

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 24

WINTER 1957

NUMBER 2

SOME OPEN QUESTIONS ON THE WORK OF STATE APPELLATE COURTS*

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THE LAND is astir with a great discontent that all is not right with the law. Any lawyer or judge from California, where the population has been increasing at the rate of some 33,000 a month, looks up at the clock, the calendar, and a giant problem—how to dispatch his mounting work and yet do it well. The State Bar and the Judicial Council, recognizing that justice and delay are antonyms, have chosen not to flounder their way through the storm of cases.¹ They have achieved a reorganization of the inferior court system, an administrative procedure act, and new rules on appeal. They are making haste wisely to free the state from mumbo-jumbo instructions and wasteful practices in the introduction of evidence, to streamline the selection of juries, to explore pre-trial procedures. Appellate judges have joined the crusade, giving advice that has resulted in improved presentation of records, briefs, and oral argument on appeal.

As these worthy reforms get under way, it is timely to speak freely of appellate review itself. If we are in earnest that the law should keep pace with the times, we must scrutinize appellate review as critically as trial procedure and the practice of law. Like lively children too long imprisoned, questions come tumbling out of the tomb of silence: How rationally have we developed practices and rules for the effective interaction of trial and appellate machinery, for the granting of hearings, for dismissals or other regulation of frivolous appeals, for the regulation of new trials by modifying judgments or reversing with directions?

If we are in earnest about efficient appellate administration, we must can-

* This article is taken from an address given by Justice Traynor before the University of Chicago Law School's Conference on Judicial Administration, November 8, 1956.

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¹ In a recent report to the Governor, Chief Justice Gibson, as Chairman of the Judicial Council, has proposed a series of far-reaching reforms ranging from the adoption of pre-trial procedures to measures strengthening the independence of the trial courts.

didly meet a host of other questions, compare generalizations from judicial experience on such matters as oral argument and the conference system, methods of assigning cases, calendaring and priorities on the calendar, expedition of decision to prevent the injustice of delay, award or apportionment of costs on appeal.

If we are in earnest about the rational growth of the law, we are bound to be concerned with the form and content of opinions. Do we submerge ourselves and the profession in wild seas of paper only to exhaust ourselves in swimming out therefrom to be resubmerged? Can we state tentative norms for decisions that affirm or reverse without opinion? For the adoption of memorandum opinions in cases controlled by settled law? For the form, the length, even the content of majority opinions as well as of concurring or dissenting opinions? Can we sharpen the distinction between prejudicial and harmless error in relation to the substantial evidence rule? In sum, do we take on the proper cases for review; do we review efficiently; do we conserve our intellectual forces in routine cases to mobilize them effectively for the crucial and novel ones?

This interaction of trial and appellate machinery, this appellate administration, this intellectual process of appellate judgment, are of the greatest public importance. Yet they are not bruited about, even in the current lively discussions on modernizing the law. Is it that ancestral pictures of bewigged and berobed justice stand as a barrier against inquiry, working a black spell, intimidating us into the silence that comes over children in the presence of the aloof and unfamiliar? Or do we rationalize that the dignity of the appellate courts depends on their mystery? If so, we do not honor them, for the implication hovers in such a premise that whatever dignity attends the judicial process emanates not from its exacting demands on mind and integrity, but from its secrecy. We may even do them injury, for in modern times that which operates in an aura of mystery may eventually find itself suspect rather than respected.

It behooves the judges themselves to take the initiative in setting forth the workaday problems that recur often enough in their jobs to challenge critical study. As one of them I am glad of this occasion to consider with you some of these problems as they come up before a court in a rapidly growing state with perhaps as great a variety of problems as any in the country. There are seven justices on our court, and each of us finishes the year with about twenty-five to thirty majority opinions. A formidable number of concurring or dissenting opinions run up the total.

