The formal definition of error in common-law litigation is specific and narrow: error occurs when an institutional actor, usually a court, violates a procedural rule. This focus on process rather than outcome is a central element of the American adversarial system’s commitment to procedural justice. Our system is based on the belief that justice is best served by using established procedures to decide every dispute, not by trying to achieve the best result in each individual case.

This focus on procedure means the law can be harsh. The bank is entitled to foreclose on the poor widow and her orphans; even an unintended and improbable death turns an assault into manslaughter; and so forth. There’s nothing novel in the notion that the law must be uniformly applied even if it sometimes produces unfortunate results. Non-lawyers may not always like these results, but they understand the purpose of adherence to general rules and accept it: ‘It’s The Law’. That’s not what concerns us here. This essay focuses on a different aspect of American proceduralism: not the rules that regulate conduct in the world at large, but those used in court, after the fact, to determine what happened in some contested event. The official ideology of the American legal system is that the procedure used to decide facts is more important than the accuracy of the decision—that a verdict may be absolutely correct legally even if it is absolutely wrong factually. This procedural focus is at odds with common intuitions about the goals of law, inconsistent with the actual conduct of courts, and in conflict with the general professional wisdom on what legal error really means in practice.

This brief essay focuses on review for error in mid-level American courts of appeal, courts whose primary mission is to resolve particular disputes rather than decide issues of general law. We begin with the official account of American appellate practice and briefly describe the system in its own terms. Next we sketch an alternative method...

† This paper was written and presented before my clerkship began, and the comments in no way reflect my clerkship experience or the opinions of the judiciary.
‡ The authors wish to thank Aviva Orenstein, Mathias Reimann, I. Glenn Cohen, and especially the eight Michigan state court judges who agreed to be interviewed for this paper.

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of review for error, a simplified and idealized version of the procedure in continental civil-law systems. We then qualify our initial description of review in American courts: reality, of course, does not entirely correspond to the procedural ideal; in practice courts often do care about factual accuracy and material justice, even if they don’t admit it. We follow with a comment on our lack of originality: our cynical description of appellate review is so well known it’s nearly official dogma. We conclude with some speculations on the structural and cultural significance of our legal system’s ambivalence, if not hypocrisy, about the importance of factual accuracy in review for error.

Keywords: review; appeal; error; trial; finality; judges; advocacy; fiction.

I.

Trial is the centrepiece of our system. Few cases may actually go to trial, far more time may be spent in pretrial preparation, post-trial appeals may take years or even decades, but trial is the main event.1 Our definition of ‘error’ is consequently trial-centric; though error is usually identified on review, in ordinary appellate litigation it exists and can be found only within the limited bounds of the trial record.2

The ideal of review for error is easily stated: the reviewing court should systematically scrutinize the entire trial record to identify procedural mistakes. Substantive mistakes should not be considered. If a jury reaches an irrational conclusion, the case may be reversed on the ground that the judge erred by not following the proper procedure—not granting a motion for judgment as a matter of law if one was warranted—but not on the ground that the jury erred by deciding the case irrationally.3

While the jury’s evaluation of the evidence at trial is essentially unreviewable, the judge’s legal rulings (and failures to rule) are reviewable for procedural correctness. This appraisal is strictly limited: a reviewing court may not reverse a judgment because it disagrees with the verdict, may not assess decisions within the scope of the trial judge’s discretion, may only consider factual information that was presented to the trial court, and ordinarily may only consider claims of error that were made at trial. There are, of course, extraordinary procedures for reconsidering cases in which important evidence is

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1 Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (‘Society’s resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens’); cf. Mirjan R. Damask, The Faces of Justice and State Authority 51–53, 62 (1986) (discussing the ‘day-in-court’ model of law).

2 Thus, no fact about the outside world—not even one that definitively proves the verdict inaccurate—should be considered in assessing whether a legal error was committed at trial. Of course, an appellate court itself may commit legal error, which is subject to correction by higher-level appellate courts in their review of the trial record.

