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THE POWER OF DISTRICT JUDGES AND THE RESPONSIBILITY OF COURTS OF APPEALS

*Paul D. Carrington**

FOR some years, the most prestigious commentator on federal practice, Charles A. Wright, has been expressing concern about the apparent evolution of the relation between trial and appellate courts, particularly in the federal judicial system.¹ With his distinguished colleague, Leon Green, he has deplored the fact that "the appellate courts have drawn unto themselves practically all the power of the judicial system."² Although sympathetic with the desires of appellate judges to achieve right results in cases coming before them, Professor Wright urges that this desire has too often been permitted to predominate, that our appellate judges have too often failed to recognize the limits of their own capacities and wisdom.

Professor Wright has conceded that the evaluation he makes is difficult, and perhaps dubious.³ It is, therefore, probably unnecessary and perhaps gratuitous to join issue with him. Nevertheless, I do not share some of Professor Wright's reactions and there may be some advantage in giving expression to my disagreement. I cannot demonstrate that his view is erroneous. The most that can be said is that his evaluation rests upon basic assumptions about the costs and values of review that are not subject to proof or disproof, that we are hence free to reject it. This is possibly too obvious to bear demonstration, but

* Professor of Law, University of Michigan Law School. B.A., Texas, 1952; LL.B., Harvard, 1955.

¹ Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A.J. 742 (1966); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949, 967-68 (1964); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

² L. GREEN, JUDGE AND JURY 380 (1930); see Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 486 (1956).

³ Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778 (1957).

it may be the kind of obvious fact which is too easily and regrettably forgotten. Most discourse about judicial institutions, their evolution and reform, is conducted at a level at least once removed from the basic assumptions which discussants often erroneously presume to share. This results in the frustration of much communication and may produce unnecessarily intense feelings. Thus, if Professor Wright and I were forced to share decisions, we could best succeed by recognizing the different points of departure from which each of us begins. Failing to do so, we are quite likely to talk past one another in increasingly shrill tones. These remarks are written in the hope of advancing the kind of understanding which will enable appellate court reform, which is now needed, to proceed with dispatch and a minimum of rancor.

Professor Wright's concern is directed at somewhat different, but related, developments. Primarily, he protests "[t]he esoteric theories by which appellate courts pretend that questions of fact have somehow become questions of law, and thus can be decided anew by the appellate judges. . . ."⁴ In particular, he is troubled by appellate regulation of the size of verdicts, by appellate regulation of the power to grant new trials because of judicial disagreement with a verdict, and by appellate willingness to re-evaluate undisputed evidence.⁵ Very closely related is his objection to the practice of reversing judgments rendered on the basis of unchallenged instructions which are later found by the appellate court to contain "plain error."⁶ Finally, he objects to the growing use of the writ of mandamus to review trial court rulings which might at an earlier time have been immunized from review by force of the requirement that courts of appeals review only "final decisions" of district courts.⁷ Almost all of these trends, if not all of the resulting decisions, can be defended as expressions of a general design which subordinates the power of individual officials, such as trial judges, to the discipline of the institutional machinery of democratic law.

I. MANDAMUS AND THE FINAL DECISION REQUIREMENT

For the federal courts, the final decision requirement is expressed in the basic statutory provision pertaining to the jurisdiction of the

⁴ Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A.J. 742, 748 (1966).

⁵ Wright, *supra* note 3, at 752-71.

⁶ Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949, 967 (1964).

⁷ Wright, *supra* note 3, at 771-78.

courts of appeals.⁸ The principle has antique origins, however.⁹ The reasons which prompted its development are now somewhat murky and may have been largely conceptual.¹⁰ But it can be explained as a device for preventing the disruption of the work of trial courts, and the delay and expense inflicted on unwilling litigants if cases are bounced around between trial and appellate courts. The work of the appellate court in formulating principles and assuring minimal compliance with legal standards will often be best served by awaiting the full development of the facts in controversy. The vitality of the finality principle may also be partly explained as an expression of the interest of appellate judges in avoiding the pain of making decisions which may later be demonstrated to be unnecessary.

The final decisions requirement was not a universal characteristic of historic English practice; it was not recognized by the Chancellor as a feature of review in equity.¹¹ Perhaps, again, the historic basis for this distinction was conceptual. But the difference might be thought justified by the nature of the power exercised by the master or judge sitting in equity: the more personal aspect of the equitable mandate and the greater compass of the equitable power might be deemed to require freer access to review. Open interlocutory review was one feature of the equity practice which tended to make it so prolix that it was necessary to make radical reform.¹² In any event the equity practice has been partly preserved in the federal judicial code, which authorizes appeals from orders granting or denying injunctions, and certain other orders which are characteristically equitable.¹³ These statutory exceptions to the final decision requirement might have been liberally construed to consume most of the rule,¹⁴ but such a development has not occurred.¹⁵

In applying this principle there is an inevitable necessity to define the kinds of trial court rulings which may be regarded as suit-

⁸ 28 U.S.C. § 1291 (1964).

⁹ See generally Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

¹⁰ Cf. *Metcalf's Case*, 11 Coke 38a, 77 Eng. Rep. 1193 (K.B. 1615).

¹¹ Crick, *supra* note 9, at 545-48.

¹² For comment on the prolixity of equity, see C. DICKENS, *BLEAK HOUSE* 1-5 (1852); Brennan, *The Menace of Jarndyce and Jarndyce*, 39 W. VA. L.Q. 279 (1933); Jessel, *Chancery As It Was and Is*, 140 L.T. 56 (1915).

¹³ 28 U.S.C. § 1292(a) (1964).

¹⁴ See, e.g., *Federal Glass Co. v. Loshin*, 217 F.2d 936 (2d Cir. 1954).