The index of cases bespeaks how far and wide they range. The mechanizing of farms, the mobility of people, the growth of public ownership, the tax laws most of all, set old property concepts in quaint relief. In our state, property is likely to take the form of fugitive oil in the land or sea, gold in the hills, growing crops of fantastic variety, precious water for semi-arid land, futuristic lease-backs whereby an owner who sells his cake seeks to have it too, literary property scratched out for the movies or television. The familiar problems of family law,

inheritance and succession take on strange countenance; they lack the simple innocence they would have in a self-contained state; they are riddled with the conflicts that armies of newcomers bring into the state with their belongings. Meanwhile the state's own residents wander far afield, and all are potential promisors or promisees, potential tortfeasors or victims. And so it frequently happens that contracts and torts are not simple ones between domiciliaries.

It is relatively simple to meet the demands of growing litigation in the lower courts by increasing their number. But an intractable dilemma arises thereafter. The development of the law by appellate decision would be disrupted if there were more than one supreme court; yet there are limits to the work such a court can undertake.

The solution lies mainly in the selection of cases for review. Should that selection be qualitative, confined to certain classes of cases? Or quantitative, merely restricted in number? Should the selection be discretionary with the court? And if so, what norms should be developed for abstention, what precautions against undue abstemiousness? Perhaps we can break ground on the problem here, by reference to how one court works. We can be quick and approximate with the tedium of description to reach the question whether it works with maximum possible effectiveness.

For the most part our court's selection is discretionary. Even though it has constitutional appellate jurisdiction in probate matters, in all cases in equity, and in all cases involving title to real property except such as arise in municipal and justice courts, these are customarily transferred to the seven intermediate District Courts of Appeal. Moreover, it is now the custom to transfer most petitions for writs of mandamus, prohibition, and certiorari to these courts. Conversely, the Supreme Court retains tax cases and election matters of statewide concern, and it exercises exclusive jurisdiction in the review of automatic appeals in death penalty cases, Public Utilities Commission decisions, State Bar recommendations, and over *coram nobis* applications when the criminal judgments were previously affirmed in the Supreme Court. Thus, almost all appeals are first decided in these intermediate courts.

It is pertinent to note that the justices of the District Courts of Appeal, like those of the Supreme Court, are appointed by the governor for a twelve-year term, subject to approval of a commission on qualifications,² as well as to the vote of the electorate. In practice this is virtually equivalent to an appointment for life. When a justice chooses to succeed himself by standing for re-election, the voters have only a veto power, which they have never used to reject an incumbent.

The decisions of these justices are final unless a litigant is successful in petitioning the Supreme Court for a hearing; roughly a fourth of some 500 petitions

² This commission consists of the Chief Justice, a presiding justice of the District Court of Appeal, and the Attorney General. Proposals are under way to broaden the commission, notably to give the State Bar and the Legislature representation.

annually are granted. The consideration of these petitions is a major task. The selection—the granting or denial of a petition—determines the course of the law as decisions determine its content. If the court errs in the granting, it will at worst have created needless work for itself and delayed decision to the prejudice of the parties. There is no procedure for retracting a grant. Once the petition is granted the court is bound to review the whole case. But if it errs in denying a petition, there are graver evils than needless work and delay, for it thereby tends to perpetuate an erroneous decision. If the intermediate court has correctly stated the law, but erroneously applied it to the case at hand, there is still injury to the petitioner. Even if it is fortuitously right in result, but wrong in reasoning, there is still injury to the law, for its decision not only persists as precedent, but gains in weight. If it is wrong in both result and reasoning, there is both injustice to the petitioner and injury to the law.

Arguably a petitioner is entitled to only one review of his case, unless it is of significant public importance. Our rule on appeal states that “[a] hearing in the Supreme Court after decision by a District Court of Appeal will be ordered . . . where it appears necessary to secure uniformity of decision or the settlement of important questions of law.”³ Granting is automatic to secure uniformity. But there are no clear norms for determining which questions of law are important, and it may well be asked if there are any that are not. Certainly there is no easy equation of importance with novelty. In practice the court ordinarily grants a petition if a majority conclude that justice demands it, without measuring the importance or novelty of the questions of law. Conversely it ordinarily denies a petition regardless of such importance or novelty, sometimes regardless even of constitutional questions, when a majority conclude that the District Court of Appeal has decided correctly and correctly stated the law. By thus giving these courts some assurance of finality for just and well-reasoned decisions, it quickens their sense of responsibility as it strengthens their authority. The Supreme Court has been aptly described as a monitor,⁴ standing ready to review only when it disapproves of what the intermediate courts have done.

