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The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure

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THE THEORETICAL FOUNDATIONS OF THE PROPOSED TENNESSEE RULES OF APPELLATE PROCEDURE

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I. INTRODUCTION

Barring any unexpected developments, the 1979 session of the Tennessee General Assembly will be requested to approve the Tennessee Rules of Appellate Procedure. The proposed rules are the product of a three-year study of the appellate procedure of Tennessee and virtually every other jurisdiction, undertaken by the Tennessee Supreme Court through its Advisory Commission on Civil Rules.[1] One of the principal purposes of the rules is to set forth a comprehensive statement of Tennessee law of appellate procedure. The rules regulate the availability and method of initiating appeals from interlocutory orders[2] and final judgments,[3] security for costs,[4] and stays or injunctions pending appeal,[5] review of bail orders and release pending appeal by the state in criminal cases,[6] the scope of appellate review,[7] appeals by

1. The Commission's membership changed during preparation of the appellate rules. Serving on the Commission at one time or another were George E. Barrett, Nashville; Richard H. Batson, Clarksville; Knox Bigham, Lewisburg; W. Harold Bigham, Nashville; Howell G. Clements, Chattanooga; James M. Glasgow, Union City; Donald F. Paine, Knoxville; Thomas R. Prewitt, Memphis; James D. Senter, Jr., Humboldt; Herbert R. Silvers, Greeneville; Hewitt P. Tomlin, Jr., Jackson; Joe W. Worley, Kingsport. The terms of James D. Senter and Herbert R. Silvers expired early in the Commission's deliberations, and they were replaced by James M. Glasgow and Joe W. Worley. Knox Bigham served as chairman until his term expired in June 1976. Donald F. Paine succeeded him as chairman, and W. Harold Bigham was appointed to take his place on the Commission. In addition to the members of the Commission and its Reporter, Justice William J. Harbison of the Tennessee Supreme Court actively and faithfully participated in the Commission's deliberations.

2. PROPOSED TENN. R. APP. P. 9-10.

3. *Id.* R. 3.

4. *Id.* R. 6.

5. *Id.* R. 7.

6. *Id.* R. 8.

7. *Id.* R. 13.

poor persons,[8] filing and service of papers,[9] computation and extension of time,[10] motions,[11] the record on appeal,[12] briefs,[13] oral argument,[14] the effect of error,[15] publication of opinions,[16] rehearing,[17] costs[18] and interest on judgments,[19] and a number of other miscellaneous matters.[20] Many of the proposed rules embody existing law, but there are also several significant changes both in matters of detail and matters of more fundamental significance. The present discussion will focus principally on rules of fundamental significance or unusual interest. Before discussing the substance of the rules, however, it may be enlightening to sketch the procedure followed in formulating them.

A. The Rulemaking Process

The Tennessee Supreme Court is empowered by statute to prescribe by rule "the practice and procedure in all of the courts of this state in all civil and criminal suits, actions and proceedings."[21] The rules adopted by the court may not "abridge, enlarge

8. *Id.* R. 18.
9. *Id.* R. 20.
10. *Id.* R. 21.
11. *Id.* R. 22.
12. *Id.* R. 24-26.
13. *Id.* R. 27-30.
14. *Id.* R. 35.
15. *Id.* R. 36(b).
16. *Id.* R. 37(b).
17. *Id.* R. 39.
18. *Id.* R. 40.
19. *Id.* R. 41.
20. For the sake of convenience, the text of the current version of the proposed rules is appended to this article. These rules are a revised version of the rules published in the South Western Reporter. *See* 554 S.W.2d No. 2, at 1-57 (1977) (advance sheet). The revised rules and Commission Comments will also be published in the South Western Reporter for further comment and criticism. The Commission comments accompanying the rules have been approved by the Advisory Commission.
21. TENN. CODE ANN. § 16-112 (Supp. 1977). Another, older section of the Code permits the supreme court to "make rules of practice for the better disposal of business before it." *Id.* § 16-311 (1955). There is some authority in Tennessee to the effect that the supreme court has inherent procedural rulemaking power concerning its own procedures that belongs to the court alone "without the control or revision of other governmental departments." Wood v. Frazier, 86 Tenn. (2 Pickle) 500, 506, 8 S.W. 148, 150 (1888). *But cf.* Chaffin v.

or modify any substantive right, and shall be consistent with the constitutions of the United States and the state of Tennessee."[22] In addition, the rules may not take effect until approved by joint resolution of both houses of the General Assembly.[23] Any laws in conflict with rules promulgated by the court and approved by the legislature are declared by the rulemaking statute to be of "no further force or effect."[24] The supreme court is also empowered to appoint a commission "to advise the [court] from time to time respecting the rules of practice and procedure."[25]

Pursuant to its statutory authority, the supreme court appointed the Advisory Commission on Civil Rules and requested the Commission to draft a set of appellate rules. Since none of the Commission's members had extensive experience in criminal matters, the Commission decided in its preliminary discussions to treat only civil appeals. Later, after a draft of a complete set of rules was submitted to the supreme court by the Commission, the rules were informally amended to include criminal appeals.[26]

Robinson, 187 Tenn. 125, 213 S.W.2d 32 (1947) (absent enabling act, a court rule that conflicts with a statute is invalid).

The desirability of judicial rulemaking has spawned a surprising amount of literature in Tennessee. *See* Armistead, *Shall the Supreme Court of Tennessee Be Given the Power to Regulate by Rules of Court All Evidence and Procedure? No*, 17 TENN. L. REV. 188 (1942); Coffey, *Shall the Supreme Court of Tennessee Be Given the Power to Regulate by Rules of Court All Evidence and Procedure? Yes*, 17 TENN. L. REV. 184 (1942); Coffey, *A Challenge and an Appeal to the Tennessee Bar*, 15 TENN. L. REV. 698 (1939); Higgins, *The Rule-Making Power of the Supreme Court of Tennessee*, 8 TENN. L. REV. 184 (1930); King, *Shall the Supreme Court of Tennessee Be Given the Power to Regulate by Rules of Court All Evidence and Procedure? No*, 17 TENN. L. REV. 178 (1942); Wicker, *Shall the Supreme Court of Tennessee Be Given the Power to Regulate by Rules of Court All Evidence and Procedure? Yes*, 17 TENN. L. REV. 168 (1942); Wicker & Anderson, *Regulation of Procedure by Rules of Court*, 15 TENN. L. REV. 758 (1939). *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001 (1969); Ashman, *Measuring the Judicial Rule-Making Power*, 59 JUDICATURE 215 (1975).

22. TENN. CODE ANN. § 16-113 (Supp. 1977).

23. *Id.* § 16-114.

24. *Id.* § 16-116.

25. *Id.* § 16-118.

26. Justice William J. Harbison asked Judges William S. Russell and Martha Craig Daughtrey of the court of criminal appeals to suggest revisions that seemed desirable and necessary in order to incorporate appeals in criminal cases in the initial draft of the rules submitted to the court. The Reporter made extensive changes in the suggested revisions of the court of criminal appeals and

The Commission worked almost exclusively from drafts of proposed rules submitted by its Reporter. Before drafting a rule for consideration by the Commission, the Reporter examined a representative sample of the law of appellate procedure of other jurisdictions and the law currently in effect in Tennessee. The legal literature was also carefully studied. Proposed rules, often accompanied by an explanatory memorandum, were circulated among the members of the Commission. Copies of representative statutes and rules from other jurisdictions were appended to memoranda discussing rules of fundamental significance. The drafts were then discussed and often revised several times. The rules themselves, which reflect the experience of Commission members from both rural and urban areas across the state,[27] are the single most significant contribution of the Advisory Commission. The time is not yet ripe nor the circumstances appropriate to assess the quality of the Commission's product, but two aspects of the rulemaking process are deserving of special comment.

In the first place, the rulemaking process from its inception was premised on the belief that the rules should be widely circulated prior to their submission to the General Assembly. Accordingly, preliminary drafts of the rules were submitted initially to the appellate and trial bench, and thereafter, in September 1977, a proposed draft was disseminated to the public at large.[28] All comments, suggestions, and criticisms elicited thereby were carefully considered by the Commission and its Reporter, and some rules were altered accordingly. A revised proposed draft, accompanied by the comments of the Commission, will be circulated shortly for further comment and is reproduced at the end of this article. The rules have unquestionably profited from comments received to date, and it is to be hoped that the openness of the rulemaking process has helped create the understanding and sympathetic endorsement that is indispensable to the rules' success.

A second noteworthy feature of the rulemaking process was the commitment of the Commission to a workable, well-

in other rules as well. Justice Harbison and Judge Russell then made the final revisions. This informal procedure was considered adequate based on the belief that civil and criminal appeals are largely indistinguishable.

27. For the membership of the Commission, see note 1 *supra*.

28. *See* note 20 *supra*.

conceived set of rules in the face of predictable controversy. Some of the rules are controversial and were so within the Commission itself.[29] Procedures that are simply familiar become procedures that are indisputably right.[30] "Familiarity, alas, breeds undeserved respect . . . . Intellectually we subscribe to improvement, but when it materializes it is a jolt to our customary ways, and we are likely to cancel our subscription."[31] With rare exception,[32] the desire to avoid controversy did not dissuade the Commission from remedying the defects perceived in existing practice.

B. The Need for Procedural Reform

The current law of appellate procedure in Tennessee is the product of intermittent and uncoordinated legislative and judicial activity extending over more than a century.[33] One result is that the law itself is scattered throughout numerous sections of the Tennessee Code and the rules and decisions of the appellate courts. Another result is a body of law that, even to the initiated, is complex, technical, incomplete, dated, and occasionally arbitrary. To the novice the law is inscrutable. Consequently, the merits of a case on appeal often become obscured by procedural concerns.

Roscoe Pound, in a now classic speech[34] delivered to the American Bar Association in 1906, highlighted the need for appellate procedural reform by a semiempirical and quite revealing comparison of the English and American case reports:

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29. Proposed rule 3(e), eliminating the new trial motion as a prerequisite to review in jury actions, and rule 24(f), eliminating the requirement of approval of the record by the trial judge, proved most controversial, at least with the bench.

30. *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

31. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 161, 166 (1960). Or, as Holmes said, "Ignorance is the best of law reformers." O. HOLMES, THE COMMON LAW 78 (1881).

32. For example, the Commission did not alter the existing law on scope of review of determinations of fact in civil actions because it was deemed inexpedient, among other reasons, to do so. *See* text accompanying notes 226-301 *infra*.

33. *See* Harbison, *Tennessee Appellate Procedure and the Uniform Administrative Procedures Act*, 6 MEM. ST. U.L. REV. 291, 302 (1976).

34. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

> One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting . . . . On the other hand, our American reports bristle with fine points of appellate procedure. . . . All of this is sheer waste, which a modern judicial organization would obviate.[35]

A comparable study conducted in 1942 of Tennessee appellate decisions revealed numerous instances of "sheer waste":

> The topic of appeal and error occupies more space in our Tennessee digests than any other topic. In a majority of the American states there are more decisions on the subject of corporations than on the subject of appeal and error. But in Tennessee appeal and error occupies three times as much space in our digests as corporations or any other one topic. An examination of a recent volume of the Tennessee Appeals Reports, Volume 24, shows that 13 per cent of all the points decided by the Court of Appeals of Tennessee in the opinions reported in that volume are questions of appellate practice. An examination of a recent volume of the Tennessee Reports, Volume 176, shows that 10 per cent of all the points decided by the Supreme Court of Tennessee in the opinions reported in that volume are questions of appellate practice.[36]

Appellate procedural problems continue to beset counsel and the courts. For example, of the last one hundred reported decisions of the Tennessee Supreme Court available at this writing, nine raised questions concerning appellate procedure.[37]

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35. *Id.* at 410-11. Pound's research revealed the following statistics:

> More than four per cent of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. . . . The state reports exhibit the same condition.

Id.

36. Wicker, *A Comparison of Appellate Procedure in Tennessee and in the Federal Courts*, 17 TENN. L. REV. 668, 669 (1943).

37. The decisions surveyed were those in volumes 541 through 551 of the South Western Reporter, second series.

C. *The Purposes of Procedural Reform*

Given the shortcomings in existing law, the proposed Tennessee Rules of Appellate Procedure have a number of remedial objectives. One essential purpose is to set forth in a single place a comprehensive and coherent statement of the fundamentals of appellate procedure. It probes too deeply perhaps to observe, as Learned Hand did nearly fifty years ago, that the chief difference between the state of nature and a civilized society is the acceptance by the latter of some "public, fixed and ascertainable standard of reference by which conduct can be judged and to which in the main it will conform."[38] But much can be said for establishing procedural rules, good or bad, that are readily accessible and that clearly, concisely, and precisely define the standards to which the participants in the appellate process are expected to conform.

Another primary purpose of the rules is simplification of the law. There is little if any contemporary value in preserving the three current methods of review from a final trial court judgment. The writ of error[39] and simple appeal[40] are descendants of the historic division of review in actions at law and review in equitable actions;[41] the appeal in the nature of a writ of error[42] is a by-product of the influence of appeal and error upon each other.[43] Ironically, the principal utility of the writ of error today is as a salutary device permitting review otherwise unavailable because of noncompliance with the technical requirements of review by appeal or appeal in error.[44] The distinction between the technical record and bill of exceptions,[45] the distinction between the bill of

38. Hand, *Is There a Common Will*, 28 MICH. L. REV. 46, 52 (1929).

39. TENN. CODE ANN. § 27-601 (1955).

40. *Id.* § 27-301. *See generally* Comment, *Tennessee Procedure—The Simple Appeal*, 35 TENN. L. REV. 642 (1968).

41. *See* text accompanying notes 52-66 *infra*.

42. TENN. CODE ANN. § 27-306 (1955).

43. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 80-84 (1941).

44. *See, e.g.*, Ward v. North Am. Rayon Corp., 211 Tenn. 535, 366 S.W.2d 134 (1963); Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949); *cf.* Hamby v. Millsaps, 544 S.W.2d 360 (Tenn. 1976) (writ of error unavailable if appeal in the nature of a writ of error perfected); Crowe v. Birmingham & Nw. Ry., 156 Tenn. 349, 1 S.W.2d 781 (1928) (same); Turner v. South Pittsburgh Lumber & Coal Co., 14 Tenn. App. 297 (1931) (writ of error unavailable if appeal perfected).

45. *See* Comment, *The Bill of Exceptions in Tennessee*, 25 TENN. L. REV.

exceptions and wayside bill of exceptions,[46] and the mode of preparation of the bill of exceptions[47] are further instances of complexities rooted in a largely forgotten history with little contemporary justification. Similarly, many of the prerequisites to empowering the appellate court to review the merits of the trial court's judgment, most notably the prayer for an appeal and granting of the prayer,[48] are senseless technicalities whose purpose of providing a record of the intent to appeal can be more simply fulfilled.[49]

Finally, rule 1 states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits." In a meaningful sense, rule 1 lies at the heart of all the other rules since it depicts the spirit in which the rules are conceived. That spirit views procedure not as a battle of "bright or dull wits . . . on witless technicalities"[50] but as a practical means to an end. Other rules reflect this same spirit. For example, rule 36(b), dealing with the effect of error, provides that "[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."[51] Similarly, rule 36(a) directs the appellate court to

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246 (1958). *Compare* Duane & Co. v. Richardson, 106 Tenn. 80, 59 S.W. 135 (1900); Powell v. Barnard, 20 Tenn. App. 31, 95 S.W.2d 57 (1936), *and* TENN. CODE ANN. §§ 27-104 to 107, -113 (1955 & Supp. 1977), *with* Darden v. Williams, 100 Tenn. 414, 45 S.W. 669 (1898), *and* TENN. CODE ANN. §§ 27-110 to 112 (1955 & Supp. 1977).

46. *See, e.g.*, Overturf v. State, 547 S.W.2d 912 (Tenn. 1977); Comment, *supra* note 45, at 258-60.

47. *See* TENN. CODE ANN. §§ 27-109 to 110 (Supp. 1977); Comment, *supra* note 45, at 252-53, 256-57.

48. *See, e.g.*, Russell v. State *ex rel.* Willis, 222 Tenn. 491, 437 S.W.2d 529 (1969); Duke v. Scott, 216 Tenn. 391, 392 S.W.2d 809 (1965); TENN. CODE ANN. § 27-310 (1955); Wicker, *supra* note 36, at 673. *But see* Honeycott v. Nabors, 197 Tenn. 300, 271 S.W.2d 859 (1954) (neither prayer for an appeal nor granting of the prayer prerequisite to filing record for writ of error).

49. Wicker, *supra* note 36, at 674; *see* text accompanying note 130 *infra*.

50. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 15 (1970).

51. *See* Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 146-47 (1927):

> The problem of prejudicial error is a problem in professional psychology. . . .
>
> The only permanent and effective cure for technicality in this respect is a better conception of the purpose of all procedure. In England

"grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires" and empowers the court to "grant any relief, including the giving of any judgment and making of any order."

II. Some Underlying Assumptions of the Rules

A. *The Purpose of Appellate Review*

Any attempt to draft the rules necessary to achieve these ends must make certain assumptions concerning the purpose of appellate review, the adversary theory of litigation, and the role of judicial discretion. In his informative and provocative article published in this journal,[52] Professor Edson Sunderland traced two entirely different theories of review, one that grew up and flourished in actions at law and another that prevailed in equitable actions.

The institution of the jury and its exclusive right to find the facts resulted in two methods of review in actions at law. Questions of fact were reviewed by attaint.[53] Essentially attaint was a proceeding directed against the original jury (although the original litigants were also parties) in which a second jury with more members passed upon the same issue. If the attaint jury reached a finding contrary to that found by the original jury, the original jury stood convicted of perjury and was punished, often quite severely. Professor Thayer's research disclosed that

> the convicted juryman lost all his movable goods to the king; he

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> in the year 1924 not a single case from the King's Bench Division was reversed for error in admitting or excluding evidence. That simple fact explains why the intricacies of practice no longer annoy the English lawyer. And it explains the success of the whole judicial establishment. Procedure has become a practical means to an end. Its rules are no more exacting than efficiency requires.

See also text accompanying notes 501-53 *infra*.

52. Sunderland, *A Simplified System of Appellate Procedure*, 17 Tenn. L. Rev. 651 (1943) [hereinafter cited as *Appellate Procedure*]. The most comprehensive discussions of criminal and civil appeals are L. Orfield, Criminal Appeals in America (1939); R. Pound, *supra* note 43. Other writings by Professor Sunderland discussing the theory of review in legal and equitable actions include Sunderland, *The Scope of Judicial Review*, 27 Mich. L. Rev. 416 (1929) [hereinafter cited as *Judicial Review*]; Sunderland, *supra* note 51.

53. J. Thayer, Preliminary Treatise on Evidence at Common Law 137-59 (1898).

> was imprisoned for a year at least; he lost his *lex terrae* and became infamous. . . . It came also to be expressed as a part of the judgment that their wives and children should be turned out of doors, and their lands laid waste.[54]

Additionally, although according to Professor Sunderland only incidentally, attaint resulted in a reversal of the previous, false verdict and its replacement by the verdict of the attaint jury.[55]

Questions of law were decided by the judges and were reviewed by proceedings in error, which were based upon a theory similar to that of attaint. Proceedings in error were viewed as new, semicriminal proceedings

> directed against the judge . . . based upon a new cause of action arising out of the wrongful act committed by him in rendering his false judgment.
>
> The common-law proceeding in error did not operate as a review of the merits of the judgment. The question never arose as to whether the judgment was just or unjust, nor did the proceeding ever involve an inquiry as to what the true judgment ought to be. The sole question was, did the judge commit an error? Such error might be great or small; its consequences might be serious or trifling, but an error was an error and the judgment must fall.[56]

On the other hand, Professor Sunderland noted that

> the judges . . . enjoyed certain privileges which were denied to the jury. While attainted jurors were both fined and imprisoned, the judges got off with a fine; and while the jurors had to stand or fall on the merits of their verdict, the judges could defend their judgments by means of a duel. But lest this give too great an advantage to brawny appellants, and encourage too free a recourse to proceedings in error, penalties were provided for unsuccessful applicants. The Assizes of Jerusalem which were typical of the time, required the party seeking to falsify the judgment to fight the whole court, including the judges and witnesses. Under such conditions losing parties were inclined to let matters drop, particularly in view of the fact that the county often kept a doughty champion in its employ to represent the court in such emergencies.[57]

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54. *Id.* at 151.
55. *Appellate Procedure, supra* note 52, at 651.
56. *Id.* at 652.
57. *Judicial Review, supra* note 52, at 417.

This view of proceedings in error as an accusation against the judge prevailed until the reign of Edward I (1272-1307) when for the first time there arose the idea of a complaint against the judgment rather than the judge.

The common-law theory of review helps explain many familiar procedures and practices. For example, formal assignments of error, still in use in Tennessee,[58] developed "because seven hundred years ago the judge was held to be entitled to know what were the charges against him . . . ."[59] Similarly, issues not raised before the trial judge could not be argued on review because there was no wrongdoing of which the trial judge could fairly stand accused.[60] Moreover, no error could be assigned on questions of fact because the jury determined questions of fact in actions at law, and any error regarding the facts was thus no fault of the judge.[61]

The theory of review in equitable actions differed markedly from the theory of review at law. While actions at law divided decisionmaking between the jury, which found the facts, and the judge, who declared the law, in equitable actions the chancellor decided both law and fact questions.[62] This unified trial procedure in equity permitted full review of the entire case and enabled the appellate tribunal not merely to search for errors but to render whatever judgment ought to have been rendered.[63] Thus, review

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58. *See* TENN. SUP. CT. R. 14; TENN. CT. APP. R. 12. *But see* TENN. CODE ANN. § 40-3409 (1975) (no assignments of error necessary in criminal cases taken to the supreme court). *See generally* Note, *Appellate Practice—Sufficiency of Assignments of Error*, 12 TENN. L. REV. 293 (1934).

59. *Appellate Procedure*, *supra* note 52, at 651-52.

60. Millar, *New Allegation and Proof on Appeal in Anglo-American Civil Procedure*, 47 NW. U.L. REV. 427, 428 (1952); *Judicial Review*, *supra* note 52, at 421-22; Sunderland, *supra* note 51, at 140; Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 490-91 (1959); Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652, 655 (1951).

61. *Appellate Procedure*, *supra* note 52, at 653.

62. *Id.* at 655.

63. Professor Sunderland observed:

> If the upper court had the power to determine the merits of the case, it became less important to know whether an error had been committed than to know how it could be rectified. In a proceeding in error the entire aim of review was to affirm or deny the existence of error; in a true appeal that problem became merely preliminary to the really basic question of what the right decree should be.

Judicial Review, *supra* note 52, at 420.

at law was a search for error while review in equity was concerned with rendering the correct decree.

Over time these two theories of review influenced one another. Most notably, "the technical concept of a proceeding in error, which restricted review to the exact points passed upon by the trial judge, exerted a restraining influence upon the development of the appeal."[64] Thus the equity appeal, unlike the Continental European appeal,[65] did not permit new questions to be raised on review.[66] At least a partial explanation for this profound influence of the common-law theory of review lies in the adversary theory of litigation.

B. The Adversary Theory of Litigation

The adversary theory of litigation includes the principles of party presentation and party prosecution.[67] These principles describe a process in which the parties initiate litigation and are responsible for raising the issues, discovering the relevant evidence, and moving the litigation forward. The judge's role, on the other hand, is limited to deciding only the questions when and as presented to him by the parties.[68]

Many reasons, some historical and others of a more contemporary flavor, have been advanced in justification of the adversary system. It has been said that the adversary system is the most effective means of ascertaining the truth;[69] that the moral force and acceptability of judgments is greatest in an adversary system;[70] and that putting the parties in charge of litigation assures a motive for thorough preparation,[71] prevents the useless

64. *Appellate Procedure*, *supra* note 52, at 654.

65. *Id.* at 653.

66. *Id.* at 654-55.

67. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.2 (2d ed. 1977); Millar, *The Formative Principles of Civil Procedure* (pt. 1), 18 ILL. L. REV. 1 (1923).

68. F. JAMES & G. HAZARD, *supra* note 67, § 1.2; Millar, *supra* note 67; Rosenberg, *The Adversary System in the Year 2000*, 1 PROSPECTUS 5, 16 (1968).

69. P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION 390-91 (2d ed. 1977); F. JAMES & G. HAZARD, *supra* note 67, § 1.2, at 5; E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 3 (1956); Rosenberg, *supra* note 68, at 15.

70. F. JAMES & G. HAZARD, *supra* note 67, § 1.2, at 5.

71. Rosenberg, *supra* note 68, at 16.

consumption of the time and money of the state in investigating matters not disputed by the parties,[72] and "spares the court from the embarrassment of errors or omissions it may make in its investigation or direction of the case."[73] On the other hand, undue emphasis on the adversary quality of litigation subverts "the very idea of justice . . . [which] is that the party with the better case on the factual and legal merits deserves to prevail, and . . . ought to."[74]

These opposing considerations are most graphically at work when an appellate court perceives a basis for decision that has not been raised by the parties, a matter discussed more fully in a subsequent section.[75] It seems somewhat unfair to base a decision upon a ground that losing counsel has not had an opportunity to rebut. But to refuse to consider an issue not raised by the parties "would be to render automatons of judges, forcing them merely to register their reactions to the arguments of counsel at the trial level."[76] Such refusal would seem particularly inappropriate in a criminal appeal in which court-appointed counsel fails to raise a matter readily apparent and clearly requiring reversal of defendant's conviction.

It is unrealistic to expect that the interests furthered by the adversary system and the interest of deciding appeals correctly under the law can be reconciled in the abstract. The most desirable approach in this and other areas as well is to grant to the appellate court sufficient discretion until experience makes perceptible guidelines for restraining and shaping the court's exercise of its discretion.

C. *The Role of Judicial Discretion*

Any discussion of judicial discretion is likely to conjure up images of two types of judges. One invariably is capricious and, worse still, a dullard; the other is impeccably fair and possessed of rare genius. Too often forgotten is the honest and conscientious

72. Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 10 (1942).

73. Rosenberg, *supra* note 68, at 16. *See generally* P. CARRINGTON & B. BABCOCK, *supra* note 69, at 389-94.

74. Rosenberg, *supra* note 68, at 16. *See generally* Morgan, *supra* note 72, at 10-11; Pound, *supra* note 34, at 404-06.

75. *See* text accompanying notes 183-214 *infra*.

76. Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955).

judge of reasonable competence who, in the loneliness that envelopes the thoughtful decisionmaker,[77] seeks whatever guidance is practically available to resolve the perplexing problem facing him. This personalization of judicial discretion serves as a helpful reminder that, notwithstanding Law Day speeches to the contrary, this is a nation not of laws alone but of laws and men.[78] "It goes without saying that the effectiveness in operation of all rules of procedure . . . depends upon the capacity and character of the tribunal enforcing and using them."[79] Moreover, it becomes equally apparent upon reflection that laws cannot be written for the dull or dishonest:

> No legislation can endow a judge with intelligence or integrity, and no legislation can create a procedure which a fool or a crook cannot pervert to his blundering or sinister purpose. It would, therefore, be as foolish as it would be futile to frame a code . . . to be administered by an incompetent or dishonest judge.[80]

The proposed appellate rules were drafted on the theory, therefore, that they will be administered by honest and reasonably competent judges. But even honest and competent judges may not legitimately lay claim to unfettered discretion:

> This pattern and ideal of reasonable regularity—in contrast to "certainty" of outcome or "universality" of rule on the one hand and to "free discretion" or "arbitrary" choice or patternlessness and the like on the other—this pattern and ideal of reasonable regularity is marbled through the muscle of a good deal of law-government in the way fat marbles through a steak to make and keep it tender. Reasonable regularity is indeed the

77. *See* Schaefer, *Appellate Advocacy*, 23 TENN. L. REV. 471, 475-76 (1954):

> The judges who are deciding your case, must, each for himself, reach his conclusion, and he does it in that peculiar atmosphere of loneliness that surrounds a judge. I don't mean that we don't have friends and I don't mean that some of us aren't popular, but when he reaches your case and he has to consider it, and when he measures it against the pertinent provisions of statute and of constitution, and against all our heritage of common law and equity decisions and when he reaches his conclusion, he does it alone.

