THE SCOPE OF REVIEW IN CRIMINAL APPEALS AND THE IOWA JUDGMENT ON THE RECORD STATUTE

Douglas Rendleman†

I. INTRODUCTION

The crisis in criminal justice is everybody's business. The criminal law process from the officer on the street to the correctional institution is under pressure from all sides. Prosecutors' offices and the trial courts are overloaded. The volume of business could not be handled except for the large proportion of cases which are settled with a bargained plea. Prosecutions that proceed to trial must, in many places, contend with delays due to clogged court calendars. The criminal case load explosion collides with the civil case load explosion in competition for an early trial date and a vacant courtroom. When the accused is convicted, an appeal is almost automatic and the burden is then cast upon an appellate court.[1] This article will deal with the scope of review in criminal appeals, and the inquiry will focus on a statute which affects the way the Iowa supreme court deals with criminal appeals.

Observers have stated the need for more efficient methods in the appellate adjudication process. Frivolous appeals and appeals without serious issues should be short-circuited before the full array of appellate adjudication is brought to bear.[2] Appellate papers prepared by counsel are to be shortened or eliminated. Oral argument is to be dispensed with or attenuated and appellate judges might rely more upon para-judicial personnel and write fewer and shorter opinions.[3] The trend, in short, is to rationalize the procedure, simplify the process and expedite decisions.

These arguments collide with values held by many, and conflicting views have been expressed. The purpose of appellate review, it is said, is to focus attention on a discreet problem. Such attention is time consuming and inefficient but the only way the judiciary can perform its functions. Efficiency may attain quicker decisions but at the cost of quality.[4] Efficiency must be prized, "yet

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† Member of the Iowa Bar. B.A. 1963, M.A. 1965, J.D. 1968, University of Iowa; LL.M. 1970, University of Michigan. The author wishes to express his appreciation for the helpful assistance of Jon Shils.—Ed.

[1] Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Stuart, *Iowa Supreme Court Congestion: Can We Avert A Crisis?*, 55 IOWA L. REV. 594 (1970) [hereinafter cited as Stuart].

[2] Isbell Enterprises v. Citizens Cas. Co. of New York, 431 F.2d 409 (5th Cir. 1970) (fifth circuit calendar system described); Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1972). *See generally* Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 249-50 (1973).

[3] MINN. R. OF APP. P. 134.07, *as amended*, Oct. 19, 1972, MINN. STAT. ANN. (Supp. 1973). Joiner, *Limiting Publication of Judicial Opinions*, 56 J. AM. JUD. SOC'Y 195 (1972).

[4] Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U.L. REV. 653 (1971) [hereinafter cited as Bazelon]; *see also* Note, *The United States*

the Constitution," the Supreme Court has stated, "recognizes higher values than speed and efficiency."[5] Certain constitutional provisions "were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[6]

Many of the rules of appellate procedure limit the issues which the appellate court may consider. First, a litigant must "save the record" in the trial court. He must take the proper procedural steps to contest a legal ruling, thereby allowing the trial court to correct its errors and putting it on notice that, if the contesting litigant loses, the ruling may be challenged on appeal. After the adverse decision in the trial court, the losing litigant must file a notice of appeal. This crucial step is jurisdictional and technical; notice must be timely and in the proper form. The next step is to place the proper documents before the appellate court. The details of preparing the record or appendix and drafting the brief are not usually jurisdictional, but the documents should be prepared and filed on time. The briefing rules and form of the appellate documents may also be a limit on review. The asserted error which was preserved below must be asserted properly to the appellate court. The assignments of error are the contentions or questions which the appellant wants the appellate court to answer favorably to him. At times the presence and technical form of the assignments have limited review: if an error is not assigned or not properly assigned, the appellate court may not consider it. Review of findings of fact by an appellate court may also be limited depending on whether a case was tried in law or equity and before a judge or a jury. Finally, review is limited to the record made below, and new factual data will not normally be received on appeal.

The policies advanced by the occasionally stern rules of appellate procedure are administrative efficiency, finality and repose for the victorious party and respect for the division of functions between trial and appellate courts as well as the preservation of the dignity of trial courts. Two countervailing factors point in the direction of considering more asserted error. First, appellate courts exist not only to resolve conflicts between individual litigants but also to make legal policy decisions for the guidance of individuals, lawyers and trial courts. Second, courts including appellate courts exist to do substantive justice and not to decide cases on technical procedural points. Lawyers and litigants prefer opinions which are written on the merits, and the loser feels better if the opinion tells him, substantively, why he lost.

These conflicting policies have forced appellate courts to develop exceptions to the general rules of appellate procedure.[7] Appellate courts will reverse for

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Courts of Appeal: 1971-1972 Term Criminal Law and Procedure, 61 GEO. L.J. 275, 281-82 (1972) [hereinafter cited as Circuit Note: Criminal]; ABA Proceedings, *Improving Procedures in the Decisional Process*, 52 F.R.D. 51, 61, 68, 76-78 (1971).

[5] Johnson v. Louisiana, 406 U.S. 356, 363 (1972).

[6] Fuentes v. Shevin, 407 U.S. 67, 92 n.27 (1972).

[7] *See generally* Campbell, *Extent to Which Courts of Review Will Consider*

"plain error" even though no objection was made below[8] and even though the error was not assigned and briefed.[9] Matter not urged before the trial court will be considered on appeal if it reveals lack of subject matter jurisdiction,[10] if it would be against good morals to affirm the judgment in light of the fresh material or if it reveals "apparent error of real importance."[11] The appellate court's attitude toward these problems may depend upon the way it conceives the function of an appellate court. If the role of appellate courts is to correct trial court errors, then it cannot consider an assertion not presented to the trial court because there has been no trial court ruling; and consequently, there is no trial court error to correct.[12] This view advances the interests favoring orderly presentation of issues and deference to lower courts but may, however, perpetuate injustice. If, on the other hand, the role of the appellate court is to seek substantive justice for the litigants, to develop a comprehensive jurisprudence and to avoid miscarriages of justice, then the scope of the inquiry on appeal is broadened considerably.[13]

The policies of the adversary system[14] militate against a broadened inquiry on appeal. Parties initiate and prosecute litigation. The self interests of the affected parties determine the ambit of the controversy and the judge is the umpire rather than a participant. When a court, unaided by an adversary presentation, decides an issue not presented, legitimate objections are in order. The parties will not have a chance to be heard; this may lead to a feeling of unfairness.[15] The court, unaided by full argument from both sides, is more likely to make an unconsidered decision.[16] Finally, if the court decides a question not argued, it must do the research itself unaided by briefs; and the extra work burden by itself may deter the court from passing on the question.[17]

Criminal appeals present somewhat different problems. The defendant's stake in the conviction, the stigma of a criminal conviction and the severe sanction of imprisonment which are not present in a civil case must be considered. In addition, there is the basic policy of criminal justice that conviction of the innocent is more seriously unjust and unfair than acquittal of the guilty.[18] The function of the appellate court in a criminal appeal is, in Orfield's words, "to see

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Questions Not Properly Raised and Preserved, Part I, 7 WIS. L. REV. 91 (1932); Part II, 7 WIS. L. REV. 160 (1932); Part III, 8 WIS. L. REV. 147 (1933) [hereinafter citing to Volume 7 as Campbell].

8 C. MCCORMICK, EVIDENCE 120 (E. Cleary ed. 1972); United States v. Miller, 468 F.2d 1041 (4th Cir. 1972).

9 F. JAMES, JR., CIVIL PROCEDURE § 11.3, at 522 n.7 (1965).

10 State v. Coughlin, 200 N.W.2d 525 (Iowa 1972).

11 Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 499-506 (1959) [hereinafter cited as Vestal].

12 L. ORFIELD, CRIMINAL APPEALS IN AMERICA 94 (1939) [hereinafter cited as ORFIELD]; Vestal, *supra* note 11, at 91.

13 Vestal, *supra* note 11, at 505-06, 509.

14 F. JAMES, JR., CIVIL PROCEDURE § 1.2 (1965); Vestal, *supra* note 11, at 487-90.

15 F. JAMES, JR., CIVIL PROCEDURE § 1.2, at 7 (1965).

16 Carroll v. Presidents and Comm'rs of Princess Anne, 393 U.S. 175, 184 (1968); ORFIELD, *supra* note 12, at 203-04.

17 Vestal, *supra* note 11, at 495.

18 *In re* Winship, 397 U.S. 358, 363-64 (1970).

that justice is done to the appellant. An innocent defendant must be released. A defendant who did not secure a fair trial should have another trial."[19] These policies are further evidenced by the possibility of habeas corpus or another post-conviction remedy at any time[20] as well as by the policy of applying changes in criminal law retroactively when they relate to the integrity of the process by which guilt has been determined.[21] The uncertain nature of criminal law applied in the past and the changing categories of permissible collateral attack bear upon the present administration of criminal law. Evenhandedness is more important than finality, and respect for the trial court may be less important than commiseration for an individual who has been unjustly convicted.[22]

The adversary principle, moreover, is subject to different considerations in criminal appeals. The plaintiff is the prosecutor's office, an institutional litigant; and lawyers in governmental offices frequently develop considerable expertise in the technical rules of appellate procedure. The accused defendant is frequently represented by appointed or retained counsel "who lack either the ability or the experience to handle what is in many ways the most difficult and specialized problem in the law—the defense of a criminal charge."[23] This inveterate imbalance may impel an appellate court to a more active stance because the reviewing judges may view with disdain the prospect of a citizen going to jail because his lawyer bungled. On the other hand, many indigent criminal appeals are thought to be lacking in substantive merit and subject to speedy disposition in order to save judicial resources for more important tasks.[24] There is, in addition, much to be said for speed in the criminal process. The defendant-appellant is entitled to some certainty; and if he is to be retried or freed, he should know quickly, especially if he is already serving his sentence. Evidence can be lost and witnesses may disappear; therefore, if there is to be a retrial, it should be prompt. Most criminal appeals are affirmed and a quick decision ends the uncertainty for everyone. Accordingly, there is a discernible trend toward speeding up criminal appeals.[25]

The judgment on the record statutes must be viewed in the context of the

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[19] ORFIELD, *supra* note 12, at 32-33.

[20] The "root principle" of habeas corpus "is that in civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." Fay v. Noia, 372 U.S. 391, 402 (1963). *See also* Sewell v. Lainson, 244 Iowa 555, 57 N.W.2d 556 (1953). Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 236-41 (1973); Circuit Note: Criminal, *supra* note 4, at 511-12.

[21] Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

[22] *See* O'Connor v. Ohio, 385 U.S. 92 (1966).

[23] Bazelon, *supra* note 4, at 669; *see also* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, 57-61 (1967); Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701, 715 (1972).

[24] Stuart, *supra* note 1, at 604. *See also* ORFIELD, *supra* note 12, at 50. *See generally* Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1972).

