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THE APPELLATE REVIEW FUNCTION: SCOPE OF REVIEW

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I

INTRODUCTION

Although they operate within some legislatively imposed constraints on their powers of review, appellate courts basically control the timing, the standards, and the scope of review of trial court decisions. By these means of control, appellate courts effectively order the ongoing functional relationship between the trial and appellate levels of a judicial system. The resulting jurisprudence of appellate practice and procedure is obviously an important body of adjective law, but it is a surprisingly unsystematic and relatively obscure one. Only in the aspect touching the timing of interlocutory review—the appealability of nonfinal orders—is there a fairly well-developed and readily accessible jurisprudence comparable to that developed in most areas of trial court procedure.

The other two aspects (those concerned with the standards and scope of review) represent the two dimensions which actually define the appellate review function at large. Standards of review—"clear error," abuse of discretion, and *de novo* review, for example—define the depth or intensity with which trial court rulings of fact, law, and discretion are subjected to review. Scope of review—which specific trial court actions or omissions are properly subject to review on a given appeal—defines the breadth of the review function.

As between the latter two aspects of the review function, the jurisprudence of standards is relatively the more systematically developed and accessible. The jurisprudence of scope is the least systematically developed and readily accessible of the three aspects.

It is to that least developed aspect that this article is devoted. The overall purpose is to outline the main features of this basically obscure body of appellate

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procedural law and to identify its more obvious policy- and value-related underpinnings. Though not peculiar to the federal system, for purposes of simplicity the subject is discussed mainly as it is encountered in that most representative and generally applicable American system.

II

THE FORMAL DESIGN FOR LIMITING SCOPE

Scope is ultimately controlled by consideration of the specific functions that appellate courts serve. While there have been various formulations, most who have thought systematically about the matter identify the following two basic functions: (1) correction of error (or declaration that no correction is required) in the particular litigation; and (2) declaration of legal principle, by creation, clarification, extension, or overruling.[1] These are, in Dean Pound's terms, respectively the corrective and preventive functions.[2]

In the discharge of these basic functions several others of subsidiary but significant importance also are served. Among them are (a) ensuring principled decisionmaking in the trial courts; (b) diffusing accountability within the legal system; (c) ensuring uniformity of principle; and (d) making justice "visible" through the reasoned opinion.

The "proper" scope of review depends to a considerable extent upon one's view of the relative importance of the two basic functions. To the extent the corrective function is emphasized, scope will tend toward the narrow; to the extent the preventive, law-giving function is emphasized, it will tend toward the wide. The system itself is slanted by formal design toward the more constrictive attitude emphasizing the corrective function. This reflects an historical preference for law's rather than equity's choice of the appropriate scope of appellate review.[3]

In the evolution of our contemporary legal systems, we have borrowed from both sources. From the appeal in equity has come the notion that appellate review is simply a continuation of the same action rather than, as at law, a new proceeding against the trial judge or his judgment. But from the proceeding in error at law has come the notion that the appellate court's function is not, as in equity, *de novo* review to give a right judgment on the same record, but is merely to correct errors of the trial court.

Strict adherence to the formal design that has developed would limit appellate review to the consideration of (1) specific first instance trial court actions or omissions (2) properly suggested as error to the trial court (3) and then properly presented for review to the appellate court (4) by an aggrieved party. The limitation on scope implied in (1) is realized by application of such judicial rules as that prohibiting "changing theories on appeal"[4] and that prohibiting the exercise of

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1. *See, e.g.,* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2-3 (1976).
2. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941).
3. For a discussion of the historical development of appellate procedure, see R. POUND, *supra* note 2.
4. *See* Snapp v. United States Postal Serv., 664 F.2d 1329, 1332 (5th Cir. 1982); Schwimmer v. Sony Corp. of Am., 637 F.2d 41, 49 (2d Cir. 1980); Cook v. City of Price, 566 F.2d 699, 702 (10th Cir.1977);

"original" jurisdiction by appellate courts.[5] The limitation implied in (2) is embodied in specific rules of trial court procedure such as the "contemporaneous objection" requirements of Rule 46 of the Federal Rules of Civil Procedure and Rule 51 of the Federal Rules of Criminal Procedure.[6] The limitation implied in (3) is specifically embodied in Rules 28(a)(2) and 28(b) of the Federal Rules of Appellate Procedure, which require that the issues for review be stated in briefs. The limitation in (4) is embodied directly in "aggrieved party" decisional law.[7]

This is the formal design, but the degree to which these limitations are actually honored to control the scope of review in particular cases is of course up to the appellate courts. Like other procedural rules, they may be stretched, qualified, or utterly avoided when the values they embody are considered outweighed by other values which the appellate courts also have a duty to safeguard.[8]

The first purpose of this article is to identify the main values embodied in the formal design and furthered by adherence to it, and to identify some of the countervailing values that may be subverted by strict adherence to the design. The second purpose is to encourage some rumination about the proper judicial attitude for confronting the question whether to adhere to the basic design.