78. Jones, *Political Behavior and the Problem of Sanctions*, in W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 1031 (6th ed. 1974).

79. Morgan, *supra* note 72, at 7.

80. *Id.* at 8.

> principle which comes close to drying up the bubbling flood of words about rule and discretion, whether in the appellate court or in any other activity of law-government. The matter comes to this: *no* discretion has any business to be truly unique in exercise.
>
> To be *right* discretion, to be lawful exercise of discretion (though there be neither rule nor precedent nor likelihood of repetition), the action so far as it affects any man or group adversely must be undertaken with a feeling, explicit or implicit, of willingness, of readiness, to do the like again, if, as, and when a like case may arise.[81]

Rules of court seeking to facilitate the "rightful" exercise of discretion require an awareness of the significance of granting discretionary judicial power, the reasons for doing so, and the need for setting forth guidelines to help shape and restrain its exercise.

In his insightful article on judicial discretion,[82] Professor Rosenberg distinguishes between discretion that is decision-liberating and discretion that is review-limiting. Decision-liberating discretion refers to a freedom of choice that permits the court to consider the circumstances of the individual case, a freedom that will be circumscribed in greater or lesser degree by articulated guidelines. Review-limiting discretion, on the other hand, is concerned with the hierarchical allocation of decision-making between trial and appellate courts and describes the intensity of appellate scrutiny of trial court decisions. Oftentimes, review-limiting discretion "gives the trial judge a right to be wrong without incurring reversal."[83]

The principal reason for granting decision-liberating discretion is to permit

> more compassionate and more sensitive responses to differences which ought to count in applying legal norms, but which get buried in the gross and rounded-off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows the individualization of law and

81. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 217 (1960).

82. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

83. *Id.* at 637.

> permits justice at times to be handmade instead of mass-produced.[84]

All rules of law necessarily speak in somewhat general terms.[85] This is so because, flattering as it would be to believe otherwise, "no draftsman or body of draftsmen, be they ever so wise and ever so ingenious, could possibly foresee all the new situations and all the variations of old situations which will be presented in the future."[86] Moreover, in order to be workable and manageable, rules must not be overburdened with qualifications, exceptions, specifications, and provisos.[87] An overly detailed statement of the law might well retard healthy growth.[88] Thus general rules are necessary but must not be blindly followed or else "justice as individualization"[89] is sacrificed. " 'Justice as individualization' is a fact of law's life. One who fails to see the constant interplay, in practical adjudication, of general rule and concrete case is missing what may well be the main event."[90] Decision-liberating discretion, therefore, is essential to secure the individualization that justice requires.

Review-limiting discretion, on the other hand, has been justified by a variety of reasons. These include the need to preserve scarce judicial resources, the need to maintain trial court morale, the need to accord to judgments needed finality, the impracticability of formulating a rule, and the unique advantage that the trial court enjoys of perceiving directly matters that cannot or can only inadequately be conveyed by the written record.[91] Professor Rosenberg convincingly argues that "[t]he common vice of the first three reasons—economy, morale uplift, and finality—is their failure to provide clues as to which trial court rulings are cloaked with discretionary immunity of some strength, and which are not."[92] Only the last two reasons—the impracticability of formu-

84. *Id.* at 642. *See generally* Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615 (1961).

85. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1051-52 (1974); Pound, *supra* note 34, at 398.

86. Morgan, *supra* note 72, at 12.

87. *Id.*; Pound, *supra* note 34, at 398.

88. Morgan, *supra* note 72, at 12.

89. Jones, *supra* note 85, at 1051-53.

90. *Id.* at 1053.

91. Rosenberg, *supra* note 82, at 660-65.

92. *Id.* at 662. *But see* Carrington, *The Power of District Judges and the*

lating rules[93] and "the superiority of [the trial court's] nether position"[94]—provide a basis for determining which trial court rulings should be committed to the trial court's discretion and are therefore appropriate reasons for conferring review-limiting discretion. And if review-limiting discretion is conferred, it becomes additionally necessary to appreciate the "gradations of discretion, ranging from the toughest, most impenetrable varieties to types that are too flimsy to ward off any appellate scrutiny that looks askance at the trial court's ruling."[95]

The reasons for drafting general rules conferring some measure of judicial discretion, however, do not justify ignoring the lessons of experience; although justice is individualized, the law, in order to be just, must also be evenhanded. As Professor Davis has argued[96] and others have demonstrated in the administrative law context,[97] unrestrained discretion is a threat to the evenhanded administration of justice. Although, as Llewellyn observed,[98] lawful discretion may be exercised without rules, the absence of rules "makes inconsistent, arbitrary, or capricious decisions possible"[99] and, less dramatically but no less importantly, leaves the honest and competent judge without the guidance that would ensure consideration of those factors typically relevant. Many of the proposed rules, therefore, explicitly permit the exercise of discretion but seek to restrain and shape that discretion

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Responsibility of Courts of Appeals, 3 GA. L. REV. 507 (1969); Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1 (1958); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

93. Formulating rules may be impracticable "because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop." Rosenberg, *supra* note 82, at 663.

94. *Id.*

95. *Id.* at 650.

96. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

97. *E.g.*, Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972); Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349 (1972); Thomforde, *Negotiating Administrative Settlements in SEC Broker-Dealer Disciplinary Proceedings*, 52 N.Y.U. L. REV. 237 (1977); Thomforde, *Patterns of Disparity in SEC Administrative Sanctioning Practice*, 42 TENN. L. REV. 465 (1975) [hereinafter cited as *Patterns of Disparity*]. Professor Davis has also made a less exacting demonstration. K. DAVIS, POLICE DISCRETION (1975).

98. *See* text accompanying note 81 *supra*.

99. *Patterns of Disparity*, *supra* note 97, at 466.

by setting forth helpful guidelines insofar as experience has made them perceptible.[100]

D. The Need for Ongoing Procedural Reform

The central role of experience in the law was summed up best in Holmes' oft-quoted aphorism: "The life of the law has not been logic: it has been experience."[101] No man or group of men possesses infallible prescience. Only experience will help illuminate the wisdom or the folly of the proposed rules. Furthermore, "[u]nless revivified, the modern new procedure will soon become as hard and unyielding as the old systems to which reform was directed."[102] The need for ongoing procedural reform, therefore, seems evident. But while the importance of ongoing reform is seldom denied, mechanisms generally have not been developed to analyze experience systematically and continuously and to alter existing law in light of this experience.[103] Whatever may be true generally, however, the mechanism is available in Tennessee, in the form of a continuing rules commission, to examine the proposed appellate rules critically and continuously with an eye toward their improvement.[104] Moreover, the work of this commission will be facilitated by proposed appellate rule 46, which permits the Tennessee Supreme Court to amend or make additional rules governing appellate procedure without the need for securing repeated legislative approval.[105] A continuing rules commission,

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100. *E.g.*, PROPOSED TENN. R. APP. P. 9(a) (grounds for interlocutory appeal by permission from trial court); *id.* R. 10(a) (grounds for extraordinary appeal by permission on original application in the appellate court); *id.* R. 11(a) (grounds for appeal by permission from intermediate appellate court to supreme court); *id.* R. 13(b) (grounds for considering issues not presented for review); *id.* R. 14(a) (grounds for considering postjudgment facts in the appellate court); *id.* R. 39(a) (grounds for rehearing).

101. O. HOLMES, *supra* note 31, at 5.

102. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 507 (1950).

103. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

104. *See* text accompanying notes 21-25 *supra*.

105. Both the proposed Tennessee Rules of Criminal Procedure and the proposed amendments to the Tennessee Rules of Civil Procedure, submitted to the General Assembly in 1976 and 1975 respectively, failed to gain legislative approval. The criminal rules were finally approved in the 1978 session. Some of the difficulty in gaining legislative approval might have been avoided if the rules had been widely circulated for comments, suggestions, and criticisms prior to

meeting at definite intervals, may well prove to be an indispensable mechanism to ensure just and up-to-date procedural rules for Tennessee.[106]

While the proposed appellate rules are best viewed as provisional, always open to improvement, it is likely that most of the rules, if subsequently approved by the legislature, will be the law for a long time to come. It seems appropriate, therefore, to discuss the rules—their scope, organization, and content—in some detail so that they may profit from further informed criticism.

III. Some Noteworthy Features of the Rules

A. *Scope and Organization of the Rules*

The rules govern all proceedings from initiation until final disposition in the Tennessee Supreme Court, Court of Appeals, and Court of Criminal Appeals,[107] including the rare situation in which the court of appeals directly reviews administrative proceedings.[108] The current rules of appellate procedure of those courts will be replaced by the proposed Tennessee Rules of Appellate Procedure, although the intermediate appellate courts are authorized to make and amend rules governing their practice as long as such rules are not inconsistent with the proposed rules.[109] Moreover, most of the provisions of the Tennessee Code dealing with appellate practice and procedure will be repealed or amended. Finally, the current version of Tennessee Rule of Civil Procedure 62 on stay of proceedings to enforce a judgment will be replaced by a new rule 62 and an additional rule 65A on the form of security and proceedings against sureties.

The rules are organized under eleven titles, which need not

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their submission to the General Assembly. The rulemaking power of the United States Supreme Court has also suffered, at least in part, from its failure to permit an opportunity for public comment. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 Stan. L. Rev. 673, 677-85 (1975). For a discussion of another cause of the unwillingness of Congress to approve rules submitted by the Supreme Court, see McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588 (1976). *See generally* J. Weinstein, Reform of Court Rule-Making Procedures (1977).

106. Clark, *supra* note 102, at 507-08.

107. Proposed Tenn. R. App. P. 1.

108. *Id.* R. 12; *see* Norman v. State Bd. of Claims, 533 S.W.2d 719 (Tenn. 1975); Tenn. Code Ann. § 7-147 (Supp. 1977).

109. Proposed Tenn. R. App. P. 45.

be described, and are arranged essentially in a chronological fashion so that, for the most part, proceeding consecutively through the rules provides a step-by-step description of the evolution of the appellate process. In this respect, as well as in others, the proposed rules differ significantly from the Federal Rules of Appellate Procedure, although some rules are modeled after the federal rules. The federal rules are an obviously appropriate source of guidance since they are the product of extensive study and careful review.[110] Moreover, to the extent the proposed Tennessee Rules of Appellate Procedure track the Federal Rules of Appellate Procedure, it is necessary to learn only one body of law, not two, and to this extent the proposed rules serve the convenience of practitioners. But it is incorrect to assume that the proposed rules are identical to the federal rules. A number of considerations explain this divergence. In the first place, the needs of state courts differ from the needs of the intermediate federal courts of appeals. For example, the Tennessee Supreme Court, as a court of last resort, needs guidelines to shape the exercise of its discretionary review of the final decisions of the court of appeals and court of criminal appeals.[111] Second, the prior practice within a state and the availability, selection, and qualifications of supporting personnel—court reporters, court clerks, and the like—also create unique demands.[112] Third, many of the federal rules are simply susceptible to improvement, and other approaches to some problems appear to be preferable. Finally, some areas of fundamental significance, including the appropriate scope of appellate review, are not treated by the federal rules, yet they seem appropriate topics of rulemaking.

In urging a simplified appellate procedure, Professor Sunderland identified three fundamental problem areas: the method and scope of review, the contents of the record on appeal, and the organization and jurisdiction of the reviewing tribunal.[113] Of these areas, only the organization and allocation of subject-matter ju-

110. Ward, *The Federal Rules of Appellate Procedure*, 28 FED. B.J. 100, 101 (1968).

111. *See* PROPOSED TENN. R. APP. P. 11(a).

112. For example, in drafting rules concerning the record, it was necessary to adjust for the fact that in civil actions there are no official court reporters in Tennessee. For the situation in criminal actions, see TENN. CODE ANN. §§ 40-2029 to 2043 (1975).

113. *Appellate Procedure, supra* note 52.

risdiction among the appellate courts[114] are not covered by the proposed rules. The rules do establish guidelines, however, for the exercise of the supreme court's discretionary review of final deci-

114. The allocation of subject-matter jurisdiction between the supreme court and court of appeals is a hodgepodge. For cases directly appealable from the trial court to the supreme court, see TENN. CODE ANN. § 8-2723 (1973) (removal of public officers); *id.* § 14-1412 (licensing decisions of the Department of Public Welfare); *id.* § 16-408 (Supp. 1977) (constitutionality of a statute or city ordinance the sole determinative question, right to hold public office, workmen's compensation, state revenue, mandamus, in the nature of quo warranto, ouster, habeas corpus where realtor being held under a criminal accusation or rendition warrant issued by the governor); *id.* § 29-311 (1955) (disciplinary actions involving attorneys); *id.* § 39-3019 (1975) (injunctions in obscenity actions); *id.* § 49-1417 (1977) (teacher tenure); *id.* § 50-1018 (workmen's compensation); *id.* § 50-1325 (unemployment compensation); *id.* § 52-931 (licensing decisions of the Department of Agriculture); *id.* § 52-1405 (confiscation of drugs ordered by the Commissioner of Safety); *id.* § 52-1508 (seizure or condemnation of vending machines and commissaries by the Commissioner of the Department of Agriculture); *id.* § 53-3417 (decisions of the Pollution Control Board and Commissioner of Public Health); *id.* § 53-4313 (decisions concerning solid waste disposal); *id.* § 57-209 (Supp. 1977) (decisions by beer boards); *id.* § 58-1908 (final determinations under Mineral Test Hole Regulatory Act by the regulatory board); *id.* § 65-230 (decisions of Public Service Commission); *id.* § 67-3123 (seizure or confiscation of contraband goods under Tobacco Tax Law by Commissioner of Revenue); *id.* § 70-333 (decisions under the Water Quality Control Act of 1971 by Water Quality Control Board); *id.* § 70-2524 (1976) (decision under the Safe Dams Act of 1973 by the Commissioner of Conservation). Some of these provisions will be affected, to an extent not yet fully known, by the Uniform Administrative Procedures Act, *id.* §§ 4-507 to 527 (Supp. 1977), and the recent amendment to that Act directing that appellate review be to the court of appeals, not the supreme court. *Id.* § 4-524. *See generally* Symposium, *The Tennessee Uniform Administrative Procedures Act*, 6 MEM. ST. U.L. REV. 143 (1976). Review by the supreme court of cases finally determined on demurrer or other method not involving review or determination of facts or on stipulation was recently abrogated. TENN. CODE ANN. § 16-408 (Supp. 1977).

Appeals in criminal actions present little problem since all first appeals are to the court of criminal appeals except for "any case wherein the sole and single question for determination involves the constitutionality of a state statute or municipal ordinance." *Id.* § 16-448. It would seem desirable to follow this same pattern for civil appeals. *See* Harbison, *supra* note 33, at 295. If, on the other hand, more types of cases are appealed directly to the supreme court, "some consideration should be given in the future to having only a single appellate court, with sufficient staff and membership to handle all types of cases." *Id.* at 296. *See also* Sunderland, *The Problem of Double Appeals*, 17 J. AM. JUD. SOC'Y 116 (1933). For a comprehensive discussion of the court structure in Tennessee, see Le Clercq, *The Tennessee Court System*, 8 MEM. ST. U.L. REV. 155 (1978).

sions of the intermediate appellate courts[115] and provide for the transfer of cases appealed to the wrong court.[116] In addition to the areas identified by Professor Sunderland, other areas of significant concern include the timing of appellate review, the parties entitled to appeal in criminal actions, the effect of an appeal on the enforceability of a judgment, the effect of error, and opinion writing and publication.

B. Method of Review of Final Trial Court Judgments

The proposed rules greatly simplify existing practice by establishing one method of empowering the appellate court to review a final judgment of a trial court from which an appeal lies to the supreme or intermediate appellate courts.[117] The only steps required of an appellant are filing and serving a notice of appeal[118] within thirty days after the date of entry of judgment.[119] Failure of the appellant to take any other step does not affect the validity of the appeal but provides a basis for whatever action the appellate court deems appropriate, "which may include dismissal of the appeal."[120] Even noncompliance with the service requirement is not necessarily fatal, since under rule 2 the appellate court may suspend the requirements of any rule for good cause. On the other hand, nothing in the rules permits the extension of time for filing notice of appeal beyond the thirty-day period,[121] although under

115. PROPOSED TENN. R. APP. P. 11(a).
116. *Id.* R. 17.
117. *Id.* R. 3(d).
118. *Id.* R. 3(e).
119. *Id.* R. 4(a).
120. *Id.* R. 3(e).
121. The Federal Rules of Appellate Procedure currently permit the district court to extend the time for filing the notice of appeal up to 30 days upon a showing of excusable neglect. FED. R. APP. P. 4; *see* 9 MOORE'S FEDERAL PRACTICE ¶ 204.13 (1975); 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3950, at 365-67 (1977); Comment, *Ad Hoc Relief from Untimely Appeals*, 65 COLUM. L. REV. 97 (1965); Annot., 26 A.L.R. FED. 569 (1976). *See also* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.13(a)(3) (1977) [hereinafter cited as APPELLATE COURT STANDARDS] (late appeal appropriate "upon a showing that extraordinary circumstances prevented and on such terms may be just [*sic*], taking the appeal on time, except where permitting the late appeal would unfairly disturb another party's reliance on the finality of the judgment"). A proposed revision of federal appellate rule 4 would permit an

certain circumstances an otherwise untimely appeal may be taken by first securing relief under Tennessee Rule of Civil Procedure 60.02,[122] and certain specified, timely post-trial motions in the trial court terminate the time for filing notice of appeal.[123] The

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extension for good cause if a motion to extend is made within 30 days after entry of judgment, and thereafter (but within 30 days after expiration of the time otherwise specified) an extension requires a showing of excusable neglect. The proposed revision sets forth other limitations not relevant here. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE (1977) [hereinafter cited as PROPOSED FEDERAL AMENDMENTS].

The Tennessee Advisory Commission rejected a provision similar to current federal rule 4. The Advisory Commission thought a late appeal would be appropriate only if the appellant did not know when a judgment had been entered. This problem arises, particularly in nonjury actions, because under TENN. R. CIV. P. 58.02, a judgment signed by the judge is considered entered for purposes of an appeal when it is filed with the clerk. No notice of the filing need be given. On the other hand, the federal rules require that every judgment be set forth on a separate document and is effective only when entered in the civil docket. FED. R. CIV. P. 58; *see* 6A MOORE'S FEDERAL PRACTICE ¶ 58.03 (1974); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2785 (1973). Moreover, the clerk is required to serve notice immediately upon entry of a judgment, although lack of notice of entry does not affect the time for appeal or authorize relief for failure to appeal within the time allowed except as provided in appellate rule 4. FED. R. CIV. P. 77; *see* 7 MOORE'S FEDERAL PRACTICE ¶ 77.05 (1975); 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3084 (1973). The Commission concluded, however, that the 30-day extension permitted by federal appellate rule 4 was not an adequate remedy, since entry of the judgment may first be discovered after that time. Besides, TENN. R. CIV. P. 60.02 is available to provide needed relief in such circumstances. *See* Jerkins v. McKinney, 533 S.W.2d 275 (Tenn. 1976). It should also be noted that the premature filing of a notice of appeal does not generally affect the validity of the appeal. PROPOSED TENN. R. APP. P. 4(d). *See also* Grundy County v. Dyer, 546 S.W.2d 577, 579 (Tenn. 1977). Moreover, in order to guard against relief from an otherwise late appeal, proposed rule 4(a) permits any party to serve notice of entry of an appealable judgment. *See* Fed. R. Civ. P. 77 & Advisory Comm. Note, 5 F.R.D. 491-92 (1946).

122. *See* Jerkins v. McKinney, 533 S.W.2d 275 (Tenn. 1976).

123. PROPOSED TENN. R. APP. P. 4(b) provides in part:

> In a civil action if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under rule 59.03 to alter or amend the judgment; or (4)

proposed rules expressly abolish the three present methods of review of final judgments—review by simple appeal, writ of error, and appeal in the nature of a writ of error.[124] While the writ of error does serve a salutary purpose under existing practice,[125] the need for such a mechanism should be substantially eliminated by the simplicity of taking an appeal merely by filing and serving notice of appeal. Moreover, the availability of the writ of error for up to two years after judgment[126] robs judgments, at least in civil actions, of some of their needed finality[127] and may well prompt needless appellate review undertaken for the purpose of thwarting later recourse to the writ of error.[128] Also abolished are the prayer for an appeal and the requirement that the prayer be granted;[129] the filing of a notice of appeal better serves the purpose of providing a record of the intent to appeal.[130]

The rules additionally eliminate any requirement of moving for a new trial as a prerequisite to review in jury cases.[131] Ideally, new trial motions serve the laudable purpose of reducing the number of appeals by affording the trial court an opportunity to

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under rule 59.01 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

Similarly, PROPOSED TENN. R. APP. P. 4(c) provides:

In a criminal action if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant: (1) under rule 33(a) for a new trial, (2) under rule 34 for arrest of judgment, or (3) under rule 32(f)(1) for a suspended sentence, the time for appeal for all parties shall run from entry of the order denying a new trial or granting or denying any other such motion or petition.

124. *Id.* R. 3(d).

125. *See* text accompanying note 44 *supra*.

126. TENN. CODE ANN. § 27-605 (1955).

127. *See* Phillips, *Civil Procedure and Evidence—Tennessee Survey 1970*, 38 TENN. L. REV. 127, 180-81 (1971). In civil actions review by writ of error is limited to the technical record unless the bill of exceptions is filed within the time specified in TENN. CODE ANN. § 27-111 (Supp. 1977). Tucker v. Hundley, 61 Tenn. App. 1, 452 S.W.2d 658 (1970), *noted in* 38 TENN. L. REV. 109 (1970). In criminal actions the appellate court, upon a showing of good cause, may permit the bill of exceptions to be filed at any time. TENN. CODE ANN. § 27-111 (Supp. 1977).

128. Appellate review is most likely to be sought if all parties desire a definitive judicial resolution of the litigated matter.

129. PROPOSED TENN. R. APP. P. 3(e).

130. Wicker, *supra* note 36, at 674.

131. PROPOSED TENN. R. APP. P. 3(e).

correct any harmful error. It can also be argued that fairness requires providing the trial court a final opportunity to correct its errors. Realistically, however, new trial motions are seldom granted and typically only increase the cost and delay final disposition of litigation.[132]

New trial motions are not abolished. The parties are afforded the option of either moving for a new trial or taking an immediate appeal. The trial court's power to grant a new trial on its own initiative under Tennessee Rule of Civil Procedure 59.04 is also unaffected. New trial motions will continue to serve unique purposes. In actions turning on the sufficiency of the evidence, a new trial motion affords a distinct advantage since the scope of review by the trial court of a jury verdict is broader than that of the appellate court reviewing the same case.[133] Moreover, in some circumstances a new trial motion will be a mechanism for gaining appellate review. For example, if there is jury misconduct, a new trial motion permits evidence of the misconduct to be included in the record. Without such evidence there can be no appellate review because the appellate court, with rare exception, is limited in its review to those facts set forth in the record.[134] In this type of situation, then, the new trial motion serves as the means by which the evidence necessary for appellate review is included in the record. The mere making of the motion itself, on the other hand, does not broaden or limit the scope of appellate review. In the language of proposed rule 3(c), "[t]he scope of appellate review of questions of law and fact shall not be limited by making or failing to make a motion for a new trial."

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132. D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 143-46 (1974); D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 85-86 (1973) [hereinafter cited as CRIMINAL APPEALS]; Wicker, *supra* note 36, at 674.

133. The trial judge, acting as the thirteenth juror, may set aside a verdict with which he disagrees; no such extensive power to set aside a jury's verdict resides in the appellate court. *See, e.g.*, Dykes v. Meighan Constr. Co., 205 Tenn. 175, 326 S.W.2d 135 (1959); Note, *Procedure—The Trial Judge's Function as Thirteenth Juror*, 23 TENN. L. REV. 328 (1954). *See also* D. MEADOR, *supra* note 132, at 143-44. The trial court may also possess a greater latitude to grant additur, *see* TENN. CODE ANN. § 20-1330 (Supp. 1977), or remittitur. *See id.* §§ 27-118 to 119 (1955).

134. PROPOSED TENN. R. APP. P. 13(c); *see* text accompanying notes 215-25 *infra*.

C. *Scope of Review*

The term "scope of review" is typically used indiscriminately to describe a number of distinguishable concepts. While proposed rule 13 retains the term in its caption, it distinguishes (1) the questions of law that may be urged on appeal, (2) consideration of issues not presented for review, (3) facts that may be considered on appeal, (4) findings of fact in civil actions, and (5) findings of guilt in criminal actions. In addition, other rules eliminate the review-limiting effect of the technical requirements of existing law. For example, by requiring only filing and service of notice of appeal to empower the appellate court to review a final judgment,[135] the rules eliminate the review-limiting effect of the failure to make a motion for a new trial[136] or the late filing of the bill of exceptions.[137] The abolition of assignments of error in rule 3(h) may permit review currently denied by an overly exacting demand for specificity.[138] Finally, proposed rule 36 on relief and the effect of error treats the distinguishable question of the appropriate standard for identifying error as harmless or prejudicial[139] and the related concepts of waived, invited, and cured error.[140] The following discussion will focus on the scope of review as defined by proposed rule 13.

1. Questions of Law that May Be Urged on Appeal

Rule 13(a) provides: "Any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required." Three aspects of this rule are particularly noteworthy.

First, the rule provides only that any question of law may be brought up for review and relief, not that the appellate court must pass upon every question or that it must grant relief. The pro-

135. *See* text accompanying notes 117-23 *supra*.

136. TENN. SUP. CT. R. 14(5); TENN. CT. APP. R. 12(5).

137. *See* note 127 *supra*.

138. *See* text accompanying notes 493-95 *infra*.

139. PROPOSED TENN. R. APP. P. 36(a) provides in part: "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."

140. *See* text accompanying note 141 *infra*.

priety of granting relief is governed by rule 36, which does not require that "relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of error."[141] In addition, in determining whether relief is appropriate, the appellate court with rare exception is limited to those facts established by the evidence in the trial court and set forth in the record, as well as those facts that may be judicially noticed.[142] Not every question of law, therefore, will justify consideration or relief by the appellate court. In both of these respects the rules simply codify existing practice and procedure.[143]

The second noteworthy feature of rule 13(a) is its rejection of the use of the notice of appeal as a review-limiting device. In the federal system the notice of appeal has served to limit the questions of law that may be urged on appeal in two principal ways. First, under the Federal Rules of Appellate Procedure the notice of appeal must specify "the judgment, order or part thereof appealed from."[144] This requirement, designed to simplify appeals by making the notice of appeal the only jurisdictional step to a valid appeal, has on occasion been interpreted as limiting the questions an appellant may urge on review to those affecting the judgment, order, or part thereof appealed from.[145] *Foman v. Davis*[146] is a striking and somewhat bizarre illustration. In that case, in an action to enforce an oral contract not to make a will, the district court entered judgment on December 19, 1960, dismissing plaintiff's complaint on the ground that the oral agreement was unenforceable under the Statute of Frauds. On December 20, plaintiff filed motions to vacate the judgment and to amend the complaint in order to assert a *quantum meruit* theory. Notice of appeal from the judgment of December 19 was filed on

141. *See generally* Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts. 1-3), 7 WIS. L. REV. 91, 160 (1932), 8 WIS. L. REV. 147 (1933). In all other circumstances, the rule provides that a party should be granted the relief to which he is entitled. PROPOSED TENN. R. APP. P. 36(a). *But see* text accompanying notes 183-214 *infra*.