[25] 9th Cir. Court Rule 20, Effective Aug. 1, 1972 at 462 F.2d LXIV (advance sheet); Task Force Report: The Courts, *supra* note 23, at 87-88. *But see* Bazelon, *supra* note 4, at 661-63.

above competing considerations. The statutes[26] are relatively obscure and provide generally that in a criminal appeal the reviewing court should render judgment on the record. The only safe test of a statute is the practical effect, and the next part of this article will examine where the Iowa judgment on the record statute has been employed in criminal appeals. Following that, the writer will attempt some comparison and generalizations about the statute's effect and value.

II. The Iowa Judgment on the Record Statute

The Iowa judgment on the record statute provides:

> If the appeal is taken by the defendant, the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it.[27]

The statute is voluminously annotated. The 1950 volume of the code annotated carries 121 pages of case excerpts and the 1973 pocket part has almost 11. The duty of the supreme court under the statute, as stated by Chief Justice Moore in a recent case, is "to decide criminal appeals according to the very justice of the case as shown by the record without regard for technical errors. We will not let a finding of guilt stand if upon examination under Code Section 793.18 we are convinced it shows a fair trial was not had."[28] Chief Justice Dillon made a very similar statement more than 100 years before that.[29] The novice should, however, beware as then Justice G. K. Thompson said in a law review article: "There is a statute which, to a considerable extent, excuses mistakes of omission and commission in criminal cases. It has been followed by the Iowa Supreme Court in many cases. This is to some extent helpful, but it . . . is sometimes distinguished or limited even in criminal cases."[30] When the Iowa criminal appeals are studied, some interesting and conflicting results appear, and the clash of policies and ideologies is apparent.

A. *Failure to Follow Appellate Rules*

The first problem to be examined will be the effect of the defendant's failure to follow the rules of appellate procedure. At the outset it should be noted that violations of the appellate rules might not have any effect on criminal appeals

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26 Ala. Code tit. 15, § 389 (Recomp. 1958); Ariz. Rev. Stat. Ann. § 13-1715 (1956); Iowa Code § 793.18 (1973); Minn. Stat. Ann. § 632.06 (1946); Mo. Ann. Stat. § 547.270 (Vernon 1949); Tenn. Code Ann. § 40-3409 (1955).

27 Iowa Code § 793.18 (1973). [Hereafter the statute will not be cited].

28 State v. Brown, 176 N.W.2d 180, 181 (Iowa 1970).

29 State v. Brainard, 25 Iowa 572, 581 (1868).

30 Thompson, *Oral Arguments in the Supreme Court of Iowa*, 38 Iowa L. Rev. 392, 393 (1953); *see also* Rendleman & Pfeffer, *Appellate Procedure and Practice*, 19 Drake L. Rev. 74, 90 nn. 171, 172 (1969); 41 Iowa L. Rev. 451 (1956).

because of statutes providing that criminal appeals "shall not be dismissed for any informality or defect"[31] and that assignments of error are unnecessary in criminal appeals.[32] Neither of these statutes, however, has been followed to any large extent. During the last half of the 19th century and the first half of the 20th, the Iowa supreme court built up an intricate and hyper-technical body of law concerning assignment of error.[33] The court went so far as to hold that assignments of error which were not argued would be deemed waived and would not be considered on appeal.[34] The court did, however, qualify the rule with the hedge that in "grave offenses" when the judges could make out the claimed error, a "concise statement of the alleged error will not be required."[35]

This strict posture has been softened considerably as a review of recent cases will show. In *State v. McCarty*[36] the proposition relied upon for reversal was stated but the state maintained that it could not be considered on appeal because it was not argued. The court citing the judgment on the record statute rejected the state's contention observing that "if a fair trial has not been had the court will reverse notwithstanding technical errors in the appeal process."[37] In *State v. Ubben* error was not assigned but defendant's lawyer made "some allusion thereto" in his argument. The court considered the issue and affirmed.[38] In *State v. Masters*, a pro se appeal, the brief failed so egregiously to comply with the applicable briefing rule that the state could not prepare a proper appellee's brief.[39] The court refused to consider the "document filed by the defendant" but instead, citing the judgment on the record statute, reviewed the transcript and the record submitted and affirmed.[40] Another appeal, *State v. Brown*,[41] was submitted without any prepared record or brief. The court, not at all perplexed by the lack of assistance from defendant's attorney, observed "we have however been alerted to some of defendant's contentions referred to in his resistance to the State's motion to dismiss the appeal"[42] and, in affirming, discussed briefly the issues of whether the evidence was sufficient

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[31] IOWA CODE § 793.14 (1973).
[32] *Id.* § 793.15 (1973).
[33] Ladd, *Assignment of Errors and the New Iowa Supreme Court Rules*, 21 IOWA L. REV. 693 (1936).
[34] State v. Walters, 244 Iowa 1253, 1260, 58 N.W.2d 4, 7 (1953) (pro se appeal). *See* Note, *An Anomaly in Criminal Appeal*, 2 DRAKE L. REV. 66 (1952).
[35] State v. Bruntlett, 240 Iowa 338, 349, 36 N.W.2d 450, 456 (1949) (concurring opinion); *see also* State v. Ostby, 203 Iowa 333, 343, 210 N.W. 934, 937 (1926): "The argument of the appellant is presented with slight regard for the rules of this court as to the manner of its preparation. This is without excuse. We have, however, examined the same with care with reference to all matters therein urged upon our attention."
[36] State v. McCarty, 179 N.W.2d 548 (Iowa 1970).
[37] *Id.* at 552; State v. Garrett, 183 N.W.2d 652, 656 (Iowa 1971).
[38] State v. Ubben, 186 N.W.2d 625, 628 (Iowa 1971).
[39] State v. Masters, 171 N.W.2d 255, 258 (Iowa 1969), *cert. denied*, 397 U.S. 1052 (1970).
[40] *Id.* *See also* State v. Garrett, 183 N.W.2d 652, 656 (1971) where the abstract of the record was inadequately prepared and the statement of fact in the brief did not cite the record. The writing judge, citing the judgment of the record statute, stated that he had read the entire transcript.
[41] State v. Brown, 176 N.W.2d 180 (Iowa 1970).
[42] *Id.* at 181.

to support the verdict, whether certain statements were admitted in violation of the Miranda rule and whether the sentence was too severe. It is fair to conclude that today violations of the briefing rules and other rules pertaining to the way an appeal is presented do not have much effect on whether an issue will be considered.[43] Full consideration, however, requires the defendant's attorney to focus the court's attention on the meritorious issues in the appeal by way of clearly stated issues and a well researched brief. It is worthy of note that while the court considered the issues in the appeals in this paragraph it reversed only one.[44]

B. *Failure to Preserve Record*

The next problem is the effect of the judgment on the record statute when the record in the trial court is not, by the applicable trial rules, saved or preserved for appeal. Normally an appellate court will not consider an issue unless that issue was raised before the trial court. The reasons for this rule are: (1) if the matter had been timely brought to the attention of the trial court, the asserted error may then have been cured; (2) courts dislike prolonged and piecemeal litigation; (3) fairness to the trial judge requires that he not be reversed for something he did not consider; and (4) appellate courts exist to correct trial court errors; and if the trial court has not passed on a question, it could not have erred.[45] These reasons spring from the adversary system and the common sense notions of frowning upon afterthought and Monday-morning quarterbacking. A party is bound by the tactics and errors of his attorney. If this asserted error is so important, why is it first argued at this late date? It is not the function of the appellate court to oversee an attorney's trial strategy which, in retrospect, did not work as planned. If, however, the appellate court is required to render judgment on the record, then may it examine the error even though the record below is not properly saved? There are many Iowa cases on this point; and because of conflicting attitudes and policies, there are inconsistencies.

At the outset it must be observed that the Iowa supreme court can be extremely strict: "Our statutory duty to review the record . . . does not mandate a reversal . . . where proper objections were not made below to errors assigned in this court."[46] There are times when the court refuses to review. For example, in *State v. Rankin*[47] the defendant, charged with incest, claimed on appeal that the trial court had erred in failing to require the state to elect a specific incident when the charged offense occurred. At trial, defendant had asked that the

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[43] *See also* similar results under similar statutes. City of Duluth v. Cerveny, 218 Minn. 511, 16 N.W.2d 779 (1944); State v. Siebke, 216 Minn. 181, 12 N.W.2d 186 (1943); Farmer v. State, 201 Tenn. 107, 296 S.W.2d 879 (1956); Renner v. State, 187 Tenn. 647, 216 S.W.2d 345 (1948). *But cf.* State v. Post, 255 Iowa 573, 580, 123 N.W.2d 11, 16 (1963).

[44] State v. McCarty, 179 N.W.2d 548 (Iowa 1970) (alternative basis for reversal).

[45] Campbell, *supra* note 7, at 92-93; ORFIELD, *supra* note 12, at 93-94.

[46] State v. Thomas, 190 N.W.2d 463, 465 (Iowa 1971).

[47] State v. Rankin, 181 N.W.2d 169 (Iowa 1970).

state elect a specific date. The supreme court held that it did not need to examine the assignment of error because "the motion was not specific enough to alert the trial court to the argument defendant makes on appeal. . . ."[48] The defendant must not only place his contentions before the trial court in substantially the same terms as he argues them on appeal, but if the trial court ignores the request, he must also request a ruling, or on appeal it will be held that he has abandoned his contention and that his assignment raised no reviewable issue.[49]

Some questions will, as a reading of the cases reveals, be reviewed. In *State v. Helter*,[50] the defendant's appeal attorney argued that the defendant had been misled into pleading guilty by a promise of his trial counsel. Although the question was raised for the first time on appeal, the supreme court reviewed the formal record and held that the guidelines for taking a guilty plea had been fully met.[51] If the indictment or information does not charge an offense, the court will reverse even though the defendant has pleaded guilty[52] or has not raised the issue at trial.[53] In one appeal,[54] the defendant had been convicted of desertion and nonsupport and appealed from an order forfeiting bond and imposing sentence. The supreme court reversed and remanded for a hearing on whether the defendant was continuing in his nonsupport although this question had not been raised in either the trial or before the supreme court.[55] The court was evidently concerned about the social welfare purpose of the statute and did not cite the judgment on the record statute.

Also to be considered are two appeals involving guilty pleas to murder.[56] In both, the trial court had imposed the death penalty, and in neither case had the defendant's attorney preserved the trial record for review by timely objections. In each, the supreme court cited the judgment on the record statute and the defendant received a full review.[57] One case was remanded for a hearing to determine the degree of guilt,[58] and the other was affirmed but not without a vigorous and persuasive dissent.[59] There are, of course, good reasons to review a

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[48] *Id.* at 171. *See also* State v. Boose, 202 N.W.2d 368, 369 (Iowa 1972); State v. Evans, 193 N.W.2d 515, 519 (Iowa 1972).

[49] State v. Hephner, 161 N.W.2d 714, 716-17 (Iowa 1968) (venue change).