I have come to believe that there is much good in this practice, even though it has more than once settled a problem that I should have liked the Supreme Court to pursue further. Thus, in *Estate of Sahlender*,⁵ the District Court of Appeal, relying on previous dicta, decided that the common-law rule against perpetuities was embodied in the state constitutional provision that “[n]o perpetuities shall be allowed except for eleemosynary purposes.”⁶ I thought otherwise, but the other members of the court did not. Since they agreed solidly with the lower court, it was perhaps just as well that they denied the petition for

³ Rule 29(a), Rules on Appeal, 26 Cal.2d 25 (1951).

⁴ To Hear or Not To Hear: A Question for the California Supreme Court, 3 Stan. L. Rev. 243, 265 (1951).

⁵ 89 Cal.App.2d 329, 201 P.2d 69 (1948).

⁶ Cal. Const. Art. XX, §9.

hearing in the case; they thus avoided needless delay, for in all probability they would have been of the same opinion after a hearing. A grant would have done no more than enable one member to write a dissenting opinion instead of merely recording his vote for hearing.

The problem is a provocative one. For whatever authority a District Court of Appeal decision gains when the Supreme Court denies a petition for hearing, it is still not binding on other District Courts of Appeal or even on itself. There is thus always some threat to uniformity, largely mitigated by the general practice of respecting such decisions and considering the seven District Courts of Appeal with their twenty-one judges as in effect courts of last resort on the bulk of cases, involving virtually all legal questions. If this is as it should be, it emphasizes the importance of the Supreme Court's granting or denying of petitions for hearing.

The Supreme Court will not examine the record unless the petition specifically sets forth:

- (1) That material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and not corrected by the District Court of Appeal; or
- (2) that substantial legal issues raised in the briefs were not considered in the opinions, and that the failure to consider them was set forth in a petition for rehearing.⁷

One might parenthetically note that the most elementary prudence would move a petitioner to be precise and thorough and would prompt his opponent to file an adequate answer. Yet it happens often enough that either is woefully negligent.

The petitions are assigned in rotation. Each justice is responsible for memorandum analyses and recommendations on those assigned to him, after examination of the briefs and if need be the records. Meanwhile his associates have read the opinion below, the petition, and any answer, and may freely research the matter further. The justices then hold conferences for discussion and vote.

This process demands not only concentration, but speed. Until its amendment last November,⁸ the state constitution required the court to act within thirty days after the decision of the District Court of Appeal became final in civil cases and within fifteen days in criminal cases. It thus worked against a grueling deadline. Has it raced so hard only to lose ground? There is always a fraction of Supreme Court opinions confirming the District Courts of Appeal—a disquieting fraction to a court that can ill afford to waste time and energy. More disquieting is the recurring phenomenon of the Court's subsequent disapproval, after no great lapse of time, of cases in which it denied a hearing.

Granted an irreducible minimum of imperfection under any system, have we been working with optimum effectiveness? A less rigid deadline might reduce the

⁷ Rule 29(b), Rules on Appeal, 26 Cal.2d 25 (1951).

⁸ Cal. Const. Art. VI, §4(d); cf. Art. VI, §4(c).

waste of needless hearings and the confusion of ill-reflected denials. At least the court would gain time to spread the volume of petitions that flow in at an uneven rate and to devote more study to particularly tough cases.

The court might also well reinvoke its dormant practice of attaching a memorandum opinion to the denial of a petition, withholding approval of erroneous dicta or erroneous alternative grounds of decision in a District Court of Appeal opinion. Such a well-aimed dart is certainly preferable to the heavy artillery of a new hearing to remove the offending matter. It strengthens the case as a precedent. It seems idle to protest a rider on the theory that its express disapproval of some parts of an opinion is an implied approval of the remainder. Despite the theory that a denial is not tantamount to approval of the existing opinion,⁹ realistically its connotation of letting well-enough alone radiates approval.