142. PROPOSED TENN. R. APP. P. 13(c).

143. *See, e.g.*, TENN. SUP. CT. R. 14(4); TENN. CT. APP. R. 12(5).

144. FED. R. APP. P. 3(c).

145. 9 MOORE'S FEDERAL PRACTICE ¶ 203.18 (1975).

146. 371 U.S. 178 (1962), *rev'g*, 292 F.2d 85 (1st Cir. 1961).

January 17, 1961. Thereafter, on January 23, the district court denied plaintiff's motions of December 20, and on January 26 plaintiff filed notice of appeal from denial of the motions. On its own motion, the First Circuit dismissed the appeal insofar as taken from the December 19 judgment.[147] The court of appeals reasoned that the motion to vacate should be treated as a motion to alter or amend a judgment filed pursuant to rule 59(e) of the Federal Rules of Civil Procedure.[148] Since a motion under rule 59 suspends the time for filing notice of appeal,[149] the court concluded that the notice of December 20 was premature and ineffective.[150] In addition, the notice of appeal of January 26 was ineffective to permit review of the judgment of December 19 because the notice did not specify it was being taken from that judgment as well as the later orders denying the motions.[151] Thus plaintiff's appeal of the December 19 judgment was dismissed even though plaintiff's intention to appeal was patent and defendant suffered no prejudice from plaintiff's "inept"[152] attempt to appeal. The highly technical decision of the court of appeals was ultimately reversed by the United States Supreme Court.[153]

The second way in which the notice of appeal has operated as a review-limiting device in the federal system is by limiting the right of the appellee, in the absence of his own notice of appeal, to urge error in the judgment.[154] The rule in federal practice concerning cross-appeals,[155] as set forth in the classic case of *United States v. American Railway Express Co.*,[156] is that

147. 292 F.2d 85 (1st Cir. 1961).

148. *Id.* at 87.

149. FED. R. APP. P. 4(a).

150. 292 F.2d at 87.

151. *Id.*

152. This characterization of plaintiff's effort is that of Justice Goldberg. 371 U.S. at 181.

153. *Id.* at 182.

154. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[2]-[5] (1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (1976); Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 HARV. L. REV. 763 (1974); Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party*, 51 HARV. L. REV. 1058 (1938).

155. 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[2] (1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (1976).

156. 265 U.S. 425 (1924).

> a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.[157]

As a corollary, an appellee need not appeal in order to "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."[158] The rule that a party may not attack a judgment without himself appealing is not limited to the cross-appeal context and "may operate to prevent an appellee from attacking so much of the judgment as is favorable to a party who has taken no appeal, or to prevent a party not involved in the appeal from benefiting from its result."[159] The term "separate appeal" is typically used in reference to an appeal that is "neither the first appeal nor a cross-appeal."[160]

The proposed Tennessee rules reject both of the review-limiting aspects of the notice of appeal that have arisen in the federal system. It is important to keep in mind the extremely limited information conveyed by the notice of appeal. Under proposed rule 3(f), which differs somewhat from its federal counterpart,[161] the notice of appeal needs to specify only the party taking

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157. *Id.* at 435.

158. *Id.*; *see* Langnes v. Green, 282 U.S. 531, 535-39 (1931). A distinguished commentator has expressed concern that three more recent decisions of the Supreme Court, Strunk v. United States, 412 U.S. 434, 437 (1973); Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 516, 521 (1973); and NLRB v. International Van Lines, 409 U.S. 48, 52 & n.4 (1972), threaten the well-established principles set forth in the text. Stern, *supra* note 154. However, the Supreme Court even more recently has reaffirmed the rule set forth in *American Railway Express*. Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976) (per curiam). *See generally* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[3] (1975); C. WRIGHT, THE LAW OF FEDERAL COURTS 523 (3d ed. 1976); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (1976).

159. 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[2], at 931 (1975).

160. *Id.*; *see* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3950, at 367 n.17 (1977).

161. *See* note 165 *infra*.

the appeal, the judgment from which relief is sought, and the court to which the appeal is taken.[162] Neither the issues presented for review nor the arguments in support of the issues are set forth in the notice of appeal. These matters need not be set forth until the later brief-writing stage.[163] The principal value of the notice of appeal is simply to declare in a formal way an intent to appeal; and as long as that intent is clear, no purpose is served by rigidly limiting the questions an appellant may urge, as the First Circuit did in *Foman*.[164] The limited purpose envisioned for the notice of appeal is reflected in a sentence added to rule 3(f) after the proposed rules were initially published for public criticism: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." Moreover, the unrestricted right to bring up any question of law under rule 13(a), combined with the simple and single directive that the notice of appeal designate the judgment from which relief is sought, should militate against the narrow review that has resulted in the federal system in situations in which only a part of the proceedings below is designated in the notice of appeal.[165] The limited purpose served by the notice of appeal also suggests that failure to serve a copy of the notice of appeal as required by rule 5 should be inexcusable only if some prejudice beyond the mere absence of notice of the appeal is suffered thereby.[166]

Cross-appeals or separate appeals are also unnecessary to obtain review and relief. As one student commentator acutely observed, "[I]t is not unreasonable that the appellee, without the necessity of also appealing, should be able to enlarge his rights, when forced into the appellate court."[167] Federal[168] as well as state[169] experience has demonstrated the difficulty of formulat-

162. PROPOSED TENN. R. APP. P. 3(f).

163. *Id.* R. 27.

164. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 203.18, at 754-55 (1975).

165. FED. R. APP. P. 3(c) requires designation of the "judgment, order or part thereof appealed from."

166. *Cf.* APPELLATE COURT STANDARDS, *supra* note 121, § 3.13(a)(2) (upon good cause, late appeal permitted unless unfair result would obtain because of reliance on finality of judgment).

167. Note, *supra* note 154, at 1067.

168. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[3]-[5] (1975); Stern, *supra* note 154; Note, *supra* note 154.

169. *See* Note, *Cross-Appeals in Maine: Pitfalls for the Winning Litigant*, 25 ME. L. REV. 105 (1973).

ing and applying a test concerning the situations in which an appellee must appeal or cross-appeal. The functional problem of including in the record those matters relevant to the issues that appellee seeks to urge on appeal[170] can be handled by permitting the appellee, as does proposed rule 24, to designate any parts he deems necessary for inclusion in the record.[171] In any event, the record in many cases will be sufficient without any designation of additional parts by the appellee.[172] The significant effect of eliminating the requirement that an appellee must file his own notice of appeal, therefore, is to permit the appellate court to consider the case as a whole once the appellant takes his appeal.

The remaining problem faced in *Foman*—that of premature filing of a notice of appeal—is treated in subdivisions (b) and (d) of rule 4, both of which were extensively amended after initial publication of the rules. The general rule established by rule 4(d) is that the right to an appeal is not lost by filing notice of appeal prior to formal entry of the judgment.[173] In the language of the rule, "a notice of appeal filed before the entry of the judgment shall be treated as filed after such entry and on the day thereof." Rule 4(b) carves out an important exception to this general rule for civil actions. If a post-trial motion specified in subdivision (b) is timely filed after filing of notice of appeal, a new notice of appeal must be filed after the court has disposed of the motion. An appeal cannot be sustained on the notice filed prior to the filing of one of the specified post-trial motions.[174]

The final noteworthy feature of rule 13(a) is that the scope of review of questions of law is the same for all appeals, including those in which the supreme court exercises its discretionary power

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170. *See generally* Comment, *Appeal and Error: Review of Errors at the Instance of a Party Who Has Not Appealed*, 20 CALIF. L. REV. 70, 77 (1932).

171. *See* text accompanying notes 472-75 *infra*.

172. Comment, *supra* note 170, at 77.

173. For a discussion explaining the circumstances in which a notice of appeal may be filed prematurely, see note 121 *supra*. Prior to revision, the only rule dealing with premature filing of notice of appeal simply provided that "the premature filing of notice of appeal does not affect the validity of the appeal if no prejudice results."

174. This resolution of the problem is based on the proposed amendments of April 1977 to the Federal Rules of Appellate Procedure. PROPOSED FEDERAL AMENDMENTS, *supra* note 121. *See generally* 9 MOORE'S FEDERAL PRACTICE ¶ 204.14 (1975).

to review the final decision of an intermediate appellate court[175] and in which an appellate court exercises its discretionary power to permit interlocutory review.[176] This result is accomplished by the language in rule 13(a) that does not require the other parties to file separate applications for permission to appeal requesting the appellate court to exercise its discretionary power to permit an appeal. The principal utility of a separate application for permission to appeal is simply that it furnishes the appellate court with additional reasons to hear the case. Permitting the appellate court to consider the case as a whole is as desirable in the context of an interlocutory appeal or an appeal from a final decision of an intermediate appellate court as it is in the context of an appeal from a final trial court judgment.[177] One conceivable disadvantage of this approach with regard to interlocutory review is that interlocutory appeals might increase.[178] Typically, interlocutory review is sought of a particular ruling by the trial court. Review seems clearly appropriate with regard to all issues material to the ruling.[179] If all other rulings are open to review, however, litigants have an incentive to fashion an appealable ruling in order to gain review of otherwise nonappealable rulings, and therefore the number of interlocutory appeals may increase.[180] Another conceivable disadvantage might arise in the context of supreme court

175. *See* PROPOSED TENN. R. APP. P. 11. The Supreme Court follows a different practice when exercising its discretionary power to grant certiorari under 28 U.S.C. §§ 1254-1258 (1970). Supreme Court Rule 23(1)(c) requires that a petition for certiorari set forth the questions presented for review and provides that "[t]he statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court." *But see, e.g.*, ILL. SUP. CT. R. 318(a):

> In all appeals, by whatever method, from the Appellate Court to the Supreme Court, any appellee, respondent, or co-party may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross appeal or separate appeal.

176. PROPOSED TENN. R. APP. P. 9-10.

177. *But see* Cumberland Capital Corp. v. Patty, 556 S.W.2d 516, 543 (Tenn. 1977) (Harbison, J., dissenting); Tennessee Dep't of Mental Health & Mental Retardation v. Hughes, 531 S.W.2d 299, 300-01 (Tenn. 1975).

178. *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 628-29 (1975).

179. *Id.* at 629.

180. *Id.*

review of final decisions of the intermediate appellate courts. Proposed rule 11, which sets forth the guidelines for exercise of the supreme court's discretionary review, recognizes that the supreme court's function is not to correct errors of the intermediate appellate court but to decide important questions of law or of public interest, as well as to secure uniformity of decision.[181] In view of these purposes, it is arguable that the supreme court should not be encumbered with questions of interest only to the parties. Both of these conceivable disadvantages, however, pale in the light of the appellate court's power to refuse to pass upon issues presented for review. But the existence of this discretionary power does not mean the appellate court should refuse to consider issues not presented in an application for permission to appeal when it is desirable to do so. For example, if on interlocutory review the appellate court readily perceives an error that may require reversal upon an appeal from the final judgment, then consideration of that issue would have the desirable effect of preventing needless litigation. Similarly, questions that might not be sufficient standing alone to prompt supreme court review of a final decision of the intermediate appellate court might nonetheless be significant or related to a question deserving of review.[182] In this situation as well, the desirability of preventing needless litigation might impel the supreme court to review issues that would require later reversal even though those issues might not otherwise merit review.

2. Consideration of Issues Not Presented for Review

Far more controversial than extending review to issues in the absence of a cross-appeal, separate appeal, or separate application for permission to appeal is extending review to issues not presented for review.[183] Any discussion of this question must begin

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181. PROPOSED TENN. R. APP. P. 11(a). *See also* Stern, *supra* note 154, at 777-80.

182. *See also* Stern, *supra* note 154, at 778-79.

183. *See generally* APPELLATE COURT STANDARDS, *supra* note 121, § 3.11; Tate, *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES J. 68 (1970); Vestal, *supra* note 60. Professor Vestal helpfully distinguishes among the facts, legal issues, and bases of decision. With rare exception, the appellate court is limited in its review to the facts set forth in the record. PROPOSED TENN. R. APP. P. 13(c); *see* text accompanying notes 215-25 *infra*. On the other hand, Professor Vestal noted:

with an appreciation of the fact that appellate courts do consider matters not presented for review by the parties.[184] Karl Llewellyn has observed that "an appellate court in quest of justice can do (and often has done) more reformulating of ill-drawn issues than is generally realized by lawyers . . . . Nevertheless, such action, on the large scale . . . is both relatively rare and a function of peculiarly sharp pressure from felt need."[185] Many times such reformulation is not apparent because the appellate court makes no mention of it.[186] There is little reason to doubt, however, that at least on occasion appellate courts, including those in Tennessee, will go beyond the issues presented for review.

The reluctance of appellate courts to consider unargued issues is based on a number of reasons, many of them well-founded.[187] One very practical reason is the "compulsion of inertia from the pressure of work and from the effort needed to redo a

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> In an analysis of the authorities, precedents, and bases of decisions, the judges of the appellate courts generally feel that they have the right to go beyond the materials presented by counsel. Although counsel will present cases and other materials in briefs and oral arguments, the court may go beyond these authorities and in independent examination reach a conclusion concerning the legal issue posed. . . . The courts have always felt free to reach a decision concerning a given legal issue on any grounds available. The judge writing the opinion will consider the briefs, his own fund of information concerning the area of law involved, the precedents discoverable in the library, what his research assistant can uncover, and other materials called to his attention. Without a doubt, there is a feeling of absolute freedom concerning sources from which the just answer to legal problems is to be ascertained.
>
> A third fact, which arises in point of time before the consideration of legal authorities, is that of determining what legal questions or issues are posed by the case submitted by the court. Here, there is not the rigid, almost complete acceptance of the articulation of the attorney as in the case of the factual environment. Neither is there the complete freedom as in the case of examination of decisional materials.

Vestal, *supra* note 60, at 479-81. Proposed rule 13(b) is concerned only with issues not presented for review; it is not a limitation on the legal authorities that may be considered or the bases upon which the appellate court may decide the issues presented for review.

184. Tate, *supra* note 183; Vestal, *supra* note 60.

185. K. LLEWELLYN, *supra* note 81, at 29. Justice Traynor has endorsed Llewellyn's observation. *See* Traynor, *supra* note 31, at 159.

186. Vestal, *supra* note 60, at 497-98.

187. *But see* Tate, *supra* note 183.

job from the ground up."[188] Even the most hard-working appellate judge with a crowded docket simply must make " 'some concessions . . . to the shortness of human life.' "[189] Another reason is tied to the adversary theory of litigation in which the court is viewed as a passive instrumentality simply responding to the issues when, as, and if presented by the parties.[190] Yet a third reason is related to the idea that the purpose of appellate review is the correction of errors.[191] An issue an appellate court wishes to consider on its own motion typically will not have been presented for consideration at the trial level.[192]

> If the appellate court is viewed solely as a court for the correction of errors, it is powerless when faced with an error not called to the attention of the lower court. Since the lower court has not been given an opportunity to consider the matter and rectify it, the lower court has not erred, and it follows the appellate court cannot act.[193]

This attitude is buttressed by a notion of deference to the trial court;[194] such deference, however, "is meaningful only when the sua sponte consideration would result in a reversal. Deference does not foreclose sua sponte consideration to affirm a decision previously reached."[195] The notion of deference also has a functional aspect in that the appellate court loses whatever benefit might be gained by the lower court's opinion on the new issue.[196]

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188. K. LLEWELLYN, *supra* note 81, at 29; *see* Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pt. 3), 8 WIS. L. REV. 147, 163 (1933); Vestal, *supra* note 60, at 494-95.

189. Morgan, *supra* note 72, at 3. The source of the quotation is not indicated and has not been discovered.

190. Vestal, *supra* note 60, at 487-90; *see* text accompanying notes 67-76 *supra*.

191. APPELLATE COURT STANDARDS, *supra* note 121, § 3.11, at 20-21; *see* text accompanying notes 52-66 *supra*.

192. Vestal, *supra* note 60, at 490.

193. *Id.* at 491; *see* Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pt. 1), 7 WIS. L. REV. 91, 93 (1932); Note, *supra* note 60, at 654. *See also* Pound, *Appeal and Error—New Evidence in the Appellate Court*, 56 HARV. L. REV. 1313, 1317-18 (1943); Note, *New Evidence on Appeal*, 18 TENN. L. REV. 285, 286 (1944) [hereinafter cited as *New Evidence*].

194. Vestal, *supra* note 60, at 491-92.

195. *Id. See also* Pound, *supra* note 193, at 1318.

196. Note, *supra* note 60, at 655.

This consideration, however, "possesses less strength if, in practice, written lower court opinions are not available,"[197] as is often the case in Tennessee.[198] An appellate court will be reluctant to consider issues on its own motion for the further reason that, if the issue has not been raised below, notions of waiver generally counsel against affording relief to a party who, in the language of proposed rule 36, "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Finally, and perhaps most convincingly, "especially in jurisdictions not addicted to rehearings, the bench is likely to share the feeling of the bar that there is something unfair in putting a decision on a ground which losing counsel has had no opportunity to meet."[199] Somewhat understandably, this feeling is less intense in criminal appeals in which defendant is represented by court-appointed counsel.[200]

Sometimes added to this list of reasons is the argument that consideration of new issues on appeal amounts to the exercise of original jurisdiction and is beyond the power of courts like the

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197. *Id.*

198. TENN. R. CIV. P. 52.01 requires only findings of fact and conclusions of law, not an opinion. Findings and conclusions, however, may be incorporated in an opinion. Moreover, findings and conclusions are necessary only if requested by a party prior to entry of judgment; and even if conclusions are set forth, they may be largely uninformative.

199. K. LLEWELLYN, *supra* note 81, at 29.

200. Vestal, *supra* note 60, at 506. Professor Rosenberg has observed (with an unmistakable affinity for the humorous):

> One recent development . . . impresses me as likely to encourage still more judicial activism at the expense of the adversary way in a great many cases; that is the strong movement to provide free legal services for the poor, both in criminal and in civil cases. When a client has not selected his lawyer in the open market, when he is not paying him out of his own pocket, when he did not entrust his fate to the lawyer with full voluntariness, I think the court will show less reluctance about second-guessing the lawyer and will act more spontaneously. The point is made nicely in the story about the young lawyer who was nervously trying his case, and the judge was getting more and more aggressive about taking it over. Finally, the judge took over the questioning and the cross-examination of witnesses, and the point came when the young lawyer said to him, "Your Honor, this case is very important to my client and me, and if you are going to try it, you better make sure that you don't lose it."

Rosenberg, *supra* note 68, at 17.

Tennessee Supreme Court,[201] Court of Appeals,[202] and Court of Criminal Appeals,[203] whose jurisdiction is appellate only.[204] Professor Sunderland convincingly contended that this argument begs the question:

> What, it may be asked, is being reviewed—the judgment, or the items of law or fact which produced it? Obviously it is the judgment with which the appellant is dissatisfied, and the correctness of that judgment is equally under review whether new points or old points are being considered. The argument confuses appellate power with the manner of its exercise, and would place upon modern courts a constitutional restriction against using any data for testing the justice of a judgment which was not available to courts of error in the Middle Ages.[205]

It often seems an afterthought, and a conclusory one at that, when an appellate court refuses to consider a new issue on the ground that its jurisdiction is appellate only. It would be regrettable if new issues were denied appellate consideration solely because of unthinking application of this formula.

Some of the more significant objections to appellate consideration of issues not presented for review can be avoided if counsel is given an opportunity to submit new briefs.[206] It would also be helpful if courts were to respond favorably to petitions for rehearing on the ground that, as set forth in rule 39(a), "the court's decision relies upon matters of . . . law upon which the parties have not been heard and that are open to reasonable dispute." Nonetheless, control over the issues should, generally speaking, reside in the parties, not the court.[207] Accordingly, rule 13(b) pro-

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201. TENN. CONST. art. 6, § 2.

202. TENN. CODE ANN. § 16-408 (1955).

203. *Id.* § 16-448 (Supp. 1977).

204. *See, e.g.*, Ruckart v. Schubert, 223 Tenn. 215, 218, 443 S.W.2d 466, 468 (1969) (dictum):

> This court is thus, constitutionally, a tribunal of appeals and errors, with jurisdiction which can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden resting upon the appellant or plaintiff in error to show the adjudication and the error therein of which he complains.

205. *Appellate Procedure*, *supra* note 52, at 657; *see Judicial Review*, *supra* note 52, at 430.

206. *See* Traynor, *supra* note 31, at 159.

207. *See* APPELLATE COURT STANDARDS, *supra* note 121, § 3.11; F. JAMES & G. HAZARD, *supra* note 67, § 1.2, at 6-7.

vides that "[r]eview generally will extend only to those issues presented for review." The rule does, however, identify one situation in which the appellate court *must* and three others in which the appellate court *may* consider issues not presented for review, although the rule does not purport to provide an exclusive listing of such situations.

The appellate court is required to consider the issue of its own as well as the trial court's subject-matter jurisdiction. This requirement is a generally recognized exception to the rule precluding review of matters not raised by the parties and is based on the idea that the parties cannot by consent confer subject-matter jurisdiction.[208] In the trial court this notion finds expression in Tennessee Rule of Civil Procedure 12.08, which provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Only this question of jurisdiction over the subject matter *must* be considered by the appellate court; in all other situations the court retains the discretion as to whether it will consider issues not presented for review.

One reason an appellate court may consider an issue on its own motion is "to prevent needless litigation."[209] For example, if the court perceives another basis upon which the trial court's judgment can be affirmed, then affirmance on unargued issues will prevent a rather meaningless and wasteful reversal. Another reason for considering an issue not presented for review is "to prevent injury to the interests of the public."[210] There is today an increasing amount of litigation in which the impact of the judgment is not confined to the parties. The "dominating characteristic" of this litigation, as it has arisen in the federal courts, "is that [the litigation does] not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."[211] This

208. Vestal, *supra* note 60, at 499-502; *see* Note, *Appellate Practice—Questions Raised for the First Time on Appeal*, 12 TENN. L. REV. 57 (1933).

209. PROPOSED TENN. R. APP. P. 13(b)(1); *cf.* Note, *supra* note 60, at 656 ("[A] more satisfactory rule might be one that an appellate court should consider new issues only when the new issue enables it to render a final judgment."). *See also* Vestal, *supra* note 60, at 506-07.

210. PROPOSED TENN. R. APP. P. 13(b)(2). *See also* Note, *supra* note 208.

211. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). *See also* McGowan, *supra* note 105, at 1588.

"public law litigation" is by no means limited to the federal courts, as demonstrated by the litigation recently before the Tennessee Supreme Court on the question of the permissible rate of interest for the loan of money.[212] Exclusive control of the litigation by the parties may be appropriate if only private rights are involved, but the interests of the public should not suffer because of inadequate representation.[213] Finally, an appellate court may consider issues not raised by the parties in order "to prevent prejudice to the judicial process."[214] Although this standard is admittedly vague, it seems most likely to be of use in criminal actions in which, for example, the defendant was inadequately represented by court-appointed counsel or was denied a fair trial.

3. Facts that May Be Considered on Appeal

The propriety of appellate consideration of issues not raised below needs to be distinguished from the propriety of considering additional facts.[215] In actions tried before a jury, appellate consideration of additional facts relevant to the merits would work a deprivation of the right to trial by jury.[216] In criminal actions consideration of such facts would raise serious problems under the confrontation clause.[217] Even in nonjury civil actions the appellate court is ill-equipped both to receive lengthy testimony and to consider factors affecting the probative value of testimony that

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212. *See* Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977).

213. Vestal, *supra* note 60, at 511. As my colleague Professor Martha S.L. Black kindly brought to my attention, the interests of the public were thoroughly protected in the *Cumberland Capital* case, and nothing in the text should be construed as suggesting otherwise.

214. PROPOSED TENN. R. APP. P. 13(b)(3); *cf.* APPELLATE COURT STANDARDS, *supra* note 121, § 3.11 (appellate court should consider an issue not raised only when necessary to prevent "manifest injustice"). *See also* text accompanying notes 549-50 *infra*. The recent case of Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978), provides a recent example of an appellate court's willingness to consider an issue on its own motion. In *McKenna*, the court, on its own motion, considered the constitutionality of the Pennsylvania death penalty statute.

215. *See generally* Millar, *supra* note 60; Pound, *supra* note 193; *Appellate Procedure*, *supra* note 52, at 651-56; *Judicial Review*, *supra* note 52, at 420-22; Sunderland, *supra* note 51, at 143-46; Note, *supra* note 60.

216. *See* Millar, *supra* note 60, at 441; Sunderland, *supra* note 51, at 144.

217. U.S. CONST. amend. VI. The Supreme Court has held that the confrontation clause is applicable to the states. Pointer v. Texas, 380 U.S. 400 (1965).

cannot be conveyed in the record.[218] These reasons, combined with the power of the trial court to reopen a judgment in order to hear new evidence,[219] suggest that appellate consideration with only rare exception is properly limited, as provided in rule 13(c), to "those facts established by the evidence in the trial court and set forth in the record and any additional facts that may be judicially noticed . . . ."[220] This limitation on the facts that may be considered on review also operates as a limitation on appellate consideration of new issues. If considering a new theory on review raises new questions of fact, then the appellate court may refuse to consider the issue because it would be necessary to remand for a new trial, which would increase rather than prevent needless litigation.

On rare occasion, however, it is appropriate for the appellate court to consider additional facts without remanding for a new trial and requiring the disproportionately burdensome preparation of a supplemental record. For example, in some cases it is critically important to bring the record up to date so that the appellate court is aware of the current position of the parties.

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218. *See* text accompanying notes 277 & 282-83 *infra*. In this area too it has been argued that consideration of new facts is beyond the power of a court whose jurisdiction is appellate only. *See, e.g.*, Pierce v. Tharp, 224 Tenn. 328, 349, 461 S.W.2d 950, 954 (1970), *cert. denied*, 402 U.S. 929 (1971); Morrow v. State, 172 Tenn. 699, 113 S.W.2d 1196 (1938); Fine v. Lawless, 140 Tenn. 453, 205 S.W. 124 (1918); Outlaw v. Cherry, 88 Tenn. 367, 12 S.W. 725 (1890); Comment by Judge D. DeHaven (Nov. 13, 1942), *reported in* 17 TENN. L. REV. 750-51 (1943). *But see* Dakota County v. Glidden, 113 U.S. 222, 225-26 (1885); R. POUND, *supra* note 43, at 387-88; *New Evidence, supra* note 193, at 287-88. Professor Millar labeled as "deplorable" a decision of the Supreme Court of Illinois, Schmidt v. Equitable Life Assurance Soc'y, 376 Ill. 183, 195, 33 N.E.2d 485, 491 (1941), holding that receipt of new evidence on appeal would amount to the unconstitutional exercise of original jurisdiction. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 25 (1952). In any event, Professor Sunderland's analysis is equally applicable here. *See* text accompanying note 205 *supra*. In truth, new facts have been considered on appeal. *See, e.g.*, Frazier v. Byrd, 535 S.W.2d 152, 153 (Tenn. 1976).