¹⁵ *Switzerland Cheese Ass'n v. Horne's Mkt.*, 385 U.S. 23 (1966).

ably final.¹⁶ Thus, the Federal Rules of Civil Procedure, for example, were required to reconcile the principle to needs created by the practice of composite litigation, so favored by the Rules.¹⁷ In permitting and encouraging multiplication of claims and parties, the Rules created a situation in which the final decision requirement could be applied with dilatory effect. Some claims may be terminated, or some parties excluded, prior to trial; if appeals from such terminal orders cannot be heard until after trial,¹⁸ great waste and delay may result. Accordingly, Rule 54(b) provides for "entry of a final judgment as to one or more but fewer than all of the claims or parties . . .", but "only upon an express determination that there is no just reason for delay. . . ."

The final decision requirement has been more recently compromised with respect to the problem of the substantive uncertainty which makes it difficult for a trial court to proceed to trial with confidence in its understanding of the controlling law. If the substantive law controlling the rights of the parties is so uncertain that there is a good chance that a long trial will later be set at naught because of an error in the instructions, or because of some other error resulting from a substantive misconception, efficient administration requires that there be an attempt to provide an authoritative basis for the trial by means of an interlocutory appeal. Accordingly, in 1958, the code was amended to authorize appeals from orders involving "a controlling question of law as to which there is [a] substantial . . . difference of opinion . . . [where] an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ."¹⁹ Such an appeal is authorized, however, only where the district judge certifies and the court of appeals permits. This device for the double exercise of discretion is said to be justified by the need for the trial judge to gauge the genuineness of the uncertainty and the extent of the resulting delay, and by the need for the appellate court to assess the likelihood of error and the availability of its time to resolve the doubt.²⁰ The total number of appeals pursued under this statute has remained small.²¹

¹⁶ See *McGourkey v. Toledo & O. Cent. Ry.*, 146 U.S. 536, 545 (1892).

¹⁷ See generally Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958).

¹⁸ This appears to have been the practice before 1938. *Collins v. Miller*, 252 U.S. 364 (1920).

¹⁹ 28 U.S.C. § 1292(b) (1964). See generally Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959).

²⁰ *Hearings on Appeals from Interlocutory Orders Before the Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess., ser. 11, at 14-15 (1958).

²¹ In 1967, 80 applications for interlocutory appeal were considered and 41 were

These exceptions or qualifications of the final decision requirement have not exhausted the competing pressures on the rule. There remains a variety of rulings made by trial judges which are not reviewable at the terminal stage of the proceeding because they become moot, or because they are so tangential to the merits of the cause that they can hardly be regarded as prejudicial enough to justify reversal even though the impact on the litigants may have been considerable. Where important rights are threatened by possible error in such rulings, there is a growing reluctance to permit the final decision requirement to stand in the way of review.²² One judge-made principle which can be said to have respectable lineage is the "collateral order" doctrine, most clearly expressed in *Cohen v. Beneficial Industrial Loan Corp.*²³ The Supreme Court there held that the court of appeals might entertain an appeal from a denial of a motion to require the plaintiff to post security for costs as required by a state statute. It was explained that the order did not "make any step toward final disposition of the merits of the case and [would] not be merged in final judgment."²⁴ When that time came, it would be too late to review the order because it would be moot; hence it was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."²⁵ This principle has seen limited application,²⁶ but its progeny may have a larger role to play in the future.

Against this background emerges the development of increased use of extraordinary writs which is deplored by Professor Wright. As with the other exceptions and qualifications, the frequency of use of extraordinary writs to challenge the actions of trial judges is not great.²⁷ Tradition has it that these writs are available only to confine the district judge, or any official, to his proper jurisdiction, or to require him to perform his clear, "ministerial" duty.²⁸ For example, a clearly appro-

allowed. 1967 DIR. ADMIN. OFFICE U.S. COURTS ANN. REP. 191 [hereinafter cited as 1967 ANN. REP.].

²² See generally Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

²³ 337 U.S. 541 (1949). See generally Underwood, *Appeals in the Federal Practice from Collateral Orders*, 36 VA. L. REV. 731 (1950).

²⁴ 337 U.S. at 546.

²⁵ *Id.*

²⁶ C. WRIGHT, FEDERAL COURTS 398 (1963); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 364-66 (1961).

²⁷ There were 158 original proceedings in all of the courts of appeals in 1967. 1967 ANN. REP. 186.

²⁸ *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 375 (1961).

priate use of extraordinary relief is the prohibition of an erroneous removal of a state criminal prosecution to a federal court.²⁹ Because an acquittal is nonreviewable, the state can obtain review only by the extraordinary means of an original proceeding in the court of appeals. The use of mandamus and prohibition has been gradually extended to other situations not involving jurisdictional excesses, but other kinds of abuses.³⁰

The particular case which inspired Professor Wright's reaction was *La Buy v. Howes Leather Co.*³¹ The Supreme Court there affirmed a mandamus directing the district judge to hear a case himself rather than refer it to a master. In accordance with a routine fairly common in his district, the judge proposed to refer the case on his own motion because the trial would be long and his docket was congested. The Court termed this practice "little less than an abdication of the judicial function,"³² requiring the exercise of supervisory control by the courts of appeals.

In my view, the decision is correct. It would be difficult, and perhaps impossible to demonstrate after trial that either party had been prejudiced by the use of the master to receive the evidence, in the sense that the outcome of the case would be affected by it. But the Constitution guarantees life tenure judges in federal courts; this guarantee is not adequately fulfilled by delegation of judicial duties to part-time officials appointed for special purposes. Moreover, the fee of the master may be taxed against the losing party. Special masters have a useful role to play in the federal practice, but it should be a very limited one,³³ and the parties have a substantial interest in insisting that this is so. Therefore, it seems to me to be a useful assurance, not only to litigants but also to trial judges, that the appellate courts are willing to exercise some supervisory responsibility in such matters. The fact that the court of appeals is open to review an abuse of discretion in the appointment of a special master assures the litigants that the order of reference stands not as the personal fiat

²⁹ *Virginia v. Rives*, 100 U.S. 313 (1879).

³⁰ 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 58.1, n.4.16 (C. Wright ed. 1958); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 375-78 (1961).

³¹ 352 U.S. 249 (1957).