III

THE PROBLEM: TO ADHERE OR NOT TO ADHERE?

In many, presumably most, appeals, no problem is presented whether to adhere rigidly to the formal design or to break through it. In these cases the dispositive issues on appeal have been clearly addressed in the trial court, errors affecting their disposition have been properly suggested there, and the same errors have been clearly assigned in a formal brief as the object of correction by the appellate court. When this occurs, no conscious notice of the proper scope of review is likely to be taken by the appellate court, and certainly no need exists formally to justify the scope of review undertaken by recording in its written opinion the technical basis for that review. But in other cases a problem is presented: an impulse arises, or is induced, to consider an issue not addressed below, or to correct an error in respect of an issue addressed below but not properly presented at one level or the other, or at either. When this occurs, what is the appropriate judicial response? What are the factors that should determine a spe-

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Kassman v. American Univ., 546 F.2d 1029, 1032 (D.C. Cir. 1976) (per curiam); Miller v. Avirom, 384 F.2d 319, 321 (D.C. Cir. 1967).

5. United States v. Heldt, 668 F.2d 1238, 1275 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 926 (1982); Miller v. Avirom, 384 F.2d 319, 321 n.8 (D.C. Cir. 1967). *See* Singleton v. Wulff, 428 U.S. 106, 119-20 (1976); Western Transp. Co. v. Webster City Iron & Metal Co., 657 F.2d 116, 119 (7th Cir. 1981); *In re* Sugar Indus. Antitrust Litig., 579 F.2d 13, 19-20 (3d Cir. 1978); Terkildsen v. Waters, 481 F.2d 201, 204-05 (2d Cir. 1973).

6. *See also* FED. R. CIV. P. 51 and FED. R. CRIM. P. 30 (requirement that any objection to a jury instruction be made before the jury retires to consider its verdict).

7. *See generally* 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 203.06 (2d ed. 1983).

8. United States v. Tolbert, 692 F.2d 1041, 1045 (6th Cir. 1982); United States v. Krynicki, 689 F.2d 289, 291 (1st Cir. 1982); Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 693 (9th Cir. 1980); *In re* Liberatore, 574 F.2d 78, 82 (2d Cir. 1978). *See* Singleton v. Wulff, 428 U.S. 106, 121 (1976).

cific response?[9]

This article attempts no specific or general answer to the first question. Too much of inspired "judgment call" is rightly involved to make such an attempt worthwhile. But it is possible to attempt identification of the conflicting values properly to be considered by any appellate court facing the problem. Before doing so, it seems not amiss to propose a general working hypothesis: *No appellate court should ever break through the formal design without taking conscious account of the conflicting values necessarily implicated in the decision to do so.*

IV

VALUES PROTECTED BY ADHERENCE TO FORMAL DESIGN

As a prelude to identification of these values, it will help to recognize the various ways in which the problem of adherence to design arises: (1) a litigant fails to advance a theory or to suggest error in the trial court, but does present the theory or assign error on appeal; (2) a litigant properly advances a theory or suggests error in the trial court but fails to present the theory or assign error on appeal; or (3) a litigant fails to advance a theory or suggest error in the trial court and also fails to present the theory or assign error on appeal. In (1), any impulse to break through formal design is party induced; in (2) and (3), it can only arise sua sponte (or possibly in response to a litigant's oral argument). Because different values are served by the successive requirements for advancing theories and suggesting error in the trial court and on appeal, the values properly to be taken into account in any case will differ depending upon the way in which the problem arises.

The values protected by the formal design exist at two levels: some pertain primarily to the particular litigation (litigation values); others pertain more broadly to ongoing concerns of the justice system (system values). Both are obvious upon reflection and may be quickly summarized.