219. *See* TENN. R. CIV. P. 60.02.

220. On the power of an appellate court to take judicial notice, see UNIFORM RULE OF EVIDENCE 12(3) (act withdrawn 1974); C. MCCORMICK, THE LAW OF EVIDENCE § 333, at 773-74 (2d ed. 1972); Currie, *Appellate Court's Use of Facts Outside the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39. For a general discussion of judicial notice, see C. MCCORMICK, *supra* §§ 328-335; 9 J. WIGMORE, THE LAW OF EVIDENCE §§ 2565-2583 (3d ed. 1940).

Accordingly, proposed rule 14 provides that the appellate court may, in its discretion, consider "those facts [that occurred after judgment] capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters." To emphasize the limited type of facts that may be considered initially on appeal, rule 14(a) also provides that "[n]othing in this rule shall be construed as a substitute for or limitation on relief from the judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Procedure Act."[221] As stated in the Commission comment, rule 14 is "not intended to permit a retrial in the appellate court."[222]

Neither the power to consider issues not presented for review nor the power to consider certain limited types of facts initially on appeal should be confused with two other distinguishable problems. One problem concerns the relief to be granted. Under proposed rule 36, the appellate court is directed to "grant the relief on the law and facts to which the party is entitled." Nothing in this rule, however, requires the court to give relief that a party has no desire of obtaining.[223] Second, when a new statute is enacted or a new decision handed down during the pendency of an appeal, the problems are essentially those of retroactivity and the use of new authority to support propositions previously advanced.[224] The propriety, if not indeed the obligation, of counsel[225] to bring such matters to the attention of the appellate court is clear and is confirmed in proposed rule 27(d), which permits the citation of supplemental authorities "[w]hen pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision."

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221. TENN. R. CIV. P. 60.02 is the most significant relevant provision. The Post-Conviction Procedure Act is codified at TENN. CODE ANN. §§ 40-3801 to 3824 (1975).

222. The rule, after all, permits consideration of only *postjudgment* facts.

223. This seems to follow from the adversary theory of litigation and the control over the issues that resides in the parties. *See* text accompanying notes 69-76 & 183-207 *supra*.

224. *See* Note, *supra* note 60, at 653-54.

225. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-23, Disciplinary Rule 7-105(B)(1) (1975).

4. Review of Factual Determinations

One of the principal reasons for not permitting appellate consideration of new facts relevant to the merits is that factfinding is the task of the trial court or jury.[226] This division of responsibility in turn raises the question of the degree of deference the appellate court should accord to trial court findings of fact and jury verdicts.

Historically, the scope of review of factual determinations[227] depended on whether an action was at law or in equity. Equity practice permitted de novo review while review at law was limited to legal errors.[228] The jury's exclusive right to find the facts provides one explanation for restricting review at law to legal issues. After all, the theory of proceedings in error was that of an accusation against the judge, and since the jury determined the facts, any error regarding the facts was no fault of the judge. Thus, no error could be assigned upon any factual questions.[229] Moreover, evidence in actions at law was typically received through the testimony of witnesses in open court. The trier of fact therefore sensed significant information that could not be adequately conveyed in the record.[230] The less informed appellate court would seem no better able to make factual determinations than the trial judge or jury. None of these considerations applied to equitable actions. Juries were not used in equity:

> [The] decision of both law and fact rested with the Lord Chancellor or with his subordinate, the Master of the Rolls. Under proper circumstances there might be a rehearing of the cause

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226. *See* text accompanying notes 216-18 *supra*.

227. *See generally* APPELLATE COURT STANDARDS, *supra* note 121, § 3.11; Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUD. SOC'Y 68 (1936); Chestnut, *Analysis of Proposed New Rules of Civil Procedure*, 22 A.B.A.J. 533, 540-41 (1936); Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937); Goodhart, *Appeals on Questions of Fact*, 71 L.Q. REV. 402 (1955); Wright, *supra* note 92, at 758-71; Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506 (1963).

228. Clark & Stone, *supra* note 227, at 190; Degnan & Louisell, *Rehearing in American Appellate Courts*, 34 CANADIAN B. REV. 898, 902-03 (1956); *Appellate Procedure, supra* note 52, at 653-54; *Judicial Review, supra* note 52, at 420; Sunderland, *supra* note 51, at 139-46; Note, *supra* note 227, at 508-09.

229. *See* text accompanying notes 52-61 *supra*.

230. *See* text accompanying notes 277 & 282-83 *infra*.

> after pronouncement of decree, and a cause decided by the Master of the Rolls could be the subject of a rehearing before the Lord Chancellor. This last was sometimes loosely spoken of as an appeal, but in strictness it was still a rehearing. For the Master of the Rolls in deciding a cause was acting only as deputy of the Lord Chancellor: every decree of the court was deemed to be that of the Chancellor.[231]

Review in equitable actions was not considered a new proceeding directed against error committed by the judge but was a continuation of the original proceeding designed to result in entry of the correct decree.[232] Moreover, unlike in proceedings at law, evidence in equitable actions was traditionally taken by deposition rather than by examination of witnesses in open court.[233]

As might be expected, these two systems influenced each other's development. Courts of equity began to receive evidence by examining witnesses in open court.[234] As a result, appellate courts on review of equitable actions began to restrict the principle of de novo review.[235] On the other hand, glaringly incorrect findings of fact in actions at law were deemed correctable as a matter of law.[236] The evolution of the law governing review of factual determinations in the federal courts illustrates these historical developments.[237]

The constitutional provision that the "Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make"[238] was construed by opponents of the Constitution as en-

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231. Millar, *supra* note 60, at 428-29. *See generally* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

232. *Appellate Procedure, supra* note 52, at 653-55; Sunderland, *supra* note 51, at 143.

233. C. CLARK, THE LAW OF CODE PLEADING § 5, at 16 (1947); R. MILLAR, *supra* note 218, at 25; Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 524-27 (1907).

234. R. MILLAR, *supra* note 218, at 270-72.

235. *See* text accompanying notes 250-52 *infra*.

236. *Appellate Procedure, supra* note 52, at 654; *Judicial Review, supra* note 52, at 421.

237. The two best treatments of the subject, upon which the textual discussion is largely based, are Clark & Stone, *supra* note 227; Note, *supra* note 227.

238. U.S. CONST. art. III, § 2, cl. 2.

dangering, if not abrogating, the right to trial by jury.[239] The ultimate result of this opposition was adoption of the seventh amendment, which not only preserved the right to a jury trial but also provided that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The seventh amendment, however, did not prescribe the scope of review of factual findings in equitable or admiralty proceedings, since the jury was not used in those proceedings.[240] The standard of review in those proceedings was established instead by the first Congress in the first Judiciary Act of 1789, which provided for appellate review by means of the common-law writ of error.[241] Review by writ of error was limited to questions of law;[242] thus, review of factual findings in equitable and admiralty actions was unavailable.[243] The Act also provided that the mode of proof by oral testimony and examination of witnesses in open court should be the same in admiralty and equitable actions as in legal actions.[244] Limiting review to questions of law, therefore, was logical since the chancellor, like the common-law judge, observed the witnesses and was thus aware of significant information unavailable to the appellate court, which had only the cold record before it.[245] This unified system of review of factual determinations in both legal and equitable actions was short-lived, primarily because of the opposition of chancery and admiralty lawyers.[246] In 1802 Congress provided that, on request of a party in an equitable action, the court in its discretion could receive evidence by deposition, as was done prior to the first Judiciary Act.[247] In the following year, appeals were restored for equitable and admiralty actions, and the writ of error was abolished in those actions.[248] Thus, a bifurcated standard of review was reinstated.

239. Clark & Stone, *supra* note 227, at 192; Note, *supra* note 227, at 508.
240. Note, *supra* note 227, at 508.
241. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.
242. *See* text accompanying note 61 *supra*.
243. Note, *supra* note 227, at 508-09 & n.12.
244. Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88.
245. Note, *supra* note 227, at 509.
246. Clark & Stone, *supra* note 227, at 194-95.
247. Act of April 29, 1802, ch. 31, § 25, 2 Stat. 156, 166.
248. Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244.

Three notable changes occurred in the law between 1803 and adoption of the Federal Rules of Civil Procedure in 1938. In 1865 Congress permitted the parties to waive a jury and empowered the trial court to decide factual as well as legal issues in actions at law when the parties waived their right to trial by jury.[249] In 1912 evidence in equitable actions was again received, as in legal actions, by examination of witnesses in open court.[250] The trial court therefore once again had the advantage of observing the witnesses. As a result, the appellate courts, while continuing to assert their power to find facts de novo upon the record, adopted "self-denying ordinances"[251] that led to results similar to those obtained upon review of actions at law.[252] Finally, yet most significantly, code pleading, with its emphasis on a union of law and equity, brought about a decline of the procedural distinctions between the two systems.[253]

The Advisory Committee on Rules for Civil Procedure, which drafted the federal rules, considered three alternative standards of review of factual findings in nonjury cases.[254] The first was retention of the distinction between legal and equitable actions; in legal actions, review would be limited to sufficiency of the supporting evidence, while in equitable actions review would extend to the weight as well as the sufficiency of the evidence. The second alternative was adoption of a unified standard of review, the standard being that used to review jury verdicts. The final alternative considered was de novo review of findings of fact in all nonjury actions whether denominated legal or equitable. Initially the Committee opted for de novo review.[255] After extensive commentary in the legal periodicals,[256] the rule as adopted provided, as it does today, that findings of the trial court "shall not

249. Act of March 3, 1865, ch. 86, § 4, 13 Stat. 500, 501.

250. Equity R. 46, 226 U.S. 661 (1912).

251. Clark & Stone, *supra* note 227, at 207.

252. *Id.* at 207-09; Note, *supra* note 227, at 510-11.

253. Clark & Stone, *supra* note 227, at 199-201.

254. Fed. R. Civ. P. 68, Advisory Comm. Note 120-21 (Prelim. Draft 1936).

255. *Id.* R. 68 provided, "The findings of the court in [cases tried without a jury] shall have the same effect as that heretofore given to findings in suits in equity."

256. *See* Blume, *supra* note 227, at 132; Chestnut, *supra* note 227; Clark & Stone, *supra* note 227; Clark, *Review of Facts Under Proposed Federal Rules*, 20 J. AM. JUD. SOC'Y 129 (1936).

be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."[257] The clearly erroneous standard was a compromise; it neither permits de novo review nor accords trial court findings the same insulation from review as is granted jury verdicts.[258] There is force in Learned Hand's observation:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.[259]

Approximately one-third of the states have adopted the clearly erroneous standard.[260]

Like the law in the federal courts, the law in Tennessee today establishes one standard of review in nonjury civil actions and a separate, more limited standard for jury verdicts. Review in nonjury actions is "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the judgment or decree of the trial court, unless the preponderance of the evidence is otherwise."[261] This standard is apparently subject to the exception that, in actions tried without oral testimony in a chancery court, the court of appeals is not "limited to the consideration of such facts as were found or requested in the lower court, but it shall independently consider and find all material facts in the record."[262] In certain actions, findings of a master concurred in by

257. FED. R. CIV. P. 52(a).

258. APPELLATE COURT STANDARDS, *supra* note 121, § 3.11, at 23; *see* 5A MOORE'S FEDERAL PRACTICE ¶ 52.03 (1975); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (1971).

259. United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1946).

260. *See* ALA. R. CIV. P. 52(a); ALASKA R. CIV. P. 52(a); ARIZ. R. CIV. P. 52(a); COLO. R. CIV. P. 52(a); GA. R. CIV. P. 52(a); IDAHO R. CIV. P. 52(a); IND. T.R. 52(A); KY. R. CIV. P. 52.01; ME. R. CIV. P. 52(a); MASS. R. CIV. P. 52(a); MICH. GEN. CT. R. 52.01; MO. ANN. STAT. § 510.310 (Vernon 1952); NEV. R. CIV. P. 52(a); N.D. R. CIV. P. 52(a); S.D. R. CIV. P. 52(a); VT. R. CIV. P. 52(a); W. VA. R. CIV. P. 52(a).

261. TENN. CODE ANN. § 27-303 (Supp. 1977). This same standard applies when an appeal is taken from a trial court directly to the supreme court. *Id.* § 27-304 (1955).

262. *Id.* § 27-113. *See also id.* § 27-301; Harbison, *supra* note 33, at 293-99.

the chancellor cannot be "disturbed" by the court of appeals.[263] Similarly, both by statute[264] and case law,[265] findings by the trial court concurred in by the intermediate appellate courts are conclusive if there is any evidence to support them. Jury verdicts are not to be set aside "where there is material evidence to support the verdict of the jury."[266] Finally, yet a different standard applies in criminal actions, which are tried almost exclusively before a jury: verdicts of guilt are set aside only if the evidence preponderates against the verdict.[267]

This crazy quilt raises a number of questions. Should there be separate standards of appellate review for actions tried before a trial judge and those tried before a jury? Should the standard vary depending upon whether the evidence consists of oral testimony? Should it matter if the action were tried in a chancery court or that there were concurring findings between the master and chancellor or trial judge and intermediate appellate court? Should there be separate standards for civil and criminal actions?

There is a good deal of legal literature focusing on the desirability and appropriate scope of appellate review of trial court findings.[268] Broad, if not de novo, review of trial court findings has been urged on the ground that an appellate court is more likely than the trial court to make correct findings since an appellate court has more time to study the case, and its findings, just as those of a jury, reflect the knowledge, experience, and wisdom of greater numbers.[269] Moreover, if a trial court is given final power over life, liberty, and property, too much discretion is being vested in one person and may result in public distrust and suspicion.[270] In addition, uniformity, certainty, and correctness of results are as jeopardized by erroneous findings of fact as by application of an incorrect principle of law.[271] Since an appellate court

263. TENN. CODE ANN. § 27-113 (1955).

264. *Id.*

265. *E.g.*, Scharff v. State, 551 S.W.2d 671, 674 (Tenn. 1977); Hickory Springs Mfg. Co. v. Evans, 541 S.W.2d 97, 98 (Tenn. 1976).

266. TENN. SUP. CT. R. 14(7).

267. *See, e.g.*, State v. Grace, 493 S.W.2d 474, 476-77 (Tenn. 1973); McBee v. State, 213 Tenn. 15, 19-20, 372 S.W.2d 173, 176 (1963).

268. *See* note 227 *supra*.

269. Blume, *supra* note 227, at 72. *See also* Carrington, *supra* note 92, at 527.

270. Blume, *supra* note 227, at 71.

271. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE

has plenary power to review questions of law, it ought also to review findings of fact de novo. Affording complete review of both legal and factual issues has the advantages of eliminating the necessity of drawing the difficult and oftentimes impossible law-fact distinction and of reducing the number of jury trials.[272] Finally, it is argued that there is no empirical proof that standard demeanor evaluation is reliable; in fact such evaluation may well be misleading.[273]

On the other hand, some other commentators point to the disadvantages of encouraging appeals by providing broad review of trial court findings.[274] Appeals increase the demand on scarce judicial resources and delay final disposition of litigation. In addition, appeals make litigation more expensive and thus give an advantage to the litigant with the deeper pocket.[275] Broad review of trial court findings also impairs trial court morale and lessens respect for the trial court.[276] Furthermore, while there is probably no certain way of knowing whether appellate or trial courts are more often correct, the trial court, like the jury, senses more than can be adequately conveyed in the record.[277]

Most of the arguments either in favor of or against broad review of trial court findings do not directly address the question

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(1949); Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417, 449 (1968).

272. Blume, *supra* note 227, at 72. Professor Blume argues that if trial court findings are not open to review, it is likely a litigant would rather take his chances on twelve jurors whose verdict may be set aside by the trial court. If, on the other hand, there is de novo review of trial court findings, "it is likely that the doubtful litigant will resolve his doubts in favor of waiver [of a jury] knowing that an avenue of escape from an unjust decision will be open to him." *Id.*

273. *Id.* at 72; *see* D. MCCARTY, PSYCHOLOGY FOR THE LAWYER 250-51 (1929); Note, *Credibility of Certain Lay Witnesses: The Psychopathic Liar on the Witness Stand*, 1 CURRENT MED. 21 (1954).

274. For authorities arguing that broad review of questions of fact increases the number of appeals, see Chestnut, *supra* note 227, at 540-41; Wright, *supra* note 92, at 780. *See also* Frankfurter & Landis, *The Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 26-35 (1930).

275. Wright, *supra* note 92, at 780.

276. *Id.* at 781. *But see* text accompanying notes 91-92 *supra*.

277. APPELLATE COURT STANDARDS, *supra* note 121, § 3.11, at 23; Chestnut, *supra* note 227, at 540; Rosenberg, *supra* note 82, at 663-65; Wright, *supra* note 92, at 781-82; *see* text accompanying notes 282-83 *infra*. *See generally* J. FAST, BODY LANGUAGE (1970).

of why the law generally discriminates in intensity of review between trial court findings and jury verdicts.[278] One beguiling explanation for this discrimination, as well as for the greater respect shown administrative findings, was offered by Judge Jerome Frank:

> A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness.[279]

The biting questions underlying Judge Frank's witty observation are whether or not a jury is more likely than a trial court to make correct determinations of fact and whether or not review of jury verdicts and administrative determinations reflects an excess of caution.

Perhaps, on the whole, jury verdicts are more likely to be correct than trial court findings.[280] But this argument and virtually all the other arguments on the desirability of no review versus some broader measure of review are wide of the mark. The task of an appellate court is not to decide whether the factfinder is generally reliable or unreliable or whether it is generally good or bad to permit review of determinations of fact. Instead, an appellate court is faced with the far more painstaking task of deciding in the particular case under review whether the factual determination in issue should be sustained or set aside. Neither the factfinder's general reliability or unreliability nor the general desirability or undesirability of review helps determine whether an erroneous determination has been made in a particular instance.

A remaining explanation for broader review of trial court findings than of jury verdicts is that the material evidence rule governing jury verdicts is too narrow. If indeed the rule is too

278. *But see* APPELLATE COURT STANDARDS, *supra* note 121, § 3.11, at 22-23.

279. Orvis v. Higgins, 180 F.2d 537, 540 n.7 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950).

280. *But see* Chestnut, *supra* note 227, at 540; Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459 (1899).

narrow, the fault may lie not with what the test ought to mean but with what it has meant. The material evidence rule is sensible insofar as it means that an appellate court, given a conflict in testimony, will uphold the trier of fact if there is material evidence from which the determinations in issue could reasonably have been made.[281] Traditionally, the law has recognized that the trier of fact is at least in a position to take note of a number of factors affecting the probative value of testimony that cannot be adequately conveyed in the record.[282] Justice Traynor has observed:

> [An appellate court] cannot know whether a witness answered some questions forthrightly but evaded others. It may find an answer convincing and truthful in written form that may have sounded unreliable at the time it was given. A well-phrased sentence in the record may have seemed rehearsed at the trial. A clumsy sentence in the record may not convey the ring of truth that attended it when the witness groped his way to its articulation. What clues are there in the cold print to indicate where the truth lies? What clues are there to indicate where the half-truth lies?[283]

On the other hand, the material evidence rule ought not lead an appellate court to sustain a determination not based on any evidence or not reasonably made from the evidence.[284] Yet, factual determinations that cannot reasonably be made may be upheld if an appellate court considers only the evidence supporting the determination. Justice Traynor's analysis is insightful and convincing:

> Occasionally an appellate court affirms the trier of facts on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational

281. R. TRAYNOR, *supra* note 50, at 27.
282. *See* text accompanying note 277 *supra*.
283. R. TRAYNOR, *supra* note 50, at 20-21.
284. *See generally* Rosenberg, *supra* note 82, at 646.

> findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.[285]

Interestingly, the material evidence rule has also been criticized not on the ground that it affords too narrow a review but on the ground it affords too broad a review of jury verdicts. To many, the principal virtue of the jury is that it softens the harshness of the law, which often lags behind community standards of fairness and decency.[286] Reviewing jury verdicts on a material evidence or reasonableness standard is thus too broad since it may deprive the jury of its valuable function of vetoing harsh, oppressive, or discriminatorily administered laws. But history provides examples not only of jury compassion but also jury passion.[287] As Justice Traynor has contended:

> It is misleading to argue that a narrow review affords an expedient precaution against the court's moving into the province of the trier of fact. Concededly, it is not for an appellate court to retry cases on appeal or to substitute its judgment of the probabilities for that of the trier of fact, whatever it may find in the record. To say, however, that it should not exceed its province is not to justify an excess of caution that would stay its review even when it becomes additionally apparent from the record that the conclusion of the trier of fact was contrary, not merely to what the appellate court would have done, but to what a trier of fact could reasonably have done. The very folly of such a conclusion works an injustice whose redress is a matter of law.[288]

Little harm would result if the law tolerated an occasional jury veto of harsh laws but at the same time guarded against jury

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285. R. TRAYNOR, *supra* note 50, at 27.

286. *See* L. GREEN, JUDGE AND JURY 122-23 (1930); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 15.5, at 891-92 (1956); F. JAMES & G. HAZARD, *supra* note 67, § 7.15, at 301-02; 5A MOORE'S FEDERAL PRACTICE ¶ 49.05, at 2235-36 (1975); R. TRAYNOR, *supra* note 50, at 31; Holmes, *supra* note 280, at 459-60.

287. *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915). As Holmes observed in dissent:

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury.

Id. at 347.

288. R. TRAYNOR, *supra* note 50, at 27.

intolerance.[289] If justice is to be administered evenhandedly, however, appellate courts must assume their responsibility to keep the law straight. Acceptance of this responsibility, combined with review to determine whether the factual determinations are reasonably supported by the evidence, would seem best suited to realization of the demands of justice.

Based upon these considerations, the Advisory Commission considered a proposed rule that set forth a single standard of review to govern jury and nonjury, legal and equitable, civil and criminal actions. The proposed rule provided:

> Findings of fact, whether by the trial court or jury, based on the opportunity of the trier of fact to assess the credibility of witnesses who appeared personally before it, shall be set aside only if, considering the whole record, no trier of fact could reasonably make the finding in issue by the required degree of persuasion.

The proposed rule was based on the theory that since both the jury and the trial court are able to take account of factors affecting the probative value of testimony that cannot adequately be conveyed in the record,[290] it is logical to establish a unitary standard of review and sensible to sustain factual determinations, if there is a conflict in testimony, as long as there is evidence to support them.[291] Since the burden of persuasion differs between

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289. *See id.* at 33.

290. *See* text accompanying notes 277 & 282-83 *supra*.

291. *See* APPELLATE COURT STANDARDS, *supra* note 121, § 3.11. The Commission on Standards of Judicial Administration found no good reason for a different approach to a trial judge's findings and recommended that both verdicts and findings be governed by the same standard of whether the factual determinations are reasonably supported by the evidence.

> In light of the pertinent historical and practical considerations involved, the appropriate rule should be that a trial judge's findings of fact and application of law to fact should be governed by the same standard that is applied to corresponding jury determinations. The trial judge, like the jury, has opportunity to see and hear the witnesses and to evaluate the evidence as a whole. The trial judge, unlike the appellate court, is regularly engaged in resolving issues of fact and is primarily responsible for doing so. To the extent that his authority in this regard is treated as less than that of the jury, appeal inevitably becomes a mechanism for retrying the facts, to the detriment of both the trial and appellate court. The interpretation, and if necessary the formulation, of rules such as Rule 52(a) of the Federal Rules of Civil Procedure should consequently be reconsidered.

Id. at 23-24.

civil and criminal actions and even among certain issues in civil actions, the rule would also have required the appellate court to take these differences into account.[292] Thus, if the appellate court required the trier to find facts by a greater degree of conviction than the more-probable-than-not standard that ordinarily applies in civil actions, then the appellate court would have had to accept responsibility for its enforcement. Otherwise, the rule requiring a more rigorous degree of persuasion would lose its vitality.[293] Finally, the rule did not contemplate a separate standard for concurring findings of the master and chancellor and of the trial court and intermediate appellate court. Ironically, the broad review of facts available if there are no concurring findings in actions tried in chancery court appears based in part on the absence of an opportunity to observe witness demeanor, since the statute establishing this broad scope of review is apparently inapplicable in any action tried upon oral testimony.[294] The limited review of concurring findings seems better viewed as a statement that one review of the findings is enough. In the case of the supreme court, where there have been concurring findings of the trial court and intermediate appellate court, limiting review can also be viewed as an admonition to the supreme court not to exercise its discretionary review power to hear cases of interest only to the parties.[295]

Despite these considerations, however, the Advisory Commission recommended that the supreme court not change current law. This decision was based in part on the thought that, while jurors come and go, judges remain who may be unwilling to enforce certain legal principles.[296] The reasonableness standard was

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292. R. TRAYNOR, *supra* note 50, at 29.

293. *See* Stromerson v. Averill, 22 Cal. 2d 808, 817, 141 P.2d 732, 737 (1943) (Traynor, J., dissenting).

294. TENN. CODE ANN. § 27-113 (Supp. 1976) provides that broad review of facts by the court of appeals "shall not apply to any case tried in the chancery court upon oral testimony."

295. *See* text accompanying notes 385-408 *infra*.

296. *See* Carrington, *supra* note 92, at 520:

> When a jury sits, the need for appellate review of findings of fact is less compelling, for several reasons. First, the jury is enthroned too briefly to create a risk that the enforcement of any principle will be impaired by an unwillingness to apply it; if juries in general will not apply a principle, its desuetude is probably in the public interest. In any event, the lawlessness is not associated with the personal despotism of the

therefore considered insufficient to serve as a meaningful check on the trial court's power.[297] Conversely, there was some sentiment that the reasonableness standard was too broad for jury verdicts. It was also considered inexpedient to change the law since it is so ingrained in Tennessee procedure. Accordingly, rule 13(d), which deals with findings of fact in civil actions, simply restates current law.[298]

Proposed rule 13(e), on the other hand, establishes a different standard of review from that previously adhered to in criminal actions. The initial draft of the proposed rules simply restated the prevailing law concerning appellate review of findings of guilt

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district judge. The jury has already served as some check on his power, hence the need for review is less. Moreover, inasmuch as the trial judge must instruct the jury and set aside its verdict if he deems it contrary to the weight of the evidence, the judgment resting on a jury verdict comes to the court of appeals with a double imprimatur.

Professor Blume also argued that trial court findings are not given less respect than jury verdicts.

It is true that a verdict will not be reviewed on the facts by an appellate court, but it is also true that it can be, and is every day, reviewed by the trial judge on motion for a new trial. A review by an appellate court is of higher dignity than a review by the trial court.

Blume, *supra* note 227, at 71.

297. The example most often cited by the Advisory Commission was review in workmen's compensation cases.

298. PROPOSED TENN. R. APP. P. 13(d) provides:

Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

The introductory clause concerning situations governed by statute is designed to preserve current law regarding concurring findings, *see* text accompanying notes 263-65 *supra*, findings in workmen's compensation cases, *see* TENN. CODE ANN. § 50-1018 (1977), and findings in administrative adjudications. *See* Public Serv. Comm'n v. General Tel. Co., 555 S.W.2d 395 (Tenn. 1977); United Inter-Mountain Tel. Co. v. Public Serv. Comm'n, 555 S.W.2d 389 (Tenn. 1977); Metropolitan Gov't v. Shacklett, 554 S.W.2d 601 (Tenn. 1977); TENN. CODE ANN. § 4-524 (Supp. 1977). The workmen's compensation statute limits review in accordance with the practice "governing other appeals in the nature of a writ of error in civil causes." TENN. CODE ANN. § 50-1018 (1977). The scope of review in such proceedings is limited to errors of law. *See, e.g.*, James v. Ducktown Sulphur, Copper & Iron Co., 109 Tenn. 375, 71 S.W. 821 (1902).

in criminal actions.[299] Quite recently, however, the United States Supreme Court held that an accused may not be subjected to a second trial when his conviction is reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict,[300] a holding made applicable to the states.[301] Although the Court did not expressly address the standard governing appellate reversal on the ground of insufficient evidence, it seems likely that the Court will hold that findings of guilt must be set aside if the evidence fails to establish guilt beyond a reasonable doubt. Proposed rule 13(e), therefore, provides that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if, considering the whole record, the evidence fails to establish guilt beyond a reasonable doubt."

