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Pushing Aside the General Rule in Order to Raise New Issues on Appeal

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INTRODUCTION

A difficult problem to which legal scholars have paid little attention over the past several decades is where a litigant attempts to raise an issue in a reviewing appellate court that it did not present in the trial court.[1] Raising a new issue on appeal creates problems for appellate courts. First, the courts are constrained by their own (judicially created) general rule of practice which states that no new issues may be raised on appeal. Second, courts that do remove themselves from the restraint of the general rule to prevent injustice in an individual case are then constrained in their ability to correctly decide the new issue. Third, the circumstances under which a court applies the general rule are so varied that there is no set of guidelines to determine when a new issue will be heard.[2] This Note will first address the problem of hearing a new issue on appeal by (1) examining the general rule; (2) examining three principal exceptions[3] to the general rule; and (3) examining the Supreme Court's position, all in order to analyze whether courts should continue to apply the general rule. Second, assuming a general rule no longer exists, this Note will examine one proposed solution to the problem of hearing new issues and show that while it is a method courts could follow, the solution actually does not solve the problem. Then a second solution will be advanced.

I. THE GENERAL RULE

A. Historical Development

The rule against considering new issues on appeal developed from the writ of error model of appellate review as it was handed down from

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1. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule,* 40 VAND. L. REV. 1023 (1987). As Professor Martineau states, this problem has been dealt with only twice in the last fifty years or so, despite the enormous implications of the decision whether to consider new issues on appeal. One article was written in 1932, *see* Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* Part I, 7 WIS. L. REV. 91, 160 (1932), Part III, 8 WIS. L. REV. 147 (1933), and one was written just recently, *see* Martineau, *supra.*

2. Compare these problems with the problems as stated by Professor Martineau. *See* Martineau, *supra* note 1, at 1023.

3. Exceptions which are based on subject matter jurisdiction, which are quasi-jurisdictional, or which are based on discovering new evidence will not be examined. For a treatment of these see Campbell, *supra* note 1.

eighteenth century English common law. The model of proceeding in error provides that upon appeal the reviewing courtshall hear only those errors which were presented below. In England, if the review was against a jury for a false verdict, then the method of review involved what was called the attaint.[4] However, questions of law were decided by the judge; therefore, in the 1200's a proceeding very much like the attaint was developed to reach false judgments rendered by judges. This review was a criminal proceeding against the judge personally which evolved into the writ of error.[5]

The purpose of the review was not to test whether the judgment was just, nor did the proceeding ever involve an inquiry as to what the true judgment ought to be. The sole question was whether the judge committed error. Since this review was based on determining the correctness of a judge's actions, it was considered unfair to reverse his judgment on a point which had never been brought to his attention. Thus, under the writ of error, the only issues that could be presented were those that had been raised and decided by the judge in the trial court.[6]

A completely different type of review developed in equity in the English courts of chancery. 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. The United States, however, inherited the writ of error model from the common law and retained the rule against considering issues in the appellate court not first presented in the trial court.[7]

B. The Modern Justifications for the General Rule

Notwithstanding the fact that today there is neither a criminal action against the judge nor the attaint against the jury, as there was six hundred

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4. As one commentator explains:

> This was the common-law predecessor of the new trial, but it took place before a superior jury of twenty-four who reviewed the action of the twelve. It was primarily a proceeding against the jury rather than against the verdict. The attainted jury was punished by imprisonment and fined for its false verdict, although the false verdict was at the same time, and as a useful incident, replaced by the true verdict of the higher jury.

Sunderland, *Improvement of Appellate Procedure,* 26 IOWA L. REV. 3, 7 (1940).

5. Sunderland, *supra* note 4, at 7. *See generally* R. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS § 1.1 (1983); R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 38-71 (1941).

6. Sunderland, *supra* note 4, at 9. *See generally* R. MARTINEAU, *supra* note 5, § 1.1; R. POUND, *supra* note 5, at 47-60.

7. Sunderland, *supra* note 4, at 10; *see also* R. MARTINEAU, *supra* note 5, § 1.1.

years ago in England, the general rule still exists.[8] Thus, its defenders have advanced modern justifications for the rule.[9]

There are three modern justifications for the general rule.[10] First the rule encourages correction and avoidance of issues in the trial court.[11] The rationale is that if the wronged party is encouraged (or forced) to object and state "the grounds therefor"[12] at the trial level, then the adverse party or the trial court can decide whether to agree with the objecting party, offer an alternative, or set out in the record the factual or legal basis for the trial court's action against the issue raised.

If the adverse party or the trial court accepts the grounds for the party's objection then there is no error and no grounds for a possibly costly appeal by the objecting party; the matter is resolved in the trial court, where it should be. If the adverse party and the trial court disagree with the objecting party, perhaps the discussion stimulated by the objection in the court will persuade the objecting party to agree, and he will not pursue the issue any further.[13]

Thus, if we accept the first rationale justifying the general rule, we see how it forces a choice on the appellant as to when he can raise an issue—a choice which causes different results procedurally. In addition, the ap-

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8. Sunderland, *supra* note 4, at 7-8.

9. Martineau, *supra* note 1, at 1028.

10. This Note adopts the rationale for the general rule as adopted by Professor Martineau from the case Pfeifer v. Jones & Laughlin Steel Corporation, 678 F.2d 453, 456 (3d Cir. 1982), *vacated and remanded,* 462 U.S. 523 (1983). *Pfeifer* involved a question as to 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. *Id.* at 456-57. The Third Circuit held that the appellant had not properly preserved 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, as required by the general rule. *Id.* at 457 n.1. Judge Ruggero Aldisert explains why the general rule is applied:

> The reasons for [the general rule] 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. This philosophy is embodied in [Rule 46 of] the Federal Rules of Civil Procedure.

Id.; *see also* Martineau, *supra* note 1, at 1029. In order to facilitate examination of the general rule this Note further divides the justification for the general rule into two additional rationales. These two rationales—avoiding prejudice and facilitation of appellate review—are commonly stated in federal appellate court opinions on the subject and follow from the statement of Judge Aldisert concerning the rationale for correction and avoidance of issues at trial.

11. As Judge Aldisert states, the rule will encourage matters to be resolved "in the trial court itself." *Pfeifer,* 678 F.2d at 456.

12. FED. R. CIV. P. 46.

13. *See* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 46.02, at 1904 (2d ed. 1987).

pellant is viewed as having made the choice not to raise an issue whether or not he actually knew he should have raised the issue. This choice is typically classified under a "waiver" theory.[14]

The general rule is next justified as being needed to prevent the adverse party from being prejudiced by a failure of the other party to object at trial.[15] The rationale is that if the adverse party is aware of the objection at trial the adverse party can meet the objection or issue raised with an alternative argument, a defense, or the introduction of new evidence in an effort to sway the court to its position. Since the adverse party cannot introduce new evidence in the appellate court,[16] he relies on the other party's failure to raise the issue at trial as an indication that he will not have to introduce evidence or factual arguments on the issue at trial. To force the adverse party to defend the issue on appeal where he could not present factual arguments would be otherwise unfair.[17]

Finally the general rule is justified as being needed to form a complete record at the trial level, in order for an appellate court to have a fully developed record when reviewing an issue.[18] The rationale is that if a party is encouraged to object and state his grounds at the trial level, then when an appeal is taken at least the lower court would have dealt with the issue in some manner, providing the appellate court with a factual record it would not otherwise have had.[19]

C. *Identifying Problems with the Rule's Modern Justifications*

The modern rationales offered to justify the general rule have definite merit. It is hard to deny that it would be beneficial to encourage the

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14. Many cases hold to this statement and term the failure of appellant to raise the issue first in the trial court as a waiver of her right to raise it for the first time in the appellate court. *See, e.g.,* Bond v. United States, 397 F.2d 162, 166 (10th Cir. 1968), *cert. denied,* 393 U.S. 1035 (1969) (The court held that "[f]ailure to make a proper and timely objection to evidence, or to move to strike it after admission, ordinarily is a waiver of the right to object and precludes appellate consideration.").

15. For other cases which state this rationale, see Hormel v. Helvering, 312 U.S. 552, 556 (1941) (general rule is essential so there is opportunity to present all relevant evidence and avoid surprising appellee); Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985) (court refused to hear new issue of step transaction doctrine because of prejudice to appellee); Higginbotham v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976) (prejudice avoided by binding parties to facts presented and theories argued below).

16. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 13.4, at 599 (1985).

17. *See, e.g.,* United States v. Patrin, 575 F.2d 708, 711-13 (9th Cir. 1978) (Although the government wanted to raise the game protection category on which it had expressly disavowed reliance at trial, the court said appellee would be prejudiced if the issue were raised on appeal because appellee might have tried the case differently by developing new facts in response to or new arguments against the new issue.).

18. *See supra* note 10 and accompanying text.

19. *See* City of Waco v. Bridges, 710 F.2d 220, 228 (5th Cir. 1983), *cert. denied sub nom* Bridges v. McLennan County, 465 U.S. 1066 (1984).

accomplishment of all matters in the trial court, the presentation of evidence and arguments, and the formation of a complete record for the reviewing appellate court. However, there are problems with the reasoning behind these justifications.

The main problem with the modern justification is that the rule does not actually encourage the raising of issues in the trial court. For the rule to encourage the raising of issues, it must work to control conduct in the trial court forcing trial attorneys to raise objections for fear of losing issues entirely. However, the rule will work only if the trial attorney is aware of the rule and can *knowingly* choose between raising the particular issue in the trial court or the appellate court. Every trial attorney knows about the general rule; however, it is questionable that a trial attorney who *knew* an objection should be made or that an issue should be raised would intentionally not present the issue to the trial court. More specifically, if the trial attorney does not present the issue, he would risk a chance of losing his client's case or, worse, a malpractice suit against himself. However, if the attorney does present the issue, he has a chance of furthering his client's case and weakening his opponent's. Therefore, if aware of it, the attorney would raise the issue, if for no other reason than he does not want to have to take an appeal.[20]

Thus, an attorney who does know of an issue will likely raise it nonetheless, without the aid of a general rule to encourage him to raise the issue. On the other hand, an attorney who does not know of an issue at trial cannot be encouraged by any rule to raise it. One cannot raise an issue of which one is not aware. Thus, when the general rule could affect conduct, it actually does not because the greater incentive to win the case is already there to control conduct. In the other situations, where the attorney is unaware of an issue, no rule could control conduct. However, courts continue to use the "waiver" theory[21] to justify the function of the rule as rationally advancing the need to encourage attorneys to raise issues in the trial court.[22] The only possible behavioral justification for the rule is if a

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20. As one judge stated: "Attorneys have everything to gain and nothing to lose from timely objection" in the trial court. Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974) (Pomeroy, J., concurring and dissenting) (In *Dilliplaine*, the majority abolished the "fundamental error" exception to the general rule. In discussing the merits of the exception, Judge Pomeroy explained the incentive of raising issues without the aid of the general rule. *Id.*

21. *See supra* note 14.

22. It should be noted that most of the confusion may result from an erroneous reliance on the rationale of Federal Rule of Civil Procedure 46, as Judge Aldisert did in defining the rationale of the general rule. Rule 46 states:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take

trial attorney *intentionally* conceals an issue for appeal[23] or *intentionally* makes a strategy decision not to raise the issue and subsequently tries to raise it.

The second justification advanced in support of the general rule is that it would be unfair to the appellee to hear an issue for the first time on appeal. However, the general rule is not narrowly drawn to prevent unfairness, making it more an excuse for the rule rather than a justification.[24]

The prejudice rationale makes sense when the appellee must present new evidence or if the appellee would have substantially altered his position had the issue been raised at trial rather than on appeal. Such a case would be where the appellant raises a completely new legal theory on appeal which is not even a clear winner for the appellant.[25] If the appellate court heard the new issue, not only would there be a chance of prejudicing the appellee (by an inability to change position and present evidence), there would be a strong chance that the court would lack the information necessary to decide the issue correctly.[26]

However, there are times when the prejudice rationale does not apply because deciding the new issue does not depend on any new facts or the

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> or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

FED. R. CIV. P. 46.

Rule 46 is not a codification of the general rule. There is a difference between the general rule and the requirement of Rule 46. Rule 46 *does* encourage matters to be resolved in the trial court. Rule 46 works this way: When an attorney is aware of an issue, the attorney, as required by the rule, must object to the trial court if he wants the trial court to act on the issue because this "(1) . . . appraises the court of the litigant's postion . . . and (2) . . . permit[s] an opponent to obviate the defect where possible." 5A J. MOORE & J. LUCAS, *supra* note 13, § 46.02, at 1903. It is very simple: If the attorney wants to get something corrected, he has to let the court know about it. However, the general rule does not do this. The general rule is a rule of what is appealable; it will not allow an *appeal* unless the error was objected to in the trial court. That is all. It has no direct relationship to the trial court as the Rule 46 requirement to object, but is an after-the-fact limitation on which issues will be heard on appeal.

23. Again, it would be difficult to think of a situation where an attorney would risk losing a case just to chance saving an error for an appeal, but some hold this to be a possibility. *See* R. MARTINEAU, *supra* note 5, § 3.2, at 35. Even if the problem of an intentional choice not to raise an issue is present, an across the board rule, such as the general rule not to hear any issue because it is believed *every* attorney in *every* case chooses not to raise the issue, does not effectively deal with the problem since it appears that attorneys already have enough incentive to raise issues (they want to win their cases). Having a rule which was narrowly drawn to confront the problem of an intentional choice as it came up would make much more sense than not hearing any new issue at all.

24. Sunderland, *supra* note 4, at 20.

25. *See* Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1146 (5th Cir. 1981) (appellant raised a new issue but it was "not at all certain that [appellant] would have prevailed on this ground had it raised this issue below."), *cert. denied*, 455 U.S. 1000 (1982).

26. *See infra* notes 48-50 and accompanying text.

new issue depends only on facts already in the record.[27] For example, in *Sheffield Commercial Corp. v. Clemente,*[28] Sheffield sued Clemente for breach of an automobile sales contract. At trial, Sheffield won and was awarded twice the damages it should have been awarded, but Clemente failed to point out the error. In discussing the damages award to Sheffield, the appellate court stated:

> Aside from clashing with the clear meaning of the contractual language, this interpretaton transforms what would otherwise be a simple requirement that Sheffield mitigate its damages into a clause which penalizes Clemente . . . . In effect, it permits Sheffield . . . to sell the same product twice and credit itself with the proceeds from both sales.[29]

However, if the general rule were applied, this issue could not have been heard because the issue was not raised in the lower court. Clemente would have been stuck with the damage calculation, even though no new evidence needed to be presented to decide the calculation, nor could Sheffield have done anything at trial to change the true damage calculation—it was purely a matter of numbers.[30] Here the general rule would prevent the proper resolution of a clear case because of its inflexibility.[31] Therefore, the rationale, if accepted, should be limited to those situations where it is truly applicable.

The third justification advanced in support of the general rule is that it encourages the formation of a complete record. However, since the general rule does not effectively control conduct in the trial court (and is really only an after-the-fact limitation on what will be heard on appeal),[32] it is questionable that the rule would also encourage the formation of a complete record.

The only thing the rule actually *ensures* is that every issue which an appellate court considers has been looked at by the trial court. Perhaps the assurance that an issue has been passed on by the trial court does sometimes facilitate the job of an appellate court.[33] But the problem, again, is that the general rule covers all cases, even those where error is clear from the record, and prevents the raising of *any* issue on appeal that was not raised or objected to at trial.

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27. If all the facts are present, this occurrence means that no new evidence could have been presented and appellee could not have changed his position at trial.

28. 792 F.2d 282 (2d Cir. 1986).

29. *Id.* at 285.

30. *Id.* at 285 n.1. (district court found net proceeds to be $8,411.34 but credited Clemente with only $4,205.67).

31. Sunderland, *supra* note 4, at 9-10.

32. *See supra* notes 20-23 and accompanying text.

33. *See, e.g., City of Waco,* 710 F.2d at 228 (The "facilitation accorded appellate review by a lower court's consideration of the legal issues and judicial resolution of factual disputes commands that [the general rule] not be disregarded lightly.").