³² *Id.* at 256.

³³ 2B W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* §§ 1161-71 (C. Wright ed. 1961); Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958).

of the district judge, but also as an expression of institutional policy which is expected to withstand at least minimal inspection by a group of judges who are more detached from the immediate dispute and who are collectively responsible for institutional integrity.³⁴ Moreover, the availability of mandamus or prohibition in such cases assures the trial judge that his relation with his constituent litigants is built on something more firm than his own personal force; the moral integrity of the federal judicial enterprise stands behind his rulings. Only a venal or unduly timid judge should fear or regret review, insofar as the esteem of his office is concerned. For those reasons, we may approve not only the holding in *La Buy v. Howes Leather Co.*, but also a later holding in the Fifth Circuit which invoked the power of the extraordinary writ to prevent a reference which was "palpably improper" despite the absence of any general pattern of improper references in the district court under review.³⁵

There are other examples of the use of extraordinary writs to provide review of preliminary rulings of trial courts which are of extraordinary importance to the parties. A discovery order which proposes to require revelation of trade secrets is one.³⁶ The party against whom discovery is sought can preserve the issue for terminal appeal only by refusing to comply with the order; this exposes him to the risk of sanctions, including a possible default. If he guesses wrong, and his trade secret contention is not upheld, he has perhaps lost not only the secret but the lawsuit as well. This places too high a price on the opportunity to make a serious contention to an appellate court.³⁷ The situation can be alleviated by use of the extraordinary writ. Similarly, it is now well-established that the final decision requirement will not prevent interlocutory review of orders striking jury demands.³⁸ The practice of providing such review is an economy to the trial court as well as an assurance of adequate protection of the seventh amendment right. The means for providing such review has been the extraordinary writ.

A more troublesome problem is the use of extraordinary writs to

³⁴ For fuller development of this idea in a somewhat different setting, see L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320-27 (1965).

³⁵ *In re Watkins*, 271 F.2d 771 (5th Cir. 1959).

³⁶ *E.g.*, *Hartley Pen Co. v. United States Dist. Court*, 287 F.2d 324 (9th Cir. 1961).

³⁷ *Cf.* *Harkness v. Hyde*, 98 U.S. 476 (1878).

³⁸ *Cf.* *Filmon Process Corp. v. Sirica*, 379 F.2d 449, 450-51 (D.C. Cir. 1967). "[T]he Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury. . . ." *Id.*

provide review of orders granting or denying transfers to other federal district courts.³⁹ The Eighth Circuit apparently refuses to entertain such petitions.⁴⁰ Judge Friendly has advocated this position for the Second Circuit⁴¹ and Professor Wright endorses it.⁴² On the other hand, Edmund Kitch has argued that only the appellate courts have sufficient perspective to be able to identify the kind of hardship case which justifies the use of the transfer power.⁴³ He concedes, however, that appellate intervention costs more to the litigants than the value of access to a more convenient forum which is the object of the transfer device. He concludes that transfers should be abolished.⁴⁴ It is possible to agree with Professor Kitch's conclusion and yet approve the practice of most circuits in providing a minimal review of transfer decisions through the use of the extraordinary writs.

A useful example is *A. Olinick & Sons v. Dempster Brothers, Inc.*⁴⁵ In that case, the defendant succeeded in executing a double play on the plaintiff's choice of a New York state forum for an action arising from the sale of an allegedly defective machine. The defendant removed the action to the federal court for the Eastern District of New York, and then moved to transfer the case to the Eastern District of Tennessee, where the machine was manufactured. The motion was granted and the transfer upheld by the court of appeals. It was held that the question could not be considered on appeal, despite the certificate of the trial judge that the case was proper for interlocutory review under the 1958 legislation. But the court was willing to consider whether an extraordinary writ should be issued to prevent an abuse of power by the district judge. It concluded that the order of transfer was not abusive.⁴⁶ I find the court's willingness to examine the record for this limited purpose reassuring. Indeed, I might have voted

³⁹ For a collection of cases, see C. WRIGHT, *FEDERAL COURTS* 146 (1963); Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 *YALE L.J.* 122, 124 (1957).

⁴⁰ *Great Northern Ry. Co. v. Hyde*, 245 F.2d 537 (8th Cir.), *cert. denied*, 355 U.S. 872 (1957).

⁴¹ *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439, 445 (2d Cir. 1966) (Friendly, J., concurring opinion); *cf.* *Application of Edwards*, 375 F.2d 108, 109 (2d Cir. 1967) (concurring opinion). In *Edwards*, Judge Friendly urges the position that mandamus should never be available to review an order consolidating criminal prosecutions for trial. *Id.*

⁴² C. WRIGHT, *FEDERAL COURTS* 146 (1963).

⁴³ Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 *IND. L.J.* 99 (1965).

⁴⁴ *Id.* at 137-42.

⁴⁵ 365 F.2d 439 (2d Cir. 1966).

⁴⁶ *Id.* at 445.

to grant the writ because the transfer did not seem to me to be justified by the facts revealed in the opinion. A prime reason for transfer given by the trial court was the relative state of the dockets in Eastern New York and Eastern Tennessee.⁴⁷ It is true that the median time lapse between issue and trial in civil cases was 9 months in Eastern Tennessee⁴⁸ and 36 months in Eastern New York in 1967.⁴⁹ But it is also true that the three district judges in Eastern Tennessee tried 202⁵⁰ cases during that year, while the eight judges in Eastern New York tried 183.⁵¹ A suspicious observer, aware that the Eastern District of New York has had some history of low productivity,⁵² and aware that some judges must share the widespread human distaste for work, might be willing to entertain the thought that the transfer order in the *Olinick* case involved some shirking. Resentment against the possible abuse must be greatly heightened if the court of appeals had taken the position favored by Professor Wright and denied the writ of mandamus on the ground that it would not review any transfer no matter how unjustified by the convenience factors involved. It is well that the court of appeals applied its limited imprimatur to the decision.

