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Considering New Issues on Appeal: The General Rule and the Gorilla Rule*

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THE GENERAL RULE

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."

THE GORILLA RULE

"The matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule."

Singleton v. Wulff, 428 U.S. 106, 121 (1976)

* A well known riddle asks: "Where does an eight-hundred pound gorilla sleep?" The response is: "Anywhere it wants." J. SARNOFF, I KNOW! A RIDDLE BOOK 53 (1976). The judicial application of this rule would be: "When will an appellate court consider a new issue?" The response is: "Any time it wants." For an exception to the original gorilla rule, see *infra* note 137.

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I. INTRODUCTION

One aspect of the appellate process that most bedevils judges and lawyers occurs when a party attempts to raise an issue in the appellate court that it did not present to the trial court. This question creates problems for the following reasons: (1) the general rule against considering new issues on appeal; (2) the perception that it is unfair to the appellant if the new issue is not considered, yet it is unfair to the appellee if the new issue is considered; and (3) the failure or inability of appellate courts to articulate any principled basis for determining when and under what circumstances a new issue will be considered. As a result, it is almost impossible to predict in a particular case whether or not the appellate court will consider a new issue raised by the appellant. This uncertainty reduces the value of being the successful party in the trial court and adds to the already overwhelming caseload of American appellate courts by encouraging appeals. Further, in many appeals, which would have been taken in any event, it can add two issues: whether or not to consider the new issue, as well as the merits of the issue itself.

Legal scholars have paid little attention to the problem, notwithstanding the enormous implications of the decision whether or not to consider new issues on appeal. In fact, the only article on

the subject was published over a half century ago.[1] Since that time, courts increasingly are willing to consider new issues, bringing into question the continued validity of the general rule. The purpose of this Article is to reexamine the general rule against considering new issues on appeal, explore the many exceptions to it, and analyze whether courts should continue to apply the rule. The Article will also examine whether exceptions to the general rule should exist and, if so, which exceptions should be recognized and under what circumstances.

To present the issue clearly, the Article will focus on those issues in a civil case that (1) the appellant[2] knew or should have known about; (2) could have been raised in the trial court but were not raised, only because of the act or omission of the complaining party; (3) may constitute reversible error; (4) are sought to be raised by appellant over the objection of the appellee. With these limitations, other factors such as constitutional requirements applicable only to criminal cases, inability to raise the issue earlier for reasons not attributable to the appellant, new theory to support the judgment, specificity, harmless error, and acquiescence of appellee are beyond the scope of this Article.[3] In essence, this Arti-

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1. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts. I-III), 7 WIS. L. REV. 91, 160 (1932), 8 WIS. L. REV. 147 (1933).

2. In most cases the party seeking to raise a new issue on appeal will be the appellant. An appellee can also seek to raise a new issue, obtain additional relief, or challenge a ruling of the trial court that was not merged into the final judgment or by which the appellee claims to be aggrieved. For reasons of convenience, the term "appellant" as used in this Article applies to any party who seeks to raise a new issue on appeal.

3. In his three-part article, Professor Campbell examined a broader base of cases and divided them into four categories: (1) general exceptions to the rule that new issues are not considered on appeal, *see* Campbell, *supra* note 1, pt. I, 7 WIS. L. REV. at 96; (2) exceptions based upon specific legal theories, *id.* at 100; (3) exceptions based upon the type of case presented, *id.*, pt. II, 7 WIS. L. REV. at 176; and (4) statutory exceptions, *id.*, pt. III, 8 WIS. L. REV. at 147. Because Campbell dealt with a more expansive set of exceptions, many of the specific issues he explored did not involve the question of waiver. Some of these exceptions include questions that are (1) first raised after the case has reached the appellate court; (2) raised to support the judgment; (3) raised without objection by the opposing party, or; (4) raised by the appellate court on its own motion. The decision in Batson v. Kentucky, 106 S. Ct. 1712 (1986), falls under one or more of these latter exceptions. In *Batson* the Supreme Court reconsidered the constitutionality under the equal protection clause of allowing the petitioner to make peremptory challenges to prospective jurors while specifically refusing to base his challenge to the venire on fourteenth amendment grounds, relying instead on sixth amendment arguments. For the debate between members of the Court on this issue, see the concurring opinion of Justice Stevens, *id.* at 1729, and the dissenting opinion of Chief Justice Burger, *id.* at 1731. For a more recent case in which the Court refused to consider the standard of negligence necessary to hold a municipality liable under 28 U.S.C. §1983 for inadequate training of employees because the instruction allegedly construing the correct

cle will consider the question of waiver by the appellant.

II. THE GENERAL RULE

A. *Historical Development and Rationale*

The rule against considering new issues on appeal is as old as appellate review.[4] Appellate review as we know it today originated in the English legal system in proceedings against a jury or judge for a false verdict or a false judgment. A review of a finding of fact leading to a verdict was obtained through an attaint, which involved a new trial before a jury of twenty-four persons. This group of twenty-four reviewed the action of the original jury of twelve, and, if it found that the original jury had rendered a false verdict, the jury could be punished by imprisonment. The jury of twenty-four also could render a new verdict in favor of the party oppressed by the original verdict, but the proceeding was primarily a means of punishing the original jury.

A similar proceeding developed for challenging the actions of the trial judge by accusing the judge of rendering a false judgment. This semi-criminal procedure, which was a new proceeding against the judge personally, evolved into the writ of error, the principal common-law procedure for appellate review of trial court proceedings. Both the title of the writ and its nature were predicated on the concept that its purpose was to determine whether the trial judge had erred. Unlike the appeal in equity proceedings, the writ of error did not provide an opportunity for the higher court to substitute its judgment for that of the trial court with regard to which party should prevail on the merits.

Under the writ of error review procedure the only issues that could be presented to the appellate court were those that had been raised and decided in the trial court. The entire purpose of the proceeding was to test the correctness of the judge's actions. The purpose was not to test whether the proper party had won, but

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standard was not objected to in the trial court, see Springfield v. Kibbe, 107 S. Ct. 1114 (1987). This refusal was over the objection of four members of the Court, including Chief Justice Burger. *See id.* at 116 (O'Connor, J., dissenting).

4. R. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS § 1.1 (1983)[hereinafter R. MARTINEAU, MODERN APPELLATE PRACTICE]; R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 38-71 (1941); C. WARREN, A HISTORY OF THE AMERICAN BAR 39-324 (1911 & reprint 1980); MARTINEAU, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1-11 (1986) [hereinafter Martineau, *The Value of Appellate Oral Argument*]; Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7-12 (1940).

only whether the judge had made an error. Logic and fairness dictated, of course, that the judge could not have committed an error only by doing something he was asked not to do or refusing to do something one of the parties requested.

The division of responsibility between judge and jury and the significance of the record were related factors supporting the restrictive nature of appellate review. A trial judge's authority was limited to questions of law, while the jury served as fact-finder. Because it would be an interference with the right to a jury trial to review a jury's factual determination, the appellate court's authority was limited to legal questions decided by the trial judge. Furthermore, the appellate court could not rule on any question not reflected in the record because the record was the only way to determine the basis of the judge's ruling. At the time, the record consisted only of formal documents filed in court and the official record of the actions of the jury and the judge. Because there was no way to record verbatim what occurred at trial, a procedure developed whereby a party could challenge a court's action that otherwise would not be reflected in the record (e.g., a ruling or an objection to evidence or a request for an instruction). Under this procedure, a party could ask the judge or a third party to record in writing the action or inaction of the judge and the fact that the party took exception to the judge's ruling. This became known as the bill of exceptions and was sent to the appellate court along with the record. In effect, the bill of exceptions was the complaint against the trial judge. Thus, a matter had to be presented to and ruled on by the trial judge before the issue could be raised in the appellate court, both because of the nature of the writ of error procedure and the practicalities of recording the lower court proceeding.[5]

A totally different type of review developed in equity. This procedure was termed an appeal, and the review was de novo. The appellate court could review the entire case, both law and facts, and render any type of judgment it thought justice demanded, without regard to whether the issue upon which the appellate court based its judgment had been presented to the lower court.[6]

American appellate procedure followed the writ of error model

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5. R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 4, § 1.1; R. POUND, *supra* note 4, at 47-60; Martineau, *The Value of Appellate Oral Argument*, *supra* note 4, at 7-10; Sunderland, *supra* note 4, at 7-12.

6. R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 4, § 1.1; Sunderland, *supra* note 4, at 9-10.

rather than the appeal in equity, much to the chagrin of Roscoe Pound and Edison Sunderland, the principal academic commentators on the appellate process during the first half of the twentieth century.[7] To Pound and Sunderland, this meant that appellate review in America focused on a search for error rather than a search for justice, which resulted in an overemphasis on the content of the record.[8] According to Pound, most of the effort to reform the American appellate process in the period between 1900 and World War II was directed at changing the focus from the procedure to the merits (i.e., doing justice between the parties).[9] This trend certainly has continued since that time. The most obvious examples of this effort are statutes authorizing appellate courts to render any judgment that justice dictates.[10]

B. The Modern Justification

The significance of error as the basis for appellate review is almost as strong today as it was in seventeenth-century England, notwithstanding the long-term effort to have the appellate court focus on the correct result rather than correcting error. The effect of history on court procedures, of course, is felt long after the reason for the procedure's development has disappeared.[11] The staying power and current viability of the essential elements of the writ of error procedure suggest, however, that the procedure has a functional basis in addition to an historical premise.

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7. R. POUND, *supra* note 4, at 107-10; Sunderland, *supra* note 4, at 10.

8. R. POUND, *supra* note 4, at 318-20; Sunderland, *supra* note 4, at 10-12.

9. R. POUND, *supra* note 4, at 374-76.

10. *See, e.g.*, 28 U.S.C. § 2106 (1982) ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . as may be just under the circumstances."); CAL. CIV. PROC. CODE § 909 (West Supp. 1987) ("The reviewing court may . . . for any . . . purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require."); LA. CODE CIV. PROC. ANN. art. 2164 (West 1961) ("The appellate court shall render any judgment which is just, legal, and proper upon the record of appeal."); N.Y. CIV. PRAC. L. & R. § 5522(a) (McKinney Supp. 1987) ("A court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment. . . ."). For a description of how the New York statute is used to permit the entry of any judgment or order the appellate court thinks is in the interest of justice, see Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 473-75 (1975).

11. For a discussion of the effort to retain fact pleading in some types of cases such as civil rights suits and prisoner petitions, see C. WRIGHT, THE LAW OF FEDERAL COURTS 446-47 (4th ed. 1983). The equity system of law still has a strong effect, particularly in the area of remedies. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 65-68 (1973).

In *Pfeifer v. Jones & Laughlin Steel Corp.*[12] Judge Ruggero Aldisert of the Court of Appeals for the Third Circuit stated succinctly the rationale for the general rule in modern appellate practice. The major question in *Pfeifer* was the proper method of measuring damages involving future lost wages. The appellant argued that the trial court had applied the Pennsylvania state court's formula rather than the federal standard.[13] The Third Circuit held that the appellant had not preserved properly the issue of whether the trial court had applied the state rather than the federal rule, and was limited to arguing the proper elements of damages under the federal rule. The court stated that in order to establish reversible error, the appellant must identify the error to the trial court and suggest a legally appropriate course of action.[14] The court observed that the reasons for this requirement

> go to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review.[15]

The court pointed out that the philosophy behind the requirement is embodied in Federal Rule of Civil Procedure 46, which requires that a party make known to the trial court the action it requests or opposes and give the reasons therefore.[16]

While recognizing the common-law tradition behind the general rule, this approach justifies the rule against considering new issues on appeal in terms of "correction and avoidance"[17] by either the adversary or the trial court. The rationale is that if the party who objects to the trial court's action is forced to state its objection and to offer an alternative, the adversary or the trial court or both can decide whether to agree with the objecting party, offer a third alternative, or set out in the record the factual or legal basis for the trial court's action. If the adversary or the court accepts the objecting party's proposal, there is no error insofar as that party is concerned and thus no basis for appeal. If the adversary or the trial court follows a course of action that differs both from the action originally objected to and the objecting party's alternative

12. 678 F.2d 453, 456 (3d Cir. 1982), *vacated and remanded*, 462 U.S. 523 (1983).
13. *Pfeifer*, 678 F.2d at 456-57.
14. *Id.* at 457 n.1.
15. *Id.*
16. *Id.*
17. *Id.*

proposal, the objecting party may be satisfied and once again not pursue an appeal. If the trial court proceeds as originally planned notwithstanding the objection, both the adversary and the trial court can ensure that the record supports the factual and legal basis for the action, thus making it easier for the adversary to defend the action on appeal and less likely that the appellate court will find the trial court's action reversible error.

The validity of this approach should be examined from the viewpoints of the private and public interests involved in the court proceeding. The private interests are those of the litigants in the particular case. From the perspective of the party who is affected adversely by the trial court action, common sense dictates that the party should be compelled to "speak up now or forever hold your peace" if the party realizes or should realize at the time the action is taken that the effect will be adverse to its interests. In various legal contexts, this principle is characterized as waiver, clean hands, and invited error. At the heart of these doctrines is the essential point that a person should not benefit from his own inaction or, stated obversely, a person has an obligation to assert his rights at the first opportunity or within a specified time. The various rules of procedure that require a matter to be raised in a particular document,[18] by a particular time,[19] or in a particular way,[20] with the failure to do so resulting in a forfeiture of the right or claim are merely expressions of the same principle. Implicit in the general rule against considering new issues on appeal is the recognition that courts must come to a conclusion if they are to perform their function of resolving disputes; but to reach conclusions, courts must enforce rules of procedure.[21] It is not unreasonable to

18. For example, under Federal Rule of Civil Procedure 12(a), if a party makes a motion but omits certain defenses or objections that can be raised by motion, the defenses or objections are waived. FED. R. CIV. P. 12(a).

19. Under Rule 12(a) certain defenses must be raised in the first responsive pleading or in a motion filed prior to the responsive pleading. *Id.*

20. The Federal Rules of Civil Procedure outline many steps that must be taken, including service of process, FED. R. CIV. P. 4 & 5; adding third parties to suit, *id.* 14(a); joinder of parties, *id.* 19(a); dropping or adding parties, *id.* 21; initiating class actions, *id.* 23; intervention, *id.* 24(c); use of depositions in court, *id.* 32(a).