3 Some procedures allow the judge to avoid the jury verdict, of course—granting a renewed motion for judgment as a matter of law, or using the power of additur or remittitur—but even then we try to maintain the fiction that the ruling is based on law, not fact. The judge’s authority to rule as a matter of law even after the jury verdict, for instance, is based on the fiction that the judge is merely deciding a question she previously deferred—that as a matter of law no rational jury could decide the case in a particular manner—notwithstanding the fact that the actual jury did decide the case in that ‘irrational’ manner.
discovered after trial, or in which a fundamental injustice occurred that is not apparent on
the trial record.\(^4\) But these procedures are not part of the regular process of review, and are
only grudgingly and infrequently permitted.\(^5\)

Assuming that all institutional actors perform within their spheres of discretion and the
process does not malfunction, the verdict of the factfinder is irrebuttably presumed to be
factually correct. Inquiry into the jury’s ‘arguments, statements, discussions, mental and
emotional reactions, votes, and any other feature of the process’ are barred by law.\(^6\) Our
legal system is supposed to generate accurate results in general, but we refuse to examine
the result in any specific case to see if it reflects ‘the Truth’.

II.

The civil-law systems on the European continent embody a fundamentally different vision
of the process of litigation. We describe a few elements of these systems in order to
highlight, by contrast, some aspects of our own system. We do not pretend to provide
an accurate description of any specific continental system; instead, we draw on elements
from different countries to create a composite sketch.\(^7\)

As Mirjan Damaška has pointed out, the title of Franz Kafka’s famous book about a
man trapped in an endless legal controversy is usually translated into English as \textit{The Trial}.
In the original German it is \textit{Der Process}.\(^8\) This shift in focus—from trial to process—

\(^4\) This is particularly true in criminal cases. If a defendant who was duly convicted at an error-free trial is
proven innocent by DNA analysis 15 years later, he may be released, but the procedure by which he obtains
his freedom will normally be a new legal proceeding rather than a review of the original conviction. He may
be granted an executive pardon, or the case may be reopened and dismissed, but not, technically, reversed.
And some reasonably common sorts of error may occur at trial but not appear in the trial record—again, especially
in criminal cases. This is frequently true, for example, for claims of ineffective assistance of counsel. In that
situation, review for error is normally accomplished by means of a petition for a writ of habeas corpus or some
other ‘original proceeding’ which permits the petitioner to supplement the trial record, and the court to make
new findings of fact. See, e.g. Massaro v. United States, 123 S. Ct. 1690 (2003). In this article we restrict our
discussion to ordinary appellate review on the record.

\(^5\) The common law allowed a jury’s verdict to be examined for substantive accuracy using the ‘writ of attaint’.
Wayne Morrison 2001). This writ was only available in limited circumstances, but essentially enabled a losing
party to argue before a new jury that the first jury gave a false verdict. If the second jury determined that the
prior jury erred, the prior jurors would ‘become forever infamous . . . be imprisoned, and their wives and children
thrown out of doors . . . have their houses razed’ and so on. Id. 404. This writ still defined error in terms of
process values; the new jury could only consider the same evidence as presented at the first trial, for ‘the question
is whether or no [the original jurors] did right upon the evidence that appeared to them’, not whether their verdict
corresponded to the real state of affairs in the world. Id. 404.

\(^6\) Fed. R. Evid. 606(b) & advisory comm. notes. This is true even if one party offers to show the jury made
an error in returning its verdict; inquiry may only be made if an outside source attempted to undermine the
procedure, such as an attempt to bribe a juror. Fed. R. Evid. 606(b).

\(^7\) We draw our description from a variety of sources; for a far more detailed examination of continental
systems, see, for example, S. Bedford, The Faces of Justice (1961); John H. Langbein, Comparative
Criminal Procedure: Germany (1977); Richard S. Frase, Comparative Criminal Justice as a Guide to
American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, 78 Cal.
to German Law 413 (Werner F. Ehke & Matther W. Finkin eds., 1996); and the works of Mirjan R. Damaška,
particularly The Faces of Justice and State Authority (1986).

\(^8\) Damaška, supra note 1, at 48 & n. 1.
reveals a fundamental difference between the two systems. In the American system trial is a single grand event that is supposed to resolve all factual disputes; in continental systems the search for factual accuracy is an ongoing process from trial through appeal. The investigating magistrate begins the process of gathering facts; at trial these facts are reexamined and new conclusions drawn; on appeal new evidence may be heard, witnesses may be recalled, and the factual conclusions of the trial court may be reconsidered and revised.