In summary, we see first that the general rule is *said* to encourage the resolution of all matters in the trial court.[34] The rule *in fact* limits the issues which are heard to those which were first raised at trial, making the rule an after-the-fact limitation on what an appellate court can review.[35] Thus, despite what conduct it might encourage at trial, the rule sharply limits the number of appeals, expressing a sincere concern for judicial economy.[36]

Second, the general rule is *said* to ensure fairness to the appellee by encouraging all evidence and arguments to be raised in the trial court. Again, it is questionable whether the rule is always needed to ensure that the appellee is not prejudiced. However, it is clear that the rule *in fact* ensures in *all* cases that the appellee first had the opportunity to present her evidence and arguments, whether the appellee wanted to, needed to, or was able to present evidence to rebut the issue.

Third, the general rule is *said* to encourage the development of a complete record for the reviewing appellate court. As stated before, the rule may or may not encourage conduct in the trial court. But the rule *in fact* ensures that every issue which comes before a reviewing appellate court has first been passed upon by the trial court.

There is a dichotomy between what the rule is said to do and what it in fact accomplishes. The federal appellate courts have responded to the tension between the rule's effect and its justifications by forming exceptions to the general rule. Examining these exceptions will help in understanding the competing concerns which are at work when a court decides to hear an issue for the first time on appeal and will help in deciding if there is any effective method of dealing with the problem of hearing new issues on appeal while still holding to the favorable aspects of the modern rationales such as preventing prejudice to the opposing party.

II. How Federal Appellate Courts Have Responded to the General Rule

Federal appellate courts still adhere to the general rule of not hearing issues raised for the first time on appeal.[37] But these courts have forgone

34. When comparing what the rule is said to accomplish with what the rule in fact accomplishes, the author does not imply that the rule may not actually accomplish what it is *said* to do. However, the author wishes to show that those accomplishments under the "in fact" category are supported by actual results while those under the "said to" category are only aspirations of the justifications for the rule and are not supported by any concrete results.

35. *See supra* note 22.

36. *See, e.g., City of Waco,* 710 F.2d at 227 (one reason for "justifying such rule is founded in the need to promote judicial economy"); Coastal States Mktg. v. Hunt, 694 F.2d 1358, 1364 (5th Cir. 1983) (judicial economy is served); Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 990 (11th Cir. 1982) (the general rule "derives primarily from the needs of judicial economy"); *Payne,* 654 F.2d at 1146 (judicial economy served).

37. *See, e.g.,* Ryan v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 644, 650 (D.C.

applying the rule under certain circumstances, so that "like almost every other principle of law, the [general rule] which adjures courts not to reverse on grounds . . . not pressed below does have its exceptions."[38] The exceptions developed by the courts are both broad[39] and narrow in scope.[40] However, no matter how courts articulate their doctrine, they hear new issues despite the existence of a general rule not to hear them.[41]

In order to understand why there are exceptions, one must understand why appellate courts would want to hear an issue even though it was not preserved in the trial court. Also, one must understand the difficulties involved in hearing an issue for the first time in an appellate court.

A. Why Appellate Courts Respond

First, appellate courts hear new issues because they want disputes resolved correctly. An error committed in a lower court persists whether or not the error is timely brought to the attention of that court. While failure to preserve an issue prevents its consideration on appeal, such failure does not cure the error. Therefore, as long as the error is not corrected, the decision below is wrong. Since an appellate court's job is to correct error on every issue which is preserved, they sometimes do not see their job as ending just because an error was not timely raised.[42]

An early case to recognize this concern was *Hormel v. Helvering*.[43] In deciding whether the appellate court below had the power to pass upon any

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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 meritorious claims cannot be urged on appeal when not presented below).

38. National Metalcrafters v. McNeil, 784 F.2d 817, 825 (7th Cir. 1986).

39. Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 361 (11th Cir. 1984) (appellate court will hear a new issue on appeal where an "interest of substantial justice is at stake").

40. Matter of Novack, 639 F.2d 1274, 1277 (5th Cir. 1981) (appellate court will hear issue if there was no opportunity to object).

41. *See infra* Part IIC.

42. *See* Sunderland, *supra* note 4, at 10. In addition to this notion, in the federal system there is a statute which authorizes appellate courts to render any judgment "as may be just under the circumstances." *See* 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.").

43. 312 U.S. 552 (1941). The major issue in *Hormel* was whether the appellee should have included a certain trust income in his individual tax return according to two sections of the tax code. The Board of Tax Appeals decided against the tax commissioner, holding the income was not taxable under either section. However, in the circuit court of appeals the commissioner abandoned reliance on the previous two sections and raised a third as a basis for taxing. *Id.* at 554-555. The court of appeals heard the issue raised under this new section and held that the income was taxable.

questions other than those which were squarely presented in the proceedings before the trial court,[44] Justice Black relied on a statute which gave the appellate court power to modify, reverse or remand a case "as justice may require."[45] Justice Black succinctly stated the appellate court's choice of foregoing the judicially created general rule in order to prevent an erroneous outcome in an individual case:

> 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.[46]

The general rule gives way to doing "justice" when it prevents an appellate court from resolving a dispute correctly. However, Justice Black also stated that the general rule should only be foregone under "certain circumstances."[47]

B. The Competence Problem

If appellate courts are sometimes faced with a lower decision where obvious "injustice" has occured, but the appellant failed to preserve the error, fairness dictates that the courts should hear the new issue. Appellate courts are unable to do so,[48] however, because they are restrained by their limited decision making capability. An appellate court cannot hold a full trial on an issue, take new evidence, or hear arguments on every point related to the new issue which may be in the record; rather, it is limited to the factual record created by the trial court.[49] Thus, an appellate court many times will not gain anything from hearing an issue, since it would not have the information necessary to decide the issue correctly.[50]

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44. Here, the Board of Tax Appeals was the lower court. *Id.* at 555.

45. *Id.* at 556-57 (citing 26 U.S.C. § 1141(c)(1) (Supp. 1939)).

46. *Id.* at 557.

47. *Id.*

48. It must be noted again, if it is not already clear, that the general rule is not authorized by any statutory or jurisdictional limitation, but is a judicially-created rule. *See* Franki Foundation Co. v. Alger-Rau & Assocs., 513 F.2d 581, 586 (3d Cir. 1975) (the general "rule is only a rule of practice and may be relaxed whenever . . . justice so warrants").

49. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 16, § 13.4, at 599.

50. *See, e.g.*, Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985) (court declined to hear new issue because "[a]pplication of the step transaction doctrine requires a detailed factual inquiry . . . and there may be facts relevant to the issue which were not developed in the record"); New Jersey Dep't of Educ. v. Hufstedler, 724 F.2d 34, 36 n.1 (3d Cir. 1983) (court will hear new issue because it is "within the competence of appellate courts and is not predicated on complex factual determinations"); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1146 (5th Cir. 1981) (court would not hear new issue because "further factual development would be essential for a *proper* resolution of this issue), *cert. denied,* 455 U.S. 1000 (1982).

The most obvious method to cure the capability problem is to have an appellate court perform the functions of a trial court. If the appellate court is allowed to make factual determinations and take additional evidence, then there is no worry that the court would be incapable of deciding an issue, because, presumably, the appellate court would then be able to obtain the information necessary to decide the issue correctly. Some state jurisdictions have used this method,[51] but it is unlikely that such an idea could take over the strong hold that the error model has on appellate practice today.[52]

Another solution allows appellate courts to remand new issues for further proceedings. The trial court could thus retry the issue which was missed, manufacturing a complete record for the reviewing appellate court.[53]

A final method for curing the capability problem is to not hear the new issue at all, because if the court does not, there is no worry of deciding the issue incorrectly. However, not hearing the issue is just applying the general rule which the court is already trying to sidestep, running contrary to the fact that the court wants to hear the issue. This final observation points out that the general rule does address the competence problem, albeit an extreme solution in the face of a court that wants to hear a new issue.[54]

Besides these extreme remedies, there must be some point in between where an appellate court can find that certain circumstances are present which will ensure that it is capable of informatively deciding a new issue, despite a failure to raise the issue in the trial court. The federal appellate courts have found this middle ground when they formed exceptions to the general rule.[55]

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51. One such state is California. A special statute provides that in cases in which trial by jury is not a matter of right or is waived, the appellate courts may make factual determinations contrary to or in addition to those made by the trial judge and may take additional evidence in order to do so. CAL. CIV. PROC. CODE § 909 (1989). It has been suggested that "[p]robably the most significant practical characteristic of this California exception is its sparing use, especially in situations where the additional evidence aims at reversal of the judgment instead of affirmance." Louisell & Degnan, *Rehearing in American Appellate Courts,* 44 CAL. L. REV. 627, 629 n.8 (1956).

