Does It Matter Who Objects? Rethinking the Burden to Prevent Errors in Criminal Process

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Objection rules enforced by forfeiture penalties make the right to appeal contingent on whether the party injured by an opponent's or judge's error made a timely objection or motion in the trial court. "No procedural principle is more familiar" than that a party who does not challenge an error at trial forfeits, partially or wholly, its entitlement to appellate review. This policy of procedural default puts the duty of care to prevent errors on injured parties. The rationale is instrumental: the threat of losing the right to correct errors will make parties take greater care to prevent errors at trial, which is immensely more efficient than correcting errors later and will minimize adjudication errors overall. Yet, in most applications, that ubiquitous logic fails on its own terms. Placing the burden of care on injured parties generally is not the optimal approach to minimizing errors. In most circumstances, the better policy is to place the duty of care to prevent errors on the party who commits the error or who benefits from the judge's error.

The key is to recognize that, analytically, error prevention in adjudication is much like accident prevention in other contexts. As in tort law, the goal is to minimize the cost of harms in bilateral activities—those in which two parties interact and either alone could prevent the harm. Litigants' error-prevention efforts are substitutes rather than complements; it is not necessary for both parties to exercise care. For that reason, procedural law should place the duty of care—and the cost of harms—on the party who can most cheaply prevent the harm.

Courts and rule makers perpetuate suboptimal rules for preventing errors by ignoring this insight and a related one: in bilateral settings, liability rules create incentives for both sides. Putting the duty to prevent errors to one party encourages the other to commit errors. This Article develops this critique and offers an alternative: putting the duty on parties to prevent their own errors rather than their opponent's. It also explains why standard procedural default rules have prevailed for so long in light of their deficiencies. One key reason is that, despite an ostensible commitment to instrumental analysis focused on adjudicative efficiency, judicial reasoning is permeated with moralistic

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judgments about the unfairness of permitting appeals for unpreserved errors. This normative view distorts courts' instrumental analyses.

Introduction

The adversarial process allocates to the parties the tasks of marshalling evidence and identifying for courts the substantive and procedural law that governs the dispute. In this sense, the adversarial model privatizes responsibility for the facts and law on which courts make judgments. This holds even for criminal adjudication, where the state is always a party, because the prosecution acts as a partisan advocate (albeit with unique ethical obligations). In contrast, inquisitorial-style models in civil law jurisdictions place this responsibility (in varying ways) with nonpartisan judicial officials—trial judges and perhaps investigating magistrates.

That distinction is well known, if too sharply drawn. What is much less well examined and adequately theorized is a fundamental principle necessitated by the party-driven adversarial model that allocates party responsibility for errors that inevitably occur in the adjudication process. Each party has self-interested incentives, shaped by burdens of proof,[1] to present evidence that supports its theory of the case and to identify for the court the law that governs the dispute and the litigation process. Adversarial procedure relies on partisan motivations and competition to provide courts with a full evidentiary record and awareness of the applicable law. But, of course, parties are not perfect. Relevant evidence is overlooked, improper evidence considered; the wrong law is argued and applied, the correct law is overlooked or rejected; judges neglect to fulfill their own affirmative duties in the process. Errors can be identified on appellate review (or even trial court review) and corrected by conducting new trials or hearings, but correcting errors is costly. *Preventing* errors is ideal. A collection of procedural rules allocate responsibility for the risk of such errors. In so doing, they allocate party incentives to prevent them and—less noticed—incentives to *commit* them. Put differently, procedural rules assign to one party the duty of care to prevent errors.

Tension between error prevention and correction is inevitable. The more easily errors can be corrected, the less reason one has to prevent them, especially if prevention is costly. Conversely, if the chance to correct errors is limited, the incentive to prevent errors increases—at least for the party *injured* by the error. Importantly, it *decreases* for the party who benefits from it. This tension is behind the ubiquitous procedural mechanism for allocating responsibility for errors and incentives to prevent them: forfeiture. Forfeiture rules sharpen party incentives to prevent errors by reducing opportunities to

1. This includes defendants who raise affirmative defenses or other issues on which they must present evidence sufficient to raise an issue and merit a jury instruction.

correct them. At their most severe, parties who fail to challenge an opponent's or judge's error forfeit any chance to correct it; they have procedurally defaulted their claim to appellate review, which is now precluded. In fact, the consequence is not always that severe because appellate-review rules balance their instrumental, incentive-maximizing function and premise of normative responsibility with public interests in substantively correct court judgments and fair procedures. Still, whether a party injured by an error "preserved"[2] the claim by objecting to it in the trial court greatly affects the standard of review. Appellate courts usually review preserved errors under a "harmless error" standard—application of which varies depending on the type of error and across jurisdictions[3]—and will not grant a remedy if the appellee (who benefited from the error) proves the error did not affect "substantial rights."[4] For a small number of preserved "structural" constitutional errors, the standard is even more favorable: reversal is automatic.[5] But if the injured party did not challenge the error first

2. *See, e.g.*, FLA. STAT. ANN. § 924.051(1)(b) (West 2017) ("'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.").

3. *See* United States v. Dominguez Benitez, 542 U.S. 74, 86–87 (2004) (Scalia, J., concurring) (listing four distinct standards of review to determine whether the error changed the trial's outcome and stating that these different standards are "harmful rather than helpful to the consistency and rationality of judicial decisionmaking"); Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1799–800 (2017) (discussing the rules federal courts apply, depending on the type of claim, when reviewing harmless error in criminal cases).

4. FED. R. CRIM. P. 52(a) (stating that there is no remedy for errors that do not affect "substantial rights"); N.C. GEN. STAT. § 15A–1443(b) (2017) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt."); Chapman v. California, 386 U.S. 18, 22, 24 (1967) (determining that constitutional violations do not merit reversal if appellate courts conclude beyond a reasonable doubt they were harmless); State v. McClanahan, 910 P.2d 193, 204 (Kan. 1996) (holding that constitutional error "may not be held to be harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt. . . . [Meaning] the error had little, if any, likelihood of having changed the result of the trial"). A small number of "structural" constitutional errors, however, are exempt from harmless error analysis and require automatic reversal. *See* Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991) (distinguishing "trial errors" from "structural defects" and listing examples of both).

A number of rights have specific requirements for appellate reversal akin to harmless error analysis that require courts to assess the error's likely effect on the proceedings. Convictions can be reversed for a violation of the right to effective assistance of counsel, for example, only if the appellate court concludes that there is reasonable probability the lawyer's deficient performance affected the outcome. Strickland v. Washington, 466 U.S. 668, 694–95 (1984).

5. *See Dominguez Benitez*, 542 U.S. at 81 ("It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding."); *Fulminante*, 499 U.S. at 309–10 (listing examples of structural errors); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 150–52 (2006) (mandating reversal when error violated Sixth Amendment right to counsel of choice); Vasquez v. Hillery, 474 U.S. 254, 261–64 (1986) (mandating reversal due to an equal protection violation caused by the racially biased selection of grand jurors); Holloway v. Arkansas, 435 U.S.

in the trial court, either appellate review of the claim is forfeited or appellate courts apply a less favorable standard under which only "plain errors" merit correction, and only if the appellant proves the error harmed substantial rights.[6]

This Article challenges the fundamental, pervasive principle that ties the availability of appellate review, and the standard of review, to the injured party's conduct during the trial stage. These rules make the right to appeal (and other error-correction opportunities) contingent on whether the party *injured* by an opponent's or judge's error spotted the error and objected to it when (or before) it occurred, when it could most easily be prevented. Thus, they place the duty of care to prevent procedural errors on injured parties and define judicial authority to correct errors in all procedural stages—in the trial court, on direct appeal, and in collateral habeas litigation.[7] If an injured party does not challenge an error within the time limit, any entitlement to appellate review—and thus to error-free adjudication—is partially or wholly forfeited. These preserve-it-or-use-it rules of claim preclusion abound in state and federal courts.[8] "No procedural principle is more familiar to this Court," the

475, 488–91 (1978) (reversing due to the unconstitutional conflict of interest of defense counsel); Tumey v. Ohio, 273 U.S. 510, 535 (1927) (reversing due to an unconstitutional judicial conflict of interest).

6. FED. R. CRIM. P. 52(b); United States v. Davila, 569 U.S. 597, 607 (2013); United States v. Moriarty, 429 F.3d 1012, 1019 (11th Cir. 2005) (explaining the defendant's burden under the plain error standard).

7. *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 953–54 (2006) ("Raise-or-forfeit rules are commonplace in both the federal and state systems, and lack of compliance with them is frequently deemed a sufficient basis for dividing those who may obtain relief from those who may not."); Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521, 524 n.12 (2002) (noting that all jurisdictions in the United States apply some form of the "contemporaneous objection rule," which requires an objection at the trial level to preserve an argument for appeal). There are numerous examples of time requirements that limit error-correction opportunities. *See, e.g.*, FED. R. CRIM. P. 12(b)(3) (listing motions that must be made before trial); *id.* 11(d) (imposing time limits on motions to withdraw guilty or *nolo contendere* pleas); *id.* 34(b) (establishing a fourteen-day deadline for defense motion to arrest judgment); *id.* 51, 52 (providing standards for appellate review and rules for preserving claims of error); *id.* 59(b)(2) (establishing a standard fourteen-day deadline to object to magistrate judge findings and providing that the failure to object "waives a party's right to review"); FED. R. EVID. 103 (stating rules for objections to evidentiary errors); FED. R. CIV. P. 46, 51(c)(2) (imposing limits on objections to court orders and jury instructions).

8. A note on terminology: *Procedural default* describes a party's failure to make a claim in a timely manner, with the consequence that the claim is precluded from being raised subsequently. Claim preclusion occurs because failure to raise the claim in time triggers, or is punished by, forfeiture of subsequent opportunities to seek to correct the error. *See* 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.4(a) (4th ed. 2015) (noting procedural default in the habeas context describes a situation in which a defendant "has failed to present his claim in the state proceedings in accordance with state procedural requirements, and the state courts have held that this lapse bars consideration of the claim on its merits"). *Forfeiture* describes the consequence that follows *inadvertent* decisions or inaction and amounts to unknowing relinquishment of an entitlement. It is used, for example, to enforce time limits for raising claims such as statutes-of-limitations and

Supreme Court noted decades ago, "than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[9] The same holds for nonconstitutional claims, in both pretrial litigation[10] and during trial under the contemporaneous-objection requirement.[11]

There are large bodies of scholarship on appellate standards of review[12] and procedural-default doctrines in federal habeas litigation.[13] But commentators and courts rarely interrogate the underlying principle and logic of how these rules allocate incentives and responsibility for errors. Granted, its longstanding rationale is straightforward and facially compelling. The threat of the forfeiture penalty[14] is intended to make injured parties protect

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speedy-trial rules. By contrast, *waiver* is the knowing relinquishment of a legal entitlement. For example, one can waive rights against warrantless police searches, against custodial questioning by police, or against trial-related rights in the course of a guilty plea, but such waivers must be intentional. *See, e.g.*, FED. R. CRIM. P. 11 (requiring stringent standards to be satisfied before the defendant can enter a guilty plea). Waiver standards vary according to the right or entitlement at issue. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218, 245–46 (1973) (articulating that consent to a search requires a diluted version of waiver that does not require knowledge), *with* Berghuis v. Thompkins, 560 U.S. 370, 384–85 (2010) (explaining that waiver of a right to remain silent can be implied when the suspect gives an uncoerced statement).

9. United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

10. *See* FED. R. CRIM. P. 12 (listing errors that must be raised by pretrial motion); *id.* 59(b) (stating a time limit for objections to magistrate judge findings and that failure to object "waives a party's right to review").

11. *See* FED. R. EVID. 103 (articulating the contemporaneous-objection requirements for preserving a claim of error that affects a substantial right of the party); 75 AM. JUR. 2d *Trial* § 315 (2018) (citing state court decisions that explain contemporaneous objections).

12. *See generally* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 (2002); Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1 (1994); Murray, *supra* note 3, at 1793; Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991 (2015); James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73 (1997). Constitutional standards that require retrospective assessments of the harm from a rights violation meet similar criticism. *See, e.g.*, Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2–6 (criticizing *Strickland* Sixth Amendment doctrine).

13. *Cf.* Heytens, *supra* note 7, at 955–62 (criticizing forfeiture rules in the context of changes in substantive law after trial but before direct appeal). *See generally* R. Lea Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 771 (1982) (asserting the need for federal review for state forfeiture procedures because such procedures make "convictions easier to obtain"); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1137 (1986) (highlighting the tension "between the tradition of state autonomy and the need for federal supervision of state court forfeitures").

14. Courts can be explicit about forfeiture's punitive function. *See* Faye v. Noia, 372 U.S. 391,

themselves by exercising care to identify errors by opponents or the court. This serves the public interest as well: preventing errors is much cheaper than correcting them later. The threat of forfeiting appellate rights "induce[s]"[15] or "encourage[s] timely objections and reduce[s] wasteful reversals,"[16] and it makes parties more vigilant in protecting their right to have their interests determined in a legal process unmarred by inadmissible evidence, application of incorrect law, or another procedural rule violation.

Preventing errors during the first trial is not immensely more efficient than correction through retrial; it is more likely to produce accurate judgments because occasionally evidence is no longer available for a second trial.[17] That concern aside, preventing errors is always better than retrospective assessment that an error occurred but probably had no effect. And in some instances, trial courts are better at determining whether something *is* an error because the trial judge, aided by the parties' arguments and a first-hand view of the evidence, "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute."[18] Even if they are not,[19] trial judges can make a better record of their own decisions for appellate

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432 (1963) (discussing "the state interest . . . [in] punishing [a defendant] for his default and deterring others who might commit similar defaults in the future").

15. Puckett v. United States, 556 U.S. 129, 134 (2009).

16. United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004); *accord* State v. Kelley, 855 N.W.2d 269, 278 (Minn. 2014) ("[F]orfeiture doctrine encourages defendants to object while in the district court so that any errors can be corrected before their full impact is realized."); State v. Ramey, 721 N.W.2d 294, 298–99 (Minn. 2006) (noting that the plain error rule encourages timely objections and gives trial courts the opportunity to remedy errors); *see also* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908 (2018) (noting that resentencing to correct errors is much less costly than retrial); *Puckett*, 556 U.S. at 134 ("[T]imely raising of claims and objections . . . gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute . . . [and] can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."); United States v. Vonn, 535 U.S. 55, 72–73 (2002) (explaining that the risk of forfeiting claims "concentrates . . . litigation in the trial courts, where genuine mistakes can be corrected easily," "promotes . . . finality," and "requires defense counsel to be on his toes"); United States v. Young, 470 U.S. 1, 15 (1985) (observing that the forfeiture doctrine fulfills the "need to encourage all trial participants to seek a fair and accurate trial the first time around" (quoting United States v. Frady, 456 U.S. 152, 163 (1982))). On the social costs of appellate reversal of convictions, see People v. Grant, 520 N.W.2d 123, 130 (Mich. 1994).