In very recent years, it has appeared likely that such uses of extraordinary writs may be displaced by the evolution of the principle of *Cohen v. Beneficial Industrial Loan Corp.*⁵³ There has recently emerged from decisions of the Supreme Court the concept of "practical finality".⁵⁴ The concept has special importance in the Supreme Court's review of state court decisions because the controlling legis-

⁴⁷ *Id.* The other reason given was the fact that the machine was manufactured in Tennessee, and part of the negotiation of the contract occurred here. Inasmuch as the real issues for trial had not yet been identified, it was impossible to predict at the time the motion was granted whether these facts were significant in their bearing on trial convenience. At best, they seem counter-balanced by the fact that the machine was delivered to, and was expected to perform in New York. This was not a case in which the plaintiff had chosen a clearly inconvenient and inappropriate forum in which to assert his claim.

⁴⁸ 1967 ANN. REP. 222.

⁴⁹ *Id.* at 219.

⁵⁰ *Id.* at 232.

⁵¹ *Id.* at 231.

⁵² In 1959, that court was the object of special attention as a corps of visiting judges was brought in to relieve its congested docket. 1959 ANN. REP. 280.

⁵³ 337 U.S. 541 (1949).

⁵⁴ Probably the most significant case is *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); for a review of others, see Frank, *Requiem For the Final Judgment Rule*, 45 TEXAS L. REV. 292, 305-17 (1966).

lation⁵⁵ makes no exceptions to the final decision requirement and because of the special difficulty of using extraordinary federal writs against state courts and officers.⁵⁶ Thus, if the national bank's rights under the federal venue statute,⁵⁷ or the union's rights to exclusive Labor Board jurisdiction,⁵⁸ are to be adequately protected against erroneous state court rulings, it must be by means of characterizing the adverse rulings as "final" for purposes of the Supreme Court's jurisdiction. And, indeed, such adverse rulings may be final in the sense that review must be now or never if the federal rights are to be given practical protection. This concept of practical finality has also been applied to the jurisdiction of the courts of appeals.⁵⁹ Many of the situations in which extraordinary writs have been applied could now be converted to appellate cases by the use of this principle. This would have the advantage of eliminating the need for an original proceeding in which the district judge is the defendant.⁶⁰ The form of the proceeding in the court of appeals might be more descriptive of the substance than is the case when an extraordinary writ is sought. Rather than drawing attention to the alleged truancy of the judge, it would direct attention on the evaluation of the right assertedly threatened by the challenged judicial order.

One criticism that can be made of this development is that it introduces one more complexity to the corpus of rules governing federal appeals. It has long been contended that the final decision requirement must be kept clean of exceptions or else abandoned because the cost of litigation over the applicability of the rule would quickly overbalance the benefits gained by its application.⁶¹ But this seems to me to overstate the burden created by this additional exceptional development; the concept of finality has never been free of uncertainty as to some of its applications and the concept of practical finality probably adds only a slight dimension of fuzziness. There

⁵⁵ 28 U.S.C. § 1257 (1948).

⁵⁶ See generally Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 YALE L.J. 515 (1964).

⁵⁷ E.g., *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

⁵⁸ E.g., *Local 438, Constr. Laborers' Union v. Curry*, 371 U.S. 542 (1963).

⁵⁹ E.g., *Carter Products, Inc. v. Eversharp, Inc.*, 360 F.2d 868 (7th Cir. 1966); *Staggers v. Otto Gerdau Co.*, 359 F.2d 292 (2d Cir. 1966); cf. *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961).

⁶⁰ See *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965).

⁶¹ Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539-45 (1932); Sunderland, *The Problem of Appellate Review*, 5 TEXAS L. REV. 126, 127 (1926).

are a larger number of cases of doubtful appealability than there once were, but the number is still not great.

There is always the threat of opening the floodgates, and it has been voiced in connection with this development.⁶² This is a serious matter in light of the present state of the dockets of the courts of appeals,⁶³ but there is no evidence that any of the spurt in the number of federal appeals filed in recent years is attributable to lower standards of ripeness for appeal. There is a more particular threat, perhaps, to individual litigants who may be harmed by delay resulting from appeals from orders which are "practically final," but this is a threat that results from any exercise of appellate jurisdiction and must be borne if important rulings are to be supported by the authority of the whole process rather than by the authority of a single judge. Delay is not a universal consequence of interlocutory review; often the appeal can be disposed of before the trial calendar makes its turn. And the motive of delay can often be taken into account on the issue of a requested stay of trial court proceedings.

Finally, there is the insistence of Professor Wright that this development undermines the prestige of the district judge. For me, as I have suggested, this consideration cuts quite the other way; his amenability to review makes the trial judge more respectable and not less. There should be access to the court of appeals to gain timely and effective review of any ruling which is of vital importance to a litigant; review of consequential rulings should be prevented only when there exists a specific urgency for dispatch which overrides the general need to institutionalize the responsibility for important decisions.

II. APPEALS AND THE FACT FINDING PROCESS

It is complained that the courts of appeals are not only intruding more quickly into the work of the trial courts, but also that the scope of review is penetrating more deeply into the process of making particular decisions. The soundness of the general principle that fact finding should be done in the court of first instance can hardly be disputed. It has generally been assumed that the appellate process is deemed to be adequately fulfilled if the reviewing court can be satis-

⁶² Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 319-20 (1966); Wright, *supra* note 4, at 748.

⁶³ See generally Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

fied that the decision is consistent with a valid and applicable general principle of law which can be said to serve as the major premise to the syllogism invoked to form that decision. The general principle or major premise reflects, of course, the varied mix of value judgments about conflicting social policies and procedural practices and is the objective of the deliberative and creative aspect of review.⁶⁴ The reviewing court can perform this role of appraising the legal premise without concern for the accuracy of the trial court's discernment of the particular circumstances to which the general principle is applied. The precise accuracy of the fact-finding may be of the utmost concern to the litigants, but it is of little general concern to others than the parties if an isolated mistake occurs in the judicial re-creation of events in dispute. Since the economics of the process require that the reviewing court not get as close to the evidence as the trial forum, the reviewing court is poorly equipped to know when such an isolated mistake has, in fact, been made. It can only assure that an adequate, valid premise is invoked to sustain the decision.