[50] State v. Helter, 179 N.W.2d 371 (Iowa 1970).

[51] *Id.*

[52] State v. Schrup, 229 Iowa 909, 295 N.W. 427 (1940) (mere possession of obscene pictures).

[53] State v. Potter, 28 Iowa 554 (1870). *See also* Campbell, *supra* note 7, at 106 nn. 83, 84.

[54] State v. Walker, 246 Iowa 932, 70 N.W.2d 177 (1955), *noted in* 41 IOWA L. REV. 451 (1956).

[55] *Id.* at 938, 70 N.W.2d at 180 (dissenting opinion).

[56] State v. Kelley, 253 Iowa 1314, 115 N.W.2d 184 (1962); State v. Martin, 243 Iowa 1323, 55 N.W.2d 258 (1952).

[57] *Id.*

[58] State v. Martin, 243 Iowa 1323, 55 N.W.2d 258 (1952); *see generally* Annot., 34 A.L.R.2d 919 (1954).

[59] State v. Kelley, 253 Iowa 1314, 115 N.W.2d 191 (1962) (dissenting opinion). It is interesting to note that Justice Larson, who wrote this dissent, was state attorney general when *State v. Martin* was argued and decided and was therefore responsible for the state's case therein.

capital case thoroughly.[60] Life is in jeopardy. The defendant who has been executed cannot later be released on habeas corpus.[61] A death penalty following a guilty plea is exceptional. It is the duty of an appellate court to rise above local passion and render a collective and reasoned decision on the merits.[62] Finally, it is particularly unsavory to hold a condemned man to his attorney's error.[63] The Iowa court, it may be tentatively concluded from the cases reviewed to this point, has made stern statements about saving the record but has also used the judgment on the record statute to review when the needs of justice seem to require review.

1. *Evidentiary Issues*

The next avenue of inquiry is the effect of the Iowa judgment on the record statute on assignments of error which relate to the admission of evidence when the issue has not been properly presented to the trial court and is raised for the first time on appeal. Normally, appellate courts will not pass on objections to evidence which have not been the subject of a ruling in the trial court. There are several reasons. It seems unfair to allow a party to stand idly by while a trial court makes a ruling, gamble on a favorable verdict and, if the verdict is unfavorable, argue against it on appeal.[64] Similarly, it is improper for a party to select a trial strategy and then, having lost, argue against it on appeal.[65] A party claiming error on appeal should, by objecting, allow the trial court to correct its own errors and allow the offering party an opportunity to put the matter into evidence correctly.[66]

What difference does the judgment on the record statute make? The Iowa supreme court, while paying verbal obeisance to the general rule against review of issues which were not raised before the trial court, has frequently extended review to evidentiary issues. In one case[67] some admissions defendant made to

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60 This is the policy of ALA. CODE tit. 15, § 382(10) (Recomp. 1958). *See* Duncan v. State, 278 Ala. 145, 157, 176 So. 2d 840, 851 (1965).

61 State v. Kelley, 253 Iowa 1314, 115 N.W.2d 191 (1962) (dissenting opinion); *see* Farrant v. Bennett, 249 F. Supp. 549 (S.D. Iowa 1966) where a 33-year-old conviction was voided and the case remanded for a hearing on degree of guilt.

62 "[T]he more cruel and revolting the crime . . . the stronger the popular feeling and public indignation, the more meticulous should the courts be. . . . 'The jurisdiction of the courts is not coordinate with that of the mob.' " State v. Martin, 243 Iowa 1323, 1328, 55 N.W.2d 258, 261 (1952). *Cf.* Carrington, *The Powers of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 527-28 (1969).

63 State v. Martin, 243 Iowa 1323, 55 N.W.2d 258 (1952). The problems of the scope of review of the evidence and review of sentences under the judgment on the record statute will be taken up later.

The death penalty seems to be gone (Furman v. Georgia, 408 U.S. 238 (1972)) but a study of the capital cases is merited because of the generalization that an appellate court's duty increases in proportion to the interests at stake. Campbell, *supra* note 7, at 178.

64 State v. Ostby, 203 Iowa 333, 210 N.W. 934 (1926).

65 State v. Meyers, 257 Iowa 857, 135 N.W.2d 73 (1965). *See also* Henry v. Mississippi, 379 U.S. 443, 451 (1965).

66 State v. Meyers, 257 Iowa 857, 135 N.W.2d 73 (1965); *see generally* C. MCCORMICK, EVIDENCE § 52 (E. Cleary ed. 1972).

67 State v. Halverson, 261 Iowa 530, 155 N.W.2d 177 (1967).

an officer were asserted for the first time on appeal to be inadmissible because of failure to give Miranda warnings. The court noted that Miranda did not apply because the trial preceded the Miranda decision and declined to review the specific issue but concluded upon a "review of the entire record" that the defendant had a fair trial.[68] Similarly, the court while noting that it need not review evidentiary questions has gone on to do so "as a matter of grace"[69] or by dicta.[70] In other appeals the question, although improperly asserted below, was reviewed and the ruling said to be harmless to the defendant[71] or reviewed because the issue was important to law enforcement agencies[72] or to guide future litigation.[73] Review is not consistent and in a few cases the court has declined review altogether.[74] In others the case has been reversed.[75] Generalization is perilous. The question under the judgment on the record statute when an evidentiary ruling is assailed first on appeal seems to be whether defendant received a fair trial. Assignments of error or contentions which were not raised below will frequently be considered on that question although the court does so begrudgingly and does not always admit what it is doing.

2. *Jury Instructions*

The next problem concerns jury instructions. What must the defendant's attorney do to preserve assertedly incorrect jury instructions for review, and if he fails to do so properly, what effect does the judgment on the record statute have on review? In order to provide full protection for his client, defendant's attorney may follow several intricate steps.[76] First, before the instructions are given, he may file a written request to charge and if it is refused, except or object. If he is contesting the instructions as they will be given, he may before the jury is instructed, object to the draft instructions giving reasons or adducing alternative instructions. Then, after the jury is instructed and an adverse verdict is returned, he may argue against the instructions in his motion for new trial. Finally, he must assign the assertedly defective instructions as error and argue the issue on appeal.

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[68] State v. Hinsey, 200 N.W.2d 810, 817-18 (Iowa 1972); State v. Halverson, 261 Iowa 530, 155 N.W.2d 177 (1967).

[69] *See, e.g.*, State v. Meyers, 257 Iowa 857, 135 N.W.2d 73 (1965); State v. Walters, 244 Iowa 1253, 58 N.W.2d 4 (1953), *cert. denied*, 346 U.S. 940 (1954).

[70] State v. Galavan, 181 N.W.2d 147, 149-51 (Iowa 1970); State v. Jones, 253 Iowa 829, 113 N.W.2d 303 (1962).

[71] State v. Hodge, 252 Iowa 449, 105 N.W.2d 613 (1960), *cert. denied*, 368 U.S. 402 (1962).

[72] State v. Entsminger, 160 N.W.2d 480, 483 (Iowa 1968).

[73] State v. Binkley, 201 N.W.2d 917, 919 (Iowa 1972).

[74] State v. Boose, 202 N.W.2d 368, 369 (Iowa 1972); State v. Binkley, 201 N.W. 2d 917, 919 (Iowa 1972); State v. Evans, 193 N.W.2d 515, 519 (Iowa 1972); State v. Ostby, 203 Iowa 333, 210 N.W. 934 (1926); *see also* State v. Clough, 289 Minn. 527, 185 N.W.2d 529 (1971); State v. Klinkert, 271 Minn. 548, 136 N.W.2d 399 (1965).

[75] State v. Barr, 123 Iowa 139, 98 N.W. 595 (1904).

[76] State v. Youngbear, 202 N.W.2d 70 (Iowa 1972); State v. Thomas, 190 N.W.2d 463 (Iowa 1971); State v. Gilmore, 181 N.W.2d 145 (Iowa 1970); State v. Horrell, 260 Iowa 945, 151 N.W.2d 526 (1967); *see also* Dunahoo, *Iowa Criminal Law*, 21 DRAKE L. REV. 488, 560 (1972).

At the same time, the trial judge has a duty to instruct fully on the law applicable to the issues in the case:[77] "[I]t is the duty of the court, without request therefore, to fairly present the issues and the law of the case to the juries in those situations where a matter is so important in the case or so much an integral part of it that in order for the jury to have an intelligent conception of the question for decision a statement of the law applicable to the facts is required."[78] Significant misdirections or omissions, therefore, are reversible error even though no request was made before the jury was instructed but the instruction was contested only later on motion for new trial or appeal. If, however, the instructions were abstractly correct but were not explicit enough and if the defendant did not raise the issue before the instructions were given but only after verdict, either by motion for new trial or on appeal, then the objection may be deemed to have been waived and the assignment will present no substantive issue to the appellate court. These rules, of course, are broad generalizations and are difficult to apply to concrete situations.

The rules which relate to jury instruction are rough compromises between the competing interests of individual rights in a fair trial on the one hand, and the efficient use of expensive judicial apparatus on the other. Ordinarily a party, through his attorney, is required to suggest and object to jury instructions before the jury is instructed; and if he does not do so, he is precluded from arguing to the contrary at a later stage of the process. This saves the expense of a new trial. Arguable errors of major magnitude may, however, be first raised after the jury verdict in a motion for new trial. If error is then asserted successfully, it is necessary to impanel another jury and retry the case. Certainly, if the error is grave enough to impair the integrity of the fact finding process, the interest in a fair trial outweighs the interest in the efficient use of judicial machinery. If the error is raised neither before the jury is instructed nor on motion for new trial but asserted first to an appellate court, then reasons for considering it become even more attenuated. Thus, there is a stage in the litigation process when arguable error is most efficiently and economically considered. For jury instructions, that stage is before the jury is instructed, for at that time the error, if any, can be corrected with relatively little expense and inconvenience. As the process moves in time and procedural stage away from this point, the allowable categories of arguable error which the appellate court will consider are narrowed; and finally, only the most basic remain. Two generalizations may be posited to summarize the foregoing: (1) the earlier in procedural stage an issue is asserted, the more likely it is to be considered on appeal; and (2) the more critical an asserted error is, the more likely it is to be considered on appeal.

The controversy, while currently a topic of heated concern,[79] is anything

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[77] State v. Brown, 172 N.W.2d 152, 156-60 (Iowa 1969); State v. Horrell, 260 Iowa 945, 953, 151 N.W.2d 526, 532 (1967); *see also* ORFIELD, *supra* note 12, at 97; Campbell, *supra* note 7, at 173.

[78] State v. Brown, 172 N.W.2d 152, 159 (Iowa 1969).