A. Litigation Values

Each rule limiting the scope of appellate review promotes specific values at the heart of litigation. The scope-limiting rule that forbids consideration of theories or issues not advanced in the trial court protects the adversary's opportunity to contest the theory or issue in the trial court, and promotes full development of a record for review. The rule prohibiting consideration of error not suggested in the trial court protects the following: the opportunity for correction or avoidance in the trial court; the opportunity for avoidance of error by action of the adversary (such as the withdrawal of a challenged question); the adversary's opportunity to present a reasoned defense of the trial court's action; and, possibly, a full development of a record for review as when, for example, objection is made to the voir dire required to establish an evidentiary foundation. Finally, forbidding consideration

9. For further discussion of the problem of adhering to the formal design, see Vestal, *Sua Sponte Consideration in Appellate Review,* 27 FORDHAM L. REV. 477 (1958-59); Campbell, *Extent to Which Courts of Review will Consider Questions Not Properly Raised and Preserved* (pts. 1, 2 & 3), 7 WIS. L. REV. 91, 160 (1932), 8 WIS. L. REV. 147 (1933).

of issues not presented on appeal ensures the adversary fair notice and an opportunity to contest, and promotes full development of the issues by partisan presentation.

B. System Values

System values are more subtle, but may be more important in the final analysis than any of the specific litigation values. They can only be suggested, not being susceptible of precise demonstration. They are associated with the integrity of the adversary system, the integrity of trial court processes, and the moral authority and psychological support of the trial bench.

Every departure from a scope-limiting rule requiring party action at either level to preserve an issue for review undercuts the adversarial process to some extent. The bar is given a signal about the seriousness with which the party presentation rules are taken, and sloppiness may be encouraged. Precedent is set. Hard cases thus may make bad law that is difficult to undo.

Every departure from a scope-limiting rule requiring party action in the trial court may subvert the efforts of the trial bench to demand observance of the rules. To the extent theories not advanced in the trial court are drawn upon to decide cases on appeal, the division of functions between the two levels of courts is compromised. All such departures may have a tendency to subvert the moral authority of the trial bench—to some extent with the public, and, to a more certain and worrisome extent, with the practicing bar. Something different from reversing or remanding for an error or omission clearly suggested to the trial judge is involved when this species of subversion occurs.

V

COUNTERVAILING VALUES

There is of course another side to this. There are powerful countervailing values that may justify departure from the design in particular cases.

These too are subtle and hard to demonstrate with precision through specific case examples, but again they are obvious upon reflection. They may be summarized under two headings: (1) avoiding unjust results in the particular case; and (2) seizing an opportunity for needed announcement or clarification of legal principle, either for guidance in further proceedings in the same case or for general precedential purposes.[10]

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10. A third category might also be thought worthy of inclusion. Appellate courts sometimes decide a dispositive issue of law not raised below or on appeal simply in the interest of expeditious resolution of the case. The alternative, of course, is remand for first instance consideration in the trial court, with or without directions.

An interesting recent example of this departure from design (which, incidentally, provoked a dissent) is found in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., — U.S. —, 103 S. Ct. 927, 944 (1983). Also interesting was the Court's resort to the general review powers conferred by 28 U.S.C. § 2106 (1976), as a legislatively created source of federal appellate power to depart from design.

A. Avoiding the Unjust Result

In the simplest kind of case, an appellant assigns on appeal specific, narrow error that was not properly suggested in the trial court—erroneous admission of evidence, failure to direct a verdict, or an improper jury instruction, for example. The error is manifest and manifestly prejudicial, justifying either outright reversal or at least remand. Substantive injustice will result from refusing to consider the error on the basis that it is not within the scope of review. On the other hand, subversion of the adversarial system, of the trial court's processes, and of the appellee's rightful expectation that only error properly signaled in the trial court can jeopardize the judgment in his favor, will result if the case is reversed or remanded because of the error.[11]

This is the problem in its classic, albeit narrow and specific, form. To recognize it is to say about all that can be said about the appropriate response, except to insist that even in confronting the problem in the simplest of forms, the working hypothesis originally proposed should be followed: the costs and benefits of achieving the just result should be carefully weighed.

