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Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases

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This article examines the plain error doctrine in criminal cases in the federal courts. An examination of the earliest plain error cases shows the federal courts' concern that, without the authority to address errors not preserved with a contemporaneous objection, federal courts would affirm convictions and sentences that were either wrongful or unfair. But the plain error doctrine that the federal courts now employ, as announced in *United States v. Olano*, is poorly suited to discovering and correcting even the serious errors that the plain error doctrine was intended to remedy. Because the doctrine is discretionary and fact-specific, it fails to generate precedents to guide future courts and litigants and perpetuates a guilt-based approach to evaluating errors. Moreover, *Olano*'s four-pronged test leads appellate courts away from the most critical inquiry: Did the error undermine the fairness and reliability of the defendant's conviction and sentence? This article proposes a new formulation of the plain error doctrine that addresses these problems.

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"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."[2]

I. INTRODUCTION

The traditional view among lawyers and jurists is that the appellate court's role is to ensure the trial court "properly resolved" the case before it.[3] Under this view, the appellate court exists to correct errors that occurred in proceedings before a lower court.[4] The appellate court fulfills its role by "subjecting the correctness of the rulings of the court below to that careful examination which the discharge of [its] duty require[s]."[5]

In the context of the direct appeal of a criminal conviction, an appellate court's review is "the final guarantor of the fairness of the criminal process."[6] Indeed, "[r]eversal on appeal is the quality control mechanism of the criminal justice system."[7] Without the error correction mechanism that appellate courts provide, trial courts would exercise "absolute" and "unreviewable" power over the disposition of criminal defendants' cases.[8] Even though there is no federal constitutional right to an appeal of a criminal conviction,[9] the notion of the appeal is now so

2. Hormel v. Helvering, 312 U.S. 552, 557 (1941).

3. Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 10 (1991); *see also* Wend v. People, 235 P.3d 1089, 1098 (Colo. 2010) ("Ensuring fundamental fairness in trial is the beacon of plain error review."); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986) (noting that the "primary function" of appellate courts is "to review for error determinations made at the trial level").

4. *See* Lester B. Orfield, *The Scope of Appeal in Criminal Cases*, 84 U. PA. L. REV. 825, 840 (1936).

5. Wiborg v. United States, 163 U.S. 632, 660 (1896); *see also* Orfield, *supra* note 4, at 840 ("The business of appellate courts is conceived of as being not to consider cases on their merits but to correct the errors of the trial court.").

6. David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 518 (1990).

7. *Id.* at 519; *see also* Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting) ("[T]he reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.").

8. Rossman, *supra* note 6, at 519.

9. *See* Abney v. United States, 431 U.S. 651, 656 & n.3 (1977); McKane v. Durston, 153 U.S. 684, 687–88 (1894) ("It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. . . . [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."). *But see Jones*, 463 U.S. at 756 n.1 (Brennan, J.,

fundamental to the operation of our criminal justice system that "a right of appeal is now universal for all significant criminal convictions."[10]

Empirical data confirm that the criminal justice system needs a robust mechanism for identifying and correcting trial errors. One recent study of the error rate in criminal convictions for capital rape-murder cases in the 1980s concluded that our system convicted innocent people at a rate of somewhere between 3.3% and 5%.[11] If the system errs this frequently when trying the kinds of serious crime that demand the highest scrutiny from trial courts, prosecutors, and defense counsel,[12] it is logical to assume it errs even more frequently in cases involving lesser scrutiny, such as theft, battery, or drug trafficking. These errors are also worrisome because one consequence of convicting an innocent person is that a guilty person remains free to continue to commit crimes.[13]

It may once have been true that a "fair" criminal justice system was the best we could hope for because we had no way to measure the accuracy of the system. Now that we know the system is less reliable than we once thought,[14] it is imperative to improve our system's ability to detect and correct the errors that lead to incorrect convictions.

True, appellate review—because it focuses on ensuring compliance with the law and procedural rules—may not be the best tool for correcting every cause of incorrect convictions. For instance, according to data on the Innocence Project's website, the leading cause of wrongful

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dissenting) (speculating that defendants are entitled to "at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding").

10. *Jones*, 463 U.S. at 757 n.1 (Brennan, J., dissenting); *see also* James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 376 (1985). Some states constitutionally guarantee criminal defendants the opportunity to appeal. *Id.* at 376–77. Professor Rossman also suggests that, even before criminal defendants had a right to appeal their convictions, there were other judicial safeguards to ensure the reliability of the judgment of conviction. *See generally* Rossman, *supra* note 6, at 528–37.

11. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007).

12. *See* Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) ("Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed.").

13. *See* Evan Whitton, *America's English-Style Legal System Evolved to Conceal Truth, Not Reveal It*, ATLANTIC (June 14, 2012, 7:31 AM), http://www.theatlantic.com/international/archive/2012/06/americas-english-style-legal-system-evolved-to-conceal-truth-not-reveal-it/258417 (suggesting that more than four percent of the U.S. prison population is innocent and "more than half of guilty defendants get off").

14. *Compare* Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."), *with Marsh*, 548 U.S. at 198 (Scalia, J., concurring) (agreeing with an estimate of an error rate in criminal convictions of 0.027%).

convictions is mistaken identification.[15] There may be no way appellate review can address that problem. But prosecutorial misconduct, police misconduct, bad lawyering, and flawed scientific evidence also contributed significantly to wrongful convictions;[16] and these problems can likely be reduced by attentive appellate enforcement of the rules intended to prevent them. By ensuring compliance with laws designed to combat these sources of error, appellate courts can play a role in increasing the accuracy of the criminal justice system.

Yet the appellate court has a second role. In addition to identifying errors, the appellate court must also consider whether a trial court's error merits reversal.[17] Even though the appellate court must examine the consequence of the errors in the factual context of each case to decide this question, the role of the appellate court is not, as the U.S. Supreme Court has often emphasized, "to determine guilt or innocence."[18] This view of the role of the appellate courts as guarantors of fairness and reliability (rather than guilt or innocence) is not controversial.

In light of the importance of appellate review of criminal convictions, this article questions whether the Supreme Court's plain error doctrine, as articulated in *United States v. Olano*, establishes a workable "discretionary" framework for allowing appellate courts to remedy unpreserved errors—those not preserved with a timely objection before the trial court—that "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'"[19] An examination of this doctrine shows that it encourages appellate courts to dispose of a defendant's appeal without a precedent-oriented legal analysis of asserted errors and their effects on the fairness and reliability of the process that led to the defendant's conviction and sentence. Rather, it diverts the appellate court's attention from the correctness of the trial court's rulings and the seriousness of any deviations from the law on the defendant's trial and sentencing in favor of reconsidering the guilt or innocence of the defendant. This is a problem because empirical evidence suggests that when appellate courts focus on the evidence of guilt, they are not particularly good at detecting and correcting error. In one review of DNA-related exonerations, ten percent of appellate courts declined to reverse in spite of error because the evidence was "overwhelming."[20] And, because the

15. *Factors Leading to Wrongful Convictions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/factors_74_chart.php (last visited Jan. 20, 2013).

16. *Id.*

17. *See* FED. R. CRIM. P. 52(a).

18. Kotteakos v. United States, 328 U.S. 750, 763 (1946) (citations omitted).

19. United States v. Olano, 507 U.S. 725, 732 (1993) (alteration in original) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

20. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 109 (2008).

plain error inquiry purports to be discretionary, it also prevents the creation of precedent that would guide both future defendants and appellate courts in their analyses of the seriousness of unpreserved errors on the fairness and reliability of their own judicial proceedings.

For instance, in *United States v. Flores-Perez*,[21] the defendant argued that the prosecution engaged in misconduct at trial.[22] On appeal, the United States conceded and the Court of Appeals agreed that the trial court erred in failing to remedy the prosecutorial misconduct, even without the aid of a timely objection from defense counsel.[23] Nevertheless, without any further explanation, the appellate court concluded that the weight of the evidence against the defendant was so significant that the trial court's error had not "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings."[24] Thus, the court declined to exercise its discretion to correct the error.[25] The court cited no precedent stating that prosecutorial misconduct of the kind the defendant experienced could ever, as a matter of law, "seriously affect[ ] the fairness, integrity or public reputation of the judicial proceedings."[26] The court also failed to explain either why the evidence was so overwhelming that it essentially rendered the conceded error moot, or why the judicial proceeding that convicted defendant was "fair" in spite of the prosecutor's conceded misconduct.[27] In short, the court was so convinced of the defendant's guilt that it was willing to overlook the error.

The majority's account may seem reasonable. No trial is perfect and courts have long recognized that it is a waste of the valuable time of judges, juries, and lawyers to retry a case to correct an error that had no real effect on the jury's decision to convict the defendant.[28] This is particularly true when, as was the case in *Flores-Perez*, defense counsel failed to object to the error at trial.

But the *Flores-Perez* majority's opinion elicited a dissenting opinion from Judge Andrew Kleinfeld.[29] In his dissent, Judge Kleinfeld elaborated on the alleged prosecutorial misconduct.[30] The prosecutor told the jury that, when they retired to the jury room, they were "no longer obli-

21. 311 F. App'x 69 (9th Cir. 2009).