17. First trials are not *necessarily* more accurate than later ones. New evidence might be subsequently uncovered, and parties might refine presentation of their case in ways that improve adjudicative accuracy.

18. *Puckett*, 556 U.S. at 134; *accord* Wainwright v. Sykes, 433 U.S. 72, 88 (1977) ("A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest . . . . It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary . . . ."). State courts rely on the same rationale. *See, e.g.*, Coffee v. State, 699 So. 2d 299, 300 (Fla. Dist. Ct. App. 1997) (noting Florida's contemporaneous-objection rule gives trial judges an opportunity to correct errors).

19. Trial judges are not better situated to determine *all* types of errors. Appellate courts are

review when parties raise the issue early. Finally, forfeiture takes away any incentive injured parties might have for a form of strategic behavior that courts have long worried about: it "prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."[20] In sum, addressing alleged errors sooner rather than later has immense public and private benefits, and "[f]orfeiture provisions supply a necessary bite" to rules that require parties to do so.[21]

It should be clear that the justification for forfeiture rules is fundamentally instrumental.[22] Their overriding purpose is to optimize parties' error-preventing behavior by encouraging care in preventing errors and deterring delays in raising claims of error. But an instrumental policy is inevitably a second-best one. All policies of deterrence are concerned with the future more than the present, and general good or overall efficiency more than justice in the specific case.

Occasionally courts acknowledge the costs of this approach in terms of fairness and adjudicative accuracy.[23] In terms of corrective justice, forfeiture

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equally well situated to resolve claims of error that turn largely on the interpretation or applicability of law or doctrine, as with some types of jury-instruction errors. *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2367–68 (2016) (considering whether the lower courts properly interpreted the term "official act"); Yates v. United States, 135 S. Ct. 1074, 1079 (2015) (discussing whether a fish is a "tangible object" under 18 U.S.C. § 1519); Skilling v. United States, 561 U.S. 358, 367 (2010) (considering whether the jury properly interpreted "honest-services" wire fraud).

20. *Puckett*, 556 U.S. at 134; *id.* at 140 (opining that "requiring the objection means the defendant cannot 'game' the system, . . . seeking a second bite at the apple by raising the claim" if he dislikes the sentence); *see also Rosales-Mireles*, 138 S. Ct. at 1911 (Thomas, J., dissenting) ("In other words, a defendant who does not alert the district court to a plain miscalculation of his Guidelines range—and is not happy with the sentence he receives—can raise the Guidelines error for the first time on appeal and ordinarily get another shot at a more favorable sentence."); *Vonn*, 535 U.S. at 73 (noting forfeiture guards against defendants who "*choose* to say nothing about a judge's plain lapse" (emphasis added)). As the Court put it in *Wainwright*:

> We think that the rule of *Fay v. Noia* . . . may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.

433 U.S. at 89. State courts show concern about sandbagging as well. *See, e.g.*, *Coffee*, 699 So. 2d at 300 ("The contemporaneous objection rule also prohibits counsel from intentionally allowing errors to go uncorrected as a trial tactic."); People v. Ford, 168 N.E.2d 33, 40 (Ill. 1960) ("An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities.").

21. Meltzer, *supra* note 13, at 1135.

22. *See* cases cited *supra* note 16; *see also Wainwright*, 433 U.S. at 90 ("We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing.").

23. *See, e.g.*, People v. Herron, 830 N.E.2d 467, 473 (Ill. 2005) ("Illinois courts recognized that forfeiture is a harsh sanction for a defendant whose attorney failed to raise an error before the trial court."); State v. Kelley, 855 N.W.2d 269, 285 (Minn. 2014) (Stras, J., concurring) ("At early

rules are perverse. They apply only when an error occurs in the adjudicative process, and they give immunity to judgments that result from procedure marred by that error.[24] They bar error correction solely when there has been no previous consideration of the error and permit a second court to assess errors only when an earlier court has already done so.[25] They aim to improve justice overall and in the future, even if the cost is that the final judgment in the present case is inaccurate or unjust.

The corrective justice critique is a powerful one, but it is also familiar. The goal of this Article is to challenge the instrumental logic of the forfeiture doctrine. In most applications, that logic, continually rehearsed by state and federal courts, does not hold up; it fails on its own terms. Placing the burden of care to prevent litigation errors on injured parties is generally not the optimal rule for minimizing harms from procedural errors. Barring parties injured by errors from subsequently seeking to correct errors they earlier failed to prevent is not necessary to minimize bad strategic behavior and frivolous appeals, despite courts' perpetual assertions otherwise. For most types of errors, the better policy is the opposite one: placing the duty to prevent errors on the party who *commits* the error (or who benefits from the judge's error), through the use of a de facto reverse-forfeiture penalty.

A starting point is to step back from the procedural-default jurisprudence and to notice the oddity of standard forfeiture rules. The party that *caused* the error, in the ordinary sense of doing something that violates a rule, does not bear the burden of preventing or correcting it. The prevailing doctrine gives the injurer no incentive to exercise care in avoiding errors. Rather, the duty of error prevention is on the party harmed by an opponent's or judge's error. The procedural regime for preventing adjudication errors incentivizes care by the rights *holder*—the passive, injured party—rather than the rights *violator* who chose some rule-violating tactic. This approach is hardly as necessary and unavoidable as courts insist. Carefully considered, arguments for incentivizing injured parties through forfeiture of appellate rights are unpersuasive.

To see why, one need only recognize the similarity of this error-prevention problem to others. Like the activities governed by much of tort, property, and contract law, litigation is a bilateral activity—two parties

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common law, a defendant's failure to object to an error at trial resulted in the forfeiture of the right to have the alleged error reviewed on appeal. However, the harshness of the common-law rule led to the creation of various exceptions . . . ." (citation omitted)).

24. Meltzer, *supra* note 13, at 1234.

25. This is an expanded paraphrase of Justice Black's criticism of forfeiture in the context of federal habeas litigation. *See* Brown v. Allen, 344 U.S. 443, 552 (1953) (Black, J., dissenting) ("I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none.").

interact (or three, counting the judge) and one suffers an injury. And all errors to which forfeiture rules apply share another characteristic with activities governed by these other bodies of law. In the language of tort law literature, litigation errors are usually "alternative-care" activities, meaning that *either* party is able to prevent harm by the exercise of due care. The parties' error-prevention efforts are substitutes for one another rather than complements; it is not necessary for *both* parties to exercise care in order to achieve the optimal level of error prevention.[26] Conceptually, errors in the adjudication process are no different from accidents in tort law. In both settings, the law must choose which party will bear the cost of the harm. That assignment of liability encourages the cost-bearing party to exercise greater care to prevent harms. The law of procedure, like tort law, is focused on minimizing the cost of errors (or, in tort terminology, accidents).

Beginning largely in tort law but now extended much beyond,[27] scholars and courts have fundamentally rethought how to choose between legal rules when the goal is the instrumental one of minimizing errors and the costs of harm. Famously, the focus of the Coase Theorem is on minimizing harms arising in bilateral activities. The theorem posits that, in the absence of transaction costs, it doesn't matter on which party legal rules assign liability for harm. When two parties can freely bargain, they will arrive at the most efficient solution for preventing harm.[28] That insight alone poses a challenge to the unanimous judicial insistence that forfeiture rules must always place "liability" for procedural errors on parties harmed by an error. If the theorem's stringent conditions were met, courts could be indifferent about which party the rules penalize for litigation errors. They are unlikely to be, however; cost-free bargaining is often no more feasible between parties in adjudication than in many other contexts.[29] But that leads to another seminal

26. Alternative-care activities contrast with "joint-care" activities in which it is best for both parties to exercise care because their care expenditures are complements rather than substitutes. Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1294 n.13 (1992) (defining alternative- and joint-care scenarios); Hans-Bernd Schäfer & Andreas Schönenberger, *Strict Liability Versus Negligence*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 597, 607–08 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). In alternative-care scenarios, more care by one makes care by the other party less productive. *Id.* In the joint-care scenarios, prevention requires care by both parties. *Id.* A large literature in tort law considers whether liability rules should place all responsibility for accident prevention on one party, permitting the other to be less careful, or whether to encourage both parties to use greater care even when care by one party can prevent the harm. *See id.* at 1305 & n.36 (criticizing rules of absolute liability for failure to incentivize both parties in bilateral activities).

27. For a very small sample (from an enormous literature) of applications beyond tort law, see, for example, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Kyle D. Logue & Joel Slemrod, *Of Coase, Calabresi, and Optimal Tax Policy*, 63 TAX L. REV. 797 (2010); and Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005).

28. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

29. *See infra* subpart II(B).

insight for how to choose the optimal rule for minimizing errors. Guido Calabresi was the first to suggest that, when the Coase Theorem's strict prerequisites are not met, the optimal level of accident (or error) prevention is achieved by placing the duty of care on the *cheapest cost avoider*. When more than one party could prevent a harm by exercising care, the incentive should be placed on the one who can do so more cheaply—the cheapest cost avoider, whether injurer or victim.[30]

Forfeiture doctrine in criminal procedure has completely ignored this insight. Judicial accounts of deterrence in this context also overlook an important corollary. In bilateral activities, liability rules—including forfeiture penalties—create incentives not simply for *one* but for *all* parties. The party that bears liability has an incentive to identify and prevent the errors—under traditional forfeiture rules, errors by the opposing party or judge. But that same rule necessarily encourages other parties to *reduce* their level of care in preventing errors. Forfeiture doctrine marginally encourages litigants to *attempt* rule-violating tactics and to overlook judicial errors that cut in their favor. Save in extreme cases of deliberate deceit,[31] parties and their attorneys face no real penalty for *attempting* to gain an advantage from a rule-violating tactic. If the opposing party fails to object and thereby forfeits any later challenge to it, they benefit. If an opponent successfully prevents it, the party is merely confined to playing by the rules. Forfeiture doctrine gives

30. Schäfer & Schönenberger, *supra* note 26, at 608; *see also* GUIDO CALABRESI, THE COST OF ACCIDENTS 135–36 (1970) (arguing the presence of transaction costs makes placing liability on the cheapest cost avoider the most efficient approach); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097 (1972) (postulating that the party who can act most cheaply should be induced to remedy an error in entitlement costs); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability*, 81 YALE L.J. 1055, 1059–60 (1972) (explaining that imposing strict liability on the cheapest cost avoider encourages efficient levels of precaution).

31. For the only modern example of a prosecutor being punished for violating a constitutional-disclosure duty, see Pamela Colloff, *Jail Time May Be the Least of Ken Anderson's Problems*, TEX. MONTHLY (Nov. 14, 2013), https://www.texasmonthly.com/articles/jail-time-may-be-the-least-of-ken-andersons-problems/ [https://perma.cc/Z2K7-ACU5]. Standards are high for remedies that merely dismiss indictments or reverse convictions, aside from any further sanctions for misconduct. *See, e.g.*, Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988) (holding that federal courts may not dismiss an indictment for prosecutorial misconduct in a grand jury that did not prejudice the defendant); Darden v. Wainwright, 477 U.S. 168, 179–83 (1986) (holding that overly racially biased prosecutor arguments did not violate the right to a fair trial); United States v. Bout, 731 F.3d 233, 239 (2d Cir. 2013) (rejecting a claim of vindictive prosecution); United States v. Udziela, 671 F.2d 995, 998–99 (7th Cir. 1982) (collecting federal decisions on courts' power to dismiss indictments for prosecutor misconduct); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.6(b) (4th ed. 2015) (describing remedies for prosecutor violations of constitutional and statutory disclosure obligations); Eric C. Surette, Annotation, *When Is Dismissal of Indictment Appropriate Remedy for Misconduct of Government Official*, 10 A.L.R. Fed. 3d Art. 3 §§ 12–19, 90–113 (2016) (describing limits on courts' authority to dismiss indictments for prosecutor misconduct).

little attention to this side effect that undermines its core ambition of efficiently preventing errors.

Forfeiture doctrine suffers from other analytical deficiencies as well. For example, courts take inadequate account of *other* incentives on parties to prevent errors, aside from those that forfeiture rules create. For many kinds of errors, incentives built into the adversarial process are so strong that forfeiture penalties add little or nothing. With some exceptions, parties are always highly motivated to frustrate most of their opponent's tactical moves by objecting to them as soon as possible. The fear of forfeiting appellate review adds little to that. The insights of economic analysis can help courts more carefully assess how forfeiture rules could integrate with the existing incentive structure of the adversarial process to optimize parties' error-prevention incentives.

In what follows, I develop the argument that the standard analysis used to justify forfeiture rules is deeply flawed. In most circumstances, existing forfeiture rules do not optimize prevention of litigation errors. Instead, procedural rules generally should place the duty of care on the error-causing party or, in specific contexts, the judge.[32] That is possible by shifting the entitlements to appellate review that apply in the wake of an uncorrected trial error. Currently, the injured party loses its right to appellate review when it fails to object to an error. Under the alternative, the error-causing party loses immunity from appellate review for errors it caused. Instead of denying review for uncorrected errors to parties who lost the trial court judgment, the alternative provides review for uncorrected errors that favored the judgment winner and are raised by the judgment loser on appeal. That encourages parties to prevent their own errors in order to protect the finality of a favorable judgment.

Part I describes the standard forfeiture penalty in more detail and context. It then explains the key flaws in the rationales for that doctrine and outlines reasons that the rule is an ineffective way to achieve its goal of preventing errors as early in the litigation process as possible. To do so, this Part introduces and adapts the cheapest-cost-avoider analysis for the adjudication context. Part II explains the alternative to standard forfeiture doctrine, which would reallocate appellate rights so as to shift the risk of error and the duty of prevention from the injured party to the acting, or error-causing, party. It defends the proposal from anticipated objections and describes how this approach takes better account of the parties' existing adversarial incentives, as well as the incentives created by the harmless error standard of review, to place the duty of care on the actor best able to prevent

32. In practice, placing the duty of care on the judge is little different from placing the duty on the party that benefits from a judicial error. Either way, the benefiting party will be motivated to bring the error to the judge's attention. *See infra* subpart III(B).

errors cheaply. This Part pays special attention to the possibility of perverse incentives and strategic behavior arising from (a) the small category of "structural" errors, which are exempt from harmless error review, and (b) errors that injured parties have no incentive, from the structure of adversarial process alone, to raise early and prevent. Finally, Part III addresses the puzzle that follows from this account: given the fundamental weakness of the standard forfeiture model, what accounts for courts' continued adherence to it? Part III suggests several possibilities, but the most significant is that courts have been insufficiently rigorous to their own instrumental mode of analysis. Judicial opinions are replete with moralistic language about the unfairness of permitting parties to correct errors on appeal that they could have prevented earlier. This moralism deeply distorts the instrumental analysis that courts purport and aspire to use.