52. However some commentators have wished it were otherwise. *See* R. POUND, *supra* note 5, at 107-10; Sunderland, *supra* note 4, at 10. More compelling reasons for not adopting the California model include efficient division of functions and allocation of limited judicial resources.

53. Wisconsin is one state which authorizes this by statute. The statute authorizes the Wisconsin Supreme Court to grant a new trial whenever there has been a miscarriage of justice (even if it is beyond the record). WIS. STAT. § 751.06 (1979-80).

54. Thus, we will see that the exceptions will be addressing some of the same competence concerns that the general rule actually solves as well. Of course we have already seen that the general rule *in fact* addresses some concerns other than competence, such as judicial economy completely unrelated to competence. *See supra* note 36 and accompanying text.

55. *See infra* notes 66-67, 77 and accompanying text.

C. A Critical Examination of the Federal Appellate Court Exceptions

1. Pure Question of Law

One of the most common exceptions to the general rule appellate courts use is the characterization of a new issue on appeal as one that is purely legal in nature. The federal appellate courts characterize many issues as purely legal, including questions of the applicability of a constitutional provision,[56] statutes,[57] or legal doctrines which were not raised in the trial court.[58] The pure law exception addresses the basic concern of an appellate court's capability to decide new issues informatively.

Recall the problem of hearing new issues on appeal because of the lack of factual information. The pure law exception attempts to solve the problem by allowing only "legal" issues to be heard. The rationale is that a legal question does not depend on the factual record below, or that the pertinent record is fully developed and easily applied to the legal theory.[59] It is further assumed that the party against whom the issue is raised would not have tried her case differently either by developing new evidence and facts in

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56. *See, e.g.,* Glidden Co. v. Zdanok, 370 U.S. 530, 535-37 (1962) (failure to question absence of article III judge does not forgo issue); Federal Election Comm'n v. Lance, 635 F.2d 1132, 1136 (5th Cir.) (en banc) (facial challenge to constitutionality of Federal 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), *cert. granted and judgment vacated,* No. 87-1384 (Jan. 23, 1989) (1989 W.L. 4558).

57. *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 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, 767-78 (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).

58. *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). *See* Martineau, *supra* note 1, at 1035-36.

59. *See, e.g., Bolker,* 760 F.2d at 1042; United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978).

response to or advancing legal arguments against the issue.[60] Thus, a failure to raise the issue below does not limit the court's ability to decide the issue because it would not have affected the decisionmaking ability of the court.

The reasoning behind the exception has its appeal. First, it makes sense. If an appellate court has an issue before it which is not tied to the appellate court's inherent limitation as a non-trial court, it should decide the new issue because it is likely to decide correctly.[61] Second, as far as exceptions go, this exception attempts to mitigate some of the concerns of the general rule which it sidesteps. Two of the concerns of the general rule are that the factual record for review would be incomplete and the adverse party would be prejudiced if a new issue was heard on appeal.[62] This exception eliminates these concerns by requiring a complete factual record or that the issue not be tied to the record at all, and inquires into the possible prejudice to the appellee.[63]

However, the pure law exception has been criticized because of the practical implications of applying the exception. First, when a completely new legal theory is raised for the first time on appeal it would seem to be a rare occasion where the issue does not require any facts, or that the case was tried so completely that an appellate court can say that no relevant, additional evidence is necessary to decide the issue.[64] Second, it is questionable to assume that the party against whom the issue is raised would not have altered his position by introducing new evidence or arguments had a new determinative issue been raised in the trial court.[65] But these criticisms can be avoided, because there are courts which actually look into the concern of factual development and avoiding prejudice to the appellee before characterizing a new issue as one that is a pure question of law. These courts refuse to hear a new issue unless the above concerns are adequately met.[66]

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60. *Patrin*, 575 F.2d at 712 (evident principle underlying pure law exception is prejudice, meaning "if [appellee] might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue, it" should not fall under the exception).

61. *See supra* notes 48-50 and accompanying text.

62. *See supra* notes 15-17 and accompanying text.

63. But note that the exception does not address the other concerns of the general rule such as encouraging issues to be raised at trial and furthering judicial economy. *See supra* notes 11-36 and accompanying text.

64. Martineau, *supra* note 1, at 1038.

65. *Id.* at 1040.

66. For example, in Payne v. McLemore's Wholesale & Retail Stores, appellant wanted to raise for the first time on appeal the defense that the activity of appellee was not protected as opposition to unlawful employment practices. The court stated it would hear the new issue if it was "a pure question of law . . . and refusal to consider it would result in a miscarriage of justice." 654 F.2d at 1144 (quoting Martinez v. Mathews, 544 F.2d 1233, 1237 (5th Cir. 1976)).

The court stated that characterizing an issue as a pure question of law would require, first,

In addition, courts have looked to circumstances which help ensure that the problems of factual development and prejudice to the appellee are addressed. One example of such circumstances include hearing a new issue only because it was closely tied to an issue previously raised in the trial court, which helps ensure that the appellee is not surprised by a completely new issue on appeal, and that many of the facts necessary to decide the issue are already in the record.[67] Another case considered the fact that the new issue was raised on an appeal from a summary judgment, ensuring that there would be no concern of prejudice because a reversal on the new issue would provide both parties an opportunity to present arguments and evidence by holding a full trial.[68]

Although the pure question of law exception is not always applied properly by the federal appellate courts, the exception can be instructive in two ways. First, the exception shows that if applied properly there are some circumstances under which a new issue can be safely heard on appeal because the appellate court can still informatively decide the new issue; proper application solves the capability problem while allowing the appellate court to correct an erroneous trial decision.

However, more importantly, the exception shows that appellate courts hear new issues despite a failure to address all of the general rule's concerns. That is, use of the exception does not encourage resolving issues in the trial court[69] because hearing an issue on appeal simply does not allow parties to take alternative action or no action to avoid an issue in the trial court. The

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that no further factual development be necessary and, second, that appellee would not have presented different arguments or new evidence had the issue been raised first at trial. The court found that the new issue here would require the court to engage in a difficult balancing of the interests of the employer and employee. *Id.* at 1145. Here, appellant's failure to raise the defense at trial precluded appellee from presenting any evidence necessary to rebut appellant's defense. The court stated that "further factual development would be essential for a *proper* resolution of [the] issue." *Id.* at 1146. (emphasis added). Therefore, since the fact-finder "must have an opportunity to hear evidence, to balance the competing considerations, and to reach a conclusion as to the reasonableness of [appellee's] conduct," the court would not characterize the issue as one that is purely legal. *Id.* at 1145.

67. *See, e.g., National Metalcrafters,* 784 F.2d at 826 (court considered that the issue raised was "logically as well as factually intertwined with the issue that [appellants] did raise of preemption by the National Labor Relations Act").

68. *See, e.g.,* Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 990 (5th Cir. 1982). Of course, another sure method which courts have used to eliminate the concerns of factual development and avoidance of prejudice to the appellee is to remand each case to allow the appellee an opportunity to present evidence it thought necessary to support the position. *See, e.g.,* Ahmed v. American S.S. Mut. Protection & Indem. Ass'n, 640 F.2d 993, 996 (9th Cir. 1981) (remand limited to consideration of equal protection arguments was appropriate), *cert. denied,* 464 U.S. 826 (1983); *Patrin,* 575 F.2d at 712 (dictum) (in light of recent change in the law remand for further findings of fact may be required to develop arguments); Nuelson v. Sorensen, 293 F.2d 454, 462 (9th Cir. 1961) (case remanded because unargued and undecided question of breach of contract might require further fact finding).

69. For a discussion of encouraging the raising of issues, see *supra* notes 11-13 and accompanying text.

exception does not further the need to facilitate appellate review by hearing only issues which the trial court has passed on,[70] because it is doing the exact opposite and allowing an issue not considered to be heard. Also, the exception does not advance the goal of judicial economy[71] because the exception is continuing the litigation, not ending it. Thus, although termed an "exception" to the general rule, it actually is not because the exception only partially addresses the commonly accepted rationales for the general rule.