22. *Id.* at 70.

23. *Id.*

24. *Id.* (citation and internal quotation marks omitted).

25. *Id.*

26. *Id.* (alteration in original) (citation and internal quotation marks omitted).

27. *See id.*

28. *See, e.g.*, FED. R. CRIM. P. 52(a); Kotteakos v. United States, 328 U.S. 750, 759–60 (1946).

29. *Flores-Perez*, 311 F. App'x at 71 (Kleinfeld, J., dissenting).

30. *Id.*

gated to presume innocence."[31] The prosecutor also told the jury that there was a "lengthy report" about the defendant that, "according to the rules of evidence, you will not be seeing."[32] In Judge Kleinfeld's view, the "case ultimately boiled down to a credibility determination—would the jury believe [the defendant] or the Border Patrol agents."[33] Therefore, Judge Kleinfeld concluded that the prosecutor's misconduct *did* "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings," and he would have reversed.[34]

To be clear, this article does not argue that the *Flores-Perez* court necessarily reached the wrong result.[35] However, this article does contend that both courts and defendants would be better served if the majority had employed a precedent-oriented legal analysis to the facts of the case, thereby fully articulating the reasoning for its refusal to reverse the defendant's conviction. The parties would be more readily able to determine whether the court reached a legally justifiable result (even if not the desired result) if the majority had fully stated the legal and factual rationales for its decision. *Flores-Perez* also illustrates the danger that, in the absence of applicable precedents, appellate courts can substitute their view of the guilt of the defendant for a judgment as to whether the case presented a serious error. Because of these problems, decisions like the *Flores-Perez* majority's decision do little to help future courts or defendants in deciding what kinds and levels of prosecutorial misconduct are sufficiently serious to warrant a remedy.

Given these apparent problems, this article examines the analytical approach that federal appellate courts employ to review and remedy—or to refuse to remedy—an error that a criminal defendant failed to preserve with a timely objection at trial. As section II will show, the plain error doctrine emerged as a safety valve to ensure that appellate courts could relieve a defendant of an improper conviction or illegal sentence without being hamstrung on the technicality of the defendant's failure to object to the error at trial. Because the safety valve operates at the expense of other values that are critical in the adversary setting, courts have struggled to ensure that there is a meaningful limit to the reach of this safety valve to cases where the appellate court is seriously concerned with the possibility that a defendant was unfairly or incorrectly convicted or a defendant was illegally sentenced. Section II argues that although appellate courts' authority to remedy unpreserved errors ought

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* (footnote and internal quotation marks omitted).
35. Indeed, the decision is a faithful (if brief) example of the kind of analysis that the Supreme Court's plain error doctrine requires.

to be exercised only to remedy serious errors, the competing interests of judicial economy and fairness to defendants actually align to support a plain error doctrine that requires courts to develop and apply an analytical, precedent-oriented approach to serious error. Section II will also show that even though the analysis of whether an unpreserved error was sufficiently serious to merit reversal is necessarily a case-specific factual inquiry, appellate courts can still develop precedent to guide future courts and defendants in understanding whether an unpreserved error will merit review and reversal. Section II concludes that such precedents can foster judicial economy and finality because they foreclose appeals of many unpreserved errors, and, in the remaining appeals, appellate courts and defendants will be able to focus their analysis and argument around the existing precedents.

Section III further discusses how the plain error doctrine, as described in *Olano*, fails to snugly connect with the rationales that support allowing appellate courts to engage in a limited review of criminal convictions for serious error. It then proposes a reformulation of the plain error doctrine that would both encourage the development of a body of caselaw to aid judges and defendants in their efforts to decide when an unpreserved error merits reversal and focus appellate courts on the seriousness of trial errors rather than on the innocence or guilt of the defendant.

Section IV returns to the *Flores-Perez* case and concludes by showing how the *Flores-Perez* majority's analysis, regardless of its correctness, demonstrates the need for and value of the rule that this article proposes.

II. THE APPEAL OF THE UNPRESERVED ERROR

The starting point for an analysis of the federal appellate court's authority to review a criminal defendant's appeal of an unpreserved error is the plain error rule: Federal Rule of Criminal Procedure 52(b). A straightforward reading of Rule 52 suggests that courts (including district courts themselves) can remedy an unpreserved error, even when the error is not brought to the court's attention, so long as the unpreserved error affects a party's "substantial rights":[36]

> **(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

36. *See* United States v. Olano, 507 U.S. 725, 732 (1993) (construing FED. R. CRIM. P. 52(b)). Although the party alleging the error is usually a defendant, the rule also applies to prosecutors' contentions of error. *See, e.g.*, United States v. Saleh, 257 F. App'x 740, 746 (5th Cir. 2007) (per curiam) (concluding that the United States had not shown how its substantial rights were affected by the error in calculating the defendant's sentence).

> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.[37]

Even so, in 1993, in *United States v. Olano*, the Supreme Court provided the cornerstone contemporary interpretation of Rule 52's plain error analysis.[38] The *Olano* Court explained that, to merit reversal, an unpreserved error must do more than merely affect substantial rights.[39] The appellant must demonstrate that the error meets all the criteria of a four-pronged test.[40] There must first be an error.[41] Second, this error must be "clear" or "obvious."[42] Third, the error must also affect the defendant's substantial rights.[43] Fourth, the *Olano* rule allows the appellate court the "discretion" to remedy an error only when it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[44] For convenience, this article will refer to an error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings" as a "serious error."

A. *The Authority to Remedy Unpreserved Error*

Although *Olano* provides the seminal modern statement of the plain error doctrine,[45] *Olano* did not purport to announce any new development in its understanding of the plain error doctrine generally or Rule 52 in particular.[46] On the contrary, the Supreme Court explicitly noted

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37. FED. R. CRIM. P. 52(b).

38. *See generally Olano*, 507 U.S. 725.

39. *Id.* at 732.

40. Puckett v. United States, 129 S. Ct. 1423, 1428–29 (2009) (citing *Olano*, 507 U.S. at 732–34, 736).

41. *See Olano*, 507 U.S. at 732–33. *Olano* notes that a waiver of a waivable right—the "intentional relinquishment or abandonment of a known right"—is not an error. *Id.* at 733 (citation and internal quotation marks omitted). Rather, the plain error rule applies to only "forfeiture" or the "failure to make the timely assertion of a right." *Id.*

42. *Id.* at 734 ("At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law."); *see also* United States v. Frady, 456 U.S. 152, 163 (1982) ("By its terms, recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."); *see also generally* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006) (discussing how courts should address a change in the law during the pendency of a defendant's appeal).

43. *Olano*, 507 U.S. at 734–35.

44. *Id.* at 735–36 (citation and internal quotation marks omitted) ("Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the court of appeals has authority to order correction, but is not required to do so."). However, the Supreme Court also wrote, "The court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant . . . ." *Id.* at 736.

45. *See, e.g.*, United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (citing the *Olano* test as the Supreme Court's authoritative statement on the meaning of Rule 52).

46. *Olano*, 507 U.S. at 732–37.

that "the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in 1936 in *United States v. Atkinson*."[47] Likewise, the advisory committee notes to Rule 52 indicated that the rule was intended to serve as "a restatement of existing law," and referred to *Wiborg v. United States*[48] and *Hemphill v. United States*[49] as examples of the existing law related to the review of unpreserved error.[50] In these three early cases, the Court grappled with both the question of whether an appellate court has the authority to review an unpreserved error and, if so, under what circumstances. They show that in spite of the Courts' evident awareness of the competing values inherent in the decision to analyze an unpreserved error, justice compels appellate courts to nevertheless remedy an unpreserved error when it is "vital" to the defendant's case.[51]

Wiborg v. United States, decided in 1896, is the earliest of these three cases. In *Wiborg*, two of the co-defendants appealed their convictions, and argued there was inadequate proof to affirm their convictions.[52] The Supreme Court agreed, briefly acknowledging that the defendants had never argued the inadequacy of the evidence before the trial court: "[A]lthough this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."[53]

The federal rules advisory committee also specifically referred to

47. *Id.* at 736 (citation omitted). Moreover, the *Olano* Court concluded that the error in the case had not affected the defendant's substantial rights, and therefore, the *Olano* Court did not need to consider whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" or whether to exercise its purported corrective discretion. *Id.* at 741. For that reason, the *Olano* Court's statements about the corrective discretion of the appellate court are merely dicta. Jeffrey L. Lowry, Note, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1078 (1994). But even if the statements are not dicta, because the case did not turn on the issue of the appellate court's corrective discretion, I argue that *Olano* did not present a genuine opportunity to examine the soundness of the corrective discretion component of the plain error analysis in a context where the court's analysis of that component mattered. Therefore, *Olano* should not be regarded as a definitive statement on that component of the analysis.

48. 163 U.S. 632 (1896).

49. 112 F.2d 505, 507 (9th Cir. 1940), *rev'd on other grounds*, 312 U.S. 657 (1941) (per curiam).