I. Traditional Forfeiture Rules

A. The Ubiquity of Forfeiture Penalties

The party-driven adversary system relies on parties not only to frame issues and produce evidence but also to identify applicable substantive law and to enforce procedural law.[33] Unless the parties invoke and demand adherence to it, most evidence and procedural rules can be ignored because—with some exceptions[34]—trial judges do not take on the responsibility of monitoring proceedings with the aim of enforcing those rules. They routinely do so either by mutual agreement or unilaterally. Prosecutors and defendants routinely agree to waive indictment and discovery requirements to reach a plea agreement, and agree to waive trial rights as part of a guilty plea.[35] Parties mutually stipulate to foundation requirements for evidence, and when

33. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 114–15 (1986) (describing the influential procedural and substantive roles played by legal counsel in adversarial proceedings).

34. Exceptions are rules that impose obligations or constraints on judges. *See, e.g.*, FED. R. CRIM. P. 11 (describing the requirements for judges before entering judgment on a guilty plea). *But see* United States v. Dominguez Benitez, 542 U.S. 74, 76 (2004) (holding that an appellate court will not invalidate a guilty plea based on a judge's Rule 11 violation unless the defendant objected to the judge's error at the guilty-plea hearing or the defendant shows a reasonable probability he would not have entered the guilty plea but for the error).

35. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74 (2015); *see* FED. R. CRIM. P. 7(b) (authorizing waiver of indictment); FED. R. CRIM. P. 11 (authorizing plea agreements). In many jurisdictions, prosecutors as well as defendants must waive the jury trial. *See, e.g.*, OR. REV. STAT. § 136.001 (2017) (granting both parties the right to jury trial); VA. SUP. CT. R. 3A:13 (requiring concurrence of state attorney for defendant to waive jury right); Patton v. United States, 281 U.S. 276, 312 (1930) (requiring consent of U.S. attorney to waive federal-jury right). For innovative discussions of waivers to streamline trials, see generally Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609 (2016) and John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2015).

it serves their partisan interest they unilaterally elect not to object to their opponent's evidence despite grounds to do so. Objections, of course, are simply claims that some action by the opposing party or judge violates a law that the objecting party demands be enforced. Parties also have some influence over instructions that trial judges give to juries, which is to say control over what substantive law is applied to the facts and how that law is defined.[36]

A virtue of this system is its efficiency—parties can ignore rules that have no real utility in a given instance. But to preserve that efficiency, there must be limits on when parties can exercise this near-total discretion over procedural law. Parties have the right to enforce (or demand adherence to) all procedural rules, but they have to make the choice to do so at the time a rule applies. Otherwise, parties could demand costly do-overs of the adjudication process. Hence the contemporaneous-objection rule requires parties to object to offers of evidence or trial court decisions at the time they occur rather than later. Equivalent time limits attach to rules governing various pretrial events, such as choice of venue, joinder, and the timing of indictments or trial.[37]

But how to enforce requirements such as the contemporaneous-objection rule? The common law's answer has been to impose a penalty of forfeiture of the entitlement to have errors committed by others corrected through appellate review. "No procedural principle is more familiar than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[38] To avoid forfeiture, Federal Rule of Criminal Procedure 51 and state law equivalents require parties harmed by an error to *preserve* the claim for appellate review by making a timely objection in the

36. *See, e.g.*, FED. R. CRIM. P. 30(a) ("Any party may request in writing that the court instruct the jury on the law as specified in the request."); FED. R. CIV. P. 51(a) ("[P]arty may file . . . written requests for the jury instructions it wants the court to give."). Failures to request or object to instructions trigger plain error review for alleged errors. *See, e.g.*, United States v. Vasquez, 899 F.3d 363, 378 (5th Cir. 2018) (holding that the district court's failure to give an instruction defining an element of a criminal offense is reviewed only for plain error when the defendant failed to request such an instruction); United States v. Morrissey, 895 F.3d 541, 547 (8th Cir. 2018) (applying plain error review to defendant's claim that the district court erred by failing to instruct the jury that it could not convict the defendant for both possession of child pornography and receipt of child pornography based on the same facts when the defendant did not request such an instruction).

37. *See* FED. R. CRIM. P. 12(b)(3) (requiring challenges to choice of venue to be brought before trial); FED. R. CRIM. P. 30(d) (requiring that objections to jury instructions must be raised before the jury begins deliberations); FED. R. CRIM. P. 32(f)(1) ("Within 14 days after receiving the presentence report, the parties must state in writing any objections . . . .").

38. Yakus v. United States, 321 U.S. 414, 444 (1944) (adding that "[c]ourts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken").

trial court.[39] The aim is to enable the trial court to prevent errors, thereby minimizing the need for error correction through appellate review.

Until well into the twentieth century, the common law approach to error correction was extreme in both directions. If a party challenged the error in the trial court and thereby preserved the claim for appeal, reversal of the judgment was granted even for relatively minor or technical errors.[40] On the other hand, if the injured party did not preserve the error, forfeiture of appellate review was virtually absolute, no matter the gravity of the error. Both approaches have now been somewhat moderated. Review under the harmless error standard permits a judgment to stand, although the process that produced it was not error free.[41] And the "plain error" standard tempers the forfeiture rule by permitting appellate courts to overturn judgments affected by especially significant errors even when the injured party failed to preserve the claim.[42] While all states apparently now use harmless error review, not all have followed federal law and adopted plain error review for forfeited errors.[43] Some that do limit plain error review to certain kinds of errors (usually constitutional ones), meaning that other kinds of errors are still subject to absolute forfeiture.[44] Some have adopted a sort of safety valve

39. FED. R. CRIM. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection."); *see also* FED. R. EVID. 103(a) ("Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike . . . ."). The equivalent rule for civil litigation is Federal Rule of Civil Procedure 46.

40. *See* Wicht, *supra* note 12, at 74 ("Prior to 1967, courts held Constitutional errors could never be harmless.").

41. *See* Chapman v. California, 386 U.S. 18, 21–22 (1967) (approving harmless error review for most constitutional errors). Harmless error review was first authorized by federal statute in the Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (codified as amended at 28 U.S.C. § 391 (1926)), *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 998. The current rule is Federal Rule of Criminal Procedure 52(a).

42. The first U.S. reference to plain error review is in *Wiborg v. United States*, 163 U.S. 632, 658–59 (1896). The U.S. Supreme Court adopted the plain error standard for federal courts in *United States v. Atkinson*, 297 U.S. 157, 159–60 (1936). The standard was codified in Rule 52 when the Federal Rules of Criminal Procedure were enacted in 1946. FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). *See generally* Johnson v. United States, 520 U.S. 461, 466–67 (1997) (elaborating on the plain error standard); United States v. Olano, 507 U.S. 725, 735–41 (1993) (same); United States v. Young, 470 U.S. 1, 15 (1985) ("The plain-error doctrine of Federal Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement."); State v. Kelley, 855 N.W.2d 269, 278 (Minn. 2014) ("The plain-error doctrine . . . provid[es] a means for appellate courts to remedy forfeited errors.").

43. *See* Jon M. Woodruff, Note, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 IOWA L. REV. 1811, 1816–17 (2017) (summarizing state plain error rules, noting at least two states without plain error rules, and describing the narrow reach of the plain error standard in Iowa and elsewhere).

44. *See, e.g.*, KAN. STAT. ANN. § 60-404 (2005) (providing for the forfeiture of appellate review

that allows appellate review for forfeited claims in "the interest of justice."[45] And there are formidable variations and complexities in how courts define the plain error and harmless error standards, as well as the requirements for preserving an error for appellate consideration.[46] For present purposes, however, those details can be left aside. The important point is that state appellate courts routinely decline to consider unpreserved claims.[47] In jurisdictions without plain error review for some or all unpreserved errors, the traditional, absolute forfeiture rule still holds; errors that may have affected the trial judgment cannot be corrected on appeal. Moreover, plain error review under Federal Rule 52(b) and state equivalents is in effect a partial forfeiture rule in two ways: plain error review is available for only a limited subset of unpreserved errors—those deemed to be plain or obvious rather than close questions—and those errors are assessed under a less favorable standard that makes error correction less likely.[48]

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for "the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection"); TEX. R. APP. P. 44.2 (propounding distinct harmless error standards for constitutional and nonconstitutional errors, but no plain error standard of review).

45. *See* ILL. S. CT. R. 451(c) (providing that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require"); N.Y. CRIM. PROC. LAW § 470.15(6) (McKinney 2009) (providing for an "interest of justice" review for unpreserved errors); *see also* FLA. STAT. ANN. § 924.051(3) (West 2017) ("An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.").

46. *See, e.g.*, Coffee v. State, 699 So. 2d 299, 300–01 (Fla. Dist. Ct. App. 1997) (describing a split among states as to whether a party who objected to an opponent's tactic in a motion in limine and prevailed must object again when an opponent violates the court's order that barred the tactic).

47. *See, e.g.*, People v. Perez, 411 P.3d 490, 514 (Cal. 2018) (holding that the defendant forfeited any claim that the state improperly vouched for the credibility of witnesses and the victim during closing argument); Martin v. State, 779 S.E.2d 342, 348, 360–61 (Ga. 2015) (holding that the capital-murder defendant forfeited the claim that the prosecutor made impermissible comments to the jury in closing argument); People v. Taylor, 102 N.E.3d 799, 808 (Ill. App. Ct. 2018) (holding that the defendant forfeited the claim that the state improperly vouched for credibility of witnesses and the victim during closing argument); Hopper v. State, 483 S.W.3d 235, 236–37 (Tex. App.—Fort Worth 2016, pet. ref'd) (holding that the defendant forfeited the argument that the prosecutor twice improperly commented on his failure to testify during closing argument); Hernandez v. State, 914 S.W.2d 218, 224–25 (Tex. App.—El Paso 1996, pet. ref'd) (holding that the defendant forfeited claims of improper jury selection and prosecutorial misconduct by failing to preserve objections for the appellate record).

48. Under plain error review, the burden of proof switches to the party alleging the error to prove that the error affected "substantial rights." *See* Johnson v. United States, 520 U.S. 461, 466–67 (1997) (discussing plain error review procedures); United States v. Olano, 507 U.S. 725, 735–41 (1993) (same); 3B CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 856 (4th ed. 2013) (same). Some states apply the same standard. *See, e.g.*, People v. Miller, 113 P.3d 743, 750 (Colo. 2005) ("Plain error addresses error that is both 'obvious and substantial' . . . [meaning] those errors that 'so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.'" (quoting People v. Stewart, 55 P.3d 107, 119 (Colo. 2002) and People v. Sepulveda, 65 P.3d 1002, 1006 (Colo. 2003))). For preserved claims, the judgment winner has the burden to show the error was harmless. (In the criminal context this is always the government, save in special circumstances.) For a small

In these rules and others, forfeiture penalties govern the vast majority of errors and rule violations that arise in pretrial and trial litigation, including those at the very start. Issues on the face of an indictment—including improper joinder of charges, codefendants, or unconstitutional charges—must be raised before trial.[49] Violations arising from the composition of the jury venire or an opposing party's unconstitutional use of peremptory strikes likewise must be challenged when they occur or become apparent. Objections to inadmissible evidence must be made before or when it is proffered; objections must be made immediately in response to lawyers' improper comments and arguments to juries, and to jury instructions.[50] The same goes for questions of whether a particular issue must be decided by the judge or jury.[51] Equivalent requirements for timeliness apply to judicial errors in the course of guilty-plea hearings.[52]

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number of "structural" constitutional errors, proof of prejudice is not required. For example, before trial a defendant need only point out to the trial judge that his counsel has a conflict of interest. Holloway v. Arkansas, 435 U.S. 475, 477, 489–90 (1978). After trial, the defendant must show that the attorney's conflict of interest adversely affected the attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). For a small number of errors that by their nature cannot ordinarily be raised at the trial stage or even on direct appeal, forfeiture does not apply until the subsequent, post-conviction stage. *See, e.g.*, Latson v. State, 193 So. 3d 1070, 1071 (Fla. Dist. Ct. App. 2016) (per curiam) (explaining that, unless apparent on the face of the record, claims of ineffective assistance of counsel cannot be raised on direct appeal and instead must be raised by motion for post-conviction relief); Beazley v. State, 148 So. 3d 552, 554 (Fla. Dist. Ct. App. 2014) ("Generally, a claim of ineffective assistance of counsel may not be raised on direct appeal."). *But see* White v. State, 711 N.W.2d 106, 109 (Minn. 2006) (clarifying that ineffective-assistance claims known to the defendant at the time of direct appeal and that can be decided on the basis of the trial court record must be brought on direct appeal or be procedurally barred when raised in a post-conviction petition).

49. FED. R. CRIM. P. 12(b)(3). Rule 12(c)(3) defines an equivalent partial forfeiture rule by requiring "timely" motions to challenge pleadings and permitting a court to consider an untimely motion "if the party shows good cause." FED. R. CRIM. P. 12(c)(3); *cf.* United States v. Broce, 488 U.S. 563, 587 (1989) (discussing how failure to present a double jeopardy challenge at a plea hearing might not constitute direct waiver of the challenge); Menna v. New York, 423 U.S. 61, 62 (1975) (explaining that a counseled plea of guilty does not necessarily constitute waiver of a double jeopardy claim).

50. *See* FED. R. EVID. 103(a) (stating the timing of evidentiary objections); FED. R. CRIM. P. 30(d) (requiring objections to jury instructions to be made before the jury begins deliberations); United States v. Severeid, 609 F. App'x 931, 932 (9th Cir. 2015) (explaining that plain error review applied to the prosecutor's impermissible comments on the credibility of the defendant and the government witness due to the defendant's failure to object).

51. *See* Johnson v. United States, 520 U.S. 461, 464–65 (1997) (concluding that the judge's error of failing to submit materiality question to the jury did not constitute plain error); United States v. Gaudin, 515 U.S. 506, 522–23 (1995) (holding that materiality must be decided by the jury); *see also* FED. R. CRIM. P. 30(d) (codifying rules for jury instruction objections).

52. *See* FED. R. CRIM. P. 11 (codifying requirements for judicial conduct in plea hearings and providing that "variance" from those requirements is "harmless error if it does not affect substantial rights"); United States v. Dominguez Benitez, 542 U.S. 74, 76 (2004) (explaining that the defendant must object during plea colloquy if the judge fails to notify the defendant of all the rights listed in Rule 11 as essential to a valid guilty plea); *cf.* United States v. Davila, 569 U.S. 597, 612 (2013) (interpreting Rule 11(h) to require that appellate courts review violations of Rule 11(c)'s bar on trial

Moreover, equivalent rules of procedural default apply in civil litigation.[53] They play an especially prominent role in civil actions that often follow criminal convictions—federal habeas litigation. Prisoners alleging constitutional errors in federal habeas petitions face a standard even stricter than the plain error rule if their counsel did not object in the original trial. They must show "cause" for excusing their counsel's failure and the "actual prejudice" resulting from the constitutional error.[54] Similarly, prisoners convicted in state courts seeking collateral review in federal courts forfeit claims they do not first present to state courts.[55]

Finally, several constitutional doctrines incorporate forfeiture penalties as a mechanism to compel criminal defendants to raise claims of constitutional violations as early as possible. If defendants fail to raise such claims sufficiently early, they lose at least partially their entitlement to error correction on appeal. For example, conflict-of-interest claims first raised by defendants in the trial court enjoy a more favorable standard of appellate review than if the same claim is presented for the first time on appeal.[56] For prosecutors, meanwhile, the double jeopardy doctrine imposes a constitutional forfeiture rule. Because it prohibits prosecution appeals of trial errors following acquittals,[57] double jeopardy law does for prosecutors what statutory and common law forfeiture rules do for defendants: it encourages preventing opponents' errors during trial. If prosecutors fail to do so and subsequently lose the judgment, they are barred from using those errors as grounds for appeal.[58] (For this reason, while forfeiture rules nominally apply

judge involvement in plea negotiations under the harmless error standard).