2. Plain Error, Fundamental Error, or "Beyond Any Doubt" Exception

A second principal exception to the general rule is seen when an appellate court characterizes an issue which was not raised in the trial court as something which is plain error, basic or fundamental error, or where the resolution of error would be "beyond any doubt."[72] First, to understand this exception it is necessary to distinguish it from the pure law exception which deals with the raising of whole new legal theories on appeal (such as raising a statute or a constitutional provision).[73] By contrast, this second exception deals with the identification of an error in the trial below not previously objected to, such as where appellant failed to object to an incorrect damage calculation,[74] improper closing arguments,[75] or improper use of evidence.[76]

The exception otherwise rests on the same competence rationale as the pure law exception. The reasoning is that error is so clear from the trial record that despite a failure to point out the error at trial (to put an objection on record) there could be no question as to the proper resolution of the matter. Since there could be no question about the outcome, an appellate court would be capable to decide the issue correctly.[77]

This rationale is embodied in the Federal Rule of Evidence 103 formulation of the plain error principle.[78] In Rule 103, part (a) defines reversible

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70. For a discussion of facilitation, see *supra* notes 18-19 & 33 and accompanying text.

71. For a discussion of judicial economy, see *supra* note 36 and accompanying text.

72. *See Dean Witter Reynolds, Inc.*, 741 F.2d at 361.

73. *See supra* notes 56-58 and accompanying text.

74. Sheffield Commercial Corp. v. Clemente, 792 F.2d 282, 285-86 (2d Cir. 1986).

75. *See* Rojas v. Richardson, 703 F.2d 186, 190 (5th Cir.), *rev'd on rehearing*, 713 F.2d 226 (5th Cir. 1983).

76. *See* FED. R. CIV. P. 103(a), (d).

77. *See, e.g., Sheffield Commercial Corp.*, 792 F.2d at 286 (because error appeared "on the face of the documents," court will take cognizance of it though no timely objection was made).

78. FED. R. EVID. 103. "Rule 103 makes the plain error principle fully applicable to civil cases, where previously neither rule nor statute expressly accomplished this result." 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 22, at 129 (1977) [hereinafter LOUISELL &

error[79] and part (d) defines plain error.[80] Both definitions have the same standard requiring that the error must affect a "substantial right" of the party.[81] If the term "substantial right" is given the same meaning in each rule, then a failure to object at trial would be inconsequential except for the added requirement that Rule 103(d) error be plain from the record.[82] Thus, to fall under the plain error exception of Rule 103, all one must do is determine whether the error is clear from the trial record, requiring no additional factual development.[83]

But, generally, civil cases endorsing the application of the plain error principle hold that its purpose is to avoid a "miscarriage of justice" or to correct "injustice,"[84] creating the impression that only *grave* error may be redressed under the plain error doctrine.[85] There is a notion that plain error must be more serious than reversible error, lest the prompt action by the litigant at trial be undermined. Yet it is doubtful that lawyers or judges can either define or consistently recognize an added increment of seriousness showing error to be not only reversible but "plain." There is also room to doubt that the phrases "miscarriage of justice" and "injustice" refer to the same conditions, and to wonder whether anything really is gained by allowing reversal under the plain error principle only where the system has completely failed.[86]

It is this confusion between the "plainness" of an error and its gravity which breeds much of the criticism of the plain error principle. Because of a lack of a consistent definition[87] which clearly separates the two concepts,[88]

MUELLER]. Also note that 28 U.S.C. § 2106 (1970) authorizes appellate courts to "affirm, modify, vacate, set aside or reverse any judgment . . . or require such further proceedings to be had as may be just under the circumstances." An occasional pre-Federal Rules of Evidence civil case has relied upon this section in noticing errors not raised at trial. LOUISELL & MUELLER, *supra*, at 129 n.10. For an example of such a civil case, see Nuelson v. Sorenson, 293 F.2d 454, 462 (9th Cir. 1961).

79. FED. R. EVID. 103(a).

80. FED. R. EVID. 103(d).

81. FED. R. EVID. 103(a), (d).

82. FED. R. EVID. 103(d).

83. Note that this is similar to the inquiry under the pure law exception. *See supra* note 59 and accompanying text.

84. LOUISELL & MUELLER, *supra* note 78, § 22, at 132. *See, e.g.*, Atlantic C.L.R.R. v. Kammerer, 205 F.2d 525, 526 (5th Cir. 1953) ("[T]his court may notice a plain error of its own motion if justice requires it.").

85. LOUISELL & MUELLER, *supra* note 78, § 22, at 132-33. There are cases, however, which do not do this. *See, e.g., Sheffield Commercial Corp.*, 792 F.2d at 286.

86. LOUISELL & MUELLER, *supra* note 78, § 22.

87. 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE ¶ 856, at 337 (2d ed. 1982) ("Indeed the cases give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know it when they see it.").

88. For example, most courts use alternatively the terms "plain" error and "fundamental" error to stand for the same principle. *Compare* Watchford v. S.J. Groves & Sons, 405 F.2d 1061, 1063 (4th Cir. 1969) (court will hear issue because "fundamental rights" involved) *with*

the exception is seen as basically ad hoc in nature without any neutral standards to apply.[89] This criticism, however, is valid not because of a flaw inherent in the plain error doctrine, but because of the confusion of the concepts of "plainess" and "gravity" and their misapplication by courts. Federal Rule of Evidence 103 not only provides express statutory authority for use of the plain error principle, but also clearly omits any language making gravity a requirement for operation of the principle by defining reversible and plain error standards to be synonymous.[90] If this Rule and its interpretation were used as a guideline for the plain error principle, then there would be much less reason to criticize the exception.

Because the plain error exception rests on the same competence rationale as the pure law exception, it, like the pure law exception, addresses only the one competence concern of the general rule and fails to address the other concerns.[91] Thus, the plain error exception is also not a true exception to the general rule.

3. Public Interest Exception

The third principal exception examined is seen when an appellate court hears a new issue because it is of "public interest."[92] Simply stated, if an appellate court considers the new issue raised to be of importance to the public, the new issue will be heard despite the general rule. The principle of the exception is probably based in the dual role of the appellate courts

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Sheffield Commercial Corp., 792 F.2d at 286 (court will hear issue because it is "plain"). If a court calls an error plain, it connotes a concept of obviousness, and nothing more. However, if a court calls an error fundamental, it may connote not only obviousness, but also gravity. While it may be an esoteric argument to distinguish the two words, it is far more important to realize how the concepts are different and how, depending on whether a court is searching for clear error as opposed to severe error, it affects the use of the principle as an exception to the general rule.

89. *See* Martineau, *supra* note 1, at 1052.

90. Also note that the advisory committee's note to Rule 103 supports the conclusion that gravity is not part of the "plain error" inquiry. The note states:

> In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which *simply does not disclose the error.*

FED. R. EVID. 103 advisory committee's note, subdivision e (emphasis added). If gravity were a factor, the advisory committee would find no distinction between the two above situations. An exclusion of evidence could be so "fundamental" as to result in a "miscarriage of justice," despite the lack of a record on the error, that the gravity factor would allow the error to be heard under the plain error rule. But the advisory committee note expresses the need for a record of the error, not an inquiry into its gravity. (Of course it is clear that error which would be considered as "harmless" would not qualify for plain error treatment.).

91. Recall these concerns: encouraging resolution of matters in the trial court; ensuring facilitation of appellate review, and advancing judicial economy. *See supra* notes 69-71 and accompanying text.

92. *See* cases cited *infra* note 94.

in deciding individual cases and of determining principles of law applicable to future cases. The danger of establishing a misleading precedent and the desire to correct an erroneous interpretation of an important principle of law sometimes become decisive factors in the consideration of a new issue on review.[93] This exception by its nature has no guidelines for its application because it is so broadly defined. However, a review of the case law reveals that the exception typically involves the first judicial review of a statute or a constitutional provision which the court sees as having an impact on the public or on future litigants.[94]

The public interest exception, unlike the pure law and plain error exceptions, is not based on the rationale that the appellate court in these cases is capable of correctly deciding a new issue because of a sufficiently complete factual record. The public interest exception is blind to this concern because the appellate court will typically decide a new issue without explicitly considering the development of the factual record or whether the appellee may have presented new evidence to confront the issue were it raised in the trial court.[95] Presumably, if the record was deficient enough to prevent a proper decision, the reviewing court would remand the case for further development of the facts and arguments; however, the exception is silent on this point.[96]

Compare the treatment of new issues under the public interest exception to, for example, the treatment of new issues under the pure law exception. The pure law exception allows a whole new constitutional provision or

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93. *See* Campbell, *supra* note 1, at 100.