[79] *See, e.g.*, Bazelon, 46 N.Y.U.L. REV. 653 (1971).

but new. The basic arguments for both sides were made more than a century ago in *State v. Brainard*.[80] The majority opinion, reversing for failure to instruct properly although the errors had not been asserted below, stated:

> It is made the duty of this court to decide criminal appeals according to the very justice of the cases as shown by the record, without regard to technical errors. It does not harmonize with the humane spirit of this statute to lay down the iron rule that the defendant must inevitably and in all cases be visited with the consequences of the omissions or errors of counsel. Such a doctrine, I feel bound to say, belongs to the days of Lord Coke and is abhorrant to all my notions of justice.[81]

Thus, because of the gravity of the interests involved, the normal rules of the adversary system are suspended and the trial judge "should see that every case goes to the jury, so that they have clear and intelligent notions of precisely what it is they are to decide."[82] In Justice Dillon's view, the judgment on the record statute suspends some of the usual rules: first of all, those of the adversary system which require counsel to try the case and relegate the trial judge to the role of an umpire; and secondly, those of appeal and error which require an appeal to stand or fall on the record made at trial.[83]

The dissenting justice saw things differently. The normal rules of the adversary system should apply: "I assume, that counsel, familiar with their client's cause, and of the true grounds of his defense, know what line of policy to pursue, and it is not for me to find fault with it. . . ."[84] The criminal appeal is no different from other appeals: "I am not at liberty to disregard well established rules upon some vague conception that possibly there has not been a fair, deliberate trial."[85] Efficient use of judicial resources favors affirmance and disfavors reversals: "I may legitimately, and must properly, search the record to sustain a judgment, but no court should indulge in presumptions to find error."[86] Finally, to reverse on an issue not presented to the trial court "offers a premium for negligence, is calculated to mislead and entrap parties, and . . . can only tend to protract litigation, and render the administration of justice uncertain."[87] When the competing interests and policies are so complicated, abstract, and basic, it should be no surprise to find that the cases are difficult and results are sometimes irreconcilable.

In appeal where a jury instruction was requested at trial but the issue was not argued on appeal, the Iowa supreme court "carefully examined the record" to determine whether defendant had received a fair trial but refused to consider

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[80] State v. Brainard, 25 Iowa 572 (1868).
[81] *Id.* at 581.
[82] *Id.* at 580, *quoting* Owen v. Owen, 22 Iowa 270, 274 (1867).
[83] Justice Dillon did add that he would not reverse upon an error not asserted below if the evidence of guilt was clear beyond "a reasonable question." State v. Brainard, 25 Iowa 572, 581 (1868).
[84] State v. Brainard, 25 Iowa 572, 583 (1868) (dissenting opinion).
[85] *Id.*
[86] *Id.*
[87] *Id.* at 587. *See also* State v. Kramer, 252 Iowa 916, 109 N.W.2d 18 (1961).

the particular instruction separately because it was not argued on appeal.[88] It would seem, however, that the instruction challenged at trial but not argued on appeal would bear on the fair trial question; and perhaps the court is roundabout in saying that while reviewing for a fair trial, it does review the instruction to some extent. In another case, defendant's proffered instruction was refused. He did not object for failure to instruct nor did he move for a new trial but later assigned this instruction on appeal. The court held that, because of defendant's failure to except at the proper time, the "assignments of error present nothing for review."[89] In each of these appeals the instruction was brought to the attention of the trial court at the time when it could most efficiently be corrected; yet in neither did the defendant receive full review. In cases where there was neither request nor exception before the jury was instructed and the issue was argued both on motion for new trial and on appeal, the court has in one appeal given the matter "brief attention" because of the judgment on the record statute.[90] In another, the court reviewed for a fair trial but refused to consider the specific challenge to the instruction because it was argued too late and merely maintained that the instruction was not as specific as desired.[91] These are not enough cases of this sort to form a discernable pattern.

The appeals in which defendant's attorney has failed to challenge the instructions at trial but has assailed them on appeal present a disconcerting array of disparate treatment. In some, the supreme court has stated the issue was not saved for review but that the record was read to determine whether defendant had a fair trial.[92] In others, the court has not considered the assigned error but has read the jury instructions as a whole[93] or has reviewed to determine whether the instructions had a basis in the record.[94] The most common treatment is to announce that defendant, his lawyer having failed to object during trial, has no right to review but that the court will review as a matter of "grace" because of the judgment on the record statute and the desire to decide cases on the merits.[95] With few exceptions, the defendants in these appeals have had their contentions considered on the merits by the appellate court despite their attorney's failure to raise the issues properly in the lower court. Apparently, the stage of the process in which the question is first raised does not make much difference.

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88 State v. Thomas, 190 N.W.2d 463 (Iowa 1971).
89 State v. Gilmore, 181 N.W.2d 145, 147 (Iowa 1970).
90 State v. Brightman, 252 Iowa 1278, 110 N.W.2d 315 (1961).
91 State v. Brown, 172 N.W.2d 152, 156-60 (Iowa 1969).
92 State v. Youngbear, 202 N.W.2d 70, 72 (Iowa 1972); State v. Hinsey, 200 N.W.2d 810, 813-14 (Iowa 1972); State v. Thomas, 190 N.W.2d 463, 465 (Iowa 1971); State v. McElhaney, 261 Iowa 199, 153 N.W.2d 715 (1967); State v. Jensen, 245 Iowa 1363, 66 N.W.2d 480, 480-85 (1954); *see also* State v. Post, 255 Iowa 573, 585, 123 N.W.2d 11, 18-19 (1963).
93 State v. Garrett, 183 N.W.2d 652, 656 (Iowa 1971).
94 State v. Wiese, 182 N.W.2d 918 (Iowa 1971).
95 *See, e.g.*, State v. Miskell, 161 N.W.2d 732, 733-34 (Iowa 1968). Two of the justices would not have reviewed the issues at all. *Id.* at 735; State v. Ford, 259 Iowa 744, 145 N.W.2d 638 (1966); State v. Walters, 244 Iowa 1253, 58 N.W.2d 4 (1953), *cert. denied*, 346 U.S. 940 (1954) (pro se trial & appeal).

It is clear that the gravity or seriousness of the asserted error affects the court's willingness to consider it for the first time on appeal. In *State v. Wallace*,[96] the defendant, having neither objected to an instruction at trial nor in motion for new trial, argued on appeal that it "violated her constitutional privilege to remain silent." The supreme court referred to the rule against considering error in instructions, even an error of constitutional magnitude, for the first time on appeal. However, the court, noting the judgment on the record statute and that the asserted right was "fundamental," gave the issue full consideration before affirming the conviction.[97] There are three reversing cases in which the defendant's attorney argued defective instructions for the first time on appeal. In two, the instructions as given failed to present defendant's theory of the case:[98] the court cited the judgment on the record statute and the trial judge's responsibility to instruct on the issues in the case even though not requested.[99] While neither of these cases seem to raise constitutional issues, it is clear that whenever the jury cannot intelligibly pass on defendant's explanation of the events charged to be a crime, the prejudice of his right to a fair trial is palpable. In the third case, the unchallenged instructions permitted the jury "to convict on an issue of fact not involved" in the charged offense.[100] This also seems obviously prejudicial to the defendant's right to a fair trial. The Iowa supreme court then will usually examine the cited error in the instruction no matter how late it is raised; and if error of sufficient magnitude to deny a fair trial is discovered, it will reverse for a new trial. This appears to be what is meant by the statements that the record or the jury instructions have been read to determine whether there was a fair trial.

III. Jury Verdicts and Submissibility

The appeals concerning the sufficiency of the evidence to support the verdict are similar to those on jury instructions. The rules are strict: the motion to direct a verdict must be interposed at the close of the state's case and renewed after the defendant's evidence, or else the record will not be preserved for review.[101] Nevertheless, when proper steps have been omitted and the defendant argues on appeal that the evidence is not sufficient to support submitting the case to the jury, the supreme court has reviewed. The court reads the record to determine whether there has been a fair trial; a conviction without any

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[96] State v. Wallace, 261 Iowa 104, 152 N.W.2d 266 (1967).

[97] *Id.* at 107, 152 N.W.2d at 268-69. Justice Mason concurred in the result because he felt that the issue was not properly before the appellate court. *Id.* at 111, 152 N.W.2d at 271. *See also* State v. Cartee, 202 N.W.2d 93, 97 (Iowa 1972); State v. Evans, 193 N.W.2d 515 (Iowa 1972); State v. Forichette, 279 Minn. 76, 156 N.W.2d 93 (1968); State v. Klinkert, 271 Minn. 548, 136 N.W.2d 399 (1965).

[98] State v. Cox, 240 Iowa 248, 34 N.W.2d 616 (1948); State v. Brainard, 25 Iowa 572, 578 (1868).

[99] *Id. See also* text at notes 81-87, *supra.*

[100] State v. Nine, 105 Iowa 131, 136, 74 N.W. 945, 946 (1898), wherein it is stated, "The rule that objections not raised in the court below will not be considered in this court does not apply in criminal cases."

[101] State v. Mart, 237 Iowa 181, 20 N.W.2d 63 (1945).

proof of an element of the charged offense constitutes a denial of a fair trial.[102] The court frequently recites the rule that a party may not argue on appeal unless he has saved the record below and then proceeds to review.[103]

What does the Iowa supreme court do when it reviews the evidence under the judgment on the record statute to determine whether the defendant has had a fair trial? The judge writing the case will usually have a court reporter's transcript of the evidence, the clerk's transcript containing the information, motions and the jury charge, an abstracted or abridged record prepared by defendant's attorney and briefs from both the defendant and the state. The rest of the court has the briefs and the abstracted record. The opinions contain frequent brief references to the criminal appeal decision process. Often, the published opinion says that the "entire record, including the trial transcript" has been examined.[104] In other cases the writing judge states something like "we have carefully examined the record."[105] The "we" seems to be editorial. Appellate judges are busy and their work load is growing rapidly.[106] It may be inferred that each justice has not read all of the material submitted in each appeal but instead at least that the writing judge has read the material and refers to "we" because the opinion speaks for the entire court and personal comments are not usually indulged in majority opinions. Nonetheless, the process involves more effort than merely considering the briefs for properly assigned error. Even though the material is read, the court has said that it will not reverse "where errors asserted below are not raised on appeal or where proper objections were not made below to errors assigned in this court."[107] The court seems to place itself in an anomalous position. It will read the papers but will not reverse unless the rules of procedure were followed. At the same time, the court has said that the entire proceeding will be reviewed to determine whether the defendant had a fair trial.[108] If the rules to determine fair trial are the same as reversible error generally, the statements declining review are unnecessary or are merely admonitions to the attorney who tried the case and to the bar generally.

The standard applied to review of a jury verdict is the usual one: fact

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102 State v. Galavan, 181 N.W.2d 147, 149 (Iowa 1970).

103 State v. Kramer, 252 Iowa 916, 109 N.W.2d 18 (1961) (serious charge); State v. Mart, 237 Iowa 181, 20 N.W.2d 63 (1945) (matter of grace).