53. *See* FED. R. CIV. P. 46, 51(c) (codifying rules for making timely objections). Federal Rule of Evidence 103 applies in criminal and civil litigation.

54. United States v. Frady, 456 U.S. 152, 167–68 (1982); *see also* 28 U.S.C. § 2255(e) (2012) (prohibiting consideration of a federal prisoner's habeas petition who failed to seek relief from the sentencing court unless that remedy is "ineffective to test the legality of his detention").

55. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Murray v. Carrier, 477 U.S. 478, 490–91 (1986); *see also* 28 U.S.C. § 2254(d)(1) (2012) (providing that a federal habeas application cannot be granted on a claim "adjudicated on the merits in State court" unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court").

56. *Compare* Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (concluding that prejudice is presumed when the trial judge orders the defense attorney's conflicted representation of codefendants over defense objection), *with* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) ("[A] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.").

57. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); Evans v. Michigan, 568 U.S. 313, 315–16 (2013) (holding that a midtrial directed verdict bars retrial); United States v. Martin Linen Supply Co., 430 U.S. 564, 565, 567 (1977) (applying double jeopardy law to a criminal contempt trial); Fong Foo v. United States, 369 U.S. 141, 142–43 (1962) (per curiam) (barring retrial after an acquittal by a judge). However, prosecutors *are* permitted to appeal judgments of acquittal entered after jury verdicts of guilty. United States v. Wilson, 420 U.S. 332, 352–53 (1975).

58. Prosecutors' double-jeopardy-based forfeiture penalty is somewhat broader. Unlike

to all parties in criminal adjudication, forfeiture applies overwhelmingly to the defense.)[59]

B. Critique of Rationales for Standard Forfeiture Rules

The traditional forfeiture rule has some significant disadvantages that courts overlook. The first can be recounted briefly: by incentivizing efficient error prevention by reducing error-correction opportunities, forfeiture undermines the accuracy and integrity of judgments. Paradoxically, it restricts error-correction procedures precisely where they are most needed—when errors go unaddressed in the trial stage—and it does so with little regard for the merits or seriousness of alleged errors. As the proliferation of known wrongful convictions in recent decades confirms, this is not merely a hypothetical risk.[60] Second, courts disregard forfeiture's *conflicting* incentives in bilateral activity: while encouraging one party to *prevent* errors, it encourages the other to *commit* errors, or at least to be careless about doing so. These weaknesses intersect with two related ones examined in the next Part. Forfeiture doctrine takes little account of parties' strong existing incentives (a) to prevent most errors by their opponents and (b) to attempt self-serving, rule-violating tactics. And the doctrine gives no consideration to which party could more easily prevent litigation errors.

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defendants, prosecutors cannot appeal the trial judge's incorrect ruling on their timely objection, nor can they seek plain error review for unpreserved errors. But that restriction does not apply to pretrial or post-trial errors, and statutes give prosecutors more access to pretrial interlocutory appeals than defendants. By raising issues such as evidence admissibility in pretrial motions before rather than during trial, prosecutors increase their opportunities for appellate review. Prosecutors can also appeal sentencing decisions, other post-judgment orders, and the decisions of intermediate appellate courts. *See* 18 U.S.C. § 3731 (2012) (authorizing prosecution interlocutory appeals on various grounds as well as post-conviction appeals from orders for a new trial); *id.* § 3742(b) (2012) (authorizing prosecution appeals from sentencing decisions); Scott J. Shapiro, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Mid-Trial Evidentiary Rulings*, 99 YALE L.J. 905, 911–14 (1990) (noting that the prosecution can appeal the court's decision to postpone decision of the evidentiary issue until trial and convert midtrial orders to pretrial ones by seeking a mistrial). Some state laws also provide for this prosecutorial ability. *See, e.g.*, N.C. GEN. STAT. §§ 15A-979(c), -1445 (2017) (providing that the state may appeal the dismissal of criminal charges, the granting of a motion for a new trial, the sentencing decision, and the granting of a motion to suppress); *cf.* FED. R. CRIM. P. 58(g)(2)(A) ("Either party may appeal an order of a magistrate judge . . . ."). For a thorough overview and empirical analysis of prosecution appeals, see generally Nancy J. King & Michael Heise, *Appeals by the Prosecution*, 15 J. EMPIRICAL LEGAL STUD. 482 (2018).

59. Defendants initiate more than 90% of state criminal appeals. NICOLE L. WATERS ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 248874, CRIMINAL APPEALS IN STATE COURTS 4 tbl.1 (2015); *see also* King & Heise, *supra* note 58, at 499 & n.68 (finding that prosecutors filed about 2% of direct appeals in a dataset of state criminal appeals for 2010).

60. For an overview of wrongful convictions and errors contributing to them, see generally BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011).

1. Forfeiture's Conflicting Functions—Incentivizing Parties vs. Screening Claims of Error.—A fundamental problem with the forfeiture penalty is that it restricts access to appellate review on grounds unrelated to the merits of alleged errors, and only for errors no court has previously evaluated. Review under the plain error standard, adopted in federal courts but not in all states, mitigates this flaw very partially by authorizing appellate courts to review certain errors based on their grave nature and likely effect. Forfeiture rules thus serve a gatekeeping function for appellate courts. But they do so not to sort meritless claims from meritorious ones but to incentivize parties to exercise greater care in preventing errors as they occur in the trial court. If parties fail to respond consistently to that incentive, forfeiture mimics the injured party's failure: both the party and the penalty deny courts the opportunity to evaluate procedural errors. Put differently, forfeiture diminishes the prospects in the present case of a judgment unaffected by error as a strategy for minimizing procedural errors in the future. This trade-off between procedural integrity for individual cases and encouraging diligence in error prevention makes forfeiture rules far from an ideal tool to achieve one of the core ambitions for any public litigation system: minimizing inaccurate or unfair judgments that are the products of rule-violating procedures. Forfeiture rules prioritize adjudicative efficiency over the conflicting aim of granting finality only to judgments likely to be accurate because they are products of error-free process.

2. Forfeiture's Conflicting Incentives in Bilateral Activity.—The more significant weakness of forfeiture is that it is an imperfect instrument even for its primary ambition of maximizing trial-stage error prevention. By adopting forfeiture rules, courts and policy makers assume that the best way to minimize errors is to incentivize one party to watch out for errors caused by the other or by the court. In criminal litigation, this means the singular focus of using forfeiture is to give *defendants* an "incentive to think and act early"[61] and "encourage[s] timely objections and reduce[s] wasteful reversals."[62] But judicial discussions of this strategy nearly always overlook the fact that, because they apply to bilateral activity, forfeiture rules create incentives for *both* parties, and those incentives conflict. While forfeiture makes each party more vigilant in spotting errors by the other, they also make each party *less* vigilant about avoiding errors in their own tactics—to use less care in determining and observing legal rules that regulate their litigation actions from drafting pleadings and selecting jurors to offering evidence and

61. United States v. Vonn, 535 U.S. 55, 73. *But see id.* at 79 (Stevens, J., concurring in part and dissenting in part) (noting defendant's objection must take a form such as, "Your Honor, I object to your failure to inform me of my right to assistance of counsel").

62. United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004).

proposing jury instructions. In fact, forfeiture rules *encourage* parties to attempt rule violations in their own tactical actions. Trial objection requirements enforced by forfeiture penalties encourage greater care to prevent errors when the *opposing* party is acting, but greater recklessness about committing errors in their own actions. Courts occasionally acknowledge the inevitability of forfeiture's perverse incentive. But given their commitment to forfeiture doctrine, they are left with no response beyond urging that professional ethics should counteract forfeiture doctrine's license to pursue rule-violating tactics.[63]

This tradeoff presents a version of the moral hazard problem—the absence of an incentive to guard against a harm when one is protected from, or benefits from, that harm. It is a familiar consequence of liability rules that govern bilateral activities. If (in the classic scenario) the rancher is liable when his cattle trample the farmer's crops, the farmer can be careless about the risk of trampling and even make it more likely—by planting tastier crops close to the property line, not investing in a fence, etc. The same holds for forfeiture-rule effects on litigating parties. Consider a prosecutor's tactical calculus, since forfeiture operates mostly against defendants in criminal litigation. When deciding, say, whether to charge the same offense twice in an indictment (despite the double jeopardy prohibition),[64] to offer inadmissible evidence, or to make impermissible comments to the jury,[65] forfeiture rules' signal to prosecutors is clear: attempt the rule-violating tactic. Save for extreme misconduct that would prompt a mistrial,[66] the

63. *See, e.g.*, State v. Moncla, 936 P.2d 727, 734 (Kan. 1997) (adding, after finding that the prosecutor violated the trial court order on inadmissible evidence but the defendant forfeited appellate review by failing to object: "We do not condone such action on the part of the prosecutor."); Hernandez v. State, 914 S.W.2d 218, 226 & n.7 (Tex. App.—El Paso 1996, pet. ref'd) (adding in a footnote, after finding that the prosecutor violated the trial court order on inadmissible evidence but the defendant failed to "preserve [the] error for appellate review": "Nothing in this opinion should be read as condoning flagrant violations of limine orders such as that engaged in here. To the contrary, we strongly condemn this tactic."). Case law in Texas once included as a factor in harmless error analysis "whether finding the error harmless would 'encourage the State to repeat the error,'" but Texas courts subsequently abandoned that consideration. Schmutz v. State, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014) (quoting Schmutz v. State, No. 06–12–00059–CR, 2013 WL 1188994, at *3 (Tex. App.—Texarkana Mar. 22, 2013) (mem. op., not designated for publication)).

64. For an example of how this is possible, presumably even in good faith, see United States v. Broce, 488 U.S. 563, 565 (1989), in which an indictment improperly charged conduct that was in fact only a single conspiracy as two conspiracies.

65. *See, e.g.*, *Moncla*, 936 P.2d at 734 (noting the "prosecutor did not follow the clear instructions of the court not to bring the results of a polygraph examination," but the defendant forfeited by failing to object); *Hernandez*, 914 S.W.2d at 225–26 (explaining that the prosecutor solicited testimony from the witness after the trial court ordered them not to do so, but the defendant forfeited the claim by failing to object).

66. *See, e.g.*, United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) (suggesting double jeopardy may bar retrial after mistrial "necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal").

prosecutor faces one of two outcomes: either the defense will object, in which case the prosecutor will have to play by the rules, or the defense won't object, in which case the prosecutor gains whatever advantage the rule-violating tactic provides because the error is immune to appellate review (or at worst faces review under the highly favorable plain error standard).

Notice that this problem is the mirror image of an injured party sandbagging—"choos[ing] to say nothing"[67] or "remaining silent about [an] objection."[68] Courts insist that the threat of forfeiture is necessary to discourage this bad behavior. Yet that same forfeiture penalty encourages the other party—the acting party—to engage in wholly equivalent behavior: deliberately not preventing errors at trial. Those parties do so by *attempting* errors—meaning rule violations—in their own tactics, or at a minimum being less careful about observing rules. Inevitably, then, one party or the other has reason for errors to pass unnoticed in the trial stage—either by causing them or by remaining silent when opponents or judges cause them. Nor are conflicting incentives of this sort unique to forfeiture rules. The harmless error standard likewise encourages rule-breaching trial tactics. By denying remedies for certain errors, appellate courts signal to prosecutors that committing such errors is cost free.[69]

Judicial opinions and commentary on forfeiture rules mostly ignore or quickly dismiss this problem, but it is a familiar one that courts and commentators grapple with in other settings such as tort law. And in every relevant respect, procedural errors are like torts. They arise in bilateral activities in which one party does something (intentionally, negligently, or reasonably) that it has a duty not to do, and that causes harm (or a risk of it) to another. In litigation, the harm is an adverse judgment attributable in part to the error, either a rule-breaching tactic or mistaken trial court ruling. As in most tort contexts, the parties' conduct is generally socially desirable; for the adversarial process to work, litigants must file pleadings, proffer evidence, and argue to juries. But if a party is careless about playing within the rules, their conduct also can cause harm to a legally protected interest. And procedural law seeks to minimize these errors, just as tort law aims to

67. United States v. Vonn, 535 U.S. 55, 73 (2002).

68. Puckett v. United States, 556 U.S. 129, 134 (2009).

69. *See* Rose v. Clark, 478 U.S. 570, 588–89 (1986) (Stevens, J., concurring) ("An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."). The appellate review standard for *Brady* disclosure violations, which permits reversal only for "material" nondisclosures, does the same. *See* David S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542–44 (2010) (criticizing *Brady*'s materiality standard for encouraging prosecutors to rationalize withholding evidence and noting appellate reversals for *Brady* violations occur only in egregious cases).

minimize accidents.[70] Both aim to minimize the total social costs surrounding these events—harms costs as well as prevention and administrative costs. As all this suggests, both bodies of law are understood predominantly in instrumental terms.

Thus, the analytical tools developed first in tort law and since extended elsewhere are useful in this context as well. Forfeiture rules are part of a procedural regime that provides every litigant with an entitlement to legal process conducted in accordance with legal rules—that is, a right to error-free adjudication.[71] As such, we can describe this entitlement with the familiar private-law taxonomy. First, this entitlement is alienable; parties can waive it. Pursuant to forfeiture rules, it can also be unintentionally relinquished. But if parties do not relinquish it, the right to error-free process is protected by a property rule rather than a liability rule. Property rules entitle the rights holder to an injunction against a wrongful taking or deprivation of their entitlement. That is what trial courts do to assure error-free process: they enjoin rule-violating tactics. When an injunction is not possible or is violated, a property rule provides the remedy of restitution. In litigation, restitution takes the form of an order granting a new trial—the remedy granted by a mistrial order or an appellate reversal.[72] (A second-best approximation is the curative instruction, which tells jurors to disregard information they were exposed to due to an error.)