94. *See, e.g., Sheffield Commercial Corp.*, 792 F.2d at 286 (court will consider Motor Vehicle Retail Installment Sales Act "because of the strong public interest in enforcement of the Act"); *National Metalcrafters*, 784 F.2d at 825 (court will hear § 301 argument because it is "based on strongly held policies demarcating the spheres of competence of state and federal government"); *Dean Witter Reynolds, Inc.*, 741 F.2d at 361 (court will hear argument based on Cuban Assets Control Regulations because failure to decide issue would leave "a vacuum . . . with respect to whether a license is required to invoke federal court jurisdiction under facts such as [present] here"); *New Jersey Dep't of Educ.*, 724 F.2d at 36 n.1 (despite failure to raise issue below, court will hear new argument based on Elementary and Secondary Education Act because it is "an issue of national importance"); Krause v. Sacramento Inn, 479 F.2d 988, 989 (9th Cir. 1973) (despite failure to raise below, court will hear equal protection argument because relaxation of the general rule is required "in appeals wherein there are significant questions of general impact").

95. None of the cases expressly considers these factors. *See supra* note 94.

96. For example, one appellate case held that an issue should be heard despite the general rule but stated that:

> Rather than consider the matter . . . the appellate court may note the existence of the unargued, undecided question and remand the case to the lower court . . . .
>
> In our opinion justice requires that such a course be followed in this case. The cause is remanded with directions to afford the parties an opportunity . . . to present any or all of the additional theories . . . and all appropriate defenses thereto.

Nuelsen, 393 F.2d at 462.

statute to be heard on review,[97] just as the public interest exception allows. But rather than ignoring factual development and possible prejudice to the appellee, the pure law exception accounts for these two concerns. The public interest exception, however, does not look at these concerns; at least it does not do so outwardly.[98]

The public interest exception blatantly violates the rationale of the general rule because it does not account for any of the concerns that the general rule is said to protect.[99] Its use is a matter of policy outweighing the rule, providing a clear example of how the general rule is not a "general" rule at all. The federal appellate courts have weakened the general rule by forming and applying exceptions which do not account for the rationales supporting the rule.

III. SUPREME COURT PRECEDENT: THE GENERAL RULE IS NOT A GENERAL RULE

The modern justifications for the general rule are questionable because the rule does not further them adequately, if at all.[100] The exceptions to the rule developed by the federal appellate courts put into question whether the rule is of general application or rather a rule courts apply under "certain circumstances" of each case.[101] As further evidence of erosion of the rule's existence, the Supreme Court has stated that hearing new issues on appeal should not necessarily be determined by the application of a general rule.[102]

The Court took this position in the case of *Singleton v. Wulff*[103] where it stated that the rule of when to hear a new issue on appeal is a matter of "discretion" on the part of each appellate court.[104] In reaching this

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97. *See supra* notes 56-58 and accompanying text.

98. Presumably if an issue raised for the first time on appeal did not meet the pure law exception, if the issue was of strong public interest, it could still be heard under the public interest exception.

99. This exception, like the pure law and plain error exceptions, does not encourage the accomplishment of matters in the trial court; if an issue is not heard until the appeal, the parties cannot magically go back and present arguments in the trial court. Nor does the exception promote judicial economy. Not hearing an issue promotes judicial economy; hearing one simply does not.

100. *See supra* notes 34-37 and accompanying text.

101. *See supra* note 55 and accompanying text.

102. *See* Singleton v. Wulff, 428 U.S. 106 (1976).

103. *Id. Singleton* involved 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.

104. *Id.* at 121 (dictum).

result, Justice Blackmun first stated the general rule and gave the commonly accepted justification.[105] He then stated what power appellate courts have when a new issue is before them:

> The matter of what questions may be taken up 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. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below.[106]

The Court continued and gave its only guidance which appellate courts could use in their exercise of this newly found discretion.[107] This guidance is limited to the situations where a new issue's resolution is beyond any doubt or where "injustice might otherwise result."[108]

The Court's language has been followed in some of the federal circuits. When confronted with a new issue on appeal, these appellate courts explain that the general rule is merely a rule of practice created by the courts themselves and the decision to hear an issue is up to the court's own discretion.[109] However, although these courts uniformly recognize their discretionary authority to hear new issues on appeal, there is no uniform method by which the appellate courts exercise this discretion. That is, between circuits there is no discernable set of guidelines for deciding when a new issue should be heard.[110] Even within circuits there is no consistency.[111]

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105. He states that the rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 120 (quoting Hormel v. Helvering, 312 U.S. 552, 556 (1941)).

106. *Id.* at 121 (dictum).

107. *Id.*

108. *Id.* However, "[t]hese examples [were] not intended to be exclusive." *Id.* at 121 n.8.

109. *See, e.g.*, National Metalcrafters v. McNeil, 784 F.2d 817, 825 (7th Cir. 1986) (court cites *Singleton* and states it will hear issue under "exceptional circumstances"); Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360 (11th Cir. 1984) (whether court will hear new argument under statute is "left primarily to the discretion of the courts of appeals"); New Jersey Dep't of Educ. v. Hufstedler, 724 F.2d 34, 36 n.1 (3d Cir. 1983) (the general rule is a "rule of discretion, rather than jurisdiction" and court will hear new issue under "special circumstances"); Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 989 (11th Cir. 1982) (decision of whether to consider an argument first made on appeal is "left . . . to the discretion of the courts of appeals"); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1146 (5th Cir. 1981) (decision to hear argument under new statute is left to the court's "discretion"), *cert. denied*, 455 U.S. 1000 (1982).

110. For example, the Eleventh Circuit stated that there are "certain exceptional circumstances in which it may be appropriate to exercise this discretion." *Dean Witter Reynolds, Inc.*, 741 F.2d at 360. The appellate court then found these circumstances to be present when the facts of the case fall under one of the preexisting exceptions to the general rule. The court listed these categories as: (1) when an issue is a pure question of law, (2) where appellant had no opportunity to object, (3) "where [an] interest of substantial justice is at stake," (4) where proper resolution is "beyond any doubt," and (5) where an issue is of general impact or of great public concern. *Id.* at 360-61.

The Seventh Circuit has used a more flexible approach. In one case, after citing *Singleton*,

The Supreme Court essentially had found this area of the law a mess and left it a mess. An appellant who wishes to raise a new issue can find his only guidance in the words of the Court itself: "We announce no general rule."[112]

Thus, according to the Supreme Court, we can conclude that the problems which were raised earlier—i.e., capability to decide a new issue informatively, concerns of judicial economy, and the encouragment of accomplishing matters in the trial court—are not necessarily solved by the general rule. Their resolution is left up to an individual appellate court's discretion. However, we may also conclude that while the Court has decided that solving these problems is best left to an individual court's discretion rather than a general rule,[113] the Court has left another problem in its solution's wake—if the process is purely discretionary, one cannot clearly predict when, or even what, new issues may be heard on appeal.

IV. PROPOSED SOLUTIONS

A. One Proposed Solution: A Criticism

The problem of hearing new issues on appeal is not new to appellate procedure.[114] But recently one commentator, Professor Martineau, addressed the problem and proposed his own solution. He states that in order "[t]o restore predictability to this crucial area of 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

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the court used the same "exceptional circumstances" language as the Eleventh Circuit. *National Metalcrafters,* 784 F.2d at 825. But rather than limiting the circumstances to determining if a case falls within one of the preexisting categories, the court looked to a number of factors which make the new issue one an appellate court should hear. First, hearing the new issue would further a strongly held public policy in favor of applying uniform federal principles in each case. *Id.* at 825-26. Second, the issue does not require any factual determinations, so there is no question of appellant having gained some advantage from bypassing the trial court. The appellate court is not "placed at a disadvantage in reviewing the issue by the absence of a determination on it in" the trial court. *Id.* at 826. Third, the appellant had "at least a partial excuse" for not properly raising the issue in the trial court. *Id.* The court then concluded, "[c]onsidering the circumstances, we cannot see what there is to be gained from refusing to decide the issue." *Id.*

111. Martineau, *supra* note 1, at 1058.

112. *Singleton,* 428 U.S. at 121.

