

APPELLATE STANDARDS OF REVIEW THEN AND NOW*

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*The best lack all conviction, while the worst
Are full of passionate intensity.****

I. THE EVOLUTION OF STANDARDS OF REVIEW OVER TIME

A. *The Slow Emergence of Appeals at Common Law*

For a range of historical reasons,¹ it took a long time for appellate procedures to develop in the common law world—

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***William Butler Yeats, *The Second Coming*, in THE NORTON ANTHOLOGY OF POETRY 923 (Alexander W. Allison et al. eds., rev. ed. 1975).

1. Several factors combined to delay the emergence of a modern appellate process in the English common law tradition. The most influential of these factors probably were (i) the prevalence of jury trials at common law (the absence of written reasons hampers review); (ii) the early appearance of writs issued by the Royal Courts (the writ of attain, the writ of error, the writ of false judgment, the writ of *certiorari* and even the writ of *habeas corpus*) which, to a variable extent fulfilled a function analogous to appeals (Why bother with appeals when we already catch errors with writs?); and (iii) the early but by all accounts chaotic development of appeals to the Chancellor in Chancery. (On the chaotic state of Chancery, see 1 WILLIAM HOLDSWORTH ET AL., HISTORY OF ENGLISH LAW, 437–42 (1956) (addressing this turmoil in sections called “[t]he inadequacy of the judicial staff” and “[t]he abuses rampant amongst the official staff”). It is entertaining, to say the least.) In their essay *Reasoned Decisions and Legal Theory*, Professors Dyzenhaus and Taggart explain why the giving of reasons—without which appeals are difficult—was a very late

thus, in England, the modern appellate process only dates back to the *Judicature Acts* of 1873 and 1875.² By contrast, appeals to intermediate courts already existed in France and in other continental European countries as early as the thirteenth century.³

feature of the common law tradition. David Dyzenhaus & Douglas Taggart, *Reasoned Decisions and Legal Theory*, in Douglas E. Edlin, *Common Law Theory* 134, 143–44 (2007) (“Recall Lord Mansfield’s (in)famous advice to a colonial governor in 1790: ‘Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right; but your reasons will certainly be wrong.’”). The fact that substantive law was essentially judge-made, un-codified (and for a long time unprinted) must also have exacerbated these factors. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 240–45 (4th ed. 2010).

2. Judicature Act 1875, 38 & 39 Vict. c. 77; Judicature Act 1873, 36 & 37 Vict. c. 66. I say the “modern” appellate process because there had existed at various points in the distant past different mechanisms (often quite convoluted or strange to modern eyes) for the review or reconsideration of judgments. In his excellent biography of William Murray, Professor Poser writes that

[t]he three central courts not only tried cases but also heard appeals. This they did in an interlocking manner. Appeals from King’s Bench went to the Exchequer Chamber, composed of the judges of Common Pleas and Exchequer, or directly to the House of Lords; appeals from Common Pleas went to King’s Bench; and appeals from Exchequer went to Exchequer Chamber, which in such cases was composed of judges of King’s Bench and Common Pleas.

NORMAN S. POSER, *LORD MANSFIELD: JUSTICE IN THE AGE OF REASON* 202 (2013). As a hereditary peer, Lord Mansfield, “sitting as a member of the House of Lords, . . . might play a role in deciding an appeal of a case on which he had sat as the trial judge,” something which the Earl of Shelburne thought “most indecent.” *Id.*

3. There can be no question that the French law of appeals developed quite early, as [l]es réformes de Saint-Louis—supprimant le duel judiciaire dans le domaine royal (1254 et 1258)—firent de l’appel l’instrument majeur des progrès de la justice royale. Le Parlement, progressivement séparé de la personne du roi, reçut un afflux d’appels des juridictions seigneuriales et des juges royaux comme les baillis. En empruntant de nombreuses règles au droit romain par l’intermédiaire des pratiques méridionales, le style du parlement précisa au XIV^e s. les décisions susceptibles d’appel, le délai de dix jours après la sentence, l’amende de fol appel, ainsi que toutes les formes requises pour « ajourner » les juges inférieurs et « intimer » l’autre partie.

Louis Halpérin, *Recours (Voies de)*, in *DICTIONNAIRE DE LA CULTURE JURIDIQUE* 1307 (Denis Alland & Stéphane Rials eds., 2003) (indicating that the appeal became an important instrument of royal justice, that appeals to Parliament came to replace appeals to the king, and that French law borrowed the notion of appeal and some of its procedures and structures from Roman law). Elsewhere in continental Europe, the reception of Romano-Canonical law accounts for the early development of appeals, for “[o]ne of the main features of canon law is the procedure of appeal, i.e., the review of the judgment of a lower by a higher court, which for reasons of law or of fact, can consider the lower judgment wrong and replace it by a better one.” R.C. van Caenegem, *History of European Civil Procedure* in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 2-18

What is more interesting, however, is an aspect of the origin of appeals shared by both the civil law and the common law traditions: the slow shift from denouncing the person of the judge to challenging the judge's error(s). Both traditions also have another characteristic in common: the notion of reviewable error changed through the centuries in a manner which reflected the dominant legal and political ideas of the times. In a sense, what we have here is a fragment of intellectual history, though admittedly a modest one.

B. Denouncing the Judge or Challenging the Judge's Error(s)?

Commenting on this aspect of legal history, Sir Frederick Pollock and F.W. Maitland write that "[t]he idea of a complaint against a judgment which is not an accusation against the judge is not easily formed."⁴ And indeed, for several centuries in England, whenever a jury of twenty-four members was satisfied that an earlier jury of twelve members had returned a false verdict, the members of the first jury faced severe punishment for the betrayal of their oath of office. The writ of attain, only abolished in 1825, made them liable to imprisonment and confiscation of their chattels.

Similarly, in France, judges who rendered "erroneous" judgments could be challenged with the procedure of *faussemment* which was directed against them personally and put them personally at risk. Montesquieu devotes several interesting pages to *faussemment* in *De l'esprit des lois*.⁵

Perhaps it should come as no surprise that, in an ancient (archaic?) constitutional environment, based for a long time on the divine-right theory of kings, errors, fallacies, or other perceived mistakes by officials or jurymen empowered to render justice on behalf of the king were seen as perverse, a mixture of

(Mauro Cappelletti, chief ed. 1987); see also *id.* at 2-32-2-40 (describing the impact of Romano-Canonical law in France, Italy, Spain, Portugal, Germany, England (in Chancery only), the Low Countries, Sweden, Hungary, Poland, Scotland, and Switzerland).

4. 2 FREDERICK POLLOCK & F.W. MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I at 665 (2d ed. 1895).

5. 2 CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS, bk. 28, ch. 22-33 (Garnier Frères 1961) (1748). The role of juries was, of course, far less important in old French law than in English law. That probably accounts for the fact that judges, not juries, were the prime targets of these review processes.

blasphemy and treachery (a *forfaiture* in French), and deserving of serious sanctions.

C. The Mutations and Long Maturation of the Notion of Error

From a historical perspective, what is especially revealing is the maturation over time of the very idea of reviewable or reversible error. Here too, we find many similarities, and some sharp differences, between the laws of England and those of continental Europe. But in both traditions, during this protracted evolution, each distinct period coincided with a different notion of error. And as each period receded into the past, a shift occurred in the understanding of what qualify as findings of fact or of law warranting review.

During the late Middle Ages, an era when the sacred and the secular were still closely intertwined, the prevailing notions are often hard to fathom by today's standard—they bring to mind theological disputations and controversies. And they differ, markedly, from the idea of error we see arising with the Reformation⁶ or, soon after, with the Enlightenment, but more about this anon.

The utilitarian notion of error, which really blossomed during the Industrial Revolution, first appeared at the time of Bentham and probably peaked at the time of Langdell. We may call it the positivist or modern idea of error, which still has real traction today. But, soon enough in the twentieth century, with Roscoe Pound, Karl Llewellyn and the American legal realists on one side, and theorists such as Hans Kelsen or H.L.A. Hart on the other, another concept of error would begin to take shape. I believe it remains the current (or post-modern, if one wishes to be slightly controversial) concept. In other words, this is where we still are now. I shall try to illustrate, briefly, the last stages of this evolution. But let me begin with an earlier shift.

6. Would dissents have been possible without the Reformation? How can there be dissents when the search for a Platonic truth is thought to be the sole point of the exercise? As a general proposition, the common law tends to be Aristotelian, the civil law Platonic. Quiet, *de facto* dissents certainly exist in continental European jurisdictions, but they are never published or brought to light because they are forbidden. In appellate jurisdictions such as the Conseil d'État in France, insiders (i.e., judges) are of course well aware of minority views expressed among themselves during deliberations, but these are not shared with outsiders (i.e., litigants, counsel, and the general public) in the reasons for judgment.

*D. A Harbinger of the Enlightenment:
Bushell's Case and Pluralities of Opinions*

One elegant and truly striking indication of such a shift is found in *Bushell's Case*, decided in 1670.⁷ It involved William Penn, the son of a famous admiral and, at that time, a Quaker of twenty-six. He would later illustrate himself in America as the founder of Pennsylvania. Penn and his friend William Mead had been prosecuted for “unlawful congregating and assemblies.”⁸ Despite implacable directions by the presiding judge, the jury acquitted them. As a result, the jurymen were imprisoned, but one of them, Bushell, sought a writ of *habeas corpus* in the Court of Common Pleas. The case came before a bench presided over by Sir John Vaughan, who delivered the unanimous judgment in terms which are astonishingly modern,⁹ and which, as it happened, caused the writ of attainder to fall into disuse long before its actual statutory abolition in 1825.