All of this holds as long as the injured party makes a timely objection to an error.[73] If a litigant fails to do so, however, then forfeiture rules change the picture. The entitlement is relinquished—either wholly or, if plain error review applies, partially. In the latter cases, any remaining entitlement is still protected by the property-rule remedy of restitution. But forfeiture rules *shift* the relinquished portion of the entitlement. What the injured party lost is replaced, in effect, by a new entitlement held by the party that committed an

70. Schäfer & Schönberger, *supra* note 26, at 598.

71. To be more precise: at trial, one has a full entitlement to an error-free process. The trial judge should bar or correct all errors, even harmless ones. But after the judgment, the entitlement is somewhat more limited. Even when errors are preserved, appellate courts let harmless errors stand. At this point, it is better to say that parties have an entitlement to legal process free of "harmful" errors, meaning those that (assessed by appellate courts under various standards) may have affected the outcome.

72. It bears noting that appellate "restitution" applies to a smaller version of the entitlement—roughly, the entitlement is now to a process free of *harmful* errors, not all errors.

73. Compared to property rules, liability rules provide a lesser degree of protection. They leave rights subject to invasion or deprivation in exchange for paying compensatory damages. Without injunctive protection, liability rules resemble a kind of forced sale. *See* Calabresi & Melamed, *supra* note 30, at 1106–07 (analyzing the difference between property and liability rights through an eminent domain example); Michael I. Krauss, *Property Rules vs. Liability Rules*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS, *supra* note 26, at 782, 782–83 (contrasting the basic taxonomy of property and liability rights).

error and won the judgment.[74] This is so because after an injured party's procedural default, the party that committed the error now enjoys a rule of no liability, which protects any advantage the party gained from a rule-breaching tactic. The injured party has lost any entitlement to challenge a judgment that was achieved in an error-marred procedure. That shift constitutes a new entitlement for the error-committing party, who is now entitled to the benefit of the favorable judgment despite its own error.

Notice that the system resembles the traditional tort rule of contributory negligence, under which the negligent actor whose conduct caused the harm (in the ordinary sense)[75] pays no part of the cost if the injured party was also negligent.[76] In procedural law, a party that negligently fails to prevent an opponent's error bears the full cost of that error in the form of its adverse effect on the outcome.[77] Traditionally, the contributory negligence rule completely barred a plaintiff's recovery; likewise, forfeiture rules bar the injured party a remedy. Both rules are attempts to optimize the level of care given to prevent errors (or accidents) in a bilateral setting in which either party's due care alone could prevent the harm. Tellingly, in tort law, the flaws of the contributory negligence rule in achieving that goal led to its replacement by comparative negligence rules. But save for the limited plain error standard, the law of procedure has adopted no analogous reforms for forfeiture penalties.[78]

Moreover, procedural errors and forfeiture are not judged by a *negligence* standard. Overwhelmingly, courts ignore the mental state of, and

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74. We could also describe the court as gaining a sort of entitlement. If judicial errors are forfeited, the court—we might even say the state—has an "entitlement" to render and enforce judgments that are (or may have been) affected by judicial error.

75. Economic analysis employs a different, technical definition. *See* Krauss, *supra* note 73, at 786 ("[T]he cause of an injury is the efficient avoider of the injury. The cheaper-cost avoider of a loss will always be said to have caused the loss if entitlements are protected by liability rules.").

76. RESTATEMENT (SECOND) OF TORTS §§ 463–466 (1965) (describing contributory negligence doctrines and noting a plaintiff is contributorily negligent when he exposes himself "to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know"); Calabresi & Hirschoff, *supra* note 30, at 1059 (describing contributory negligence in these terms); Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1694 (1995) (illustrating the idea of contributory negligence in these terms).

77. A partial analogy to the forfeiture is the contract law doctrine of mitigation, which "requires the promisee to take steps to reduce the loss from breach after it learns of the breach or acquires reason to know of it." Eric A. Posner, *Contract Remedies: Foreseeability, Precaution, Causation and Mitigation*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS, *supra* note 26, at 162, 169. A distinction may lie in the limitation that the promisee/injured litigant have "reason to know" they must act to mitigate or prevent harm to themselves. In procedural law, this is true only to the degree that the injured party be in a position to notice the error; there is no inquiry as to whether a reasonable party would have spotted the error.

78. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 & cmt. a (2000) (rejecting the old contributory negligence rule and endorsing a principle of pure comparative responsibility under which the "[p]laintiff's negligence . . . reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff").

level of care exercised by, both the error-committing party and the forfeiting injured party. Thus, when the injured party makes a timely objection, error *correction* operates like a strict liability rule: courts ignore the erring party's negligence or intent. And when the injured party fails to object, forfeiture rules operate like a *reverse* strict liability rule: courts ignore the injured party's negligence or intent in failing to raise the error.[79] Again, this consequence is qualified for a small portion of errors by plain error review for unpreserved errors. But that safety valve retains the doctrinal structure of strict liability, albeit with the burden shifted to the injured party.

In light of these structural parallels between tort law and procedural law, and with this descriptive taxonomy in mind, it is easy to see the analytical failure in forfeiture-rule jurisprudence. When the aim of legal rules is to minimize the costs of errors (or accidents) in bilateral activities in which care by one rather than both parties is sufficient to prevent harm, courts and policy makers should place responsibility on the cheapest cost avoider, i.e., the party who can most cheaply prevent a particular harm.[80] The fundamental question is the same in procedural law as in tort and other areas of law. Should drivers use greater care to avoid pedestrians, or should pedestrians use greater care to avoid cars? Should the drafting party write contract terms more clearly or should the counterparty read more carefully before assenting? Should prosecutors use greater care to avoid tactics that violate evidentiary and constitutional rules, or should defendants use greater care to identify and challenge prosecutors' errors?

There is little to suggest that courts and policy makers have correctly (or deliberately) determined that the victims of procedural errors can most cheaply and efficiently prevent such errors. Traditional forfeiture rules are so widely used that their rationale has become intuitive. But it is hardly intuitive that parties *injured* by an opponent's error can prevent the error more easily than the party who *committed* it. On average, the parties should have lawyers who are equally skilled in recognizing rule violations. But the acting party likely would be more knowledgeable about the specifics of their tactics—the

79. Doctrine defining ineffective assistance of counsel, which includes a negligence inquiry, does not provide defendants with a way to avoid this strict liability standard. Under *Strickland v. Washington*, if defense counsel's performance fell below a gross negligence standard (and there is a reasonable probability that poor performance affected the outcome), the defendant's conviction should be reversed. *See* 466 U.S. 668, 690–91 (1984) (requiring that the counsel's performance be "outside the wide range of professionally competent assistance"). But rarely is an attorney's mere failure to object to prosecution or trial court errors, such as evidence admissibility or jury instructions, deemed unconstitutional deprivation of effective assistance. *See id.* at 694 (requiring that a defendant show the trial outcome more probably than not would have been different absent the attorney's errors). Note also that, while the contemporaneous-objection rule does not apply to *Strickland* claims, the doctrine shares with plain error review that the injured party bears the burden of proving the error and consequent injury. *Id.* at 694–96.

80. *See* sources cited *supra* note 30.

indictment they drafted, the evidence they plan to introduce, the arguments they will make to the jury. That knowledge should give them some edge as well about the governing law. Often the injured or passive party's costs may be roughly equivalent, but that is less likely for tactics and rule violations that are unanticipated, especially when the governing law is not clear-cut and less familiar to typical trial lawyers.[81] Those differences suggest that passive parties face higher costs in recognizing meritorious objections and articulating to the court why the relevant law supports them.

Another reason that acting parties can typically prevent errors more efficiently is that their mode of prevention entails lower administrative costs. Injured parties prevent opponents' errors by succeeding in their objections to rule-violating tactics. But arguments about objections, and trial court adjudication of those arguments, are administrative costs. As a method of prevention, that is more costly than if the acting party simply used greater care to avoid the error in the first place, avoiding the need for adversarial argument and judicial decision-making.[82] To be sure, costs vary depending on the nature of the error. For some errors, the parties' prevention costs may be roughly equal. A witness who unexpectedly offers inadmissible hearsay testimony may be one example. But in the main, the erring party's costs generally should be lower. For instance, prosecutors have more information about the grand jury's composition (and have it earlier) than does the defense.[83] Or, when charging conspiracy counts, prosecutors almost certainly have more factual information with which to determine whether it is a double jeopardy violation to charge two separate conspiracies because the course of conduct constituted only one conspiracy.[84] There are few, if any, scenarios in which an injured party can more cheaply prevent an acting party's error than the acting party itself. If that is so, prevailing forfeiture doctrine that places the duty of prevention on the injured party is poorly conceived as a general rule for allocating responsibility for error prevention. The next Part describes

81. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 515–19 (1995) (noting that the law was unclear as to whether judge or jury decides issue of materiality in false statements offense); United States v. Foster, 626 F. App'x 820, 820 (11th Cir. 2015) (concerning the defense's failure to object to the plain error of a prosecutor who "commented extensively, repeatedly, and improperly on [defendant's] valid invocation of his Fifth Amendment privilege against self-incrimination").

82. Sometimes error corrections can be accomplished informally by communication between the parties rather than through pretrial motions or trial objections. That lowers administrative costs compared to adjudicating the resolution in court, but it nonetheless entails higher costs, at least oftentimes, than the acting party opting to avoid the rule violation on its own.

83. *See* Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1208–09 (2017) (describing a prosecutor's control over grand juries); *cf.* Vasquez v. Hillery, 474 U.S. 254, 256 (1986) (describing a single county judge's role in selecting grand jurors).

84. *See* United States v. Broce, 488 U.S. 563, 588 (1989) (Blackmun, J., dissenting) (discussing a prosecutor's ability to consider the scope of the conspiracy, carefully draw the indictment, and ensure that double jeopardy concerns are addressed at the plea hearing).

what an alternative forfeiture doctrine would look like, then assesses its strengths and weaknesses.

II. Restructuring Responsibility for Errors

A. The Alternative to the Traditional Forfeiture Rule

The incentive to exercise greater care created by the risk of forfeiture need not target the party harmed by the error. In many circumstances, the responsibility to prevent errors could be placed on the acting party whose tactic could cause an error. With regard to errors by the trial judge, this kind of "reverse" forfeiture rule could extend to parties who benefit from the court's error, in contrast to traditional rules that target the injured party. On this model, rather than incentivizing parties to prevent their *opponent's* errors (or judicial errors that benefit an opponent), the forfeiture penalty would encourage parties to use greater care to prevent their own errors (or judicial errors in their favor).

How would such a rule work against error-committing parties? Here the taxonomy sketched above is helpful. Erring parties would forfeit the entitlement they now enjoy under the rule of no liability for engaging in rule-violating tactics. That entitlement takes the form of finality for judgments in their favor, which erring parties enjoy when the injured party fails to make a timely objection, which bars subsequent appeals based on the unpreserved claim. The reverse-forfeiture rule would simply grant injured parties standard access to appellate review, even for claims that were not "preserved" by an earlier objection. Whether a claim is cognizable on appeal, and which standard of review applies, would no longer turn on the injured party's trial-stage behavior. (And thus "preserved" would no longer be an apt term because injured parties would have no duty to fulfill in order to retain access to appellate review.) Like traditional forfeiture rules, this alternative takes the form of a property rule: the remedy is restitution of the right to error-free (or *harmful* error-free) process through appellate reversal of the trial court judgment. Like traditional forfeiture rules, it would also take the form of strict liability: parties who cause errors would be subject to reversal of judgments in their favor regardless of whether they were negligent in opting for the rule-violating tactic.

In this way, a reverse-forfeiture rule would shift the burden of care for preventing litigation errors. The effect ought to be that, when making tactical decisions, parties would exercise greater care to prevent causing errors by avoiding the use of rule-violating choices. Having lost the immunity from appellate review provided by the injured parties' procedural default, parties would be motivated before and during trial to insulate an eventual favorable judgment from appellate reversal by preventing harm caused to their opponents through their own errors. Critically, this reform reduces the

undesirable incentive that parties have to be indifferent about whether their trial-stage tactics violate rules. Recall that prevailing forfeiture rules *encourage* parties to attempt rule-breaching tactics. If caught, they suffer no penalty for carelessly (or deliberately) violating rules. If their error goes unnoticed, they reap a double benefit—whatever undue advantage the prohibited tactic provides toward winning the judgment, plus immunity from error correction on appellate review. For passive parties who might be unfairly harmed by an opponent's error, this approach has the virtue that, unlike forfeiture penalties now, it does not merely supplement other existing incentives to challenge opponents' errors at the trial stage. Thus, reversing the target of forfeiture incentives sharply reduces incentives to *cause* errors, while in most circumstances only modestly reducing incentives to prevent opponents' errors. A reverse-forfeiture rule provides a better balance of aggregate incentives for both parties. Incentives to play by the rules would be stronger, while incentives to monitor opponents' errors would be reduced only modestly. (The same beneficial adjustment goes for judicial errors.) The motivation would be to insulate an eventual favorable judgment from appellate reversal by preventing errors that cut against their opponents.

While this reverse-forfeiture alternative would be novel as a general policy for minimizing the range of errors long governed by traditional rules of procedural default, its form is not unprecedented. It has the same structure as established doctrines that govern contexts in which placing the burden of care on the injured party is not feasible because the opponent's rule violation cannot be observed. The best example is the *Brady* doctrine, which requires prosecutors to disclose exculpatory evidence to the defense.[85] Defendants cannot identify when prosecutors breach that duty by failing to disclose evidence in the government's possession, so it hardly makes sense to incentivize defendants to do so as a means to prevent *Brady* violations. Prosecutors are not merely the cheapest but the *only* cost avoider. Out of necessity, *Brady* doctrine incentivizes the error-*causing* party to prevent violations, and it does so with a version of a forfeiture penalty. Although not normally described in these terms, *Brady* doctrine penalizes prosecutors who breach the disclosure duty with forfeiture of some of the finality of the conviction they won. Normally, when prosecutors win at trial, the conviction is immune from reversal on the grounds that a defendant failed to introduce

85. Brady v. Maryland, 373 U.S. 83, 87 (1963). Another context in which defendants arguably cannot be expected to object is when the judge violates Federal Rule of Criminal Procedure 11(c) by getting involved in plea negotiations and advising the defendant on his best course of action. Whether defendants must object to the judge about her conduct in order to preserve review under the harmless error standard is currently unsettled. *See* United States v. Davila, 569 U.S. 597, 612 (2013) (reversing because the court of appeals failed to consider defendant's "contention that the extraordinary circumstances his case presents should allow his claim to be judged under the harmless error standard of Rule 52(a) rather than the plain error standard of Rule 52(b), the Rule that ordinarily attends a defendant's failure to object to a Rule 11 violation").

certain favorable evidence. But prosecutors forfeit this bar on the defendant's appellate claim if they breach the *Brady* disclosure duty and prevent the defendant from using the evidence. Defendants making *Brady* claims argue in effect, "I would have used the undisclosed evidence at trial, and it probably would have changed the outcome in my favor."[86] To protect the finality of trial judgments, the argument that "I failed to discover and introduce evidence X" usually loses. *Brady* makes it viable.