B. Seizing the Opportunity for Needed Declaration of Principle

The impulse to depart from the formal design in order to announce a legal principle arises from an anomaly at the heart of our system of appellate review as it has evolved. The declarative, legislative function of appellate courts can only be rightly exercised as a by-product of their more mundane corrective function. This is ensured by both the scope-limiting rules under discussion here and, more profoundly, by case or controversy, mootness, standing, and related criteria. In conjunction, these ordain that principle can only be declared, changed, or clarified in the course of considering specific trial court actions properly assigned as error by a truly interested litigant in a controversy still alive at the time of appellate decision. The declarative function of appellate courts is thus dependent upon a random pathology in the trial processes and by chance factors that are quite beyond the power of those courts to control, except preventively.[12]

This problem on occasion causes an appellate court to reach out in disregard of the scope-limiting design (or other limiting rules)[13] to make what it perceives to be a critically important declaration of principle. Whether this is done primarily to order the further course of proceedings upon remand, or for general precedential purposes, the impulse to depart from design in such cases raises our basic problem

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11. For examples of abandonment of the scope-limiting design to avoid an unjust result, see Washington v. Davis, 426 U.S. 229, 238 (1976)(error not presented to Supreme Court); United States v. The Barge Shamrock, 635 F.2d 1108, 1111 (4th Cir. 1980), *cert. denied,* 454 U.S. 830 (1981) (new theory presented on appeal); MacEdward v. Northern Elec. Co., 595 F.2d 105, 109-10 (2d Cir. 1979)(error not assigned at trial or on appeal).

12. This is a particularly ironic circumstance for those who would rate the declarative function as the more important of the two. *See, e.g.,* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 HARV. L. REV. 1 (1979).

13. For example, a concurring opinion in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978), argued that standing and ripeness limits were disregarded by the majority. *Id.* at 95 (Rehnquist, J., concurring).

in its most complex and institutionally significant form. Here, disregard of design may be thought most respectable for the very reason that it serves that other basic function of the appellate courts. Consequently, it may be that departure from design occurs here most casually, frequently without deep concern for the values necessarily subverted, and ordinarily without the court's feeling the need specifically to justify the deed in its written opinion. But of course the design's values are as completely subverted when this is the primary reason for departure as when that reason is narrowly to avoid an unjust result in the particular case. And although it cannot be demonstrated, the suspicion may be ventured that many departures from design undertaken for this reason could not be justified solely on the basis of the need to avoid a specific unjust result.

The variations on this particular theme are too many for comprehensive survey, but two basic patterns can serve to illustrate the process at work. These patterns may represent the circumstances in which appellate courts chafe most frequently under the constraints imposed on their declarative function by the scope-limiting design. Each could be said to involve a court armed with a principle in search of a case. In the first, the case can be made suitable for declaration of the principle only by drawing on a legal/factual theory not considered in the trial court; in the second, only by applying the principle to a less than satisfactorily developed factual record.

Erie Railroad v. Tompkins[14] provides an interesting illustration of the first pattern. The case is of course remembered for the principle it declared. But the *way* it was declared is the subject here explored. It will be recalled that both parties on appeal agreed that *Swift v. Tyson*[15] applied, and contended only over its proper application.[16] But the opinion opened by stating that "[t]he question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved,"[17] and then proceeded to disapprove the doctrine and give us in its place that mysterious conflicts principle whose time, ready or not, had come. The departure in *Erie* from scope-limiting design, with consequent subversion of litigation and system values, did not go unnoticed at the time—Justice Butler in plaintive dissent remarked the fact.[18] Significantly, however, the majority recorded no concern that its approach might have created any problem and attempted no justification for the exercise. Who now remembers the dissent?

A more recent Supreme Court case illustrates the second pattern. *Estelle v. Gamble*[19] started with a *pro se* complaint by a state prisoner alleging under section 1983[20] a violation of his eighth amendment rights by the failure of state prison officials and the prison medical director to attend to his medical needs following an injury. The district court sua sponte dismissed the complaint for failure to state

14. 304 U.S. 64 (1938).
15. 41 U.S. (16 Pet.) 1 (1842).
16. *Erie*, 304 U.S. at 82 (Butler, J., dissenting).
17. *Id.* at 69 (footnote omitted).
18. *Id.* at 82.
19. 429 U.S. 97 (1976).
20. 42 U.S.C. § 1983 (1976).