104 *See, e.g.*, State v. Garrett, 183 N.W.2d 652, 656 (Iowa 1971); State v. Brown, 176 N.W.2d 180, 181 (Iowa 1970); State v. Hess, 256 Iowa 794, 129 N.W.2d 81 (1964); *see* Justice Larson's dissent in *State v. Kelley*, 253 Iowa 1314, 1329, 115 N.W.2d 184, 192 (1962) arguing that record means "whole record." "The very least we should do in this regard is to require a record of those proceedings so we can determine for ourselves whether it alone would justify such a finding." *See also* State v. Reichenberger, 289 Minn. 75, 182 N.W.2d 692 (1970); State v. Gamelgard, 287 Minn. 74, 177 N.W.2d 404 (1970); State v. Forichette, 279 Minn. 76, 156 N.W.2d 93 (1968); State v. Kotka, 277 Minn. 331, 152 N.W.2d 445 (1967).

105 *See, e.g.*, State v. Rankin, 181 N.W.2d 169, 171 (Iowa 1970); State v. Halverson, 261 Iowa 530, 155 N.W.2d 177 (1967); State v. Torrence, 157 Iowa 182, 131 N.W.2d 808 (1964).

106 Stuart, *supra* note 1.

107 State v. Thomas, 190 N.W.2d 463, 465 (Iowa 1971).

108 *See* notes 88, 91, 92, *supra*.

findings are not reviewed de novo but the evidence is viewed in the light most favorable to the state; credibility questions are considered to have been resolved by the jury, and the verdict is binding on appeal unless it is clearly against the weight of the evidence or lacking substantial support in the evidence.[109] The reviewing court does not reweigh the evidence, and the judgment on the record statute seems to have made very little difference. By way of contrast, the standard applied to fact finding by a trial judge on matters ancillary to trial of the issues is more thorough. In an appeal from a denial of a change of venue, the supreme court made "an independent evaluation of the circumstances" which the concurrence assailed as an improper "de novo rule for review."[110] In determining whether certain admissions were voluntary, the court "review[ed] the record anew."[111] In these appeals, however, the scope of review was commanded by the United States Supreme Court;[112] and although the judgment on the record statute was cited,[113] it, in the absence of the federal cases, would not compel review.

IV. SENTENCES

The judgment on the record statute seems on its face to allow the supreme court some discretion in regard to sentences. It allows the appellate court to "modify the judgment, or render such judgment as the district court should have done . . . or reduce the punishment. . . ."[114] The Iowa supreme court, however, has not moved with alacrity to review sentences.[115] Where the sentence was imposed by the jury under a statute which stated that the jury "must" decide the punishment, the reviewing court held that it has no power to reduce the sentence.[116] On an appeal from a sentence set by a trial judge when the

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[109] *See, e.g.*, State v. Parkey, 200 N.W.2d 518 (Iowa 1972); State v. Young, 172 N.W.2d 128, 129 (Iowa 1969); State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943). This standard is not de novo but neither is it the substantial evidence test applied in civil appeals. *Compare* Claybourg v. Witt, 171 N.W.2d 623, 625-26 (Iowa 1969) (equity) *with* Christensen v. Miller, 160 N.W.2d 509 (Iowa 1968) (law). The standard of review of convictions based on circumstantial evidence is somewhat different. *See* State v. Brown, 172 N.W.2d 152, 155 (Iowa 1969). *Compare* N.Y. CRIM. PRO. LAW § 470.15 (McKinney 1971) (review the adequacy of the evidence to support the verdict). *See also* Circuit Note: Criminal, *supra* note 4, at 426.

[110] Pollard v. District Court, 200 N.W.2d 519, 520-21 (Iowa 1972). *See also* Lloyd v. District Court, 201 N.W.2d 720, 722 (Iowa 1972); State v. Elmore, 201 N.W.2d 443, 445 (Iowa 1972).

[111] State v. Moon, 183 N.W.2d 644, 646 (Iowa 1971).

[112] Pollard v. District Court, 200 N.W.2d 519, 520 (Iowa 1972), *citing* Sheppard v. Maxwell, 384 U.S. 333 (1966); State v. Moon, 183 N.W.2d 644, 646 (Iowa 1971), *citing* Greenwald v. Wisconsin, 390 U.S. 519 (1968).

[113] State v. Moon, 183 N.W.2d 644, 646 (Iowa 1971); *see also* State v. Helter, 179 N.W.2d 371 (Iowa 1970) (guilty plea: record examined, *citing* § 793.18).

[114] IOWA CODE § 793.18 (1973).

[115] Dunahoo, 21 DRAKE L. REV. 488, 569-70 (1972). The scholarly comment is collected and summarized in S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1284-87 (1969) and appellate review seems to be favored.

[116] State v. Brown, 253 Iowa 658, 673, 113 N.W.2d 286, 295 (1962), *citing repealed* IOWA CODE § 690.5 (1962) providing for the death sentence. The court stated "the argument the death penalty is outmoded and barbaric is one for the legislature, not the courts . . . ." *Id. But see* Furman v. Georgia, 408 U.S. 238 (1972).

excessiveness of the sentence is cited as error, the supreme court is hesitant to interfere. A proper sentence is said to be within the discretion of the trial judge and will be examined only for an abuse of discretion.[117] There are appeals which seem to indicate that no abuse will be found if the sentence is within the statutory limits.[118] The reason given for this reticence is that sentencing must follow a factual inquiry and the trial judge had the facts before him.[119] On the other hand, some appeals apply a factual analysis to the sentence to determine whether the sentencing judge abused his discretion before affirming the sentence.[120] Dissenting in *State v. Kelley*,[121] Justice Larson cited the language of the judgment on the record statute which allows the supreme court to "reduce the punishment" and urged a more thorough review. Justice Larson argued that the facts of the case, the makeup of the defendant and legal doubts about the procedure impelled the reviewing court to interpose a balanced collective judgment and either reduce the sentence or grant a new trial.[122] These arguments did not persuade the majority in that case and have not since been adopted by the Iowa supreme court. The potential of employing the judgment on the record statute to review sentences for excessiveness has not been realized.[123] The judgment on the record statute has been applied, however, to reduce sentences. In two of these cases the sentence was improper in that it was "too indefinite,"[124] and in one it was "too indefinite to stand."[125] In these cases the supreme court noted that, because of the judgment on the record statute, it need not remand for a proper sentence but could itself impose sentence. The court, after discussing what were conceived to be the important factors in determining sentence such as age, mental capacity, employment record and prior difficulties, made an independent determination and imposed sentence.[126] These were cases where the trial judge has not exercised his

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117 State v. Evans, 189 N.W.2d 582 (Iowa 1971); State v. Brown, 176 N.W.2d 180, 183 (Iowa 1970); State v. Young, 172 N.W.2d 128, 131 (Iowa 1969); State v. Kelley, 253 Iowa 1314, 115 N.W.2d 184 (1962), *citing* § 793.18. The court responded: "In effect he [defendant] asks us to exercise the pardoning power and commute the sentence. That we do not have such power is the long standing holding of this court." *Id.* at 190.

118 State v. Delano, 161 N.W.2d 66 (Iowa 1968); State v. Kramer, 252 Iowa 916, 109 N.W.2d 18 (1961).

119 State v. Young, 172 N.W.2d 128 (Iowa 1969) (defendant's attitude displayed at trial; pre-sentence report); State v. Kramer, 252 Iowa 916, 109 N.W.2d 18 (1961).

120 State v. Beer, 193 N.W.2d 530 (Iowa 1972); State v. Brown, 176 N.W.2d 180 (Iowa 1970); State v. Young, 172 N.W.2d 128 (Iowa 1969).

121 State v. Kelley, 253 Iowa 1314, 1327, 115 N.W.2d 184, 191 (1962) (dissenting opinion), discussed above at note 117.

122 *Id.* at 1337-38, 115 N.W.2d at 197-98.

123 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCE (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 25-26 (1967).

124 State v. McCollom, 260 Iowa 977, 151 N.W.2d 519 (1967) (not to exceed 60 years: state confessed error and asked supreme court to impose a proper sentence); State v. Jackson, 251 Iowa 537, 101 N.W.2d 731 (1960) (not to exceed seventy (70) years).

125 State v. Stevenson, 195 N.W.2d 358 (Iowa 1972).

126 *Id.* (Not to exceed 25 years to 10 years); State v. McCollom, 260 Iowa 977, 151 N.W.2d 519 (1969) (not to exceed 60 to 50); State v. Jackson, 251 Iowa 537, 101 N.W.2d 731 (1960) (not to exceed 70 to 50). "Of late years we have gone to

power under the statute and had abused his discretion under any standard.

In *State v. Pilcher*,[127] defendant had been convicted and sentenced to fifty years. He appealed; the conviction was reversed and a new trial was ordered. Pilcher was again convicted but this time sentenced to sixty years. Between the second sentence and oral argument before the Iowa court, the United States Supreme Court held in *North Carolina v. Pearce*[128] that a more severe sentence could be imposed upon retrial only if new information is available at the second trial and is made of record. The prior Iowa law allowed an enhanced sentence upon retrial. Thus, the reviewing court in the second appeal was faced with a dilemma: if the *Pearce* case was not to be applied retroactively to cases tried before it was decided, Pilcher's enhanced sentence on reconviction was proper; but if *Pearce* applied to cases on direct appeal or retroactively in general, Pilcher's enhanced sentence was improper. The Iowa court cited the judgment on the record statute and reduced Pilcher's sentence to fifty years, the same as the first sentence.[129] *Pilcher* seems to be almost in a class by itself; the sentence was not reduced because of either an abuse of discretion or sympathy for the defendant but, it seems, because of a desire to prevent a possible reversal. In this respect, the judgment on the record statute provided a safety valve through which the Iowa court could end the litigation and provide certainty for all.

Next to be considered is a problem that is related to the sufficiency of the evidence to support the submission to the jury, proper instructions on charged and included offenses and the power to reduce sentences on appeal. What happens when the appellate court finds that the evidence does not support submission of the convicted offense but does support a lesser included offense? For example, what if the defendant is convicted of grand larceny and while the proof of theft is clear, there is no evidence of the value of the property; thus, the crime actually proved was therefore nothing more than petty larceny? In a 1924 case[130] the defendant had been convicted of first degree murder. The defendant was the only witness who testified to the facts of the killing. An examination of the record revealed "an utter failure of any proof of the essential ingredients of premeditation and deliberation which are required to raise the offense" to first degree murder; and therefore, it was held to be error to instruct on first degree murder.[131] There was evidence of malice in the use of a deadly weapon, and the jury had evidently rejected the defendant's testimony which

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great, sometimes fantastic, lengths in making sure defendants have due process of law . . . . Weeping for criminals is a common facet of our life nowadays; weeping for their victims is too often left to the victims themselves, or, if they have unfortunately not survived the crime, to their relatives. . . . There is nothing we can do for Joseph Dixon now; but a proper sentence, commensurate with the crime committed, may save some future Joseph Dixon from a like fate." *Id.* at 738.