21. In United States v. Seigel, 168 F.2d 143 (D.C. Cir. 1948), the Court of Appeals for the District of Columbia recognized this principle, stating:

> Rules of procedure . . . are not mere naked technicalities . . . . [R]easonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice. Justice cannot be administered in chaos. . . . If the courts must stop to inquire where substantial justice on the merits lies every time a litigant refuses to abide [by] the reasonable and known rules of procedure, there will be no administration of justice.

Id. at 146 (footnote omitted).

expect that persons who avail themselves of a forum should follow that forum's rules of procedure, and not be heard to complain about an adverse effect from their failure to do so.

From the viewpoint of the adversary whose interests are advanced by the trial court's action, requiring the objecting party to speak up at the time the action occurs is not only highly desirable but a matter of simple fairness. If the adverse party is aware of the objection the party can, as Judge Aldisert has pointed out, urge that the action not be taken, an alternative be adopted, or make as complete a record as possible to support the action.[22] If no objection is made, the adverse party may think that the other party agrees with the action or for tactical reasons decides not to raise an objection. In either case the adverse party may fail to develop a record that would support the action taken or forgo taking some step that would avoid the alleged error. The failure to object is particularly important with regard to the development of the record. The party seeking to have the trial court act is unlikely to attempt to put the basis for the request in the record when there is no objection from the other party. That is just "gilding the lily" insofar as the trial court proceedings are concerned. Competent trial counsel always are conscious of the hazards of trying to prove that which does not have to be proven and of appearing to waste the court's time in so doing.

The public interests to consider include those of the trial and appellate courts and other present and future litigants who look to the courts to resolve disputes. It is difficult to see any positive effect on the trial court other than the time saved initially when no objection is made. Three results can flow from considering a new issue on appeal. First, the appellate court will consider the new issue to be reversible error requiring either the entry of a new judgment or, more likely, further proceedings in the trial court. Second, the appellate court will not find reversible error, in which case the trial court's original judgment will stand (unless some other reversible error is found). Third, the appellate court will find reversible error not only on the new issue but on some other properly preserved issue that requires further proceedings in the trial court. From the viewpoint of the trial court, the effect of considering the new issue may be neutral at best, requiring no additional time on its part. At worst the new issue may require substantial additional proceedings in the trial court and possibly a new trial,

22. *Pfeifer*, 678 F.2d at 457 n.1.

which is the most likely result of reversible error. Furthermore, the appellate court is unlikely to consider the new issue unless the court perceives some likelihood that reversible error exists.[23]

Invariably, there is a negative effect on the appellate court when new issues are raised on appeal. Each time an appellant asks the appellate court to consider an issue not raised in the trial court, the appellate court must devote time to deciding whether to consider the issue and, if it decides to do so, must then spend additional time examining its merits. Inevitably, the more an appellate court is willing to consider new issues, the more likely it is that additional appeals will be taken. A losing party who will not appeal if the party knows that the appellate court will not consider new issues may do so if it thinks that the appellate court may consider the issue. The same principle applies in a case in which other issues are properly preserved on appeal. The losing party may decide to raise an issue overlooked in the trial court just in case the other issues are found to be without merit. The work of the appellate court is increased in either instance.

Litigants in other present and future cases necessarily are affected whenever an appellate court devotes time to a new issue or a trial court is compelled to spend time on a case that has been reversed and remanded by the appellate court as a result of considering the new issue. Any additional time spent on one case necessarily delays the consideration of cases involving other litigants. The only advantage to other litigants occurs if they also seek to raise a new issue in the appellate court.

In *Dilliplaine v. Lehigh Valley Trust Co.*[24] the Pennsylvania Supreme Court analyzed the reasons for the enforcement of the general rule against considering new issues on appeals. In *Dilliplaine* the appellant attempted to challenge an instruction given by the trial court even though the appellant had neither requested a different instruction nor objected when the instruction was given.[25] The appellant argued that the appellate court should ignore the general rule because the giving of the instruction by the trial court was plain or fundamental error.[26] The court acknowledged previously allowing new issues to be raised under the plain

23. For an analysis of the application of the requirement that reversible error be found, see *infra* text accompanying notes 62-63.

24. 457 Pa. 255, 322 A.2d 114 (1974).

25. *Id.* at 256 & n.3, 260, 322 A.2d at 115 & n.3, 117.

26. *Id.* at 256, 322 A.2d at 115.

or fundamental error exception to the general rule.[27] In eliminating the exception, however, the court pointed to the exception's harmful effects on both the trial and appellate processes.[28] The court's analysis, which examined the effects on the adversary, the trial and appellate courts, and other litigants, is similar to that outlined in the preceding paragraphs.[29] The court also criticized the practice of allowing exceptions to the general rule. In looking at its own experience with the plain and fundamental error exception, the court concluded that another major weakness of the exception was its ad hoc nature.[30] Despite the court's repeated use of the exception, the court indicated:

> [T]he theory [of the exception] has never developed into a principled test, but has remained essentially a vehicle for reversal when the predilections of a majority of an appellate court are offended.*** The theory has been formulated in terms of what a particular majority of an appellate court considers basic or fundamental. Such a test is unworkable when neither the test itself nor the case law applying it develop a predictable, neutrally-applied standard.[31]

This statement, remarkable in its candor, acknowledges that appellate courts ignore a basic requirement of the appellate process when they make exceptions to procedural rules for reasons they describe as "plain," "basic," "fundamental error," or "in the interests of justice." Appellate judges must recognize that they cannot render decisions that apply only to the facts of one case. Precedent and stare decisis are essential features of a common-law system. Appellate courts undercut the entire system when they ignore the precedential value of cases. Judge Albert Tate, Jr. made this point in the following terms:

> The result that seems "just" for the present case must be a principled one that will afford just results in similar conflicts of interest. . . . [A] judge has an initial human concern that the litigants receive common-sense justice, but he also realizes that the discipline of legal doctrine governs his determination of the cause.[32]

When courts deviate from this principle, they inject a degree of uncertainty into the law that is inimical to the system of justice, weakening the predictability that is such an important part of any

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27. *Id.* at 257, 258, 260, 322 A.2d at 116-17. For a further discussion of the plain, basic, or fundamental error exception, see *infra* text accompanying notes 107-33.

28. *Id.* at 257-58, 259, 322 A.2d at 116-17.

29. *Id.* at 257-59, 322 A.2d at 116-17; *see supra* notes 21-24 and accompanying text.

30. *Id.* at 259, 322 A.2d at 117.

31. *Id.* at 259, 322 A.2d at 116-17 (footnote omitted).

32. Tate, *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIGATION, Winter 1978, at 11.

system of appellate review. Without predictability, the appellate process becomes little more than an exercise by which the appellant attempts to persuade the appellate court that the result reached by the trial court was not the "right" result.[33] This system of appellate review makes every appeal a de novo proceeding in which the parties try the issue on the merits. Such an unpredictable system is inconsistent with the premises of appellate review in this country.[34] To act in some cases as though it were consistent is to change the premises of the system on an ad hoc basis with no clearly established criteria for doing so.

III. Exceptions to the General Rule

A. Criteria

A court usually does not give a rationale when it decides whether to consider a new issue on appeal in contravention of the general rule. Instead, the court merely cites the general rule if it refuses to consider the new issue.[35] If the court chooses to consider the issue, it points to some earlier case in which the same type of issue was considered for the first time on appeal and then proceeds to decide the issue.[36] On a few occasions, however, courts have

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33. For a criticism of appellate courts seeking the "right" result see Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779-82 (1957).

34. For a discussion of Judge Aldisert's analysis of the requirements of the common law adversary system, see *supra* notes 13-18 and accompanying text.

35. *See, e.g.*, Ryan v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 644, 650 (D.C. Cir. 1983) (failure of appellant to raise issue of individual versus class taxpayer status in Freedom of Information Act proceeding warranted nonconsideration by court); Evans v. Valley W. Shopping Center, 567 F.2d 358, 361 (9th Cir. 1978) (per curiam) (no reason to consider issues not raised below); Cannon v. United States Acoustics Corp., 532 F.2d 1118, 1119 (7th Cir. 1976) (per curiam) (even if claims meritorious they cannot be urged on appeal when not presented below); Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1280 (Alaska 1985) (court refused to consider effect of oral contract when presented for the first time on appeal); Santa Fe Nat'l Bank v. Galt, 94 N.M. 111, 113, 607 P.2d 649, 651 (N.M. Ct. App.) (possibility that venue was fraudulently established would not be considered by court of appeals when not raised below), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1979); Farmers State Bank v. Thompson, 372 N.W.2d 862, 865 n.3 (N.D. 1985) (court refused to consider theories of waiver or estoppel not "directly raised at the trial level").

36. *See, e.g.*, Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513, 515 (2d Cir. 1982) (per curiam) (five cases from various circuits cited as authority for appellate consideration of new issues if additional facts not required, or pure legal issue involved; unjust enrichment issue considered when only argument for imposition of constructive trust raised below); Ricard v. Birch, 529 F.2d 214, 216 (4th Cir. 1975) (application of tolling statute could be raised for first time on appeal as exception to rule of nonreviewability); Burns v. State Compensation Ins. Fund, 265 Cal. App. 2d 98, 105-06, 71 Cal. Rptr. 326, 330 (1968) (court cited three prior decisions as precedent for permitting new issues of law to be raised first on appeal); Cronin v. Lindberg, 66 Ill. 2d 47, 61, 360 N.E.2d 360, 366 (1976) (citing two

identified certain previously developed criteria for allowing exceptions to the general rule and have attempted to determine whether the new issue satisfies these criteria. In *United States v. Krynicki*,[37] for example, the First Circuit listed the following factors as determinative: (1) is the issue purely legal, not requiring the introduction of additional facts?; (2) is the proper resolution of the issue beyond doubt?; (3) is the issue certain to arise in other cases?; and (4) will declining to consider the issue result in a miscarriage of justice?[38] These criteria are helpful in analyzing individual exceptions to the general rule because they can be examined in light of the various interests affected by the general rule.

The first criterion creates an exception for purely legal issues that do not require the development of additional facts. The issue considered in *Krynicki* is typical. The court was asked in that case to decide an issue of statutory construction—does the Speedy Trial Act require an indictment within thirty days of the initial arrest, even though the charges stemming from that arrest are no longer pending? The trial court dismissed the indictment because it was not made within thirty days of the original arrest. On appeal the government argued for the first time that the original charges still had to be pending when the indictment was handed down for the thirty-day period to apply.[39] The Court of Appeals for the First Circuit concluded that the appellee would not have been able to introduce any facts bearing on the question at trial because its resolution was dependent solely on the language of the statute and its legislative history. Thus, the court's consideration of the issue for the first time on appeal did not prejudice the appellee.[40]

Courts have characterized many issues as purely legal, thus allowing them to be raised for the first time on appeal. These issues include questions of the applicability of a constitutional provision,[41] statute,[42] or legal doctrine[43] concededly or arguably applica-

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prior decisions that allowed exceptions based on public importance of legal issues to be raised on appeal); People *ex rel.* Sterba v. Blaser, 33 Ill. App. 3d 1, 10-11, 337 N.E.2d 410, 416 (1975) (court referred to one prior holding to support new legal issue being raised when all pertinent facts were before the court).

37. 689 F.2d 289 (1st Cir. 1982). *Krynicki* involved a criminal case on appeal by the government. In its analysis, the court cited almost exclusively to civil cases as authority, thus extending its reasoning to criminal as well as civil cases.

38. *Id.* at 291-92.

39. *Id.* at 291.

40. *Id.*

41. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 535-37 (1962) (failure to question absence of article III judge below does not waive issue); Federal Election Comm'n v. Lance, 635 F.2d 1132, 1136 (5th Cir.) (en banc) (facial challenge to constitutionality of Federal

ble but not mentioned in the lower court. According to the *Krynicki* court, the assumption behind this exception is that facts are irrelevant to the resolution of the question or all of the relevant facts are in the record.[44] This being true, the courts reason that the opposing party would not have introduced any additional evidence

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Corrupt Practices Act could be raised for first time on appeal when facts fully developed), *cert. denied*, 453 U.S. 917 (1981); McDonald v. Illinois, 557 F.2d 596, 601 (7th Cir.) (failure of state's counsel to raise eleventh amendment immunity below does not waive issue), *cert. denied*, 434 U.S. 966 (1977); Richins v. Industrial Constr., Inc., 502 F.2d 1051, 1056 (10th Cir. 1974) (eleventh amendment immunity issue may be raised for first time on appeal); Town of S. Tucson v. Board of Supervisors, 52 Ariz. 575, 583, 84 P.2d 581, 584 (1938) (constitutionality of state statute of public importance and not requiring further facts may be considered on appeal); City of Fort Smith v. Housing Auth. of Fort Smith, 256 Ark. 254, 255-57, 506 S.W.2d 534, 535-36 (1974) (due to the public interest in constitutionality of Housing Authority Act provisions, appellate court addressed issue of constitutionality of amendment to Act even though not raised below); Claremont Improvement Club, Inc. v. Buckingham, 89 Cal. App. 2d 32, 33, 200 P.2d 47, 48 (1948) (appellate court allowed defendant to raise new issue of unconstitutionality of restrictive covenant). *But see* Granada Wines, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, 748 F.2d 42, 44 (1st Cir. 1984) (constitutional challenge to Multiemployer Pension Plan Amendments Act could not be raised for first time on appeal).

42. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 553-54 (1969) (in interest of judicial economy, applicability of Voting Rights Act provision not precluded from consideration by failure to raise issue below where all facts undisputed); Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 693-94 (9th Cir. 1980) (where issue purely one of law and not affected by factual record below appellate court has discretion to consider for first time application of correct state statute concerning attorney's fees); Higginbotham v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976) (new argument based on state wrongful death statute considered on appeal where purely legal question raised and post-oral argument briefs submitted); Smith v. Pasqualetto, 246 F.2d 765, 767-68 (1st Cir. 1957) (where relevant "Sunday statute" overlooked below, consideration on appeal imposed no substantial injustice upon parties if costs of appeal imposed on appellant); Redevelopment Agency of Berkeley v. City of Berkeley, 80 Cal. App. 3d 158, 166-67, 143 Cal. Rptr. 633, 638 (1978) (validity of ordinance may be considered for first time on appeal where issue only matter of law); No Oil, Inc. v. Occidental Petroleum Corp., 50 Cal. App. 3d 8, 25-26, 123 Cal. Rptr. 589, 602 (1975) (validity of drilling ordinances would be considered for first time on appeal because of public interest implicated); Cordes v. Hoffman, 19 Wis. 2d 236, 120 N.W.2d 137 (1963) (discretionary review of statute's applicability granted to enhance prospective application).