113. This effectively removes the importance of the general rule's existence as an inflexible rule.

114. *See generally,* R. POUND, *supra* note 5, at 374-76; Sunderland, *supra* note 4, at 10.

of Civil Procedure 60(b) or a separate action."[115] Martineau states that if "appellate courts were limited by this standard, the occasions on which [they] would consider a new issue would be sharply reduced. [The] standard would help restore predictability to the appellate process and serve the interests the general rule was designed to protect."[116]

The proposed solution can be characterized as a two-step process. First, the solution requires that a Federal Rule of Civil Procedure 60(b) standard be met before a new issue will even be considered for review. This first requirement is an inquiry into whether the attorney who failed to raise the issue at trial did so because of "excusable neglect."[117] Second, once excusable neglect is found, the new issue must be one that is "reflected in the record."[118]

The first requirement is deficient because (1) it focuses too much on the conduct of the trial attorney rather than the protection of the litigant, and (2) the body of law which is attached to Federal Rule of Civil Procedure 60(b) gives little guidance for determining the excusability of failures to raise objections at trial. Applying a Rule 60(b) "excusable neglect" standard requires a factual inquiry into the conduct of a litigant's attorney at trial to determine, as the words imply, whether there was a good excuse for not raising an issue in the trial court. This inquiry requires a comparison of the attorney's actual conduct to some objective standard concerning how attorneys should perform, inquiring into such matters as whether an attorney would have reasonably known to object at trial, whether there was oppor-

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115. Martineau, *supra* note 1, at 1061. 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 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.

116. Martineau, *supra* note 1, at 1061.

117. FED. R. CIV. P. 60(b)(1). It is correctly pointed out that not all of Rule 60(b) would apply. Martineau, *supra* note 1, at 1060. Accordingly this Note will focus on "excusable neglect" which is found in the language "mistake, inadvertance, surprise, or excusable neglect." FED. R. CIV. P. 60(b)(1).

118. Martineau, *supra* note 1, at 1061.

tunity to object, or whether the issue was in fact raised in some other perfunctory manner.[119] Presumably, if the attorney's conduct meets the objective standard, then the failure to raise the issue at trial would be considered excusable, the attorney would not be at fault, and relief would be granted on the matter.[120]

This first requirement would provide a strong check on attorney conduct. The Rule 60(b) standard rewards good lawyering by allowing only "excusable neglect" to be overlooked in the appellate court and punishes bad lawyering by preventing an issue from being raised where an attorney's conduct falls below the objective standard.[121] By focusing only on the acts of the trial attorney, the first step in the proposed solution, much like the general rule, does promote the concerns of judicial economy and checking attorney negligence.

However, it is a matter of opinion as to whether the court should focus on the attorney rather than the litigant. The litigant should be the focus of the inquiry.[122] One judge states that the very reason for providing an exception to the general rule is not because a trial attorney was not negligent but because some attorneys are negligent. Expressing a concern for protecting the litigant, he states:

> [T]here is evidence that . . . the quality of trial advocacy in our nation's courts has been declining. We must strive to reverse this trend, to be sure, but I do not think we should do so at the expense of litigants who are not to blame for their attorneys' shortcomings. There are other, more direct and less costly ways of raising standards of trial advocacy than discarding [the means necessary to relieve litigants].[123]

Of course, this statement could be countered with the argument that not allowing a new issue to be heard does not leave the litigant without a remedy; the litigant could recover his loss from the negligent attorney in a

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119. Professor Martineau did not give a specific example of how the Rule 60 inquiry would operate in the context of failures to object. However, examining the language of the rule, the inquiries listed here appear to follow from the rule. *See* FED. R. CIV. P. 60(b)(1).

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

121. *See generally* Note, *Appeal and Error—New Evidence in the Appellate Court,* 56 HARV. L. REV. 1313, 1317 (1943).

122. In responding to the statement that allowing an appellate court to remedy defects caused by trial attorneys below encourages negligence, one commentator stated:

> [I]t recalls an English lawyer's version of the sporting theory of justice that a trial at law is a cock fight in which that party prevails whose advocate is the gamest bird with the sharpest spurs. In such a contest a court may well refuse to do anything for a litigant whose counsel omits to prove something not really disputed and capable of proof by incontrovertible evidence. But in any modern view of the purposes of legal procedure there is no need for the client to suffer injustice in such a case.

Id. at 1318 (footnote omitted).

123. Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 263, 322 A.2d 114, 119 (1974) (Pomeroy, J., concurring and dissenting) (arguing for the continued use of the fundamental error doctrine as an exception to the general rule).

malpractice suit. But this argument is faulty because if the true objective is to remedy the litigant (not punish attorneys) the issue should be resolved on appeal, not in another trial.

The first requirement of Professor Martineau's solution is also deficient because the body of law which is part and parcel of Federal Rule of Civil Procedure 60(b) gives little guidance to determining "excusable neglect" with respect to failure to raise objections at trial. The law under that rule deals primarily with cases of missing motion deadlines or having dismissals entered against litigants rather than failures to object to error in the trial court.[124] For example, a typical Rule 60(b) motion for excusable neglect may involve a situation where default is entered against a party due to a failure of the party's attorney to oppose a motion for summary judgment within a certain time limit.[125] A Rule 60(b) inquiry would consider the reasons for the failure, such as whether counsel was from out of town and therefore not aware of local rules,[126] in order to determine if there was excusable neglect in failing to oppose the motion. Compare, however, that situation to a failure to raise or object to an error at trial. Applied to the second situation, the Rule 60(b) standard would inquire into the reasons why the attorney did not object, such as whether he was given an opportunity to object or, given an opportunity to object, whether it was still reasonable not to raise the issue.[127] Although the basic inquiry of whether the negligence of the attorney was excusable is the same in both situations, each inquiry involves different factual questions. Of course, the fact that a court would have to perform different inquiries than what it presently considers under Rule 60(b) does not mean there would be a serious defect in applying excusable neglect analysis to the case of failures to object. But, if a court is going to latch onto a different body of law to deal with a new problem, it would be helpful if the precedent gave guidelines. Application of a Rule 60(b) standard would take on a different look in the context of failures to

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124. *See, e.g.*, In Re Salem Mortgage Co., 791 F.2d 456 (6th Cir. 1986) (where counsel for creditor in bankruptcy court signed a stipulation inadvertantly, court ruled in favor of the trustee on the stipulated issue, and counsel asked for relief under Rule 60(b)(1) for excusable neglect); Surety Ins. Co. v. Williams, 729 F.2d 581 (8th Cir. 1984) (counsel for parties agreed to settle a case for breach of contract and judgment was entered, but one party filed for Rule 60(b) relief on ground that attorney did not have authority to settle); Quality Prefabrication v. Daniel J. Keating Co., 675 F.2d 77 (3d Cir. 1982) (party sought relief under Rule 60(b) from default judgment where counsel failed to respond to a discovery motion); Supermarkets General Corp. v. Grinnell Corp., 490 F.2d 1183 (2d Cir. 1974) (Rule 60(b) relief denied in a class action suit where party had notice and opportunity to opt out but had not done so); Coady v. Aguadilla Terminal, 456 F.2d 677 (1st Cir. 1972) (party seeking relief from judgment entered upon failure of counsel to file a timely cost bond).

125. *See, e.g.*, Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277 (5th Cir. 1985).

126. *Id.* at 1280.

127. *See supra* notes 115 & 117.

object as compared to the cases the rule presently deals with, leaving little guidance as to what would be excusable.[128]

Another problem with using Rule 60(b) is that once an appellate court decides that there was excusable neglect (and the issue should be heard), the Rule stops there and goes no further. In the situations now covered by the Rule, it functions well. Take an example where an attorney inadvertently enters a voluntary dismissal of both defendants rather than one and, as a result, his client's whole case is dismissed by the court. The attorney moves for relief under Rule 60(b) and the court determines that dismissal of the extra defendant was excusable neglect and, therefore, the case should be reinstated.[129] As one can see, negligence on the part of the attorney is the *only* inquiry. If the court finds excusable neglect, the court grants relief and the attorney gets a chance to go back and try again. Compare, however, the situation where an attorney fails to raise an issue at trial, which requires an analysis with two steps rather than one: first, an inquiry as to whether the attorney's negligence was excusable, and second, once an excuse is found, *the appellate court must decide the issue that the attorney failed to raise at trial.*

Unlike the above case, where an inadvertent motion can be dismissed and a new trial granted,[130] the court here cannot give the attorney a chance to try again because the court cannot magically allow the attorney to go back and object to the issue at trial. Once the issue is before the appellate court, it has to be decided based on the present state of the record.