127 State v. Pilcher, 171 N.W.2d 251 (Iowa 1969).

128 395 U.S. 711 (1969).

129 State v. Pilcher, 171 N.W.2d 251, 254-55 (Iowa 1969).

130 State v. Leib, 198 Iowa 1315, 201 N.W. 29 (1924).

131 *Id.* at 1322, 201 N.W.2d at 32.

related to self-defense. Thus, a conviction for second degree murder could have been affirmed easily. Yet the Iowa supreme court ordered a new trial.[132] The issue is this: under the language of the judgment on the record statute which allows the supreme court to "render such judgment as the district court should have done," could the court have rendered a judgment of second degree murder on appeal and saved the trouble, uncertainty, and expense of a second trial? The Iowa court's answer was no. In *State v. O'Donnell*, an earlier and similar appeal, the same language from the judgment on the record statute had been cited by appellant as allowing the appellate court to alter the sentence from death to life imprisonment.[133] The court, however, said that to construe the statute in that fashion and to render judgment on appeal would be to tread upon the constitutional requirement that the role of the appellate court is to correct errors of law, not to pass on questions of fact. It is, the court said, the jury's function to pass on disputed fact questions; and even though "we are satisfied that the defendant is guilty of murder in the second degree," he has a right to another trial before a properly instructed jury.[134] Therefore, instead of reducing the conviction to the lesser offense, the court reversed the judgment and remanded for a new trial.[135] Except for the interpretation of the constitution and statute, the only practical reason the court gave is that "the evidence may not be the same on a retrial."[136]

The *O'Donnell* case is exceptional. The Minnesota supreme court, citing a judgment on the record statute similar to the Iowa statute,[137] held that where the evidence did not support submission to the jury under the convicted offense but did under a lesser included offense, the case would be remanded with directions to enter judgment of conviction of the lesser offense.[138] The Tennessee court, in a similar case, reduced the judgment to the lesser offense,[139] citing among other sources a judgment on the record statute similar to the Iowa statute.[140] Other state appellate courts have reduced to a lesser included offense when the evidence did not support submitting the offense in the verdict citing their general statutory power to modify erroneous judgments[141] or citing only their inherent supervisory powers.[142] The Court of Appeals for the District

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132 *Id.* at 1323, 201 N.W.2d at 33. *See also* State v. Borwick, 193 Iowa 639, 187 N.W. 460 (1922) (similar: new trial ordered).

133 State v. O'Donnell, 176 Iowa 337, 157 N.W. 870 (1916).

134 *Id.* at 346, 157 N.W. at 873.

135 *Id.* at 353, 157 N.W. at 876.

136 *Id.* at 346, 157 N.W. at 873.

137 MINN. STAT. ANN. § 632.06 (1947).

138 State v. Jackson, 198 Minn. 110, 268 N.W. 924 (1936).

139 Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944).

140 *Id.* at 904. The statute is now TENN. CODE ANN. § 40-3409 (1955). The length of sentence troubled the court somewhat, and the court sentenced the defendant to one year but offered the state the option of retrial.

141 *See, e.g.*, People v. Mendes, 35 Cal. 2d 537, 219 P.2d 1 (1950); Ritchie v. State, 243 Ind. 614, 189 N.E.2d 575 (1963); State v. Gunn, 89 Mont. 453, 300 P. 212 (1931).

142 Denwiddie v. State, 202 Ark. 562, 151 S.W.2d 93 (1941); State v. Braley, 224 Ore. 1, 355 P.2d 467 (1960); *see also* Commonwealth v. Sterling, 314 Pa. 76, 170 A. 258 (1934) (inherent and statutory power).

of Columbia recently held that Section 2106 of the Federal Judicial Code,[143] which allows an appellate court to "modify" a judgment, is an adequate grant of power to allow the Court of Appeals to reduce the conviction to a lesser included offense where the evidence will not support the convicted offense but will support the lesser one.[144] If, under an inherent power or a statutory power to modify or to render judgment on the record, an appellate court can render judgment for a lesser included offense, it would appear, a fortiori, that a court with statutory power to render such judgment as the lower court should have rendered could enter judgment for a lesser included offense. The exact reverse is true in Iowa which may be the only jurisdiction which denies this power to the appellate court.[145] The countervailing interests in a jury trial and the role of appellate courts as courts to correct legal error, in this instance, outweigh the power to render judgment or reduce sentence under the judgment on the record statute. The policies of speedy completion of criminal prosecutions, preventing excessive use of the court system, and the common sense dictum that the greater offense includes the lesser[146] give way to other perceived interests.

V. Miscellaneous Issues

The next problem is whether in direct criminal appeals as distinguished from habeas corpus the appellate court may entertain issues and appeals which are presented out of time. There are two ways this may be presented: first, if notice of appeal has not been timely or properly filed, the appellate court is said to have no jurisdiction to hear the case and will decline review; and second, after an opinion is filed, the parties have a short period of time to file for rehearing before the case is closed. The judgment on the record statute has had very little, if any, effect on these matters. The Iowa supreme court for a long time was implacable in requiring proper and timely notice of appeal.[147] This has changed[148] because of a federal habeas corpus decision[149] and not because of the judgment on the record statute. Thus a defendant is somewhat protected from his attorney's inadvertence but the pure afterthought must be

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[143] 28 U.S.C. § 2106 (1970).

[144] Austin v. United States, 382 F.2d 129, 142 (D.C. Cir. 1967). The mandate was a remand with directions to the District Court either to enter judgment upon the lesser offense or, if "undue prejudice to the accused" were found, to order a new trial. *Id.* at 143; *see also* DeMarrias v. United States, 453 F.2d 211 (8th Cir. 1972).

[145] Austin v. United States, 382 F.2d 129, 140-41 (D.C. Cir. 1967). The cases are collected in n.24 at 140 and the statement is made in n.25 at 141.

[146] Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944). The court discusses possible prejudice to the defendant in Austin v. United States, 382 F.2d 129, 142-43 (D.C. Cir. 1967).

[147] *See, e.g.*, State v. Horsey, 176 N.W.2d 769 (Iowa 1970) (sua sponte); Blanchard v. Bennett, 167 N.W.2d 612 (Iowa 1969). *See also* Martin v. Wainwright, 469 F.2d 1072 (5th Cir. 1972).

[148] State v. Wetzel, 192 N.W.2d 762, 764 (Iowa 1971); State v. Horsey, 180 N.W.2d 459, 460 (Iowa 1970) (rehearing, delayed appeal granted). *See* DeMarrias v. United States, 444 F.2d 162 (8th Cir. 1971), *rev'd*, 453 F.2d 211 (8th Cir. 1972); Michigan General Court Rule 806.4, 1 Mich. App. lxii (1963) (delayed appeal).

[149] Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970).

raised in a post-conviction setting rather than a direct appeal. The Iowa court has also been strict about preventing afterthoughts from being raised by motion for rehearing after an opinion is filed, and the court has held that it will not consider matters not presented in the original submission.[150] The court now seems to be loosening up somewhat because of post-conviction remedies rather than the judgment on the record statute.[151]

The judgment on the record statute was involved in the appeal on the clerk's transcript alone[152] which was a throwback to feudal England.[153] That practice has been stopped, at least for indigents.[154] The clerk's transcript appeal is not, however, completely dead;[155] there are still a few appeals where, citing the judgment on the record statute, the defendant's attorney has asked the court to perform counsel's function.[156] If these are indigent appeals and if the defendant fails to knowingly waive his right to a full appeal with briefs and an oral argument, then it it is doubtful that this process would pass a constitutional test. In *Anders v. California,*[157] the Supreme Court considered an appeal in which the defendant's attorney had filed a "no merit" letter and the appellate court had examined the record from the trial court before affirming.[158] The Court held that the appeal was infirm stating that the procedure:

> did not furnish petitioner with counsel acting in the role of an advocate nor did it provide . . . full consideration and resolution of the matter as is obtained when counsel is acting in that capacity.[159]
>
> . . . .
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> [T]he Court has only the cold record which it must review without the help of an advocate.[160]
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> . . . .
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> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*.[161]

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150 State v. Rutledge, 243 Iowa 201, 50 N.W.2d 801 (1952); *see also* State v. Waddell, 191 Minn. 475, 254 N.W. 627 (1934). *But see* Savery v. Eddy, 242 Iowa 822, 45 N.W.2d 872, *rehearing*, 48 N.W.2d 230 (1951).

151 State v. Horsey, 180 N.W.2d 459, 460 (Iowa 1970).

152 Uhlenhopp, *Judicial Reorganization in Iowa*, 44 IOWA L. REV. 627 n.73 (1958). *See, e.g.*, State v. Wilson, 110 N.W.2d 333 (Iowa 1961); State v. Copenhaver, 110 N.W.2d 333 (Iowa), *cert. denied*, 368 U.S. 806 (1961).

153 ORFIELD, *supra* note 12, at 22.

154 Entsminger v. Iowa, 386 U.S. 748 (1967); *see* State v. Entsminger, 160 N.W.2d 480 (Iowa 1968); *compare* State v. Entsminger, 137 N.W.2d 381 (1966).

155 State v. Kent, 178 N.W.2d 287 (Iowa 1970); State v. Kent, 178 N.W.2d 287 (Iowa 1970) (second case).

156 State v. Brown, 176 N.W.2d 180 (Iowa 1970) (appeal submitted on reporter's transcript and clerk's transcript without brief or argument except as raised in resistance to state's motion to dismiss appeal); State v. Chance, 175 N.W.2d 125 (Iowa 1970); State v. Vinzant, 258 Iowa 98, 137 N.W.2d 599 (1965). *Cf.* State v. Masters, 171 N.W.2d 255 (Iowa 1969); *see also* Hawkins v. State, 49 Ala. App. 26, 268 S.2d 492 (1972).

157 386 U.S. 738 (1967). A useful recent article is Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1972).

158 People v. Anders, 167 Cal. App. 2d 65, 333 P.2d 854 (1959) which followed the procedure recognized in *In re* Nash, 39 Cal. Rptr. 205, 393 P.2d 405, (1964).

159 Anders v. California, 386 U.S. 738, 743 (1967).

160 386 U.S. 738, 745.

161 *Id.* 744; *see also* Douglas v. California, 372 U.S. 353, 357-58 (1963).