D. The Timing of Appellate Review

Just as vitally important as the question of the scope of review is the question of when appellate review may be sought. Most jurisdictions, including Tennessee, generally permit an appeal as of right—that is, "an appeal that does not require permission of the trial or appellate court as a prerequisite to taking an appeal"[302]—only upon entry of a final judgment.[303] The proposed rules follow this general rule and permit an appeal as of

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299. Originally, proposed rule 13(e) provided that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside only if the evidence preponderates against the finding."

Arguably, the current standard of review of findings of guilt in criminal actions is unconstitutional under the due process clause as well as the double jeopardy clause. *See* text accompanying notes 300-01 *infra*. In *In re* Winship, 397 U.S. 358 (1970), the Supreme Court held that due process requires all elements of a criminal offense to be proven beyond a reasonable doubt. Yet, as noted in the text, *see* text accompanying note 293 *supra*, unless the appellate court takes the burden of persuasion into account when reviewing factual determinations, the rule requiring a rigorous degree of persuasion loses its vitality. Thus, the Tennesee law, requiring that the evidence preponderate against the finding of guilt, may subvert the "beyond a reasonable doubt" standard constitutionally mandated by *In re Winship*, and itself be violative of due process.

300. Burks v. United States, 46 U.S.L.W. 4632 (U.S. June 14, 1978).

301. Greene v. Massey, 46 U.S.L.W. 4636 (U.S. June 14, 1978).

302. PROPOSED TENN. R. APP. P. 3(d).

303. *See, e.g.*, Cockrill v. People's Sav. Bank, 155 Tenn. 342, 347, 293 S.W. 996, 997-98 (1927) (writ of error); Carrol v. Caldwell, 8 Tenn. (1 Mart. & Yer.) 78 (1827) (appeal in the nature of a writ of error); Moore v. Churchwell, 27 Tenn. App. 443, 446, 181 S.W.2d 959, 961 (1942) (appeal).

right only from a final judgment.[304] The rules do not contain a general definition of finality[305] because it is typically clear whether an order is final or interlocutory.[306] However, proposed rule 3(a), dealing with the availability of an appeal as of right in civil actions, does define finality in the context of civil actions involving multiple claims or multiple parties:

> Except as otherwise provided in rule 9, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.[307]

The general rule limiting appeals to entry of a final judgment[308] has been justified, first of all, on the ground that it reduces the number of appellate proceedings and their attendant expense and burden on both the parties and the appellate courts. At most there is only one appeal, and if the issue that would otherwise be the basis of an interlocutory appeal is rendered moot—because the party who would have appealed prevails or settles or because the trial court itself corrects its error—there may be no appeal.[309] In addition, a finality rule prevents delay at

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304. PROPOSED TENN. R. APP. P. 3(a)-(b).

305. For definitions of a final judgment, see Mengle Box Co. v. Lauderdale County, 144 Tenn. 266, 276, 230 S.W. 963, 965 (1921); Thomas v. Hedges, 27 Tenn. App. 585, 590, 183 S.W.2d 14, 16 (1944).

306. *See* C. WRIGHT, *supra* note 158, § 101, at 505.

307. Proposed rule 9 describes situations in which interlocutory review is available. *See* text accompanying note 346 *infra*.

308. *See generally* F. JAMES & G. HAZARD, *supra* note 67, §§ 13.4, .9-.12; 9 MOORE'S FEDERAL PRACTICE ¶¶ 110.06-.13, .16-.30 (1975); C. WRIGHT, *supra* note 158, §§ 101-102; 15 C. WRIGHT, A MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3905-3919 (1976); Carrington, *supra* note 92, at 508-17; Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 YALE L.J. 539 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292 (1966); Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975); Sunderland, *supra* note 51, at 127; Wright, *supra* note 92, at 771-82; Note, *The Final Judgment Rule in the Federal Courts*, 47 COLUM. L. REV. 239 (1947) [hereinafter cited as *Final Judgment Rule*]; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961) [hereinafter cited as *Appealability*].

309. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.07, at 108-09 (1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at

the trial level and results in a quicker ultimate resolution of the action.[310] "Thus, the final judgment rule seeks to serve the twin goals of minimizing appellate dockets and maximizing fairness to litigants by the speedy and inexpensive termination of litigation."[311] Moreover, the fact that the trial court is given "primary responsibilities for fact finding, standard application, and procedure mean that most rulings that precede factfinding do not lead to reversal, and that often a court of appeals can satisfactorily identify the controlling legal questions only after factfinding has been completed."[312] On the other hand, delaying appellate

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430-32 (1976); Carrington, *supra* note 92, at 509; Frank, *supra* note 308, at 293; *Appealability*, *supra* note 308, at 352; *Final Judgment Rule*, *supra* note 308, at 239.

310. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.07, at 107 (1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 431-32 (1976); Carrington, *supra* note 92, at 509; Frank, *supra* note 308, at 292-93; *Appealability*, *supra* note 308, at 351; *Final Judgment Rule*, *supra* note 308, at 239.

311. Note, *Civil Procedure—Appealability—Expansion of Interlocutory Appeals in Tennessee*, 42 TENN. L. REV. 584, 585 (1975).

312. 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 430 (1976); *see* F. JAMES & G. HAZARD, *supra* note 67, § 13.4, at 670; *Appealability*, *supra* note 308, at 352. It is also argued that delaying appeal to entry of a final judgment may prompt the trial court to consider its interlocutory rulings with greater care, "for errors not requiring reversal will never be corrected and those that warrant reversal will compel a complete retrial." *Appealability*, *supra* note 308, at 352; *see* 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 431 (1976). It seems more likely, however, that insulation from review may prompt lesser care. Finally, Professor Wright has repeatedly argued that "[t]rial judge authority may be so enhanced by the delayed appellate process, further, that more effective trial governance is possible, and greater community acceptance will attach to all judicial determinations, whether at the trial or appellate level." 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 431-32 (1976); *see* Wright, *supra* note 92, at 779-80. Professor Carrington, on the other hand, has argued that interlocutory review

> assures the trial judge that his relation with his constituent litigants is built on something more firm than his own personal force; the moral integrity of the federal judicial enterprise stands behind his rulings. Only a venal or unduly timid judge should fear or regret review, insofar as the esteem of his office is concerned.

Carrington, *supra* note 92, at 513. The principal difficulty with both these arguments, however, is that neither offers a discriminating principle by which those interlocutory rulings justifying an immediate appeal can be identified. The best effort to articulate such principles is in *Appealability*, *supra* note 308, which provided invaluable assistance in formulating proposed rules 9 and 10.

review until entry of a final judgment may mean that subsequent proceedings will be a waste because an early error that could have been corrected by an interlocutory appeal will cause a later reversal.[313] Furthermore, under a finality rule, review may be permitted only when it is too late to be effective.[314] In addition, certain types of orders, such as discovery orders, may never be reviewed on appeal from a final judgment because it is unlikely that they would require reversal.[315] Thus, both the prevention of inconsistent trial court rulings and the development of a uniform body of law may be stifled.[316] Finally, unyielding application of a finality rule would prevent immediate correction of those relatively rare instances of capricious trial court behavior.[317]

Speaking generally, the rule limiting appeals of right to final judgments has worked well, while jurisdictions with broad authority for appeals as of right from virtually all interlocutory rulings have found such authority "a prime source of delay and expense in litigation [that] imposes an undue burden on the [appellate court]."[318] The principal difficulties presented by retention of the final judgment rule, therefore, lie in identifying those interlocutory orders that should be immediately appealable and establishing procedures to prevent abuse of interlocutory appeals.

Two principal methods of describing those interlocutory orders that should be immediately appealable emerge from a survey of the statutes and rules of court of other jurisdictions. In some jurisdictions an appeal is permitted, generally as of right though

313. *See* 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 434 (1976); Carrington, *supra* note 92, at 510; Frank, *supra* note 308, at 293; Sunderland, *supra* note 51, at 127; *Appealability, supra* note 308, at 352.

314. *See* C. WRIGHT, *supra* note 158, § 101, at 504; 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 433 (1976); Frank, *supra* note 308, at 293; Sunderland, *supra* note 51, at 127; *Appealability, supra* note 308, at 352; *Final Judgment Rule, supra* note 308, at 239.

315. *See* Carrington, *supra* note 92, at 511; *Appealability, supra* note 308, at 352.

316. *See Appealability, supra* note 308, at 352.

317. *Id. See also* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973); Comment, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 137, 152-57 (1976).

318. Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 BUFFALO L. REV. 307, 330 (1967).

at times by permission, from defined classes of interlocutory orders. Most often singled out for interlocutory review in civil actions are (1) orders granting or denying an injunction;[319] (2) orders appointing or refusing to appoint a receiver;[320] (3) orders granting or denying a new trial;[321] (4) orders involving changes in or challenges to the place of trial;[322] (5) orders granting or denying provisional remedies[323] or involving the possession, delivery, or sale of property,[324] or the payment of money;[325] and (6) orders requiring an accounting.[326] This listing is by no means exhaustive. Indeed, depending upon the classification scheme, as many as fifty or so additional classes of interlocutory orders emerge. A second, less common method of describing those interlocutory orders that are immediately appealable is by setting forth flexible guidelines but conditioning appeal on the consent of the trial and appellate court. For example, when an immediate appeal will materially advance ultimate termination of litigation, interlocutory review is commonly permitted from interlocutory orders involving a controlling question of law as to which there is substantial ground for

319. *See, e.g.*, ALASKA SUP. CT. R. 23(a); ARK. STAT. ANN. § 27-2102 (1962); GA. CODE ANN. § 6-701(a)(3) (Supp. 1974); ILL. SUP. CT. R. 307(a); MINN. R. CIV. APP. P. 103.03(b); R.I. GEN. LAWS § 9-24-7 (1969); WIS. STAT. ANN. § 817.33(3)(b) (West 1977).

320. *See, e.g.*, COLO. APP. R. 1(a)(4); KAN. CIV. PRO. STAT. ANN. § 60-2102(a)(3) (Vernon 1967); MICH. GEN. CT. R. 806.2(2); MONT. R. APP. CIV. P. 1(b); NEV. R. APP. P. 3A(b)(2); S.D. COMPILED LAWS ANN. § 15-26-1(5) (1967).

321. *See, e.g.*, ILL. SUP. CT. R. 306(a)(1); IND. CODE ANN. § 34-1-47-1(b) (Burns 1973); MINN. R. CIV. APP. P. 103.03(e); MO. ANN. STAT. § 512.020 (Vernon 1952); OKLA. STAT. ANN. tit. 12, § 952 (West 1961); OR. REV. STAT. § 19.010(2)(d) (1975); WASH. R. APP. P. 2.2(a)(9).

322. *See, e.g.*, FLA. APP. R. 4.2(a); MONT. R. APP. CIV. P. 1(b); NEV. R. APP. P. 3A(b)(2).

323. *See, e.g.*, KAN. CIV. PRO. STAT. ANN. § 60-2102(a)(1) (Vernon 1967); MINN. R. CIV. APP. P. 103.03(c); MONT. R. CIV. APP. P. 1(b); OKLA. STAT. ANN. tit. 12, § 952 (West 1961).

324. *See, e.g.*, ILL. SUP. CT. R. 307(a)(4)-(5), (7); MISS. CODE ANN. § 11-51-7 (1972); MO. STAT. ANN. § 512.020 (Vernon 1952); MONT. R. APP. CIV. P. 1(b); NEV. R. APP. P. 3A(b)(3); OR. REV. STAT. § 19.010(2)(b) (1975); R.I. GEN. LAWS § 9-24-7 (1969); VA. CODE § 8.01-670(B)(2) (1977); W. VA. CODE § 58-5-1(g) (1966).

325. *See, e.g.*, MISS. CODE ANN. § 11-51-7 (1972); VA. CODE § 8-462(2)(b) (1950); W. VA. CODE § 58-5-1(g) (1966).

326. *See, e.g.*, GA. CODE ANN. § 6-701(a)(3) (Supp. 1974). Some of the situations set forth in the text reflect the fact that historically the final judgment rule was not adopted in equity. *See* Crick, *supra* note 308, at 545-46.

difference of opinion.[327] Interlocutory review is also permitted whenever final review would amount to an injustice because of the impairment of a legal right or because of unnecessary delay, expense, hardship, or other related factors;[328] or whenever necessary and appropriate for the exercise of appellate jurisdiction;[329] or whenever specified motions present important questions;[330] or whenever an appeal from certain motions would settle all the controlling principles.[331] This listing also is not exhaustive, but it does convey an accurate impression of the kinds of flexible guidelines other jurisdictions have formulated.

Most jurisdictions adopt neither method to the total exclusion of the other but utilize both methods of identifying those interlocutory orders immediately appealable. Thus, an appeal typically as of right is permitted from certain enumerated classes of interlocutory orders, and flexible guidelines describe when a discretionary appeal is permitted in other than the enumerated instances. This approach is also embodied in the federal rules and statutes.[332] The current Tennessee statute governing interlocutory appeals is also a combination of both methods, although all inter-

327. *E.g.*, 28 U.S.C. § 1292(b) (1970); ALASKA SUP. CT. R. 23(d); ILL. SUP. CT. R. 308(a). For discussions of the federal statute, see Note, *Section 1292(b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940 (1966); Note, *supra* note 178; Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959) [hereinafter cited as *Discretionary Appeals*].

328. ALASKA SUP. CT. R. 23(e). The Alaska rules also provide that otherwise nonappealable orders or decisions may be reviewed only

> (1) where the order or decision sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of [the supreme court]; (2) where the sound policy behind the general rule of requiring appeals to be taken only from final judgments is outweighed by the claim of the individual case that justice demands a present and immediate review of a particular non-appealable order or decision; or (3) where the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for [the supreme court's] power of supervision and review.

Id. R. 24.

329. *E.g.*, IOWA R. CIV. P. 347(a); MONT. R. APP. CIV. P. 17(a).

330. MINN. R. CIV. APP. P. 103.03(i).

331. MISS. CODE ANN. § 11-51-7 (1972).

332. *See* 28 U.S.C. §§ 1651(a), 1292 (1970); FED. R. CIV. P. 54(b).

locutory appeals are discretionary.[333]

The prevalence of a combination of both methods suggests that each has advantages. Permitting interlocutory appeals in defined classes of cases, particularly appeals as of right, appears to make the law definite and lessens the need for any preliminary judicial involvement in determining the propriety of an interlocutory appeal.[334] Some uncertainty and resultant judicial involvement no doubt continues, however, in determining whether a case falls within or without the defined class.[335] This uncertainty could be disastrous and spawn an increased number of appeals if a party forfeits his right to appellate review of an interlocutory order by not appealing at the specified time.[336] Moreover, permitting an appeal in defined classes of cases may permit interlocutory appeals when they are not needed and, even more significantly, prohibit them when vitally necessary.[337] On the other hand, formulating flexible guidelines and conditioning an interlocutory appeal on the permission of the trial or appellate court permits interlocutory review when and if appropriate and eliminates uncertainty as to the right to appeal.[338] These gains, however, are purchased at the cost of greater judicial involvement in determining the appropriateness of an interlocutory appeal.[339]

On balance, the arguments in favor of formulating flexible guidelines seemed stronger to the Advisory Commission, and it thus became necessary to determine whether an interlocutory appeal ought to require the consent of the trial and appellate court. The reasons typically advanced for requiring the consent of the trial court are that its familiarity with the controversy and parties better enables it to predict whether an interlocutory appeal will result in a reduction in the total duration or cost of the litigation if the challenged order is reversed, as well as to determine the presence of dilatory motives.[340] If performed with a sym-

333. TENN. CODE ANN. § 27-305 (Supp. 1977).

334. *Appealability*, *supra* note 308, at 352.

335. *Id.*

336. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.07, at 109-10 (1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 434 (1976); *Appealability*, *supra* note 308, at 352-53.

337. *Appealability*, *supra* note 308, at 352.

338. *Id.* at 353.

339. *Id.*

340. *See* Note, *supra* note 178, at 614; *Appealability*, *supra* note 308, at 379; *Discretionary Appeals*, *supra* note 327, at 344-45.

pathetic understanding of the general undesirability of interlocutory appeals, the trial court can also protect the appellate court from being inundated with requests for permission to appeal.[341] On the other hand, the trial court is more likely to be influenced by the pressure of the litigants and the temptation to rid itself of difficult or controversial questions.[342] Appellate court consent would thus eliminate the wastefulness of preparing the record, writing the briefs, and conducting oral argument only to have the appeal ultimately dismissed on the ground that the trial court's consent was not properly given. Experience under the current Tennessee discretionary appeals statute has proven this possibility to be more than simply an academic concern. Finally, the appellate court knows better the burden interlocutory review has on its own docket and can probably better assess the likelihood of reversible error than the trial judge who made the contested ruling.[343]

Little if anything will be gained, however, if the appellate judicial energy expended in determining the appropriateness of interlocutory review approaches the effort needed to dispose of the case as upon a full appeal.[344] Similarly, any effective limitation on the right to an interlocutory appeal will require the appellate court to refuse to consider review of cases in which the trial court has not given permission to appeal. Indeed, as long as the trial court considered all relevant factors and no improper ones, its decision to give or withhold permission should generally be accepted.[345] Appellate review without the trial court's consent would seem appropriate only to control capricious trial court behavior or as may be necessary to protect the appellate court's ability to grant complete relief in the regular course of a later appeal. Refusal to review in the face of certification would seem appropriate only if it readily appears that certification was improper.

All interlocutory appeals under the proposed appellate rules are governed by rules 9 and 10 and are denominated as appeals

341. *Appealability*, *supra* note 308, at 379.

342. *Id.*

343. *Id.*; *Discretionary Appeals*, *supra* note 327, at 345.

344. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 571 (1969); Note, *supra* note 178, at 614.

345. Note, *supra* note 178, at 617.

by permission. Interlocutory review under rule 9 requires the permission of both the trial and appellate courts and is the rule under which most interlocutory appeals must be sought. Subdivision (a) of rule 9 does not purport to be a complete statement of the circumstances that may justify discretionary interlocutory review, but it does set forth "the character of the reasons that will be considered." Those reasons are as follows:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.[346]

In addition, in order to render protective applications for permission to appeal unnecessary, the last sentence of rule 9(a) provides that "[f]ailure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment."

Interlocutory review under rule 9 is sought first by requesting the trial court to grant its permission to appeal. If the trial court is of the opinion that an appeal should be allowed, it must state in writing the reasons for its opinion, including "(1) the legal criteria making the order appealable . . . ; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal."[347] The requirement of written reasons should not only facilitate consideration by the appellate court of the propriety of the exercise of its discretionary power to permit the appeal but should also guard against a precipitous or an unwarranted grant of permission by the trial court. Once the

346. PROPOSED TENN. R. APP. P. 9.
347. *Id.* R. 9(b).

trial court enters an order granting permission to appeal, an application for permission to appeal must be filed "within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later."[348] The application must contain "(1) a statement of the facts necessary to an understanding of why an appeal by permission lies and (2) a statement of the reasons supporting an immediate appeal" and must be accompanied by copies of "(1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal."[349] If the appellate court grants its permission, the appeal proceeds in the same manner as an appeal as of right. As a safeguard against delaying tactics, the rule provides that an application for permission to appeal or the grant thereof does "not stay proceedings in the trial court unless the trial or appellate court orders otherwise."[350]

Interlocutory review under rule 10 requires only the permission of the appellate court but is available only "(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules."[351] In order to emphasize the infrequent and unusual situations in which rule 10 is available as well as the need to obtain only the permission of the appellate court, the rule is captioned "Extraordinary Appeal by Permission on Original Application in the Appellate Court." The procedure for applying for an extraordinary appeal under rule 10 is substantially the same as that set forth in rule 9. An application for an extraordinary appeal must be filed and must contain "(1) a statement of the facts necessary to an understanding of why an extraordinary appeal lies, (2) a statement of the reasons supporting an extraordinary appeal, and (3) the relief sought."[352] The application must also "be accompanied by copies of any order or opinion or parts of the record necessary for determination of the application."[353] Unless the appellate court is of the opinion that an

348. *Id.* R. 9(c).
349. *Id.* R. 9(d).
350. *Id.* R. 9(f).
351. *Id.* R. 10(a).
352. *Id.* R. 10(c).
353. *Id.*

extraordinary appeal should be granted, no answer to the application need be filed.[354] If, on the basis of the application, the appellate court is of the opinion that the extraordinary appeal may lie, "the appellate court shall order that an answer to the application be filed by the other parties within the time fixed by the order."[355] The proceedings thereafter, with regard to briefs and oral argument, lie in the discretion of the appellate court.[356] Finally, rule 10 authorizes the appellate court to "issue whatever order is necessary to implement review under this rule."[357] The purpose of this provision, in addition to empowering the appellate court to enter whatever order is necessary to effectuate the purposes of the rule, is to eliminate any dispute regarding the technically correct writ—certiorari, supersedeas, mandamus, prohibition, and the like—that should issue. Abandonment of the old terminology of the writs is thus designed to force consideration of the appropriate order to achieve the purposes of rule 10 without being encumbered by irrelevant historical considerations.

While rules 9 and 10 alter existing law on the availability of interlocutory review in civil actions, their impact on appeals by the state in criminal actions is particularly noteworthy. Both rules expressly provide that permission to appeal may be sought by the state in criminal actions.[358] Currently, interlocutory review by the state is obtained by petitioning for certiorari under the section of the Tennessee Code that provides:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy or adequate remedy.[359]

This section is of strained application if, for example, the state is seeking interlocutory review of an order to suppress evidence. While the trial court's order may be erroneous, it is difficult to understand in what manner the court "has exceeded the jurisdic-

354. *Id.* R. 10(d).
355. *Id.*
356. *Id.*
357. *Id.* R. 10(a).
358. *Id.* R. 9(g), 10(e).
359. TENN. CODE ANN. § 27-801 (1955); *see, e.g.*, State v. Wert, 550 S.W.2d 1 (Tenn. Ct. App. 1977).

tion conferred, or is acting illegally." In truth the appellate courts have simply recognized that, unless certiorari lies, the state has no "plain, speedy, or adequate remedy." The irreparable injury standard of proposed rule 9(a)(1) should easily be satisfied, however, since without the suppressed evidence, a judgment of acquittal is often inevitable, and, even under proposed rule 3(c), which deals with appeals by the state in criminal actions, the state cannot appeal as of right from such a judgment.[360]

E. Parties Entitled to Appeal in Criminal Actions

While the question of who is entitled to appeal from a final judgment presents few problems in civil actions,[361] appeals from final judgments in criminal actions present some unique problems. A defendant is clearly entitled to appeal, as a matter of right, a judgment of conviction entered on a plea of not guilty. On the other hand, the defendant typically forfeits his right to appeal on a plea of guilty,[362] and the same is probably true on a plea of nolo contendere. The Tennessee Supreme Court Advisory Commission on Criminal Rules concluded, however, that even on a plea of guilty or nolo contendere it is desirable in certain situations to permit the defendant to appeal as a matter of right. Accordingly, proposed appellate rule 3(b) permits an appeal as of right by the defendant

> on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved with the consent of the state and the trial court the right to appeal a certified question of law dispositive of the action, or if the defendant seeks review of his sentence and there was no plea agreement concerning his sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had.[363]

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360. *See* text accompanying note 378 *supra*.

361. *But see, e.g.*, Cole v. Arnold, 545 S.W.2d 95 (Tenn. 1977).

362. *See, e.g.*, Capri Adult Cinema v. State, 537 S.W.2d 896, 899 (Tenn. 1976); Ray v. State, 224 Tenn. 164, 167-68, 451 S.W.2d 854, 855 (1970); McInturff v. State, 207 Tenn. 102, 106, 338 S.W.2d 561, 563 (1960).

363. As originally promulgated, proposed rule 3(b) did not include the last situation specified in the current version of the rule. The proposed appellate rules were drafted before legislative approval of the Tennessee Rules of Criminal Procedure. The current version of the proposed appellate rules has been altered in light of the criminal rules, and the criminal rules also will require amendment if the appellate rules are approved by the General Assembly.

Rule 3(b) also authorizes the defendant to appeal as of right "from an order modifying the conditions of or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding."

The authorities are in conflict over whether at common law the state had a right to seek review in criminal actions.[364] In any event, as long as the defendant could not appeal,[365] had no counsel, could not call witnesses, or testify on his own behalf,[366] denying the state the right to appeal did seem to even things up just a bit. Also, the double jeopardy clause places significant constitutional restrictions on state appeals.[367] The defendant has a significant interest in his liberty pending appeal by the state[368] as well as a legitimate concern about paying the costs of his defense on appeal.[369] These matters, however, can be handled without completely denying the state the right to appeal.[370] There is also a

364. *Compare* United States v. Sanges, 144 U.S. 310, 312 (1892); State v. McGrorty, 2 Minn. 224 (1858), *and* Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486 (1927), *with* State v. Lee, 65 Conn. 265, 30 A. 1110 (1894), *and* Kronenberg, *Right of a State to Appeal in Criminal Cases*, 49 J. CRIM. L.C. & P.S. 473, 473-75 (1959). *See generally* L. ORFIELD, *supra* note 52, at 55-76; Hoy, *Appellate Review for the State in Criminal Cases*, 22 U. CIN. L. REV. 463 (1953); Note, *Criminal Procedure—Right of State to Appeal*, 45 KY. L.J. 628 (1957); Comment, *State Appeals in Criminal Cases*, 32 TENN. L. REV. 449 (1965).

365. L. ORFIELD, *supra* note 52, at 56-57; Miller, *supra* note 364, at 490.

366. *See* 2 J. WIGMORE, *supra* note 220, § 575, at 684-86; Miller, *supra* note 364, at 491.

367. *See, e.g.*, Sanabria v. United States, 46 U.S.L.W. 4646 (U.S. June 14, 1978); Burks v. United States, 46 U.S.L.W. 4632 (U.S. June 14, 1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Sisson, 399 U.S. 267, 289-90 (1970); Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662, 671 (1896). *See generally* Kronenberg, *supra* note 364, at 475-76, 481-82; Miller, *supra* note 364, at 491-96; Comment, *Government Appeals of "Dismissals" in Criminal Cases*, 87 HARV. L. REV. 1822, 1822-28 (1974); Note, *supra* note 364, at 631-36; Comment, *supra* note 364, at 458-62; Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303 (1974); *see also* Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 STAN. L. REV. 71 (1959); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960). *But see* United States v. Scott, 46 U.S.L.W. 4653 (U.S. June 14, 1978).

368. ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO CRIMINAL APPEALS § 1.4, at 39 (1969) [hereinafter cited as CRIMINAL APPEALS STANDARDS].

369. *Id.* § 1.4, at 40; L. ORFIELD, *supra* note 52, at 62.