In continental systems, a higher court may reject the conclusions of a lower court without implying that the lower court committed an error: the reviewing court may simply have more information at its disposal. With less emphasis on the legal battle between competing adversaries, a reversal on appeal is not seen as depriving the winner of a victory won at trial. To illustrate, consider the double jeopardy prohibition. Both the American and continental systems prohibit multiple prosecutions of a defendant for the same crime, but a continental prosecutor may appeal the factual accuracy of a criminal acquittal. In America this would be considered a gross violation of the rule against double jeopardy; once a defendant has been acquitted at trial, she must be released. The difference turns on the way the process of fact-finding is conceived. In continental systems the factual determination, and hence the first round of jeopardy, is not thought to be complete until it has been approved by the highest court that will review it. The continental prosecutor may appeal an adverse factual ruling for the same reason that an American prosecutor may appeal an adverse legal ruling—no final decision has been made at trial, so reconsideration of the factual determination is not seen as a second proceeding. This continual process of honing and revising the factual findings is aided by comparatively transparent decision-making. At every stage of the proceedings, the continental fact-finder must produce a written opinion justifying its factual findings. On review, the logic of these factual assessments can be examined and tested. The authority to reconsider factual findings gives appellate courts the power to forthrightly correct lower-court decisions that they believe are substantively incorrect.

III.

In Section I we described an idealized view of the American system. Reality is far from that ideal. American appellate courts do not generally conduct systematic review for procedural error; they do much more, and far less.

Two opposing forces frame the actual practice of American appellate review. On one hand, the complexity of modern American litigation is so great that significant error is all but inevitable. An elaborate network of procedural and evidentiary rules regulates every step along the way, from service of process to post-verdict motions. In a system committed to the proposition that justice is the product of procedure, generations of lawyers, judges, and legislators have deposited layer upon layer of procedural rules, sub-rules, and exceptions in an attempt to hone this procedure and improve the administration of justice. The resulting rules are so intricate that errors are the ‘inevitable companions of trials’.9

On the other hand, several countervailing mechanisms allow courts to ignore the vast majority of these inevitable errors. The first and most direct method is the harmless error rule: by describing a mistake as ‘harmless’ the appellate court can affirm on the ground that the defendant’s ‘substantial rights’ were not affected. Second, questionable decisions can often be described as within the lower court’s unreviewible discretion. Third, many claims of error can be ignored entirely. Unlike continental appellate courts—which review reasoned lower-court opinions accompanied by official summaries of the evidence—American appellate courts review cryptic one-word verdicts on the basis of bulky and opaque verbatim records. In most cases the only publicly available description of the facts and issues is the one the appellate court provides in its own opinion. Any incompleteness or inaccuracy in that description is usually invisible to everybody but the parties themselves. Finally, when an appellate court fails to correct an error it ought to have rectified, this *appellate* error can only be identified and fixed if a higher appellate court exercises its power of review, and review by an upper level appellate court, typically the state supreme court, is a rare event.

These two opposing forces create a system that departs from the procedural ideal in two directions. First, there is no *systematic* review for procedural error. For the most part, trial-court judgments are simply affirmed without serious consideration of potential errors. For example, one study found only thirty federal cases in a two-year period—that were reversed for evidentiary error. The absence of meaningful review is especially common in criminal appeals, where the extremely low reversal rate—frequently 10% or less—might be more a reflection of appellate judges’ conviction that almost all criminal defendants are factually guilty than a genuine estimate of the proportion of criminal trials that are infected with prejudicial procedural error.

At the same time, appellate courts occasionally exceed the limits of procedural review.

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10 Kotteakos v. United States, 328 U.S. 750, 764–65 (1946); Brecht v. Abrahamson, 507 U.S. 619, 630 (1993). There are only a few specific errors—such as when the trial judge is provably biased or there is a complete denial of the right to counsel—that are considered ‘structural’ errors requiring automatic reversal. Even errors at the very heart of a trial, such as omitting an element of the crime from the jury instructions, can be deemed harmless. Neder v. United States, 527 U.S. 1, 8–15 (1999).

11 As California Supreme Court Justice Roger Traynor explained, ‘[o]ften all too easy affirmance is a tempting course of least resistance because many records laced with error appear at first glance to indicate that the correct result was reached below’. ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970).