43. *See, e.g.*, Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (purely legal issue of federal abstention may be raised for first time on appeal); National Advertising Co. v. City of Rolling Meadows, 789 F.2d 571, 574-75 (7th Cir. 1986) (case disposed of on new legal issue to avoid deciding constitutional issue); Chicago, B. & Q. R.R. v. City of N. Kan. City, 276 F.2d 932, 939 (8th Cir. 1960) (public policy underlying abstention doctrine merits appellate consideration despite failure to raise issue below); Ward v. Taggart, 51 Cal. 2d 736, 742, 336 P.2d 534, 537-38 (1959) (en banc) (court considered restitution as theory of recovery on appeal due to state's public policy); Zinn v. Ex-Cell-O Corp., 148 Cal. App. 2d 56, 82-83, 306 P.2d 1017, 1034 (1957) (court permitted application of conflict of laws doctrine for first time on appeal); Diversified Computer Serv., Inc. v. Town of York, 104 Ill. App. 3d 852, 854-55, 433 N.E.2d 726, 728-29 (1982) (in order to "achieve a just result or maintain a uniform body of precedent," court considered new issue of township's authority to enter into contract).

44. 689 F.2d at 291.

had the issue been raised in the trial court, and thus the opposing party is not prejudiced when the new issue is considered on appeal.[45]

This series of assumptions is of questionable validity.[46] To suggest that an appellate court can look at the record and conclude that no additional, relevant evidence could have been introduced on a completely new legal issue had the parties known it would be decisive in the case simply flies in the face of what we know about the trial process. No case is tried so completely and competently that an appellate court can confidently say that the trial would have gone exactly the same way if a new, determinative, legal issue had been raised in the trial court. The presumption should be to the contrary. It does not require a great deal of imagination to predict the reaction of the trial judge who questions the relevance of evidence sought to be introduced that may not be relevant to any issue before the trial court, but may be relevant to a new issue that the opposing party may decide to raise in the appellate court.

Royal Indemnity Co. v. Blakely[47] is one of the few cases in which an appellate court has given a thoughtful response to an appellant's attempt to raise a new, purely legal, issue on appeal. In *Blakely* the Massachusetts Supreme Judicial Court refused to consider the question of the applicability of a statute requiring uninsured motorist coverage to the limitations on coverage in an insur-

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45. *See, e.g.*, Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976). "[T]he new theory raises a purely legal question. No facts could have been developed to aid our resolution of the issue .... Under these circumstances, we believe it would be unjust now to refuse to consider the new argument." *Id.* at 768 n.10. The Supreme Court of California stated: "[W]hen as here the facts with reference to the contention newly made on appeal appear to be undisputed and that probably no different showing could be made on a new trial it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly." Panopulos v. Maderis, 47 Cal. 2d 337, 341, 303 P.2d 738, 740 (1956).

46. Anyone who has been subjected to the vagaries and uncertainties of trial knows that tactical decisions must be made at innumerable points during trial preparation and the trial itself. These decisions include whether to seek out a witness, conduct an experiment, hire an expert, conduct a deposition, ask an interrogatory, call a witness, ask a witness a question, conduct a line of cross-examination, make an objection, make a motion, request an extension or a continuance, and the like. The decision whether to pursue a particular trial tactic is made frequently on the spur of the moment without time for full reflection. In addition, these decisions usually are made on the basis of the issues raised in the pleadings, motions, and objections that are developed during the course of the proceedings. Courts and attorneys spend a great deal of time on pretrial conferences and pretrial orders in order to narrow the issues, which reduces the amount of evidence that must be compiled and shortens the length of the trial. It is questionable whether any trial record adequately reflects these tactical decisions.

47. 372 Mass. 86, 360 N.E.2d 864 (1977).

ance policy. The appellee argued that it would be prejudiced by the new issue because it had no opportunity to produce evidence on the legality of the limitations. The appellee did not state explicitly, however, what kind of evidence it would have offered on the issue. The court suggested that evidence could have been introduced on the interpretation of the statute by the administering state agency. The court pointed out that courts often look to administrative statutory interpretations in construing a statute.

Forcing the appellee to show prejudice from consideration of a new issue places the appellee in an almost impossible position because it asks the appellee to speculate on what might have been different had the issue been raised in the trial court. The appellee cannot state with any confidence what might have been different and thus cannot be certain how it would have benefited had it been aware of the issue in the trial court. By allowing the issue to be raised for the first time on appeal, appellate courts ignore the most obvious prejudice to the appellee: the taking away of a judgment in the appellee's favor. Defeat rather than victory is the ultimate prejudice. The response to this reasoning is that the appellee is losing nothing to which it is entitled because the result would have been adverse to the appellee anyway had the issue been raised in the trial court. This argument is faulty, however, in its assumption that the appellate court is able to know where justice lies between the parties in some absolute sense and can ensure that the "right" party prevails by considering a new issue.[48]

The reality of the judicial process renders this assumption untenable. What an appellate court knows about a case, particularly regarding the equities between the parties, is limited to what is shown in the record.[49] The record in turn is limited to the trial court proceedings, which are a function of the pleadings, the abilities of counsel, the rulings of the trial court, the availability of witnesses and other evidence, the identity of the trial judge, the composition of the jury, the rules of evidence, the rules of procedure, and the substantive laws of the jurisdiction. No one would argue that the system is a system of perfect justice. In the words of Justice Holmes, the best that appellate judges can do is to ensure that the game is played by the rules.[50] Yet an appellate court ignores a

48. *See* Wright, *supra* note 33, at 781.

49. *See* R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 4, § 8.3 (emphasizing that the appellate court's operating principle is "if it is not shown in the record, it did not happen").

50. L. HAND, THE SPIRIT OF LIBERTY 306-07 (I. Dilliard 3d ed. 1960).

rule long considered basic to the adversary process in an effort to come to the "right" result when it decides a case on a legal issue not raised in the trial court.[51]

Considering a new legal issue on appeal unless the appellee can show prejudice also ignores the practicalities of appellate practice. In the usual case the appellant will raise the new issue in its initial brief. Consequently, the appellee will learn of the new issue for the first time when it receives the appellant's brief. The appellee has thirty days at most in which to file its own brief in which the appellee must address those issues raised by the appellant that were considered in the trial court, the question of whether the new issue should be considered by the appellate court, and the merits of that issue. The appellee also must address whether considering the new issue is permitted under any exception to the general rule. If consideration is permitted, the appellee must attempt to show prejudice. Thus, the appellee has but a few short days in which to develop theories and arguments and conduct research on an issue that it otherwise would have had months or years to develop had the issue been raised in the trial court. Clearly, this is procedural prejudice. Yet appellate courts again and again consider new legal issues with a mere recitation of the rubric that the new issue is purely legal, no new facts are required to decide the issue, and the appellee has not shown that it will be prejudiced if the new issue is considered.[52]

When appellate courts follow this course of action they either do not understand, or chose to ignore, the implication of their actions. When the "purely legal" criterion is measured against the

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51. *See* United States v. Seigel, 168 F.2d 143, 146 (D.C. Cir. 1948) (holding that one who is not a party to the record is not entitled to appeal in the case).

52. *In re* Howell, 731 F.2d 624, 627 (9th Cir.) (constitutionality of California Sales and Use Tax a question of law and where facts stipulated or fully developed, may be considered first time on appeal), *cert. denied*, 469 U.S. 933 (1984); *see, e.g.*, Pegues v. Morehouse Parish School Bd., 706 F.2d 735, 738 (5th Cir. 1983) (law of the case and res judicata doctrines are purely legal; considered on appeal because no prejudice to defendants); Alaska Chapter, Assoc. Gen. Contractors, Inc. v. Pierce, 694 F.2d 1162, 1165 (9th Cir. 1982) (argument that HUD regulation not authorized by Indian Self-Determination Act and involves only questions of law may be considered on appeal); Panopulos v. Maderis, 47 Cal. 2d 337, 341, 303 P.2d 738, 741 (1956) (when facts are undisputed, court allowed new legal issue to be raised); California School Employees Ass'n v. Sunnyvale Elementary School Dist., 30 Cal. App. 3d 46, 56-57, 111 Cal. Rptr. 433, 439 (1974) (court considered appellant's new argument that management of part of school system had been illegally transferred); Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 24 Cal. App. 3d 35, 43, 100 Cal. Rptr. 791, 797 (1972) (court permitted new argument based on provision of California Labor Act when all pertinent facts were before the court), *aff'd*, 414 U.S. 117 (1973).

modern rationale for the general rule,[53] a conclusory statement that the issue is purely legal and its resolution would not require the development of additional facts ignores the likelihood that both the appellee and the trial court would have had other options in addition to the opportunity to develop fully a record to support the action. These options include the decision not to take the action in question or take some other action to avoid the objection. Of course, these options are not available if the objection is not raised until the case reaches the appellate court.

The second criterion listed in *Krynicki* for considering a new issue on appeal is that the proper resolution of the question must be beyond doubt.[54] The *Krynicki* court found that "preliminary examination of this legal issue by the trial court would not benefit either the court or the parties appreciably" because the government's argument was so compelling.[55] This reasoning ignores both the assistance to the appellate court of having statutes or other legal principles first construed by the trial court where its effects are felt directly, as well as the opportunity for the opposing party or the trial court to take some alternative action or no action to avoid the alleged error. Presumably, the likelihood that the trial court would have persisted in its course of action after the error was pointed out is highly unlikely if the action taken by the trial court was so clearly an error. This criterion essentially is characterized as the plain, basic, or fundamental error exception.[56]

The third criterion does not relate so much to the issue's impact on the case in which it is raised but its impact on future cases. In *Krynicki* the court held that declining to reach the issue "will neither promote judicial economy, nor aid in the administration of the criminal justice system" because the issue was certain to arise in other cases.[57] This is a strange reason to consider an issue in a particular case as an exception to the general rule. The only other type of case in which the courts hear an issue not properly before the court on the ground that the issue is certain to arise in future cases is when the mootness of the case otherwise would prevent its consideration.[58] The justification for the mootness exception is

53. *See supra* notes 12-34 and accompanying text.

54. United States v. Krynicki, 689 F.2d 289, 292 (1st Cir. 1982).

55. *Id.*

56. *See infra* notes 107-33 and accompanying text.

57. *Id.*

58. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546-47 (1976) (case not moot when issue, if not addressed, will evade review, yet be capable of repetition); Weinstein v.

closely akin to the doctrine of necessity. Considering an issue in a moot case is the only way the issue will be considered.[59] This crucial factor, however, is not present when the only reason the issue is not properly before the appellate court is because the issue was not presented to the trial court. In fact, the assumption is just the opposite. There is every likelihood that the issue will be raised properly in future cases; thus, the court will be able to rule on the issue without making an exception to the general rule. The court can state its views on the issue in the present case without making an exception to the general rule if the court wishes to do so. A common procedure is for the court to decide expressly that the issue is not properly before the court but to state what its position will be in future cases. While pure dictum is not binding in future cases, such a statement provides guidance to attorneys and lower courts. This practice is followed most often when the court wishes to take the opportunity to indicate that it finds no merit to the issue being raised.[60]

The *Krynicki* court identified the last criterion—causing a miscarriage of justice—as the most important.[61] In the *Krynicki* opinion and other cases that follow the same approach, the phrase "miscarriage of justice" is not defined.[62] What the courts appar-

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Bradford, 423 U.S. 147, 149 (1975) (per curiam) ("capable of repetition, yet evading review" doctrine limited to instances in which challenged action is too short-lived to be fully litigated and reasonable expectation that same party would be subjected to same action again).

59. *Stuart*, 427 U.S. at 546. "Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies. The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Id.* (citations omitted).

60. *See, e.g.*, Lee v. Hodges, 321 F.2d 480, 484 n.6 (4th Cir. 1963) (after rejecting appellant's argument for federal abstention on the merits, issue then rejected because not raised below); Royal Indem. Co. v. Blakely, 372 Mass. 86, 88, 360 N.E.2d 864, 866 (1977) (new issue held not properly before court because not raised below, but still considered because applicable to other cases, and result not changed by consideration of new point); *cf.* Richerson v. Jones, 572 F.2d 89 (3d Cir. 1978) (although decision reversed on other grounds, exhaustion of administrative remedy argument considered because of policy interests of fairness to pro se litigants); Campbell, *supra* note 1, pt. I, 7 WIS. L. REV. at 100.

61. *Krynicki*, 689 F.2d at 292.

62. *Id.*; *see also* Hormel v. Helvering, 312 U.S. 552, 558 (1941) (appellate court properly considered issue of whether trust income taxable as gross income when plain miscarriage of justice would otherwise result); *The Barge Shamrock*, 635 F.2d 1108, 1111 (4th Cir. 1980) (use of wrong accrual date in applying statute of limitations would be "denial of fundamental justice"), *cert. denied*, 454 U.S. 830 (1981); Martinez v. Mathews, 544 F.2d 1233, 1237 (5th Cir. 1976) (refusal to consider migrant workers' theory of entitlement to majority representation on health board would result in miscarriage of justice); Freifield v. Hennessy, 353 F.2d 97, 99 (3d Cir. 1965) (failure to object to erroneous jury instructions resulted in "miscarriage of justice" which must be corrected); Fee, Parker & Lloyd, P.A. v. Sullivan, 379

ently mean is that the issue would have resulted in reversible error if it had been properly raised; failure to consider the issue will cause the affirmance of a judgment infected by reversible error; to affirm such a judgment would be a miscarriage of justice; to avoid a miscarriage of justice the court will consider the new issue.

The logic of this reasoning has the virtue of simplicity to recommend it, but little else. Under this reasoning, an appellate court should allow *any* reversible error to be raised as an exception to the general rule because a miscarriage of justice will result if any reversible error is ignored. This means that the only issues an appellate court should not allow to be raised as an exception to the general rule are issues that do not constitute reversible error. If an issue would not constitute reversible error, however, there is no harm to either the appellee or the public interests by considering the issue because the judgment that is appealed still will stand. Consequently, the miscarriage of justice criterion is simply another way of saying that the general rule is not the general rule but, rather, is a rule that should never be followed, at least in any case in which it would affect the result.