One might infer from reported *Brady* violations that this approach to error prevention is far from optimal.[87] It surely does not perfect compliance, but documented violations do not mean the rule is suboptimal, much less that incentivizing error-causing parties is, in general, suboptimal. First, while known *Brady* violations are disturbing, we have no way to determine the actual rate of *Brady* violations among prosecutors nor what the lowest achievable rate might be, given that maintaining perfect compliance indefinitely by thousands of officials is implausible.[88] Second, *Brady* creates a weaker incentive to prevent violations than it could because it employs a de facto harmless error standard. Appellate courts grant a remedy not for all violations but only for those violations in which they determine the undisclosed evidence was "material."[89] That weakens *Brady*'s incentive for

86. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) (stating that undisclosed evidence is "material" and justifies reversal under *Brady* only if its disclosure raises a "reasonable probability" of a different outcome, that is, "a probability sufficient to undermine confidence in the outcome" (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984))).

87. *See* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."); EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf [https://perma.cc/UMQ9-KXKE] (surveying cases in which DNA evidence eventually exonerated the defendant and prosecutorial misconduct claims were raised, and noting 41% involved *Brady* claims); *The Recidivists: New Report on Rates of Prosecutorial Misconduct*, FAIR PUNISHMENT PROJECT (July 13, 2017), http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/ [https://perma.cc/2AHB-S5TV] (documenting instances of prosecutors withholding exculpatory evidence); *see also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351–52 (describing barriers to detecting *Brady* violations and citing a study finding that 83% of 210 *Brady* claims in 2004 were unsuccessful).

88. And because the disclosure duty takes the form of strict liability, prosecutors breach the duty even if their failure to disclose was unintentional or negligent. Kyles v. Whitley, 514 U.S. 419, 432 (1995).

89. Medwed, *supra* note 69, at 1543–44; *see also Olsen*, 737 F.3d at 631 (Kozinski, J., dissenting) (arguing prosecutors too often violate *Brady* obligations because "courts don't *make* them care"). *Brady* carries only a weak incentive for compliance because violations trigger a reversal only when the undisclosed evidence is "material," meaning there is "reasonable probability" that disclosure would have changed the outcome. *See* Strickler v. Greene, 527 U.S. 263, 281 (1999) (stating that there is a remedy for failure to disclose exculpatory evidence under *Brady* only if "there is a reasonable probability that the suppressed evidence would have produced a different verdict"). Different standards that made reversals more likely when nondisclosure is

compliance even though that incentive must overcome the countervailing one arising from the lawyer's adversarial role—the incentive not to help one's opponent by searching out and handing over evidence that undermines one's case.[90]

Setting aside the debate about *Brady*'s efficacy, the broader point for present purposes is that this doctrine seeks to prevent litigation errors by putting the burden of care on the error-causing party, much like liability rules in tort law and elsewhere.[91] Another example of the same strategy is the ubiquitous rule that parties in litigation cannot seek to correct their *own* errors post judgment. Here, too, the equivalent of forfeiture is used to encourage greater care in avoiding errors by error-committing parties—although, granted, in this context the error-committing party and injured party are the same.[92] Still, this entrenched policy reinforces the point that placing the burden of error prevention on error-causing parties is hardly unprecedented.

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proven would strengthen prosecutors' incentive to use care in assuring compliance. The strongest such version would probably be to treat *Brady* violations as a structural error, making reversal automatic for any failure to disclose exculpatory or impeachment evidence. There are several arguments to reform the *Brady* doctrine. *See* United States v. Bagley, 473 U.S. 667, 695–96 (1985) (Marshall, J., dissenting) (arguing for a prosecutorial duty to disclose "*all* information . . . that might reasonably be considered favorable to the defendant's case"); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 725–27 (2006) (suggesting broadening codified discovery rules); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN ST. L. REV. 1133, 1144, 1151–52 (2005) (proposing options to promote disclosure by prosecutors).

90. *Cf.* Rose v. Clark, 478 U.S. 570, 588–89 (1986) (Stevens, J., concurring in judgment) (arguing that failing to provide a remedy for prosecutors' errors "can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case").

91. Another error-prevention doctrine that does not place the burden of care on the injured party is the ineffective-assistance doctrine under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Lay defendants cannot identify and object to their attorneys' poor performance, although some try. *See, e.g.*, United States v. Davila, 569 U.S. 597, 601 (2013) (describing that the defendant wrote "to the District Court expressing dissatisfaction with his court-appointed attorney"); United States v. Dominguez Benitez, 542 U.S. 74, 77 (2004) ("[T]he District Court received . . . several letters from Dominguez, in which he asked for a new lawyer . . . . [Later, the defendant again told the judge] he was dissatisfied with his representation . . . ." (footnote omitted)). The problem is that rules of procedure cannot induce *any* actor to exercise greater care in preventing this error. Judges and prosecutors have at best a partial view of the defender's performance, and defense attorneys are never held personally liable for negligent provision of services. The remaining options include appeals to lawyers' professionalism and litigation to reform indigent defense systems in which inadequate funding contributes to right-to-counsel violations. *See, e.g.*, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1123, 1134 (W.D. Wash. 2013) (granting a continuing injunction that requires adequate support of the public defender's office in response to the plaintiffs' allegation of systematic ineffective assistance of counsel); Public Def., 11th Judicial Circuit v. State, 115 So. 3d 261, 265 (Fla. 2013) (seeking permission to withdraw from cases due to excessive caseloads and lack of funding); Hurrell-Harring v. State, 930 N.E.2d 217, 224 (N.Y. 2010) (finding that allegations of ineffective assistance of court-appointed counsel for indigent defendants raise concerns that insufficient, "merely nominal attorney-client pairings occur in the subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing").

92. Denying parties a right to appeal errors they cause discourages such mistakes, serves

B. Justifications for the Alternative and Anticipated Objections

1. Both Options Create Equivalent Incentives.—The foremost objection to this alternative is simply the standard argument for the traditional rule: without the forfeiture penalty, injured parties would less frequently object to opponents' and judges' errors, either because they would reduce their level of care in monitoring and preventing errors by their opponent or the court, or as a sandbagging strategy for insurance against an unfavorable judgment. The result would be fewer errors corrected at the trial stage and more appeals, which would increase costs and undermine finality.

We have established the weakness of this argument. It overlooks the incentives for error prevention that rules create for *both* parties in bilateral-activity contexts. In this setting, any rule that targets only one party for liability simultaneously licenses less care by one party and encourages greater care from the other.[93] This insight is widely accepted in analyses of other bodies of law but unacknowledged in case law and scholarship on procedural forfeiture. The Supreme Court has ignored this logic even when petitioners explicitly argue the point.[94] Yet the point is straightforward: both the traditional forfeiture rule and its alternative make one party indifferent (or worse) to errors because failure to correct them yields a procedural advantage. Under the standard rule, the error-committing party gains immunity from appellate review when the injured party defaults. Under the reverse-forfeiture alternative, the injured party retains access to appellate review even for errors it failed to challenge in the trial court. In this sense,

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systemic efficiency, and is viewed as fair in a party-dominated adversarial system, even though allowing error-marred judgments to stand, as courts acknowledge, can undermine the justice system's legitimacy. *See, e.g.*, Rosales-Mireles v. United States, 138 S. Ct. 1897, 1910 (2018) ("[R]egardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings."); *id.* at 1908 ("[T]he public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.'" (quoting Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215–16 (2012))). *But see* United States v. Cotton, 535 U.S. 625, 632–33 (2002) (holding the lower court's error had little effect on the "public reputation of judicial proceedings").

93. Comparative negligence rules in tort, which apportion accident costs between plaintiffs and defendants, attempt to avoid this effect. *See* Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1070–71 (1986) (arguing that the comparative negligence rule is well suited "to give moderate incentives for precaution to both parties rather than strong incentives to one party and weak incentives to the other").

94. In *United States v. Vonn*, Justice Souter's majority opinion saw no "merit" in Vonn's argument that reviewing unpreserved defense claims under the plain error standard rather than the more favorable harmless error standard "invites the judge to relax"—i.e., be less careful in avoiding errors because the defendant has a strong incentive to be very careful. 535 U.S. 55, 73 (2002). But the Court either missed the point or refused to acknowledge it. Justice Souter simply reasserted "the point of the plain-error rule" is to keep "defense counsel . . . on his toes, not just the judge," *id.*, as if a judge's level of care could never change in response to rules.

the rules are structurally identical; both create incentives for undesirable strategic behavior. There is no basis for concluding, from the rules alone, that the pair of incentives created by one version is superior to the pair created by the alternative. With regard solely to their instrumental effects, the choice between these options must turn on other criteria. The best criteria would be to elect the rule that places liability on the cheapest cost avoider, while taking into account the incentives parties face from sources *other* than forfeiture rules.

2. Multiple Incentives to Prevent or Permit Errors.—Wholly aside from the incentive that forfeiture rules provide, parties have strong incentives to prevent most errors by their opponents or the judge in the trial stage. Parties' most likely path to achieving a favorable outcome is always to prevail in the trial stage because trial victories are always better than appellate reversals of trial losses.[95] They happen sooner and are more valuable. Acquittals are final, and convictions are reviewed under standards that defer to fact-finding and judicial discretion at trial and disregard harmless errors. Most defendants' appeals are unsuccessful,[96] and most appellate victories result merely in starting over with a new trial or hearing.[97] A new trial should hardly motivate defendants' strategic behavior about error prevention *during the first trial*. The prize is another trial on the same charges by prosecutors who have refined their case in light of lessons from the first trial. Rarely should the defense be able to foresee, during the first trial, that it will benefit from the delay more than the government. Evidence dissipation is very much a two-way street, even if formally a greater concern for parties bearing the burden of proof. Speedy trial restrictions and constitutional limits on preindictment delay protect against the unfair harm to the *defense* from evidence and witnesses lost with the passage of time.[98] Double Jeopardy guards against

95. *See* Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 43–45 (1978) (discussing several reasons that criminal defense attorneys have for raising challenges at trial and thus why they are unlikely to hold back as a strategy to create appeal issues, save for challenges to "institution of the charges").

96. *See* Michael Heise et al., *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939, 1960 (2017) (recounting that in a recent survey of state appeals courts, "[o]nly 14.9% of the first appeals of right produced a favorable outcome for the defendant").

97. *See* ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 60–64 (2001) (showing that, across all circuits, the remand rate has universally exceeded the reversal rate, regardless of the subject of the case).

98. *See* Doggett v. United States, 505 U.S. 647, 654 (1992) ("[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including . . . 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence. . . . [Harming defendant's ability] adequately to prepare his case skews the fairness of the entire system." (second alteration in original) (quoting Barker v. Wingo, 407 U.S. 514, 532 (1972))); United States v. Lovasco, 431 U.S. 783, 795 (1977) (holding that precharge delay may violate Due Process if "undertaken by the Government solely 'to gain tactical advantage over the accused'" (quoting United States v. Marion, 404 U.S. 307, 324 (1971))).

prosecutors benefiting from retrials, using the first trial to improve their case in a second.[99] And Confrontation Clause doctrine and evidence rules permit prosecutors to offer testimony from a prior trial for any missing witnesses,[100] mitigating the loss of any first-trial witnesses who are unavailable for the second. And to gain that uncertain prize, many defendants will be incarcerated during the appeal process. The non-indigent will have to pay their own expenses for appeals and a new trial; losers may be charged costs for unsuccessful appeals.[101]

The defense, then, is hardly less motivated during trial to prevent errors due to the prospect of appeal than is the prosecution, which is barred from appealing after acquittals by double jeopardy law. Both sides are highly motivated to prevent opponents' errors that could reduce their odds of a favorable trial outcome. At least with regard to errors that could affect liability or sentence decisions, forfeiture rules are largely redundant; given other incentives to prevent errors, the additional nudge from forfeiture rules likely affects parties' level of care marginally if at all.

a. Sandbagging Nonstructural Errors.—There are a few exceptions, however. Without forfeiture rules, defendants might strategically remain silent about certain prosecution errors that could be easily corrected because preventing those errors would not improve their odds of winning in the trial court. Examples might include improper venue or joinder in the indictment, or racial bias in grand juror selection or composition of the trial jury venire.[102]

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99. *See* Ashe v. Swenson, 397 U.S. 436, 445–47 (1970) (stating the Fifth Amendment guarantee against double jeopardy forbids a prosecutor from trying the same case multiple times in an effort to refine the prosecution's strategy). *But see* Bartkus v. Illinois, 359 U.S. 121, 122–24 (1959) (holding that successive prosecutions by separate state and federal prosecutorial authorities against the same defendant for the same offense did not violate the constitutional rights of the defendant, even though the state and federal prosecutors coordinated with each other in their respective prosecutions).

100. *See* FED. R. EVID. 804(a)–(b)(1) (permitting use of prior testimony if the defendant previously had opportunity and motive to cross-examine the witness); Crawford v. Washington, 541 U.S. 36, 59 (2004) (holding that the prior or preliminary testimonial statements of witnesses absent from trial are admissible when the declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant); California v. Green, 399 U.S. 149, 158 (1970) (holding that the "Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination"); Mattox v. United States, 156 U.S. 237, 240–44 (1895) (holding that the testimony gathered during a murder trial overturned on appeal is admissible in the second trial, where the declarant died after the first trial and was fully cross-examined during the first trial).

101. *See*, *e.g.*, State v. Rich, 3 A.3d 1210, 1220 (Md. 2010) (charging appellate costs to the losing defendant–respondent).

102. *See*, *e.g.*, Vasquez v. Hillery, 474 U.S. 254, 262 (1986) (reaffirming that the Constitution forbids bias in selection of grand jurors); Lockhart v. McCree, 476 U.S. 162, 183–84 (1986) (holding that the fair-cross-section doctrine guarantees only that the procedures for creating a jury pool are designed to yield a panel fairly representative of the community); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (same); Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality) (holding that

(In some instances defendants *do* worry such errors affect the prosecution's outcome; when that is so they recognize the incentive to prevent them early.) But this is true only for a short list of errors with specific characteristics. The defendant must see no meaningful advantage from preventing the error before the trial judgment; the error must be "structural"[103] so that it triggers automatic reversal rather than review for harmless error;[104] the defense must foresee gaining more from delay and retrial than the prosecution.

There are two scenarios in which defendants might foresee no gain from preventing the kind of error that is normally expected to affect the merits decision. One is when the defense assesses the odds of a favorable trial outcome as very good *even if* they permit the opponent to use a rule-violating tactic. The other is when the defense assesses the odds of a favorable trial outcome as very low even if they prevent the opponent's prohibited tactic. In either case, silently permitting the error might seem more valuable as a future basis for reversal than preventing the error as a means to improve the odds at trial.

In either scenario, this kind of sandbagging strategy attempts to thread a very small needle. In the first instance, the defense effectively concludes that the opponent's error will be *harmless*—i.e., it would not meaningfully diminish his high odds of prevailing. Yet at the same time, he must predict implausibly that an appellate court will *not recognize that the error was harmless* because nonstructural errors are reviewed under a harmless error standard.[105] In the second scenario, one who estimates high odds of losing

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the Constitution forbids only "systematic exclusion of identifiable segments of the community from jury panels"); Meltzer, *supra* note 13, at 1196 (giving jury composition as an example of a claim a defendant may strategically withhold because the claim does not affect the jury's consideration of the facts).