50. FED. R. CRIM. P. 52 advisory committee's note. *But see Notes to the Rules of Criminal Procedure for the District Courts of the United States*, 4 F.R.D. 405, 405 (1944) ("The Notes are not to be regarded as a part of the Rules. They have been prepared without supervision or revision by the Supreme Court, and are not approved or sponsored by the Court. They have no official sanction and are intended merely as suggestions and guides." (citation and internal quotation marks omitted)).

51. *Wiborg*, 163 U.S. at 658.

52. *See id.* at 658–59.

53. *Id.* at 658.

Hemphill v. United States, in which the Ninth Circuit expressed a similar view:

> True, we have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful. But that is not the case here. . . . [W]e think the harm done by the question was mitigated by the answer and that no prejudice appears sufficient to warrant a reversal . . . .[54]

But the Supreme Court itself provided the fullest exposition of the competing values at stake in the decision to review an unpreserved error in 1936 in *United States v. Atkinson*:

> The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact.[55]

However, *Atkinson* went on to conclude: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[56]

Like *Wiborg* and *Hemphill*, *Atkinson* was, first and foremost, about the question of whether an appellate court has the authority to remedy an unpreserved error.[57] As Lester Orfield explained, "The general rule governing appellate procedure is that the court will refuse to consider questions not raised below."[58] This general rule is often referred to as the contemporaneous-objection rule.[59] Indeed, when a defendant fails to object to an error, one might argue that no "question" was even

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54. *Hemphill*, 112 F.2d at 507. The *Hemphill* court cited no authority for its statement of the law. *See id.*

55. United States v. Atkinson, 297 U.S. 157, 159 (1936).

56. *Id.* at 160.

57. *See id.* at 159–60.

58. Orfield, *supra* note 4, at 840; *see also* United States v. Pielago, 135 F.3d 703, 709 (11th Cir. 1998) ("The narrowness of the plain error rule is a reflection of the importance, indeed necessity, of the contemporaneous objection rule to which it is an exception."); United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir. 1984) ("Reversing a conviction on the basis of an error that the defendant's lawyer failed to bring to the judge's attention is inconsistent with the premises of an adversary system . . . ."). The *Silverstein* court concluded that such a reversal was "justifiable only when the reviewing court is convinced that it is necessary in order to avert an actual miscarriage of justice, which implies the conviction of one who but for the error probably would have been acquitted. [The Court is] not convinced that there was such a miscarriage here." *Silverstein*, 732 F.2d at 1349.

59. *E.g.*, Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

"presented to the trial court," and therefore, "there is nothing [for the appellate court] to review."[60]

Even so, the federal courts have uniformly rejected this notion, and concluded that they have the authority to remedy certain unpreserved errors in criminal cases.[61] They have done so even though, as *Atkinson* discussed, many of the pertinent policy considerations militate against any review of unpreserved errors.[62] Indeed, in addition to addressing the authority of the appellate court to remedy an unpreserved error, *Atkinson* outlined these pertinent policy considerations: (1) fairness to the trial court; (2) fairness to the parties; (3) the public interest in finality of the judgment; (4) the public interest in ensuring that criminal defendants in particular receive a fair trial that correctly applies the applicable law.[63]

The first of these considerations, fairness to the trial court, may seem somewhat out of place. After all, the trial court is supposed to be a neutral party without an interest in the proceeding[64] and the whole notion of the appellate court system presupposes the possibility that trial courts make errors.[65] But courts and commentators have often emphasized (though not recently) that "[c]onsiderations of fairness to the trial court compel" a limited review for unpreserved errors "since the trial court should not be held to have committed an error with regard to a question it did not rule on and which was not called to its attention."[66] This concern for the trial court may be a legacy of the writ of error system that predated the criminal appeal as we know it today.[67] Under the writ of error system, a defendant who believed the trial court had erred could obtain relief through only a new proceeding alleging the error directly against the trial court judge.[68] Of course, under such a system, it would be "unfair to reverse [the trial judge's] judgment on a

60. Orfield, *supra* note 4, at 840.

61. *See generally* Joe Ivy Gillespie, Note, *Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 MISS. L.J. 42 (1951).

62. *Atkinson*, 297 U.S. at 159.

63. *See id.*at 159–60.

64. *See* 28 U.S.C. § 455 (2006).

65. *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 66–67 (1985) (noting that appellate review exists to ensure both that the trial court reaches the correct result and that the process treats the parties fairly).

66. Gillespie, *supra* note 61, at 43; *see* Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 3 (1958) (expressing one appellate judge's view that "[w]e should never unnecessarily try to make a monkey of the judge in the court below, or to trespass on his feelings or dignity and self-respect"); Orfield, *supra* note 4, at 840 ("[I]t seems inequitable to the trial court to chalk up a reversal against it when it was given no opportunity to correct its error.").

67. *See* Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 986 (1989).

68. *See id.*; *see also* Rossman, *supra* note 6, at 541–42.

point which had never been brought to his attention."[69] Although we have long since abandoned the writ of error system, it may be that trial court judges are sensitive about being reversed by an appellate court because reversal implies the trial judge failed to do something that he or she should have done.[70] Out of professional courtesy, the appellate court may still be reluctant to reverse a trial court given the potential that this reversal could cause embarrassment or other negative consequences for the trial court judge.[71]

Conversely, however, the potential for trial court error is present in every appeal.[72] Because the main role of appellate courts is to determine whether the lower court erred, and because appellate courts routinely correct the preserved errors of the lower courts, it is difficult to determine how this consideration ought to influence an appellate court in deciding whether to consider an unpreserved error. This may explain why the Supreme Court's contemporary explanations of the plain error rule do not explicitly refer to fairness to the trial court as a significant component of the appellate court's decision to exercise its authority to review or remedy an unpreserved error.[73] Moreover, an appellate court can still exercise due professional courtesy to lower court judges in the way that the court explains the error in its opinion.[74]

While the consideration of fairness to the trial court has dwindled

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69. Dennerline, *supra* note 67, at 986.

70. *See supra* note 65 and accompanying text. Indeed, it may be that the "clear or obvious" prong of *Olano*'s plain error formulation implies that the error is one the trial court should have prevented, even without the aid of an objection from defendant or defendant's counsel. *See* United States v. Frady, 456 U.S. 152, 163 (1982) ("By its terms, recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.").

71. *See* William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 FLA. L. REV. 957, 962 (1999) ("The reversal of a lower court decision is a conclusive rebuke to a lower court . . . ."); *see also* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 134 (1980) (postulating that a judge's reversal rate is a proxy for the quality of the judge's decisions); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 582 (2003) (theorizing that trial court judges fear reversals because they might engender disrespect for the judge's legal abilities, reduce opportunities for advancement, harm the judge's reputation, and "impede[ ] judges' efforts to shape policy").

72. *See supra* notes 3–8, 65 and accompanying text.

73. *See, e.g.*, United States v. Marcus, 130 S. Ct. 2159, 2164–67 (2010); United States v. Olano, 507 U.S. 725, 731–37 (1993).

74. *See* Ross, *supra* note 71, at 958–62 (suggesting that judges retain a tone of "professional courtesy and respect among judges" and implying that the tone of the appellate court's reversal is important in maintaining the "institutional legitimacy of the courts"). *But see* Higgins & Rubin, *supra* note 71, at 134 (proposing reversal rate as a measure of quality for a judge's decisions). Obviously, a judge's reversal rate could not, by itself, convey the appellate court's understanding that an unpreserved error was never brought to the trial court's attention, and that the error was, therefore, more easily missed. Nevertheless, to the extent that the consideration for the effect of a review of unpreserved error on the trial court is of concern to the appellate court, perhaps scholars

in importance in contemporary cases involving unpreserved errors, the remaining considerations that *Atkinson* identified—fairness to the parties, the public interest in finality of the judgment, and the public interest in ensuring that criminal defendants in particular receive a fair trial—remain vital.

Although *Atkinson* referred to "fairness to the . . . parties" as a unitary concept,[75] it can be conceptualized as referring simultaneously to two distinct but closely related concepts. First, it refers to the basic fairness inherent in giving both sides an equal and contemporaneous opportunity to make their case.[76] Either party can tender objections to the presentation of evidence, argument, selection of jurors, or sentencing. The party responding to the objection can concede or respond to the objection with argument and even with evidence when appropriate.[77] Then, the trial court can rule on the issue, and both sides can continue trying the case with the uncertainty of the objection resolved.[78] In some cases, the trial court can "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."[79] In other cases, a party responding to an objection might concede the point either because it agrees with the objection or simply concludes concession is more expedient than contest.[80] Regardless, when objections are made at the trial court, the responding party can easily concede issues without compromising the possibility of obtaining a favorable judgment. On appeal, by contrast, the appellee has little choice but to defend the judgment against the appellant's contentions of error.

The second aspect of fairness to the parties is to discourage "sandbagging."[81] This term refers to a party's intentional effort to "game" the system by making one argument at trial, and, if that does not prevail, trying a new strategy on appeal.[82] Or, even more egregiously, a

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and judicial administrators ought to distinguish between reversals based on unpreserved errors from other errors.

75. United States v. Atkinson, 297 U.S. 157, 159 (1936).

76. *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1029 (1987).

