ISSN 1352-3252

LEGAL THEORY

Volume 2
Number 1

March
1996

CAMBRIDGE
UNIVERSITY PRESS

LEGAL THEORY

ISSN 1352-3252

Editorial Office: *Legal Theory*, Yale Law School, Drawer 401A Yale Station, New Haven, Connecticut 06520, USA; Fax: 203-432-8260.

Publishing, Subscription, and Advertising Offices: Cambridge University Press, 40 West 20th Street, New York NY 10011; or Cambridge University Press, The Edinburgh Building, Shaftesbury Road, Cambridge CB2 2RU, England.

Legal Theory is published quarterly. Annual subscription rates for Volume 1, 1995: Institutions: $100.00 in the USA, Canada, and Mexico; UK£62.00 in all other countries. Individuals: $50.00 in the USA, Canada, and Mexico; UK£31.00 in all other countries. Prices include postage and insurance; airmail outside the USA, Canada, and Mexico is £20.00 extra.

Periodicals postage paid at New York, NY, and additional mailing offices. Forwarding and Return Postage Guaranteed, Address Correction Requested. Postmaster: Send address changes in the USA and Canada to: *Legal Theory*, Cambridge University Press, Journals Fulfillment Dept., 110 Midland Ave., Port Chester, NY 10573–4930.

Printed in the United States of America.

Legal Theory, 2 (1996), 83–85. Printed in the United States of America
 0361–6843/96 $5.00 + .00

REPLY TO A COMMENT ON "THE APPEALS PROCESS AS A MEANS OF ERROR CORRECTION"

Steven Shavell
Harvard Law School

In his interesting comment on my recent article, "The Appeals Process as a Means of Error Correction,"[1] Edward Schwartz makes two criticisms of my analysis. The criticisms have essentially to do with my assumption that an appeals court judge will base his or her decisions only on what happened at trial, and not on any inference that can be drawn from the fact that an appeal was brought. Before explaining why I do not find Schwartz's criticisms problematic, it will be helpful for me to restate the main features of the model that I examined in the article.

The chief assumptions of the model were that socially costly errors may occur at trial, that the state can reduce the incidence of error by devoting greater resources to the accuracy of trial courts and/or by establishing appeals courts, and that appeals courts also absorb resources. The major question posed was whether it is socially advantageous for the state to establish appeals courts. (Formally, the state's objective was to minimize total social costs: the social costs of error plus the legal resources expended on trial courts and on appeals courts, if established.)

I showed in the model that it is socially desirable for the state to establish appeals courts under quite general circumstances, because this allows errors to be corrected relatively cheaply. In particular, litigants who are the victims of trial court error are assumed in the model to succeed on appeal more often than litigants who are not the victims of error.[2] Consequently, separation of the two types of litigants is possible: Litigants who are the victims of error can be induced to bring appeals and litigants who are not the victims of error can be discouraged from bringing appeals.[3] (In exten-

I wish to thank Bruce Hay and Louis Kaplow for comments and the John M. Olin Center for Law, Economics, and Business at Harvard Law School for research support.

1. JOURNAL OF LEGAL STUDIES 24 (1995): 379–426.
2. In point of fact, the accuracy of the appeals courts is endogenous to the model.
3. To amplify, let the return be R_c if an error was made and R_n if it was not, so that $R_c > R_n$. Let the private cost of an appeal be c. (For convenience, I am using different notation from that in the article.) Then if $R_c > c > R_n$, appeals will be brought if and only if errors occurred. If, however, $R_n > c$, any disappointed litigant will bring an appeal, but a fee f can always be

sions of the model, it is litigants who are likely—rather than certain—to have been the victims of error who are led to bring appeals.) Appeals courts then endeavor to correct trial court errors. The virtue of the institution of appeals courts thus is, at root, economic: With an appeals system, legal resources are devoted toward error correction *only in the subset of cases in which errors were made.* By contrast, were there no appeals courts, the only available avenue for error correction would be investment of additional legal resources in improving trial court accuracy, which is to say, use of legal resources in *all* cases.

Let me now address Schwartz's two criticisms.[4] He suggests that because of separation—that because litigants who choose to bring appeals are always victims of trial court error—appeals court judges can rationally infer that this is so and should therefore find in favor of appellants. But, Schwartz says, I assume that appeals court judges do *not* make use of the foregoing rational inference and that they thus do not always find in favor of appellants. He goes on to emphasize that my assumption is crucial to my conclusion: Were appeals courts always to find in favor of appellants, all disappointed litigants would be led to appeal, producing an unraveling of the supposed equilibrium in which litigants bring appeals if and only if trial courts erred.