There is still bound to be a traffic of cases in which the Court feels impelled to grant hearings. Do we direct this traffic so that it does not become chaotic as it proceeds through the last narrow funnel? With this concern in mind alert justices have insisted over the years that the courts are jointly responsible with the lawyers for making the oral argument intelligent. It would be as great a folly for an appellate judge—though some have committed it—to come into a hearing ignorant of the case as to come wrapped in a sound-proof sleeping bag.

The court must be informed from the outset if it is to make oral argument meaningful and its own decision representative. To that end our procedure works reasonably well. The court hears oral argument in San Francisco, Sacramento and Los Angeles. Once a hearing is granted, the case is delegated by rotation to one of the justices who voted therefor, for the preparation of a calendar memorandum. This is no mean task. It ordinarily involves a review of the whole record. The memorandum must present both sides objectively, in so enlightened a manner that the other justices can formulate their views for purposeful questioning in the oral argument. Thus armed, they frequently indicate new lines of inquiry to counsel for supplementary briefing. Indeed, one might roughly generalize that the heart of counsel's argument should be in the briefs, and that the special advantage of oral argument is the opportunity it affords to respond to well-reflected questions.

Here counsel's responsibility matches that of the court. Occasionally they dismiss a troubling question both orally and in the briefs. One question, cavalierly dismissed by counsel as having nothing to do with the case, proceeded from a theory that became the basis of the court's decision, later sustained by the United States Supreme Court. Fortunately for counsel that theory saved their case; but the wages of indifference are not always so munificent.

Nor should counsel delude themselves that they strengthen their case by avoiding sensitive issues, even though opposing counsel have failed to uncover them. Judges have eyes in back of their heads. With their law clerks they re-

⁹ *Bohn v. Bohn*, 164 Cal. 532, 537, 129 Pac. 981, 983 (1913); *People v. Davis*, 147 Cal. 346, 350, 81 Pac. 718, 720 (1903).

search every case, and the briefs should meet head-on the questions that a judge must resolve in arriving at his decision.

Conference follows swiftly upon oral argument, sometimes within the same day, and a tentative vote is taken. If a majority agree with the justice who presented the calendar memorandum, he is assigned to write the opinion; otherwise it is re-assigned. The ensuing opinion, together with the record and briefs, circulates for the study and comment of the other justices. It travels a hard road. One can speak from experience that there is no danger here of passive assent, of the so-called one-man opinion. There are often cumulative intramural memoranda, sharpening the issues, sometimes compelling re-assignment if the majority shifts. A time-clock keeps this process orderly—at the weekly conferences there is a review of all circulating opinions, and each justice accounts for any delay in stating his views unequivocally. Most cases are decided within ninety days after oral argument. There is perforce give and take, to clarify and to crystallize.

Such a tempering process is that of a group, not that of a justice alone. One who takes part in it knows the marks of battle in the opinions that bear his name. He ceases to mourn the loss of a frugal phrase that contained his meaning exactly, and comes to accept the prolix replacement for its easier way with a hard idea. And he can sometimes rejoice that the questions of others cleared the mists from his own thinking.

This lively exchange makes it unnecessary for all the judges to write final opinions, as in the English Court of Appeals. Indeed they could not do so without churning the cases with uncertainty and swelling the torrent of reports. To what end but a serious sacrifice in the number of cases that could then be heard?

Nor does it seem necessary for all the judges to submit even tentative opinions. If there is substantial agreement, there is no need for such opinions. Once written, there is the danger that they would persist as concurring opinions for the crossing of "t's." If there is disagreement, it is more effectively dissipated by telling memoranda on one opinion than by tentative opinions that take off in their own directions.

Whatever the primary responsibility of each judge for the cases assigned to him under a rotation system, much is gained by a pooling of intellectual resources for the development of the final opinions. Such joint enterprise, discouraging one-man compartments of expertness, is well-suited to a state with multifarious legal problems. Precisely because the Supreme Court of the state leaves to the District Courts of Appeal the bulk of case law, the problems it takes on ordinarily defy easy or narrow solutions. Therefore no one judge carries overwhelming authority even in fields in which he is specially versed. Actually the expert in water law or tax law or oil and gas law knows more than most the complex uncertainties of his subject and the risks that would attend insulated study. What knowledge he has he can share with his colleagues, who are competent to understand him if they are competent to sit on a court.