Bushell was decided many years before the appearance of the Judicature Act 1873, at a time when reviewing courts (other

7. *Bushell's Case*, Vaughan 135, 124 E.R. 1006 (1670).

8. *Id.* at 135.

9. Upon the return of the writ, Vaughan concluded that there had been “no cause of fine or imprisonment” against Bushell and his eleven fellow jurymen:

I would know whether any thing be more common, than for two men students, barristers, or Judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that the two men should infer distinct conclusions from the same testimony: Is any thing more known than that the same author, and place in that author, is forcibly urg'd to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing: must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the Judge and jury. . . . And by the way I must here note, that the verdict of a jury, and the evidence of a witness are very different things, in the truth and falsehood of them: a witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a Judge, out of various cases consider'd by him, infers to be the law in the question before him.

Id. at 141–42 or 1009.

than the Chancellor's Court) operated primarily with prerogative writs—*habeas corpus* in this instance. But writ-driven judicial review obviously prefigured what would eventually become judicial review and appeals. More to the point, the tone of this remarkable judgment, rendered at a time when Locke, Newton, and Spinoza were at work, and when the Enlightenment was right over the horizon, is a potent harbinger of what was about to emerge. It is not clear to me that Vaughan's brand of thinking would have been possible before the Reformation. It certainly departed from what could be labelled theological¹⁰ thinking about law and I doubt it would ever have been tolerated under Canon Law in the Vatican.

The great master of this period, of course, was Lord Mansfield, who sat as Chief Justice of the Court of King's Bench from 1756 to 1788. He was steeped in Roman law, civil law, and the *lex merchant* of the time, and his lifespan coincides almost exactly with what we call the Age of Enlightenment. It is an era of fierce public debate, marked by major, judge-made changes in the law, most in the name of Reason. Quite apart from a number of *causes célèbres*¹¹ that he heard and decided, Mansfield today is remembered primarily for his general and long-lasting influence on the orderly development of the common law.¹²

10. Or, if one prefers, dogmatic.

11. Thus, he held that general warrants were illegal, *Money v. Leach*, 97 E.R. 1075 (1765), reversed the declaration of outlawry against the seditious libeller John Wilkes, *R. v. Wilkes*, 4 Burr. 2527 (1770), and by his own estimation, see POSER, *supra* note 2, at 295, set some 14,000 to 15,000 slaves free as a result of his celebrated judgment in *Somerset v. Stewart*, 98 E.R. 499 (1772).

12. On Mansfield's legacy, one scholar writes that

[m]ore than two hundred and fifty years after he became a judge, Lord Mansfield remains a dominant presence, not just to legal scholars but also to judges and lawyers in Britain, the United States, Canada, and other nations that follow the Anglo-American legal tradition. Every year, his decisions and pronouncements are cited as relevant to present-day conditions (or in some cases explicitly rejected because they are no longer relevant). Courts and governments around the globe continue to learn from Mansfield's wisdom.

POSER, *supra* note 2, at 396. Prefacing a captivating biography of Judge Henry Friendly, no less a judge than Richard Posner describes Friendly as "the best federal appellate judge of the past half century." DAVID M. DORSEN, *HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA* xi (2012). Dorsen considers Friendly's legacy, noting that

[a]s much as any twentieth-century American jurist, Friendly was in the tradition of Lord Mansfield, whose innovative thinking moved England's legal doctrines closer to the demands of a commercial reformation. Two centuries after

*E. "Error" According to Nineteenth-Century
Rationalists and Positivists*

The nineteenth century is the time when the law, looking back at itself, believes that it is working itself pure. It thinks of itself as a discipline about to rival the natural sciences in terms of accuracy and predictability of results. In some measure, this is a consequence of Jeremy Bentham's influence: he believed that laws should always be "rational"¹³ and that they should all be codified.¹⁴ Characteristically, he is said to have written that "'I think therefore I am' is the argument of Descartes, 'I am therefore I do not have to think' is the argument of the common law."¹⁵ He was a major philosopher, to be sure, but his intellectual influence may also at times have been little short of nefarious.

This is the century of the Industrial Revolution, and of scientism (a word whose first recorded use, according to the OED, is in 1870¹⁶), it is the era of Albert Venn Dicey's account of the law of the constitution,¹⁷ as well as *Halsbury's Laws of England* and *Halsbury's Statutes*,¹⁸ the period during which we

Mansfield, Friendly's open, analytical, and practical mind led him to create constructive and even novel solutions to a rapidly growing economy.

Id. at 350 (footnote omitted).

13. There can be no doubt that, as time passed, the pursuit of rationality became easier because of a host of reasons both endogenous and exogenous to law: the advent and growth of accurate case reporting, the decline of civil juries coinciding with the rise of judgment writing by judges in civil cases, the invention and dissemination of printing, the spread of literacy, and the like.

14. It is he who coined the word "codification" in English. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 513 (1911) (describing Bentham as "the inventor of the words, 'codify,' and 'codification'").

15. This quotation may be apocryphal (I have never been able to trace it) but I distinctly remember from my student days in England that a distinguished legal academic used it verbatim in a lecture. It is, at any rate, quite consistent with Bentham's distaste for many common law rules and institutions. *See, e.g.,* Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 355 (1999) (quoting an 1811 letter from Bentham to President James Madison in which he characterizes the common law as a "yoke . . . about [the] necks" of Madison and his compatriots).

16. *See Scientism*, OED.COM, <http://0-www.oed.com/> (tracing word origin to 1870).

17. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885).

18. HALSBURY ET AL., THE LAWS OF ENGLAND, BEING A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND (1907); HALSBURY ET AL., THE COMPLETE STATUTES OF

see a rise and hardening of *stare decisis* as a decisionmaking rule. It is also the golden age of the declaratory theory of the common law.¹⁹ It is an age of exactness and formalism, characterised by a quest for certainty, an era of picking gnats with tweezers in the hope, after Darwin, that minutiae will reveal to us why the law should remain static or how it should occasionally evolve.

Much later than Bentham, but on a parallel course, the American Christopher Columbus Langdell invented his own science of the common law at Harvard Law School. He may not have been the pathetic dunce that Grant Gilmore depicts in his entertaining Storrs Lectures, in which he speaks of this period as the Age of Faith.²⁰ There can be little doubt, however, that had Langdell been an appellate judge, nothing would have found favour in his eyes that did not coincide exactly with his own views on any issue; everything else would have warranted reversal as clearly wrong.

The culmination of this vision of law is an environment in which the quest for the one and only right answer provides a singleness of purpose for all pursuits, intellectual or professional. In such an environment, virtually any disagreement with the findings of a lower jurisdiction, whether of law or of fact, justifies reversal. The costs of appellate litigation and the

ENGLAND CLASSIFIED AND ANNOTATED IN CONTINUATION OF HALSBURY'S LAWS OF ENGLAND (1929).

19. The theory goes back to Blackstone's Commentaries, which first appeared in 1766. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND [69] (1852) (asserting that "the law in [a] case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one"). Lord Reid called it a "fairy tale." Reid, *The Judge as Lawmaker*, 12 J. SOC'Y OF PUB. TEACHERS OF L. (NEW SERIES) 22, 22 (1972).

20. GRANT GILMORE, THE AGES OF AMERICAN LAW, 38-43 (2d ed. 2014). Gilmore writes that "Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of a genius." *Id.* at 38. In fact, Langdell was an innovator, and modern legal education in universities is much in his debt. See generally, e.g., BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL 1826-1906 (2009). But he most decidedly was of the view that, to every legal question, there is one and only one right answer, discoverable by scientific enquiry, the law library and law reports being the laboratory and instruments of lawyers.

complexities of procedure²¹ are the factors that restrict the scope of appellate review—in other words, not some self-imposed concept of deference or self-restraint (or of futility of reconsideration), but red tape and steep transaction costs in litigation.

By the mid-twentieth century in the United States, and later in England but never there as decisively as in the United States, this Age of Faith would come to something of an end. In England, strict adherence to precedent remained an article of faith well into the 1960s. Lord Simonds presided over a period of “substantive formalism,” as Robert Stevens calls it,²² which marked the final phase of a conception of law and adjudication that had appeared well over a century earlier. Thus,

Lord Simonds as senior Law Lord ensured that “justice as certainty” prevailed in the House of Lords since most of the Law Lords generally favoured precedent to principle, refining rather than rationalising the law, and applying the law as it was, not as they might wish it to be. Law reform was for the legislature.²³

Substantive formalism constituted the apotheosis of the declaratory theory.

F. “Error” According to Twentieth Century Skeptics and Realists

Next, the First and the Second World Wars, the Great Depression, much upheaval, and a range of other societal factors ushered in what Gilmore calls the Age of Anxiety.²⁴ (The Age of Scepticism would be as accurate a description, in my view.) The first clear sign, according to him, was the reaction to the

21. This is not yet the era of access to justice. Dickens’s *Bleak House* offers an image of how things worked that is not merely a caricature.

22. ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY 1800–1976*, at 326–35 (1979) (discussing Lord Simonds’s career in the context of a “politics of substantive formalism”).

23. ALAN PATERSON, *FINAL JUDGMENT: THE LAST LAW LORDS AND THE SUPREME COURT 255* (2013) (footnote omitted).

24. See generally GILMORE, *supra* note 20, at 61–88.

publication of Benjamin Cardozo's Storrs Lectures, delivered at Yale in 1920.²⁵ Gilmore explains:

Our dawning Age of Anxiety is perfectly symbolized by the mysterious—the almost mystical—figure of Benjamin Nathan Cardozo. . . . The thing that is hardest to understand about *The Nature of the Judicial Process* is the furor which its publication caused. Nothing can better illustrate the extraordinary hold which the Langdellian concept of law had acquired, not only on the legal but on the popular mind.²⁶

In less than one generation, the Langdellian model of legal reasoning would lose much of its appeal, in large measure because of the emergence of a new and powerful jurisprudential school, known as American legal realism. Unlike Langdellian jurisprudence, it is not at all monolithic, and indeed to call it a school may be a bit of a misnomer. Two of its most influential members, Roscoe Pound and Karl Llewellyn, took a special interest in appellate processes and caselaw. Each wrote an impressive monograph on the subject²⁷ in which he gives an account of judicial decisionmaking which marks a clear departure from Langdellian views about precedents and “right answers.” I have elsewhere devoted some sixteen pages to a detailed discussion of Llewellyn's thesis, under the title *L'élaboration et l'ordonnement du droit par l'appel*.²⁸ I will therefore not delve into the question here. Suffice it to say that Llewellyn's concept of judicial decisionmaking presents the role of appellate courts as one of preserving the systemic coherence of the law, and especially judge-made law, rather than one of reviewing for error all lower-court judgments which could be considered defective in a Langdellian sense. The essay includes

25. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). But, as Lon Fuller observed, “Cardozo did not follow the example of those who make relativism itself an absolute.” Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377 (1946).

26. GILMORE, *supra* note 20, at 67, 69 (footnote omitted).

27. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941). Of the two books, Llewellyn's is the more challenging. Pound and Llewellyn held many of the same views, however. See N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1997).

28. *Wainwright Lecture*, *supra* note *, at 532–48.

what can be described, I think without exaggeration, as an onslaught on the one-single-answer doctrine dear to Langdell. And implicit in this view, or perhaps even explicit at times, is a concept of interpretive pluralism which we have seen at work in Canadian administrative law for over thirty-five years.

Change in English law came later, was more laborious and apparently not as pronounced. In 1962, Viscount (formerly Lord) Simonds retired from the House of Lords, where he had been first appointed in 1944 and had served as Lord Chancellor between 1951 and 1954. Two years later, under a Labour government, Lord Gardiner became Lord Chancellor. His role in the adoption of the (rather extraordinary) 1966 *Practice Statement*²⁹ on precedent in the House of Lords is fully documented in a Paterson monograph³⁰ and it makes for fascinating reading. Quite clearly, a new concept of precedent and of *stare decisis* was taking shape. English law was never as permeable to the ideas of American legal realism as was Canadian law and this is well apparent in administrative law.³¹ There are signs of change, however, and of a partial incorporation of realist ideas. Thus, I would argue that what the House of Lords did, heroically, some sixteen years ago in *Kleinwort Benson v. Lincoln City Council*³² is such a sign, and a strong one too, of a shift in paradigm: the House practically abandoned the declaratory theory of the common law, whose apotheosis, as we saw, was substantive formalism.

A recent monograph³³ by Judge Posner (his sixty-fourth title, according to a review in the *Harvard Magazine*³⁴) is

29. [1966] 3 All E.R. 77 (characterizing precedent as “an indispensable foundation upon which to decide what is the law and its application to individual cases,” but also recognizing that “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law”).

30. ALAN PATTERSON, *LAW LORDS: HOW BRITAIN’S TOP JUDGES SEE THEIR ROLE* 149–51 (1982).

31. More on this later. *See infra* note 45.

32. [1999] 2 A.C. 349 (acknowledging that “[t]he whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world,” and that “a judgment overruling an earlier decision is bound to operate to some extent retrospectively” because it will apply “to all cases subsequently coming before the courts,” even those in which the relevant actions took place before the change in the law).

33. RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016).

certainly the most current, and possibly the most eloquent, account of what legal realism may mean today in appellate judging. It is true that Judge Posner carefully eschews the label legal realist for himself. As he points out, the use of this expression in academic circles still occasionally conveys a disagreeable nuance of cynicism towards legal reasoning. (I would have said that the realists were uncomfortably lucid rather than cynical but Judge Posner does make a plausible point here.) He quickly adds, however, that “[r]ealism is equivalent to pragmatism in the lay, not philosophical, sense of the word” and he describes himself as a pragmatist.³⁵ His critique (at times hilarious, and no doubt deliberately so) of originalism as an avatar of formalism, of conventional canons of statutory interpretation that yield no clear answer, of convoluted legal reasoning dressed up as logico-deductive analysis, of unweighted multifactor tests that confuse rather than clarify judicial decisionmaking, of blinkered and ill-informed legal arguments that miss the essential (often economic) realities of particular disputes, and indeed his very critique of standards of review on appeal, all ring refreshingly candid and true.³⁶

The distinctions or clarifications a Canadian judge might wish to add are of no real account here. Judge Posner could be critical of Oliver Wendell Holmes, Jr., but he never concealed his admiration for Holmes the judge and Holmes the realist.³⁷ More than once, his latest book brings to mind the lucid and lapidary style of Justice Holmes, as when Judge Posner writes:

34. Lincoln Caplan, *Rhetoric and Law: The Double Life of Richard Posner, America's Most Contentious Legal Reformer*, HARV. MAGAZINE, Jan.–Feb. 2016, at 49, available at <http://harvardmagazine.com/2015/12/rhetoric-and-law>.

35. POSNER, *supra* note 33, at 79.

36. *Id.* at 83–88, 101–07, 117–20, 126–32.

37. It is Justice Holmes, after all, who wrote, “We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.” Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899). Judge Posner reproduced this entire article in RICHARD A. POSNER, *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* (1997). Holmes shared the view expressed in it with his colleague Justice Brandeis, who, dissenting with Justice Holmes in *DiSanto v. Pennsylvania*, 273 U.S. 34 (1927), which was overruled in part on other grounds by *California v. Thompson*, 313 U.S. 109 (1941), observed that “in the case at bar, also, the logic of words should yield to the logic of realities.” *Id.* at 43 (Brandeis & Holmes, JJ., dissenting).

“All this is implicit in the emphasis I have placed on the indeterminacy of law, the fact that it is not a science or even a social science, that it is a kind of groping.”³⁸ Indeed, let us grope along, in as well-informed a way as we can manage under the circumstances, but let us not delude ourselves about what we are doing.

II. STANDARDS OF REVIEW HERE AND NOW

A. The Fundamental Distinction Between Judicial Review and Appeals

Standards of review in administrative law (or what we commonly call “judicial review” in the narrow sense) were once a hotly debated issue. Subject to a few qualifications I mention below, they are much less controversial today. The starting point of modern public law in this country is the foundational precedent of the Supreme Court of Canada in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*,³⁹ a case whose immense significance I frequently underscored in law review articles⁴⁰ as well as in judgments.⁴¹ The pivotal importance of this case was reaffirmed in *Dunsmuir v. New Brunswick*,⁴² the other landmark decision in the field. Between those two cases, and after *Dunsmuir*, there were dozens of other judgments in the Supreme Court of Canada which enriched our understanding of judicial review⁴³ and there were also, of

38. POSNER, *supra* note 33, at 227.

39. [1979] 2 S.C.R. 227 (C.U.P.E.).

40. See in particular, in the aftermath of *Dunsmuir*, Yves-Marie Morissette, *Rétrospective et prospective sur le contentieux administratif*, 39 R.D.U.S. 1 (2008–2009).

41. See, e.g., *Commission de la santé et de la sécurité du travail c. Société Terminaux Montréal Gateway*, 2015 QCCA 542 (Que. Ct. App.); *Comité exécutif de l'Ordre des ingénieurs du Québec c. Roy*, [2011] R.J.Q. 1700, 2011 QCCA 1707 (Que. Ct. App.); *RCI Environnement inc. c. Commission des transports du Québec*, [2007] R.J.Q. 1152, 2007 QCCA 666 (Que. Ct. App.); *Commission de la santé et de la sécurité du travail c. Fontaine*, [2005] R.J.Q. 2203, 2005 QCCA 775 (Que. Ct. App.).

42. [2008] 1 S.C.R. 190, 2008 SCC 9.

