Rule(s) 3, 7 available as of 1/1/2009 online at: http://www.courts.state.nh.us/rules/scr/index.htm. Also see New Hampshire Supreme Court Judicial Duties online at: http://www.courts.state.nh.us/supreme/index.htm. See also Footnote 49. We note that the Supreme Court of Appeals of West Virginia Statistical Reports from 2006 and 2007, as cited previously herein, describe New Hampshire as having a 100 percent discretionary docket. We believe that this information in these reports is outdated and would refer readers to the citations listed in this footnote to compare the discrepancies.

[49] State of New Hampshire Judicial Branch, 2003-2004 Report. *Justice Moving Forward: A Time For Change* at pages 6-7. Available online, as of 1/1/2009 at: http://www.courts.state.nh.us/supreme/rpt03.04.pdf.

[50] See the 2005-2006 Biennial Report of the New Hampshire Judicial Branch, *State of New Hampshire Judicial Branch: Mapping the Future*. Available online at http://www.courts.state.nh.us/press/report06_web.pdf. See also footnote 49.

number of opinions in 2006 far in excess of that of the Supreme Court of Appeals. North Dakota, for instance, disposed of 226 cases by issued opinion in 2006;[51] Delaware's Supreme Court issued 79 (2007)[52] and Montana's high court disposed of an astounding 352 cases by written opinion (2007).[53]

Even if one adds the total number of *per curiam* opinions of the Supreme Court of Appeals, every state mentioned above, save Delaware, issued more opinions than West Virginia in 2006 despite having smaller populations and fewer requests for appeal. We note that it is not clear from the reporting of these courts whether the number of opinions includes *per curiam* opinions. The exception is Delaware whose high court's 79 opinions represent only those assigned to an individual justice (with *per curiam* opinions reported separately), meaning that it too issued more signed opinions than the Supreme Court of Appeals.

There is something to be said for advocating quality over quantity. Some contend that the number of high quality, major opinions that can be produced in a year by an appellate judge is between 25 and 30, with a few suggesting that 35 is a reasonable output.[54] The Supreme Court of Appeals issued only 12 per justice in 2006. In 2007 the Supreme Court of Appeals issued only 47 signed opinions or 9.4 per justice.

West Virginia's judicial branch needs to promote the certainty of the law and guidance to its citizens and businesses through the publishing of more opinions. An intermediate appellate court would add another court that could lend weight to existing precedent and demonstrate to lower courts how to apply existing rules to various factual scenarios. These expressions of the proper application of law would not only promote the goals of the judicial branch but would free the Supreme Court of Appeals from its enormous burden of simple case disposition and allow it to focus on issuing guidance through more signed opinions from each justice on a variety of issues under West Virginia law.

PART III: A REVISED JUDICIAL SUPERSTRUCTURE IN WEST VIRGINIA

Other states have created intermediate appellate courts to help fulfill the societal goals of their judiciaries. Two of the more recent additions to the growing number of states with intermediate appellate courts have been Nebraska and Mississippi, both of which added intermediate appellate courts in the 1990s.[55]

All things considered, we propose the creation of the Court of Appeals of West Virginia in conjunction with a right of first appeal in most cases. The Court of Appeals would issue written opinions, thereby increasing the body and variety of common law within the

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[51] See North Dakota Judicial System Annual Report 2007, available online at http://www.court.state.nd.us/court/news/ndcourts2007a.pdf.

[52] 2007 Statistical Information for the Delaware Supreme Court, available online at: http://courts.delaware.gov/AOC/Annual%20Reports/FY07/?SupremeDispoBrkdwn.pdf.

[53] 2007 State of the Judiciary Address, Chief Justice Karla M. Gray, p.9 of the Transcript, Available online at: http://www.montanacourts.org/state_judiciary/2007.pdf. While it is possible that these other states make different determinations as to what constitutes an opinion for the terms of their reporting, the numbers are so staggering as to suggest a serious discrepancy beyond any calculation anomalies.

[54] 52 Me. L. Rev. 43 at 63.

[55] 52 Me. L. Rev. 43 at 72.

jurisdiction. With a new Court of Appeals, the right of first appeal from the circuit courts would be available fairly and administered. First, it would ensure greater opportunity for justice or sense of justice for litigants in specific cases and reduce uncorrected judicial error. Second, it would enhance the consistent application of the law throughout the state and increase public confidence in the judicial branch. An appeal of right would bring West Virginia in step with virtually every other state and satisfy the American Bar Association standard that "a party to a proceeding heard on the record should be entitled to one appeal of right from a final judgment…"[56]

This new intermediate appellate court would calendar, resolve and clear first appeals from West Virginia's circuit courts and administrative agencies. Much like intermediate courts in other states it would entertain the initial appeal, assume responsibility for error correction, ensure that rules and procedures have been followed and that the correct law has been applied in every case.[57]

In January 2004, when the New Hampshire high court instituted a right of appeal in most instances, that state experienced a small increase in the total number of appeals filed, from 842 in 2003 to 898 in 2004, but a huge increase in the number of appeals reviewed or "accepted" from 347 in 2003 to 645 in 2004.[58] We believe that West Virginia could expect a similar increase and surmise that the increased review of appeals along with the attendant consequences in the form of opinions generated, errors corrected and public confidence fostered would help to fulfill the goals of a sound judiciary that are stressed in this article. Unlike in New Hampshire, the Supreme Court of Appeals would not be left to shoulder this increased burden alone, but instead would be assisted by the new Court of Appeals. The two courts could work together to accomplish the important goals of a modern judiciary. At the same time, the Supreme Court of Appeals could focus its own efforts on only those cases and appeals it deems most worthy of its attention.