The foregoing suggests the importance of written opinions, required in our

state. In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

Critics have rightly advocated the regular use of memorandum opinions in routine cases involving settled law. They have also been rightly severe with the grievous sins of garrulousness and pretension. But the solution does not lie in martinet rules that would flatten all opinions to the same length and form. Some opinions must be longer than others; some judges are more literate than others; a few have embellished the law with the more than literate phrase. This much we know, the thinking reed¹⁰ will not bring forth a wooden judgment. To say that we want better opinions is to mean we want better judges. Yet in many areas lawyers who clamor for better opinions remain barbarously indifferent to programs that would encourage well-qualified men to become and remain judges.

There are some who regard the dissenting opinion as the *enfant terrible* of appellate practice, though they differ as to whether it is dreadful or merely provoking. Others, conceding its antic possibilities, stoutly defend it, though they differ as to whether it is an expansive expression of internal disagreement or an indispensable part of diagnosis. Again, here is a problem that is not to be solved by martinet rules. If a judge merely deems his own view preferable, and the establishment of some rule counts more than the rule itself, he should at most record his dissent in two words or preferably keep his silence. If he is convinced that the majority has so misapplied settled law or so erroneously devised a new rule as to foster a malignant growth of the law, he should at least record his dissent. Should he decide to set forth his reasons, he should do so with painstaking care. Above all, he should keep his opinion impersonal. No conscientious judge will undertake a dissent without first asking himself the searching question whether it is likely to serve the law by extracting from the shadows the problems left unstated and the theories that should eventually control. Reference to the majority opinion should be kept at a minimum, unless it serves as a time-saving device to indicate the relevant defects and gaps that compel the rationale of the dissent.¹¹

Paradoxically the well-reasoned dissent, aimed at winning the day in the future, enhances the present certainty of the majority opinion, now imbedded in the concrete of resistance to the published arguments that beat against it. For that very reason the thoughtful dissident does not find it easy to set forth his dissent.

¹⁰ "Man is only a reed, the feeblest reed in nature, but he is a thinking reed." Pascal's *Pensées* (G.B. Rawlings translation) 35.

¹¹ See *Rosemary Properties, Inc. v. McColgan*, 29 Cal.2d 677, 700-708, 177 P.2d 757, 771-76 (1947).

Once he has done so he has had his day. He should yield to the obligation that is upon him to live with the law as it has been stated. He may thereafter properly note that he is concurring under compulsion, abiding the time when he may win over the majority, but he should regard dearly enough the stability of the law that governs all the courts in the state not to renew the rataplan of his dissent. When the trial court properly follows the declared law and is duly affirmed by the intermediate court, he should not vote for a hearing on the basis of his dissent. Conversely, should the trial court be reversed on the basis of his dissent, he should vote for a hearing. When the court has granted a hearing in a case with multiple issues, including the ancient one, and there is a nucleus of dissenters on other issues, he should not cast his vote on the basis solely of his ancient dissent to achieve a reversal or affirmance that would not otherwise have materialized. To do so would only work mischief. The judge's responsibility to keep the law straight is not less when he is a dissenter.

That is easier said than done. A dissenter is usually in dead earnest, resilient against the odds. Like many another judge, I have had to learn to give up dissenting while holding fast to a conviction. Thus I still believe, though still against the odds, in a dissent of several years ago against the California rule that presumptions are evidence and as such can be weighed.¹² I no longer believe that it serves any useful purpose to reiterate that dissent. It rests with the professors and practicing lawyers to revive it in commentary if they see fit, or to hasten its oblivion by criticism, or to let it wither away if they choose in the stillness of indifference.