In *Krynicki* it is unclear whether the four criteria on which the analysis is based are intended to be cumulative or in the alternative. In *Krynicki* the particular issue satisfied all four criteria, but the court did not indicate whether the result would have been different had it not. The first of the four criteria requires that the issue be a legal issue requiring no further factual development. Presumably, the court would not consider the issue or at least would remand the case for further development of the record if the factual record was not complete.[63] The latter procedure would give the opposing party an opportunity to present any facts it thought would support its position. While this procedure would reduce the unfairness to the appellee, it would not allow the trial court or the appellee, absent remand, to take an alternative action or no action

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So. 2d 412, 419 (Fla. Dist. Ct. App.) (reviewing record for insufficiency of evidence and ordering lower court to direct verdict for defendant, court considered new issue to prevent miscarriage of justice), *cert. denied*, 388 So. 2d 1119 (Fla. 1980); *In re* Zeimet's Estate, 259 Wis. 619, 49 N.W.2d 924 (1951) (if court had not considered application of statute of limitations, miscarriage of justice would have resulted).

63. *See, e.g.*, Nuelsen v. Sorenson, 293 F.2d 454, 462 (9th Cir. 1961) (case remanded because unargued and undecided question of breach of contract might require further factfinding); Bebco Distrib., Inc. v. Farmers & Merchants Bank, 485 So. 2d 330, 331-32 (Ala. 1986) (court refused to consider the ambiguity of a letter of credit because the issue had not been pursued below and, as a result, there was insufficient factual material in the record to support this issue on appeal).

at all in order to avoid the claimed error. The requirement that the issue be purely legal would appear to be a *sine qua non* of exceptions to the general rule.

Requiring that the resolution of the issue be so clear as to leave no doubt as to the result appears to be cumulative with the requirement that the issue be purely legal. As with the first criterion, the rationale for the second criterion is that having the trial court consider the issue would not aid in its resolution.[64] The second could not exist independently of the first because if all of the facts necessary for resolution of the issue were not in the record, its proper resolution could not be clear.

Whether or not the issue is likely to arise in future cases does not appear to be so much a requirement that supplements the first two criteria but is simply an added reason to consider the issue. It is highly unlikely that an issue would be unique to the pending case and not likely to arise in the future. Even if this were the situation, it hardly would be a reason to refuse to consider the issue if the first two conditions were satisfied.

The requirement that refusal to consider the issue would result in a miscarriage of justice[65] is clearly cumulative with the first and second criteria. The likelihood of the issue arising in future cases and the miscarriage of justice criteria could, however, be considered to be in the alternative. The resolution of the issue to give guidance in future cases may be sufficient reason to consider the issue even if for some reason the issue would not constitute reversible error in the pending case. By the same token, avoiding a miscarriage of justice in the present case would be a sufficient basis for considering the issue even if it were doubtful that the issue would arise again.

In summary, it would appear that of the four requirements set forth in *Krynicki*, an issue would have to satisfy both the first and the second as well as one or both of the third and fourth criteria, but not all four, in order to allow an exception to the general rule. In other words, an exception to the general rule against considering new issues on appeal is justified under *Krynicki* if the following criteria are satisfied: (1) the new issue is purely legal and does not require the introduction of additional facts; (2) the proper resolution of the issue is beyond doubt; and (3) either the issue is certain

64. For a discussion of the requirement that the issue be purely legal, see *supra* notes 39-53 and accompanying text.

65. *See supra* notes 61-63 and accompanying text.

to arise in future cases or failure to consider the issue will result in a miscarriage of justice in the present case.

Most courts faced with the question of whether to allow an exception to the general rule do not make an analysis similar to that in *Krynicki*. Far more common is for a court to consider an issue solely on the basis of its substantive nature (e.g., legal issue,[66] constitutional issue,[67] jurisdictional issue,[68] eleventh amendment[69]) or its impact on the proceedings (plain error or miscarriage of justice[70]). Some cases have attempted to qualify the issue under one of the criteria set forth in *Krynicki* without examining the other criteria. For instance, in *Singleton v. Wulff*[71] the Supreme Court listed two types of cases in which a court of appeals could exercise its discretion to resolve an issue not raised in the trial court.[72] The Court cited those cases in which the issue was not in doubt or where injustice may otherwise result. The Court, however, merely was citing these instances as examples of when it would be appropriate for a court of appeals to exercise its discretion to hear and decide a new issue. The attitude of the court is summarized best by its statement, "[W]e announce no general rule."[73] *Singleton* would have been a particularly appropriate case for the Court to have established general guidelines for consideration of a new issue on appeal.[74] The Court reversed an appellate decision that relied on an issue not considered in the trial court.[75] The Court, however, held only that under the circumstances of the case, consideration of the new issue was improper.[76] The Court gave little guidance other than to cite two types of cases in which considering a new issue would be proper.

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66. *See* cases cited *supra* note 43.
67. *See* cases cited *supra* note 41.
68. *See infra* notes 77-88 and accompanying text.
69. *See infra* notes 89-99 and accompanying text.
70. *See infra* notes 107-33 and accompanying text.
71. 428 U.S. 106 (1976).
72. *Id.* at 121.
73. *Id.*
74. *Singleton* concerned two physicians' challenge to a Missouri statute denying Medicaid benefits for abortions that were not "medically indicated." The district court dismissed the complaint for lack of standing. The court of appeals reversed, finding that the physicians did have standing. The court of appeals proceeded to the merits of the case because the statute "could not profit from further refinement," and was "obviously unconstitutional." *Id.* at 111-12. Because the statute constituted a special regulation on abortion that discriminated against patients and physicians on the basis of the patient's poverty, the appeals court held that the statute violated the equal protection clause. *Id.* at 112.
75. *Id.* at 109-11.
76. *Id.* at 119.

In view of this lack of Supreme Court guidance and the problems with the *Krynicki* analysis, the remainder of this Article will explore generally recognized exceptions to the general rule and demonstrate the wide range of exceptions and their inconsistent application. This Article will conclude by recommending circumstances under which exceptions to the general rule should be permitted.

B. Analysis of the Principal Exceptions

1. Subject Matter Jurisdiction

The most universally recognized exception to the general rule is subject matter jurisdiction.[77] The exception applies to the subject matter jurisdiction of both the trial court[78] and the appellate court.[79] Subject matter jurisdiction is considered so central to the legal process that it can be raised at any time by either party,[80] or

77. *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (because question of standing goes to Court's jurisdiction, issue must be decided although not considered below); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 16 (1963) (Court not precluded from considering district court jurisdiction because not challenged below); *see also* R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 4, § 3.5; Campbell, *supra* note 1, pt. I, 7 WIS. L. REV. at 100 (1933).

78. *See, e.g.*, County of Oakland v. City of Berkley, 742 F.2d 289, 295 (6th Cir. 1984) (right to contest pendant jurisdiction not waived by failure to address jurisdiction in district court because issue of subject matter jurisdiction always before federal court); Knighten v. Commissioner, 705 F.2d 777, 778 (5th Cir.) (per curiam) (rehearing granted to consider issue of subject matter jurisdiction of tax court even though merits of argument found to be frivolous), *cert. denied*, 464 U.S. 879 (1983); Smith v. Grimm, 534 F.2d 1346, 1349 n.4 (9th Cir.) (federal appellate court may review subject matter jurisdiction even through not raised below) (citing Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379 (1884)), *cert. denied*, 426 U.S. 980 (1976); United States v. Rochelle, 363 F.2d 225, 230 (5th Cir. 1966) (subject matter jurisdiction of court below considered *sua sponte* on appeal despite lack of discussion below).

79. *See, e.g.*, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398 (1979) (argument that jurisdiction of court of appeals was defective cannot be ignored, even though not contained in petition for certiorari); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1171 n.1 (9th Cir. 1984) (court obligated to determine *sua sponte* the finality of order on appeal); United States v. O'Neil, 709 F.2d 361, 369 (5th Cir. 1983) (court obligated to raise issue of appellate jurisdiction on own motion); Dixon v. Delaware Olds, Inc., 396 A.2d 963, 966 (Del. 1978) (time limits for perfecting appeal mandatory to existence of appellate jurisdiction and cannot be waived by either parties or court); Vournazos v. Vournazos, 71 Ill. App. 3d 672, 677-78, 390 N.E.2d 19, 23 (1979) (order appealed from neither final nor appealable interlocutory order); Corder v. Corder, 546 S.W.2d 798, 800 (Mo. Ct. App. 1977) (appellate court must consider question of appellate jurisdiction *sua sponte* when not raised by other party).

80. *See, e.g.*, Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 430 n.5 (9th Cir. 1978) (defense of lack of subject matter jurisdiction may be asserted at any time by either parties or court); Burleson v. Coastal Recreation, Inc., 572 F.2d 509, 513 (5th Cir. 1978) (regardless of whether plaintiff had standing to appeal from take-nothing judg-

by the court on its own motion.[81] If an appellate court is not satisfied that it has jurisdiction over an appeal, the court must dismiss the appeal.[82] Because subject matter jurisdiction cannot be waived, this objection differs from most other jurisdictional objections such as lack of personal jurisdiction[83] and expiration of the statute of limitations.[84]

The requirement that a court have subject matter jurisdiction—something that cannot be conferred by the parties either by failure to object or by express consent[85]—is a fundamental doctrine of civil procedure to which there are no exceptions.[86] While there may be some debate over exactly what is an issue of subject matter jurisdiction,[87] once an issue is fairly within the scope of the

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ment in his favor, it could raise lack of diversity jurisdiction on appeal); Colspito v. Califano, 89 F.R.D. 374, 379 (D.N.J. 1981) (defense of lack of subject matter jurisdiction may be asserted at any time by any interested party), *quoting* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1350, at 544-45 (1969).

81. *See, e.g.*, Baumann v. Arizona Dep't of Correction, 754 F.2d 841, 843 (9th Cir. 1985) (although litigant asserts order is final and appealable, court must consider jurisdictional issue *sua sponte*); Ray v. Edwards, 725 F.2d 655, 658 n.3 (11th Cir. 1984) (appellate court has duty to review jurisdiction of interlocutory appeal *sua sponte* at any point in process); United States v. Beasley, 558 F.2d 1200, 1201 (5th Cir. 1977) (court has authority as well as duty to recognize *sua sponte* a lack of jurisdiction over interlocutory appeal).

82. Bender v. Williamsport Area School Dist., 106 S. Ct. 1326, 1331 (1986) (recognizing duty of Court to examine jurisdiction in every case, notwithstanding litigants' agreement that jurisdiction exists).

83. *See, e.g.*, Pila v. G.R. Leasing & Rental Corp., 551 F.2d 941, 943 (1st Cir. 1977) (defendant waived defense of insufficient service of process by omitting defense from motion to dismiss); Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244, 1248 n.3 (5th Cir. 1976) (personal jurisdiction may be waived while subject matter jurisdiction may not); Zelson v. Thomforde, 412 F.2d 56, 58-59 (3d Cir. 1969) (courts may consider subject matter jurisdiction *sua sponte*, personal jurisdiction waivable and may not be considered *sua sponte*); *see also* FED. R. CIV. P. 12.

84. *See, e.g.*, Paetz v. United States, 795 F.2d 1533, 1536 (11th Cir. 1986) (statute of limitations affirmative defense that is waived if not included in pleadings); Peterson v. Air Line Pilots Ass'n, Int'l, 759 F.2d 1161, 1164 (4th Cir.) (settled that defense of statute of limitations waived unless asserted promptly in answer or motion), *cert. denied*, 106 S. Ct. 312 (1985); Chapman v. Orange Rice Milling Co., 747 F.2d 981, 984 (5th Cir. 1984) (limitations must be specifically pleaded or waived).

85. *See, e.g.*, Koke v. Phillips Petroleum Co., 730 F.2d 211, 214 (5th Cir. 1984) (jurisdiction cannot be conferred on court by agreement only; irrelevant that all parties assert that conditional orders are appealable); Hoots v. Pennsylvania, 639 F.2d 972, 978 (3d Cir.) (recognizing duty of court to examine jurisdiction in every case, notwithstanding litigant's agreement that jurisdiction exists), *cert. denied*, 452 U.S. 963 (1981).

86. *See* 5 C. WRIGHT & A. MILLER, *supra* note 80, § 1393. One court held, however, that subject matter jurisdiction can be waived through a party's failure to raise the issue in the trial court. City of Plaquemine v. Dupont, 388 So. 2d 127, 128 (La. Ct. App. 1980).

87. *See generally* Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967), which argues that the rule on allowing a jurisdictional issue to be raised at any time applies only when a lack of juris-

term, the court must be satisfied that it has jurisdiction or dismiss the proceeding. Concerns over how, when, or by whom the issue of subject matter jurisdiction is raised are irrelevant. The various interests to consider in analyzing the validity of the general rule and its exceptions[88] do not even begin to come into play. Put simply, the general rule presupposes subject matter jurisdiction. Thus, allowing the issue of subject matter jurisdiction to be raised at any time is not an exception to the general rule but a precondition before the general rule can become applicable.

2. Quasi-Jurisdictional Issues

a. Eleventh Amendment

Some courts also allow certain issues relating to the exercise of jurisdiction to be raised at any time. The immunity from suit granted to states by the eleventh amendment is one issue that is treated most like subject matter jurisdiction. Recent cases have held that when the state's attorney does not interpose the eleventh amendment as a bar to a lawsuit against the state in the trial court, the issue can be raised on appeal.[89] The rationale for these decisions is that the immunity granted by the eleventh amendment can be waived only by the state legislature, not by the state's attorney's failure to raise the defense. This position was first enunciated by the Supreme Court in *Ford Motor Co. v. Department of Trea-*

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diction appears on the record. In a footnote, Dohbs points out the problem of determining what issues are properly characterized as involving subject matter jurisdiction:

> A court is said to be without jurisdiction of the subject matter or to lack competency when it has not been given power to hear the type of case involved. However, courts have no fixed approach to characterization of cases into type, so that a great many defects are said to be defects in subject matter jurisdiction, even when the court obviously has jurisdiction over the general type of action involved.

Id. at 493-94 n.15. For a review of cases in which appellate courts have improperly characterized errors by the trial court as questions of subject matter jurisdiction, see Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEX. L. REV. 854 (1955).

88. *See supra* notes 12-34 and accompanying text.

89. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 678 (1974) (eleventh amendment defense in nature of jurisdictional bar not waived even if raised in trial court); Telsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987) (district court had no jurisdiction to enforce against state decree entered into by state when state raised eleventh amendment objection for first time on appeal); McDonald v. Illinois, 557 F.2d 596, 601 (7th Cir.) (state counsel's failure to raise eleventh amendment immunity constitutes waiver only if state counsel empowered by state to waive immunity; because no state law granted counsel such power, no waiver occurred), *cert. denied*, 434 U.S. 966 (1977); Richins v. Industrial Constr., Inc., 502 F.2d 1051, 1056 (10th Cir. 1974) (because eleventh amendment immunity available on appeal, no waiver hy failure to raise below).

sury.[90] The Court stated: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this court will consider the issue arising under this amendment in this case even though urged for the first time in this court."[91]

This position is contrary to the position taken by the Supreme Court in *Clark v. Barnard*,[92] an 1883 decision that was neither mentioned in *Ford* nor overruled in any prior or subsequent case. The Court in *Clark* held that the State of Rhode Island consented to the exercise of jurisdiction by appearing as an intervening claimant in a federal court proceeding. The Court reasoned that

> [t]he immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .[93]

The Court distinguished a previous case in which a state had appeared in court only to object to the exercise of jurisdiction over the state.[94] The Court did not mention the necessity of examining the state's statutes to determine whether the state attorney had the authority to waive the immunity, as was done in *Ford*[95] and subsequent decisions.[96] The only issue in *Clark* was whether the attorney had the authority to represent the state in court.[97]

Allowing the eleventh amendment to be raised for the first time in the appellate court would be justified if the eleventh amendment is viewed as a restriction on subject matter jurisdiction. One court of appeals, however, correctly recognized that there is a difference between subject matter jurisdiction and the eleventh amendment because the latter can be waived while the former cannot.[98] In this regard the eleventh amendment issue is much closer to questions of personal jurisdiction and statute of limitations. The

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90. 323 U.S. 459 (1945).
91. *Id.* at 467.
92. 108 U.S. 436 (1883).
93. *Id.* at 447.
94. *Id.* at 448 (distinguishing Georgia v. Jessup, 106 U.S. 458 (1882)).
95. *Ford*, 323 U.S. at 467-70.
96. *See, e.g.*, Della Grotta v. Rhode Island, 781 F.2d 343, 346-47 (1st Cir. 1986) (examination of eleventh amendment claim revealed "peculiar circumstances" of explicit waiver by state); Skehan v. Board of Trustees, 669 F.2d 142, 148 (3d Cir.) (differing positions of state governmental branches insufficient to show intent to waive immunity; waiver must be clear and explicit), *cert. denied*, 459 U.S. 1048 (1982); *see also* cases cited *supra* note 89.
97. *Clark*, 108 U.S. at 448.
98. Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449, 459-60 (6th Cir. 1982).

issues then become the following: whether the state's attorney has the authority to appear on the state's behalf; whether the appearance should be treated as a waiver in the absence of an objection to jurisdiction; and ultimately, whether the harm to the state by not allowing it to raise the eleventh amendment defense for the first time on appeal outweighs the harm to the interests of the other parties and the public by so doing.

Allowing a state to wait to raise the eleventh amendment immunity issue until after judgment is rendered in the trial court gives the state an enormous advantage. If it wins in the trial court without making an eleventh amendment objection, the state has the res judicata, collateral estoppel, and precedential benefits of a favorable judgment on the merits. If it loses, the state simply can raise the eleventh amendment issue on appeal and have the judgment reversed. This is a classic case of "heads I win, tails you lose."

If *Clark* were followed then even if the state is bound by the previous judgment, the harm to the state is minimal. The state can recover for the attorney's failure to plead the amendment the amount of any money judgment on the bond of an attorney who is a public official, or in a malpractice action against a private attorney. The state also can limit the res judicata, collateral estoppel, and precedential effect of the decision by pleading in a timely fashion the eleventh amendment in any subsequent proceeding. Thus, the harm to the state can be limited to a substantial degree. For the opposing party, defeat is snatched from the jaws of victory after having been put to the time and expense of a full trial and an appeal. The appellee's attorney is harmed if the case was taken on either a contingent fee basis or the assumption that attorney's fees would be recoverable from the state. The public interest is harmed by the waste of judicial resources and the consequent delay in the hearing of other cases. The public does benefit by enforcement of a provision of the Constitution, but the eleventh amendment protections can be waived, as can virtually all other constitutional provisions, absent some reason to put it in a special category. No such reason has been advanced.

Viewed only as an immunity issue, the closest analogies to the state's immunity from suit under the eleventh amendment are the sovereign immunity of governments and the absolute and qualified immunity of public officials. The ordinary waiver doctrine applies to both the sovereign immunity of governments and the immunity

of public officials.[99] The waiver doctrine similarly should apply to eleventh amendment immunity. As a result, the issue of immunity under the eleventh amendment should not be an exception to the general rule against considering new issues on appeal.

b. Constitutionality of a State Statute

Whether or not a federal court should abstain from ruling on the constitutionality of a state statute when its decision may depend upon the state court's interpretation of the statute is another issue that the Supreme Court[100] and some lower federal courts[101] have held is an exception to the general rule. The underlying reason for the courts' reluctance to act on the constitutional issue, and to allow the statutory question to be raised in violation of the general rule, arises from the principle that a court should not rule on a constitutional issue unless it is absolutely necessary to do so.[102] Arguing on appeal that the appellate court should *not* decide an issue when no similar objection had been presented to the trial court is not the same as asking the appellate court to decide an issue not raised in the trial court. There is no rule that requires an appellate court to decide every issue decided by the trial court.[103] This same

99. *See, e.g.*, Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986) (because absolute and qualified immunity are affirmative defenses, not doctrines of a jurisdictional nature, failure to assert timely these defenses constitutes waiver); Abraham v. Pekarski, 728 F.2d 167, 174 (3d Cir.) (failure to argue entitlement to absolute immunity based on legislative character of actions waived by failure to plead below), *cert. denied*, 467 U.S. 1242 (1984); Inmates of Neb. Penal & Correctional Complex v. Greenholtz, 567 F.2d 1381, 1384 n.3 (9th Cir. 1977) (although immune from money damages, parole board members, by failing to assert immunity from legal expense below, waived immunity); Corsican Prods. v. Pitchess, 338 F.2d 441, 443-44 (9th Cir. 1964) (because prosecuting officer failed to assert Civil Rights Act immunity below, issue waived on appeal).

100. Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (new arguments in favor of abstention may be considered on appeal because of equitable nature and court's ability to raise issue *sua sponte*).

101. *See* West v. Village of Morrisville, 728 F.2d 130, 131 (2d Cir. 1984) (because effective state remedies available, abstention considered for first time on appeal although opposed by both parties); Urbano v. Board of Managers, 415 F.2d 247, 254 n.20 (3d Cir. 1969) (appellee's failure to assert abstention doctrine below does not bar appellate consideration) (citing Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102, 126 (1968)), *cert. denied*, 397 U.S. 948 (1970); Chicago, B. & Q. R.R. v. City of N. Kan. City, 276 F.2d 932, 939 (8th Cir. 1960) (abstention should be raised at earliest possible time, but failure to raise below not waiver because of strong underlying public policy).

102. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring) (considerations of propriety and practice demand refraining from deciding constitutionality of act until obliged). *See generally* C. WRIGHT, *supra* note 11, § 52.

103. *See, e.g.*, Green v. Department of Commerce, 618 F.2d 836, 840 (D.C. Cir. 1980) (party has no right to compel appellate decision on legal point unless necessary to its case);

principle is used to permit a court to consider a new statutory issue not raised below if it will permit avoidance of the constitutional issue.[104]

To allow the statutory issue to be considered in these circumstances can be viewed as an exception to the general rule because the appellate court is not required to consider a new issue. As with subject matter jurisdiction, however, the "no constitutional decision unless absolutely necessary" principle operates totally outside the general rule. This principle arises not from a concern for the party raising the issue but from basic considerations of federalism and restraint in the use of judicial power.[105] Unlike the general rule, this principle does not have its basis in the adversary system or in concern for the rights of the litigants to the proceeding. Whether or not a court should follow this principle in a particular case depends upon considerations totally independent of the general rule. Consequently, it should not be considered as an exception to the general rule.

3. Questions of Law

The exception to the general rule for pure questions of law is discussed in section III, part A.[106]

Association of Am. R.Rs. v. ICC, 600 F.2d 989, 999 n.34 (D.C. Cir. 1979) (appellate court ability to bypass difficult preliminary issues and dispose case on result required by merits).

104. *See, e.g.*, National Advertising Co. v. City of Rolling Meadows, 789 F.2d 571, 574-75 (7th Cir. 1986) (new statutory argument may be considered on appeal in order to avoid difficult constitutional argument); Correa v. Clayton, 563 F.2d 396, 400 (9th Cir. 1977) (constitutional questions should not be decided when nonconstitutional basis for decision exists even though not considered by parties below); Allen v. Aytch, 535 F.2d 817, 819-20 (3d Cir. 1976) (case decided on nonconstitutional ground not addressed below to avoid constitutional decision).

105. In County Court of Ulster County v. Allen, 442 U.S. 140 (1979), the Court stated:

> Federal courts are courts of limited jurisdiction. They have the authority to adjudicate specific controversies between adverse litigants over which and over whom they have jurisdiction. In the exercise of that authority, they have a duty to decide constitutional questions when necessary to dispose of litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration.

Id. at 154; *see also* United States v. Clark, 445 U.S. 23, 27 (1980) (indicating that a "court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided"); McLaughlin v. Arco Polymers, Inc., 721 F.2d 426, 430 (3d Cir. 1983) (court refrains from deciding difficult constitutional question when case can be resolved on another issue); Mabey v. Reagan, 537 F.2d 1036, 1041 (9th Cir. 1976) (when both constitutional and nonconstitutional grounds exist for deciding case, court obliged to use nonconstitutional grounds).

106. *See supra* notes 39-51 and accompanying text.

4. "Plain," "Basic," or "Fundamental Error"

Other than subject matter jurisdiction and a pure legal issue, the exception to the general rule most often used by appellate courts is when the trial court makes an error that is described as plain, basic, or fundamental.[107] One of the most common errors within this classification involves instructions to a jury—either the failure to give an instruction or the giving of an improper instruction. This Article will use jury instructions as the basis for an analysis of the exception to the general rule for plain, basic, or fundamental error.

The first step in this analysis is to define plain error. One of the major problems in analyzing the general rule and its exceptions is that courts seldom define their terms. Instead, courts do little more than make conclusory statements. Nowhere is this more blatant than when courts deal with the plain error exception. Recently the Court of Appeals for the Fifth Circuit attempted to define plain error by quoting a statement by Justice Stone in *United States v. Atkinson*.[108] Stone stated that appellate courts should "notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[109] The Minnesota Supreme Court has defined plain error as error that destroys the substantial correctness of an instruction, causes a miscarriage of justice, or results in substantial prejudice.[110]

An examination of the development of Justice Stone's definition of plain error demonstrates how a narrowly drawn exception to the general rule can be expanded into a roving commission for appellate judges to seek out and correct error wherever it can be found. Justice Stone's full statement of the exception reads as follows: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[111] Justice Stone was stating a rule with particular application to criminal cases in which the court was acting in the public interest and on its own

107. For convenience hereafter referred to as "plain error."

108. 297 U.S. 157, 160 (1936).

109. Rojas v. Richardson, 703 F.2d 186, 190 (5th Cir. 1983), *quoting* United States v. Atkinson, 297 U.S. 157, 160 (1936).

110. Lindstrom v. Yellow Taxi Co., 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

111. *Atkinson*, 297 U.S. at 160.

motion. Only if a court ignores these crucial qualifiers can the exception be expanded to apply to a civil case in which the appellant is seeking to have the appellate court consider a new issue solely to protect its private interests. Justice Stone obviously was concerned with something more than just an erroneous instruction or the failure to give an instruction. This conclusion is made abundantly clear by the circumstances of the case in which the statement was made.

Atkinson involved the question of whether there was statutory authority for a Veterans Administration regulation permitting government insurance policies to define total disability as including the loss of hearing in both ears. The Court held that the government could not raise the issue on appeal, having failed to object to the jury instructions on the issue in the trial court.[112] The Court gave the general rule as its reason for not allowing the new issue to be raised, citing fairness to the court and the parties as well as the public interest in bringing to an end litigation after a fair opportunity has been provided to present all issues of fact and law.[113] Only after discussing the general rule did Justice Stone define plain error.[114] Stone concluded that the question presented in *Atkinson* did not fall within the exception.[115] Consequently, Justice Stone's statement of the plain error exception was mere dictum.

In his statement of the exception, Justice Stone cited two previous opinions that he authored.[116] The earlier of the two was a criminal case in which the issue was whether the defendant's objection to a question by the trial judge asking the jury on how it was divided and thus unable to reach a verdict was sufficiently particularized.[117] The Court held that particularization was not necessary to allow review of the action because it involved the proper relation of the trial court to the jury and could not be remedied by a modification of the charge to the jury after the harm had been done.[118] The second case also involved an objection which, it was argued, was not sufficiently particularized to allow the objection to be considered as raising the issue in the trial court.[119] In this case

112. *Id.* at 159.
113. *Id.*
114. *Id.* at 160.
115. *Id.*
116. New York Cent. R.R. v. Johnson, 279 U.S. 310 (1929); Brasfield v. United States, 272 U.S. 448 (1926).
117. *Brasfield,* 272 U.S. at 450.
118. *Id.*
119. *Johnson,* 279 U.S. at 318.

the error was the trial court's failure to prevent or correct misconduct by counsel. The appellate court emphasized the trial court's responsibility to prevent appeals to passion and prejudice independent of an objection.[120] This last point is especially significant because Justice Stone framed the rule in terms of what an appellate court may notice on its own motion, or *sua sponte,* and not when the court may consider a new issue raised by a party. Although it bears some similarity to allowing a party to raise a new issue, *sua sponte* consideration involves substantially different considerations. For this reason, the two questions have always received separate treatment.[121]

Justice Stone's essential point was that in some circumstances the responsibility of the court to protect the integrity of judicial proceedings transcends the adversary process. The Court held that an attorney's appeal to a jury's racial or ethnic prejudice is one of those circumstances. The courts have the same responsibility to preserve the integrity of the judicial process as they do to ensure they have jurisdiction; these are not matters that can be waived by the parties. Thus they both fall into the same category and should not be considered as exceptions to the general rule.