77. *See id.*

78. *See id.* at 1029–30; *see also* Gillespie, *supra* note 61, at 43.

79. Puckett v. United States, 129 S. Ct. 1423, 1428 (2009); *see also* Martineau, *supra* note 76, at 1029 (noting that the objection requirement allows "'the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review'" (quoting Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523 (1983))).

80. *See* Martineau, *supra* note 76, at 1029–30 (observing that the responding party may agree with the objecting party).

81. *See Puckett*, 129 S. Ct. at 1428.

82. *See id.*; Thomas M. Hoskinson, Note, *Criminal Procedure: Trial Integrity and the Defendant's Rights Under the Plain Error Rule 52(b)*, 37 SUFFOLK U. L. REV. 1129, 1132 (2004).

party might strategically choose not to object to a known error so that, in the case of an adverse judgment, the error will lead the trial court or the appellate court to order a new trial.[83] Either way, a sandbagging party attempts to use the appellate process as a lever to obtain an unfair advantage over the opposing party. Appellate courts suspecting this strategy have uniformly disapproved of it as an unjustifiable effort to get a "second bite at the apple."[84]

The third of the four policy values that *Atkinson* identified was the public interest in the finality of the judgment.[85] The Supreme Court elaborated on this value in the habeas corpus context in *Wainwright v. Sykes*.[86] It noted that strict enforcement of the contemporaneous-objection rule had a salutary effect on both the quality and efficiency of the criminal trial.[87] At the trial,

> [a] defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.[88]

And, as *Sykes* alludes, the contemporaneous-objection rule also generally limits appeals to the issues timely presented to the trial court, thereby promoting judicial economy.[89] As appellate courts periodically note, no trial is perfect, but a fair trial need not be perfect.[90] Since no trial is perfect, we must have finality at some point.

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83. United States v. Pielago, 135 F.3d 703, 709 (11th Cir. 1998) (defining "sandbagging" as "saving an issue for appeal in hopes of having another shot at trial if the first one misses"); Hoskinson, *supra* note 82, at 1132.

84. *E.g.*, United States v. Jenkins, 347 F. App'x 793, 798 (3d Cir. 2009) (quoting United States v. Valencia-Lucena, 925 F.2d 506, 514 (1st Cir. 1991)); United States v. Saro, 24 F.3d 283, 287–88 (D.C. Cir. 1994).

85. United States v. Atkinson, 297 U.S. 157, 159 (1936).

86. *See* Wainwright v. Sykes, 433 U.S. 72, 89–90 (1977).

87. *Id.* at 90.

88. *Id.*

89. *See* Dennerline, *supra* note 67, at 992 ("[T]he rule sharply limits the number of appeals, expressing a sincere concern for judicial economy.").

90. *E.g.*, United States v. Shoup, 476 F.3d 38, 43 (1st Cir. 2007) (citing United States v. Ortiz, 447 F.3d 28, 35–36 (1st Cir. 2006)); United States v. Gabaldon, 91 F.3d 91, 95 (10th Cir. 1996) (quoting United States v. Manriquez Arbizo, 833 F.2d 244, 247 (10th Cir. 1987)).

All of the first three policy considerations that *Atkinson* described militate against appellate court review of unpreserved error and in favor of a strict application of the contemporaneous-objection rule. Only the final policy consideration that *Atkinson* identified—the public interest in ensuring that the criminal defendant receives a fair trial[91]—weighs in favor of the review of unpreserved error.

Although *Atkinson*, as a *civil* case, did not provide the Supreme Court an opportunity to elaborate on this weighty consideration,[92] the Supreme Court has done so in other criminal cases. For instance, in *Clyatt v. United States*, the Supreme Court explained:

> [I]t is the imperative duty of a court to see that all the elements of [a defendant's] crime are proved . . . . Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.[93]

Indeed, in many of the early cases that discussed the appellate courts' authority to review unpreserved errors, the appellate courts were satisfied that the evidence produced at trial was simply insufficient to prove the defendants' guilt under the correct view of the applicable law, and therefore the courts reversed the convictions.[94]

The importance of correctly stating and applying the law is especially high in the criminal context because errors can lead to wrongful convictions, and the wrongful conviction of an innocent defendant is abhorrent to our judicial system. The Supreme Court has stated that this "concern is reflected . . . in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'"[95] The federal courts have also acknowledged that the weight this policy consideration must receive in the criminal adjudication process is heavy: "'The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned.'"[96]

Moreover, as *Atkinson* articulated the policy concern, it is not only the defendant's significant interest in a fair trial and an accurate convic-

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91. *See* United States v. Atkinson, 297 U.S. 157, 159–60 (1936).

92. *See id.* at 160.

93. Clyatt v. United States, 197 U.S. 207, 222 (1905).

94. Screws v. United States, 325 U.S. 91, 107, 113 (1945) (plurality opinion); *Clyatt*, 197 U.S. at 222; Wiborg v. United States, 163 U.S. 632, 659–60 (1896).

95. Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)); *see also* United States v. Pelullo, 14 F.3d 881, 893 (3d Cir. 1994) ("Our system of criminal justice prides itself on the ability to assure that no innocent person is convicted wrongfully . . . .").

96. *Schlup*, 513 U.S. at 325 (alterations in original) (quoting THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE, AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS 756 (1824)).

tion that mitigates toward a limited appellate review of unpreserved errors. On the contrary, the policy also reflects "the public interest."[97] And, in this sense, the policy reflects a concern for both "present and future litigants who look to the courts to resolve disputes."[98] Accordingly, this policy supports not only the notion that an appellate court ought, in an appropriate case, to review an unpreserved error, but that it also should announce legal rules to ensure that similarly situated future defendants can likewise obtain review.[99]

Aktinson and *Wiborg* unequivocally established that the duty of the appellate courts required that they "temper[ ]"[100] the harshness of the contemporaneous-objection rule with a willingness to review serious unpreserved errors.[101] To do otherwise would undermine the credibility of the conviction or sentence and the judicial process itself. The drafters of the Federal Rules of Criminal Procedure codified this authority to remedy unpreserved errors in Rule 52(b).[102]

B. *The Discretion to Remedy Unpreserved Error*

While Rule 52 may have clarified that the federal appellate courts have the authority to remedy an unpreserved error, neither the text of Rule 52 nor the cases that preceded it fully clarified when the appellate court ought to exercise this authority.[103] Were the appellate courts to exercise this authority too loosely, it would compromise the values that supported the contemporaneous-objection rule in the first place, thereby exacting a serious cost in terms of fairness, judicial economy, and public perception.[104] Conversely, however, if appellate courts wielded this authority too sparingly, they might affirm the convictions of innocent defendants or ratify illegal sentences.[105] Thus, as the Supreme Court has acknowledged: "Any unwarranted extension of [the] exacting definition of plain error would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly

97. *See Atkinson*, 297 U.S. at 160.

98. Martineau, *supra* note 76, at 1031.

99. *See id.* 1033–34.

100. United States v. Young, 470 U.S. 1, 15 (1985).

101. *See id.* at 15 & n.12 (citing *Atkinson*, 297 U.S. at 160; Wiborg v. United States, 163 U.S. 632 (1896)).

102. FED. R. CRIM. P. 52 advisory committee's note.

103. *See* Heytens, *supra* note 42, at 955–56 (noting that the Supreme Court has "provide[d] little assistance in determining what factors courts should consider when deciding whether to correct a harmful but forfeited error").

104. *See supra* Section II.A.

105. *See supra* Section II.A.

redressed.'"[106] Granting relief under Rule 52(b) too liberally would give defendants "'extravagant protection.'"[107]

The Supreme Court further clarified the circumstances under which an appellate court should review and remedy an unpreserved error in *United States v. Olano*.[108] First, the authority extends to only errors involving a failure to make a "timely assertion of a right."[109] Thus, when the defendant "intentionally relinquish[es] or abandon[s] . . . a known right," and the defendant has followed any necessary procedure for doing so, the appellate court cannot exercise its authority to relieve the defendant of the consequences of the choice.[110] Second, the error must have been "clear" or "obvious" under the law as it stands at the time of the appeal.[111] Third, the defendant must show that the asserted error affected his or her "substantial rights," which generally means that the error prejudiced the defendant.[112]

Even if an error meets all of these criteria, however, the appellate court's authority to remedy an unpreserved error under Rule 52(b) "is permissive, not mandatory."[113] But the boundaries of the discretion that the appellate court possesses to remedy unpreserved errors are not particularly clear.[114]

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106. United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982)); *see also* Puckett v. United States, 129 S. Ct. 1423, 1429 (2009) (citation omitted) (using the same language).

107. *Young*, 470 U.S. at 16 (quoting Henderson v. Kibbe, 431 U.S. 145, 154 n.12 (1977)).

108. United States v. Olano, 507 U.S. 725, 732–37 (1993).

109. *Id.* at 733.

110. *Id.*; *see also Puckett*, 129 S. Ct. at 1429.