13 For example, in 1999, 9.5% of federal appeals by criminal defendants were reversed on appeal either in whole or in part. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL APPEALS, 1999, WITH TRENDS 1985–99, at 4, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fca99.pdf. Similarly, a study of appeals filed in an intermediate court of appeal in California in 1974 found that 4.8% of appeals by criminal defendants resulted in complete reversals, and that in only another 2% one count of several was reversed or the degree of the conviction was reduced. Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal,* 1982 AM. B. FOUND. RESEARCH J. 543, 575–76.

14 Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review,* 70 IOWA L. REV. 311, 332 (1985) ('The one factor common to a great number of opinions affirming criminal convictions on harmless error grounds is the staunch belief of the reviewing courts in the guilt of the appellants seeking reversals of their criminal convictions. This belief appears to transcend all variations of formula and all problematic calculations about what juries might have done had the error complained of been avoided').
and reverse cases for perceived substantive errors. Since American courts have no authority to do this explicitly, the stated grounds for reversal is always procedural, even if the motivating factor is substantive error. If the jury relied on an eyewitness account that the appellate judges find incredible, the appellate court might reverse, citing errors in jury instructions or improper admission of hearsay. Just as judges may strain the limits of the harmless error rule to uphold the conviction of a defendant they perceive as guilty, judges may inflate the importance of errors they would normally regard as trivial if they suspect that an innocent defendant may have been convicted.

We interviewed five Michigan state trial-court judges and three intermediate appellate-court judges and asked them about the process of appellate review. The trial-court judges all believed that the Michigan appellate courts engaged in result-oriented review on appeal. One example they gave was a form of clandestine remittitur: the state appellate courts, they said, almost invariably reverse very large judgments for personal injury plaintiffs, typically for some unrelated procedural error. This predictable pattern of reversal sends a message to litigants that the courts disfavor large personal injury judgments; it not only helps achieve the judges’ preferred result—smaller jury awards—but also puts pressure on plaintiffs to settle out-of-court for less than they might get from a jury. Covert substantive review of this sort may be uncommon, but because it is hidden it is unconstrained and potentially unprincipled.

IV.

At this point you might be thinking: ‘this is all pretty familiar’. It is. We have not unearthed any deep, undiscovered truths about the American legal system. On the contrary, the legal-realist description of American courts of appeals—that they are result oriented and institutionally hypocritical—is well known and openly acknowledged, at least in some contexts. Prominent scholars have discussed the reality of appellate practice in similar terms; Charles Allen Wright, for example, has written: ‘unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court’. Prominent appellate judges such as Roger Traynor and Irving R. Kaufman have made the same point explicitly, although not when they are writing from the bench. And mainstream appellate advocacy manuals teach lawyers how to play to this substantive bias; indeed, they imply that playing to the judge’s result-oriented

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15 For example, in People v. Byrd, 198 P.2d 561 (Cal. Ct. App. 1948), a California appellate court reversed a father’s conviction for incest that was based solely on the twice-recanted testimony of his troubled daughter. The appellate court left no doubt that it disbelieved the daughter’s testimony, but since the testimony of a single eyewitness is legally sufficient to support a jury’s verdict, the court reversed based on a technical mistake by the trial judge. California Justice Roger Traynor discusses Byrd, supra note 11, at 92 n.67.

16 Interview with Washtenaw County trial judges, Ann Arbor, MI (Feb. 18, 2003); Telephone interview with Michigan Court of Appeals Judge (Mar. 20, 2003); Telephone interview with Michigan Court of Appeals Judge (Mar. 24, 2003); Telephone interview with Michigan Court of Appeals Judge (Mar. 24, 2003).

17 E.g. Davies, supra note 13; Allen, supra note 14; Berger, supra note 12.


concerns is a large part of the appellate lawyer’s art. As one manual explains, ‘[y]ou want the judge who reads your statement of facts to conclude, ‘If there’s any justice in the world, this party should win; now let me see if there is any law that allows me to decide this way’.’

Perhaps the most curious thing about covert substantive review is that it is such a brazenly open secret.

V.

What does this open disjunction between theory and practice on appeal tell us about American legal culture? We have several lightly connected observations.

1. Duplicity. Legal fictions are common in our law: we take ordinary English words and use them in a technical legal sense that diverges drastically from their ordinary meaning. We say that a corporation is a person, for instance, or that guardians of the mentally incompetent can exercise the will of their wards, but we don’t pretend to believe that these statements are actually true. We don’t flinch when a judge points out that a corporation is not really a person; it happens all the time.