103. The Supreme Court has labeled barely a half-dozen errors to be "structural" and—*if preserved*—to justify automatic reversal without an assessment of harm. They include complete denial of counsel, of the right of self-representation, or of choice of privately retained counsel; a biased judge; denial of a public trial; a flawed reasonable-doubt instruction; and bias in the grand jury composition. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (discussing denial of choice of privately retained counsel); Johnson v. United States, 520 U.S. 461, 468–69 (1997) (listing complete denial of counsel, lack of impartial trial judge, bias in grand jury composition, denial of right to self-representation, denial of right to a public trial, and flawed reasonable-doubt instruction as structural errors and citing relevant precedents). Structural claims subject to automatic reversal are for the most part errors that no longer frequently recur, thus leaving few opportunities for sandbagging gamesmanship.

104. Recall that, if the error is one an appellate court would find "harmful," then the defense, assuming they recognized it, would have been motivated to object. Conversely, if the error is one that would be found harmless, the defense has no reason to "sandbag" it. *See* Meltzer, *supra* note 13, at 1197–99 (providing reasons why sandbagging is unlikely to occur frequently).

105. The harmless error standard varies somewhat depending on the type of error. For nonconstitutional errors, the standard is somewhat lower. *See* FED. R. CRIM. P. 52(a) (defining harmless error as one that "does not affect substantial rights"); Kotteakos v. United States, 328 U.S. 750, 765 (1946) (determining that nonconstitutional trial errors do not require reversal if a court concludes "with fair assurance" that the judgment "was not substantially swayed by the error"); *see*

would plausibly be tempted to "sandbag" an issue for appeal. Yet unless a defendant has virtually *no* hope of acquittal, those are also circumstances in which one is especially averse to giving the opponent the added advantage of a rule-violating tactic. (This scenario is surely rare in a system in which 97% of convictions occur by guilty plea; defendants facing those odds don't opt for trial.)[106] And even if a defendant follows this path, the harmless error standard undercuts the strategy precisely because of the slim odds of acquittal that otherwise motivate the tactic. If the defense recognized that the government's evidence was overwhelming, so would the appellate court, especially given appellate deference to trial court judgments.[107] In which case, it will deem the error harmless.

Here again we see that the harmless error standard, whatever other criticisms it merits,[108] reinforces the right incentives for litigants for error

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also Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 850–51, 864 (1988) (describing the harmless error standard for judge's failure to recuse under 28 U.S.C. § 455(a)). For constitutional errors, the burden of showing harmlessness is higher. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (affirming that for constitutional errors, reversal is not required if the prosecution shows beyond a reasonable doubt that the error was harmless); Smith v. Farley, 59 F.3d 659, 663 (7th Cir. 1995) ("The normal rule of harmless error is relaxed in two areas—the use of peremptory challenges, and the composition of the grand jury—when the error involves racial prejudice."). Error correction is more restricted in post-conviction habeas litigation, where an error must have had a "substantial and injurious effect or influence in determining the jury's verdict," Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting *Kotteakos*, 328 U.S. at 776), and where federal courts apply "doubly deferential" review dictated by 28 U.S.C. § 2254(d) and reverse only if state court determinations of errors were objectively unreasonable, meaning no "fairminded jurists" could agree. Davis v. Ayala, 135 S. Ct. 2187, 2199 (2015) (quoting Harrington v. Richter, 562 U.S. 86, 101 (2011)).

106. *Cf.* Henderson v. United States, 568 U.S. 266, 286 (2013) (Scalia, J., dissenting) ("Where a criminal case always has been, or has at trial been shown to be, a sure loser with the jury, it makes entire sense to stand silent while the court makes a mistake that may be the basis for undoing the conviction."). Justice Scalia does not address the likelihood that defendants will demand a trial for "a criminal case [that] always has been . . . a sure loser with the jury," given the price for passing up guilty-plea discounts. In a system with a 97% guilty-plea rate, there is little reason to think that many "sure loser" cases go to trial. Among the small number that do, only a subset of those might present defense counsel with a "sandbagging" opportunity.

107. As the Supreme Court once put it:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . Once a defendant has been found guilty of the crime charged . . . upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 319 (1979); *accord* United States v. Craft, 484 F.3d 922, 925 (7th Cir. 2007).

108. Scholarly commentary on the harmless error standard criticizes it on various grounds, including that it is *under*—rather than overly—protective, that is, courts too often use it to deny remedies for significant errors. *See, e.g.*, Edwards, *supra* note 12, at 1170 (arguing that "[w]hen we hold errors harmless, the rights of individuals . . . go unenforced" and "the deterrent force of a reversal" is ineffective); Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 199–204 (2016) (arguing that hindsight bias and courts' tendency to look at the weight of evidence rather than error impact has resulted in a heightened

prevention in the trial stage. It deprives parties of any reward for sandbagging insignificant errors at trial, and it grants a remedy only for harmful errors that the injured party is already highly motivated to prevent at trial. After all, for an error to be harmful, by hypothesis it must have been *effective* in (wrongly) improving the odds for the party that employed it—precisely the kind of error that the injured party would be eager to prevent at trial. Courts rarely acknowledge this, but the parties' motivation to win at trial, combined with harmless error review, means that there is little need to put additional incentives on injured parties to object to errors in the trial stage. Thus, abolishing the forfeiture penalty for "unpreserved" errors should make little difference.

The same logic applies to post-conviction sentencing errors. In federal courts, those errors usually involve the trial judge applying the wrong sentencing statute or guideline. When that error leads to a harsher sentence, defendants have every reason to be vigilant in preventing them, and strategic sandbagging would be nonsensical. A successful appeal would leave the conviction intact and merely provide the defendant what he could have had earlier: a lighter sentence calculated under the more favorable law. The Supreme Court seems lately to have recognized that any failures to object in this circumstance are inadvertent. While defendants who fail to object in a timely manner at the sentencing hearing are still relegated to plain error review, the Court's recent decisions have taken some of the sting out of that penalty in this context and instructed lower courts to more readily grant resentencing under the plain error standard.[109]

b. Sandbagging Structural Errors.—Errors that do not realistically affect decisions about liability or punishment raise different concerns. Over time, Supreme Court majorities seem to have recognized this. All of the Court's explicit references to "sandbagging" arguably occur either with respect to errors that did not affect substantive outcomes or in the context of

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standard in harmless error review); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7 (2002) (criticizing harmless error review for "creat[ing] a firewall between constitutional rights and remedies"); Murray, *supra* note 3, at 1804 (criticizing the role the strength of the prosecution's case has on denying relief under the harmless error standard).

109. *See* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1905, 1911 (2018) (using the plain error standard to reverse the calculation of a sentence using the wrong guideline range, even though the sentence was within the correct guideline range). In a related case, the Court reversed a sentence under the plain error standard and clarified that:

> [I]n most cases the Guidelines range will affect the sentence. When that is so, a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under Rule 52(b).

Molina-Martinez v. United States, 136 S. Ct. 1338, 1349 (2016).

federal habeas petitions raising collateral challenges to convictions.[110] The Court's earliest references to "sandbagging" were in habeas cases,[111] where policy considerations and litigant motivations are very different from ordinary criminal litigation. Federalism and comity are central policy concerns of federal habeas doctrine,[112] as, historically, was the suspicion that defendants would withhold federal constitutional claims from hostile state courts in hopes of presenting the claim in a friendlier federal forum.[113] Congress and the Court have strengthened forfeiture rules to strengthen federal deference to state courts, the finality of judgments, and defendants' incentives to raise all claims first in state courts.[114]

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110. However, in contrast to the Court's majority opinions, dissenting Justices—who are those usually least receptive to criminal defendants' claims—worry about the defense sandbagging even errors that affect merits decisions. *See, e.g.*, *Rosales-Mireles*, 138 S. Ct. at 1911 (Thomas, J., dissenting) ("If the [plain error] standard were not stringent, there would be nothing 'prevent[ing] a litigant from "sandbagging" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.'" (quoting Puckett v. United States, 556 U.S. 129, 134 (2009))).

111. *Davis v. United States*, 411 U.S. 223 (1973), and *Francis v. Henderson*, 425 U.S. 536 (1976), were the first decisions to raise the strategic behavior concern, albeit without using the term "sandbagging." Heytens, *supra* note 7, at 960 n.204; *see also* Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (using "sandbagging" for the first time).

112. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 731 (1991) ("[I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights."); Rose v. Lundy, 455 U.S. 509, 518 (1982) (explaining that federal courts apply the doctrine of comity to defer action on causes properly within their jurisdiction until the state courts have had an opportunity to pass upon the matter); *see also* Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1056–59 (1978) (discussing the role that federalism and comity have played in Supreme Court habeas precedent); Andre R. Jaglom, Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63, 80–85 (1977) (discussing the contraction of federal habeas jurisdiction by the Burger Court based on principles of federalism and comity).

113. No longer worried about state court hostility, Congress and the Court now view the fear of hostile state courts as implausible and consequently have reformed the law to compel defendants to raise all claims first in state courts or face forfeiture of them in federal court. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (codified as amended at 28 U.S.C. § 2254(b) (2012)) (requiring exhaustion of state remedies before granting federal habeas relief); *Wainwright*, 433 U.S. at 89 (holding, in a pre-AEDPA decision, that the failure to timely object in state court bars federal habeas review absent a showing of "cause" and "prejudice" attendant to the state procedural waiver).

114. The Court has explained, for example:

> A State's procedural rules serve vital purposes at trial, [and] on appeal . . . [such as] "afford[ing] the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. This . . . promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow . . . ."

Murray v. Carrier, 477 U.S. 478, 490–91 (1986) (citation omitted) (quoting Reed v. Ross, 468 U.S. 1, 10–11 (1984)). Scholars and some Justices have criticized this approach and made sound arguments that a knowing waiver or "deliberate bypass" standard for constitutional claims better accommodates the competing interests at stake by deeming claims forfeited only if a defendant

For ordinary criminal litigation, then, the best argument for forfeiture stems from the kinds of errors that defendants could ignore in the trial court without affecting their prospects of a better liability decision or sentence, and which could be easily remedied without yielding them much benefit. One example is an indictment that violates double jeopardy by charging conduct that constitutes a single offense as two separate offenses. That error could be readily cured by an indictment, leaving the defendant still facing prosecution for the same conduct.[115] Another example is an indictment issued by a grand jury that was selected through a racially biased process; in all likelihood, a new, unbiased grand jury would issue the same indictment.[116] Other examples are *certain* pretrial claims listed in Federal Rule of Criminal Procedure 12, which relate either to defects "in instituting the prosecution" (e.g., improper venue or errors in grand jury proceedings) or in the charging document (e.g., improper joinder, lack of specificity, and duplicative charges). Perhaps the best examples are violations of Rule 11's requirement that the judge informs the defendant of various enumerated rights and gets his affirmative waiver of those rights in order for a guilty plea to be valid.[117] Curing the error is easy and costless if brought to the judge's attention at the time, yet realistically it is unlikely the violation affected the defendant's decision to plead guilty. In this scenario, the forfeiture rule aims to increase the defense counsel's level

intentionally opted not to raise it in the trial court. *See Wainwright*, 433 U.S. at 101–04 (Brennan, J., dissenting) (arguing most defaults are unintentional and the deliberate bypass rule adequately guarded against intentional forfeitures); Meltzer, *supra* note 13, at 1216 (proposing that intentional defaults should be enforced on federal habeas review, but those resulting from ignorance or inadvertence of counsel should be excused); *cf.* Heytens, *supra* note 7, at 942–44 (arguing that in cases in which the controlling law has changed between trial and appeal, defendants need only show that the error was clear based on the newly applicable law). The "deliberate bypass" test was created in *Fay v. Noia*, 391 U.S. 372, 438–39 (1963), as a standard for screening federal habeas petitioners' claims that had not been raised previously in state courts. For a time, FED. R. CRIM. P. 11 operated under a functionally equivalent standard. *See* McCarthy v. United States, 394 U.S. 459, 472 (1969) (reversing guilty plea conviction for the judge's failure to comply with Rule 11, where the defendant neither waived Rule 11 nor objected to the judge's error), superseded by statute, *see* FED. R. CRIM. P. 11(h) advisory committee's note (1983 Amendment).

115. *See* United States v. Broce, 488 U.S. 563, 565 (1989) (stating that the indictment to which the defendant pled guilty improperly described as two conspiracies what was in fact only a single conspiracy).

116. *See* Vasquez v. Hillery, 474 U.S. 254, 256, 264 (1986) (reversing for the unlawful race-based exclusion of grand jurors when defendant did not default on the claim); Francis v. Henderson, 425 U.S. 536, 542 (1976) (concluding that the rule from Davis v. United States applies when a federal court is asked in a § 2254 habeas action to overturn a state-court conviction for an allegedly unconstitutional grand jury indictment); Davis v. United States, 411 U.S. 233, 235, 243–44 (1973) (reasoning that because the grand jury indicted two white accomplices in addition to petitioner, the district court's denial of relief was not an abuse of discretion).

117. *See* United States v. Vonn, 535 U.S. 55, 60–61 (2002) (concerning a court's failure to inform the defendant of his right to assistance of counsel at trial); *see also* United States v. Dominguez Benitez, 542 U.S. 74, 78 (2004) (considering a judge's failure to, before entering a guilty plea, warn the defendant that he could not withdraw the plea if the trial court did not accept the prosecutor's sentencing stipulations and recommendations).

of care in ensuring compliance with Rule 11. Otherwise, a savvy counsel might remain silent about a judge's error in case her client might later want a basis for challenging the guilty plea.[118]

Note that, even to some of these errors, defendants have motivations to object early. They should alert the trial court as soon as possible that a charge violates a statute of limitations, is the product of prosecutorial vindictiveness, or was filed after unconstitutional delay because the remedy for each is to bar the prosecution.[119] And defendants have incentives to object early to other errors in this category as well because violations could affect the merits and genuinely impose cognizable injuries, as when potential defense evidence has been lost due to pretrial delay. Otherwise-barred evidence might be admissible solely due to improper joinder of offenses or defendants. Or an improper venue might substantially inconvenience the defendant while providing the government with the prospect of a more favorable judge or jury.[120]

c. Preventing Errors in Guilty-Plea Hearings.—The errors that defendants often have no reason to prevent occur in guilty-plea hearings. Federal Rule of Criminal Procedure 11 (and its state counterparts) defines a list of requirements for courts to meet before convicting a defendant based on his guilty plea. Most involve informing a defendant of his legal entitlements and confirming that he knowingly waives them. Defendants have little to gain from preventing judicial errors in this protocol; all should

118. For examples of the kinds of Rule 11 errors by judges that defense attorneys might in theory exploit by sandbagging—and of holdings that put the burden of preventing judicial errors on the parties—see cases cited *supra* note 117. The assumption that defendants have counsel is the response to the formal awkwardness of a requirement that a defendant "ask[] the judge to advise him of a right of which the Rule 11 colloquy assumes he is unaware." *Vonn*, 535 U.S. at 79 (Stevens, J., concurring in part and dissenting in part).