111. *Olano*, 507 U.S. at 734; *see also generally* Heytens, *supra* note 42, at 953–73 (considering the consequences of a defendant's failure to object at trial on the appellate court's authority to give the defendant the benefit of a change in the law during the pendency of the direct appeal). However, in *United States v. Atkinson*, the Supreme Court said that an appellate court could remedy an unpreserved error if the error was obvious *or* if it had "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." 297 U.S. 157, 160 (1936). The *Olano* formulation requires that the error be both obvious and serious. *See Olano*, 507 U.S. at 734.

112. *Olano*, 507 U.S. at 734. Although Rule 52(a) already indicates that a court shall disregard any error "that does not affect substantial rights," and contains no express indication that this rule does not apply to cases involving unpreserved error, FED. R. CRIM. P. 52(a), the *Olano* Court concluded that Rule 52(a)'s "substantial rights" inquiry applied only to preserved errors. *See Olano*, 507 U.S. at 734. For unpreserved errors, *Olano* announced the same inquiry was required, but emanated from Rule 52(b), and, under this inquiry, the defendant bore the "burden of persuasion with respect to prejudice." *Id.* Moreover, *Olano* also considered that there might be some errors that might not require a showing of prejudice, and yet other cases in which the court might presume prejudice, but the facts of *Olano* did not require the court to elaborate on those possibilities. *Id.* at 735.

113. *Id.*

114. Heytens, *supra* note 42, at 955–56; *see also* United States v. Marcus, 130 S. Ct. 2159, 2169 (2010) (Stevens, J., dissenting); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 15 (1970) ("There is obvious need of guidelines to control appellate discretion in the evaluation of error." (footnote omitted)).

The *Olano* Court stated that "the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*."[115] Under the *Atkinson* standard, the "court of appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[116]

But it is not clear what this standard requires. In adopting this standard, the *Olano* Court acknowledged that, in one line of precedent, the Court had explained that the remedial discretion "should be employed 'in those circumstances in which a miscarriage of justice would otherwise result,'"[117] and that the term "miscarriage of justice," at least in the closely related context of the Supreme Court's collateral review jurisprudence, "means that the defendant is actually innocent."[118] *Olano* concluded this definition was too narrow: "The court of appeals *should no doubt* correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant, but we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence."[119] The *Olano* Court concluded, however, that it did not need to address the question of whether the asserted error was serious because the error did not affect the defendant's substantial rights.[120]

Since *Olano*, the Supreme Court has not meaningfully clarified the standards that ought to guide appellate courts in their decision to remedy unpreserved errors. The Supreme Court has emphasized that the existence of serious error must not be judged using a "'*per se* approach'" but rather "on a case-specific and fact-intensive basis."[121] Every case, the Supreme Court notes, "'necessarily turns on its own facts.'"[122] Thus, while an appellate court must review the facts of the case to satisfy itself that there has been a serious error before it may provide a remedy, the

115. *Olano*, 507 U.S. at 736.

116. *Id.* (alteration in original) (quoting *Atkinson*, 297 U.S. at 160).

117. *Id.* (quoting United States v. Young, 470 U.S. 1, 15 (1985)) (internal quotation marks omitted).

118. *Id.* (citing Sawyer v. Whitley, 505 U.S. 333, 339–40 (1992)).

119. *Id.* (first emphasis added) (citations omitted).

120. *Id.* at 741.

121. Puckett v. United States, 129 S. Ct. 1423, 1433 (2009) (citation omitted). Thus, the *Puckett* Court endorsed the notion that the government's breach of a plea agreement must always satisfy every component of the *Olano* plain error analysis. *Id.* at 1431–33. Although the *Puckett* Court agreed that "when the Government reneges on a plea deal, the integrity of the system may be called into question," it stated that nevertheless "there may well be countervailing factors in particular cases." *Id.* at 1433. *See also* United States v. Marcus, 130 S. Ct. 2159, 2163–64 (2010) (rejecting a Second Circuit rule that "'a retrial is necessary whenever there is any possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct'" (citation omitted)).

122. *Young*, 470 U.S. at 16 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 240 (1940)).

Supreme Court has said little about how the appellate court should determine whether a trial error, which is, by definition, a deviation from the procedural rules designed to ensure a fair trial, is sufficiently serious to warrant a remedy.

The only other guidance that the Supreme Court has provided about serious error comes as an inference from its repeated insistence that plain errors are rare.[123] It is "difficult," we are told, to demonstrate "all four prongs [of the *Olano* plain error test] . . . 'as it should be.'"[124]

Perhaps it should. But even in sum, this guidance to the appellate courts leaves open how the appellate courts should separate the deserving case from the meritless one. Appellate courts know they must examine the consequence of the error on the trial process,[125] and, from this examination, somehow determine which errors are serious enough to merit a remedy.[126]

C. *Vindicating the Contemporaneous-Objection Rule*

One might reasonably wonder if this critique of the open nature of the appellate court's discretion to remedy unpreserved errors undervalues the appellate court's discretion as a mechanism for restricting the reach of this exceptional mode of relief to the most egregious errors. The Supreme Court lauds the "case-specific and fact-intensive" approach as the ideal method for ensuring that appellate courts can indeed remedy unpreserved errors without making categorical rules that undercut the contemporaneous-objection rule and the sound rationales supporting it.[127] Indeed, the Supreme Court's repeated use of the word "discretion"[128] to refer to the appellate court's authority to review unpreserved errors illustrates its concern for preserving the vitality of the contemporaneous-objection rule and avoiding a torrent of appeals for unpreserved

123. *See* Jones v. United States, 527 U.S. 373, 389 (1999) ("'It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1977))); *see also id.* at 389 ("[W]e exercise our power under Rule 52(b) sparingly."); United States v. Robinson, 485 U.S. 25, 35 (1988) (Blackmun, J., concurring in part and dissenting in part) (noting that the plain error doctrine "is to be invoked only rarely").

124. *Puckett*, 129 S. Ct. at 1429 (citation omitted).

125. *See Robinson*, 485 U.S. at 35 (Blackmun, J., concurring in part and dissenting in part) (noting that "any application of the plain-error doctrine necessarily includes some form of prejudice inquiry").

126. *See* United States v. Olano, 507 U.S. 725, 736 (1993).

127. *Puckett*, 129 S. Ct. at 1433; *see also* United States v. Marcus, 130 S. Ct. 2159, 2163–64, 2166–67 (2010) (condemning as too broad a Second Circuit rule that required a reversal of a defendant's conviction when the jury could have based it on conduct occurring before the enactment of the pertinent criminal statute "'*no matter how unlikely*'" it was that the jury actually did so (citation omitted)).

128. *E.g.*, *Olano*, 507 U.S. at 737.

error. The notion of discretion implies there is not a single "correct" answer as to the propriety of remedying unpreserved errors in any particular case.[129] Accordingly, no case sets a precedent that future defendants can rely on to "demand" a remedy for similar unpreserved errors.[130]

While this discretionary system may appear to give appellate courts a high level of control over the rate of unpreserved error reversals, thereby preventing the erosion of the contemporaneous-objection rule, it provides little guidance to future courts or defendants as to which unpreserved errors merit consideration or reversal.[131] Instead, the discretionary system strongly suggests that *any* unpreserved error can become a basis for reversal if a defendant's appellate counsel can persuade the court that the error was sufficiently egregious.[132] Thus, it encourages defendants' appellate lawyers to scour the record for every colorable unpreserved error.[133] Indeed, in the absence of rules that foreclose such relief, the attorney's ordinary duty of diligence may require him or her to present these arguments to the appellate court as a matter of course.[134]

But the discretionary system, with its implicit concern that well-defined rules and exceptions might somehow compel future appellate courts to reverse convictions, even in the face of low-merit assertions of unpreserved error,[135] fails to appreciate that a system of well-defined rules and exceptions can also *foreclose* the prospect of appellate review of an unpreserved error.[136] Legal rules can apprise defendants' appellate

129. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636–37, 641 (1971) (internal quotation marks omitted) ("To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another. . . . [T]he term suggests that there is no wrong answer to the questions posed . . . .").

130. *See id.*

131. *See* Martineau, *supra* note 76, at 1056–59 (noting that rules and exceptions allow "litigants, attorneys, and judges [to] share the same expectations regarding considerations of new issues on appeal").

132. *See id.* at 1024 (noting that, because "it is almost impossible to predict . . . whether . . . the appellate court will consider a new issue," the system of discretionary justice encourages appeals); *see also id.* at 1034 (reasoning that, without the predictability cultivated by a system of well-defined rules, "the appellate process becomes little more than an exercise by which the appellant attempts to persuade the appellate court that the result reached by the trial court was not the 'right' result").

133. *See, e.g.*, Staples Hughes, *Thirty-Four Brief Points About Appellate Advocacy in Criminal Cases*, N.C. CT. SYS. OFF. INDIGENT DEF. SERVICES, http://www.ncids.org/Defender%20Training/Nuts%20and%20Bolts%20of%20Appellate%20Procedure/34%20brief%20points.pdf (last visited Jan. 22, 2013) (advising appellate attorneys to present all errors to the appellate court that "hurt at trial . . . even if [it] may not have been obviously preserved at trial for appellate review").

134. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012).