The nature of appellate review is not an ordinary fiction. Ordinary legal fictions are not subversive: they can be recognized as false without undermining the foundation of the system. But there would be howls of outrage if a judge were to admit that she affirmed a case despite serious error because the defendant was clearly guilty. Typical legal fictions do not exempt courts from the judicial task of applying the law once it is identified; they are technical manoeuvres that define the rules that apply to specific situations by analogy or extension. Review for error is the central judicial task of appellate courts. To officially admit duplicity in performing that function would be a shattering rejection of our judicial system. What’s more, there is no plausible competing description of American appellate review. Regular substantive review is an attractive notion, even if it’s untenable, but it’s hard to articulate a principled argument for a system of routine affirmance accompanied by occasional, idiosyncratic, and sometimes politically motivated substantive review.

2. Frugality. The high proportion of affirmances, even in cases with serious procedural error, serves as a form of docket control for swamped appellate courts. As other scholars have pointed out, our system creates more procedural rights than it can afford to honour.


21 For a more detailed discussion of legal fictions, see Louise Harmon, Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment, 100 YALE L.J. 1, 2–16 (1990); Note, Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law, 115 HARV. L. REV. 2228 (2002).


We rely on shortcuts to deal with this problem. The main shortcut is pre-trial settlement, by private agreement in civil cases or by bargained pleas in criminal prosecutions. Routine, summary affirmation is another shortcut. It saves time on review, a high priority since intermediate courts are almost invariably flooded with cases. By quickly affirming all cases that appear to be substantively correct, a court can allocate its time to more searching examinations of cases that appear substantively problematic. Habitual affirmation also discourages appeals in the first instance; with little hope of success, the loser at trial has little incentive to spend time and money on an appeal. By extension, routine affirmation also discourages trials by reducing the incentive to go to trial rather than settle in order to preserve the right to seek review.26 And in general, trials are unpredictable and this unpredictability encourages risk-averse parties to accept plea-bargains or pretrial settlements rather than gamble on trial. If appellate courts were vigilant in systematically correcting all trial errors, the unpredictability of litigation would be reduced, and that would reduce the incentive to settle.

3. Variability. Appellate review in America is notoriously inconsistent. It varies from court to court and from case to case. The quality of the legal work on appeal may make a big difference. A skilful defence lawyer can sometimes make the judges worry about the substantive justice of the result while simultaneously casting the argument in terms of procedural error.28 A prisoner filing a petition for review in pro per has little chance of being noticed. The substance of appellate review also varies from one type of case to another. Several state trial-court judges with whom we spoke thought that their appellate courts are likely to be genuinely concerned about procedural error in family-law cases—an area of law where most judges have few preconceived assumptions about the correct outcomes and no particular systemic agenda. On the other hand, in ordinary criminal cases appellate courts might tacitly assume that most defendants are guilty, focus their attention primarily on the rare cases in which they think a defendant might be innocent, and paper over procedural errors in the rest.

26 For example, in a case in which a trial-court judge has ruled before trial that two of the plaintiff’s expert witnesses will not be permitted to testify at trial, the plaintiff—knowing that reversal on appeal is highly improbable, see Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146–47 (1997) (exclusion of expert evidence is within trial court’s discretion); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 157–58 (1999) (same), is more likely to accept a discounted settlement rather than go to trial without those experts and then appeal the trial judge’s ruling. In a criminal case only the defendant may appeal from the judgment, and the initial appeal is generally free—paid for by the state—so appeal is a predictable sequel to conviction at trial. In that context, a low reversal rate will have little or no direct effect on the number of appeals. A pattern of affirming almost all cases without regard to procedural error may still reduce the number of trials, however, and as a result hold down the number of appeals. For example, if a trial-court judge refuses to exclude evidence that was arguably seized in violation of the constitution, a criminal defendant has little reason to forgo a plea bargain, stand trial and risk much harsher punishment in order to preserve his right to appeal the judge’s ruling on the admissibility of the contested evidence, since a victory on appeal is unlikely regardless of the merits of the legal claim.