The distinction between the narrow question of fact and the broad question of law is, however, much less crisp than this verbalization might indicate. Like all useful principles of substance or procedure, it must be fitted to the situations in which it is employed. To paraphrase a doubting remark of Jabez Fox,⁶⁵ findings of fact may be defined as the class of decisions we choose to leave to the trier of fact subject only to limited review, while conclusions of law are the class of decisions which reviewers chose to make for themselves without deference to the judgment of the trial forum. This skepticism about the circularity of the distinction is borne out by many cases involving review of administrative decisions.⁶⁶ The distinction there is especially obscure because the administrative agency has its own role in formulating general federal policy and is therefore entitled to some deference with respect to its conclusions of law.⁶⁷ Some courts, unwilling to recognize this function of the agency, but nevertheless

⁶⁴ Professor Wright seems at times to regard this as the only legitimate role of appellate courts. *E.g.*, Wright, *supra* note 3, at 751.

⁶⁵ Fox, *Law and Fact*, 12 HARV. L. REV. 545, 551 (1899), states:

That part of the case which is left to the jury is fact, as it seems to me, because it is left to the jury; and that part which is decided by the judge is law because he chooses to decide it, and to decide it in such a way that it shall be used as a precedent for future cases.

Compare L. GREEN, *supra* note 2, at 279 and Wright, *supra* note 3, at 770.

⁶⁶ 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.03-.08 (1958).

⁶⁷ See L. JAFFE, *supra* note 34, 546-92.

willing to uphold administrative activity, have been attracted to a subterfuge of characterizing agency decisions as fact-finding even though they seem to express substantive value judgments rather than perceptions of individual circumstance. This muddled use of terminology is unnecessary, and is falling into disuse.⁶⁸ There is an analytical difference between the two types of decisions: the line of distinction represents the point at which reasoned judgment fails to supply an answer to the dispute.⁶⁹ When the reviewer's skills of formulation and application of substantive policy have been expended without producing a solution, there is no alternative but to rely on instinct, and the instinct of the trier of fact serves as well or better than any.⁷⁰

Even the purest findings of fact, however, cannot be entirely immunized from review. Otherwise, the process of decision being what it is, the general principles and the policies they reflect could be quickly subverted by hostile findings. By taking a discolored view of the facts in every case in which a principle is invoked, the trier of fact could frustrate its application. The reviewing court must, therefore, examine the record closely enough to assure that the law is not being flouted.⁷¹ Furthermore, some marginal check on the "unfairness and unskillfulness"⁷² of the judge in conducting the trial ought to be supplied, in the interest of the litigants, and in the public interest in providing them with reasonable satisfaction in the process.

With respect to the problem of review of findings of fact, the principle of balancing the restraint on trial court power against the re-

⁶⁸ *E.g.*, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *cf.* *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904).

⁶⁹ J. LANDIS, *THE ADMINISTRATIVE PROCESS* 146 (1938).

⁷⁰ Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 *HARV. L. REV.* 81, 87 (1960), quoting Jerome Michael, states:

[The court] is supposed to submit an issue to the jury if, as the judges say, the jury can decide reasonably either way. But to say that I can decide an issue of fact reasonably either way is to say, I submit, that I cannot, by the exercise of reason, decide the question. That means that the issue we typically submit to juries is an issue which the jury cannot decide by the exercise of its reason.

The decision of an issue of fact in cases of closely balanced probabilities, therefore, must, in the nature of things, be an emotional rather than a rational act. . . .

⁷¹ *E.g.*, *United States v. Hoxsey Cancer Clinic*, 198 F.2d 273 (5th Cir. 1952). In *Hoxsey*, the district judge refused to enjoin traffic in allegedly misbranded drugs because, he found, some patients were in fact cured of cancer by potassium iodide compounds, there being no competent evidence to that effect.

⁷² R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 3 (1941) (quoting Ulpian).

straint on appellate court extravagance is expressed in several seemingly different "tests". With respect to civil, nonjury cases, Rule 52 of the Federal Rules of Civil Procedure provides that findings of fact shall not be set aside unless "clearly erroneous". When a jury sits, the need for appellate review of findings of fact is less compelling, for several reasons. First, the jury is enthroned too briefly to create a risk that the enforcement of any principle will be impaired by an unwillingness to apply it; if juries in general will not apply a principle, its desuetude is probably in the public interest. In any event, the lawlessness is not associated with the personal despotism of the district judge. The jury has already served as some check on his power, hence the need for review is less. Moreover, inasmuch as the trial judge must instruct the jury and set aside its verdict if he deems it contrary to the weight of the evidence, the judgment resting on a jury verdict comes to the court of appeals with a double imprimatur. Despite these reasons for imposing additional restraints on review, judgments in jury cases are yet reversed if the verdict is found to be without the support of "substantial evidence".⁷³ Supposedly, this is a different and more restrained test than the examination required to determine whether the judge's own findings of fact are clearly erroneous. The more deferential "substantial evidence test" is employed in reviewing criminal convictions, whether or not a jury was present.⁷⁴ And the same test is also used to describe the proper scope of review of administrative findings of fact, with the statutory gloss that review of administrative findings must be based on "the whole record".⁷⁵

The difference amongst these tests is insubstantial. The principle which restrains review is too plastic to be subject to such refinements of language. The scope of review must be shaped to particular factors in each case, such as the value of the substantive principle invoked, the likelihood of a misapplication resulting from stubborn disregard or limited understanding by the trier of fact, and the nature and extent of the evidence on which the findings rest. Also, the scope of review will be responsive to differences in the nature of the forum under review. This rich mix will remain constant in its variation.

⁷³ See Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937).