The responsibility to keep the law straight is a high one. It should not be reduced to the mean task of keeping it straight and narrow. We should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration. The briefs carry the first responsibility in stating the policy at stake and demonstrating its relevance; but if they fail or fall short, no conscientious judge will set bounds to his inquiry. If he finds no significant clues in the law books, he will not close his eyes to a pertinent study merely because it was written by an economist or perhaps an anthropologist or an engineer. As with cases or legal theories not covered by the briefs, it is only fair that the appellate court direct the attention of counsel to these materials, if it appears that they may affect the outcome of the case, and give them the opportunity to submit additional briefs.¹³

In its preoccupation with substantive problems an appellate court sometimes loses sight of the importance of the procedural rules for determining what errors will be reviewed and how a case will be disposed of if the judgment below proves erroneous. Certainly the court's rules should enable it to settle as much of the

¹² *Speck v. Sarver*, 20 Cal.2d 585, 590-98, 128 P.2d 16, 19-23 (1942).

¹³ Consult Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1295-96 (1952).

dispute as possible on one appeal. If the record itself indicates what the proper result should be, the court should avoid the expense and delay of a new trial by modifying the judgment or directing the entry of the proper judgment. In California the court has that power, though it has not consistently exercised it. Equally important is the power to affirm in part, when the judgment is severable as to issues or parties, and order retrial as to certain issues or parties only.

An appellate court could also put an end to much litigation by freeing itself from a dogmatic application of the rule that only an appellant can complain of error. Ordinarily only the appellant will do so, and when his contentions are without merit, it would of course serve no purpose to entertain academic complaints of error by the respondent. In occasional situations, however, it seems wrong not to hear respondent's complaint though he failed to counter appellant's appeal with one of his own. Needless litigation is bound to ensue. Why not allow the respondent to rely on the trial court's error, to sustain the correct result and thereby obviate a new trial? Should not a mechanical application of the rule that only an appellant can complain of error yield to a liberal application of the rule that an appellate court will affirm a correct judgment though it was arrived at erroneously?¹⁴ Even if it cannot affirm the judgment, something is gained if it rules on respondent's contention of error and thereby affords guidance to the trial court on the retrial. In our state the Code of Civil Procedure¹⁵ specifies that if a new trial is granted, an appellate court shall determine all the questions of law necessary to a final determination of the case. If it is to do so, it should not preclude respondent from attacking error.¹⁶ It can ill afford to apply rules so mechanically as to add needlessly to litigation that is already multiplying from natural causes.

We give finality to the disposition of cases on the facts when they are in conflict. Under the substantial evidence rule it is ordinarily futile to base an appeal on insufficiency of the evidence whether the burden in the trial court was to prove the facts by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt.¹⁷ Thus, the importance of winning in the trial court looms large.

Inevitably the substantial evidence rule conjures up the perennial question as to what is fact rather than law. There is no magic answer to that question, and we might more practically speak in terms of what we leave to the jury and what we leave to the court.¹⁸ Thus we tolerate determination by a jury of what is reasonable care, even though it must fix a standard therefor and thus make law

¹⁴ See *Mott v. Horstmann*, 36 Cal.2d 388, 393, 224 P.2d 11, 14 (1950).

¹⁵ Cal. Code Civ. Proc. §53.

¹⁶ See *Henigson v. Bank of America*, 32 Cal.2d 240, 244, 195 P.2d 777, 779 (1948).

¹⁷ See *Beeler v. American Trust Co.*, 24 Cal.2d 1, 7, 32-35, 147 P.2d 583, 587, 599-601 (1944).

¹⁸ Consult Thayer, *A Preliminary Treatise on Evidence at the Common Law* 202-4 (1898).

ad hoc for the particular case.¹⁹ Conversely, in other fields, when there is no conflict in the evidence, it is accepted that courts determine what factually existed or occurred as well as the legal effect thereof. Such pragmatic allocation between judge and jury, however, does not always serve to indicate the so-called law that is open on appeal from the so-called fact that is not. Thus a trial court's ruling on admissibility will be binding on appeal when it happens to turn on a resolution of conflicting evidence on a preliminary question of fact. In this situation the question of fact persists as such. It is not transformed into so-called law, even though the trial court has taken it from the jury.