a claim.[21] The court of appeals reversed and remanded with instructions to reinstate the complaint but without definitive elaboration of controlling substantive principle.[22] Still on no record but the inartfully drawn *pro se* complaint, the Supreme Court took the occasion to announce the "deliberate indifference to serious medical needs" standard for such claims[23] and, applying it to the complaint, reversed as to the medical director but remanded to the court of appeals for the application of the new principle to the attempted statement of claim against other officials. As in *Erie,* a lone dissenter voiced concern for the possible subversion of system values resulting from this first-instance appellate declaration of legal principle on so meager and questionable a record from a trial court where neither fact nor legal theory had been first put to test. Justice Stevens suggested that when confronted with a trial court's dismissal of a complaint attempting to state a novel claim, an appellate court might well decline to announce new principle and simply remand for factual development in the trial court, because the actual facts as there determined might reveal that no declaration of new principle was required.[24]

There is of course much to be said for the majority actions and dissenting views in both *Erie* and *Gamble*. What can be insisted upon in any event is the obligation of appellate judges to consider seriously the conflicting values that led good judges in both of these cases to disagree on so fundamental an issue relating to the exercise of appellate power.[25]

C. The Mechanism: "Plain and Fundamental Error"

The established formula or ritual for breaking through design in order to correct error not properly suggested at trial or assigned on appeal is to call it "plain" or "fundamental."[26] Being "plain" or "fundamental," its consideration is necessary to prevent manifest injustice, and this presumably justifies any resulting sub-

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21. 429 U.S. at 98.

22. *Id.*

23. *Id.* at 104.

24. *Id.* at 112 n.7 (Stevens, J., dissenting).

25. For other examples of courts confronting this problem, see Sibbach v. Wilson, 312 U.S. 1 (1941), where the Court clarified the power to issue a contempt order (under Rule 37 of the Federal Rules of Civil Procedure) for failure to submit to a physical examination, and overturned the district court's contempt order, which was not assigned as error, by noticing the "fundamental error" of the order; *In re* Liberatore, 574 F.2d 78, 82-83 (2d Cir. 1978), where the court took the opportunity to clarify a procedural issue that was not presented below; United States v. General Motors Corp., 518 F.2d 420, 440-41 (D.C. Cir. 1975), where the court refined and modified the district court's legal standard for suits involving defective automobiles but noted the danger, in adopting a new theory, of denying the opposing party the opportunity to present facts material to the new theory; Wratchford v. S.J. Groves & Sons, 405 F.2d 1061, 1062-63 (4th Cir. 1969), where the court decided that the federal standard for "sufficiency of evidence to go to the jury" applies in diversity suits, even though this issue was not technically before the court.

26. *E.g.,* Washington v. Davis, 426 U.S. 229, 238 (1976); United States v. The Barge Shamrock, 635 F.2d 1108, 1111 (4th Cir. 1980), *cert. denied,* 454 U.S. 830 (1981); MacEdward v. Northern Elec. Co., 595 F.2d 105, 109-10 (2d Cir. 1979).

Plain or fundamental error is undoubtedly and understandably invoked more readily in criminal than in civil cases. *See* Silber v. United States, 370 U.S. 717, 718 (1962)(per curiam); United States v. Pepe, 512 F.2d 1135, 1137 (3d Cir. 1975).

Plain error is "plainer" when a pertinent statute was overlooked in the trial court. Ricard v. Birch, 529 F.2d 214, 216 (4th Cir. 1975).

A court may more readily notice plain error when the case is to be remanded in any event. Noticing the error may avoid its repetition on retrial. Harris v. Smith, 372 F.2d 806 (8th Cir. 1967).

version of litigation and system values.[27]

An appellate court effectively sets its course in this whole matter by the way it administers its "plain error" rule. Inevitably, different philosophies about the relative importance of the underlying values dictate how "plain" an error must be for a particular court to notice it. Judicial attitudes clearly cover the spectrum on this matter. Indeed, at least one appellate court, the Supreme Court of Pennsylvania, has abolished the plain error rule and adheres to the formal design as a matter of general policy.[28] Presumably this represents a considered judgment that the litigation and system values protected by the design outweigh any countervailing values in achieving just results in particular cases or in being able to declare needed principle by departing from design in appropriate cases.[29]

VI

A SPECIAL PROBLEM OF SCOPE: ISSUES PRESENTED BY (OR CONSIDERED IN BEHALF OF) APPELLEES

In the paradigmatic two-party lawsuit, one party wins a complete victory, and the other, as the only aggrieved party, appeals. Following the formal design, the scope of review is determined by the errors properly assigned by the appellant. The appellee's sole interest is to defend his judgment against the various assignments of error, and he consequently has no interest in having the scope of review broadened beyond that defined by the appellant. Although error potentially prejudicing him may well have occurred at trial, it has been washed out in his favorable judgment, and any interest in that error becomes completely academic.