43. See, e.g., *Canadian Broad. Corp. v. SODRAC 2003 Inc.*, [2015] 3 S.C.R. 615, 2015 SCC 57; *Sask. (Human Rights Comm'n) v. Whatcott*, [2013] 1 S.C.R. 467, 2013 SCC 11; *Alta. (Information and Privacy Comm'r) v. Alta. Teachers' Ass'n*, [2011] 3 S.C.R. 654, 2011 SCC 61; *Can. (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009

course, a few instances in which the Court misfired, sometimes badly so.⁴⁴ Out of this corpus grew a doctrine of deference towards tribunals and other administrative decisionmakers which inspired a great deal of academic commentary.⁴⁵

This theory or doctrine of deference, also sometimes referred to as interpretive pluralism, is a home-grown development: when *C.U.P.E.* was decided, in 1979, Canadian administrative law began to part ways with English administrative law.⁴⁶ In my view, the doctrine came into existence in North America because of the impact of American legal realism on legal scholarship, legal thinking, and, in particular, judicial thinking.⁴⁷ It remains currently the prevailing approach to judicial review, even though there are occasional

SCC 12; *B.C. Tel. Co. v. Shaw Cable Sys. (BC)*, [1995] 2 S.C.R. 739; *Domtar v. Que. (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

44. One disastrous example, in my humble opinion, is the judgment in *Union des employés de services, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, decided unanimously after twenty-six months of deliberations, by a panel of four judges (three of the original seven, Judges Estey, Chouinard, and LeDain, having respectively retired, died, and become incapacitated during the process). It is now mercifully defunct as a result of *Dunsmuir*.

45. See, e.g., PAUL DALY, *A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE* (2012).

46. As a result of Lord Diplock's judgment in *O'Reilly v. Mackman*, [1983] 2 A.C. 237, English judges generally show no deference to administrative decisionmakers on questions of law; there is a presumption that the law is for the judge. *Anisimic v. Foreign Comp. Comm'n*, [1969] 2 A.C. 147, 167 sowed the seed, noting that "it is for the courts to interpret the statute, by which an inferior tribunal is given jurisdiction, to see whether it acted within it." See also *R. v. Hull University Visitor, ex parte Page*, [1993] A.C. 682, 692 (explaining that "bodies other than courts, in so far as they are required to apply the law . . . are required to apply the law correctly," and that "[i]f they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law"); *Boddington v. British Transp. Police*, [1999] 2 A.C. 143.

According to Professor Endicott, this is the result of a distortion of what the House of Lords in *Anisimic* actually meant. It ruled that an error of law that leads the public authority to step outside its jurisdiction results in a nullity that is fully reviewable. TIMOTHY A.O. ENDICOTT, *ADMINISTRATIVE LAW* 303 (2009). "Yet the Law Lords went on in later cases to invent a rule that it is unlawful for a public authority to make a decision based on any error of law. One remarkable feature of the novel doctrine is the way in which it arose from a myth about *Anisimic*." *Id.*

47. The doctrine does have obvious affinities, however, with a parallel doctrine in the United States. See *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *Auer v. Robbins*, 519 U.S. 452 (1997); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 511 DUKE L.J. 511 (1989).

signs of departure from this received doctrine. The most troubling one in recent times is an emerging tendency to favour a segmentation of tribunals' decisions, which has the potential of dragging us down a slippery slope towards the review for correctness of all questions of law.⁴⁸ The received doctrine may yet undergo significant metamorphoses, as might happen as a result of a case recently heard in the Supreme Court of Canada; the case reignited an old controversy about the review of persistently contradictory decisions by tribunals acting within their jurisdiction.⁴⁹ This said, the doctrine of deference is not the

48. Dissenting in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, 2015 SCC 16, Justice Abella wrote:

My final concern is a practical one. What do we tell reviewing courts to do when they segment a tribunal decision and subject each segment to different standards of review only to find that those reviews yield incompatible conclusions? How many components found to be reasonable or correct will it take to trump those found to be unreasonable or incorrect? Can an overall finding of reasonableness or correctness ever be justified if one of the components has been found to be unreasonable or incorrect? If we keep pulling on the various strands, we may eventually find that a principled and sustainable foundation for reviewing tribunal decisions has disappeared. And then we will have thrown out *Dunsmuir*'s baby with the bathwater.

Id. at ¶ 173.

Earlier that year, in *Tervita Corporation v. Canada (Commissioner of Competition)*, [2015] 1 S.C.R. 161, 2015 SCC 3, Justice Abella had concurred in the result but had rejected the standard of correctness as inapplicable and opted instead for a reasonableness standard. *Id.* at ¶ 171. In *SODRAC*, also decided in 2015, she dissented for the same reason. Justice Rothstein, writing for the majority in that case, offered the following rejoinder,

Justice Abella objects to the segmentation of issues for the purpose of standard of review analysis and to the confusion she says this causes. This is the same objection she raised in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, 2015 SCC 16, a decision issued by this Court in April 2015. *Saguenay* is the controlling authority and, on the issue of standard of review, these reasons apply *Saguenay*.

Id. at ¶ 41. If *Saguenay* does carry this kind of weight, it will be difficult not to fall back into the logic of cases such as *Metropolitan Life Insurance Company v. International Union of Operating Engineers Local 796*, [1970] S.C.R. 425, itself based on *Anisminic*, but that is precisely what *C.U.P.E.* was meant to correct. One court of appeal appears to share this view of *Saguenay*. See *Stewart v. Elk Valley Coal Corp.*, 2015 ABCA 225 (Alta. Ct. App.) Two of my colleagues and I took a different view in *Commission des droits de la personne et de la jeunesse c. Côté*, 2015 QCCA 1544 (Que. Ct. App.).

49. *Wilson v. Atomic Energy of Can. Ltd.*, 2016 SCC 29, 2016 CSC 29; see also *Atomic Energy of Can. Ltd. v. Wilson*, [2015] 4 F.C.R. 467, 2015 FCA 17 (Stratas, J.A., for the Court), *rev'd*, 2016 SCC 29, 2016 CSC 29. Justice Stratas's reasons are of particular interest here. See *id.* at ¶¶ 52–56 (describing “persistent discord” among specialized tribunals, expressing concern that decisions have “depended on the identity of the adjudicator” and opining that *Dunsmuir* indicates that rule-of-law considerations require court to intervene “by giving its view of the correct answer”). Many years ago, I argued

dominant paradigm in areas other than administrative law.⁵⁰ In that sense, appeals still differ from judicial review, unless of course the object of the appeal is a judgment in judicial review.

Outside the confines of administrative law, other appellate standards of review apply. These are not entirely dissimilar from those applicable to judicial review, for a common notion of reasonableness or, more accurately, unreasonableness, pervades both judicial review and appeals. An excellent monograph on the topic, now in its second edition,⁵¹ does not take into account *Dunsmuir* and ulterior developments, but it remains perhaps the most thorough study of the subject and a safe guide on appellate standards.⁵²

For my present purposes, I will offer a simpler account of standards and focus on what is to me the most crucial distinction

that, according to one concept of the rule of law, review was warranted in cases of persistent inconsistencies. Yves-Marie Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse*, 16 R.D.U.S. 591, 632–33, 642–43 (1986). Mr. Justice LeBel, then a member of the Court of Appeal of Quebec, agreed in *Produits Pétro-Canada Inc. v. Moalli*, [1987] R.J.Q. 261 at ¶ 25 (Que. Ct. App.) (quoting Morissette, *supra* this note). *Domtar* and *B.C. Telephone* first discarded and then rehabilitated to a limited extent the view in question. In his reasons in *Wilson*, Justice Stratas does not mention *Domtar*, but it seems to me that, quite apart from the issue of “unjust” dismissal raised by the case, a prior and a significant issue, pertaining specifically to the scope of judicial review, must be addressed first in disposing of that appeal. And the question is not who has the last say on the meaning of “unjust,” but, rather, under what precise circumstances courts are entitled to have the last say in the judicial review of a tribunal’s decision. That is the interesting and difficult question, forever reargued in such cases. In my view, not all divergences of opinion qualify as inconsistencies. See *Société Terminaux Montréal Gateway*, 2015 QCCA 542 (discussing meanings ascribed to term “essential fact” by various decisionmakers). To hold that they do amounts to substituting appeals to judicial review.

50. There are obvious historical, institutional, and even policy reasons why deference towards reasonable legal interpretations (or decisions) is not a doctrine which should easily extend to areas of law unrelated to judicial review and administrative law. In my view, however, there are no analytical reasons why this should be so.

51. ROGER P. KERANS & KIM M. WILLEY, *STANDARDS OF REVIEW EMPLOYED BY APPELLATE COURTS* (2d ed. 2006). Judge Kerans was a member of the Court of Appeal of Alberta from 1980 to 1997, and Ms. Willey, a lawyer educated in Canada, is at present pursuing the Ph.D. in law at Cambridge.

52. Kerans and Willey identify five “traditional” standards: (i) absolute deference, (ii) unreasonableness, (ii) patent unreasonableness, (iv) correctness (or concurrence), and (v) fresh assessment (or trial *de novo* on the record). *Id.* at 38–39 (footnote omitted). These categories remain useful despite the fact that *Dunsmuir*, of course, collapsed (ii) and (iii) in judicial review. Rather than a standard of review, absolute deference is a complete bar to review; the inability of the Crown to appeal fact-based acquittals is perhaps the only significant example of this sort of legal restriction on appellate review.

at work here, namely the distinction between law and fact. Before I do so, however, it is worth mentioning that, on appeal, there are certain types of first-instance decisions (often described as “discretionary”) which attract a perceptible degree of deference from appellate courts. The leading commentators call this category “guidelines cases”⁵³ and offer as illustrations, *inter alia*,

- i. quantum of damages for non-pecuniary loss,
- ii. the custody of children,
- iii. family support,
- iv. interlocutory orders and case-management matters, and
- v. sentencing.⁵⁴

This is really an open-ended category and not an outlier category. One should not underestimate its scope, for the issue may arise whenever the application of a rule actually requires the weighing of a range of factors, something which is not infrequent. A typical example would be a variation of a custody order in a judgment which applies (or more accurately, follows) *Gordon v. Goetz*⁵⁵ and weighs the seven separate factors listed by then-Justice McLachlin in her reasons.⁵⁶ But the same could be said of many other judgments: for example, rulings on oppression remedies under section 241 of the Canada Business Corporations Act⁵⁷ or rulings on a debtor-protection order under the Companies’ Creditors Arrangement Act.⁵⁸ The rationale for

53. KERANS & WILLEY, *supra* note 51, at 207–47. The category of guideline cases divides roughly into two sub-groups: “the first are those cases involving the management of the trial and some aspects of the pre-trial process; the second are those where the rule of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them.” *Id.* at 208.