The plain error exception has received a full analysis in only one case, *Dilliplaine v. Lehigh Valley Trust Co.*[122] In *Dilliplaine* the Pennsylvania Supreme Court decided to abandon its long held recognition of the plain error exception. The court's reasons for abandoning the exception were based on the exception's adverse effect on the various interests involved, namely the litigants, their attorneys, the trial court, and the appellate court.[123] The court also recognized the ad hoc nature of the exception and that neutral standards for the rule never had been developed. Thus, the court acknowledged that the exception was used whenever a majority of the court felt in any given case that an error meriting reversal had been committed.[124] The alleged error in *Dilliplaine* was the trial court's instruction relating to due care in an automobile accident

120. *Id.*

121. *Compare* Vestal, *Sua Sponte Consideration in Appellate Review,* 27 FORDHAM L. REV. 477 (1959) *and* Katz v. Carte Blanche Corp., 496 F.2d 747, 771 (3d Cir. 1974) (Aldisert, J., dissenting) *with* Campbell, *supra* note 1, pt. III, 8 WIS. L. REV. 147. If a court can consider a question *sua sponte,* the question can, of course, be raised by a party. The reverse, however, is not necessarily true.

122. 457 Pa. 255, 322 A.2d 114 (1974). For a discussion of the *Dilliplaine* court's rejection of the plain error exception, see *supra* notes 24-34 and accompanying text.

123. *Id.* at 257, 322 A.2d at 116.

124. *Id.* at 256, 322 A.2d at 115.

case.[125] The opinion of Justice Pomeroy, who concurred in the result in the case but dissented from the abolition of the plain error exception, is instructive. In Pomeroy's view the plain error rule applies to

> any trial error which deprives a litigant of his fundamental right to a fair and impartial trial. This right is an integral part of due process of law, guaranteed to all litigants by the Fifth and Fourteenth Amendments. Obviously it is only an unusual trial error that will amount to a denial of due process, and in my view, the doctrine should be available to remedy only those trial errors so contrary to fundamental fairness as to reach the dimensions of a constitutional violation.[126]

The cases cited by Justice Pomeroy in support of his position were criminal cases.[127] There is no question that in criminal cases the requirements of due process outweigh principles of waiver, particularly in view of the opportunity to raise constitutional issues in post conviction proceedings.[128] One court specifically has refused to apply the plain error rule to civil cases, describing it as a rule of criminal procedure inapplicable to civil cases.[129] This approach is valid because due process in civil cases requires only notice and an opportunity to be heard; in contrast, far more extensive protection is required in criminal proceedings.[130] Waiver of both substantive and procedural questions are part and parcel of civil procedure.[131] Questions of due process simply do not arise if the requirements of

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125. *Dilliplaine*, 457 Pa. at 256, 322 A.2d at 115.

126. *Id.* at 261, 322 A.2d at 118 (Pomeroy, J., concurring in result, but dissenting on abolition of plain error exception).

127. *Id.* at 261-62, 322 A.2d at 118. Justice Pomeroy relied upon the following cases: *In re* Adoption of I., 455 Pa. 29, 34, 312 A.2d 601, 604 (1973) (Pomeroy, J., concurring) (right to counsel of such fundamental importance that it may be raised first on appeal), *cert. denied*, 429 U.S. 1032 (1977); Commonwealth v. Hallowell, 444 Pa. 221, 226-27, 282 A.2d 327, 329 (1971) (voluntariness of confession used to convict appellant of murder considered for first time on appeal); Commonwealth v. Thompson, 444 Pa. 312, 317, 281 A.2d 856, 858-59 (1971) (Pomeroy, J., concurring) (denial of assistance of counsel deprived defendant of fundamental due process rights); Commonwealth v. Jennings, 442 Pa. 18, 23-25, 274 A.2d 767, 770-71 (1971) (jury instruction given at trial reviewed for fundamental error despite failure to object when instruction was given); Commonwealth v. Williams, 432 Pa. 557, 562-64, 248 A.2d 301, 304-05 (1968) (jury instruction reviewed for fundamental error).

128. *See, e.g.*, Reece v. Georgia, 350 U.S. 85 (1955) (requirement that challenge to grand jury selection procedures be raised before indictment invalid where indigent defendant not provided counsel until after indictment; issue not waived); *see also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 993 (1985).

129. *See* Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984).

130. *See* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.405[4.-1], at 222 (2d ed. 1984).

131. *See* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 46.02, at 1904 (3d ed. 1986).

minimal notice and opportunity to be heard have been met.[132]

In applying these standards to jury instructions in a civil case, a court should not permit an objection to jury instructions to be raised for the first time on appeal under the plain error exception if a litigant has failed to request or object to an instruction in the trial court. Neither due process nor the integrity of the judicial process is involved when a party who is participating in a jury trial has an opportunity to request or object to an instruction but does not through no fault of the court. The party had ample opportunity to protect its rights, but simply failed to do so.

The provisions of Federal Rule of Procedure 51 and its state counterparts demonstrate the impatience of the drafters of civil procedure rules with tardy requests for, or objections to, jury instructions.[133] Rule 51 expressly provides that a party cannot assign as error the giving or failing to give an instruction unless an objection is made, including giving the grounds for the objection. This rule is not qualified so as to exempt a really "bad" instruction or the failure to give an obvious instruction. There is, in short, no plain error exception to this rule, and the courts should not create one.

IV. "WE ANNOUNCE NO GENERAL RULE"[134]

The ultimate goal of a system of appellate review is uniformity.[135] Uniformity in this context means that persons in similar circumstances are treated similarly. In *Singleton v. Wulff*[136] the Supreme Court stated that one way to test the validity of allowing appellate courts to permit exceptions to the general rule is to ex-

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132. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 3.19, at 164 (1985).

133. Federal Rule of Civil Procedure 51 states in part:

> 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, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

FED. R. CIV. P. 51; *see also* ARIZ. R. CIV. P. 51; IND. R. CIV. P. 51(c); MASS. R. CIV. P. 51(B); OHIO R. CIV. P. 51(a).

134. Singleton v. Wulff, 428 U.S. 106, 121 (1976) (appellate courts have discretion to decide what new issues may be considered on appeal; no general rule announced).

135. *See* R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 4, § 1.6, at 18; *see also* Parker, *Improving Appellate Methods*, 25 N.Y.U. L. Rev. 1 (1950) (proper administration of rules and standards requires objective and uniform review). *But see* Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 Geo. L.J. 417, 426-29 (1968) (arguing that uniformity is no more likely with appellate review than without it).

136. *Wulff*, 428 U.S. at 121.

amine whether appellate courts consistently apply the various types of exceptions. If courts consistently recognize certain exceptions to the general rule, the general rule can be said to incorporate these exceptions. Therefore, litigants, attorneys, and judges will share the same expectations regarding considerations of new issues on appeal.[137] Attorneys and their clients will not be surprised or disappointed when the court considers or refuses to consider a new issue, which enhances uniformity and predictability.

The principal difficulty with this idealized description of appellate courts' application of exceptions to the general rule is that it is exactly the opposite of how these exceptions are currently applied by appellate courts. Inconsistency is the hallmark of the various exceptions. For every case that can be found in which an exception to the general rule is allowed, another exists in which the court refused to permit the exception and enforced the general rule. This is a situation in which the rule is sometimes honored and sometimes breached, with no discernible basis for predicting

137. Even the original gorilla rule is not without its exceptions.

"Look. I'm sorry ... If you *weighed* 500 pounds, we'd certainly accommodate you — but it's simply a fact that a *400*-pound gorilla does *not* sleep anywhere he wants to."

when one or the other will occur. The best description of the current status of all of the exceptions to the general rule was given by the *Dilliplaine* court in describing the plain error rule in Pennsylvania—the exceptions are nothing more than vehicles for reversal when the predilections of a majority of an appellate court are offended. This is ad hoc decision making at its worst.

Inconsistency in the recognition and application of exceptions to the general rule is easily demonstrated. An examination of cases in state appellate courts clearly shows that for every exception to the general rule one court has permitted, another court has refused to permit a similar exception. An extensive list of these cases is set forth in Appendix I.[138] The list ranges from subject matter jurisdiction to objections to the admission of evidence and covers virtually every aspect of the trial court proceedings.

Inconsistency also exists in the federal courts, but in a slightly different way. The principal problem is not so much that one circuit will allow an exception and another will not (although that problem does exist), but that the various circuits are creating an ever expanding list of exceptions with little or no regard to prior case law, previously developed criteria, or limitations imposed in earlier cases. The statement in *Singleton* that "[w]e announce no general rule," while intended to describe the lack of any specific limitations on exceptions to the general rule means, in effect, that the general rule is no longer a general rule.[139]

If the courts attempted to develop objective criteria for determining when an exception should be recognized and simply differed on the application of the criteria, inconsistency in the recognition of exceptions to the general rule would not be a matter of great concern. The cases indicate, however, that very few courts have attempted to develop objective criteria. In the overwhelming majority of cases the court merely decides whether or not to recognize an exception, giving no rationale for its action. If the court refuses to consider the new issue it merely recites the general rule. If the court does consider the new issue, it simply states the exception to the rule (with or without citing authority for allowing the exception). The question is resolved in conclusory terms with little or no analysis to support whatever decision is made. As a result, the dominant characteristic of the application of the general rule

138. See Appendix I, *infra* at 1062. This list is intended to be representative but not exhaustive.

139. A representative list of cases demonstrating the range of exceptions permitted by the federal courts is set out in Appendix II, *infra* at 1066.

and its exceptions is inconsistency.

V. A Proposed Solution

The rationale behind the general rule against considering new issues on appeal provides compelling reasons for its continued vitality. A few instances exist, however, when the general rule should not be enforced. One instance is when the issue involves subject matter jurisdiction, which is properly not an exception to the general rule but a precondition to appellate review that a court should raise on its own motion.[140] The same applies to those cases in which principles of federalism or constitutional adjudication are involved[141] or when the integrity of the judicial process is threatened.[142]

Besides those situations in which the general rule is not applicable, there are other types of issues that can be raised for the first time in the appellate court without doing violence to the rationale of the general rule. The Federal Rules of Civil Procedure recognize two avenues for a party to seek relief from a judgment: a motion filed in the court that issued the judgment or a separate action.[143] Under Rule 60(b) a party can seek relief from a judgment for any of six reasons. Some of the reasons would not be exceptions to the general rule by their nature because they involve matters about

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140. *See supra* notes 77-88 and accompanying text.

141. For a discussion of when issues of federalism may be raised for the first time on appeal, see *supra* notes 89-105 and accompanying text.

142. For a discussion of when issues involving plain error may be raised, *see supra* notes 107-33 and accompanying text.

143. Federal Rule of Civil Procedure 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court.

FED. R. CIV. P. 60(b).

which the appellant could not have known at the time of trial.[144] The others provide a well developed body of law for permitting exceptions to the general rule, including mistake, inadvertence, surprise, excusable neglect, void judgment, misconduct of a party,[145] or the reasons for which a court in a separate action will grant relief from a judgment.[146] It makes sense to permit an issue not originally raised in the trial court to be raised on appeal if, under the law of the jurisdiction, the issue could be a basis for relief from the judgment long after the judgment is final.

One of the requirements for allowing this type of issue to be raised on appeal would be that the matter upon which relief is sought was not known and could not reasonably have been known in time to have been raised at trial.[147] Without this requirement, this exception would allow the party seeking to raise the issue to lie in wait during trial proceedings, hoping for a favorable result there and, if unsuccessful, to raise the previously known defect in the appellate court.[148] This is essentially equity's "clean hands" doctrine[149] applied to the raising of new issues and is applicable to the Rule 60(b) type of motion.

Allowing the new issue to be raised under these circumstances would permit the appellate court to rectify the error at the earliest possible time. This procedure would avoid the waste and embarrassment of having the appellate court affirm the judgment only to have the judgment subsequently set aside on grounds already in

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144. These reasons would include: newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), *see* FED. R. CIV. P. 60(b)(2); and that the judgment upon which it is based has been reversed, or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. *See* FED. R. CIV. P. 60(b)(5).

145. *See generally* 11 C. WRIGHT & A. MILLER, *supra* note 80, §§ 2857-2865 (1973); 7 J. MOORE & J. LUCAS, *supra* note 131, ¶¶ 60.19-60.27.

146. *See generally* 11 C. WRIGHT & A. MILLER, *supra* note 80, § 2868 (1973); 7 J. MOORE & J. LUCAS, *supra* note 131, ¶ 60.28.

147. For example, relief under Federal Rule of Civil Procedure 60(b)(6)

> is not for the purpose of relieving a party from free, calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests. In particular, it ordinarily is not permissible to use this motion to remedy a failure to take an appeal.

11 C. WRIGHT & A. MILLER, *supra* note 80, at 214-15 (1973).

148. *Compare* Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 258, 322 A.2d 114, 116, *with id.* at 262, 322 A.2d at 118 (Pomeroy, J., concurring and dissenting). While the *Dilliplaine* court's opinion addressed only unknowing failures to raise exceptions at trial, Justice Pomeroy's opinion reveals his understanding that deliberate misuse of the plain error exception was within the scope of the majority opinion. *Id.*

149. *See generally* D. DOBBS, *supra* note 11, § 2.4, at 45-46.

the record. If the grounds are not in the record as it comes to the appellate court, the new issue should not be heard. Allowing the new issue to be raised in this instance would require the court to remand the case for the purpose of an evidentiary hearing. This procedure could be used too easily as a delay tactic and may not even be necessary because the judgment may be reversed on grounds properly preserved in the trial court.

V. Conclusion

The rule preventing an appellate court from considering an issue not raised in the trial is as old as the common-law system of appellate review. Even though the historical reasons for its original development are no longer valid, the rule today finds strong support in the balancing of the interests of the litigants and their attorneys as well as the institutional interests of the judicial system. Making adherence to the general rule a matter of discretion in the appellate court has resulted in the effective abolition of the general rule. The general rule has been replaced by a system in which the question of whether an appellate court will consider a new issue is decided solely on the basis of whether a majority of the court considers the new issue necessary to decide the case in accordance with their view of the relative equities of the parties. The only consistent feature of the current system is its inconsistency. If courts are free to disregard the general rule whenever they wish to do so, in effect there is no general rule. The current situation is destructive of the adversary system, causes substantial harm to the interests that the general rule is designed to protect, and is an open invitation to the appellate judges to "do justice" on ad hoc rather than principled bases.

To restore predictability to this crucial area of the judicial process, appellate courts should consider only those new issues that are reflected in the record and would provide a basis for relief pursuant to a rule similar to Federal Rule of Procedure 60(b) or a separate action. If appellate courts were limited by this standard, the occasions on which appellate courts would consider a new issue would be sharply reduced. This standard would help restore predictability to the appellate process and serve the interests the general rule was designed to protect.

There is no question but that appellate courts, like gorillas, are subject to few restraints except those that are self-imposed. It can only be hoped that unlike gorillas, appellate judges will recognize the necessity for self-restraint in the exercise of their awesome powers.