A new intermediate appellate court could be designed in different ways to handle these cases. Intermediate appellate courts are now found in most states. Many states have different systems specifically tailored for their needs.[59] The most familiar model is the Federal system with separate courts of appeals, each with its own districts or geographic jurisdictions.[60] Florida is an example of a jurisdiction patterned after the Federal model.[61] Other states have designed specialized courts to deal with certain subject matter or specifically with criminal matters.[62]

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[56] 52 Me. L. Rev. at 58 citing ABA Standards Relating to App. Cts. §3.10 (1994). We note that the extent to which states offer an appeal of right is varied and therefore difficult to compare; however, without an exhaustive analysis, it appears clear that following the institution of mandatory review in most instances in New Hampshire, that West Virginia remains the only State with a completely discretionary docket. Virginia has an intermediate appellate court that handles appeals in criminal matters, domestic relations, and administrative appeals including workers compensation. Some of these appeals are by right and some are at the discretion of its intermediate court. The Supreme Court of Virginia has a mostly discretionary docket. The Commonwealth, although complex in terms of what may be appealed as a matter of right, is likely the state, other than West Virginia, with the fewest opportunities to appeal as a matter of right.

[57] See generally 45 Fla. L. Rev. 21 at 28-34.

[58] State of New Hampshire Judicial Branch, 2003-2004 Report. *Justice Moving Forward: A Time for Change* at pages 6-7. Available online, as of 1/1/2009 at: http://www.courts.state.nh.us/supreme/rpt03.04.pdf.

[59] 45 Fla. L. Rev. 21 at 31-33.

[60] *Id.*

[61] *Id*.

[62] *Id*. at 31-32.

Another approach — the one we advocate — would be a single, state-wide Court of Appeals. Because West Virginia is relatively small, it is this approach that has the greatest potential to reduce the costs associated with administration of the Court of Appeals and reduce the potential for conflicts between various geographically based subdivisions of the same court.

We envision a single Court of Appeals with no divisions or circuits. It would seat no fewer than nine judges who would preside in rotating panels of three. The Court of Appeals would be based in Charleston. Panels could travel to other cities and towns on a regular or as-needed basis. Since the panels would be rotating, different judges would make the trip each time for different cases, precluding the development of geographical associations with particular judges.

A single state-wide intermediate appellate court works elsewhere. Nebraska saw verifiable results when it created its intermediate appellate court in 1991 and appointed six judges with mandatory appellate jurisdiction in most instances.[63] Following the creation of this court, due in large part to the shifting of appellate burdens, the Nebraska Supreme Court increased the average length and number of issues addressed in its opinions.[64] Furthermore, the Nebraska Supreme Court was able to increase its reversal rate (presumably catching an increased percentage of existing error); decrease the percentage of its dispositions accomplished by memorandum order; and file more dissenting and concurring opinions during the same time.[65] We surmise that the creation of a Court of Appeals in West Virginia would have much the same effect. It would fulfill the goals of the judiciary in and of itself. It would free the Supreme Court of Appeals to increase the volume and value of its work product and develop the role of the judiciary in West Virginia as an authoritative source and guide to citizens, litigants, lawyers and judges.

Many different variations are available to select qualified individuals to fill the new judgeships that would be created on this intermediate appellate court. The present system involving elections could be used or modified. Judges could be appointed by the Governor and confirmed in some manner by the Legislature. Although appellate appointments are a new concept for the judicial branch in West Virginia, they have worked well in other jurisdictions where they take various forms. By way of example, appointments could be for a set term without the possibility of reappointment, or they could be for a set term followed by a state-wide, unopposed, simple retention vote for an additional term. We leave the manner of selecting judges for an intermediate appellate court for another day. Nonetheless, we suggest those considering the implementation of a selection system to articulate the ways their proposals will serve the stated goals of a sound judiciary.

We have articulated three goals for a consistent and adequate judicial superstructure. There are others, perhaps less important ones. In every event, the goals to be served should befit West Virginia's particular needs. Some might believe that the type and volume of civil, criminal and administrative cases in West Virginia do not merit the creation of an intermediate appellate court. We disagree. Comparisons with peer states strongly support our position. Further, the case for an intermediate appellate court is even stronger based on fundamental concerns for quality of review and current systemic inadequacies. Assuming the creation of an appeal of right, we believe the case for an intermediate court in West Virginia

[63] 52 Me. L. Rev. 43, at 73.
[64] 52 Me. L. Rev. 43, at 73.
[65] *Id.*

is complete. The question is not whether a certain number of cases are filed, pending or processed. Rather the only issue is whether the superstructures of the West Virginia judiciary are accomplishing the goals that West Virginians deserve to expect of their courts.

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