54. *Id.* at 229–49.

55. [1996] 2 S.C.R. 27.

56. *Id.* at ¶ 49.

57. R.S.C. 1985, ch. C-44 § 241(3) (May 2017) (indicating that court “may make any final or interim order that it thinks fit” and referring to more than ten possible orders).

58. R.S.C. 1985, ch. C-36 § 49(1) (May 2017) (indicating that the court may, if “satisfied that it is necessary for the protection of the debtor company’s property or the

deference here is based, at least in part but sensibly enough, on the coexistence of several possible, equally valid, and perhaps even contradictory outcomes to the decisionmaking process.⁵⁹

B. The Fundamental Distinctions Between Fact and Law

Over the last decade or so, the Supreme Court of Canada rendered a series of judgments which hinge on this distinction. It is easy to set out in general terms what they stand for. They repeatedly underscored the nature of the standard of review on questions of fact. As a result of *Housen v. Nicholaisen*⁶⁰ and *H.L. v. Canada (Attorney General)*,⁶¹ but pursuant also to a judge-made rule that came into existence much earlier,⁶² it is now indisputable in Canadian positive law that, on question of fact, or on mixed questions of fact and law, the standard of review on appeal will justify a reversal only in the presence of a “palpable and overriding error.” Naturally, there is room for discussion on what amounts to a palpable and overriding error, and there can be vigorous debates on what is, and what is not, a question of law, or a question of fact, or a mixed question of law and fact, and so on. Before I consider these complications, I will say a few words on what appears to be at this time the lay of the

interests of a creditor or creditors, make any order that it considers appropriate” and referring to more than ten possible orders).

59. On this aspect, see *Béton Brunet c. Syndicat canadien des communications, de l'énergie et du papier, section locale 700 (SCEP)*, 2015 QCCA 188 (Que. Ct. App.), at ¶¶ 40–42, where I stressed that very point.

60. [2002] 2 S.C.R. 235, 2002 SCC 33 at ¶ 1, 3–6 (opining that it should be “unnecessary” to state the rule that “a court of appeal should not interfere with a trial judge’s reasons unless there is a palpable and overriding error,” and discussing meaning and application of standard expressed in that phrase).

61. [2005] 1 S.C.R. 401, 2005 SCC 25 at ¶ 9 (recognizing *Housen* rule that “findings of fact by the trial judge will be disturbed on appeal only for errors that can properly be characterized as palpable and overriding”).

62. It appears that we owe the precise formulation (“palpable and overriding error”) to Justice Ritchie in *Stein v. The Ship “Kathy K,”* [1976] 2 S.C.R. 802. These same words are nowhere to be found in the Supreme Court of Canada databases prior to 1976. But, citing decisions that went as far back as 1880, Justice Ritchie wrote in *Stein* that “[t]hese authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts.” *Id.* at ¶ 7. He may have had a sharp pen but the idea was not new.

land with respect to these different standards of review. This is not complicated.⁶³

On appeal, the standard of review for questions of fact and mixed questions of fact and law is palpable and overriding error. That is true of all questions of fact, not only in civil but also (and surprisingly⁶⁴) in criminal proceedings. So, in essence, and subject to the often unpredictable exception of the guidelines cases mentioned above, there are two standards of review on appeal: palpable and overriding error and mere error. The former applies to anything other than a question of law, and the latter to any question of law. I will return below to palpable and overriding errors but first I will add a few words of clarification about the standard of mere error. That standard and the standard of correctness are the same. What they mean for a judge exercising appellate review is crystal clear: they mean “I get to decide, period.” The standard of correctness (or error) has been described as a “concurrence” standard, which is both true and commendably tactful.⁶⁵ I use a blunter formulation because I

63. Judge Posner has noted that “review of purely legal findings is plenary, and of factual findings (and application of law to fact) deferential in the sense of giving respectful consideration to the determination by the lower court,” and that “[t]here is a little more to standards of review, but not much.” POSNER, *supra* note 33, at 84. These words could apply here.

64. See *R v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, ¶ 117, 118; *R v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38, ¶ 71; see generally *R v. Babos*, [2014] 1 S.C.R. 309, 2014 SCC 16; *R v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26; *R v. Clark*, [2005] 1 S.C.R. 6, 2005 SCC 2. I say “surprisingly” for epistemic reasons: The presumption of innocence and the burden of proof in criminal trials are tied to a reasonable doubt, and palpable and overriding error on appeal raising questions of fact seems a detrimental alteration of what an accused person is entitled to expect from the judicial system. On the other hand, once it is conceded that, for a host of institutional reasons, the trier of fact is not to be reversed in the absence of an obvious mistake, the extension of the standard to criminal cases appears defensible. Otherwise, perpetual retrials on appeal would become the norm, if only for appellants who can afford the process, which is not a better form of criminal justice.

65. KERANS & WILLEY, *supra* note 51, at 39. The authors explain that

[t]he First Edition of this work argued for the preference of the term “concurrence” in reflection of the fact that it is arrogant for a higher court to presume that its interpretation is necessarily correct. Canadian appellate courts have ignored this advice. However, for the purposes of consistency with the terminology of the Supreme Court of Canada, we will reluctantly use the term “correctness” to refer to this least deferential standard of review, but only in association with the preferred expression “concurrence.”

Id. at n.7. I entirely agree with them.

believe that, regardless of the level at which review occurs, there is a virtue in exposing appellate arrogance for what it is.

I am not suggesting here that “I get to decide, period” is a synonym for “I get my way, no matter what.” Of course not: judges are constrained by the law, but they are constrained by the law as they honestly understand it to be. There is a subject/object difficulty at work here. One would have to be naïve indeed to think that the law’s meaning, especially in the litigious surroundings where judges live and work, is always as perfectly plain, and as certain in outcome, as is the formal (but deceptively certain) formula $2 + 2 = 4$. (Indeed, but *what* 2s? What is behind the formal symbol?) So “I get to decide, period” is not a complete license to do as one pleases. It is only the freedom to let one’s interpretive preference prevail, and only for the time being. This, in the last analysis, and for most of us judges, means subject to the interpretive preferences of five of the nine highest judicial decisionmakers in the land. Unless, of course, no matter of national importance is at stake, there is no constitutional issue involved, and Parliament or the relevant legislature chooses not to get in the way, and so on. Such are the thoughts that legal realism inspires. Plato would likely be overwhelmed by all this prattle.

Turning now to the standard of review for questions of fact, or mixed questions of fact and law, we know from the caselaw that it is “palpable and overriding error.” As I suggested earlier, there are two difficulties here: (i) what qualifies as a question of law, and (ii) what qualifies as a “palpable and overriding” error. I will now examine these two questions in turn.

C. Identifying Questions of Law

The distinction between questions of fact and questions of law is of considerable importance on appeal. In many cases heard in the court where I serve, counsel will pay surprisingly little attention to it. All too often, the distinction is overlooked, instrumentalised, or greatly distorted. When it is not overlooked, it frequently becomes itself a matter of debate, which most of

the time amounts to a dialogue of the deaf.⁶⁶ Yet there is no shortage of good scholarship on the topic.⁶⁷ For my part, the two most enlightening law review articles I have found are by Professors Allen and Pardo⁶⁸ and by Professor Endicott.⁶⁹ The views I express here closely follow, I believe, the argument developed by Professor Endicott, whose opinion I share.⁷⁰

I begin by saying that some questions, of course, are undoubtedly questions of law (for example, does a recent amendment to the Code of Civil Procedure apply retroactively?) and that some questions are just as assuredly questions of fact (for example, was John Smith in Ottawa on June 6, 2014?). That is not where the problem lies. The problem arises where we are confronted with what is usually called a “mixed question of law and fact,” a notion I find inherently misleading. When the analysis is carried through as it should be, we almost always end up with questions of law or questions of fact.

66. Many lawyers, of course, can distinguish, in an intuitive way, questions of law from questions of fact. Regrettably, however, many also cannot, or simply will not if it may operate detrimentally to their client’s interest. Thus, in *Canada (Director of Investigation & Research, Competition Act) v. Southam, Inc.*, [1997] 1 S.C.R. 748, Justice Iacobucci noted that “[t]he parties vigorously dispute the nature of the problem before the Tribunal. The appellants say that the problem is one of fact. The respondent insists that the problem is one of law. In my view, the problem is one of mixed law and fact.” *Id.* at ¶ 34. It seems rather strange that such a debate was still ongoing at that level of court. With such inclinations to argue come what may, how could these counsel be sure that they had graduated from a law school, as opposed to a “fact school”? In that sense, what the Supreme Court of Canada explains, painstakingly, in cases such as *Housen*, 2002 SCC 33, at ¶¶ 27–36, about the extricable nature of questions of law, is fundamental to understanding what appeals are for.