This however is not the only litigation pattern and consequently not the only way in which the scope of review may be determined. Even in two-party litigation both parties may be clearly aggrieved by the judgment. In such a case both, by taking appeal, may assign errors which in combination set the scope of review. Still, in this pattern as well, neither party has an interest in broadening the scope

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27. In Hormel v. Helvering, 312 U.S. 552 (1941), the Court stated:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557.

28. Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 260, 322 A.2d 114, 117 (1974)(civil case); Commonwealth v. Clair, 458 Pa. 418, 421-22, 326 A.2d 272, 273-74 (1974) (criminal case).

29. Plain or fundamental error is the most prevalent mechanism for avoiding scope-limiting rules, but it is not the exclusive mechanism. Occasionally, other rationales are used to break through the formal design.

When questions of public policy are involved or public funds are at stake it becomes easier to break through the formal design. Consumers Union of United States, Inc. v. FPC, 510 F.2d 656, 662 n.10 (D.C. Cir. 1974)(public policy concerning price of natural gas); Platis v. United States, 409 F.2d 1009, 1012 (10th Cir. 1969)(public monies at stake in a Federal Tort Claims Act case).

The scope of review may be expanded if the trial court contributed to the failure to preserve or present an error for review. United States v. Wright, 542 F.2d 975, 985 (7th Cir. 1976), *cert. denied,* 429 U.S. 1073 (1977) (trial court affirmatively misled counsel about the proper form of objections); Industrial Dev. Bd. v. Fuqua Indus., Inc., 523 F.2d 1226, 1237-38 (5th Cir. 1975)(trial court failed to comprehend theory presented by plaintiff).

of review past that set by the cross-assignments of error by the two parties-appellant.

Occasionally, however, it appears on appeal that although an appellee's judgment (or a favorable part thereof) cannot be affirmed on the basis used in the trial court, it could be affirmed or at least saved from outright reversal on a different basis. This alternative basis may have been advanced and rejected in the trial court or it may never have been considered there. In the first instance, it can be seen that the trial court's error in rejecting the alternative basis, although apparently mooted in the judgment for the appellee, has now emerged as prejudicial. Should the scope of review be broadened to include consideration of this potentially dispositive error? In the second instance, it is not accurate to charge the trial court with any error which might now be assigned *nunc pro tunc.* However, should not this appellee stand in at least as good a position as the appellant in whose behalf a theory not advanced in the trial court is considered as a basis for reversing or vacating a judgment?

The answer to both of these questions is a hesitant and imprecise "yes." It is implicit in the general judicial rule that an appellate court may affirm a judgment on any basis that finds support in the record.[30] Some courts applying the rule, however, seem not to realize that it is a scope-expanding rule that calls for exactly the same weighing of conflicting values called for when formal design is broken through in behalf of appellants. To notice an error or theory that deprived an appellee of an alternative basis upon which his judgment might have been supported when that error or theory was not suggested below or formally presented on appeal involves precisely the same departure from design that occurs in the more common situation where such error disfavoring an appellant is noticed. Here, too, the costs of departure from design should be weighed before applying this generally salutary rule.

One final twist to this particular problem should be noted. The reach of the general rule that a judgment may be upheld on any basis supportable on the record is limited to "upholding." A corollary rule states that it does not extend to enlarging or otherwise modifying a judgment in a way that favors the appellee or disfavors the appellant.[31] If the court is to do more than merely uphold the judgment below, the appellee must have enlarged the scope of review by taking a cross-appeal. The distinction was tersely put by Mr. Justice Brandeis in *United States v. American Railway Express Co.*[32] There the plaintiff had sought an injunction prohibiting enforcement of an ICC order. The district court granted the injunction on the stated ground that a controlling ICC statute precluded the issuance of

30. *See, e.g.,* Schweiker v. Hogan, 457 U.S. 569, 585 n.24 (1982).

The Supreme Court has given as the reason for the rule that a remand would be wasteful when the correct decision has already been reached. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). Appellate courts may be drawing here on the principles embodied in Rule 15(b) of the Federal Rules of Civil Procedure (empowering the district court to allow trial of issues not raised in the pleadings and amendment of pleadings to conform with evidence adduced and issues raised at trial) as the source of their power to conform the theory of recovery to the record in the case.