The troublesome law-fact dichotomy arises also in the review of decisions coming from courts sitting without juries and from administrative agencies. We customarily treat that dichotomy as an absolute on review. Why should we? Review is the final discriminating search to see that no stone of law has been left unturned in the rational development of a decision. Why should we leave some stones unturned that have the appearance and substance of law although they are labelled fact? Why should we abandon responsible review of determinations of fact alive with legal consequences on the assumption that they have emerged from a pure fact-finding process?²⁰

Consider how narrowly many an appellate court like ours looks out from its blinders. It affirms the trier of fact on isolated evidence²¹ unless the finding is of an inherently improbable fact,²² an infrequent situation. We do not ordinarily come upon incredible findings as to what is within the reach of a dwarf or beyond the reach of a giant. The usual case calls for a comparison of probabilities. Yet an appellate court is reduced to a myopic vision of whether the evidence torn from the context of the whole record is substantial enough to support a finding. Substantial in relation to what? Is it substantial if it is not reasonable in the light of the whole record?²³

It is specious for an appellate court to assume that because a trier of fact could rationally believe some evidence standing alone, he has rationally rejected everything that controverted it. The whole record may defy as irrational the conclusion the trier reached. It is equally specious to chant the expediency of a narrow review as a precaution against the court's moving into the province of the trier of fact. Concededly it is not for an appellate court to retry cases on appeal or to substitute its judgment of the probabilities for that of the trier of

¹⁹ Consult Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 457-60 (1899).

²⁰ See *Loper v. Morrison*, 23 Cal.2d 600, 611-12, 145 P.2d 1, 6-7 (1944).

²¹ See *Estate of Teel*, 25 Cal.2d 520, 527, 530-35, 154 P.2d 384, 387-88, 389-92 (1944); *Estate of Bristol*, 23 Cal.2d 221, 223-24, 231-34, 143 P.2d 689, 689-90, 693-95 (1943).

²² Occasionally it shows great tolerance as to what is not inherently improbable. Thus in *Arais v. Kalensniko*, 10 Cal.2d 428, 431-34, 74 P.2d 1043, 1045-47 (1937), the court (later overridden by statute, Cal. Code Civ. Proc., §§1980.1-80.7) sustained a jury verdict of paternity despite conclusive blood tests to the contrary.

²³ Consult Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1027 (1956).

fact, whatever support it might find in the record. But to say that it should not exceed its province is not to justify an excess of caution that would stay its review even when it becomes additionally apparent from the record that the conclusion of the trier of fact was contrary, not merely to what the appellate court would have done, but to what any trier of fact could reasonably have done. The very folly of such a conclusion works an injustice whose redress is a matter of law.

The substantial evidence rule, working in uneasy harness with the rule that only prejudicial error is reversible, calls a halt to much litigation. The wayward application of the two rules poses a riddle. Although the courts invoke the substantial evidence rule to abdicate review of the record as a whole, that abdication is counteracted by the prejudicial error rule whereby the court seizes upon an error to reverse an unjust judgment against the weight of the evidence. The court is constantly weighing evidence to determine whether error is harmless or prejudicial.

What makes an error prejudicial is a question that nags at a court. Sometimes it curls round the record even though there may be a correct result, for the court is concerned to preclude prejudice to the judicial process, to the procedural rights of a litigant as well as to his immediate cause or defense. Recurringly it declares minimum standards of fairness whose violation constitutes prejudice. These automatically include traditional procedures, such as jury trials, even though there might be equally fair alternatives consonant with due process.

A court constantly fills in details of the standards as it determines whether there is prejudice. Thus it may declare that a jury trial includes the right to have the jury instructed on any issue presented by the evidence.²⁴ Conversely it may specify that there is no right to technical perfection in every instruction. There is no touchstone for determining what errors should be deemed automatically prejudicial. Suppose there is a denial of a statutory right to a peremptory challenge and hence one unwanted juror. There is no great likelihood that he would affect the result, given the assumption that jurors act reasonably, particularly in a civil action requiring the vote of only nine jurors for a verdict as in our state. In addition, there is no right to any particular jury. But since there is no way for a party deprived of his peremptory challenge to show prejudice, there is no sanction to enforce his right unless violation thereof is adjudged automatically prejudicial. Moreover, there are times when reversal is necessary to secure compliance with the law in future cases. Our court has divided five to two on this question, the majority holding the error harmless.²⁵ The danger of such a holding is that it becomes entrenched as a precedent, inviting future violation of the right.