370. *See* text accompanying notes 381-84 *infra*.

vital public interest that the guilty should not go free because of an erroneous result at the lowest level of the judicial hierarchy.[371] Moreover, if the state is not permitted to appeal, there is no opportunity to develop a uniform body of substantive and procedural law unless and until a defendant chooses to raise the issue on appeal.[372]

> It seems rather remarkable, in a country which debates so violently . . . the propriety of permitting the Supreme Court of the United States to pass on the constitutionality of legislative acts, that at the same time we tolerate a method which makes possible a final adjudication of unconstitutionality by the trial court.[373]

Finally, for a variety of reasons, including limited resources and the difficulty of sustaining the interest of prosecuting witnesses, experience seems to demonstrate that appeals by the state are not abused, but rather are rarely taken in jurisdictions permitting them.[374]

By statute in Tennessee, the state is permitted to pray an appeal in the nature of a writ of error or to seek a writ of error as in civil actions,[375] subject to the exception that the "state has no

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371. Kronenberg, *supra* note 364, at 480; Miller, *supra* note 364, at 503; Comment, *supra* note 364, at 467.

372. Kronenberg, *supra* note 364, at 480-81; Miller, *supra* note 364, at 505-06; Comment, *supra* note 364, at 468; *see* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 140 (1967). *But see* L. ORFIELD, *supra* note 52, at 73:

> As to the contention that appeal by the state will aid in the scientific development of the law, is not a sufficient answer that too high a price is paid for such development when it is obtained by harassing persons charged with crime? Has there been any dearth of development in the past? Cannot the law be adequately shaped by the legislature or judicial council and in cases where the appeal is by the defendant? Is it not a bit far-fetched to assert that the rights of the state will be underdeveloped and those of the defendant be overdeveloped merely because the appeal is brought by the defendant? Moreover, as has been pointed out, in jurisdictions where the state may appeal, very few appeals are brought. How can the law be developed unless they are?

373. Miller, *supra* note 364, at 505; *see* Kronenberg, *supra* note 364, at 481.

374. L. ORFIELD, *supra* note 52, at 72 & nn.61-62; Miller, *supra* note 364, at 500.

375. TENN. CODE ANN. §§ 40-3401 to 3402 (1975).

right of appeal or other remedy for the correction of errors, upon a judgment of acquittal in a criminal case of any grade."[376] This exception was modified somewhat by rule 29(c) of the Tennessee Rules of Criminal Procedure, which provides, "The State shall have the right of appeal where the Court sets aside a verdict of guilty and enters a judgment of acquittal." Proposed rule 3(c) adopts this provision of the criminal rules and is otherwise consistent with the current interpretation of the statute.[377] The rule is more specific than the statute, however, and provides:

> In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) granting or refusing to revoke probation; (4) arresting judgment; or (5) remanding a child to the juvenile court.[378]

In addition, rule 13(a), providing that any question of law may be brought up for review and relief by any party, would permit the state to obtain review on any question of law decided adversely to the state if the defendant appeals. None of these provisions would interfere with the right to trial by jury,[379] since only

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376. *Id.* § 40-3403.

377. *See* Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974); Gossett v. State, 224 Tenn. 374, 387-88, 455 S.W.2d 585, 590-91 (1970); State v. Malouf, 199 Tenn. 496, 504-06, 287 S.W.2d 79, 82-83 (1956).

378. For recommended statutes giving the state the right to appeal in criminal actions, see CRIMINAL APPEALS STANDARDS, *supra* note 368, § 1.4; ALI ADMINISTRATION OF CRIMINAL LAW § 13 (1935); ALI CODE OF CRIMINAL PROCEDURE § 428 (1931); Note, *supra* note 364, at 637. The federal statute permitting appeals by the government is 18 U.S.C. § 3731 (1970).

379. *See* L. ORFIELD, *supra* note 52, at 71:

> To give the state the right to appeal from a verdict of not guilty is to take a step in the direction of despotism. Trial by jury is one method of obtaining popular and local participation in the administration of the criminal law. If laws out of harmony with public opinion have been passed, it gives an opportunity for such public opinion to assert itself. It is true that a defendant may appeal from a verdict of guilty. But since he himself is appealing he cannot object that the jury is being ignored; and it is probable that jury trial was developed more to protect the rights of individuals than to safeguard society at large.

But see Kronenberg, *supra* note 364, at 480; Miller, *supra* note 364, at 497-99; Comment, *supra* note 364, at 465-66.

questions of law are open to review on appeal by the state.[380] To protect the defendant's liberty interest, rule 8(b) provides that "defendant shall not be held in jail or to bail during the pendency of an appeal by the state, or an application for permission to appeal by the state, unless there are compelling reasons for his continued detention or being held to bail."[381] Defendants without sufficient financial resources are currently provided counsel,[382] transcripts,[383] and the like at state expense. As an additional protection against harassment of the defendant, rule 40(b) permits awarding costs against the state in the same circumstances they may be awarded against a private litigant.[384]

F. Discretionary Review by the State Supreme Court of Final Decisions of the Intermediate Appellate Courts

In addition to permissive appeals from interlocutory orders, the proposed rules establish one other type of appeal by permission for the situation in which the supreme court is asked to exercise its discretionary power of review of final decisions of the intermediate appellate courts. This discretionary power of review needs to be considered against the background of the allocation of subject-matter jurisdiction between the supreme court and intermediate appellate courts.

Under current law, certain specified classes of cases are appealable directly from the trial court to the supreme court,[385] and all other cases are appealable only in the discretion of the supreme court from final determinations of the intermediate appellate courts.[386] Thus, the supreme court is a court of both first and second appeal. The highest court of virtually every other state with intermediate appellate courts also acts as a court of both first and second appeal. The classification of cases sent directly to the respective appellate courts for review varies greatly among

380. *See generally* Burks v. United States, 46 U.S.L.W. 4632 (U.S. June 14, 1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

381. *See generally* CRIMINAL APPEALS STANDARDS, *supra* note 368, § 1.4.

382. TENN. CODE ANN. § 40-2017 (1975).

383. *Id.* § 40-2040.

384. *See generally* Friedenthal, *supra* note 367, at 96-97; Kronenberg, *supra* note 364, at 479; Miller, *supra* note 364, at 501.

385. *See* note 114 *supra*.

386. TENN. CODE ANN. §§ 16-452, 27-819 (Supp. 1977).

the states.[387] There is also a variety of approaches concerning the treatment of cases that reach the highest court through the intermediate court of appeals. In some states, certain cases can be appealed from the intermediate appellate court to the highest court as a matter of right.[388] Another common approach is to permit the highest court to review cases pending but not yet decided by the intermediate appellate court upon request of the parties, certification by the intermediate appellate court, or the highest court's own motion.[389] Again, review of cases pending before the intermediate appellate court is often restricted to certain classes of cases.

Proposed rule 11 covers discretionary review by the supreme court of only final decisions of the intermediate appellate courts. The rule does not need to address those cases in which an appeal lies directly from the trial court to the supreme court since all direct appeals are either appeals as of right or by permission and are covered by previously discussed rules. Similarly, rule 11 does not govern review of cases pending in the intermediate appellate courts since plenary discretionary review by the supreme court is limited to final decisions of the intermediate appellate courts.[390] Thus, the fundamental purpose of rule 11 is to identify those cases that are of such extraordinary importance that they justify the burdens of time, expense, and effort associated with double appeals.[391]

The laws of other jurisdictions identify a number of situations as appropriate for a double appeal. These include cases in which the decision sought to be reviewed conflicts with other decisions,[392] involves an important question of law[393] or a signifi-

387. Sunderland, *supra* note 114.

388. *E.g.*, FLA. APP. R. 2.1(5)(b); ILL. SUP. CT. R. 317; N.C. GEN. STAT. § 7A-30 (1969); WASH. R. APP. P. 13.2(a).

389. *E.g.*, COLO. APP. R. 50(b); MASS. APP. R. 11(a); N.M. STAT. ANN. § 16-7-14(C) (1953); N.C. R. APP. P. 15.

390. TENN. CODE ANN. §§ 16-452, 27-819 (Supp. 1977).

391. Professor Sunderland severely criticized double appeals. *See* Sunderland, *supra* note 114. But the practical problems are such that double appeals will probably remain a feature of appellate review for some time to come. For a discussion of a recommended terminal intermediate appellate court, see Lilly & Scalia, *Appellate Justice: A Crisis in Virginia*, 57 VA. L. REV. 3 (1971).

392. *See, e.g.*, ALA. R. APP. P. 39(c)(4); COLO. APP. R. 49(a)(3); FLA. APP. R. 2.1(5)(b); ILL. SUP. CT. R. 315(a); MICH. GEN. CT. R. 853.1(3); N.M. STAT.

cant constitutional question,[394] involves a matter of public interest,[395] or requires exercise of the highest court's supervisory authority.[396]

Instead of describing classes of decisions of the intermediate appellate court, proposed rule 11 identifies four reasons of extraordinary importance that justify double appeals. These reasons are "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for exercise of the Supreme Court's supervisory authority."[397] The principal shortcoming of describing categories of cases is that often such cases are not in fact sufficiently important to justify a double appeal. For example, double appeals ought not be permitted simply because a case involves a constitutional or novel question since not all constitutional or novel questions are important questions of law. Rule 11 provides that an appeal in all cases lies only in the discretion of the supreme court and further provides that the four reasons specified in the rule are neither controlling nor a full measure of the reasons that the court will consider.[398]

The procedure for seeking permission to appeal from final decisions of the intermediate appellate courts does not differ significantly from the procedure for seeking permission for interlocutory review. An application for permission to appeal must be filed within thirty days after the date of the entry of the judgment of the intermediate appellate court or within fifteen days after denial of a petition for rehearing or entry of the judgment on rehearing.[399] The application must contain the following:

ANN. §§ 16-7-14(B)(1)-(2) (1953); N.C. GEN. STAT. § 7A-31(b)(3), (c)(3) (1969); WASH. R. APP. P. 13.4(b)(1)-(2).

393. *See, e.g.*, ILL. SUP. CT. R. 315(a); MICH. GEN. CT. R. 853.1(1); N.C. GEN. STAT. § 7A-31(b)(3), (c)(3) (1969).

394. *See, e.g.*, N.M. STAT. ANN. § 16-7-14(B)(3) (1953); WASH. R. APP. P. 13.4(b)(3).

395. *See, e.g.*, FLA. APP. R. 2.1(5)(b); MASS. APP. R. 27.1(a); N.M. STAT. ANN. § 16-7-14(B)(4) (1953); N.C. GEN. STAT. § 7A-31(b)(3), (c)(3) (1969); WASH. R. APP. P. 13.4(b)(4).

396. *See, e.g.*, COLO. APP. R. 49(a)(4); ILL. SUP. CT. R. 315(a).

397. PROPOSED TENN. R. APP. P. 11(a).

398. *Id.*

399. *Id.* R. 11(b).

> (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of entry of the judgment on rehearing; (2) the questions presented for review; (3) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application; and (4) the reasons, including appropriate authorities, supporting review by the Supreme Court.[400]

A copy of the opinion of the appellate court must be appended to the application.[401] If permission to appeal is granted, the rule specifies the time within which briefs must be served and filed.[402] It should be emphasized that the purpose of the application is to demonstrate to the supreme court that the case is an appropriate one for the exercise of the court's discretion in favor of permitting an appeal, not to argue the merits of the decision of the intermediate appellate court.

Rule 11 differs from existing law in several respects. Most significantly, the rule articulates guidelines for the exercise of the supreme court's discretionary power of review. In addition, rule 11(e) requires two justices to vote in favor of granting permission to appeal.[403] Under current law, only one justice need favor granting certiorari in order for the case to be heard.[404] Permitting review on the vote of a single justice seems to create needless expense and delay since in all probability the judgment will be affirmed. The effect of granting review is simply to enable one member of the court to write a dissenting opinion.[405] Third, the time for filing an application for permission to appeal is thirty days from the date of entry of the judgment of the intermediate appellate court. No extensions are permitted.[406] This differs from the forty-five days that may be extended an additional forty-five days currently permitted for seeking certiorari.[407] Finally, rule 11 changes existing terminology. Instead of speaking of certiorari,

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400. *Id.*
401. *Id.*
402. *Id.* R. 11(f).
403. *Id.* R. 11(e).
404. TENN. CODE ANN. §§ 16-452, 27-819 (Supp. 1977).
405. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 214-15 (1957).
406. PROPOSED TENN. R. APP. P. 2.
407. TENN. CODE ANN. §§ 16-452, 27-820 (1955 & Supp. 1977).

the rule talks of an application for permission to appeal. While renaming familiar procedures is not inherently desirable, certiorari is an ambiguous word used to describe distinguishable procedures capable of a more functional description.[408] Moreover, it proved far simpler in the overall scheme of the appellate rules to divide all plenary review proceedings into appeals as of right and appeals by permission.

G. Effect of an Appeal on Enforceability

If an appeal, either as of right or by permission, is taken, two important problems arise. The first concerns what effect the appeal should have on the enforceability of the judgment or order appealed from and whether security ought to be required. The other involves the record on appeal.

Quite inexplicably there appears to be an absence of critical commentary and empirical study concerning the perplexing problem of enforceability pending appeal in civil actions, although there is commentary explaining how the rules of various jurisdictions are intended to work.[409] As a result, enforceability pending appeal is an area in which it appears desirable to permit the exercise of a measure of judicial discretion until experience and study make more definitive guidelines perceptible. Moreover, if the Commission's deliberations are an accurate gauge, the current law in Tennessee, particularly that concerning the need to secure judgments, seems at times to be unnecessarily complicated if not unascertainable. Although the need for a concise and understandable statement of the law was therefore clear, the proper content of such a statement was far less clear.

The Commission ultimately recommended that Tennessee Rule of Civil Procedure 62 on stay of proceedings to enforce a judgment be extensively amended and that the current statutes on security and stays be repealed.[410] Proposed amended rule 62 provides that no execution may issue upon a judgment until the expiration of thirty days after its entry, subject to certain enumerated exceptions:

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408. For example, certiorari sometimes refers to a method of securing interlocutory review. *See* text accompanying note 359 *supra*.

409. *See, e.g.*, 7 MOORE'S FEDERAL PRACTICE ¶¶ 62.01-.10 (1975); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2901-2909 (1973).

410. The most important sections of the Tennessee Code that would be repealed are TENN. CODE ANN. §§ 27-312 to 318 (1955).

> In injunction and receivership actions, and in actions that remove a public officer as otherwise provided by law, or that award, change or otherwise affect the custody of a minor child, an interlocutory or final judgment shall not be stayed after entry unless otherwise ordered by the court and upon such terms as to bond or otherwise as it deems proper to secure the other party. The party in whose favor judgment is entered may also obtain execution or take proceedings to enforce the judgment prior to expiration of the 30-day period if the party against whom judgment is entered is about fraudulently to dispose of, conceal, or remove his property, thereby endangering satisfaction of the judgment.[411]

An automatic thirty-day stay in injunction and receivership actions might effectively defeat the granted relief, and the interests of the public and minor child were deemed to be of such importance as to justify excepting judgments removing public officers and custody decrees from the automatic thirty-day stay.[412] Even after an appeal is taken in these actions, and in actions for alimony or child support, "the [trial] court in its discretion may suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party."[413] Except for injunction, receivership, removal, and custody actions, the execution of a judgment is additionally stayed

> for 30 days after entry of any of the following orders made upon timely motion: (1) granting or denying a motion under rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) granting or denying a motion under rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under rule 59.03 to alter or amend a judgment; and (4) denying a motion under rule 59.01 for a new trial.[414]

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411. PROPOSED TENN. R. CIV. P. 62.01.

412. Other jurisdictions take a similar approach to custody decrees. *See, e.g.*, CAL. CIV. PROC. CODE § 917.7 (West Supp. 1977).

413. PROPOSED TENN. R. CIV. P. 62.03. For a discussion of the current law concerning the trial court's power to alter a decree for child support during the pendency of an appeal, see Smith v. Haase, 521 S.W.2d 49 (Tenn. 1975).

414. PROPOSED TENN. R. CIV. P. 62.02.

Under proposed appellate rule 4(b), these same motions also terminate the running of the time for filing a notice of appeal, which need not be filed until and within thirty days after entry of the enumerated orders.[415] Thus, these motions have an identical effect on the time after which execution may issue and within which notice of appeal must be filed.

In order to obtain a stay beyond the automatic thirty days and the additional stay provided upon the making of the previously specified motions, an appellant must ordinarily give a bond or other security,[416] the conditions of which are as follows:

> A bond for stay shall have sufficient surety and: (1) if an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal; (2) if an appeal is from a judgment ordering the assignment, sale, delivery or possession of personal or real property, the bond shall be conditioned to secure obedience of the judgment and payment for the use, occupancy, detention, and damage or waste of the property from the time of appeal until delivery of possession of the property, and costs on appeal. If the appellant places personal property in the custody of an officer designated by the court, such fact shall be considered by the court in fixing the amount of the bond.[417]

Additional provisions of rule 62 exempt poor persons from the requirement of securing the judgment and empower the trial court, upon a proper showing, to require less than the full amount of security based upon a party's financial condition.[418] If the appellant is the state, any county or municipal corporation within the state, or an officer or agency thereof acting in their behalf, the judgment is stayed automatically and no bond or other security is required.[419] In cases in which a bond is required, the stay is effective when the bond is approved by the trial court.[420] Finally, proposed appellate rule 7 establishes a procedure for summary review of the trial court's action, although it also recognizes the

415. *See* note 123 *supra*.
416. PROPOSED TENN. R. CIV. P. 62.04.
417. *Id.* R. 62.05.
418. *Id.*
419. *Id.* R. 62.06.
420. *Id.* R. 62.04.

appellate court's authority to order a stay, approve a bond, or grant other relief without first seeking relief from the trial court if "application to the trial court for the relief sought is not practicable . . . ."[421] A related provision establishes a summary procedure for review of bail orders by the defendant both prior to and after conviction.[422]

As indicated earlier, the effect an appeal should have on the enforceability of the judgment or order appealed from and whether security ought to be required is a perplexing one that has escaped meaningful commentary and empirical study. The overwhelming majority of states, however, condition a stay of execution in actions for money or property upon a bond or other security securing the judgment,[423] although the states differ as to whether a stay upon filing a bond is a matter of right or lies in the discretion of the court.[424] A handful of states provide that the taking of the appeal itself stays execution without any bond requirement,[425] and at least one state permits execution in certain circumstances if the judgment creditor provides security for restitution.[426] No state has adopted the position that a stay may not

421. PROPOSED TENN. R. APP. P. 7(a).

422. *Id.* R. 8. The proposed rules do not set forth the circumstances in which release may be obtained in criminal actions. The relevant statutory provisions are TENN. CODE ANN. §§ 40-1201 to 1243, 40-3405 to 3408 (1975 & Supp. 1977). The recent enactment of the Release from Custody and Bail Reform Act of 1977 may affect these statutory references in an as yet undertermined fashion. *See* 1978 Tenn. Pub. Acts ch. 506, §§ 1-48.

423. *E.g.*, ALASKA R. CIV. P. 62(d); CAL. CIV. PROC. CODE § 917.1 (West Supp. 1977); COLO. R. CIV. P. 62(d); ILL. SUP. CT. R. 305(a); IND. T.R. 62(D); KAN. CIV. PRO. STAT. ANN. § 60-262(d) (Vernon 1963); KY. R. CIV. P. 73.04; MD. R.P. 1017; MINN. R. CIV. APP. P. 108.01; NEV. R. CIV. P. 62(d); N.M. R. CIV. P. 62(d); N.Y. CIV. PRAC. LAW § 5519 (McKinney 1963); N.D. R. CIV. P. 62(d); OHIO R. CIV. P. 62(B); WASH. R. APP. P. 8.1.

424. *E.g.*, MD. R.P. 1017(e) (lower court may refuse stay).

425. *E.g.*, ME. R. CIV. P. 62(e); MASS. R. CIV. P. 62(d).

426. MINN. R. CIV. APP. P. 108.04 provides:

> Notwithstanding an appeal from a money judgment and security given for a stay of proceedings thereon, the trial court, on motion and notice to the adverse party, may grant leave to the respondent to enforce the judgment upon his giving bond to the appellant as herein provided, if it be made to appear to the satisfaction of the trial court that the appeal was taken for the purpose of delay. Such bond shall be executed by the respondent, or someone in his behalf, and shall be conditioned that if the judgment be reversed or modified the respondent will make such restitution as the Supreme Court shall direct.

be granted under any circumstances in money and property actions. This universal acceptance of the propriety of stays, at least in some circumstances, may be rooted in history.[427] The very opportunity to appeal accorded in all states stands as a testament to the fact that judgments of trial courts are not invariably correct. Accordingly, there is an element of unfairness in depriving a person of his money or property before his liability has been conclusively adjudicated. In addition, permitting execution prior to completion of the appellate process presents some practical problems if the trial court's judgment is reversed. The party against whom execution issues may not be able to be made whole if the executing party is without sufficient assets when the judgment is later reversed on appeal, although security could be required before execution would issue. Even if security is required, however, the judgment debtor may be deprived of needed use or enjoyment of property for which he cannot be adequately compensated in monetary terms, or he may be forced prematurely into bankruptcy. On the other hand, the judgment creditor may not have as great a need for the money or property involved. Also, undoing execution because of a later reversal requires expenditure of more effort and money and raises more complicated factual and legal issues than would be the case if execution issued only upon completion of the appellate process.

Delaying execution until the appeal process is finally exhausted is not immune from criticism, however. While appeals are universally permitted for the correction of errors, they are not deemed so fundamentally important as to be required by the Federal Constitution.[428] Although errors requiring reversal are not uncommon, most errors are harmless or require only partial rever-

427. An appeal in equity vacated the decree. 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 112, Comment b (1971); RESTATEMENT OF JUDGMENTS § 41, Comment d (1942). *But see Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1072 (1965). While a pending writ of error did not vacate the judgment, it apparently did act as a supersedeas to execution. Note, *The Finality of Judgments in the Conflict of Laws*, 41 COLUM. L. REV. 878, 880 (1941).

428. Ohio v. Akron Metropolitan Park Dist., 281 U.S. 74 (1930); McKane v. Durston, 153 U.S. 684 (1894). Indeed, one distinguished commentator has observed that someday "the fact will have to be faced that . . . there cannot be an appeal of right in all cases." Hazard, *After the Trial Court—the Realities of Appellate Review*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 83 (H. Jones ed. 1965).

sal.[429] The fact that most cases on appeal are affirmed means that the party prevailing at the trial level can quite accurately urge that it is probably he, not the appellant, who is being deprived of the use and enjoyment of property or money if execution is delayed pending appeal. Moreover, the availability of a stay may invite frivolous appeals taken only for the purpose of delay during which time appellant, unless restrained, may dissipate his assets or damage appellee's property. The requirement of security alleviates this problem, but it is not a complete solution for the judgment creditor who needs his property in kind or needs his money immediately rather than at some indefinite time in the future. Finally, the remaining arguments in favor of stays—the potential of premature bankruptcy and the complicated issues that may arise in undoing a completed execution—can be effectively refuted. The bankruptcy argument is inapplicable if the judgment debtor is financially solvent and no empirical data demonstrating the pervasiveness of bankruptcy in these circumstances is available. Besides, it generally works to the judgment creditor's disadvantage to force his debtor into bankruptcy. With regard to the factual and legal issues that would arise in undoing a completed execution, the well-developed law of restitution is available to provide needed guidance. The possibility of being required to undo execution exists even today in the overwhelming majority of jurisdictions in which the appeal itself does not stay execution, since appellant may not provide security. In short, this problem has not proven to be insuperable.

The desirability of requiring security to stay execution is also debatable. Two purposes are served by a security requirement. First, a bond or other security gives the opposing party some assurance that the judgment will be expeditiously satisfied and that he will be made whole for any damages caused by the delay on appeal. Second, a bond securing the judgment, and not costs alone, may be aimed at deterring frivolous appeals taken only to

429. A study of nearly 1000 published opinions in civil actions taken to either the Tennessee Supreme Court or Court of Appeals revealed that 58% of the cases before the supreme court were affirmed and 54% of the cases before the court of appeals were affirmed. Eleven percent of the supreme court's cases and 14% of the court of appeals' cases were affirmed in part and reversed in part. Outright reversals occurred in 31% of the supreme court's cases and 32% of the court of appeals' cases. These statistics were compiled by my former research assistant, Elizabeth A. Snyder.

delay execution. Whether a security requirement achieves these objectives is not known. The bond premium may be less than the reduction in the judgment that the judgment debtor may gain if the judgment creditor needs to settle in order to avoid the delay in payment incident to an appeal. If the bond is not set in an adequate amount or fails to cover noneconomic loss, the security may not be sufficient to make the ultimate winner whole. The fact that bonds cost money not only increases the expense of already expensive litigation but also disadvantages those unable to afford a bond or find a willing surety.[430] These problems can be substantially alleviated, however, by the trial court's discretionary power to require less than full security from those financially able to secure a part of the judgment, or none at all from poor persons.[431] The trial court's authority in proposed new rule 65A to accept security "in any . . . form the court deems sufficient to secure the other party" should also alleviate these problems.

All the arguments for and against stays and security requirements suggest the need for some judicial discretion. Accordingly, proposed rule 62.07 provides that "in exceptional cases" the trial court may stay proceedings "on any other terms or conditions as the court deems proper." In a similar vein, proposed rule 62.08 permits the appellate court "to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of any appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered." To be sure, this discretionary power combined with the other provisions of the relevant rules cannot be viewed as a final, perfect accommodation of the conflicting interests. But until further study provides better answers, the proposed rules at least should cure some of the defects in existing law.[432]

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430. *See also* Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C.L. REV. 1091, 1093-96 (1974).

431. *See* text accompanying note 418 *supra*.

432. Security for costs in the amount of $500 must be filed in all civil actions, unless an appellant is otherwise exempted by the proposed appellate rules or the Tennessee Rules of Civil Procedure or has filed a bond for stay that includes security for the payment of costs on appeal. PROPOSED TENN. R. APP. P. 6. Proposed appellate rule 18 permits poor persons to proceed without the giving of security, and proposed amended civil trial rule 62.06 permits the state

H. The Record on Appeal

The second significant problem that arises once an appeal is taken involves the record on appeal, "the story upon which the reviewing court is to say whether or not one of the parties has been ill-used under the law."[433] Here, as much as in any other area, it is necessary to consult history in order to understand the current law in Tennessee.

Before 1285 the appellate record in England consisted only of the judgment roll, which included the writ, the pleadings, the verdict, and the judgment.[434] This rather limited amount of information, however, is all that was probably necessary for appellate review in an era in which the jury was the knower of facts and not the finder of facts.[435] Later, other matters were included in the record;[436] but, despite the dramatic evolution of the role of the jury, "[t]he evidence, proceedings and rulings on the trial of the action including the proceedings on motion for a new trial or rehearing were not part of the record proper . . . ."[437] In order to incorporate this latter kind of information into the record, the Statute of Westminster of 1285[438] introduced the bill of exceptions. For the first time, the appellate court was in a position to consider errors that occurred at the trial itself.[439] The record on appeal thereafter consisted of two parts, the original judgment roll and the latter-day bill of exceptions. Moreover, these two parts of the record were mutually exclusive.

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and other specified governmental entities also to proceed without giving security. It should be noted that the California Supreme Court held that, under the circumstances there presented, the absolute right to demand security for costs without a prior judicial inquiry into the reasonableness of the amount or the merits of plaintiff's action constituted a taking of property without due process of law. Beaudreau v. Superior Court, 14 Cal. 3d 488, 535 P.2d 712, 121 Cal. Rptr. 585 (1975), *noted in* 89 HARV. L. REV. 1006 (1976).