⁷⁴ *United States v. Tutino*, 269 F.2d 488 (2d Cir. 1959); *Cannon v. United States*, 166 F.2d 85 (5th Cir. 1948). *But cf.* *United States v. Page*, 302 F.2d 81 (9th Cir. 1962) (clear error test applicable to review of findings made on motion to suppress evidence illegally obtained).

⁷⁵ 5 U.S.C. § 706 (Supp. III, 1968).

For these reasons, Leon Green has suggested⁷⁶ that anyone who could distinguish and define findings of fact more precisely would be a public enemy.⁷⁷

Because of the nature of the principles involved, it is very difficult to perceive any trends in their use. Examples prove nothing about trends and a series of evaluations of disputable examples would reveal little more than the biases of the evaluator. Nevertheless, as a regular reader of the Federal Reporter, I am prepared to share the sense of Professor Wright's observation that the sphere of fact-finding is shrinking gradually over quite a long historic curve.

I suspect that findings need not be so erroneous, as once may have been necessary to merit condemnation as "clearly erroneous". And as an observer of federal judicial statistics, I am prepared to concede that this development may have contributed somewhat to the burgeoning of the dockets of the courts of appeals, although this, too, is non-demonstrable.⁷⁸ But even if some congestion is the result, I would find the evolution benign.

I would prefer to justify my evaluation by means of a counter-example which I would expect Professor Wright to approve.⁷⁹ *Commissioner v. Duberstein*⁸⁰ presented two tax disputes to the Supreme Court; both taxpayers were being taxed for income which they preferred to regard as gifts. Duberstein had received a Cadillac from a business associate, who gave it to him, by his own report, as an expression of gratitude for services freely rendered. The Tax Court found the intent of the transfer to be remunerative and deemed the automobile to be taxable income.⁸¹ Taxpayer Stanton, on the other hand, received a "gratuity" of \$20,000 on the occasion of his resignation as president of a subsidiary of Trinity Church, provided that he would make no claim to a pension. A district court found that the \$20,000 was a gift and not taxable as income.⁸² The initial decisions

⁷⁶ L. GREEN, *supra* note 2, at 270-71.

⁷⁷ See also *NLRB v. Southland Mfg. Co.*, 201 F.2d 244 (4th Cir. 1952). For a thoughtful analysis of the terminological differences, see L. JAFFE, *supra* note 34, at 595-618.

⁷⁸ See generally Carrington, *supra* note 63, at 543-49. As observed there, the steady reversal rate coincident to a rising rate of appeal is an ambiguous datum.

⁷⁹ Cf. 2B W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 1132, at 523 n.17.9 (C. Wright ed. 1961).

⁸⁰ 363 U.S. 278 (1960).

⁸¹ *Mose Duberstein*, 17 CCH Tax Ct. Mem. 16 (1958).

⁸² *Stanton v. United States*, 137 F. Supp. 803 (E.D.N.Y. 1955).

in both cases were reversed by courts of appeals⁸³ and the cases were brought to the Supreme Court because of the apparent conflict between these appellate decisions. The Court did conclude that the findings of the trial court in the *Stanton* case were too cryptic to stand; but, otherwise, the findings of both triers of fact should be reinstated, despite the apparent injustice of taxing Duberstein and not Stanton.⁸⁴ Although the Court could offer no plausible distinction between the cases to justify the result, neither could it subscribe to any refinements on the language of the Internal Revenue Code which could be employed to bring the cases into line. The government's effort to provide analytical tests for distinguishing gifts from income was rejected. Despairing of the use of reasoned analysis as a solvent, the Court said:

Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The non-technical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.⁸⁵

On the day that the *Duberstein* decision was rendered, the Court also affirmed a judgment resting on a jury verdict that strike benefits were gifts and not taxable income.⁸⁶ While the trial judge's "experience with the mainsprings of human conduct"⁸⁷ was there fortified by the accumulated experience of twelve jurors, the decision in that case is subject to the criticism that it reflects excessive deference to triers of fact. In none of the cases was there a real conflict in the evidence. All three cases involve the application of a legal standard to events that do not readily fit either of the preformed pigeon holes of gift or income, which must be reshaped to accommodate these sorts of cases. One would suppose that the tax policy of the United States ought to be the primary source of enlightenment in making the accommoda-

⁸³ *Stanton v. United States*, 268 F.2d 727 (2d Cir. 1959); *Duberstein v. Commissioner*, 265 F.2d 28 (6th Cir. 1959).

⁸⁴ 363 U.S. at 293-94.

⁸⁵ *Id.* at 289.

⁸⁶ *United States v. Kaiser*, 363 U.S. 299 (1960).

⁸⁷ *Commissioner v. Duberstein*, 363 U.S. 278, 297 (Frankfurter, J., concurring in part).

tion. It is hard to see how the trier of fact's experience with the "main-springs" of life qualifies him for the clearest insight into the Internal Revenue Code and its purposes. While the approach taken by the Supreme Court succeeds in disposing of the cases, and perhaps reducing the flow of appeals in tax cases where the undisputed evidence is ambivalent, the results represent an important default in fulfilling the role of the appellate process. The resulting situation is one which lends itself to the disheartening analysis that in indistinguishable circumstances, businessmen lose, workingmen win, and churchmen tie, in accordance with the prejudices of dominant judges or jurors.

I find myself fully in agreement with the comment of Erwin Griswold on this trilogy of cases deferring to the wisdom of the trier of fact:

We are advised that this will not "satisfy an academic desire for tidiness," and I concur. I venture the thought that it will not please practical lawyers either, within or without the Government. Should all tax questions simply be submitted to juries for their judgment, representing a sample of the general public? Of course not. Certain questions are appropriate for jury decision. But there are also questions of law; and there are questions of mixed law and fact, where the legal element is the responsibility of the court. To overrate the function of the jury (or other trier of the facts) is to shirk the function of the court, and to fail to administer justice rationally, consistently, and soundly.