135. *See* United States v. Marcus, 130 S. Ct. 2159, 2166–67 (2010) (rejecting a Second Circuit rule that categorically required reversal of convictions that contained a certain kind of unpreserved error).

136. *See* Martineau, *supra* note 76, at 1057 (concluding that a well-defined system of rules and

lawyers of when appeals based on unpreserved error can expect little chance of success.[137] Therefore, to the extent that controlling the quantity of unpreserved errors that receive appellate review helps to ensure the continued validity of the contemporaneous-objection rule, there is no reason to conclude that *Olano*'s discretionary system does a better job of limiting review than would a system of well-defined rules and exceptions.

The discretionary approach to reviewing unpreserved errors also creates a situation in which appellate courts may fail to recognize truly meritorious plain error appeals because of the relatively high quantity of low-merit appeals of unpreserved errors that the appellate courts routinely examine. According to one survey, federal appellate courts reverse the trial court's judgment only 5.4% of the time in criminal cases.[138] Although there is a dearth of data on the prevalence of successful appeals premised on arguments of unpreserved error, because *Olano*'s plain error review is considered quite deferential[139] it is likely that only a small fraction of this 5.4% reversal rate is attributable to reversals based on successful arguments of unpreserved error.[140] Given that appellate arguments premised on unpreserved error are likely to be common, but that the chance of success on these arguments is quite low, appellate courts will likely develop a cognitive bias in favor of rejecting appeals premised on unpreserved error.[141]

This bias is worsened by the Supreme Court's preference for case-by-case decision-making.[142] In the absence of legal precedents that

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exceptions allows attorneys and their clients to expect and anticipate when assertions of unpreserved error will not succeed on appeal).

137. *See id.*

138. MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 5.01 (3d ed. 1999); *see also* Joy A. Chapper & Roger A. Hanson, *In Criminal Appeals: Identifying Reversible Error*, JUDGES' J., Winter 1991, at 3, 4 (1991) (reporting 267 errors in 1,750 criminal cases in the state appellate courts under study).

139. *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 372 (2005) (noting that plain error review is "highly deferential").

140. *Cf.* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 670 & fig.2 (2006) (showing that, in the context of the review of cases on direct appeal in the Tenth Circuit when the *Booker* decision was announced, those cases that were reviewed under the plain error standard were reversed far less frequently than cases reviewed under the harmless error standards applicable to errors preserved with a contemporaneous objection).

141. *See* Guthrie & George, *supra* note 139, at 373 ("Thus the strategic theory predicts that low reversal rates become self-reinforcing: Current judges are hesitant to reverse because prior judges did not reverse, and so on."); *see also* JOHN D. MULLEN & BYRON M. ROTH, DECISION-MAKING: ITS LOGIC AND PRACTICE 95 (1991) (noting that, according to the "availability fallacy," decision-makers assume that "the occurrence that comes most easily to mind is the most probable").

142. *See* Puckett v. United States, 129 S. Ct. 1423, 1433 (2009).

direct the attention of courts (and defendants' appellate lawyers) to the pertinent considerations and give guidance on how to evaluate and balance them, this bias can go unchecked. Indeed, appellate courts' analyses of defendants' arguments of unpreserved error are often brief and conclusory,[143] which raises the risk of appellate error.

Appellate courts know that the process of applying existing law to facts in writing improves the quality of judicial decision-making. In fact, appellate courts have often insisted that administrative law judges (ALJs) explain their reasoning in reaching their decisions both because the process of explanation "'help[s] the ALJ get it right' and it 'allow[s] [the appellate court] to discharge [its] duty to review the decision.'"[144] Similarly, an appropriate legal analytical framework can help appellate judges themselves "get it right" in evaluating the seriousness of unpreserved errors. And, equally important, because defendants' appellate lawyers would be using the same analytical framework, they too would be more able to judge the merits of appealing unpreserved errors in the first place.

Even though the contemporaneous-objection rule makes ample sense in our adversarial system of justice, the fairest and most reliable way to vindicate it in the context of appeals of criminal convictions is through the application of legal rules that thoughtfully lay out circumstances warranting relief from it on appeal.

III. AN ANALYTICAL JURISPRUDENCE OF SERIOUS ERROR

> In our attempt to clarify Rule 52(b), we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text. Errors come in an endless variety of "shapes and sizes." Because error-free trials are so rare, appellate courts must repeatedly confront the question of whether a trial judge's mistake was harmless or warrants reversal. They become familiar with particular judges and with the vast panoply of trial procedures, they acquire special expertise in dealing with recurring issues, and their doctrine evolves over time to help clarify and classify various types of mistakes. These are just a few of the reasons why federal appellate courts are "allowed a wide measure of discretion in the supervision of litigation in their respective circuits.

143. *See, e.g.*, United States v. Newmark, 374 F. App'x 279, 283 (3d Cir. 2010); United States v. Hill, 334 F. App'x 640, 645–46 (5th Cir. 2009) (per curiam); United States v. Prather, 312 F. App'x 705, 705–06 (5th Cir. 2009) (per curiam); United States v. Flores-Perez, 311 F. App'x 69, 69–71 (9th Cir. 2009); United States v. Davis, 514 F.3d 596, 615–16 (6th Cir. 2008).

144. Gunderson v. U.S. Dep't of Labor, 601 F.3d 1013, 1028 (10th Cir. 2010) (O'Brien, J., dissenting) (alterations in original) (quoting Lane Hollow Coal Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 137 F.3d 799, 803 (4th Cir. 1998)).

United States v. Marcus, 130 S. Ct. 2159, 2169 (2010) (Stevens, J., dissenting) (citations omitted). Because the *Olano* formulation of the plain error doctrine did not attempt to engage the appellate courts in the creation of a body of law that would allow them to evaluate the seriousness of errors in context, appellate courts must rely on other, more general indicators of seriousness. Unfortunately, as this section describes, these other indicators of seriousness only guide appellate courts away from their core purpose of ensuring defendants a fair trial and a sentence in accord with the law.

A. *The* Olano *Formulation*

Olano and the cases that followed have laudably aimed to clarify for the appellate courts the standards they should follow in determining whether to remedy an unpreserved error.[145] As a practical matter, however, the *Olano* formulation does not focus on the essence of the problem.[146] Rather, its four-pronged inquiry needlessly complicates the analysis, and makes it more difficult for appellate courts to make the critical assessment: Did the defendant get a fair and reliable trial and a legal sentence? The *Olano* formulation distracts both appellate courts and defendants from this key inquiry because (1) it compels appellate courts to separately analyze both whether the asserted error affected a defendant's "substantial rights" and whether it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"[147] even though both questions are qualitatively similar inquiries into the consequences of the error on the trial; (2) it gives undue weight to the obviousness of the error; and (3) it focuses the appellate court primarily on the merits of individual cases rather than on synthesizing and articulating rules that explain why an error was (or was not) serious. As a result, the *Olano* formulation fails to snugly connect with the policy considerations justifying plain error review.

First, *Olano* introduces a redundancy into the plain error analysis.[148] The third prong of *Olano* requires the appellate court to determine whether the asserted error affected the defendant's "substantial rights," as is required under the text of Rule 52(b).[149] As *Olano* explains, an

145. *See id.* at 2168–69.

146. *See id.* at 2169.

147. United States v. Olano, 507 U.S. 725, 734, 736 (1993) (citation and internal quotation marks omitted).

148. *See* Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 No. 6 CRIM. L. BULL. ART 6 (2007) ("In short, prong three and prong four are, in spite of the protestations in *Olano* to the contrary, in practice coterminous.").

149. *Olano*, 507 U.S. at 734.

error ordinarily affects a defendant's substantial rights when the error was "prejudicial"; this means "[i]t must have affected the outcome of the district court proceedings."[150] Accordingly, *Olano*'s third prong requires the court to consider the consequence of the error on the defendant's conviction and sentence.[151] But that is also a part of the function of *Olano*'s fourth prong. Under the fourth prong—the serious error prong—the appellate court must also separately evaluate the consequence of the error under the *Atkinson* serious-error standard, that is, whether the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[152] However, the fourth prong imposes a higher standard of seriousness than the third prong: The *Olano* Court explicitly acknowledged that an error that affects the defendant's substantial rights "does not, without more, satisfy the *Atkinson* standard."[153] Thus, the third and fourth prongs of the *Olano* inquiry both require the same kind of judgment—an evaluation of whether the error had sufficiently serious consequences to merit reversal—but the fourth prong merely requires a higher level of seriousness. Therefore, the third and fourth prongs of the formulation could and should be collapsed into a single inquiry.

Second, *Olano*'s second prong, which requires the appellate court to determine whether an error is "clear" or "obvious,"[154] elevates a pertinent consideration into a decisive consideration. Since the purpose of the plain error doctrine is to determine whether the proceedings in the trial court were so unfair as to relieve the defendant of the harsh effect of the contemporaneous-objection rule, the central focus of the inquiry must be the fairness and reliability of the trial and sentencing.[155] To be sure, when the trial court makes an obvious error, it is more likely to have seriously affected the fairness, integrity, or public reputation of proceedings before the trial court. But even when the trial court makes a subtle

150. *Id.*

151. *See id.*

152. *See id.* at 736 (alteration in original) (citation and internal quotation marks omitted).