433. Stone, *The Record on Appeal in Civil Cases*, 23 VA. L. REV. 766, 768 (1937).

434. *Appellate Procedure*, *supra* note 52, at 658; *see* R. POUND, *supra* note 43, at 44.

435. For a classic discussion of the historical evolution of the jury, see J. THAYER, *supra* note 53.

436. *Appellate Procedure*, *supra* note 52, at 658.

437. Stone, *supra* note 433, at 772.

438. 13 Edw. 1, c. 31.

439. R. POUND, *supra* note 43, at 44-45; Stone, *supra* note 433, at 773-74; *Appellate Procedure*, *supra* note 52, at 652; *Judicial Review*, *supra* note 52, at 419.

> Matters of exception could never become a part of the judgment roll, and matters of record could never become part of a bill of exception. . . . The question was not so much whether a matter was proper for the appellate court to consider, but rather whether the proper vehicle was employed to bring it before the court. If proper material came up through the wrong part of the appellate record—for example in the judgment roll when it should have come up in the bill of exceptions, or vice versa—it was treated as a nullity and the court would not consider it.[440]

Thus it is that, because of what happened nearly seven hundred years ago, Tennessee law to this day draws a distinction between the technical record and bill of exceptions, and the courts are called upon to decide what matters properly belong in each.[441] To take a little license with Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of [Edward I]. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[442]

Professor Sunderland observed in 1943 that "[b]ills of exception became obsolete in England so long ago that many of the oldest men now in the offices of the Royal Courts of Justice never heard of them, and the record proper as such no longer exists in English practice."[443]

One of the purposes of the proposed rules treating the record on appeal is to abolish the senseless distinction between the bill of exceptions and the technical record. "They merely provide obstacles which confuse and delay the litigant and divert his attention and that of the court from the really meritorious questions which are of primary concern."[444] The method of preparing the record should, in addition, be inexpensive and simple and should convey what transpired below fully, fairly, and accurately without overburdening the appellate court with unnecessary matter.

One method that has been utilized to achieve these ends is

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440. *Appellate Procedure, supra* note 52, at 658-59.

441. *See* note 45 *supra*.

442. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

443. *Appellate Procedure, supra* note 52, at 659.

444. *Id.* Professor Sunderland's observation applied as well to the distinction between the bill of exceptions and the wayside bill of exceptions.

the narrative, as opposed to a question-and-answer record.[445] It was argued in support of narrative records that they would save the expense of reproducing a more voluminous verbatim record, concomitantly save the time of the judges who otherwise would be required to "wade through thousands of pages of printed testimony,"[446] and thereby prevent one-judge decisions that would result from the inability of each judge to read the entire record.[447] On three separate occasions narrative records were utilized in the federal courts, and each time their use was abandoned.[448] While

445. For a discussion of the significance of verbatim recording of proceedings, see Louisell & Pirsig, *The Significance of Verbatim Recording of Proceedings in American Adjudication*, 38 MINN. L. REV. 29 (1953). These authors note the effect of verbatim recording of proceedings on the behavior at trial of the court and counsel and on the ability for meaningful review in certain circumstances on motions for a new trial and on appeal. The availability of a verbatim recording seems additionally important in order to ascertain whether error is harmless or prejudicial. *See* text accompanying notes 501-53 *infra*.

446. Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483, 503 (1929).

447. *Id.* at 502-03; Stone, *supra* note 433, at 789.

448. Narrative records were initially authorized by the first Judiciary Act, Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84, but abandoned in 1803. Act of March 3, 1803, ch. 983, § 2, 2 Stat. 244. Narrative records were again authorized in 1861, Equity R. 67, 66 U.S. (1 Black) 6 (1861), but in 1891 the narrative form was made optional. Equity R. 67, 144 U.S. 689, 690 (1891). Narrative records were last authorized in 1912. Equity R. 75(b), 226 U.S. 671 (1913). The Federal Rules of Civil Procedure that were adopted in 1938 once again made the narrative form optional, Fed. R. Civ. P. 75(c), 308 U.S. 753-54 (1939), and the 1966 amendments to rule 75, Fed. R. Civ. P. 75, 383 U.S. 1064-67 (1965), as do the Federal Rules of Appellate Procedure today, FED. R. APP. P. 10, require a transcript of proceedings if available. As one commentator observed, narrative records are

> explainable only as an anachronism surviving from the days when the only record of the trial consisted in the notes of the trial judge and a narrative statement of the proceedings was the easiest to prepare. Since the courts have been provided with stenographers and their proceedings are taken down in shorthand, it is a useless waste of time and effort to require that a narrative statement of the proceedings be prepared; such statement, moreover, does not present nearly so accurate a picture as the transcript of the stenographer's notes.

Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 5 (1950). Since the courts in Tennessee have not been provided with stenographers for civil actions, narrative records are not anachronisms. However, if a verbatim report of proceedings is available, the proposed rules require that a transcript be prepared. PROPOSED TENN. R. APP. P. 24(b); *see* text accompanying notes 476-78 *infra*.

there may have been some saving in reproduction costs, it was argued that "all of this saving, and much more, is lost in the process of reducing the record to a narrative."[449] Also, reducing the record to a narrative itself takes time, so while the appellate court may save time, the entire appellate process may be lengthened.[450] Finally, and most significantly, "[i]t is impossible for the court to get a true picture of the proceedings at the trial except by reading the questions of counsel and the answers of witnesses in the words which were used at the trial."[451]

Today, appeals in the federal system for the most part are taken on a record consisting of a verbatim transcript, the papers and exhibits filed in the district court, a certified copy of the docket entries,[452] and a document known as the appendix.[453] The appendix consists of the relevant docket entries, pleadings, charge, findings or opinion, the judgment, order or decision in question, "and any other parts of the record to which the parties wish to direct the particular attention of the court."[454] Essentially the appendix is an addendum to the briefs and provides each appellate judge with a condensed version of the record.[455] If the appendix contains all the information necessary for decision, the appeal can be determined without recourse to the record.[456] If the

449. Griswold & Mitchell, *supra* note 446, at 503-04; *see* Stone, *supra* note 433, at 790. It should be kept in mind that when these authors wrote, records were printed and therefore far more expensive to prepare than today. *See* Joiner, *Lawyer Attitudes Toward Law and Procedural Reform*, 50 JUDICATURE 23, 25 (1966).

450. Griswold & Mitchell, *supra* note 446, at 504.

451. *Id.*; *see* Parker, *supra* note 448; Stone, *supra* note 433, at 790.

452. FED. R. APP. P. 10(a).

453. *Id.* R. 30.

454. *Id.* R. 30(a).

455. *See generally* 9 MOORE'S FEDERAL PRACTICE ¶¶ 230.01-.02 (1975); 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3976 (1977); C. WRIGHT, *supra* note 158, § 104, at 524-25; Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L.J. 431, 459-63 (1966); Longsdorf, *Record on Appeal in Civil Cases in Federal Courts—An Analysis of Methods*, 26 J. AM. JUD. SOC'Y 179 (1943); Slade, *The Appendix to the Briefs: Rule 30 of the Federal Rules of Appellate Procedure*, 28 FED. B.J. 116 (1968); Willcox, Karlen, & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U. L. REV. 934, 945-48 (1958).

456. Longsdorf, *supra* note 455, at 182.

appendix is insufficient, resort can always be had to the record itself.[457]

The appendix system, however, was controversial when proposed[458] and has been subjected to substantial criticism. Although perhaps to a lesser extent, preparation of the appendix, like preparation of the narrative record, is costly and time-consuming as well as complicated.[459] The costs are particularly high in cases in which it is argued that the evidence is insufficient to support the findings or a verdict, since the inevitable tendency is to reproduce all the evidence in the appendix.[460] Similarly, "[i]f the evidence is diffusely technical or documentary, excerpting is difficult and the tendency is to overload."[461] Moreover, some of the advantages of the appendix can be achieved simply by quoting relevant portions of the record in the brief in connection with the argument itself.[462] Within the federal system, the Ninth Circuit does not require preparation of an appendix,[463] and other circuits dispense with the appendix for certain kinds of cases[464] pursuant to federal appellate rule 30(f), which empowers the circuits to "dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require." California adopted the appendix system in 1907 but later abandoned it as amounting to "unnecessary, expensive, and ofttimes garbled duplication of material already available in the record."[465] Justice Traynor has been quoted as saying that hearing appeals in California on the original transcript alone has worked well, has not been unduly burdensome although only one record is available for

457. FED. R. APP. P. 30(a).

458. Professor Wright notes that "[t]he question of the contents and preparation of the appendix was more controversial than any other question in the preparation of the Appellate Rules and at one point three different drafts were distributed for consideration by the profession." C. WRIGHT, *supra* note 158, § 104, at 524.

459. Cohn, *supra* note 455, at 461-62; Willcox, Karlen, & Roemer, *supra* note 455, at 461.

460. Longsdorf, *supra* note 455, at 182.

461. *Id. See also* Cohn, *supra* note 455, at 461.

462. Longsdorf, *supra* note 455, at 182.

463. 9TH CIR. R. 4.

464. 1ST CIR. R. 11(f); 2D CIR. R. 10(a); 3D CIR. R. 10(a); 5TH CIR. R. 13(b); 6TH CIR. R. 10(a); 8TH CIR. R. 11(a)(1); 10TH CIR. R. 10(a), (c).

465. Longsdorf, *supra* note 455, at 183.

the entire court, has caused no difficulty in transferring the record among the judges, and has not contributed to the evil of one-judge opinions.[466]

As a result of these conflicting considerations, the proposed Tennessee Rules of Appellate Procedure do not require preparation of an appendix but afford the parties the option of preparing an appendix if they so desire.[467] The cost of preparing the appendix, however, is not a recoverable cost on appeal.[468]

The method of preparing the record under the proposed rules is similar to the method specified in the federal rules. If the parties do nothing at all, the record on appeal automatically consists of (1) copies of all papers filed in the trial court, except subpoenas, summons, discovery papers, and jury lists, none of which typically are needed on appeal; (2) the original of any exhibits filed in the trial court; (3) a transcript or statement of the evidence or proceedings; and (4) any other matters designated by a party (including those matters just noted that are not normally included in the record) that are needed to convey a fair, accurate, and complete account of what transpired in the trial court.[469] Papers relating to discovery and offered in evidence for any purpose are treated as exhibits.[470] By drawing no formal distinction between the different parts, all constituting but one record, the rules eliminate the present distinction between the technical record and the bill of exceptions and the concern over what matters properly belong in each.[471] By transmitting a complete account of what transpired below, the appellate court is in a posi-

466. Willcox, Karlen, & Roemer, *supra* note 455, at 948.

467. PROPOSED TENN. R. APP. P. 28. Proposed rule 28 may well prove to be the least significant of the proposed rules.

The method of preparing the appendix is typically referred to as the separate appendix method. Although the appellant is directed by proposed rule 28(a) to reproduce all parts of the record that must be studied in order to determine the issues presented and not merely those parts that support his argument, the rule merely encourages, but does not require, the parties to agree upon a single appendix. The appellee may include in a separate appendix to his brief any additional parts of the record he deems essential for the judges to read. The parties may rely on parts of the record not included in the appendix, which is served and filed with a party's brief. References in the briefs to parts of the record reproduced in an appendix must be made to the pages of the appendix at which they appear. *Id.* R. 28(c).

468. *See id.* R. 40(c).

469. *Id.* R. 24(a).

470. *Id.*

471. Bills of exception are explicitly abolished. *Id.* R. 24(h).

tion to ascertain whether error is harmless or prejudicial and whether the evidence is sufficient to sustain the findings or verdict.

If less than a full record is considered sufficient, however, the appellant may, within fifteen days after filing his notice of appeal, file and serve a description of the parts of the record he intends to include on appeal.[472] The appellant's description must be accompanied by a short and plain declaration of the issues he intends to present on appeal.[473] If the appellee desires to have any other parts included in the record, he must file and serve a designation of additional parts within fifteen days after service of the appellant's declaration of the issues and designation.[474] All parts of the record described or designated by the parties are included by the clerk of the trial court as the record on appeal.[475]

Because of the need to have an exact record of what took place in the trial court and to avoid the inaccuracies that inevitably attend preparation of a narrative record,[476] the rules require a verbatim transcript "[i]f a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available."[477] The rules do not require that a stenographic report be made of all the evidence or proceedings, however, since the Advisory Commission concluded that any such requirement would be impracticable given the shortage of qualified court reporters in some areas and the undue expense in certain kinds of cases.[478] If a stenographic or other substantially verbatim record is not available, the rules establish a procedure for generating a narrative record.[479] In all cases, the parties can prepare an agreed statement as the record on appeal in lieu of the full record that otherwise results if the parties do nothing at all.[480]

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472. *Id.* R. 24(a).

473. *Id.*

474. *Id.*

475. *Id.*

476. *See* text accompanying note 451 *supra*.

477. PROPOSED TENN. R. APP. P. 24(b).

478. Of course, in criminal actions verbatim transcripts will almost always be available since the courts have been provided court reporters for such actions. *See* TENN. CODE ANN. §§ 40-2030 to 2043 (1975).

479. PROPOSED TENN. R. APP. P. 24(c). The procedure is essentially the same as that described in the text for preparing less than the entire transcript. *See* text accompanying notes 481-84 *infra*.

480. PROPOSED TENN. R. APP. P. 24(d).

The method of preparing the verbatim transcript is substantially the same as the method of preparing the entire record, of which the transcript is only a part. If less than the entire transcript is to be included in the record, the appellant must, within fifteen days after filing his notice of appeal, file and serve a description of the parts of the transcript he intends to include in the record.[481] The appellant's description must be accompanied "by a short and plain declaration of the issues he intends to present on appeal."[482] The appellant's declaration and description of the parts of the transcript to be included in the record may be filed and served with the declaration and description of the parts of the record to be included on appeal.[483] The appellee is then given the opportunity to designate additional parts, which must be prepared at the appellant's expense unless he applies for an order requiring appellee to do so.[484] The transcript must be filed within ninety days after filing the notice of appeal.[485] The appellant must give the appellee notice of the filing of the transcript and the appellee is given fifteen days to object to the transcript as filed.[486] If no objection is made, the transcript as filed is included in the record on appeal.[487]

Unless the parties are unable to agree on what transpired, it is not necessary for the trial court to authenticate the record on appeal,[488] although the transcript must be certified as accurate by the appellant, his counsel, or the reporter.[489] Omissions, improper inclusions, and misstatements may be remedied at any time, pursuant to stipulation of the parties or on motion of a party or on motion of the trial or appellate court.[490] This procedure should be somewhat more convenient than the current scheme, inherited from the common law,[491] for diminution of the record.[492] Elimina-

481. *Id.* R. 24(b).
482. *Id.*
483. *Id.* R. 24(a).
484. *Id.* R. 24(b).
485. *Id.*
486. *Id.*
487. *Id.*
488. *Id.* R. 24(f).
489. *Id.* R. 24(b). A narrative record must also be so certified. *Id.* R. 24(c).
490. *Id.* R. 24(e).
491. *Appellate Procedure, supra* note 52, at 660.
492. *See* TENN. SUP. CT. R. 9; TENN. CT. APP. R. 20.

tion of the current requirement of authentication of the bill of exceptions by the trial court is designed to lighten the burden of both the parties and the trial court and is based on the assumption that the parties in an adversary setting will see to it that the record is accurate. Many members of the Tennessee bench do not share this assumption, but at least in cases in which a stenographic transcript is available it seems unlikely that any untoward problems will arise.

As an additional step in simplifying the record, assignments of error are abolished.[493] Assignments of error are simply a remnant of the theory at common law that proceedings in error were an accusation against the trial judge.[494] In the words of Professor Sunderland,

> As a part of a modern system of appellate review assignments of error serve no jurisdictional purpose, and are useful only for giving notice of the points to be raised before the appellate court. When used simply for this purpose, there is a definite advantage in dropping the term "assignments of error," since it carries with it common-law implications which merely confuse and obstruct . . . .[495]

For "assignments of error," the rules substitute the term "issues presented for review."[496] The issues are set forth in the briefs, which must contain, among other things, a jurisdictional statement in cases appealed directly from the trial court to the supreme court, a statement of the case, a statement of the facts with appropriate references to the record, an argument, and a short conclusion stating the precise relief sought.[497] To facilitate preparation of the briefs, the record on appeal is retained in the trial court until receipt of the appellee's brief.[498] In order to hold down costs, neither the record nor the briefs need to be printed,[499] and the rate of recoverable costs cannot be higher "than [that] gen-

493. PROPOSED TENN. R. APP. P. 3(h). *See generally* Wilson, *Assignments of Error in Appellate Practice*, 9 U. KAN. L. REV. 165 (1960).

494. *See* text accompanying notes 56-59 *supra*.

495. *Appellate Procedure*, *supra* note 52, at 660; *see* American Bar Association, *Report of the Committee on Simplification and Improvement of Appellate Practice*, 63 A.B.A. REP. 602, 604 (1938).

496. PROPOSED TENN. R. APP. P. 27(a)(4).

497. *Id.* R. 27(a).

498. *Id.* R. 25(b), (d).

499. *Id.* R. 30(a).

erally charged for photocopying in the area where the [trial court] clerk's office is located."[500]

I. The Effect of Error

Once the briefs are in and oral argument has been heard,[501] the appellate court must consider the issues presented in light of the substantive law. The proposed rules offer no guidance here. But if, after careful deliberation, the court concludes error has been committed, the rules speak to the "riddle"[502] of whether the

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500. *Id.* R. 40(f).

501. Some federal courts of appeals have curtailed the availability of oral argument. *See* Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 265-69. In England, on the other hand, "appellate argumentation is entirely oral." P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 16 (1976); *see* D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 152-54 (1963); CRIMINAL APPEALS, *supra* note 132, at 71-80; Wiener, *English and American Appeals Compared*, 50 A.B.A.J. 635 (1964). The American Bar Association has expressed its opposition to the curtailment or elimination of oral argument in nonfrivolous appeals. Action of the House of Delegates, August 1974, *reprinted in* 2 ADVISORY COUNCIL FOR APPELLATE JUSTICE, QUANTITY AND QUALITY IN APPELLATE JUSTICE 32 (1975). The Association's Commission on Standards of Judicial Administration recommends that oral argument be denied only "if the court concludes from a review of the briefs and record of the case that its deliberation would not be significantly aided by oral argument." APPELLATE COURT STANDARDS, *supra* note 121, § 3.35. Similarly, the Commission on Revision of the Federal Appellate System recommended that the appellant

> be entitled as a matter of right to present oral argument, unless: (a) the appeal is frivolous; (b) the dispositive issue or set of issues has been recently authoritatively decided; or (c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 48 (1975). The proposed rules provide that oral argument will be heard in every appeal on request of a party or the appellate court. PROPOSED TENN. R. APP. P. 35(a), (h). The Advisory Commission explicitly rejected a proposal that would have permitted the appellate court to dispense with oral argument even though requested by a party. *See generally* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* at 16-24.

502. This is Justice Roger Traynor's characterization of the problem. *See* note 50 *supra*. Llewellyn thought in 1960 that Justice Traynor's concern with finding a pattern to distinguish harmless from prejudicial error "is probably a full generation ahead of him and me." K. LLEWELLYN, *supra* note 81, at 197

error is harmless or prejudicial.[503]

The problem of identifying error as prejudicial or harmless has a history in need of telling. Wigmore states that until the landmark case of *Crease v. Barrett*,[504] the orthodox English view was that an error in admitting or excluding evidence "was not a sufficient ground for setting aside the verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached."[505] This formulation of the orthodox English rule seems to equate harmless error with the correctness of the judgment or, alternatively, the sufficiency of the evidence to support the result.[506] *Doe v. Tyler*,[507] one of the principal cases upon which Wigmore relied, certainly supports his formulation. In *Doe* the court determined that a verdict of the jury would be sustained if the finding could be justified independently of the evidence that was the subject of the objection. On the other hand, *Rex v. Ball*,[508] the other principal case upon which Wigmore relied, can be construed to establish a significantly different test of harmless error. This test does not equate harmlessness with correctness. Rather, if, but for the error, the

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n.194. Traynor in characteristic fashion has advanced a resolution to the problem sooner than even one of the most insightful jurisprudes imagined possible.

503. Justice Traynor's book, *see* note 50 *supra*, is by far the best treatment of the subject. For other discussions, see C. MCCORMICK, *supra* note 220, § 183; 7 MOORE'S FEDERAL PRACTICE ¶¶ 61.01-.12 (1975); 1 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 103[06] (1977); 1 J. WIGMORE, *supra* note 220, § 21; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2881-2888 (1973); Baker, *Reversible Error in Homicide Cases*, 23 J. CRIM. L.C. & P.S. 28 (1932); Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1 (1952); Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976); Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48 (1957); Hebert, *The Problem of Reversible Error in Louisiana*, 6 TUL. L. REV. 169 (1932); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1966); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973); Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450 (1947) [hereinafter cited as *Rule Reviewed*]; Comment, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967); Note, *A Comment on Application of the Harmless Constitutional Error Rule to "Confession" Cases*, 1968 UTAH L. REV. 144.

504. 149 Eng. Rep. 1353 (1835).

505. 1 J. WIGMORE, *supra* note 220, § 21, at 365.

506. R. TRAYNOR, *supra* note 50, at 17-22.

507. 130 Eng. Rep. 1397 (1830).

508. 168 Eng. Rep. 721 (1807).

party asserting the error might have prevailed and a verdict in his favor upheld on appeal, the error is prejudicial regardless of the appellate court's opinion of the correctness of the result.[509] This more stringent test of harmless error is surprising since, as mentioned in *Ball*, a criminal case, the English doctrine of double jeopardy apparently prevented a new trial upon reversal.[510]

Crease v. Barrett, like its predecessors, is subject to conflicting interpretations. In this case plaintiff had demanded a toll for tin extracted from a mine. The dispositive issue was whether the surface land was part of plaintiff's leasehold or the private property of another. Defendant offered in evidence a lease executed by the Prince of Wales, also plaintiff's lessor, in which the Prince admitted the land was that of another. The lease was not received in evidence, but the Court of Exchequer held this to be error. The court then proceeded to consider whether a new trial was necessary and held that regardless of the strength of the evidence in plaintiff's favor or the court's opinion of the correctness of the verdict, the error was prejudicial:

> It may be that the supposed admission may be readily explained, and may not weigh in the least against the very strong evidence of the right of the Prince to the mines in question . . . but we cannot on this account refuse to submit the question to the consideration of another jury. . . .
>
> We cannot say, however strong our opinion may be on the propriety of the present verdict, that, if the lease had been received, it would have had no effect with the jury; nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been set aside as improper; and therefore we think there must be a new trial.[511]

Wigmore vilified *Crease v. Barrett* for enunciating "a rule which in spirit and later interpretation signified that an error of ruling created 'per se' for the excepting and defeated party a right to a new trial."[512] Justice Traynor, on the other hand, concluded that the rule approximating automatic reversal originated not

509. *See* R. TRAYNOR, *supra* note 50, at 6.

510. For a discussion of the English doctrine of double jeopardy prior to 1907, see Friedland, *New Trial after an Appeal from Conviction* (pt. 2), 84 L.Q. REV. 185 (1968).

511. 149 Eng. Rep. at 1358-59.

512. 1 J. WIGMORE, *supra* note 220, § 21, at 367.

with *Crease v. Barrett* but with its subsequent misapplication. Indeed, Traynor praised the decision for its "resolve not to invade the province of the jury"[513] by identifying an error as harmless or prejudicial according to whether the court believed that a correct or incorrect result was reached:

> The rationale of *Crease v. Barrett* is that when the appellant has introduced sufficient evidence to take his case to the jury and might conceivably have received, but for the error, a verdict in his favor that would have been upheld on appeal the risk that error affected the verdict is too great to permit affirmance.[514]

Whatever the source of the original sin, the majority of American jurisdictions during the second half of the nineteenth century adopted a rule of presumed prejudice or automatic reversal for the commission of error.[515] Moreover, "[o]riginally applied to erroneous rulings by the trial court on questions of evidence, the application of the [rule of presumed prejudice] was extended, in many jurisdictions, to every error committed in the course of a trial, whether in a criminal or civil case."[516] The concern of the courts during this period was their fear of invading the province of the jury. The appellate court could tell from the record whether an error had been committed during the trial, but the effect of error on the minds of the jurors was not etched in the record. Only by weighing the evidence could error be deemed harmless, but the exclusive right to weigh the evidence belonged to the jury. Affirmance in the face of error would thus deprive the litigants of their right to trial by jury.[517]

Wigmore argued that concern for invading the jury's province ignored the doctrine and history of the jury's function, since the jury

> has always been under the control and correction of the trial judge and appellate courts. . . . Moreover, upon a question of new trial because of erroneous ruling on evidence, the appellate Court is not asked to overturn the verdict; on the contrary, it is asked to let the verdict stand . . . . The "usurpation," if any,

513. R. TRAYNOR, *supra* note 50, at 6.
514. *Id.*
515. 1 J. WIGMORE, *supra* note 220, § 21, at 367-68.
516. Hebert, *supra* note 503, at 171.
517. *See Appellate Procedure*, *supra* note 52, at 652-53.

> consists in setting aside the verdict, not in confirming it. The advocates of the Exchequer rule concede that, for the purpose of overturning the verdict, they may scrutinize and interfere with it, so as to say that it goes against the weight of the whole mass of the evidence; yet, for the purpose of supporting the verdict, they professs to be unable to weigh a particular piece of evidence, so as to say that it ought not to have affected the same weight of evidence. This is one of the most indefensible cases of illogic that has ever been sanctioned in our books.[518]

Traynor also convincingly argues, although on markedly different grounds, that appellate review to determine whether an error is harmless or prejudicial does not usurp the jury's role:

> Actually, appellate review of the evidence to determine whether an error is harmless does not invade the province of the jury. The function of such review is not to determine how an appellate court would decide the facts, but to determine whether an error influenced the verdict. If the court is convinced upon review of the evidence that the error did not influence the jury, and hence sustains the verdict, *a fortiori* there is no invasion of the province of the jury. There is likewise no invasion should it appear instead that the error did influence the jury, and hence contaminated the verdict, for the appellant then did not get the jury trial to which he was entitled. In that event, the appellate court clearly acts within its own province when it affords the appellant a right to a new trial.[519]

Moreover, the rule of automatic reversal had serious disadvantages. The rule extracted the price normally associated with appeals—delay, expense, increased demand on limited judicial resources—without inquiring whether the price was worth paying because the error deprived a party of the essentials of a fair trial.[520] When appellate courts reversed for any error, "lawyers played the game accordingly, . . . sowing error in the record,"[521] and those with unmeritorious causes were most likely to succumb to the temptation of sowing error.

The undesirability of automatic reversals led to the enactment of harmless-error statutes, rules, and even constitutional

518. 1 J. WIGMORE, *supra* note 220, § 21, at 369-70.
519. R. TRAYNOR, *supra* note 50, at 13-14.
520. *See id.* at 14.
521. *Id.*

provisions.[522] These provisions took a number of different forms, but their common objective, without depriving litigants of a fair trial, was "to conserve not merely public funds, but the judicial process itself for legitimate disputes by guarding against needless reversals and new trials that would clog already burdened trial-court calendars."[523] The effectiveness of these enactments varied significantly, with many courts continuing as before to reverse for virtually any error.[524]

In nearly one-half the states,[525] the formulation of which errors are harmless is substantially that of Federal Rule of Civil Procedure 61:[526]

> No error . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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522. *See* 1 J. WIGMORE, *supra* note 220, § 21, at 376 n.17; Hebert, *supra* note 503, at 171 & nn.11-13.