67. See generally, e.g., Daniel Jutras, *The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?* 32 MAN. L.J. 61 (2016); Frédéric Bachand, *Le traitement en appel des questions de fait, questions de droit et questions mixtes*, 86 CAN. BAR REV. 97 (2007); A.L. Goodhart, *Appeals on Questions of Fact*, 71 L.Q. REV. 402 (1955); Walter Wheeler Cook, ‘Facts’ and ‘Statements of Fact’, 4 U. CHI. L. REV. 233 (1937); Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545 (1899).

68. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003). Professor Allen is one of the editors of Wigmore’s treatise and an evidence scholar. Professor Pardo of the University of Alabama, also an evidence scholar, is among Professor Allen’s frequent co-authors. The view expressed in this stimulating article is very much a contrarian one.

69. Timothy A.O. Endicott, *Questions of Law*, 114 L.Q. REV. 292 (1998). Professor Endicott, who is Canadian, is a former Dean of Law at the University of Oxford.

70. For a full discussion of the two conflicting theses of these three authors and a more detailed analysis of the problem, see the *Wainwright Lecture*, *supra* note *, at 520–30.

My own view of the matter is simple. I believe, first, that in any dispute between A and B, one has to distinguish between the question presented for decision on its merit, let us call it Y, and a prior question of characterisation as to whether Y is a question of law or a question of fact, let us call that prior question X. The answer to question X (Is Y a question of law or of fact?) depends on Y's potential to attract an answer that has a normative reach beyond the dispute between A and B. In other words, and to put it plainly, if, because of the reasons you offer in support of your ruling, you rule not just on the dispute between A and B, but also on other disputes, whether actual or potential, the normative reach of the answer you are giving to question Y entails that you are deciding a question of law. Indeed, you may stand up and salute: you are *making* law, though only interstitially.⁷¹ It is trite to say that juries never decide questions of law. In point of fact, where jury nullification is tolerated, juries decide questions of law, even though they do so simply by ignoring a law they find objectionable. Where, however, jury nullification is not tolerated, as in Canada, the reason juries never decide questions of law is that they only render verdicts and they never give reasons.⁷² I have offered as a practical illustration of this line of reasoning⁷³ a rather entertaining little case⁷⁴ which three of my colleagues decided

71. Here comes Holmes again. As is I think very well known, Justice Holmes wrote that he “recognize[d] without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say ‘I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.’” *S. Pac. Co v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In so doing, “he of course rejected the classical or purely declaratory theory of the judicial function.” Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 33 (1955).

72. A rather vivid illustration of the problem can be found, albeit only indirectly, in *R v. Morgentaler*, [1988] 1 S.C.R. 30, ¶¶ 65–68. The scorching comments aimed at counsel by Chief Justice Dickson in that opinion were also a denunciation of a forensic tactic which amounted to an incitement to jury nullification. The acquittals in that memorable case were restored by the Supreme Court of Canada on constitutional grounds. The jury, which had returned verdicts of not guilty in the first place, had done so, of course, without reasons. Had it been required to give reasons, it is at least plausible, given the tenor of counsel for the defence's closing speech that the jury would have deliberately derogated from the law then thought to be in force.

73. *Wainwright Lecture*, *supra* note *, at 528–30.

74. *Paradis v. R*, 2007 QCCA 281 (Que. Ct. App.); *Paradis v. R*, No. 450-36-000515-040, 2004 CanLII 49126 (Super. Ct. Dec. 10, 2004); *R. v. Paradis*, No. 450-01-031282-036, 2004 CanLII 3327 (Ct. Que. July 7, 2004). Until the case reached the Court of Appeal,

after I had granted leave to appeal, on “a question of law alone,” as required by the Criminal Code.

When seen in this light, the problem of characterization (i.e. question X, above) is much less troubling than it is customarily thought to be. There are sound reasons of legal policy for approaching the problem in this manner, reasons which Justice Rothstein sets out in the recent Supreme Court judgment in *Sattva Capital Corp. v. Creston Moly Corp.*⁷⁵ By itself, the interpretation of a contract is a question of fact, something which is well accepted in civil law countries and which is the only sensible answer to the question of characterization. It seemed self-evident to the leading commentators⁷⁶ and I entirely agree with them.

What *Sattva* decided has long been the law in France, where the supreme judicial court, the *Cour de cassation*, does

no one, including judges and counsel, had noticed a salient fact: the admittedly intoxicated driver who had just gotten into the car was sitting by mistake in a vehicle identical to his own but belonging to another person. *Paradis*, 2007 QCCA at ¶ 6 (holding that the failure of the judge below to consider evidence indicating that the driver’s own keys would not have started the stranger’s car was an error of law that determined the outcome of the case, and entering an acquittal).

75. [2014] 2 R.C.S. 633, 2014 SCC 53. Justice Rothstein points out in *Sattva* that [t]he purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* . . . identified the degree of generality (or “precedential value”) as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal.

Id. at ¶ 51.

76. KERANS & WILLEY, *supra* note 51. They write that

[a] curious situation arises about the interpretation of documentary evidence, including contracts. Misdirection about the rules of interpretation is of course a reviewable legal error. But, the meaning of a document is a matter of fact; the first judge seeks to find the true intention of the author or authors. This is often a matter of inference from the actual words used. Yet the appellate courts regularly substitute their view for that of the trial court. Why should documents get this special treatment? The interpretation of documents is, then, an area where Canadian reviewing courts, unlike some U.S. courts, have not yet faced the logic implicit in their approach to other factual questions. One reviewing court, the Saskatchewan Court of Appeal, has refused to re-try the interpretation of documents.

Id. at 142 (footnotes omitted).

not entertain *pourvois en cassation* concerning the interpretation of contracts because, as a rule, the *Cour de cassation* deals only with questions of law.⁷⁷ Interestingly enough, three exceptions to this rather strict definition of jurisdiction developed over time: they concern “*les contrats d’application étendue ou répétée*,” “*les contrats homologués par les pouvoirs publics*,” and “*les conventions collectives*.”⁷⁸ The second and third exceptions are of limited relevance here because they pertain to legal devices that have no clear equivalent in our law (i.e. French collective agreements are very different from ours). But the first category, which is far from negligible, applies, typically, to standard-form contracts and, especially, insurance policies. It is therefore unsurprising that the first cases after *Sattva* which softened the impact of this important precedent, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Company*⁷⁹ and *MacDonald v. Chicago Title Insurance Company of Canada*,⁸⁰ both involved standard-form insurance policies.

D. Finding “Palpable and Overriding” Errors

The words palpable and overriding (*manifeste et dominante* or *manifeste et déterminante* in French) convey a nuance of intensity; they speak of the degree of obviousness that the error must evince in order to warrant review. The court on which I serve offered various clarifications of this notion on several occasions.⁸¹ In the recent *Vidéotron, s.e.n.c. c. Bell ExpressVu*,

77. The matter is elegantly explained in a standard treatise on *cassation*. See JACQUES BORÉ & LOUIS BORÉ, *LA CASSATION EN MATIÈRE CIVILE*, 275–80 (4th ed. 2008). Evidently, the characterization of a contract—as one of employment or one of agency—often will qualify as a question of law.

78. *Id.* at 280–84.

79. 2015 ABCA 121 (Alta. Ct. App.), at ¶¶ 15–18, (holding that the interpretation of a standard-form insurance contract is reviewable on a standard of correctness), *rev’d* 2016 SCC 27 (holding that the interpretation of a standard-form insurance contract is an exception to the *Sattva* rule, that the appropriate standard of review in this case was correctness, but that the Court of Appeal’s interpretation was incorrect).

80. 2015 ONCA 842 (Ont. Ct. App.), at ¶¶ 35, 37, 41 (holding that the interpretation of a standard-form insurance contract is reviewable on a standard of correctness), *motion for leave to appeal to S. Ct. of Can. dismissed* (No. 36830, Oct. 20, 2016).

81. See, e.g., P.L. c. Benchetrit, [2010] R.J.Q. 1853, 2010 QCCA 1505 (Que. Ct. App.); *Regroupement des CHSLD Christ-Roi* (Centre hospitalier, soins de longue durée) c.

l.p.,⁸² we were faced with a judgment in which an experienced and respected trial judge, after a trial of fifty-seven days raising issues of considerable technical complexity, had disregarded as not in evidence 37,675 pages of financial data and statistics used by the plaintiff's experts and admitted by the defendants. As a result, we awarded some \$83,000,000 of damages (amounting, apparently, to over \$140,000,000 with interest and costs) to the plaintiff, where the judgment of first instance had assessed the damage at a little under one million dollars. I am not suggesting that only errors of fact of this magnitude warrant review, but this is nevertheless a good example of palpable and overriding error.