153. *Id.* at 737.

154. *Id.* at 734.

155. *See supra* Section II.A. Former Chief Justice of California Roger Traynor also rejected the "Not Clearly Wrong Result" method of assessing errors:

> However egregious the errors, and however great the likelihood that absent the error a different judgment would have been entered, the court would have to discount the error as harmless. Such a test operates to diminish judicial responsibility. The emphasis should not be on whether the judgment is not clearly wrong; how could an appellate court rest easy in the face of doubt? The emphasis should be on whether the judgment is not clearly right, so long as there is a substantial chance that error brought it about. . . . [I]t is perilous to assume that a judgment not clearly wrong, but still dubious, can be equated with justice.

TRAYNOR, *supra* note 114, at 17–18.

error, that error could significantly impair the fairness of the trial if the consequence of the error was profound, such as the exclusion of critical defense evidence, the empanelling of a biased juror, or a misstatement of the applicable law in the jury's instructions. For instance, one can certainly imagine trial courts making subtle errors in their application of sophisticated evidentiary rules like the hearsay rule or the expert witness rule that, despite the errors' subtlety, have a significant effect on the weight of the evidence presented to the jury. And, as the *Olano* Court recognized, the obviousness requirement is even more difficult to apply when the law applicable to the error changes between the time of the error and the time of appellate consideration.[156]

The Supreme Court recognized this in *Atkinson*. *Atkinson*'s original requirement for remedying an unpreserved error required that the error either be obvious *or* "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[157] Interpreted another way, the *Atkinson* formulation presumed that obvious errors were serious enough to merit reversal, but acknowledged that other, more subtle errors could also be serious enough to warrant reversal.[158] *Olano* purported to accept the *Atkinson* formulation,[159] but misstated it.[160] One might discount the misstatement as inadvertent and unintentional, except for the frequency with which the Supreme Court repeats it.[161]

In any case, the obviousness of an error can be very difficult to assess.[162] While there may be some errors on either end of a spectrum of

156. *See Olano*, 507 U.S. at 734 ("We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified."); *cf.* Heytens, *supra* note 42, at 941–42 (arguing that the rationales behind the plain error analysis do not support a court's refusal to give the defendant the benefit of a law that changes while the defendant's case awaits a decision on direct review).

157. United States v. Atkinson, 297 U.S. 157, 160 (1936).

158. *See id.* Of course, one might also fairly criticize the *Atkinson* rule as too broad because not every obvious error undermines the fairness of the trial and sentencing. But if, as this section suggests, obviousness is treated merely as a factor in a seriousness inquiry, the court's conclusion about the obviousness of the error can be tempered by the court's assessment of the other pertinent factors. *See infra* Section III.B.

159. *Olano*, 507 U.S. at 736 ("[T]he standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*." (citation omitted)).

160. *Compare id.* ("The court of appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (alteration in original) (quoting *Atkinson*, 297 U.S. at 160)), *with Atkinson*, 297 U.S. at 160 ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, *or* if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." (emphasis added)).

161. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 631–32 (2002).

162. *But see, e.g.*, United States v. Gonzalez-Rodriguez, 621 F.3d 354, 363 (5th Cir. 2010) (concluding that, to merit reversal, "the error must be 'so clear or obvious that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in

obviousness, in many cases, the obviousness of the error may be difficult to discern because it requires the application of a legal rule that is facially clear but unclear when applied to the facts of the defendant's case.[163] This kind of judgment is quite different from the kind of judgment the appellate court must exercise to determine whether the error "seriously affect[ed] the fairness, integrity or public reputation"[164] of the trial court's proceedings[165] because it calls not for an evaluation of the consequences of the error but, rather, the clarity of the result when the applicable legal rule is applied to the facts of the defendant's case.[166] Thus, although the blatant obviousness of an error may be a decisive consideration in a few cases, consideration of the obviousness of the error will more frequently lead the appellate court away from the key analysis of the fairness, integrity, or public reputation of the trial court proceedings.

Finally, the *Olano* interpretation of the plain error rule invites appellate courts to do exactly what they are never supposed to do. It requires the courts to weigh the evidence supporting the defendant's conviction to determine whether the error undermines the evidence and arguments that the prosecution produced to prove the defendant's guilt.[167] Or, phrased differently, the appellate court must speculate as to whether the prosecution's evidence and arguments were so persuasive as to the defendant's guilt that the error did not undermine the fairness of the trial.[168] As Judge Harry Edwards has observed, this focus on the facts of the case (which occurs in the review of both preserved and unpreserved errors) is both troubling and unavoidable.[169] Judge

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detecting it.'" (quoting United States v. Trejo, 610 F.3d 308, 319 (5th Cir. 2010))). While such a rule may help resolve the problem of subjectivity in the assessment of whether an error is "clear" or "obvious," in doing so it bypasses the central question of the consequence of the error on the trial process for any error that is not abundantly obvious. *See id.* Furthermore, it also raises a new question about the kind of competence that a trial judge and prosecutor must have in detecting errors. *See id.* Of course, this kind of consideration most directly vindicates the "respect for the trial court judge" rationale discussed in Section II. But, given the diminishing importance of that rationale in contemporary plain error jurisprudence, placing this much emphasis on the clarity of the error to the trial court gives it undue weight.

163. *See* Heytens, *supra* note 42, at 966.

164. *Olano*, 507 U.S. at 736 (citation and internal quotation marks omitted).

165. *See* United States v. Marcus, 130 S. Ct. 2159, 2168 (2010) (Stevens, J., dissenting) (noting that each of the four prongs of the *Olano* analysis require "a distinct form of judgment").

166. *See* TRAYNOR, *supra* note 114, at 18–22 (rejecting the "Correct Result" formulation of harmless error and equating it with the appellate court assuming the role of "a second jury to determine whether the defendant is guilty").

167. *See* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1189–90 (1995) (explaining that the "miscarriage of justice" standard takes a "guilt-based approach" to determining the effect of the error).

168. *See id.*

169. *Id.* at 1187.

Edwards, writing about whether an error is "substantial," explained,

> Even a brief survey . . . reveals the tendency of judges to apply the doctrine by assessing whether the evidence adduced at trial, or the untainted evidence in the case of an evidentiary error, appears sufficient to support a guilty verdict. In some cases this is as it should be, for the presence of massive evidence of a defendant's guilt surely is one factor for a court to consider in ascertaining whether it can say with fair assurance that an error substantially affected the jury's verdict (or, in the case of constitutional error, whether the error was harmless beyond a reasonable doubt). Frequently, however, the weight of the evidence against a defendant is not just one factor playing into the harmless-error analysis, but rather the sole criterion by which harmlessness is gauged.[170]

Although Judge Edwards was writing about whether a preserved error affected a defendant's substantial rights, he also observed that the same phenomenon occurs in the assessment of unpreserved errors.[171] The Supreme Court's recent unpreserved error jurisprudence has only further emphasized that the appellate court's prime focus for determining whether an error meets *Atkinson*'s serious error standard must indeed be the facts of the case.[172] Left unguided, this kind of judgment is fraught with danger because it depends heavily on appellate judges' subjective concepts of justice and fairness.[173]

B. *A Proposed Reformulation*

Therefore, to realign the plain error analysis with its common law precedents, the text of Rule 52(b), and the rationales supporting review of unpreserved errors, this section proposes a new formulation of the plain error doctrine:

> In a criminal case, a court may correct an error that occurred at trial or sentencing, even though that error was not brought to the attention of the trial court. The court must correct an error that, in its discretionary judgment, seriously affects the fairness, integrity, or public reputation of judicial proceedings. In determining whether an error seriously affects the fairness, integrity, or public reputation of judicial proceedings, the court shall explicitly consider (1) the purpose of the right impaired by the error on the fairness and reliability of the judgment and sentence, and (2) the seriousness of the error's consequences in impairing this purpose in the factual context of the case.

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170. *Id.* (footnotes omitted).

171. *Id.* at 1190.

172. *E.g.*, Puckett v. United States, 129 S. Ct. 1423, 1433 (2009) ("The fourth prong is meant to be applied on a case-specific and fact-intensive basis.").

173. *See* Martineau, *supra* note 76, at 1058, 1061.

This proposed rule has four main features. First, because the motivating rationale for allowing review of unpreserved errors in criminal cases is the public interest in ensuring that criminal defendants receive a fair and reliable trial,[174] this rule focuses squarely on the seriousness of the asserted error. Unlike the *Olano* formulation, this proposed rule does not separately consider whether the error appears to be harmless or whether the error was "clear" or "obvious." While these considerations may still be pertinent and may even be decisive in certain cases, the appellate court's task will ultimately be to determine, using any pertinent consideration, whether an error meets the *Atkinson* serious error standard.