Surely some guides and standards could be developed and laid down in cases like these. . . . It is no doubt true that a standard established by the Court as a construction of the statutory provision would not decide every conceivable case that might arise. It is the nature of legal questions that many of them fall between earlier decisions, or very close to the line, and thus require further refinement, or even qualification, of earlier decisions in the field. But that is no reason for not providing guidance which will resolve a large proportion of the cases, and, even more important as a practical matter, will enable administrative officers and counsel advising clients to resolve many of the problems long before they develop into disputes or litigation.⁸⁸

⁸⁸ Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 89-90 (1960).

When a jury is available to make the fact findings, the role of both trial and appellate judges is diminished, but takes on somewhat different aspects. The trial judge has several powers and responsibilities as an overseer of the jury. Professor Wright protests that these powers are increasingly and too frequently being exercised at the appellate level. The measure of my disagreement with Professor Wright is less with respect to this protest because it seems to me that less is at stake.

Perhaps the most important power of the trial judge conducting a jury trial is his power to set aside the verdict if he disagrees with it, and to order a new trial.⁸⁹ As long as he exercises this power affirmatively, he is almost immune from review because the new trial order lacks sufficient finality for review.⁹⁰ Where the power is exercised in the alternative to a judgment notwithstanding the verdict,⁹¹ however, it is possible for such a ruling to come before the court of appeals. In at least one such instance, an order granting a new trial was reversed, despite the protest of Judge Hastie that the reversal usurped the prerogative of the trial judge to exercise unfettered discretion in ordering new trials.⁹² More recently, such an order was reviewed and reversed on the occasion of terminal review following the second trial; the court of appeals ordered the entry of judgment on the basis of the first verdict.⁹³

When the motion for new trial is denied, there is no problem of finality. Contrary to earlier indications, it has become customary for courts of appeals to assert the power to review such orders "for abuse of discretion".⁹⁴ It is nevertheless still very difficult to find a clear case in which a court of appeals has found an order denying a new trial based on the weight of the evidence to be an abuse. More common are cases in which it was made to appear that the trial judge failed to exercise his power after expressing his own disapproval of

⁸⁹ The basis for this power in the federal practice is FED. R. CIV. P. 59(a). See generally Riddell, *New Trial at the Common Law*, 26 YALE L.J. 49 (1916).

⁹⁰ E.g., *Conney v. Erickson*, 317 F.2d 247 (7th Cir. 1963).

⁹¹ FED. R. CIV. P. 50(c).

⁹² *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir. 1960). The result may receive some implicit approval in the language of FED. R. CIV. P. 50(c) ("unless the appellate court has otherwise ordered"), adopted in 1963. See also *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

⁹³ *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967).

⁹⁴ E.g., *Eastern Air Lines v. Union Trust Co.*, 239 F.2d 25, 30 (D.C. Cir. 1956); *Marsh v. Illinois Cent. R.R. Co.*, 175 F.2d 498, 500 (5th Cir. 1949). *Contra*, *United States v. Laub*, 37 U.S. (12 Pet.) 1, 4 (1838).

the verdict in some other way; he may then be directed to exercise his power.⁹⁵

Because more orders denying than granting new trials are subject to review, the operation of a more penetrating scope of review is likely to result in more new trials. Therefore, as Professor Wright suggests, the development of more review of such orders can be regarded as a stricture on the role of the jury. Perhaps, therefore, the development of more penetrating review should be condemned as a violation of the seventh amendment. I find this analysis somewhat overdrawn, however. The development seems benign to the extent that it reflects the general trend toward the regularization of the use of the power of the trial judge. For me, the power of the trial judge to set aside a verdict that he does not like is made more tolerable if he is subject to a measure of review in the exercise of that power. Furthermore, it would seem that this consideration might be permitted to predominate even in the mind of an unqualified enthusiast for jury power.

Perhaps appellate intrusion is less justified in the special situation of the remittitur. It will be recalled that the custom developed in trial courts of using the power to order a new trial as a device for imposing limits on damage recoveries. The form of the judge's decision is a conditional order of new trial: there will be a new trial unless the plaintiff remits part of his recovery.⁹⁶ For reasons that are far from persuasive, the Supreme Court has distinguished the remittitur from the additur and has forbidden district judges to use their power to coerce the defendant to pay a sum larger than that fixed by the jury; the additur is said to violate the seventh amendment.⁹⁷ In recent years, there has been a trend in the courts of appeals, which is no more than an aspect of the trend favoring review of new trial

⁹⁵ *E.g.*, *Hampton v. Magnolia Towing Co.*, 338 F.2d 303 (5th Cir. 1964). There is no explicit authorization in the federal rules for this; but where the new trial order is denied at the same time that a judgment *n.o.v.* is denied, both are reviewed simultaneously. If a new trial should be granted for other reasons, for example, on account of the admission of improper evidence, the court of appeals can, of course, make the proper remand. As to the exercise of judgment about the weight of the evidence, however, the rules say only that "nothing in this rule precludes [the appellate court] from determining that the appellee is entitled to a new trial. . . ." FED. R. CIV. P. 50(d).

⁹⁶ See generally 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1305.1, at 374-76 (C. Wright ed. 1958).

⁹⁷ *Dimick v. Schiedt*, 293 U.S. 474 (1935). The Court relied on the seventh amendment provision that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the common law." U.S. CONST. amend. VII.

orders, which has imposed a second check on excessive verdicts. There are several cases in which courts of appeals have, in effect, conditioned their affirmations on remissions from verdicts by ordering the trial court to grant a new trial conditionally.⁹⁸ On several occasions, the Supreme Court has reviewed such decisions and restored the remitted portions of the verdicts without deciding the question of whether the action of the courts of appeals was within the seventh amendment.⁹⁹ In light of the dubious and one-sided character of the whole process of regulating the size of verdicts, I tend to share Professor Wright's discomfort in the extension of the process to involve the courts of appeals. On the other hand, it is not clear to me that the task of damage formulation must be conducted as whimsically as it is;¹⁰⁰ if the courts of appeals were equipped to provide and enforce some norms about the appropriate compensations, I would not regard it as an offense to the dignity of the trial courts, nor to the essential role of the jury.