523. R. TRAYNOR, *supra* note 50, at 14.

524. Professor Sunderland concluded that harmless error statutes changed judicial decisionmaking not at all. He thought that the problem of determining whether error is harmless or prejudicial was essentially

> a problem in professional psychology. No rules can be framed which will solve it, for rules can only be drawn in general terms, and it is in the interpretation of the rules that the difficulty comes . . . .
>
> The only permanent and effective cure for technicality in this respect is a better conception of the purpose of all procedure.

Sunderland, *supra* note 51, at 146-47. *See also* 1 J. WIGMORE, *supra* note 220, § 21, at 373-74: "By an emasculating interpretation, or by a virtual obliteration, the statutes have effected little progress,—so far as their mere legislative command is concerned. Professional instinct from within, and professional pressure from without—the demands of the Bar to be allowed to win by technicalities—have been too strong."

525. *E.g.*, ALASKA R. CIV. P. 61; ARIZ. R. CIV. P. 61; COLO. R. CIV. P. 61; DEL. CH. R. 61; DEL. CT. C.P. CIV. R. 61; GA. CODE ANN. § 81A-161 (Supp. 1977); IND. R. P. 61; KY. R. CIV. P. 61; ME. R. CIV. P. 61; MASS. R. CIV. P. 61; MICH. GEN. CT. R. 529(1); MINN. R. CIV. P. 61; MONT. R. CIV. P. 61; NEB. REV. STAT. § 25-853 (1975); NEV. R. CIV. P. 61; N.M. R. CIV. P. 61; N.D. R. CIV. P. 61; R.I. R. CIV. P. 61; S.D. COMPILED LAWS ANN. § 15-6-61 (1969); UTAH R. CIV. P. 61; VT. R. CIV. P. 61; W. VA. R. CIV. P. 61; WYO. R. CIV. P. 61.

526. *See also* 28 U.S.C. § 2111 (1970); FED. R. CRIM. P. 52.

Despite its widespread adoption, this test offers no guidelines for identifying which errors are prejudicial and which harmless. The rule seems at best an admonition not to disturb a judgment for insubstantial error; it does not help decide which errors affecting the substantial right of the parties to a fair trial are of such importance that affirmance is inconsistent with substantial justice.[527] In this regard, the current Tennessee statutes are clearly preferable, for affirmance or reversal is tied to the effect of error on the "merits of the judgment"[528] or "results of the trial."[529] Under this test a litigant is not entitled to a trial free from all error, but he is entitled to a trial free from error that contaminates the judgment.[530]

In applying this test, which identifies harmless or prejudicial error according to its effect on the judgment, it is improper for an appellate court to affirm, as the court did in *Doe v. Tyler*, because there is sufficient evidence to support the judgment.[531] An error may have affected the outcome even though the result is reasonably based on the proper evidence.[532] More difficult to overcome is the easy equation of harmless error with the correct result, that is, the appellate court's belief that the same result would be reached on retrial. Professor Reese has argued:

> [T]he notion that the appellate court should not be influenced by what it believes to be the "correctness" of the judgment may not always be sound. To be sure, an appellate court should, in regard to the merits of a case, be extremely hesitant to substitute its own judgment for that of the trial judge and particularly for that of the jury. And yet, would it always be wrong for an appellate court, particularly in a civil case, to affirm a judgment that almost certainly reached the right result although it could not honestly be said that it was "highly probable" that the error did not influence the trier of fact? The interest of the public in the conservation of court time and the interest of the parties in a reasonably speedy resolution of their dispute are obviously values to be considered, although they are perhaps not of paramount importance.[533]

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527. R. TRAYNOR, *supra* note 50, at 15-16.
528. TENN. CODE ANN. § 27-116 (1955).
529. *Id.* § 27-117.
530. R. Traynor, *supra* note 50, at 20.
531. *See* text accompanying notes 505-07 *supra*.
532. *See* R. TRAYNOR, *supra* note 50, at 17-18.
533. Reese, Book Review, 71 COLUM. L. REV. 527, 529 (1971).

Traynor's response is central to a correct interpretation of a harmless-error statute like Tennessee's and proposed rule 36(b), which measures harmlesss error in terms of the effect of error on the judgment:

> The conservation of judicial resources, though itself a worthy objective, is a strange terminal point for an argument purportedly concerned with precluding miscarriages of justice. The argument goes off course because of its assumption at the outset that a correct result is necessarily a just one.
>
> What could be more misleading than such an equation? It is one thing to tolerate as harmless the errors that involve only the "mere etiquette of trials" or the "formalities or minutiae of procedure." It is quite another also to tolerate as harmless the errors that do such violence to the substantial rights of litigants as to debase the judicial process itself, whose very purpose is to assure justice. Once such violence is tolerated, no one could enter a courtroom confident of a fair trial. Would that matter? Would justice suffer? Yes. Concededly, not one of us can draw a picture of justice or state its dimensions in words. Nonetheless, we know from this country's long experience in giving substance to the concept of a fair trial that for us, at least, it is an essential element of justice.[534]

Thus, under the current statutes and proposed rule 36(b), a party's right to a fair trial is not dependent on the strength or weakness of his adversary's evidence.[535] Over time, reversal for error affecting the judgment may increase fairness at the trial level by causing error to be more closely monitored.[536] Moreover, as Professor Reese tacitly concedes, to affirm in the face of error affecting the judgment because the appellate court believes the correct result was reached below and would be reached again on retrial necessarily requires the appellate court to determine what result it would have reached on the record without the error. In so doing, the appellate court substitutes itself for the trier of fact.[537] But the appellate court is not in as good a position as the trier of fact, since the court cannot adequately judge the impact of witnesses testifying personally before the trier of fact.[538] In

534. R. TRAYNOR, *supra* note 50, at 19.
535. *See Rule Reviewed, supra* note 503, at 459.
536. R. TRAYNOR, *supra* note 50, at 50.
537. *Id.* at 21.
538. *See* notes 277 & 282-83 *supra* and accompanying text.

addition to the inability of the appellate court to observe the demeanor of witnesses, Justice Traynor has noted:

> [A] quasi trial in the appellate court is bound to deprive a defendant in a criminal case of an opportunity to confront any witnesses against him. Even though there was confrontation in the trial court, an appellate court can never conjure up the impact of that live confrontation.
>
> Worst of all, a quasi trial on appeal deprives defendants in criminal cases and many litigants in civil cases of the right to trial by jury. It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty.[539]

Realistically, of course, even a test that identifies harmless or prejudicial error by its effect on the judgment requires an appellate court to weigh the evidence.[540] The process is a painstakingly difficult one that involves an evaluation only of probabilities, for typically there are no certain answers as to the effect error had on the trier of fact.[541] Because the process involves probabilities based upon weighing of the evidence, Judge Jerome Frank argued that unless an appellate court reversed automatically for error affecting a reasonable trier of fact or was convinced beyond a reasonable doubt that the result was correct, the error must be held prejudicial. Otherwise, the appellate court will simply decide whether it agrees with the result below and thereby substitute itself for the trier of fact.[542] This is essentially the test embraced by the Supreme Court for federal constitutional errors.[543] Although incapable of verification, it seems, however, that an appellate judge can separate his conviction concerning the correctness of the result from the degree of probability that error influenced the judgment.[544] Moreover, under Frank's test, few

539. R. TRAYNOR, *supra* note 50, at 21.

540. *Id.* at 36.

541. *Id.* at 22, 30.

542. United States v. Antonelli Fireworks Co., 155 F.2d 631, 648 (2d Cir. 1946) (Frank, J., dissenting). For a listing of cases in which Jerome Frank and Learned Hand carried on a dialogue on harmless error, see R. TRAYNOR, *supra* note 50, at n.85.

543. *See* Chapman v. California, 386 U.S. 18 (1967).

544. R. TRAYNOR, *supra* note 50, at 36.

errors could conscientiously be held harmless.[545] His test thus results, although perhaps to a lesser extent, in the same disadvantages as those associated with the rule of automatic reversal.

Traynor advocated a test of high probability for harmlessness: "Given an error that affected a substantial right, the judgment below is suspect. Unless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse."[546] The Advisory Commission considered Traynor's test but substituted a rule that provides: "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."[547] The rule differs from Traynor's in that it substitutes the language "more probably than not affected the judgment" for his "highly probable that the error did not affect the judgment." Rule 36(b), therefore, seems to require reversals less frequently than would Traynor.[548] In addition, the rule adds that an error can be prejudicial, regardless of its effect on the judgment, if it prejudices the judicial process. Examples of errors in this latter category would include "failure to provide the accused with the effective assistance of counsel, obvious bias on the part of the judge or jury, and improper discrimination in jury selection."[549] These errors ought

545. *See id.* at 43-44.

546. *Id.* at 35.

547. PROPOSED TENN. R. APP. P. 36(b).

548. Fewer reversals seem likely principally because under proposed rule 36(b) all errors must be weighed in light of all the evidence. Traynor's test, on the other hand, would permit reversal almost invariably "without weighing the evidence, in the event of an error that inherently carries a high risk of affecting the judgment." R. TRAYNOR, *supra* note 50, at 58. Examples of such inherently prejudicial error are trials "dominated by a mob or infected by prejudicial publicity. High risks also attend the knowing use of perjured testimony by the prosecution or the suppression of evidence favorable to the defendant. Again, high risks attend confessions, particularly in light of their usually shattering force." *Id.* Some of these situations might require reversal under proposed rule 36(b), regardless of their impact on the judgment, on the ground that they carry a high risk of prejudice to the judicial process. *See* text accompanying notes 549-50 *infra*.

549. Reese, *supra* note 533, at 527. For other examples, see R. TRAYNOR, *supra* note 50, at 64-73.

to lead to automatic reversal without consideration of whether they affected the judgment in a particular case because the public would lose confidence in a system that tolerated them.[550] The rule also differs from the current Tennessee statutes in two respects. First, the statutes do not set forth the degree of conviction an appellate judge must possess that an error influenced the judgment before it will be held prejudicial;[551] the proposed rule adopts a more-probable-than-not standard.[552] Second, the statutes do not expressly require, as they should, reversals for errors inimical to the judicial process. But despite these differences, the proposed rule adopts the approach embodied in the current statutes insofar as most errors are linked to their effect on the judgment. This seems the most sensible approach to an intricate problem.[553]

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550. Reese, *supra* note 533, at 527-28.

551. *See* TENN. CODE ANN. §§ 27-116 to 117 (1955).

552. Articulating the standard in these terms seems far more helpful than a formulation couched in terms of "reasonable" probability. "The nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion. Discretion is at least under better control within tests that focus on the degree of probability . . . ." R. TRAYNOR, *supra* note 50, at 34-35.

553. The standard set forth in rule 36(b) applies to both criminal and civil appeals. Professor Saltzburg has argued that a more stringent test of harmlessness should apply to criminal appeals. The test he favors is one of reasonable possibility; as long as it is reasonably possible that the error affected the judgment, the appellate court should reverse. Saltzburg, *supra* note 503. Aside from the shortcomings that inhere in a standard couched in terms of "reasonable" possibility, *see* note 552 *supra*, Professor Saltzburg's position is premised on the questionable assumption that "since the standard of proof in ordinary civil cases differs greatly from that required in ordinary criminal cases, the significance of a procedural error in either context also differs *and should be reflected in the applicable standard of harmlessness*." Saltzburg, *supra* note 503, at 989 (emphasis added).

The significance of admitting evidence that should have been excluded or excluding evidence that should have been admitted undoubtedly varies between criminal and civil cases. For example, in criminal cases improperly excluded evidence should be held prejudicial if its admission would raise a reasonable doubt about guilt, while in typical civil cases, improperly excluded evidence is prejudicial only if its admission would tip the balance of probabilities. Conversely, error is prejudicial in criminal cases if the evidence, without the improperly admitted evidence, fails to establish guilt beyond a reasonable doubt, while in an ordinary civil case error is prejudicial only if the evidence, without the improperly admitted evidence, fails to satisfy the less rigorous more-probable-than-not standard. While the *application* of a harmless error standard

J. Opinion Writing and Publication

No better test has yet been developed to ensure the careful deliberation necessary to determine the existence of error and its effect on the judgment than the requirement that the appellate court reduce its reasons to writing, "which is thinking at its hardest."[554]

> A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.[555]

In addition, "litigants and the public are reassured when they can see that the determination emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify."[556]

On the other hand, it is not always necessary that a lengthy, written statement of reasons accompany every final disposition of an appeal. Similarly, the inconvenience of preparing written reasons to accompany the appellate court's minor day-by-day

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thus will vary depending upon the required degree of persuasion, it does not necessarily follow that the *standard itself* should be different for criminal and civil cases.

The crucial question addressed by a properly constructed harmless error standard is the degree to which an appellate court must be persuaded that an error did (or, alternatively, did not) affect the judgment before it will reverse (or, alternatively, affirm). Professor Saltzburg would have an appellate court reverse in a criminal case whenever a reasonable possibility exists that the error affected the judgment. Justice Traynor would require reversal unless the appellate court concluded that it was highly probable the error did not affect the judgment. Proposed rule 36(b) adopts yet a third standard: an appellate court should reverse only if it is more probable than not that the error affected the judgment or would result in prejudice to the judicial process. The acceptability of any of these standards ultimately depends upon the extent to which they avoid the evils associated with automatic reversal, on the one hand, and the evils associated with too ready affirmance in the face of error on the other. Because of its nebulousness, *see* note 552 *supra*, the "reasonable possibility" test appears largely indistinguishable from a rule of automatic reversal and thus may result in the very evils most harmless error statutes are designed to alleviate.

554. Traynor, *supra* note 405, at 218.

555. *Id.*

556. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 31.

determinations[557] would almost certainly outweigh the probable benefits. Opinion writing is the single "most time-consuming and expensive phase of the traditional American [appellate] process."[558]

> Some judges are prone to write more than is necessary and to polish and refine the literary style at considerable cost in time and with insignificant gain for the judicial function. Refined editing is particularly likely when the opinion is destined to be preserved in print between hard covers under the author's name.[559]

Moreover, the burden placed upon other members of an appellate court in considering needlessly lengthy opinions reduces the time, enthusiasm, and ability to consider more deserving appeals. The other extreme of simply affirming or, worse still, reversing without any statement of reasons needs be avoided as well.[560]

In order to accommodate these conflicting considerations, proposed appellate rule 37(b) defines two kinds of opinions: a full opinion and a memorandum opinion. A full opinion sets forth the facts, the issues presented for review, and an analysis of pertinent authorities and principles. On the other hand, a memorandum opinion is written principally for the benefit of the parties and sets forth simply the issues presented, the result or other disposition, and a short statement of the reasons.[561] The memorandum opinion differs from the full opinion in two respects. First, because the memorandum opinion is written principally for the benefit of the parties, there is no need to set forth a statement of the facts or procedural history of the case, at least not in any great detail, since the parties are already acquainted with these matters.[562] Second, the memorandum opinion sets forth the reasons behind the decision of the appellate court; it does not contain an

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557. An example is the decision whether to grant a motion or other request for an order or relief. Proposed rule 37(a) requires that the denial of any motion or application or petition be accompanied by a statement of reasons, either orally or in writing. The form of the statement lies in the discretion of the appellate court.

558. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 32.

559. *Id.*

560. *See* Haworth, *supra* note 501, at 271-74.

561. *See* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 34-35.

562. *Id.* at 35.

analysis of pertinent authorities and principles. As has been stated by other writers, "[a] memorandum decision gives only the reasons; it does not lay bare the reasoning."[563]

Based on recommendations made by the American Bar Association Commission on Standards of Judicial Administration,[564] the Advisory Council for Appellate Justice,[565] and other commentators,[566] rule 37(b) provides that a written statement of reasons must accompany every final disposition of an appeal and "should be in a form appropriate to the complexity and importance of the issues presented." The rule also provides that a memorandum opinion is appropriate if

> (1) the issues presented involve application of a well-settled rule of law to a recurring fact situation; (2) the issue presented is whether the evidence is sufficient to support the findings and the evidence clearly is sufficient; (3) disposition of the appeal is clearly controlled by a prior holding of the deciding or higher court and no reason appears for questioning or qualifying that holding; and (4) the appeal is accompanied by an opinion of the court or agency being reviewed, and that opinion identifies and discusses all the issues presented, and the appellate court approves of the conclusion and reasons in the opinion.

Full opinions, on the other hand, are appropriate if

> (1) the opinion enunciates a new rule of law, modifies or criticizes an existing rule, or applies an established rule to a novel fact situation; (2) the opinion resolves a conflict or apparent conflict of authority; (3) the court is not unanimous; or (4) the opinion involves a question of public interest.

In order to ensure collegial deliberations, all opinions must indicate the participating judges. In order to lessen the self-perceived need of individual judges to draft full opinions and to refine and polish their prose, on the other hand, memorandum opinions need not signify their author. Finally, rule 37(a) provides that

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563. *Id.* For examples of memorandum opinions, see State v. Hawkins, 263 La. 36, 267 So. 2d 185 (1972); People v. Thomas, 58 Mich. App. 218, 227 N.W.2d 257 (1975).

564. APPELLATE COURT STANDARDS, *supra* note 121, § 3.36.

565. 5 ADVISORY COUNCIL FOR APPELLATE JUSTICE, SUPPLEMENT, PROCEEDINGS, AND CONCLUSIONS 128 (1975) [hereinafter cited as APPELLATE JUSTICE].

566. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 33-35.

denials of motions or applications or petitions—matters other than the final disposition of an appeal—may be accompanied by either an oral or written statement of reasons.[567]

Related but distinguishable from the problem of opinion writing is the problem of publication of opinions.[568] Many appeals appear to be of interest only to the parties and "do not raise issues of types that . . . will contribute importantly to knowledge of the law or its development."[569] If every appellate opinion were published and, particularly, if every final disposition of an appeal were accompanied by a full opinion, the quantitative and qualitative burden and cost of legal research would be intolerable and the cohesiveness of the law threatened.[570] Since the insignificant opinions are commingled with the blockbusters, all volumes must be purchased, creating serious problems of storage not to mention the expense of acquisition and maintenance.[571] Besides, the burgeoning number of case reports sires digests, services, and periodicals discussing the cases.[572] Furthermore, publication increases the time spent individually writing and collectively considering

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567. *See* note 534 *supra*.

568. *See generally* APPELLATE COURT STANDARDS, *supra* note 121, § 3.37; APPELLATE JUSTICE, *supra* note 565, at 128-29; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 35-41; Advisory Council for Appellate Justice, *Standards for Publication of Judicial Opinions* (1973), *reprinted in* 2 ADVISORY COUNCIL FOR APPELLATE JUSTICE, QUANTITY AND QUALITY IN APPELLATE JUSTICE 79-88 (1975) [hereinafter cited as *Publication Standards*]; Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Courts*, 67 LAW LIB. J. 362 (1974); Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975); Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791 (1975); Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195 (1972); Kanner, *The Unpublished Appellate Opinions: Friend or Foe?*, 48 CAL. ST. B.J. 386 (1974); Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 438-39 (1976).

569. *Publication Standards*, *supra* note 568, at 79; *see* APPELLATE COURT STANDARDS, *supra* note 121, § 3.37, at 63; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 35; Joiner, *supra* note 568, at 195.

570. APPELLATE COURT STANDARDS, *supra* note 121, § 3.37, at 63-64; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 35; *Publication Standards*, *supra* note 568, at 79; Joiner, *supra* note 568, at 195-96.

571. APPELLATE COURT STANDARDS, *supra* note 121, § 3.37, at 63-64; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 35; *Publication Standards*, *supra* note 568, at 79; Joiner, *supra* note 568, at 196.

572. *Publication Standards*, *supra* note 568, at 79; Jacobstein, *supra* note 568, at 795; Joiner, *supra* note 568, at 196.

opinions.[573] On the other hand, selective nonpublication poses a threat to the evenhanded administration of justice:[574]

> [O]pinions [that] are not published . . . are not generally available. Access is limited to lawyers who can conveniently get to the court's files and to the governmental and institutional law offices that are in a position to maintain their own collections of clandestine opinions. This affords an advantage over the "have-nots." If these opinions are citable, we have a violation of a fundamental presupposition of our legal order, that the law be knowable and readily and equally accessible to all.[575]

Alternatively, unpublished opinions might be made generally available by unofficial reporting services, such as those that currently exist in Tennessee. But "that in turn frustrates the objectives of the non-publication policy, namely, reducing the quantity of printed material that lawyers must read and use."[576] Moreover, "[w]hen judges are able to hide their work product from public view, they become unaccountable in the tribunal of informed public opinion and unassailable by their critics."[577] This last observation is not aimed at intentional misconduct but at the far more likely unintentional errors an appellate court may commit. Indeed, one study of a jurisdiction with a selective nonpublication rule found that, articulated guidelines to the contrary notwithstanding, "[i]mbedded in the bulk of unpublished opinions is a not-inconsiderable body of law dealing with novel points and giving rise to conflicts among decisions."[578] The problem of invisible conflicts is exacerbated if a no-citation rule accompanies a nonpublication rule, because counsel cannot call the conflicts to the attention of the court.[579] Thus, the "uniform and coherent enunciation and application of the law"[580] is undermined. Be-

573. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 35; *Publication Standards*, *supra* note 568, at 81; Joiner, *supra* note 568, at 196.

574. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 36; Gardner, *supra* note 568, at 1124; Kanner, *supra* note 568, at 386; Seligson & Warnloff, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972). *But see* Leventhal, *supra* note 568, at 439.

575. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 36.

576. *Id.*

577. Gardner, *supra* note 568, at 1227; *see* Kanner, *supra* note 568, at 386.

578. Kanner, *supra* note 568, at 443.

579. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 38; Gardner, *supra* note 568, at 1225.

580. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 38.

sides, a no-citation rule cannot compel lawyers and judges to forget what they remember. It cannot prevent counsel from relying on the reasoning of an unpublished case—thereby perhaps refreshing the appellate court's recollection—or "insinuat[ing] its existence and its persuasive force."[581] Similarly, it should not be surprising to learn that trial judges have let their "duty to the litigants to avoid reversible error . . . override their duty to observe the amenities of non-citation."[582] Added to these considerations is the concern that

> nonpublication inevitably reduces the visibility of the correcting function of the appeal. Over time, it must depreciate that basic function, leaving trial courts and administrative agencies more on their own, and increasing general anxiety about the integrity of the legal process at all levels. Visibility is too important . . . to be abandoned in favor of the limited benefits of nonpublication.[583]

While all these matters were considered, the Advisory Commission did not recommend to the supreme court that all opinions be published. Instead, rule 37(b) provides only for the publication of full opinions; "memorandum opinions shall not be published." If the standards establishing the situations in which a memorandum opinion is appropriate are strictly followed,[584] then most memorandum opinions will not have any stare decisis value.[585] In addition, the precedential value of memorandum opinions is slight in any event by reason of their rather cryptic form and absence of a statement of facts.[586] Rule 37 does not prohibit citation of unpublished opinions, and these opinions will continue to be matters of public record. Thus, conflicting unpublished opinions can be brought to the appellate courts' attention, although these courts should make clear that a "lawyer is not remiss in his professional duty if he fails to do research in the memorandum decisions, or to cite such decisions. Such research will not be economic, and all litigants should be spared the expense of it."[587]

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581. *Id.* at 37.
582. *Id.* at 38.
583. *Id.* at 39.
584. *See* text accompanying notes 564-67 *supra*.
585. *See* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 501, at 39.
586. *Id.* at 40.
587. *Id.* at 41.

Finally, if any judge perceives an abuse of the nonpublication rule, he need merely translate his perception into a separate concurring or dissenting opinion since a full opinion and publication is required whenever the court is not unanimous.[588]

Whatever the impact the publication standards established by rule 37 would have elsewhere, their impact in Tennessee will likely be to make more opinions available in published form. The Tennessee Code currently requires all opinions of the supreme court to be officially published, but only the opinions of the court of appeals for which certiorari is denied by the supreme court must be published.[589] However, the Code excepts from its mandatory publication requirement

> appeals from any state boards or commissions, including public service commission, appeals involving revenue matters and/or taxes, and appeals where the only grounds for a new trial were that there was no evidence to support the verdict and/or that the verdict of the jury was contrary to the weight and preponderance of the evidence.[590]

The reason for some of these exceptions, particularly those involving revenue and tax matters, is not clear, but most of the exceptions correspond roughly to situations specified for nonpublication in rule 37. While the number of published supreme court opinions will not be dramatically affected by rule 37, the number of published opinions of the intermediate appellate courts should increase. Some may lament the added burden and expense this may appear to cause, but the visible and evenhanded administration of justice should be promoted thereby.

IV. CONCLUSION

Any discussion focusing on rules of fundamental significance or unusual interest runs the risk of creating some mistaken impressions. One is that the proposed rules are entirely new and create change for the sake of change itself. To be sure, the proposed rules do alter current law in many of its fundamental re-

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588. *See* text accompanying notes 564-67 *supra*.

589. TENN. CODE ANN. § 8-612 (Supp. 1977). *But see* TENN. SUP. CT. R. 31. The Code provision noted herein inexplicably makes no provision for publication of decisions of the court of criminal appeals.

590. TENN. CODE ANN. § 8-612 (Supp. 1977).

spects. But given the absence of any comprehensive reform in the law for more than a century, the changes seem strikingly modest. In point of fact, much of the law embodied in the rules is familiar fare, as can be verified by studying the rules, which are appended to this discussion. Another mistaken impression that might be created is that the rules were not drafted with a concern for details. Yet, even a cursory examination will quickly reveal rules on a variety of matters of detail including voluntary dismissal;[591] joint and consolidated appeals;[592] transfer of cases appealed to the wrong court;[593] appeals by poor persons;[594] the substitution, addition, and dropping of parties;[595] filing and service of papers[596] and briefs;[597] form of briefs and other papers;[598] computation and extension of time;[599] motions;[600] completion, transmission,[601] and filing of the record;[602] sequence of oral argument or submission of cases;[603] conduct of oral argument;[604] entry of judgment and the persons to whom copies of the reasons and judgment are to be sent;[605] rehearing in the appellate court;[606] costs;[607] interest on judgments;[608] issuance, stay, and recall of mandates from the appellate court;[609] filing of the mandate in the trial court and proceedings thereafter;[610] and other miscellaneous matters, many of which will be treated in a subsequent article.

The proposed appellate rules are not immune to criticism. Indeed, this discussion has at times been critical of some of the

591. PROPOSED TENN. R. APP. P. 15.
592. *Id.* R. 16.
593. *Id.* R. 17.
594. *Id.* R. 18.
595. *Id.* R. 19.
596. *Id.* R. 20.
597. *Id.* R. 29.
598. *Id.* R. 30.
599. *Id.* R. 21.
600. *Id.* R. 22.
601. *Id.* R. 25.
602. *Id.* R. 26.
603. *Id.* R. 34.
604. *Id.* R. 35.
605. *Id.* R. 38.
606. *Id.* R. 39.
607. *Id.* R. 40.
608. *Id.* R. 41.
609. *Id.* R. 42.
610. *Id.* R. 43.

rules. However, it is also important to recognize the difficulties involved in drafting the rules. It is to be hoped that this discussion has furthered an understanding of those difficulties and will result in helpful criticism of the rules before their submission to the Tennessee General Assembly.

It should be unmistakably clear that further significant reform cannot await the passage of another one hundred years. Only ongoing procedural reform will permit the evolutionary growth in the law that the judgment of time dictates about the judgment of today.