4. Responsiveness. Lack of principle makes our courts more flexible and responsive; it enables judges to keep closer to the mainstream than official norms sometimes permit. The public at large seems to believe that courts should focus on punishing the factually guilty and protecting the factually innocent, rather than producing procedurally flawless trials. Even educated adults who realize that the best laws may produce harsh or distressing consequences have a hard time accepting the notion that our legal system is often unconcerned with the accuracy of its verdicts. In the rare cases in which appellate judges reverse judgments because they think the decision may be inaccurate—and in the many cases in which they affirm procedurally flawed judgments that they believe are factually correct—they are reflecting, if not responding to, the common view of a court’s true function.

Our culture celebrates judicial independence, but we also want politically responsive courts. One of the most unusual aspects of our legal system is the extraordinary American institution of a largely elected state-court judiciary. In civil law countries a judge is a career civil servant whose assignments and promotions are determined within a judicial bureaucracy. American judges are chosen by politicians or voters, answer (if at all) to the electorate, and run their courts with a great deal of independence. This independence brings with it a measure of personal accountability for their decisions. One reason for the reluctance to reverse in criminal cases—even in the face of serious procedural error—is that criminal appeals are often the subjects of political campaigns, and always in the same way: American judges are never criticized for affirming convictions, only for reversing them. This sort of political pressure is less common in non-criminal cases and can run in either direction. Occasionally, it may lead appellate judges to overstate trial-court error in order to reverse an unpopular ruling. The Michigan trial-court judges we talked to told us about a case in which an appellate court went out of its way not only to reverse but to publicly rebuke a trial-court judge in a family-court case that happened to generate an extraordinary amount of unfavourable publicity.

5. Obscurity. American law consists of a patchwork of statutes, rules, and judicial opinions. The answers to most questions can only be found by carefully researching scattered appellate opinions. Even if a statute seems directly on point, a wise lawyer will not rely on its language until she has examined the relevant cases interpreting that language. This emphasis on precedent makes American law less accessible to ordinary citizens than the law in code-dominated civil-law systems. Concealed substantive review makes our law more inaccessible yet. Even if an interested citizen could find the relevant appellate opinions, the true reasons for decisions—not to mention the process by which the decisions are reached—are hidden. Imagine a lawyer trying to explain appellate practice to a client:

First, we must base our claims on procedure, not fact; we can’t simply say the lower

court is wrong, we have to point out technical errors in the process used to make the decision. However, second, procedural claims don’t really matter; if that’s all we have, we’ll probably lose despite all the procedural errors at trial. Therefore, third, substance is critically important after all, but, fourth, it can only be used indirectly. Our best hope is to get the judges worried about an underlying claim of factual injustice, in which case the court may reverse on other grounds, without anybody ever openly addressing the substantive issue.

6. Adversarialism. Finally, covert substantive review may represent one of the many triumphs of adversarialism in American justice. The role of a judge presupposes neutrality, but American judges are at heart adversarial advocates; they are ‘[l]awyers who were once advocates, whose job now is to decide among advocates, and who, in the process of deciding, will advocate their position to their colleagues’. The contrast in judicial style with the continental system is telling: Continental legal opinions are supposed to be written in an authoritative tone that suppresses individuality and describes the law in an impersonal didactic manner that resembles legislative enactments; dissents or other separate opinions are discouraged. In America, judicial opinions are argumentative. They are supposed to persuade us that the court’s decision—or the writer’s position—is just and correct. We know that our judges are advocates; we expect them to be advocates; we celebrate brave or prescient acts of judicial advocacy, especially by judges who wrote in dissent or took unpopular positions: Harlan’s dissent in *Plessy*, for example, or Holmes’s dissents on the First Amendment. From the Chief Justice of the United States on down, everybody in our legal system, judge and lawyer, is always *arguing*, always trying to *persuade* someone to agree with them, and frequently doing so—as advocates are trained to do—for reasons beyond those that are explicitly given. It should be no surprise that in a system that exalts the virtues of advocacy, in which the only well developed professional role is that of the advocate, decisions on review are often made for reasons that are not stated in the opinions.

31 FRANK COFFIN, A Lexicon of Oral Advocacy 69; see also Robertson, supra note 20, at 125 (‘Within my own court judges are not supposed to be advocates but, if they are honest, will often admit they are’.).

32 DAMAŠKA, supra note 1, at 45 n. 62.

33 *Plessy* v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).