Automatic reversal is directed at the error itself, regardless of its influence on

²⁴ *People v. Carmen*, 36 Cal.2d 768, 772-74, 228 P.2d 281, 284-85 (1951).

²⁵ *Buckley v. Chadwick*, 45 Cal.2d 183, 289 P.2d 242 (1955).

the result. Most errors, however, will be adjudged prejudicial only if there was a reasonable probability that they influenced the result and a reasonable court or jury could have reached a different one.²⁶ Even in California, requiring a "miscarriage of justice"²⁷ for reversal, such influence is deemed prejudicial.

Certainly it is hard for an appellate court to evaluate what has influenced a trier of fact, harder even than to evaluate the reasonableness of what the trier has done. Only occasionally are there signs to go by, such as excessive or inadequate damages that suggest the influence of error on a jury, and written opinions or comments that suggest its influence on a trial judge.

Absent such signs, an appellate judge must feel his way, intuition and reasoning working as one,²⁸ to resolve the fact question of influence. There are those who would stay him from doing so. Some believe such a task is needless, on the ground that an appellate judge should focus his inquiry on the correctness of the result and affirm what he deems correct. If he did so, however, he would assume the role of trial judge or jury, and whenever he equated the result with his own predilections, error would become automatically harmless.

Others believe that whenever the record would support a judgment either way, the error should be deemed automatically prejudicial, on the ground that it is an impossible task to determine whether error influenced the trier of fact. This argument, running into head-on collision with the preceding one, is that a judge purporting to evaluate the influence of error is realistically driven to evaluate instead the correctness of the judgment, perforce acting as trial judge or jury.

This beguiling defeatism that would spare a judge his most difficult task is harder to answer. Concededly he is driven to reviewing the whole record, even to weighing the evidence. Nevertheless it is possible for him deliberately to keep in abeyance the question of the correctness of the judgment as he proceeds by inference to adjudge the degree of probability that error influenced the result, which is the focus of his inquiry. In that focus the usual errors—misconduct, erroneous rulings on admissibility of evidence, erroneous instructions—cease to look alike. Some are volatilized by a record so overwhelmingly supporting the result that any other, even though tenable, is reduced to a mere possibility. Some appear tentatively prejudicial at the outset by their very magnitude, and unquestionably so when the evidence supporting the result lacks the magnitude to dissipate them. Some, not of themselves clearly prejudicial or clearly harmless, cast a cloud on the result that compels an inference of prejudice unless they are likewise so dissipated. An appellate judge, reasoning from imponderables to the probabilities of what has gone on in the minds of others, need not find that it was more probable than not that an error influenced the result to deem

²⁶ *People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243, 254 (1956).

²⁷ Cal. Const. Art. VI, §4½.

²⁸ A French appellate judge vividly reminds us that such interaction is inevitable. Gorphe, *Les Décisions de Justice* (1952) (esp. pp. 33, 41-42, 57, 72).

it prejudicial. He must deem it prejudicial if he finds it not improbable that had it been absent another result would have been reached. Otherwise he would be declaring an error harmless in the face of a substantial chance that it was not, thereby depriving the appellant of the trial to which he was entitled.

And now we must look back to that uneasy harness of the substantial evidence rule, which would keep to one side of the whole record, and the prejudicial error rule, which advances along the whole record into the realm of probabilities. If a judge calls on one rule to move into that realm so that he may evaluate the influence of error on a judgment, why should he not call on the other in like manner so that he may evaluate the reasonableness of the judgment? Is he not as competent to adjudge the reasonableness of a given result from the whole record as to construct inferences from the imponderables that it conjures up?

Something is lost to the judicial process if judges fail to exert full responsibility for their decisions. Such responsibility imposes its own discipline. As they analyze issues that have been disputed every inch of the way, they learn to guard against premature judgment. Entrusted with decisions, bound to hurt one litigant or the other, they come to understand the court's responsibility in terms not of power but of obligation. The danger is not that they will exceed their power, but that they will fall short of their obligation.