What one sees is that under Professor Martineau's solution the court runs into the same capability problem that courts have always faced in deciding new issues informatively.[131] Because again, even though the appellate court has the issue before it, the court still must question whether additional factual determinations are necessary or new evidence is needed, or whether the appellee might be prejudiced.[132] Thus, Rule 60(b) does not give guidance on when an appellate court would be capable of deciding a new issue once it is before the court.

The second requirement of Professor Martineau's proposed solution attempts to solve the capability problem by requiring that appellate courts consider only those new issues which are "reflected in the record."[133] However, before accepting it as a solution, one must ask what this statement means. It cannot mean that the issue being raised for the first time on

128. Note that this is one of reasons Professor Martineau wanted Rule 60(b). *See* Martineau, *supra* note 1, at 1060.

129. *See* Noland v. Flohr Metal Fabricators, 104 F.R.D. 83 (D. Alaska 1984).

130. *See* Fed. R. Civ. P. 60(b).

131. *See supra* notes 49-50 and accompanying text.

132. *See supra* notes 59-60 and accompanying text.

133. Martineau, *supra* note 1, at 1061.

appeal has previously been objected to and is in the record. If this were true, the appellate court would already be able to hear the issue without any general rule barring it—anything raised at trial can be appealed. Perhaps, the statement means that the facts necessary to decide the issue are completely developed in the record. However, Professor Martineau does not expressly define "reflected in the record" to mean that the facts are fully developed. What one sees is that by saying the issue must be "in the record," while supposedly solving the problem of deciding new issues on a possibly deficient record, is as vague as saying an issue should be decided only it is one of "plain error."[134] This lack of definition would leave appellate courts with the same problems that they have been struggling with under the previous case law.[135]

Thus, Professor Martineau's proposed solution may actually restore some predictability to this area of appellate procedure by requiring a specific standard be applied to the conduct of trial attorneys before an issue is heard. But the price his solution pays for checking attorney conduct is a failure to provide any guide as to what an appellate court should do to ensure its capability of informatively deciding an issue once it is before the court.

B. A Second Proposed Solution

Another method to solve the problems of hearing new issues on appeal is to codify a uniform model rule based on the proper application of the principles and methods federal appellate courts have already formed. First, the predicability problem[136] can be solved by using a uniform model rule. By requiring each appellate court to draw from the same factors in determining when a new issue should be heard, uniform results can be expected and lawyers, judges, and courts will be able to predict what issues will be heard on appeal.[137] Second, the problem of lack of factual information[138] can also be solved. By framing the proposed uniform model rule according to the principles and methods appellate courts have already used to determine when to hear new issues,[139] the solution can draw on the courts' years of experience, rather than ignoring their work, to address and solve a problem that has actually already been solved.

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134. *See supra* notes 87-89 and accompanying text.

135. *See supra* notes 48-50 & 55 and accompanying text.

136. For a discussion of how there is a lack of guidance in the case law today, see *supra* notes 124-26 & 128-29.

137. An example of this methodology is Professor Martineau's own proposed statutory solution. *See supra* notes 115-16 and accompanying text.

138. For a discussion of how appellate courts are limited in ability to decide issues before them, see *supra* notes 49-54.

139. This involves looking primarily to how federal appellate courts have formed exceptions to the general rule.

Thus, to strike a balance between the competing concerns of appellate courts wanting to get to new issues,[140] their inability to act as trial courts,[141] and the need to prevent intentionally saving issues for appeal,[142] the following model rule derived from the principles and methods of what has already been done to solve these problems could be used:

> A new issue should be heard on appeal only when the party raising the issue can show:[143]
> (1) that there was no intentional choice to fail to raise the issue in the trial court below;[144] and
> (2) no further factual development of the record is necessary;[145] and
> (3) opposing party will not be prejudiced by his or her inability to present evidence or arguments on the new issue;[146] or
> (4) that there was no opportunity to object to or to raise the issue below in the trial court.[147]
> If both (2) and (3) above are not met, but the court still deems it necessary to hear the new issue (such as where the issue is one of great public interest),[148] the court should hear the issue only if the case is remanded to ensure full factual development and to ensure the opposing party is not prejudiced.[149]

The above model rule is an attempt to allow courts to reach new issues to prevent injustice in an individual case. However, the rule allows a new issue to be heard on appeal only when there is sufficient assurance that an appellate court can correctly decide the issue without prejudice to the appellee. Although based upon the prior case law on raising new issues, the rule omits any language such as "plain error," "miscarriage of justice," or "question of law" previously used. The rule is an attempt to focus

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140. *See supra* notes 42-47 and accompanying text.

141. *See supra* note 51 and accompanying text.

142. *See supra* note 23 and accompanying text.

143. Federal appellate courts have generally placed the burden on the party raising the new issue to show why it should be heard. *See* City of Waco v. Bridges, 710 F.2d 220, 228 (5th Cir. 1983) (The court held that "[t]he burden of establishing exceptional circumstances clearly rests on the party asserting the new issue."), *cert. denied sub nom.* Bridges v. McLennan County, 465 U.S. 1066 (1984).

144. *See supra* note 23 and accompanying text; *see also* Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1146 (5th Cir. 1981) (court held that a party "should not be entitled to raise new issues on appeal simply because those he relied upon at trial were unsuccessful"), *cert. denied,* 455 U.S. 1000 (1982).

145. This is based on the first principle underlying the pure law exception, *see supra* notes 59 & 64-66 and accompanying text, and the plain error exception, *see supra* notes 76-82, to the general rule.

146. This is based on the second principle underlying the pure law exception. *See supra* notes 60 & 65-66 and accompanying text.

147. This is simply a restatement of what is already required by Federal Rule of Civil Procedure 46 ("[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party."). *See also supra* notes 22 & 40.

148. *See supra* notes 92-98 and accompanying text.

149. *See supra* note 53 and accompanying text.

directly on the problems associated with raising new issues and uses the definitive terms as stated in the cases to provide clearer guidance as to what courts should look for. For example, using an inquiry into the factual development of the record rather than looking for "plain error" properly focuses the court's attention on its ability to decide a new issue rather than on the issue's gravity.

The above model rule shows that this area of appellate procedure can be made predictable while still accounting for the concerns that arise when a new issue is brought before an appellate court. One need not apply a different body of law to solve problems that body of law was not intended to solve because all that is necessary is for one to pull together the proper aspects of what appellate courts have been doing all along to solve the problems.

CONCLUSION

The general rule against hearing new issues on appeal originated from the eighteenth century English practice of a criminal action against the trial judge. Notwithstanding the removal of the criminal action against the judge, modern defenders advance justifications for the rule's continued existence. These justifications, while worthy in their own right, are not well advanced by the general rule they support because of the rule's inflexibility. The exceptions to the general rule further put into question the rule's continued use and give examples of circumstances under which appellate courts could hear new issues without fear of being incapable of deciding the issues correctly. Finally, the Supreme Court's position on the general rule is that the rule should actually not be general at all, but rather a question of appellate court discretion to decide under what circumstances new issues will be heard. While the Court may certainly have given the first clear indication for the removal of the general rule, it failed to give guidelines within which appellate courts could exercise their newly found discretion. This lack of guidance left the occasions on when new issues would be heard in the state it was found—unpredictable.

Two solutions have been proposed to solve the problem of predictabilty and to identify the circumstances under which courts would be capable to decide issues informatively. The first solution, while substantially solving the predictability problem, left untouched the problem of appellate courts getting issues before them which would have either little factual development or would greatly prejudice the opposing party if heard. This resulted from applying foreign body of law to solve a problem which had already, in large part, been solved by existing federal appellate court case law. The second proposed solution solves the predictability problem by using a model rule which would give specific guidelines for appellate courts to follow. In addition, the model rule solves the problems of factual development and

prejudice to the appellee by looking to, rather than ignoring, what the federal appellate courts have already done to solve these problems

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