A brief of some kind, the Court held, was the constitutional imperative.[162] Thus, unless the indigent defendant knowing his right to a full dress appeal and understanding what it entails explicitly waives the appeal, his attorney is exposing himself to a later charge of having been ineffective counsel;[163] and the conviction may be upset in a later proceeding.[164] It is not enough to place the cold record before the reviewing court and say: "Here it is. You decide it as the statute requires."[165]

The Iowa judgment on the record statute has been frequently cited in opinions even though review is frequently brusque.[166] Perhaps the statute is cited because of the Iowa practice of appointing a different attorney to brief and argue on appeal.[167] Appellate counsel reads the paper record and transcript from the trial and finds and seeks to argue assertible error which trial counsel did not notice below. The appellate attorney may cite the judgment on the record statute.[168] That assignment is generally not well taken for it may be omnibus and, if the appeal is properly argued, cumulative of other assignments[169] and will not receive much separate consideration. It might be prudent to remind the court of its duty under the statute but the court seems willing to perform its duty anyway.[170] The judgment on the record statute has been operative in several reversals.[171] There have, however, been fewer appeals reversed recently than in earlier times. The observer, nevertheless, cannot say that incorrect convictions are being affirmed nor that the court is ignoring its statutory duty. Indeed with the full scale federalization of state criminal law and the expansion of remedies both by direct review and collateral attack,[172] it may safely be stated that criminal case defendants are receiving

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[162] 386 U.S. 738, 744.

[163] *Id.* at 745.

[164] The Iowa appeals appear to have anticipated this. State v. Brown, 176 N.W.2d 180 (Iowa 1970) (defendants' request). State v. Masters, 171 N.W.2d 255, 256 (Iowa 1969). *But see* State v. Chance, 175 N.W.2d 125 (Iowa 1970). The problem is whether a convicted defendant can *knowingly* with full understanding waive a full appeal. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); DeMarrias v. United States, 444 F.2d 126, 164 n.3 (8th Cir. 1971).

[165] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS § 3.2(b), at 73-83 (Approved Draft 1970); Hawkins v. State, 49 Ala. App. 26, 268 So. 2d 492, 495-97 (1972) (Judge Tyson concurring specially).

[166] State v. Hinsey, 200 N.W.2d 810, 818 (Iowa 1972).

[167] State v. Thomas, 190 N.W.2d 463, 464 (Iowa 1971); State v. Wiese, 182 N.W.2d 918, 920 (Iowa 1971); State v. Galavon, 181 N.W.2d 147, 150 (Iowa 1970); State v. Cox, 240 Iowa 248, 252, 34 N.W.2d 616, 619 (1948); State v. Mart, 237 Iowa 181, 20 N.W.2d 63 (1945); State v. Brainard, 25 Iowa 572, 580 (1868).

[168] *See, e.g.*, State v. Young, 172 N.W.2d 128, 131 (Iowa 1969).

[169] *See, e.g.*, State v. Brown, 253 Iowa 658, 113 N.W.2d 286 (1962).

[170] *See, e.g.*, State v. Hinsey, 200 N.W.2d 810, 818 (Iowa 1972).

[171] State v. Lunsford, 204 N.W.2d 613 (Iowa 1972); State v. McCarty, 179 N.W.2d 548 (Iowa 1970); State v. Sonderleiter, 256 Iowa 106, 99 N.W.2d 393 (1959); State v. Cusick, 248 Iowa 1168, 84 N.W.2d 554 (1957); State v. Walker, 246 Iowa 932, 70 N.W.2d 177 (1955) (§ 793.18 not cited in sua sponte reversal); State v. Martin, 243 Iowa 1323, 55 N.W.2d 258 (1952); State v. Cox, 240 Iowa 248, 34 N.W.2d 616 (1948); State v. Schrup, 229 Iowa 909, 295 N.W. 427 (1940); State v. Barr, 123 Iowa 139, 98 N.W. 595 (1904); State v. Nine, 105 Iowa 131, 74 N.W. 945 (1898); State v. Potter, 28 Iowa 554 (1970); State v. Brainard, 25 Iowa 572 (1868).

[172] Henry v. Mississippi, 379 U.S. 443 (1965); Townsend v. Sain, 372 U.S. 293

more rather than less consideration in appeals. Trial and appellate practice, moreover, are improving; and it may well be that there is less occasion to cite the judgment on the record statute because there is less need to do so. Trial and appellate rules are now less technical than previously, and courts are more willing to decide cases on the merits than they were earlier in this century. Countervailing pressure to attenuate review stems from crowded dockets, congestion and the feeling that many indigent criminal appeals lack substantive merit. A satisfactory compromise is hard to find.

VI. Conclusion

The general problem considered is the effect of a statute on the scope of review. Scope of review is a complicated problem;[173] and the effect of statutes may be questionable since courts, in Professor Jafee's words, "will find it easy to ignore or 'interpret' phrases which are at best so essentially imprecise, so ultimately dependent on the tone and mood of judicial application."[174] Jaffee does conclude that "[i]f in particular cases, however, the legislature makes clear an intention to broaden judicial review, the court should conscientiously seek an intellectual stance which expresses the statutory intention."[175]

The judgment on the record statute evidences an intent to expand the appellate inquiry in criminal appeals. The general policy of the statute seems to be a reasoned decision on the merits in criminal appeals. There has not been much scholarly commentary on the problem of scope of review in criminal appeals;[176] and similarly, the judgment on the record statute has not received much attention[177] although it has been frequently cited by the Iowa court. An appellate court's general power to broaden review is not doubted; the questions are when it should be exercised[178] and whether the judgment on the record statute makes any difference.

Some conclusions may be advanced. The judgment on the record statute has had no effect on sentence review,[179] notice of appeal and rehearing[180] even though a broad reading might expand the scope of the inquiry in the appellate court and allow the court to consider questions which are now precluded. In appeals where the evidence does not support the convicted offense, the appellate court's arguable power under the judgment on the record statute to enter a

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(1963) (federal habeas corpus available unless state proceeding has provided an adequate opportunity to present claim). Circuit Note: Criminal, *supra* note 4, at 511-23.

173 L. Jaffee, Judicial Control of Administrative Action, chs. 14-16 (1965) [hereinafter cited as Jaffee].

174 *Id.* at 620; *see also* Vestal, *supra* note 11, at 498-99, 504-05.

175 Jaffee, *supra* note 173, at 620.

176 Orfield, *supra* note 12, at 77-100.

177 *See, e.g.*, for a brief discussion, *Id.* at 98-99; Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Presented*, Part III, 8 Wis. L. Rev. 147, 149 (1933); Ladd, *Assignment of Errors and the New Iowa Supreme Court Rules*, 21 Iowa L. Rev. 673, 697 (1936); 41 Iowa L. Rev. 451 (1956).

178 Orfield, *supra* note 12, at 95; Campbell, *supra* note 7, at 94.

179 *See* text at notes 114-23, *supra*.

180 *See* text at notes 147-51, *supra*.

conviction on a lesser included offense is rejected, and the case is sent back for retrial. This puts Iowa in a class by itself.[181] The judgment on the record statute, moreover, was a part of the statutory apparatus for the clerk's transcript appeal which, before it was declared unconstitutional, deprived the defendant of a full dress review and an adversary appellate procedure.[182]

The effect of the judgment on the record statute on appeals where the appellant has failed to follow the briefing rules is not so clear. In line with a general national trend, the Iowa decisions on proper assignments of error have become less strict.[183] The trend is more apparent in criminal than in civil cases,[184] although it is not certain that the judgment on the record statute is responsible.[185] The trend away from hyper-technical assignment of error rules reflects the general movement in the direction of decisions on the merits. The federal rules of appellate procedure do not require assignments of error but call for "a statement of the issues presented for review,"[186] and more and more state systems are adopting appellate rules modeled upon the federal rules thereby doing away with the assignment of error problem.

When the defendant's briefing has failed completely, the Iowa court has cited the judgment on the record statute to provide him some review.[187] This may be similar to treatment in other appellate courts.[188] It may be questioned. Why should the overburdened appellate court take over the attorney's job? In these cases, the defendant's attorney is not even an amicus curiae as in *Anders*. However, this may be in violation of the adversary principle required by *Anders v. California* in indigent appeals.[189] If appeals are not briefed or improperly briefed, the solution is not to require the court to both brief and decide the appeal but rather to improve the quality of legal services in indigent appeals.[190] It must be observed that this general statement neither briefs nor decides the case before the court.[191]

The judgment on the record statute has been most frequently cited in cases where a question has been raised on appeal but the defendant's attorney failed to do what was necessary at trial to preserve the record for appeal. In

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181 *See* text at notes 130-46, *supra.*
182 *See* text at notes 152-54, *supra.*
183 *See* text at notes 31-44, *supra.*
184 *Compare* State v. McClelland, 162 N.W.2d 457, 461 (1968) and State v. Fielder, 260 Iowa 1198, 152 N.W.2d 236 (1967) *with* Henneman v. McCalla, 260 Iowa 60, 79-80, 148 N.W.2d 447, 458-59 (1967); Elkin v. Johnson, 260 Iowa 46, 53, 148 N.W.2d 442, 446 (1967).
185 *Compare* IOWA CODE §§ 793.14-15 (1973) *with* § 793.18. *See* State v. Johnson, 259 Iowa 599, 600, 145 N.W.2d 8, 9 (1966).
186 FED. R. APP. P. 28(a)(2).
187 *See* text at note 156, *supra.*
188 United States v. Sanders, 434 F.2d 219 (4th Cir. 1970) (pro se brief with no citations considered).
189 *See* text at notes 157-65, *supra.*
190 State v. Peterson, 266 Minn. 77, 123 N.W.2d 177 (1963) (court noted probable error not assigned, new briefs ordered, conviction reversed). ORFIELD, *supra* note 12, at 100. In the writer's opinion, if attorneys were adequately compensated, the problem would dissipate if not disappear.
191 *Id.*

many appeals, the Iowa court has cited the judgment on the record statute to review.[192] In appeals where evidentiary rulings or jury instructions for the sufficiency of the evidence to support the verdict were at issue, the court has declined to review the specifically asserted error. However, citing the judgment on the record statute, the court has often reviewed the proceedings generally or to determine whether the defendant received a fair trial.[193] This seems to be a circuitous route to review because the asserted error may deny a fair trial. The criminal defendant does receive a more thorough review than the civil litigant, for the Iowa court in civil appeals specifically refuses to review assigned error when the record below was not properly saved.[194]

It is next to impossible to determine whether the defendant-appellant in Iowa receives a more thorough review than a defendant-appellant elsewhere when the attorney fails to save the record below. Three generalizations are posited to explain a broadened scope of review: first, the court has a duty to decide cases on the merits rather than procedural technicalities;[195] second, the more serious the asserted error, the more likely that the court will review it;[196] and third, the trial court has a duty to instruct the jury on the whole case.[197] The cases, nationally, are mixed and puzzling.[198] Some refuse to review unless a timely objection was asserted at trial.[199] Some state cases do not review, in the absence of timely objection, unless fundamental error is asserted.[200] The federal standard is one of declining to review in the absence of plain error.[201] Some cases state the rule, note that the case does not fall within the rule and then go on to review the asserted error.[202] The scope of these concepts remains unclear, and their boundaries are unexplored. Even

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192 *See* cases cited notes 50-53, 56-59, *supra*.

193 *See* cases cited notes 67-73, 75, 88, 91-95, 97-100, 103-05, 108, 111, 113, *supra*. *See also* State v. Lunsford, 204 N.W.2d 613 (Iowa 1972).