Finally, Professor Wright has objected to a perceived increase in appellate concern with the quality of unchallenged judicial instructions to juries. It is hard to know the practical importance of correct instructions to the jury, but their theoretical importance is very great, for the charge is the one assurance that the jury will resolve the dispute by application of law. Generally, the parties should be better informed than the judge about the controlling law, having had much more time to study and reflect upon it; counsel should be equipped to guide the judge by providing him with sound principles to be given to the jury, and by objecting to any unsound ones. Of course, this does not always happen; it is possible for the judge to give bad instructions without objection from either party because of the failure of their understanding. It is often asserted, despite the provision of the federal rules to the contrary,¹⁰¹ that the court of appeals should attempt to correct such situations by remand for new trial only if the error in the instructions is a "plain error", or a

⁹⁸ *E.g.*, *Grunenthal v. Long Island R.R. Co.*, 388 F.2d 480 (2d Cir. 1968); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir. 1967); *Bankers Life & Cas. Co. v. Kirtley*, 307 F.2d 418 (8th Cir. 1962).

⁹⁹ *E.g.*, *Grunenthal v. Long Island R.R. Co.*, 391 U.S. 902 (1968).

¹⁰⁰ *See generally* DeParcq & Wright, *Damages Under the Federal Employers' Liability Act*, 17 OHIO ST. L.J. 430, 466-83 (1956).

¹⁰¹ FED. R. CIV. P. 51: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. . . ."

“fundamental error”.¹⁰² If the courts of appeals are too aggressive in applying this standard, they invite litigants to be smart by playing dumb and encouraging the judge to err in his instructions. Perfection is too much to ask; life, law, and language are too complex and uncertain to expect the trial judge, untutored, to match precisely correct instructions to every case. In light of the negative results attained by the search for perfection, I can agree with Professor Wright that some courts of appeals have overdone it. Especially unrealistic, it seems to me, is a line of cases in the Third Circuit¹⁰³ which have reversed judgments because of fuzziness in the instructions which strike me as minor and not likely to mislead.

CONCLUSION

I am thus able to conclude on an agreeable note by sharing some of Professor Wright's specific conclusions, just as I share his general observation that more issues are coming to be regarded as proper concerns of appellate courts.

I view the various trends adverted to as aspects of a single development of a tighter institutional framework to bind or channel the power of trial judges. This development may be regarded as benign or not, according to one's assumption about the trial judge as an individual. If the basis for one's opinion is an assumption that the trial judge is wise and good, that he is likely to rise above the melee and render a detached and impersonal decision which will accurately reflect the public welfare in the manner that a fully informed public would desire, then the aggressive intrusions of appellate courts can be regarded as usurpations. If the basis for opinion is a contrary assumption that trial judges are equipped with an abundance of human failings, that they are likely to become emotionally involved in their work, and to lack the time, energy, or support to make sound reflective judgments about the application of public policy in disputed situations, then appellate activism can be regarded as benign growth. This does not assume that circuit judges are wiser than district judges; that I very much doubt. But three heads are better than one, and the tempo of the work of appellate courts allows for reflection and instruction that is not available to trial judges.

Of course, it is an oversimplification to portray Professor Wright

¹⁰² 2B W. BARRON & A. HOLTZOFF, *supra* note 79, § 1106, at 473-74.

¹⁰³ *E.g.*, *Ratay v. Lincoln Nat'l Life Ins. Co.*, 378 F.2d 209 (3d Cir. 1967); *Freifield v. Hennessy*, 353 F.2d 97 (3d Cir. 1965); *Mazer v. Lipshutz*, 327 F.2d 42 (3d Cir. 1963).

as an adherent of Plato, or myself as an adherent of Aristotle. One need not choose between trusting individual judges or distrusting them; one can take a position at any point on a long spectrum. And the valuation is complicated by other factors, especially the cost and delay of appellate litigation, whose consequences may be appraised variously.¹⁰⁴ But this very basic value judgment cannot be eliminated from the mix of factors that are to be taken into account in drawing the perimeter of the proper appellate role.

These observations are not made merely for the purpose of supporting the assertion that we have not learned very much that is new about judicial institutions in recent millennia, however true that assertion may be. The conclusion can also be tendered that the problem of defining the proper role of appellate courts will not soon yield to the techniques of modern science. Better data accumulation and retrieval methods do ease the task of assessing the cost and delay of appeals. But we are yet quite a long way from being able to test empirically any of the competing assumptions that may be made about the need for greater institutionalization of decisions at trial. Perhaps the best we can do is to measure the public acceptability of the existing role of appellate courts, or of any proposed changes, but such measurements tend to reflect only a compound ignorance: if none of us has a sound scientific basis for his own assumptions, a survey that compiles these assumptions can be no more scientific than its informational input. While the acceptability of judicial practice is a relevant measure of its success, it cannot serve as a sufficient explanation to the inquiring mind, nor as a terminus of concern for those responsible for the judicial institutions and practices of a rapidly-changing society.

If it is correct to assert that science is not ready with a quick answer to the basic issue that divides Professor Wright's view from my own, it may also be useful to suggest the wisdom of avoiding too strong an attachment to one's own assumptions. Here, I share Professor Wright's willingness to concede the difficulty of maintaining any assertion. After millennia of inconclusive debate, none of us is entitled to be

¹⁰⁴ Thus, Professor Wright asserts the relevance of Chief Justice Ellsworth's dictum that "a man [should] not be permitted to try his case two or three times over." Wright, *supra* note 4, at 748; Wright, *supra* note 3, at 751. All would agree with the dictum; at some point, it surely becomes relevant to the process of converting trial court decisions into issues to be resolved at the appellate level; but I perceive that point to be yet some distance away.

a zealot. On the other hand, decisions must be made; courts must carry on; their practices will evolve and will be changed from time to time. Inevitably, decisions and practices must rest on some shaky assumptions. Decisions will surely be better and practices will be sounder if their creators are mindful of the frail underpinning.