I was a member of the panel which heard *Vidéotron* (for two full days) and the argument on the existence of a palpable and overriding error took only a few minutes. That in itself is always very telling: How much time and effort is needed to identify the error? An easy-to-identify error is likely to meet the standard. That is what is meant by being “able to ‘put one’s finger on’ the crucial flaw, fallacy or mistake,” the expression used by Justice Fish in *H.L.*⁸³ More recently, in *Canada v. South Yukon Forest Corporation*,⁸⁴ Justice Stratas of the Federal Court of Appeal (whose language I quote at length because I think, respectfully, that his analysis is impeccable) had this to say on the topic after noting that “the parties had a fundamentally different understanding of the meaning of palpable and overriding error” in that “long and complex case,” and acknowledging that the standard is “highly deferential”⁸⁵:

In applying the concept of palpable and overriding error, it is useful to keep front of mind the reasons why it is an appropriate standard in a complex case such as this.

In this case, there were 40 days of trial stretched out over 6 months, with 19 witnesses and over 1,000 documents, many of which were intricate and technical. In clear and

Comité provincial des malades, [2007] R.J.Q. 1753, 2007 QCCA 1068 (Que. Ct. App.). *Benchetrit* was quoted and followed by the Court of Appeal of Quebec seventeen times and referred to in other judgments of the Court 106 times, while *Christ-Roi* was quoted and followed twenty-two times by the Court of Appeal of Quebec and referred to in other judgments of the Court eighty-one times.

82. 2015 QCCA 422 (Que. Ct. App.).

83. 2005 SCC 25 at ¶ 70.

84. 2012 FCA 165.

85. *Id.* ¶¶ 43, 44, 46.

thorough reasons showing considerable synthesis and assessment of the complex evidence before her, the Federal Court judge made key findings of fact. Some of these were founded upon her assessment, clearly expressed, of the credibility of the witnesses before her. Her credibility findings concerning most of the Department's officials who testified are quite negative.

Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.

. . .

In this Court, the Crown submitted that a number of the Federal Court's findings of fact should be set aside on the basis of palpable and overriding error.

In my view, the Crown failed to establish palpable and overriding error as it has been articulated above. The Federal Court judge had a basis in the record for her key factual findings. The Crown views the basis for some of them expressed in the reasons as being rather thin. In some regards that may be so but, as I have explained, thinness alone is not palpable and overriding error.

Therefore, in this appeal, I shall proceed on the basis that every one of the Federal Court's findings of fact must stand.⁸⁶

The failure of counsel to heed the warnings of appellate judges confronted with bulky records and convoluted or opaque issues of fact probably accounts for the robustness of the metaphors with which these judges reiterate the simple point made in *Housen* and in *H.L.* Yet it should be self-evident by now that a palpable and overriding error is not in the nature of the proverbial needle in a haystack (*une aiguille dans une botte de foin*) but is instead in the nature of the biblical beam in the eye (*une poutre dans l'oeil*).⁸⁷ Enough said.

86. *Id.* ¶¶ 47–49, 52–54.

87. *See* J.G. c. Nadeau, 2016 QCCA 167 (Que. Ct. App.), at ¶ 77 (opining that “erreur manifeste et dominante tient, non pas de l’aiguille dans une botte de foin, mais de la poutre

*E. The Incidence of Institutional Constraints
on Reviewing Practices*

There are also external reasons to be selective in exercising appellate jurisdiction, reasons which are unrelated to the tenor of legal issues arising in particular cases, or which have only a very loose connection with the substance of those cases.

One such reason is the steadily increasing number of querulous or vexatious litigants who lodge appeals as of right or who systematically seek leave to appeal where leave is needed.⁸⁸ That is a topic in itself and one for another day. But I will mention in passing that in several appellate courts I know, there are procedural safeguards available today, which did not exist ten or twenty years ago, to prevent such litigants from squandering the time and energy of the judges and court personnel. Devices such as Rule 2.1 of the Ontario Rules of Civil Procedure, which came into force in 2014, are now needed to contain those types of situations.⁸⁹ And we see here and there

dans l'oeil"); *see generally id.* ¶¶ 75–79 (discussing palpable and overriding error), ¶¶ 128–30 (noting that the appellate record disclosed primarily questions of fact and suggesting that counsel took too aggressive an approach in criticizing the actions of the judge below in an attempt to establish the existence of palpable and overriding error where there was none), *motion for leave to appeal to S. Ct. of Can. dismissed sub nom Grondin v. Nadeau*, 2017 Carswell Que. 958 (S.C.C. Mar. 2, 2017) (dismissing application in light of *Benhaim v. St-Germain*, [2016] 2 S.C.R. 352, 2016 SCC 48).

In *Benhaim*, a majority of five members of the Supreme Court of Canada adopted the needle-in-a-haystack/beam-in-the-eye formulation, *Benhaim* at ¶ 39, and, in the absence in that case of any palpable and overriding error of fact, dismissed the appeal. The two *Benhaim* dissenters found no fewer than three palpable and overriding errors on the part of the trial judge, *id.* ¶ 103 (opining that trial judge had “misconstrue[ed]” certain testimony, “omitted” certain evidence, and “erred” in the “inference-drawing process itself”), errors which had escaped the notice of the Court of Appeal. . . . It sometimes feels as if we are running around in circles.

88. A judgment rendered by a panel I was part of on December 9, 2015, provides a spectacular and sorry illustration of what I am describing here. *See In re Poplawski*, 2015 QCCA 2054 (Que. Ct. App.).

89. *See generally* Ont. R. Civ. P. 2.1 (addressing courts’ power to stay or dismiss frivolous, vexatious, or abusive proceedings and motions); *see also, e.g.*, *Gao v. Ont. (Workplace Safety & Ins. Bd.)*, 2014 ONSC 6497 (Ont. Super. Ct.). Justice Myers observed in *Gao* that

[e]xperience teaches that vexatious litigant proceedings can be very expensive and often serve just to give a vexatious party yet another opportunity to inflict the very harms that the process is designed to end. To obtain a vexatious litigant order, an applicant must commence a separate proceeding and prove that the target has persistently and without reasonable grounds instituted vexatious

in the caselaw an innovative use of inherent powers to prevent abuses of the appellate process by such litigants.⁹⁰

The growing complexity of trials and appeals also warrants case-management measures which may restrict the room for manoeuvre of parties exercising their right of appeal. Large class actions come to mind here, and I can provide a specific example. I recently heard, with four colleagues, and over a period of six days, an appeal from a Superior Court judgment delivered on June 9, 2015.⁹¹ This judgment, after a trial of 251 days, awarded some thirteen billion dollars to plaintiffs who sued several cigarette manufacturers for selling a toxic product. We were initially told that the record on appeal exceeded 257,000 pages, but, as a result of deft case management in the Court of Appeal, the record was pared down to 203,000 pages before it came to us. The parties had identified before the hearing thirty-eight common questions, and nineteen additional questions of interest to only one of the appellants, for a total of fifty-seven.⁹² It should be obvious that streamlining is *de rigueur* in litigation of

proceedings or has conducted proceedings in a vexatious manner. The requirement to show persistence has meant that litigants must endure several vexatious proceedings prior to bringing a vexatious litigant proceeding. While courts have recognized that vexatious litigants can inflict substantial costs on the opposing parties and significant systemic costs, the harm is amplified by the need to endure multiple frivolous proceedings before section 140 [of the *Courts of Justice Act*] applies. Moreover, an application for a vexatious litigant declaration is a separate legal proceeding. This gives the vexatious litigant a platform from which to repeat all of her or his vexatious conduct. The respondent in a vexatious litigant proceeding has all of the rights of a respondent to a regular application—i.e. to file evidence, to cross-examine, to summon third party witnesses, to bring motions, and, especially exhausting and expensive, the right to or to seek leave to appeal at every step of the way. In virtually all of these cases the respondents are impecunious and will not be able to pay the costs awards that they invariably rack up along the way to being declared vexatious litigants.

Id. ¶ 8.

90. *See, e.g.*, *Chutskoff Estate v. Bonora*, 2014 ABCA 444 (Alta. Ct. App.). Justice Slatter, sitting alone as a motions judge in *Chutskoff Estate*, dismissed three applications for leave to appeal brought by a vexatious litigant and included these words in the conclusion to his opinion: “This decision is final, and no application to reopen it will be entertained. Any attempt to continue to litigate the issues resolved here, in any form and under any pretext, will be treated as a contempt of court.” *Id.* ¶ 19.

91. *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382 (Que. Super. Ct.).

92. And this is only part of the story. In addition to these questions, which all pertain to the final judgment, several interlocutory judgments on the admissibility of evidence which could not be appealed at the time because they were being rendered during the trial, were also challenged by the appellants.

this complexity and that appellate judges cannot be expected to review the entire record in order to form a view of the facts. Picking gnats with tweezers definitely is not an option here. The *Housen* rule, which directs appellate courts to assess claims of error using the palpable and overriding standard, comes in handy in this type of case.

Lastly, I must say a word or two of external and institutional pressures on appellate courts. What I will describe here is definitely more apparent in the federal courts of appeals in the United States than in Canadian courts but we can detect in Canada, at least in some appellate courts, tendencies that resemble those which are now increasingly conspicuous in the United States. One such indication is the growth in the number of law clerks and staff lawyers in the Supreme Court of Canada between 1980 and today.

The principal cause of this state of affairs below the border appears easy to identify: it is the size of the federal appellate judiciary relative its caseload.⁹³ Between 1960 and 2010, the average number of appeals filed per judge of the federal courts of appeals each year increased from not quite sixty to almost 350. I do not think that we face this problem here—the number of federally appointed judges in Canada appears to be commensurate with the task at hand.