31. *See, e.g.,* Alford v. City of Lubbock, 664 F.2d 1263, 1272-73 (5th Cir.), *cert. denied,* 456 U.S. 975 (1982).

32. 265 U.S. 425 (1924).

such an order.[33] On appeal the plaintiff as appellee urged as additional grounds for affirmance that the order was unconstitutional, and in any event unreasonable.[34] In holding it proper to consider these alternative bases for affirmance, the Court opined:

> [T]he appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.[35]

Unfortunately, it is not always clear whether an appellee seeks by expanding the scope of review merely to uphold the judgment or to enlarge it. The resulting difficulty poses one of the most vexing conceptual problems encountered in appellate procedure. Fortunately it is a problem not too frequently encountered. Consequently, there has not been a great deal of systematic analysis of the close-case problem either by the courts or commentators.[36] A case that illustrates the type of close question that can be presented is *Standard Accident Insurance Co. v. Roberts.*[37] There the plaintiff sought in the trial court a declaration of noncoverage under an insurance policy issued to defendant. The defendant contended, inter alia, that he was covered by the policy, that the plaintiff was estopped to deny coverage, and that the policy should be reformed to provide coverage as intended by the parties.[38] The trial court entered judgment for defendant on the basis of the estoppel theory.[39] On appeal by the plaintiff, the defendant sought to urge all three grounds in support of the judgment. The court held that, without having taken a cross-appeal, he could urge coverage of the policy and of course estoppel, but not reformation.[40] The court stated that "appellees' contentions as to reformation of the policy . . . seek to change or to add to the relief accorded by the judgment . . . ."[41] There was no indication, however, of what change reformation would effect.[42]

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33. *Id.* at 430.

34. *Id.* at 434-35.

35. *Id.* at 435 (footnote omitted).

36. For further discussion of this problem, see Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 HARV. L. REV. 763 (1974); Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party,* 51 HARV. L. REV. 1058 (1938).

37. 132 F.2d 794 (8th Cir. 1942).

38. *Id.* at 795.

39. *Id.*

40. *Id.* at 795-96.

41. *Id.* at 795.

42. Another case that illustrates the close question of whether appellee is seeking affirmance or expansion of the judgment is Phillips v. Pennsylvania Higher Educ. Assistance Agency, 657 F.2d 554 (3d Cir. 1981). There the plaintiffs brought an action challenging the defendant's practice of suing in a distant forum to collect on defaulted student loans. The plaintiffs alleged that the defendant's practice violated due process and Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The trial court accepted the due process claim but rejected the unfair trade practices claim. In support of their judgment on appeal the plaintiffs again asserted the unfair trade practices claim. The court refused to consider the unfair trade practices claim absent a cross-appeal because acceptance of the claim would have required enlarging the judgment. The Unfair Trade Practices Act specifically provided for minimum nondiscre-

VII

CONCLUSION: SOFTENING THE IMPACT OF NONADHERENCE TO DESIGN

For purposes of analysis, this paper has presented the problem of adherence or nonadherence to the formal design for controlling scope of review in a rather simplistic way which may suggest that the only alternatives once a problem is presented are to adhere to design or not to adhere. Of course, the matter is not that simple. There are usually middle-ground alternatives available to the properly concerned court. For example, a failure on appeal to assign an error or advance a theory that was properly noted or advanced at trial can be handled by directing reargument or rehearing. In terms of our analysis, this protects most of the litigation and system values embodied in the formal design, and at relatively small cost in other values. Remands for reconsideration on reopened records frequently serve to ensure the development of the adequate factual record necessary to permit responsible clarification or disapproval of existing principle. Even these approaches, of course, involve trade-offs between the conflicting values; the point is simply that there are usually alternatives.

This suggests an appropriate closing note. Only that court properly mindful of the conflicting values involved when the formal design is threatened is likely to choose the best alternative.[43]

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tionary statutory damages. Even though the plaintiffs were willing to waive the damages, the court refused to consider the claim, holding that the damages were not waivable. *Id.* at 566-68.

43. Many cases undoubtedly reflect *sub silentio* exercises of exactly that sort of informed choice. *See, e.g.,* Hormel v. Helvering, 312 U.S. 552 (1941); Helvering v. Gowran, 302 U.S. 238 (1937). In both of these cases the Supreme Court applied a new theory but in the interest of fairness remanded the cases to afford an opportunity to present additional evidence relevant to the new theory. *See Hormel,* 312 U.S. at 560; *Gowran,* 302 U.S. at 247.