Appellate Issues

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Editor's Note

"All too often, the facts that are important to a sensible decision are missing from the briefs, and indeed from the judicial record" Judge Richard A. Posner wrote in *Reflections on Judging*[1]. "The Appellate Record: Adequate or Not?" is the theme of this *Appellate Issues*.

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It's a theme that's attracting increasing attention. One driver, to be sure, is Judge Posner, both his commentary and his opinions. But his writing is the product of still other, underlying forces prompting consideration of the constraints the record does or does not, should or shouldn't, place on legal analysis.

These underlying pressures are multiple and inter-related. They include the increasing factual complexity of the world from which disputes arise (as Judge Posner observed in *Reflections on Judging*); the fingertip availability of an infinitude of fact, accessible to the parties, the court, and a scrutinizing public as well; the growth of factual information itself and of methods of factual analysis; a greater awareness of appellate decisions and of their potential impact, spurred by the increasing efficiency of Internet communication; and a general pragmatic awareness, arising from people's own endeavors in business and daily life, that decision-making is fact oriented.

What is more, the question of how the record should constrain judicial determinations touches on tensions that lie at the very heart of the judicial system. On the one hand, there's an impulse to restrict the field of view to a closed universe. As a practical matter, everything can't be litigated and re-litigated. Litigation would go nowhere if the resource of accessible evidence and argument remained boundless. Likewise, it would go nowhere if appeals were de novo repetitions of the trial; not only would the initial trial become a mere dress rehearsal but successive trials would be an economic catastrophe. Finality at both the trial and appellate level is achieved only by imposing limits.

In addition, a concern for fairness supports re-

strictions. The adversarial process presumes that the validity of a proposition is affirmed by subjecting it to rebuttal. So there's an expectation that whatever one side raises the other should have a chance to counter. Similarly, there's an expectation that parties should have a chance to respond to adverse matter newly raised by a judge; for what's the source of judicial validity if not the adversarial test? So fairness supports excluding matter if there was no rebuttal opportunity.

On the other hand, there's an abiding impulse to get things right and render a correct, or at least, the best, decision. Inevitably, the interest in getting things right is an incentive for more information, whether it's an undisclosed or newly administered DNA test or sociological and psychological data on whether the death penalty deters.

In addition, apart from inevitable errors that can misdirect a proceeding from what is factually or legally correct, the adversarial process suffers from an inherent defect, which, in turn, finds its cure by enlarging the field of available information. It might be called the "either/or defect."

In essence, the adversarial process strives to cram a multi-dimensional, nuanced world into an either/or dichotomy fueled by self-interest. Yet there's no assurance that any aspect of a case is necessarily as either the plaintiff or the defendant portrays it. The plaintiff can argue A and the defendant can argue B. But reality may well be neither. It could be C. Or it might be something that resembles A but with a bit more of the A-like qualities or of A's verifying supports — AA. C and AA could be points of fact or law. But in either case, since neither was raised, neither would be included in the appellate case — unless there's a way of bringing them in.

The articles in this issue examine such tensions from varying perspectives.

In my contribution, "The Call of the Real," I trace an intellectual line through William James and Oliver Wendell Holmes, Jr., among others, arguing that the still resonate philosophical outlook known as "pragmatism" compels legal reasoning to remain open to non-record legislative facts. I conclude with an analysis of the majority and dissenting opinions in *King v. Burrell*.

Gaëtan Gerville-Réache and Conor B. Dugan, in "Protecting the Record from 'Truthy' Amici Facts: Strategies for Embattled Party Counsel," offer advice on how a party can counter non-record facts raised by opposing amici; in the process, they provide an historical perspective on the use of legislative facts and insightful examples of legislative fact abused.

Devin C. Dolive's and E. Travis Ramey's "Appellate Judicial Notice in a 'Google Earth' World" is a thoroughly researched study of judicial notice at the appellate level. They, too, examine history. They consider current use of the Internet and criticisms leveled against it. They conclude with recommendations to advance the goals of both fairness and correctness.

In "Judges and the Internet: Does the Record Still Matter?" John J. Bursch discusses the growing prevalence of judicial use of the Internet to access non-record facts, concluding with advice for preventing this sua sponte judicial reliance from taking an unfavorable turn.

D. Alicia Hickock discusses knotty, cutting-edge conundurms in her widely researched "As a Matter of Fact … Why Such Controversy Over Legislative Fact-Finding?" Is a lower court bound by a higher court's outcome-determinative finding on a matter of legislative fact? What if the finding is wrong? Or what if the finding becomes wrong in time because both the realm of fact and our understanding of it are in constant flux? And does a legislature's finding take precedence if it's at issue in a constitutional challenge?

Ellie Nieberger's "Judicial Notice of Adjudicative and Nonadjudicative Facts" is a useful, practitioner's overview of judicial notice under Federal Rule of Evidence 201 and related issues, such as appellate review of a trial court's judicial notice.

In "Improved Accuracy through Improved Accuracy: Rule 10(e) and the Record on Appeal," Nancy M. Olson explores making corrections or modifications to the record under Rule of Appellate Procedure 10(e).

"A Tale of Two Records" by Robert S. Shafer and Martin A. Kastin is the story of two cases before two state supreme courts on virtually identical records on parallel theories of liability with over $1 billion at stake. Yet the outcomes and opinions in each are entirely different with one court invoking non-record factual matter to which it lends a particularly disturbing shade.

In "You Fight or You Die: When Bending the Knee at Trial Costs You the Throne," Brian K. Keller relies on his experience as Deputy Director of the Navy's Appellate Division to identify types of cases vulnerable to record inadequacies because of a failure of appellate counsel to participate at the trial court level.

Howard J. Bashman discusses the legal side of an inadequate record: the impulse, if not the judicial obligation, to get a point of law right even though it wasn't argued before the trial court. In the process, "Raising New Issues on Appeal: The Legal Aspect of the Record on Appeal" describes useful circuit court exceptions to the waiver rule.

"Red Tie Guy: a True Story of the Overpowering Influence of Facts Outside the Record" is the issue's coda. Wendy McGuire Coates unearthed this gem from the mine of real life interviews. It's a reminder of the range of influential phenomena that seep through the boundaries of the record and established procedure. It's also a reminder that, for better or worse, both advocacy and judicial decision-making are distinctly human endeavors not easily reducible to a set of formal rules.

To stretch oneself beyond the practiced literary mode of the legal brief is rewarding. You become more limber and adept as a writer. You acquire a deeper understanding of the law. At the same time, it's challenging work. There's no single correct way. You might start without a clear view of where you'll finish. But in the end, the benefit extends to a community of readers and echoes beyond.

I wish to thank each of the contributors for sticking with the task and sharing a piece of their mind.

David J. Perlman, Editor

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[1] Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), 131.