Second, although the appellate court may consider all pertinent facts, the rule focuses the appellate court's attention on the subset of the facts pertinent to the error. It emphasizes that the appellate court's inquiry must first determine the *purpose* of the right impaired by the error *independent* of the facts of the case. Then, the appellate court can examine the facts of the case to determine if other aspects of the trial achieved this purpose in spite of the error. This will deter appellate courts from reassessing the defendant's guilt in favor of considering how important the right impaired by the error was to ensuring the fair trial and sentencing of the defendant.

For instance, in a case where the error involved the erroneous exclusion of evidence, the appellate court might conclude that such an error results in an unfair trial whenever the evidence could have created a doubt in the minds of the jurors that was not credibly suggested by other evidence. Then the appellate court would examine the record to see whether the excluded evidence met this criterion. This approach guides the appellate court's attention away from an independent assessment of the defendant's guilt and toward a focused analysis of the record. Although there is no way to examine the effect of the error on the case without a close examination of the case itself,[175] this method aims to clarify how the role of the appellate court involves a "form of judgment"[176] distinct from the kind the jury exercises in convicting the defendant (or the kind the court exercises in sentencing the defendant).

Third, the proposed rule calls for the appellate court to explicitly detail its analysis of the error to ensure that (1) the court creates a reference point for future cases that deal with the same issue; (2) the parties

174. *See supra* Section II.

175. *See* United States v. Robinson, 485 U.S. 25, 35 (1988) (Blackmun, J., concurring in part and dissenting in part) ("[A]ny application of the plain-error doctrine necessarily includes some form of prejudice inquiry . . . ."); Edwards, *supra* note 167, at 1187.

176. This language originates in United States v. Marcus, 130 S. Ct. 2159, 2168 (2010) (Stevens, J., dissenting).

can determine whether the court "got it right,"[177] and, therefore whether to petition for further appellate review or reconsideration; and (3) the judges on the court can satisfy themselves, as much as possible, that the court's opinion accurately appreciates the significance of error and its consequences under the case's particular facts.

Fourth, while this proposed reformulation eliminates the discretion that appellate courts have to refuse to remedy an error, it still calls for a different kind of judicial discretion by directing appellate courts to evaluate the seriousness of the error in light of the case's factual consequences. As other scholars have recognized, judicial discretion can serve the appellate court as a method of fashioning new rules of law in areas where the rules are either not clear or not widely accepted.[178] When the legal issues are new, a measure of discretion allows the appellate court to focus first on identifying the relevant considerations and seeing how they apply in particular cases.[179] Over time, various appellate courts will identify the full range of pertinent considerations and develop approaches for balancing them.[180] At the outset, when the rules are not yet well-established, courts' decisions may be seen as more discretionary.[181] But, as rules develop, decisions that once were an exercise of discretion become traditional questions of law.[182]

This approach also better harnesses the tremendous intellectual power of the judiciary. When no consensus has yet emerged regarding a novel legal issue, the understanding that courts' early analytical approaches to deciding the issue are an exercise of a limited judicial discretion prevents one appellate court (or panel of a court) from foreclosing another appellate court (or panel) from addressing the issue in another way.[183] This gives various courts significant independence from one another as rules develop, and emerging cognitive science strongly supports the notion that "the best collective decisions are the product of disagreement and contest."[184]

This approach also gives appellate courts some flexibility to deal with the kinds of errors known to cause wrongful convictions. As empirical evidence mounts about the sources of trial errors that lead to incor-

177. *Cf. supra* note 142 and accompanying text (discussing and citing cases where appellate courts engaged in merely conclusory analyses of unpreserved error claims).

178. *See, e.g.*, Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 50–51 (2000).

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.*

184. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS xix, 161–68 (2004).

rect convictions, appellate courts can direct heightened attention to these kinds of errors and their effects on the trial process.

Thus, under this proposed reformulation, the appellate court will continue to exercise a level of discretionary judgment to craft appropriate rules when the rules applicable to the facts are unclear. However, as rules develop, appellate courts and defendants will be able to use and refine them in the common law tradition.[185] And, rather than relying on subjective considerations and unguided discretion to control the frequency of review of unpreserved error as the *Olano* formulation does,[186] the proposed rule would foster the development of standards to guide the appellate court in its decision to review an unpreserved error, while leaving open the possibility that the existing rules are incomplete or even incorrect until the rules are validated through application in many cases over time.

IV. CONCLUSION

> "To clear the confusion reflected in the Court of Appeals' application of the plain-error standard . . . this Court should . . . formulate a test for plain error that articulates the prejudice standard to be applied . . . ."

United States v. Robinson, 485 U.S. 25, 36 (1988) (Blackmun, J., concurring in part and dissenting in part). In the *Flores-Perez* case described in the introduction, the Ninth Circuit provided an apt demonstration of the difficulties inherent in the decision of whether to remedy an unpreserved error. The dissent pointed out the two most worrisome aspects of the defendant's trial: (1) the prosecutor told the jury that there was a lengthy report about the defendant that, "according to the rules of evidence, you will not be seeing," thereby implying that the prosecutor had special knowledge of the defendant's guilt; and (2) during closing argument (before which the trial court had already given its final instructions to the jury), the prosecutor told the jury that they were "no longer obligated to presume innocence."[187] The majority did not specifically

185. *See* Martineau, *supra* note 76, at 1033–34.

186. *Cf.* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1565–66 (2003) (contrasting the exercise of discretion that courts exercise in the absence of a controlling rule in an area that "defies the development of legal 'rules'" from the discretion courts exercise when merely making decisions in an area that "sensibly implies limitations on second-guessing" from a higher court). As the rules remain new, the Supreme Court may indeed be well-advised to avoid interfering with the development of the rules, but, over time, the Supreme Court can exercise its supervisory authority to coordinate and clarify the rule to ensure consistency within the courts of appeal.

187. United States v. Flores-Perez, 311 F. App'x. 69, 71 (9th Cir. 2009) (Kleinfeld, J., dissenting) (internal quotation marks omitted).

consider the effect of these errors.[188] Rather, even though the *Flores-Perez* court agreed that these statements were obvious errors, it concluded that the errors did not meet *Olano*'s requirement that the error "'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings' given the overwhelming evidence of guilt and [the defendant's] striking lack of credibility at trial."[189]

Under this article's proposed rule, the majority opinion may indeed be correct on the first issue. If the majority is correct that the evidence was overwhelming, the prosecutor's allusion to the existence of additional evidence was merely superfluous. Unlike the erroneous exclusion of *defense* evidence, which might have sown doubt in the mind of the jury about the defendant's guilt, this kind of error probably does not introduce much doubt that, but for the error, the jury would have reached a different conclusion. Even so, under the proposed rule, the appellate court would have been explicitly required to consider the consequence of the error in the factual context of the case. This requirement would have prompted the majority to explain why the evidence was overwhelming in spite of the dissent's view to the contrary,[190] thereby reducing the possibility that the majority misunderstood the quality and quantity of evidence on every element necessary to prove the defendant's guilt. A more elaborate explanation also would have increased the likelihood that the form of judgment reflected in the opinion was truly an analysis of the error rather than a reassessment of the defendant's guilt. Also, it would have also provided a more complete analysis to guide future courts and defendants considering similar issues.

The majority's opinion is less persuasive with respect to the prosecutor's comment to the jury that it could disregard the presumption of innocence once it began its deliberations. The opinion is less persuasive because the error did not relate to the evidence; rather, it related to whether the jury had been properly charged with the applicable law and whether it applied that law during its deliberations.[191] Thus, the majority's suggestion that the overwhelming evidence prevented this error from "'seriously affect[ing] the fairness, integrity or public reputation'"[192] of the proceeding seems facially inapposite. After all, how can evidence, regardless of its weight, moot the issue of whether the jury properly understood the applicable law?[193]

188. *See id.* at 70–71 (majority opinion).

189. *Id.* (alteration in original) (citation omitted).

190. *See id.* at 71 (Kleinfeld, J., dissenting).

191. *See id.*

192. *Id.* at 70 (majority opinion) (citation omitted).

193. *See* TRAYNOR, *supra* note 114, at 22 ("Even overwhelming evidence in support of a verdict does not necessarily dispel the risk that an error may have played a substantial part in the

Under the proposed rule, the court would have been compelled to explicitly consider the jury's written instructions, verdict forms, or other information in the record indicating whether the jury was properly apprised of the law. If the jury was indeed clear about the law notwithstanding the prosecutor's comments, then the majority was correct that the error did not rise to the level of serious error. Even if the jury was not correctly apprised of the law, the proposed rule would require the court to then consider whether the error caused serious consequences in the factual context of the case. Sometimes, even an incorrect statement of the law would not create a serious error; for instance, the incorrect statement might relate to an element of the crime the defendant never contested. In the absence of this kind of analysis, however, the *Flores-Perez* opinion appears to primarily reflect the majority's opinion that the defendant was guilty.

This article's proposed solution would aid the federal appellate courts in ensuring that their analyses focus on the seriousness of the error, avoid guilt-based judging, and develop precedents that will guide future courts and defendants in determining the merit of providing a remedy for unpreserved errors. Given the evident injustice of incorrect convictions and the new empirical evidence about their prevalence, the need for closer, more disciplined scrutiny of unpreserved errors is real and urgent.

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deliberation of the jury and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error . . . .").