As Schwartz acknowledges, I noted exactly these issues in my article.[5] Apparently, however, I was too brief in explaining my assumption that appeals court judges do not use inferences from the fact that appeals are brought, and I seek to further justify my assumption here. First, the assumption seems warranted by the *feasibility* of preventing appeals court judges from freely using the inferences in question. The legal system can and does restrict the range of factors that appeals court judges are permitted to consider in deciding appeals; the grounds for reversal are limited; and, were an appeals court to state that it was favorably influenced by the very fact that an appeal was brought, rather than by the merits of the appeal, the appeals court could be countermanded.[6] More generally, it is a commonplace that the legal system prevents courts from using certain types of information for reasons of policy. For example, if information about a criminal defendant is illegally obtained by the police, the information will be barred under the exclusionary rule. This is not to deny, of course, that courts have some discretion to use information that the legal system would prefer that they not use (a court's unannounced use of an inference from the fact that an

chosen so that $R_c > c + f > R_n$, in which case appeals will be brought if and only if errors occurred. Similarly, if $c > R_c$, a subsidy s can be chosen so that $R_c > c - s > R_n$, so that again, appeals will be brought if and only if errors occurred.

4. For expositional reasons, I begin with his second criticism.

5. See section II.I on inference from the fact that an appeal is brought.

6. Whether today it *would* be countermanded is another question, but the teachers of civil procedure whom I have queried agree that it would be viewed as unseemly and perhaps reversible error for an appeals court judge to cite the fact that an appeal was brought as a reason for his judgment.

o are likely—rather than certain—to
e led to bring appeals.) Appeals courts
errors. The virtue of the institution of
nomic: With an appeals system, legal
correction *only in the subset of cases in*
were there no appeals courts, the only
on would be investment of additional
urt accuracy, which is to say, use of legal

o criticisms.[4] He suggests that because of
who choose to bring appeals are always
als court judges can rationally infer that
in favor of appellants. But, Schwartz says,
do *not* make use of the foregoing rational
ot always find in favor of appellants. He
mption is crucial to my conclusion: Were
or of appellants, all disappointed litigants
g an unraveling of the supposed equilib-
als if and only if trial courts erred.
oted exactly these issues in my article.[5]
brief in explaining my assumption that
nferences from the fact that appeals are
fy my assumption here. First, the assump-
ibility of preventing appeals court judges
question. The legal system can and does
appeals court judges are permitted to
rounds for reversal are limited; and, were
favorably influenced by the very fact that
by the merits of the appeal, the appeals
More generally, it is a commonplace that
m using certain types of information for
information about a criminal defendant
the information will be barred under the
deny, of course, that courts have some
the legal system would prefer that they
se of an inference from the fact that an

case appeals will be brought if and only if errors
n be chosen so that $R_c > c - s > R_n$, so that again,
s occurred.
his second criticism.
fact that an appeal is brought.
nded is another question, but the teachers of civil
at it would be viewed as unseemly and perhaps
e to cite the fact that an appeal was brought as a

appeal was brought cannot be penalized), but it is to deny that they have complete discretion to do so.

Second, it is not entirely obvious that an appeals court judge, if not limited in what factors he could consider in making a decision, would *desire* to use his inferential knowledge and find in favor of the appellant. He would want to do this if he were interested only in justice in the instant case, but this view of a judge's motivation may be questioned as narrow. One would think that, to the degree that a judge's utility depends on the social interest, he will attend not only to the case at hand but also to wider factors relevant to social welfare. Indeed, we see that judges recognize these broader concerns when they willingly apply all manner of rules of evidence that bar information that would be pertinent to their particular cases (for example, when they apply the exclusionary rule to exclude evidence that they know would, if allowed, convict a criminal defendant).

Third, although a judge can draw a sharp inference about appellants in the basic model that I considered, he cannot draw a clear inference in several of the extensions of the model that I investigated. Specifically, the judge cannot infer that appellants are definitely victims of trial court error if litigants have imperfect information about the occurrence of error, or if litigants differ in the costs they incur in making appeals.[7] This would tend to attenuate a judge's motivation (such as it might be) to use inferences from the fact that a party brought an appeal.

Schwartz's other criticism of my article concerned my simplifying assumption that the universe of cases brought to the trial courts was fixed in character. He observes that the types of case brought to the trial courts will be influenced by the accuracy of trial courts, among other factors. Schwartz is obviously correct in this regard, but that does not vitiate my analysis, because trial court error is inevitable. Suppose that it is only plaintiffs with meritorious cases who bring suit in a putative equilibrium. Were trial courts to use this inferential knowledge and find in favor of all plaintiffs, there would be an unraveling of the equilibrium because plaintiffs without meritorious cases would also bring suit. Thus, as with appeals courts, it would be optimal to prevent trial courts from considering the fact that a suit was brought in deciding cases. Accordingly, some trial court errors would occur, and there would be reason for resort to appeals courts.[8] In sum, were I to have taken into account the legal system's ability to winnow out unmeritorious suits at the trial court level, the qualitative nature of my conclusions about the social desirability of the appeals courts as a means of error correction would not have been altered.

7. See section II.D on imperfect litigant information about error, and section II.H on heterogeneity among litigants.

8. Moreover, even if trial court judges did use their inferential knowledge and always decided in plaintiffs' favor—and even if, counter to logic, there would be no unraveling of the equilibrium in which only meritorious suits are brought—trial court judges could still err in deciding on the quantum of damages or the magnitude of punishment.