APPENDIX I

STATE CASES

EXCEPTIONS: CONSIDERATIONS GIVEN	RULE: NO CONSIDERATION GIVEN
I. Jurisdictional Issues	
A. Subject Matter Jurisdiction The lack of jurisdiction of trial court is considered by appellate court, though not raised below, because such an issue is not waivable. Carillo v. Jam Prods., Ltd., 97 Ill. 2d 371, 376, 454, N.E.2d 649, 651-52 (1983).	The question of the jurisdiction of the city court would not be considered by the appellate court when the issue was never raised in the trial court or the pleadings. City of Plaquemine v. Dupont, 388 So. 2d 127, 128 (La. Ct. App. 1980).
B. Standing Plaintiff's lack of standing to sue was determinative of the outcome of the dispute, since matters such as standing which related to the subject matter jurisdiction cannot be waived by parties in the trial court. State Dep't of Pub. Welfare v. Bair, 463 N.E.2d 1388, 1391 (Ind. Ct. App. 1984).	Political party's standing to challenge appellant's candidacy for office would not be considerd by state appellate court when that issue was presented for the first time on appeal. *In re* Barlip, 59 Pa. Commw. 178, 182, 428 A.2d 1058, 1060 (1981).
C. Jurisdictional Amount Insufficiency of amount in controversy in proceedings below would be considered by state supreme court because parties could not waive issues relating to subject matter jurisdiction. Emery v. Pacific Employers Ins. Co., 8 Cal. 2d 663, 665-66, 67 P.2d 1046, 1048 (1937).	Appellant's challenge of amount in controversy being below jurisdictional amount of lower court would not be considered by appellate court for the first time on appeal. Wallace v. Wallace, 256 S.C. 294, 298-99, 182 S.E.2d 60, 62-63 (1971).
D. Indispensible Party Absence of indispensible party was a fundamental error which merited consideration on appeal, despite the failure of either party to raise this issue in the lower court. Yano v. Yano, 144 Ariz. 382, 386-87, 697 P.2d 1132, 1136 (Ariz. Ct. App. 1985).	Failure to join tortfeasors and insurance company as indispensible parties was an issue waived when not introduced in lower court. Ferraro v. William Lyles Constr. Corp., 102 Cal. App. 3d 33, 44-45, 162 Cal. Rptr. 238, 245 (1980).
E. Sufficiency of Complaint Defects in the establishment of a cause of action will be considered for first time on appeal, even though they were not raised below. *In re* Estate of Barber, 49 Cal. 2d 112, 118-19, 315 P.2d 317, 321 (1957) (en banc).	Failure of declaration to state sufficient facts to establish a cause of action was not an issue which could be heard for the first time on appeal. S. & W. Constr. Co. v. Butler, 207 So. 2d 350, 351 (Miss. 1968).

II. Constitutional Issues	
A. Statute	
Constitutionality of state housing act provisions was addressed for the first time on appeal because of manifest public interest. City of Fort Smith v. Housing Auth., 256 Ark. 254, 255-57, 506 S.W.2d 534, 535-36 (1974).	Court refused to consider constitutionality of state consumer protection act, when the constitutionality was not questioned at the trial stage. Devine Seafood, Inc. v. Attorney Gen. of Md., 37 Md. App. 439, 444, 377 A.2d 1194, 1197 (1977).
B. Ordinance	
Constitutionality of forest zoning provision was considered for first time on appeal because purely legal issue was presented and because outcome of constitutional scrutiny affected public interest. Bayside Timber Co. v. Board of Supervisors, 20 Cal. App. 3d 1, 6-8, 97 Cal. Rptr. 431, 439-40 (1971).	Unconstitutionality of zoning ordinance was not considered on appeal because it had not been pleaded in trial court. Smith v. City of Alexandria, 300 So. 2d 561, 566 (La. Ct. App. 1974).
C. Due Process	
Due process issue was not waived even though it was not raised in the lower court. Conner v. Universal Util., 105 Wash. 2d 168, 171, 712 P.2d 849, 851 (1986) (en banc).	Argument based upon due process violations of both state and federal constitutions did not merit consideration on appeal where not presented in court below. Chapin v. Stuckey, 286 Ark. 359, 368, 692 S.W.2d 609, 615 (1985).
III. Plain Error	
A. In Civil Cases	
Plain error doctrine applicable to civil cases. Wachovia Bank & Trust Co., N.A. v. Guthrie, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984).	Plain error doctrine not applicable in civil cases. Mayrose v. Fendrich, 347 N.W.2d 585, 586 (S.D. 1984).
B. Error in Instruction	
Error in jury instruction constituted fundamental error, which must be reversed on appeal, even though the error was not excepted to below. Security Mut. Casualty Co. v. Bleemer, 327 So. 2d 885, 887 (Fla. Dist. Ct. App. 1976).	Error in jury instructions was not the type of error which could be considered on appeal under the fundamental error doctrine. Coleman v. Allen, 320 So. 2d 864, 866 (Fla. Dist. Ct. App. 1975).
C. Excessiveness of Verdict	
Excessive damage award would be reviewed by appellate court in order to correct fundamental error in the allocation of damages. Marks v. Delcastillo, 386 So. 2d 1259, 1267-68 (Fla. Dist. Ct. App. 1980).	Excessiveness of verdict could not be considered on appeal where it had not been challenged in the lower court. Feazell v. Campbell, 358 So. 2d 1017, 1019 (Ala. 1978).

IV. Pure Legal Issue

A. General

Court considered new issue on appeal where all facts necessary for decision were apparent from the record, having a purely legal issue to be resolved.

People *ex rel.* Sterba v. Blaser, 33 Ill. App. 3d 1, 10-11, 337 N.E.2d 410, 416 (1975).

When lower court fails to rule on legal issue, appellate court will not consider that issue, even where all facts necessary for decision are available from the record.

Santa Fe Nat'l Bank v. Galt, 94 N.M. 111, 113, 607 P.2d 649, 651 (N.M. Ct. App. 1979).

B. Legality of Contract

Legality of contract issue was not waived by the failure to introduce it in the court below and would be considered on appeal due to its prospective precedential value.

Diversified Computer Servs., Inc. v. Town of York, 104 Ill. App. 3d 852, 854-55 433 N.E.2d 726, 728-29 (1982).

Illegality of contract defense was waived on appeal because it had not been presented in the lower court.

Piskorowski v. Shell Oil Co., 403 N.E.2d 838, 847 (Ind. Ct. App. 1980).

C. New Legal Theory

New legal theory would be considered on appeal to avoid possibility of fundamental error wrongly deciding the outcome.

Love v. Hannah, 72 So. 2d 39, 43 (Fla. 1954) (en banc).

Parties are restricted to legal theories advanced at trial; appellate court was in error for considering new legal theory on appeal.

Davis v. Campbell, 572 S.W.2d 660, 662 (Tex. 1978).

D. New Defense

Appellant may raise new defense on appeal in order to avoid injustice or surprise, as was the case where appellee (plaintiff below) knew of a defense available to appellant (defendant below) but did not reveal the information prior to trial.

Tarzian v. West Bend Mut. Fire Ins. Co., 74 Ill. App. 2d 314, 320-21, 221 N.E.2d 293, 296 (1966).

On appeal, appellant is precluded from raising for the first time defense of adequate remedy at law to bar equitable relief granted below; conversely, appellee is entitled to raise that defense or any other on appeal which supports the judgment of the lower court.

Shaw v. Lorenz, 42 Ill. 2d 246, 248, 246 N.E.2d 285, 287 (1969).

E. Estoppel

Although defense of estoppel was not raised in lower court, it would be considered on appeal in order to adjudicate correctly the merits of the case.

Stewart v. O'Bryan, 50 Ill. App. 3d 108, 109-10, 365 N.E.2d 1019, 1020 (1977).

Parties who proceeded at trial solely on the basis of adverse possession could not present defenses of estoppel, unclean hands, and subdivision on appeal.

Thomas v. Ross, 477 A.2d 950, 953 (R.I. 1984).

F. Statute of Limitations

Effect of statute of limitations having run would be considered by appellate court when raised for the first time on appeal.

Manor Drug Stores v. Blue Chip Stamps, 71 Cal. App. 3d 423, 426-27, 139 Cal. Rptr. 483, 485 (1977).

The issue of whether a statute of limitation barred plaintiff's claim would not be considered for first time on appeal.

Kootenai Corp. v. Dayton, 184 Mont. 19, 25, 601 P.2d 47, 50 (1979).

G. Set Off Tenant's right to setoff, which was not raised at trial, would be decided on appeal where trial court had erred on the question of damages. Wanderer v. Plainfield Carton Corp., 40 Ill. App. 3d 552, 561, 351 N.E.2d 630, 633-34 (1976).	The insufficiency of amount of the setoff allowance decided below would not be reviewed on appeal where it bad not been challenged in the lower court. Allred v. Smith, 674 P.2d 99, 101 (Utah 1983).
V. Jury Instructions A. Failure to Request Failure of trial judge to give correct jury instructions would be considered by appellate court where counsel had not requested the proper instruction below. Rivera v. W. & R. Serv. Station, Inc., 34 A.D.2d 115, 117, 309 N.Y.S.2d 274, 276 (1970).	Party who had failed to proffer correct jury instruction in trial court could not complain for the first time on appeal of the trial judge's failure to give that instruction. Moore Ford Co. v. Smith, 270 Ark. 340, 342-43, 604 S.W.2d 943, 945 (1980).
B. Failure to Object Despite failure of counsel to object to improper jury instruction, that point could be raised on appeal for the first time. Railway Express Agency, Inc. v. Fulmer, 227 So. 2d 870, 872 (Fla. 1969).	Defendant's failure to object at trial to erroroneous jury instruction precluded consideration of that issue when presented for the first time on appeal. Pagnella v. Action for a Better Community, Inc., 57 A.D.2d 1076, 1076, 395 N.Y.S.2d 834, 834-35 (1977).
VI. Evidence A. Parol Evidence Use of parol evidence could be challenged on appeal where not objected to below because of its legal significance. Humphries v. Haydon, 297 Ky. 219, 222, 179 S.W.2d 895, 897 (1944).	Effect of applying parol evidence rule to contract dispute between the parties would not be analyzed when issue was presented to appellate court for first time on appeal. C. V. Steed v. Busby, 268 Ark. 1, 7, 593 S.W.2d 34, 38 (1980).
VII. Misconduct A. By Judge Where misconduct of trial judge was so egregious that no objection would have alleviated the resulting prejudice to plaintiff below, appellate court would consider the issue, when raised, as grounds for appeal. Love v. Wolf, 249 Cal. App. 2d 822, 834-35, 58 Cal. Rptr. 42, 50 (1967).	Alleged misconduct of trial judge would not be considered as grounds for reversal on appeal when not objected to in the trial court. Hurvitz v. Coburn, 117 Ariz. 300, 303-04, 572 P.2d 128, 132 (Ariz. Ct. App. 1977).
B. By Counsel Effect of prejudicial remarks made at trial would be considered on appeal, though not properly preserved in the court below, in order to "ensure a fair trial and protect the judicial process." Underwood v. Pennsylvania R.R., 34 Ill. 2d 367, 370-71, 215 N.E.2d 236, 239 (1966).	The effect of potentially prejudicial remarks made by counsel for plaintiff would not be considered on appeal under the "plain error" doctrine. Bowman v. Burlington N., Inc., 645 S.W.2d 9, 11-13 (Mo. Ct. App. 1982).

APPENDIX II

FEDERAL CASES

I. JURISDICTIONAL ISSUES

A. Subject Matter Jurisdiction, Generally:

- Mitchell v. Maurer, 293 U.S. 237, 244 (1934) (defense of lack of subject matter jurisdiction may be asserted at any time by either parties or court).

B. Standing:

- Bender v. Williamsport Area School Dist. 106 S. Ct. 1326 (1986) (standing involves Court's jurisdiction and must be decided first on appeal).

C. Jurisdictional Amount:

- Danko v. Lewy, 149 F.2d 66, 68 (5th Cir. 1945) (while question of jurisdictional amount may be raised at any time, question here lacked merit).

- Miller v. First Serv. Corp., 84 F.2d 680, 683 (8th Cir. 1936) (where record affirmatively shows lack of jurisdictional amount, appellate court has duty to take notice on its own motion and dismiss the case).

But see:

- Peoples Loan & Fin. Corp. v. Halbeisen Motors Co., 271 F.2d 538, 541 (5th Cir. 1959) (defendant's failure to contest jurisdictional amount until case concluded precluded defendant from subsequently raising the question).

D. Diversity:

- Mansfield, C. & L. M. Ry. v. Swan, 111 U.S. 379 (1884) (court ordered to remand case to state court when lack of diversity was shown on record).

E. Mootness:

- Aquirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th Cir. 1986) (mootness indicated on record raises jurisdictional question that the court may consider *sua sponte*).

F. Notice and Service of Process:

- Pila v. G.R. Leasing & Rental Corp., 551 F.2d 941, 943 (1st Cir. 1977) (defendant waived defense of insufficient service of process by omitting the defense from its motion to dismiss, even though plaintiff failed to raise issue of defendant's waiver below).

- United States v. Ball, 326 F.2d 898, 902-03 (4th Cir. 1964)

(under jurisdictional statute issue of deficient notice in tax proceeding not waived by appellant's failure to raise the issue below).

But see:

- International Controls Corp. v. Vesco, 593 F.2d 166, 173 (2d Cir.) (deliberate and purposeful failure to challenge finding of insufficient service estopped party from claiming service was sufficient), *cert. denied,* 442 U.S. 941 (1979).

G. Propriety, Three Judge Court:

- Flast v. Cohen, 392 U.S. 83, 88 n.2 (1968) (because the propriety of the three judge court convened below constitutes a jurisdictional issue, the lateness of claim is irrelevant).

But see:

- Hicks v. Miranda, 422 U.S. 332, 338 n.5 (1975) (because issue of improper membership of three judge court below did not involve a jurisdictional requirement, appellant's failure to raise the issue below constituted a waiver of the issue).

H. Defective Judicial Authority:

- Glidden Co. v. Zdanok, 370 U.S. 530, 536-37 (1962) (failure to question absence of article III judge below does not constitute a waiver of the issue).

I. Pendant Jurisdiction:

- County of Oakland v. City of Berkeley, 742 F.2d 289, 295 (6th Cir. 1984) (right to contest pendant jurisdiction not waived by defendant's failure to raise issue in district court).