194 Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971) ($10,000 punitive damage award to thief not reviewed because defendant's attorney did not challenge instructions at trial). Because punitive damages are justified as punishment or a civil fine, [W. PROSSER, LAW OF TORTS 9-11 ch. 1, § 2 (4th ed. 1971)] could the court have applied the criminal standard and reviewed the record to determine whether the instructions had any basis in the evidence?

195 Campbell, *supra* note 7, at 94.

196 Campbell, *supra* note 7, at 179.

197 Campbell, *supra* note 7, at 173. *See* text at notes 77-100, *supra*.

198 *See* 24 C.J.S. *Criminal Law* § 1669 (1961).

199 *See, e.g.*, State v. Smith, 263 La. 75, 267 So. 2d 200 (1972); State v. Monroe, 263 La. 31, 267 So. 2d 184 (1972); People v. Spells, 42 Mich. App. 243, 201 N.W.2d 361 (1972); People v. Greene, 42 Mich. App. 154, 201 N.W.2d 664 (1972); Ferrell v. State, 267 So. 2d 813 (1972). *But see* Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950).

200 Barrett v. State, 266 So. 2d 373, 375 (Fla. Ct. App. 1972); *see generally* 43 TEMPLE L.Q. 228 (1970); *see also* People v. Gates, 25 Mich. App. 625, 181 N.W.2d 620 (1970) (miscarriage of justice); ILL. STAT. ch. 110A, § 451(c) (Smith-Hurd 1968); People v. Wicks, 115 Ill. App. 2d 19, 252 N.E.2d 698 (1969).

201 *See, e.g.*, United States v. Crowder, 464 F.2d 1284, 1285 (9th Cir. 1972); United States v. Price, 464 F.2d 1217, 1219 (8th Cir. 1972); Rules of Evidence for United States Courts Rule 103(d) (effective July 1, 1973); *see also* 1A New Jersey Practice Rule 2:10-2 (Del Dio 1971). *See generally* Circuit Note: Criminal, *supra* note 4, at 503-06.

202 United States v. McGee, 464 F.2d 542, 543 (5th Cir. 1972).

if a plain error or fundamental error barrier is erected to bar review, the court must expend some effort to determine whether the asserted error is of plain or fundamental stature. The problem is to mark out the difference between these cryptic concepts and the Iowa fair trial review. The question can be put this way: is there a borderland of error which is not harmless error, and if proper objections are made, reversible error; yet if no objections are made, neither plain nor fundamental, affirmable error? Stated another way: does plain or fundamental error include all error which is not harmless error? Or is there a middle gound of error which, if proper objections are interposed, is reversible and not harmless but, unless the record is preserved at trial, not plain and not reversible? This borderland or middle ground seems to be occupied by at least some cases where the error would or might be reversible if proper objection had been taken but, in the absence of timely objection, was not reviewed.[203] The next question is whether in Iowa appeals there are errors which are reversible if proper objection is made in the lower court but which would be affirmable following an argument for the first time on appeal and review for a fair trial. The writer cannot say that there are any of those cases but neither can he deny that there may be some.[204] The conclusions, then, are

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[203] Cases which apparently support the textual statement are: United States v. Johns, 466 F.2d 1364, 1365 (5th Cir. 1972); *compare* United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Wright, 466 F.2d 1256, 1259 (2d Cir. 1972); United States v. Tanks, 464 F.2d 547, 548 (9th Cir. 1972); Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970); Barrett v. State, 266 So. 2d 373 ,375 (Fla. Ct. App. 1972); People v. Jackson, 41 Mich. App. 530, 200 N.W.2d 465 (1972). *See generally* Circuit Note: Criminal, *supra* note 4, at 504-05.

[204] *Cf.* State v. Binkley, 201 N.W.2d 917, 919 (Iowa 1972); State v. Wallace, 261 Iowa 104, 152 N.W.2d 266 (1967). In Mr. Sullins' article, 22 DRAKE L. REV. 435 (1973) *supra*, many cases are cited for the waiver principle: the idea that, if there is no timely objection, the defendant waives consideration of the question and the issue cannot be considered on appeal. The prudent defense attorney should heed carefully the admonitions of Mr. Sullins' article. Some of the cases cited appear to stand for the proposition that there are certain types of error which will be reversed if proper and timely objection is taken but affirmed in the absence of proper and timely objection. *See* State v. Binkley, 201 N.W.2d 917, 918-19 (Iowa 1972); State v. Coffee, 182 N.W.2d 390 (Iowa 1970); State v. Allnut, 156 N.W.2d 274 (Iowa 1968); State v. LaMar, 151 N.W.2d 496 (Iowa 1967). The matter is, however, not so clear. In many of the cited cases, the asserted error said to be waived was technical, easy to correct upon a timely motion and perhaps not prejudicial. *See* State v. Williams, 193 N.W.2d 529 (Iowa 1972); State v. Coffee, 182 N.W.2d 390, 394-96 (Iowa 1970); State v. Medina 165 N.W.2d 777, 779 (Iowa 1969). In other instances, the asserted error, said to have been waived, was simply harmless. *See* State v. Coffee, 182 N.W.2d 390, 393 (Iowa 1970). In many appeals, moreover, where the error is said to have been "waived," the entire record was reviewed under a fair trial standard. *See* State v. Boose, 202 N.W.2d 368, 370 (Iowa 1972); State v. Taylor, 201 N.W.2d 724, 727 (Iowa 1972); State v. Chance, 175 N.W.2d 125 (Iowa 1970). In many others the waiver principle was stated but the asserted error was reviewed to some extent. *See* State v. Binkley, 201 N.W.2d 917, 919-20 (Iowa 1972); State v. Taylor, 201 N.W.2d 724, 726-27 (Iowa 1972); State v. Curtis, 192 N.W.2d 758, 759 (Iowa 1972) (no prejudice appeared); State v. Garrett, 183 N.W.2d 652, 656 (Iowa 1971); State v. Shemon, 182 N.W.2d 113 (Iowa 1970); State v. Rankin, 181 N.W.2d 169 (Iowa 1970) (fair trial); State v. Davis, 175 N.W.2d 407, 409-11 (Iowa 1970) (fair trial); State v. Olbers, 174 N.W.2d 649, 652 (Iowa 1970); State v. Brown, 172 N.W.2d 152, 160 (Iowa 1969) (fair and impartial trial); State v. Medina, 165 N.W.2d 777, 779 (Iowa 1969); State v. Wallace, 152 N.W.2d 266, 268-69 (Iowa 1967) (fair trial). There is a lack of impressive certainty and solidarity about the cases. While the principle of the judgment on the record statute is still very much alive (State v. Lunsford, 204 N.W.2d 613 (Iowa 1973)), full compliance with procedural rules is the only safe course to follow. If the rules are not

uncertain and indefinite; and while it might seem that the Iowa criminal appellant is receiving a broader and more tolerant review, it is impossible to be certain.

Perhaps, commensurate with broadened inquiry on collateral attack,[205] appellate courts on direct appeal should be more willing to examine issues not asserted below.[206] Any category of assertible error which may be examined in habeas corpus should be arguable on direct appeal even though no timely objection was interposed at trial.[207] This will advance the interests in deciding cases on the merits, speed termination of litigation, prevent unnecessary litigation and develop a rational jurisprudence. If these direct appeals are affirmed on procedural points, the defendant may later begin a separate collateral proceeding to assert his unconsidered error. Until the asserted error is decided, there may be no guidance to lower courts on an important point of law.[208] It may be that the Iowa court, by use of the judgment on the record statute, has begun to forge intelligible standards in this murky area.

In addition to the instrumental and more tangible functions discussed above, the judgment on the record statute may have a symbolic value. The statute does not expand the power of the appellate court,[209] and its significance is one of attitude and tone.[210] The Iowa court frequently states that it has read the record or the transcript.[211] This may be important, not because the court could do it but because it does do it. The court not only does justice but also bends over backward to give the appearance of doing justice. There is some importance in taking pains and articulating reasons. This value creates not only accuracy in deciding cases but also a feeling of personalized justice. If the entire record has been read by a justice of the state supreme court, the conviction and affirmance may take on heightened credibility and credence. Carrington observes that the judicial process is "importantly symbolic" because "it is ritual which celebrates our common concern for the right of each individual to insist that official decisions affecting him be made subject to general prin-

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followed, there may be review but this review may be under a less rigorous standard. For full consideration, the asserted error must be presented to both the trial and the appellate court.

205 Townsend v. Sain, 372 U.S. 293 (1963).

206 State v. Monroe, 263 La. 31, 267 So. 2d 184 (1972); Bazelon, *supra* note 4, at 699.

207 *Cf.* Henry v. Mississippi, 379 U.S. 443, 452-53 (1965). The problem of the adequacy of trial counsel is interesting and inconclusive. Trial counsel will infrequently argue either at trial or on appeal that his client was deprived of the effective assistance of counsel. Bazelon, *supra* note 4, at 668. Yet there are cases holding that a defendant cannot assert ineffective trial counsel on appeal unless an objection was made at trial. State v. Clough, 289 Minn. 527, 185 N.W.2d 529 (1971); State v. McGee, 336 Mo. 1082, 83 S.W.2d 98 (1935). Other cases review the adequacy of counsel when the issue was apparently not raised below. State v. Johnson, 189 Neb. 113, 201 N.W.2d 200 (1972). In Iowa, lack of effective counsel is reviewable on collateral attack. Kime v. Brewer, 182 N.W.2d 154, 156 (Iowa 1970). *See also* Alesi v. Craven, 446 F.2d 742 (9th Cir.), *cert. denied*, 404 U.S. 856 (1971); Walker v. Wainwright, 350 F. Supp. 916 (M.D. Fla. 1972).

208 Bazelon, *supra* note 4, at 670.

209 Campbell, *supra* note 7, at 94.

210 Vestal, *supra* note 11, at 498.

211 *See* cases cited in notes 104-05, *supra*.

ciples of humane quality enforced by high officials personally familiar with his problems."[212] Compassion and sensitivity for individual problems may reduce the sting of a conviction and lend legitimacy to our frequently maligned judicial institutions. This is intangible and cannot be measured. The difficulty lies in the crowded dockets and the trend toward depersonalized justice. If appellate judges use much of their time deciding cases with merely individual significance, less effort can be expended on more important appeals; the quality of their work product might well suffer, and even the extraordinary may become blurred by routine. In this context, the judgment on the record statute is old but hardly venerable and may be a useless anachronism. Limited judicial resources, it must be agreed, should be used to meet adjudicative needs in the order of their relative importance. Perhaps the symbolic value thought to be achieved under the judgment on the record statute must give way to more tangible and instrumental uses of judicial time and the judgment on the record statute preserved as a safety valve for the extraordinary case.

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[212] ABA Proceedings, *Improving Procedures in the Decisional Process*, 52 F.R.D. 51, 78 (1971).