But other background factors also aggravate the pressure on appellate courts. The increasing complexity of the docket, notably because of mammoth class actions and complex civil-

93. Professors Richman and Reynolds, who speak of a caseload explosion, offer the following statistics on the evolution of federal appellate caseloads in the United States.

Year	Appeals Filed	Judges	Average per Judge
1960	3,899	68	57.3
1970	11,662	97	120.2
1980	23,200	132	175.8
1990	40,898	167	244.9
2000	54,697	167	327.5
2010	56,790	167	340.1

WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* 8 (2013). One solution would be to increase the size of the appellate judiciary from the current 179 judges (a figure that includes some visiting and senior-status judges) to a membership of 342. *Id.* at 170. That is an increase of roughly ninety-two percent, which does not appear a likely scenario.

rights actions,⁹⁴ is one such factor. Charter litigation, class actions such as *Létourneau*,⁹⁵ and mega criminal trials (e.g., in Quebec, the *Hells Angels* cases⁹⁶), arguably amount to a parallel trend in Canada.

Some knowledgeable observers detect a marked deterioration in the traditional high quality of appellate justice in the federal courts of appeals. They blame it primarily on the persistent refusal of the U.S. Congress to increase the size of the federal judiciary in a manner commensurate with the growth of its caseload.⁹⁷ Another troubling factor is the equally persistent refusal of Congress to address the issue of diminishing judicial remuneration.⁹⁸ The empirical foundation of this claim remains a matter of debate among academics and the issues are complex.⁹⁹ Canadian judges continue to be spared many of these annoyances. But in the United States, with such numbers,

94. By way of example, between 1961 and 1979, as a result of two United States Supreme Court cases, *Brown v. Allen*, 344 U.S. 443 (1953), and *Fay v. Noia*, 372 U.S. 391 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977), the number of *habeas corpus* petitions by state prisoners in the federal courts of appeals increased by “roughly 1700 percent.” See J. WOODFORD HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS* 11 (1981).

95. See text accompanying notes 91 & 92, *supra*.

96. See, e.g., *R. v. Stadnick*, 2009 QCCA 1574 (Que. Ct. App.).

97. RICHMAN & REYNOLDS, *supra* note 93, at 165–72.

98. More than a decade ago, Chief Justice Roberts warned against the pernicious effects of this state of affairs on the recruitment of a diverse and well-qualified judiciary. John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary* 1, Supreme Court of the United States, SUPREMECOURT.GOV, <https://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> (referring to Congressional failure to raise salaries for federal judges as “a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary”); see also *id. passim* (expounding on this topic, which was the single focus of the 2006 *Report*).

99. See, e.g., Scott Baker, *Should We Pay Federal Circuit Judges More?* 88 B.U. L. REV. 63 (2008) (ultimately disputing on empirical grounds the claim (or assumption) that better pay will improve judicial performance); Christopher Zorn, William D. Henderson & Jason J. Czarnezki, *Working Class Judges*, 88 B.U. L. REV. 829 (2008) (concluding that the behavior of federal judges appointed from the country’s top five legal markets differs from that of federal judges appointed from smaller markets, in which law-firm partners make less than do law-firm partners in top legal markets); Scott Baker, *Refining the Judicial Salary/Judicial Performance Debate: A Response to Professors Cross, Czarnezki, Henderson, Marks, and Zorn*, 88 B.U. L. REV. 855 (2008) (acknowledging other scholars’ reactions to results of study reported in *Should We Pay Federal Circuit Judges More?* and encouraging more empirical research).

something had to give, and it did. Many of these changes occurred in the last four decades:

- i. very short hearings (something still quite alien to English lawyers and judges,¹⁰⁰ though not quite so alien for Canadian judges),
- ii. disposals with no hearing at all (overall in the twelve federal courts of appeals, the average percentage of merit terminations after an oral hearing is eighteen percent),¹⁰¹
- iii. disposals without reasons in unpublished decisions,

100. Let us remember here *Anisminic*, that famous 1969 case, argued for twelve days (three weeks) in the Court of Appeal, and for twelve additional days (three weeks again) in the House of Lords. Lengthy hearings of this kind were once the rule, not the exception: *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd. (No 2)*, [1966] All E.R. 536 (H.L.), was heard for twenty-one days. As late as 1989, the House of Lords heard oral arguments for twenty-six days in *Maclaine Watson & Company Ltd. v. Department of Trade and Industry*, [1990] 2 A.C. 418, a case that appears to have been relatively straightforward and in which the performance of counsel prompted the following remarks by Lord Templeman, whose opinion (or “speech”) was itself decidedly straightforward:

For the conduct of these appeals, there were locked in battle 24 counsel supported by batteries of solicitors and legal experts, armed with copies of 200 authorities and 14 volumes of extracts, British and foreign, from legislation, books and articles. Ten counsel addressed the Appellate Committee for 26 days. This vast amount of written and oral material tended to obscure three fundamental principles—that the capacities of a body corporate include the capacity to contract, that no one is liable on a contract save the parties to the contract and that treaty rights and obligations are not enforceable in the courts of the United Kingdom unless incorporated into law by statute. In my opinion the length of oral argument permitted in future appeals should be subject to prior limitation by the Appellate Committee.

Id. at 483. By contrast, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the challenge to Obamacare, took up a grand total of six hours, spread over three days. See Tr. of Oral Arg., *Fla. v. Dept. of HHS*, 2012 WL 1031485 (Mar. 28, 2012) (No. 11-400); Tr. of Oral Arg., *Nat’l Fed. of Indep. Bus. v. Sebelius*, 2012 WL 1031484 (Mar. 28, 2012) (Nos. 11-393 & 11-400); Tr. of Oral Arg., *Dept. HHS v. Fla.*, 2012 WL 1017220 (Mar. 27, 2012) (No. 11-398); Tr. of Oral Arg., *Dept. HHS v. Fla.*, 2012 WL 993811 (Mar. 26, 2012) (No. 11-398); see also Order Pertaining to the Allocation of Oral Arg. Time, *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, Feb. 21, 2012, Nos. 11-393, 11-398, & 11-400 (allocating six hours of argument time among counsel for parties and amici).

101. POSNER, *supra* note 33, at 233.

- iv. no-citation rules while they lasted,¹⁰²
- v. multiplication of law clerks (federal appellate judges have a choice between five law clerks or four law clerks and an assistant),¹⁰³ and
- vi. exponential growth of the cadre of central staff attorneys.¹⁰⁴

These are all signs of a Weberian bureaucratization of the federal appellate system, a process which Professors Richman and Reynolds deplore.¹⁰⁵ One problematic effect of this transformation in the practice of appellate judging is that very few judges actually write their judgments. Judge Posner, again, writes with commendable frankness in his book: “[T]he number of federal judges who write their own opinions, as distinct from editing (sometimes quite lightly) law clerks’ opinion drafts, can probably be numbered on the fingers of two hands.”¹⁰⁶ Since by his count in 2016, there are 187 circuit judges, this observation entails that 177 of them farm out, as it were, the writing of their judgments, or merely edit what comes along after stating their preferences to their clerks.

Professors Richman and Reynolds argue that a return to the “Learned Hand treatment” is essential if the federal judiciary is to retain its constitutional legitimacy in the United States. A laudable thought but I suspect that they are not about to get satisfaction.

102. RICHMAN & REYNOLDS, *supra* note 93, at 75–80.

103. POSNER, *supra* note 33, at 68.

104. Professors Richman and Reynolds document this trend and estimate at “about 500 staff attorneys” the size of the cohort at the time of publication in 2013. RICHMAN & REYNOLDS, *supra* note 93, at 112. That means an average of forty-one attorneys per circuit.

105. *See generally id.*

106. POSNER, *supra* note 33, at 4. He adds that “[n]o one doubts that the judge is in charge; that’s not the issue; the issue is who should be the opinion writer. I know for certain of only three federal court of appeals judges besides myself who write all their own drafts. I imagine that there are a few others; and I know that there are judges who write at least some of their first drafts.” *Id.* at 223. It can be supposed that, having been appointed to the Seventh Circuit in 1981, having been chief judge of that circuit from 1993 to 2000, and remaining a member of the same court in 2016 at the age of 76, Judge Posner likely knows what he is talking about.

* * *

Law never stands still for very long. Not surprisingly, appellate standards of review in Anglo-American legal systems have evolved a great deal through the ages. At different times, they reflected different understandings of law and of legal reasoning—those that prevailed in the climate of the day. One thus detects a degree of porosity in these standards, a form of osmosis with their environment, intellectual and normative. Currently, we live in an era of realism or pragmatism about law. We must accept that, in the words of a prominent American jurist and judge, law is “not a science or even a social science.”¹⁰⁷ We know it to be a discipline firmly rooted in reality which values a thorough and rigorous analysis of all relevant facts and which responds well to prudential considerations.

The point of appeals in this context is not to hunt down with passionate intensity all forensic claims of alleged error. The standards of appellate review as they exist today strike a delicate balance between promoting the systemic coherence of the law in force here and now, and exercising an appropriate measure of quality control over the many judgments and decisions of courts of first instance and tribunals. It is also a fragile balance because it can be upset by institutional and other pressures on the appellate process. Vigilance is therefore needed to ensure the integrity of this process. Without it, the rule of law is weakened and perhaps meaningfully curtailed.



107. *Id.* at 227.