J. Indispensible Parties:

- Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 104 (3d Cir. 1986) (party may raise the issue of failure to join indispensible parties for the first time on appeal).

But see:

- Mucha v. King, 792 F.2d 602, 613 (7th Cir. 1986) (defense of failure to join indispensible party waived if not made in trial court).

K. Exhaustion of Administrative Remedies:

- Bolger v. Marshall, 193 F.2d 37, 39 (D.C. Cir. 1951) (issue of exhaustion of administrative remedies is jurisdictional and therefore may be raised for the first time on appeal).

L. Prejudgment Interest:

- Zumerling v. Marsh, 783 F.2d 1032, 1034 (Fed. Cir. 1986)

(award of prejudgment interest against United States is a jurisdictional issue and therefore may be considered for the first time on appeal).

M. Preemption:

- Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1497 (9th Cir. 1986) (federal preemption arguments implicating choice-of-law questions are waived unless timely raised).

II. Constitutional Issues

A. Abstention:

- Bellotti v. Baird, 428 U.S. 132, 143-44 n.10 (1976) (absence of full arguments below concerning equitable doctrine of abstention does not bar appellate consideration *sua sponte*).

B. Eleventh Amendment Immunity:

- McDonald v. Illinois, 557 F.2d 596, 601 (7th Cir.) (state counsel not empowered to waive immunity; no waiver of immunity by failure to raise the issue below), *cert. denied*, 434 U.S. 966 (1977).

C. Facial Challenge to Statute:

- Federal Election Comm'n v. Lance, 635 F.2d 1132, 1136 (5th Cir.) (facial challenge to constitutionality of Federal Corrupt Practices Act could be raised for first time on appeal provided that the facts were fully developed below), *cert. denied and appeal dismissed,* 453 U.S. 917 (1981) (en banc).

But see:

- Granada Wines Inc. v. New England Teamsters & Trucking Indus. Pension Fund, 748 F.2d 42, 44 (1st Cir. 1984) (constitutional challenge to Multiemployer Pension Plan Amendments Act could not be raised first time on appeal).

D. Avoidance of Constitutional Issue:

- National Advertising Co. v. Rolling Meadows, 789 F.2d 571, 574-75 (7th Cir. 1986) (new statutory argument may be considered on appeal in order to avoid a more difficult constitutional argument).

E. Due Process:

- Complaint of Bankers Trust Co., 752 F.2d 874, 887-88 (3d Cir. 1984) (in order to ensure due process, a new theory may be considered on appeal).

But see:

- Fleury v. Harper & Row, Publishers, Inc., 698 F.2d 1022, 1029 (9th Cir.) (claim that lower court's construction of California Code of Civil Procedure denied appellant due process not considered on appeal because claim was not raised below), *cert. denied,* 464 U.S. 846 (1983).

III. Plain Error

A. Jury Instructions:

1. Erroneous Instructions:

- Freifield v. Hennessy, 353 F.2d 97, 99 (3d Cir. 1965) (instruction to exonerate defendant if accident an "Act of God" submitted new, untried issue to jury, fundamental and highly prejudicial error, corrected despite absence of objection below).

2. Insufficient, Inadequate Instructions:

- Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294, 297-98 (2d Cir. 1962) (failure of judge to explain term of art "constructive notice" jeopardized integrity of trial corrected on appeal without objection below).

3. Prejudicial Misleading Instructions:

- Dowell, Inc. v. Jowers, 166 F.2d 214, 221 (5th Cir.) (suggestion of previously awarded damages amounts highly prejudicial, calculated to mislead jury, reversed on appeal despite lack of objection below), *cert. denied,* 334 U.S. 832 (1948).

4. Failure to Give Instructions:

- Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1089 (4th Cir.) (failure of court to give special rescue instruction in negligence action misstated fundamental substantive principles, corrected on appeal despite absence of objection below), *cert. denied,* 106 S. Ct. 136 (1985).

5. Confusing Form of Submission of Instructions:

- United States v. 564.54 Acres of Land, 576 F.2d 983, 987-88 (3d Cir. 1978) (failure to divide omnibus question into separate elements left jury without adequate guidance on fundamental question, corrected on appeal without objection below), *rev'd,* 441 U.S. 506 (1979).

6. Failure of Judge to Make Preliminary Determination:

- Mitchell v. Volkswagenwerk AG, 669 F.2d 1199, 1209

(8th Cir. 1982) (failure of judge to make initial determination on apportionment of damages left jury to speculate, where indivisible injury involved, plaintiff's failure to object understandable, corrected on appeal).

7. *But see:*

- Parrett v. Connersville, 737 F.2d 690, 698 (7th Cir. 1984) (doubtful that errors affected outcome of trial, blanket plain-error exception not recognized in circuit, cost of errors imposed on party causing them), *cert. denied,* 469 U.S. 1145 (1985).

- Bertrand v. Southern Pac. Co., 282 F.2d 569, 572 (9th Cir. 1960) ("plain error" rule not available in civil appeals unless instruction objected to below), *cert. denied,* 365 U.S. 816 (1961).

B. Cause of Action Accrual Date:

- *The Barge Shamrock*, 635 F.2d 1108, 1111 (4th Cir. 1980) (date of accrual of cause of action is a question of law, and if incorrectly decided constitutes plain error that can be heard on appeal), *cert. denied sub nom.* Shell Oil Co. v. United States, 454 U.S. 830 (1981).

C. Pro Se Representation of Class Action:

- Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) (per curiam) (permitting pro se litigant to represent inmates in class action was plain error which can be raised on appeal).

D. Fairness, Integrity, or Public Reputation of Judicial Proceedings:

- Connor v. Finch, 431 U.S. 407, 421 n.19 (1977) (court-ordered voter reapportionment plan, challenged only in part below, reviewed *in toto* where errors "seriously affect the fairness, integrity or reputation of judicial proceedings") (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

IV. Interests of Public Policy

A. Need for Judicial Construction of Statute:

- Green v. Brown, 398 F.2d 1006, 1009 (2d Cir. 1968) (construction of Investment Company Act of 1940 involved issues important to many investors; called for relaxation of general rule).

B. Interest in Enforcement of Act:

- Sheffield Commercial Corp. v. Clemente, 792 F.2d 282, 286

(2d Cir. 1986) (failure of lease agreement to conform to Motor Vehicle Retail Installment Sales Act noticed first time on appeal because strong public interest in Act's enforcement).

C. National Policy and Federalism:

- National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, 784 F.2d 817, 825-26 (7th Cir. 1986) (provision of National Labor Relations Act concerning federal preemption considered where strongly held policies of state and federal jurisdiction at issue).

D. Pro Se Litigants:

- Richerson v. Jones, 572 F.2d 89, 96-97 (3d Cir. 1978) (flexible policy needed in allowing new issues to be raised on appeal when lay persons initiate complaints of employment discrimination) (superseded by statute as stated in Dougherty v. Lehman, 711 F.2d 555 (3d Cir. 1983)).

V. Pure Legal Issues

A. Constitutionality of Statute:

- *In re* Howell, 731 F.2d 624, 627 (9th Cir.) (constitutionality of California Sales and Use Tax a question of law; where facts stipulated or fully developed, may be considered first time on appeal), *cert. denied,* 469 U.S. 933 (1984).

B. Abstention:

- Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (purely legal issue of federal abstention may be raised for first time on appeal).

C. Application of Statute:

- Higginbothem v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976) (application of Georgia wrongful death statute raised purely legal question, not requiring factual development, and briefed after oral argument, considered first time on appeal).

D. Validity of Regulation:

- Alaska Chapter, Assoc. Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1165 (9th Cir. 1982) (argument that HUD regulation not authorized by Indian Self-Determination Act a question of law, considered for first time on appeal).

E. Attorney General Determination:

- Briscoe v. Levi, 535 F.2d 1259, 1277 (D.C. Cir. 1976) (where determination by Attorney General that state maintained discriminatory voting procedures made subsequent to district court dismis-

sal, pure legal issue could be considered on appeal), *vacated and remanded sub nom.* Briscoe v. Bell, 432 U.S. 404 (1977).

F. Purely Legal Doctrines:

- Pegues v. Morehouse Parish School Bd., 706 F.2d 735, 738 (5th Cir. 1983) (law of the case and res judicata doctrines purely legal, considered on appeal without prejudice to defendants).

G. New, Similar Theory:

- Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513, 515 (2d Cir. 1982) (per curiam) (where argument for imposition of constructive trust raised below, similar theory of unjust enrichment considered where additional facts not required).

H. Factors Considered:

- Quinn v. Robinson, 783 F.2d 776, 814-15 (9th Cir.) (factors of pure legal issue, fully developed record, clear resolution of issue, and injustice to parties, consideration of probable cause issue, but not complex statute of limitations issue, permitted), *cert. denied*, 107 S. Ct. 271 (1986).

- Rodriguez v. Munoz, 808 F.2d 138 (1st Cir. 1986) (new issue permitted on appeal to avoid confusion created by erroneous application of law by trial judge).

VI. Choice of Law

A. Duty of Court to Consider Correct Law:

- Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 646 (3d Cir. 1958) (right to contract interpretation under correct state law not waivable; court has duty to consider).

B. Factors Allowing Application of Correct Law:

- Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 693-94 (9th Cir. 1980) (award of attorney fees under correct state law pure legal issue, with clear resolution, not requiring further facts or complex analysis, considered on appeal).

But see:

- Michael-Regan Co. v. Lindell, 527 F.2d 653, 656-57 (9th Cir. 1975) (conflict of laws issue concerning attorney fees waived when not raised below).

VII. Statute Not Applied, Overlooked

A. Generally:

- Hormel v. Helvering, 312 U.S. 552, 556-59 (1941) (to comply

with fundamental justice, taxation of income under alternate statute considered for first time on appeal because purely a question of law).

B. Tolling Statute:

- Ricard v. Birch, 529 F.2d 214, 216 (4th Cir. 1975) (tolling statute, in mandatory terms, necessary to reach correct result, considered for first time on appeal).

C. Safety Statute:

- O'Neill v. United States, 411 F.2d 139, 144 (3d Cir. 1969) (safety statute, as expression of state social policy noticed on appeal, remanded for factual development), *appeal after remand,* 450 F.2d 1012 (3d Cir. 1971).

D. Commission Rules:

- Lilly v. Grand Trunk W. R. Co., 317 U.S. 481, 488-89 (1943) (rule promulgated by federal safety commission of unquestioned validity, integral part of Boiler Inspection Act, considered for first time on appeal).

E. Factors Considered:

- Allen v. State Bd. of Elections, 393 U.S. 544, 554 (1969) (interests of judicial economy, and undisputed facts, permit consideration of statute not considered below).

- Higginbothem v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976) (wrongful death statute considered to avoid manifest injustice where no new facts required and issue briefed after oral argument).

- Smith v. Pasqualetto, 246 F.2d 765, 767-68 (1st Cir. 1957) (lack of omniscience of trial judge and counsel's laxity below warrant consideration of statute, where no injustice would be suffered by appellee or litigants awaiting access to courts).

- Empire Life Ins. Co. of Am. v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972) (inapplicability of UCC not advancement of new theory, but compliance with duty to apply correct law).

F. But see:

1. Statute of Limitations:

   - Paetz v. United States, 795 F.2d 1533, 1536 (11th Cir. 1986) (statute of limitations is affirmative defense, waived if not included in pleadings).

2. Licensing Statute:

   - Miller v. Avirom, 384 F.2d 319, 322 (D.C. Cir. 1967)

(failure to raise issue of licensing statute waived point, in fairness to court and parties, and public interest in finality of litigation).

3. Statutory Immunity:

- Corsican Prods. v. Pitchess, 338 F.2d 441, 443-44 (9th Cir. 1964) (prosecuting officer failed to assert Civil Rights Act immunity below, issue waived on appeal).

VIII. Failure to Object

A. *Jury Instructions:*

1. Trial Judge Awareness of Issue:

- Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1371 (9th Cir. 1979) (purpose of Federal Rule of Civil Procedure 51 requiring objection met where court fully aware of plaintiff's position, and where objection would be pointless formality).

2. Objection Discouraged By Trial Judge:

- American Nat'l Bank & Trust Co. v. Aetna Ins. Co., 447 F.2d 680, 683 (7th Cir. 1971) (trial judge's discouragement of detailed objection and assurance that record protected warranted consideration of issues on appeal).

3. Alternate Instructions:

- Cone v. Beneficial Standard Life Ins. Co., 388 F.2d 456, 462-63 (8th Cir. 1968) (where trial court expressly recognized that proffered charge contrary to charge given, issue considered despite absence of formal objection).

4. Issue of Law:

- Matador Drilling Co. v. Post, 662 F.2d 1190, 1197 (5th Cir. 1981) (interpretation of contract a matter of law reviewable de novo on appeal, despite failure to object to form of submission of issues or to propose limiting instructions).

5. *But see*:

- Dunn v. St. Louis-S. F. Ry. Co., 370 F.2d 681, 684 (10th Cir. 1966) (heavy burden on parties to make objection with specificity, acquiesence of district court insufficient to preserve rights).

B. *Admission of Evidence:*

1. Facial Indication of Relevancy, Competence

- Harris v. Smith, 372 F.2d 806, 815 (8th Cir. 1967) (when condition of record and form of question itself indicate ques-

tion is relevant and competent, no offer of proof needed to preserve issue).

2. Objection by Other Parties, Notice by Trial Court:

- Howard v. Gonzales, 658 F.2d 352, 356 (5th Cir. 1981) (objection by co-party sufficient to preserve error on appeal).

- Frateli Gardino, S.P.A. v. Caribbean Lumber Co., 587 F.2d 204, 207 (5th Cir. 1979) (when trial judge expressed uncertaintly about plaintiff's theory, termed proof of damages as "ambiguous," issue considered on appeal despite absence of objection to exhibit containing theory of damages).

3. *But see:*

- Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984) (objection made by co-defendant cannot be used to cure his own failure to object).

- Sucher Packing Co. v. Manufacturers Casualty Ins. Co., 245 F.2d 513, 519 (6th Cir. 1957) (although trial judge stated that exceptions unnecessary during progress of trial, objection still required at end of trial to preserve issue), *cert. denied*, 355 U.S. 956 (1958).

C. *Improper Comments:*

1. By Judge:

- Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1961) (clearly improper and prejudicial remarks of judge noticed on appeal as plain error, despite counsel's failure to object for fear of antagonizing judge).

2. By Counsel:

- Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 286 (5th Cir. 1975) (final argument of counsel seriously prejudiced defendant's right to fair trial, noticed on appeal without objection below).