119. *See* United States v. Lovasco, 431 U.S. 783, 795–97, 795 n.17 (1977) (surmising that precharge delay may violate due process and require dismissal of indictment if purpose is to gain tactical advantage over the defendant); Blackledge v. Perry, 417 U.S. 21, 28–29 (1974) (holding that prosecutorial retaliation for a defendant's successful appeal violates due process). Prosecutors sometimes see an analogous advantage in raising pretrial objections early—for example, in seeking to disqualify a particularly effective defense attorney on conflict-of-interest grounds. *See* Wheat v. United States, 486 U.S. 153, 163–64 (1988) (affirming trial court's decision, at prosecutor's request, to forbid codefendants from waiving potential conflicts of interest and be represented by the same attorney); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 690–96 (1992) (discussing prosecutors' motivations for preventing one lawyer from representing codefendants).

120. *See, e.g.*, United States v. Ramirez, 420 F.3d 134, 139 (2d Cir. 2005) (holding that a trial was conducted in the wrong venue and vacating the conviction); United States v. Quirke, No. 1:12–MJ–261A, 2012 WL 4369304, at *2–3 (D.R.I. Sept. 24, 2012) (dismissing a criminal complaint for improper venue). On improper joinder, see generally FED. R. CRIM. P. 8, 13 & advisory committee's notes. *See also* United States v. Hawkins, 589 F.3d 694, 703–04 (4th Cir. 2009) (holding offenses to be improperly joined under Rule 8(a)); United States v. Satterfield, 548 F.2d 1341, 1343–44 (9th Cir. 1977) (determining that appellant improperly joined for trial with codefendant under Rule 8(b)).

be aware of this information from their attorneys, so the judge's oversight usually does not deprive the defendant of information that would affect his decision to plead guilty, but it does foreclose a basis for challenging the guilty plea later. In this setting, the forfeiture penalty gives defendants an incentive they otherwise lack to prevent errors. Yet even in this context, the forfeiture rule is ill-conceived and a suboptimal approach to error prevention.

In theory, defendants who seek to overturn their guilty pleas based on an error in the plea hearing *ought* to recognize how little they stand to gain from doing so. Every defendant who has pleaded guilty has already concluded that a plea rather than a trial is his best option. If the conviction is vacated in light of a plea-colloquy error, the defendant returns to square one: facing the same charges and same government evidence (barring the unlikely fortuity of a witness who has gone missing in the meantime), with no assurance that he will even be *offered* a plea bargain again. Nonetheless, some seek to withdraw pleas anyway, apparently because their sentence turned out to be harsher than they expected.[121] Examples are the defendants in the two cases that the Supreme Court used to extend the forfeiture doctrine to errors in guilty-plea hearings.

In *United States v. Dominguez Benitez*,[122] the defendant was charged with drug offenses and pleaded guilty with the hope that he fit the "safety valve" exception to the otherwise mandatory ten-year minimum.[123] Due to his prior convictions that came to light only after the court accepted his guilty plea, he did not.[124] The trial judge clearly erred in not telling Dominguez that the court was not required to follow the prosecutor's sentence recommendation.[125] By not objecting that the judge had not informed him

121. The defendant in *Dominguez Benitez*, 542 U.S. 74 (2004), is an example of one unlikely to gain anything if his conviction were vacated. The evidence against Dominguez was strong and surely still available for trial: he was arrested at the scene of a drug deal by law enforcement officials to whom he quickly confessed and provided information about other suspects. 542 U.S. at 76. To the extent the government's evidence is typical in this fairly standard federal drug prosecution, *Dominguez Benitez* suggests that few drug defendants have much hope the government's evidence will dissipate during a perhaps two- or three-year period in which they win a reversal of their conviction. Drug cases constituted 30% of the federal criminal prosecutions terminated in 2013–2014; immigration offenses made up 25.6%. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, NCJ 250183, FEDERAL JUSTICE STATISTICS, 2014—STATISTICAL TABLES 17 tbl.4.2 (2017). Evidence in those cases as well, consisting usually of public records and agents' testimony surrounding apprehension, is likewise unlikely to dissipate with time enough to provide many defendants a windfall.

122. 542 U.S. 74 (2004).

123. *Id.* at 77–78.

124. *Id.*

125. *See* FED. R. CRIM. P. 11(c)(3)(B) ("[T]he court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request."); *Dominguez Benitez*, 542 U.S. at 78 ("[T]he judge failed to mention that Dominguez could not withdraw his plea if the court did not accept the Government's recommendations.").

about a point of law that he did not know,[126] Dominguez forfeited his right to challenge the plea's validity under the harmless error standard of review.[127] The Court's unanimous decision implies little patience or sympathy for Dominguez's claim, which was fairly weak: the judge's error likely did not affect Dominguez's decision to plead guilty.

United States v. Vonn[128] was similar in key respects. Vonn faced three serious charges related to a bank robbery. When he pled guilty, the judge made a small but plain error, failing to confirm that Vonn knew he would have a right to counsel if he opted for trial; Vonn neglected to object that the judge had failed to inform him of this right.[129] (Notably, "the *prosecutor* tried to draw the court's attention to its error," but the judge ignored her.)[130] Apparently not resigned to the eight-year prison sentence, Vonn sought to withdraw the plea by raising the judge's error for the first time on appeal.[131] But unless the government had somehow lost key evidence in the interim, Vonn had little reason to expect this would lead to a better outcome.

(Occasionally judicial error more plausibly contributes to a defendant's forfeiture. In *Manrique v. United States*,[132] the district court imposed Manrique's sentence shortly after his guilty plea, to which he timely filed a notice of appeal.[133] But the court deferred its victim restitution order for three months, after which the judge failed to notify Manrique, as required by Rule 32(j), of his right to appeal the order.[134] Manrique failed to file a second notice of appeal for that order and for that reason was deemed to have forfeited his right to appeal the order.)[135]

The defendants' claims in *Vonn* and *Dominguez Benitez* rightly struck the Court as "mere sour grapes over a sentence once pronounced."[136] Together they suggest that some defendants *will* try to take advantage of a judge's small but plain mistake to undo their guilty pleas, despite not having a realistic expectation of a better outcome the second time around.[137] Is the

126. *See* United States v. Vonn, 535 U.S. 55, 79 (2002) (Stevens, J., concurring in part and dissenting in part) (criticizing the rule that a defendant "ask[] the judge to advise him of a right of which the Rule 11 colloquy assumes he is unaware").

127. *Dominguez Benitez*, 542 U.S. at 83.

128. 535 U.S. 55 (2002).

129. *Id.* at 60; *see also* FED. R. CRIM. P. 11(c)(3) (1996) (current version at FED. R. CRIM. P. 11(b)(1)(D) (2018)).

130. *Vonn*, 535 U.S. at 60 (emphasis added).

131. *Id.* at 61.

132. 137 S. Ct. 1266 (2017).

133. *Id.* at 1270.

134. *Id.* at 1275 (Ginsburg, J., dissenting).

135. *Id.* at 1274 (majority opinion).

136. *Vonn*, 535 U.S. at 72.

137. Note that Vonn's and Dominguez's actions are not the product of 20/20 hindsight. Even *with* hindsight, neither should see much of a path to a better outcome.

Court correct, then, in its expectation that abolishing the forfeiture rule can only lead to a "waste of judicial resources required to process the frivolous attacks on guilty plea convictions"?[138]

No, for three reasons. First, without the forfeiture penalty, defendants must still prevail under the harmless error standard.[139] Despite the Supreme Court's implication otherwise,[140] that standard is hardly favorable to appellants.[141] Appellate courts are unlikely to conclude that many claims resembling Vonn's or Dominguez's harmed the defendant by leading him to plead guilty when he otherwise would not have. Removing the forfeiture penalty would significantly improve defendants' odds of reversing a conviction only for the fairly rare half-dozen types of errors in the "structural" category.

Second, the forfeiture penalty probably does little to incentivize greater care in error prevention from the defense in the context of guilty-plea hearings, not because defendants already have strong incentives to do so but because they have so few, and the incentive to avoid forfeiture is too weak to make a difference. Defendants have little to gain from helping the trial judge avoid Rule 11 violations, precisely for the reason the Court inferred, which is also the reason such claims would fail harmless error analysis: these judicial missteps do not really matter to defendants because they rarely cause real harm. Why be vigilant in preventing a judge from overlooking the query about the right to counsel at trial *even if* failing to do so means the standard of appellate review for that error becomes less favorable?

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138. McCarthy v. United States, 394 U.S. 459, 472 (1969).

139. *See* Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) ("[M]ost constitutional errors have been held amenable to harmless-error analysis . . . ."); Arizona v. Fulminante, 499 U.S. 279, 306–07 (1991) (collecting examples).

140. *Vonn*, 535 U.S. at 73 (expressing fear about defendants who would "choose to say nothing about a judge's plain lapse under Rule 11" and suggesting such sandbagging would be more likely under the harmless error standard because "the burden would always fall on the Government to prove harmlessness").

141. Criminal defendants lose a large majority of appeals in the state courts. There has been a great deal of scholarly analyses of recent data and discussion of the challenges in measuring appellate success rates. *See* Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1474, 1475 fig.1 (2009) (finding a 48.9% reversal rate of all noncapital criminal appeals in state appellate courts with discretionary jurisdiction and a 28.2% rate for those with mandatory jurisdiction, slightly lower rates for capital cases, and wide variation between rates of individual state courts based on 2003 data of appeals filed by either party); Heise et al., *supra* note 96, at 1941–43 (describing prior outcomes of criminal appeals research and the challenges related to that research); *id.* at 1960 ("Only 14.9% of the first appeals of right produced a favorable outcome for the defendant."); WATERS ET AL., *supra* note 59, at 1 (asserting that 81% of state court criminal appeals in 2010 that were reviewed on the merits affirmed the trial court decision); *id.* at 4–5 tbls.1 & 2 (reporting that the reversal rates are higher for appeals filed by the state than by defendants). About 4% of the criminal appeals in courts of last resort were filed by the prosecution. WATERS ET AL., *supra* note 59, at 4 tbl.1.

The final reason is the most important. Eliminating the forfeiture penalty on defendants will not lead to more errors on which defendants can lodge "frivolous attacks on guilty plea convictions" because *errors will not increase*. There is good reason to expect they will *decrease* from what seems to be an already-low error rate. The explanation should be familiar. Eliminating the forfeiture rule does not reduce the level of care committed to preventing errors. It *shifts* the incentive to exercise care (i.e., the duty of care) to the prosecution and the trial judge. Adjudication is a bilateral (or *tri*lateral) activity in which due care by one party forecloses the need for care by the other.[142] Any of the three players in guilty-plea hearings can prevent procedural errors. If the defendant has no incentive to do so, the prosecutor and judge have all the more reason to *exercise greater care to prevent judicial errors*. And they both inherently have stronger reasons to avoid errors anyway because the prosecutor and judge value the finality of the conviction more highly than the defendant.

3. Hearings as Trilateral Activities and the Cheapest Cost Avoider.— Because hearings are bi- or tri-lateral activities, all of the court's incentive arguments simply flip with a change from standard forfeiture rule to the reverse-forfeiture alternative in which the prosecution and court lose some of the judgment's immunity from appellate review. Reducing the defendant's "incentive to think and act early"[143] in preventing errors inevitably increases the prosecutor's and judge's incentives to do so.[144] Defendants may indeed "simply relax," "sit there," and "choose to say nothing about a judge's plain lapse."[145] But the standard forfeiture rule currently *encourages* judges and prosecutors to do exactly that—take less care to prevent errors because defendants who fail to prevent them are effectively foreclosed from appeal. Recall the trial judge's carelessness in *Vonn* despite the prosecutor's effort to correct him.[146] Forfeiture encourages "defense counsel to be on his toes." Reverse forfeiture encourages judges and prosecutors to be on theirs.[147]

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142. *See* Gilles, *supra* note 26, at 1294 & n.13.

143. *Vonn*, 535 U.S. at 73.

144. *Id.* at 79 (Stevens, J., concurring in part and dissenting in part) (noting defendant's objection must take a form such as, "Your Honor, I object to your failure to inform me of my right to assistance of counsel . . . .").

145. *Id.* at 73 (majority opinion).

146. The trial judge's negligence in *Vonn* makes it an ironic case for the Supreme Court to reiterate its belief that only the defense's level of care is affected by forfeiture incentives. The Court assumed that the judge always exercises due care to avoid errors and that forfeiture is needed for "defense counsel to be on his toes, *not just the judge*." *Id.* (emphasis added).

147. *Cf. id.* at 80 (Stevens, J., concurring in part and dissenting in part) (stating that Rule 52(a)'s harmless error standard "gives incentive to the judge to follow meticulously the Rule 11 requirements and to the prosecutor to correct Rule 11 errors at the time of the colloquy").

In guilty-plea hearings, then, *any* of the three players can feasibly bear the duty of care to prevent errors. The judge and lawyers all know and can easily follow Rule 11's explicit list of requirements for valid guilty pleas.[148] (The prosecutor in *Vonn* diligently did exactly that.) All three are—in the economic jargon—capable "cost avoiders." But who is the *cheapest* cost avoider? The best candidate is the judge.

Start with the fact that Rule 11 and related constitutional doctrines define information requirements for valid guilty pleas. Much of them relate to information about what the defendant knows, understands, waives, and admits: whether he knowingly waives all legal entitlements, understands the elements of each charge, and understands the facts about his conduct, state of mind, and circumstances that make him guilty of each charge. And all that information must be put on the record at the hearing, along with the judge's findings about the adequacy of the defendant's knowledge and waivers.

Rule 11 formally assigns that duty to meet these requirements to the judge, although the *Vonn* forfeiture rule shifts the duty of preventing errors to the defense. Yet the burden of error prevention in this context is probably more difficult and costly for attorneys on both sides than for the judge. The lawyers have various duties as advocates, which makes the added duty of monitoring the judge's performance more challenging to fulfill. Prosecutors

148. There are other kinds of errors that can invalidate a guilty plea. One is deprivation of a defendant's right to effective assistance of counsel. *See* Missouri v. Frye, 566 U.S. 134, 149–50 (2012) (overturning the conviction after defense counsel failed to apprise the defendant of a plea offer and defendant instead pleaded guilty to a more serious offense); Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (holding that the defense counsel's failure to advise petitioner that a guilty plea may result in deportation constitutes ineffective assistance of counsel); *cf.* Lafler v. Cooper, 566 U.S. 156, 174 (2012) (overturning the conviction after defendant rejected a plea bargain on defense counsel's advice and was found guilty at trial). For obvious reasons, ineffective assistance is not an error that defendants are expected to raise and seek to prevent as it occurs. For that reason, some have argued that *Lafler* and *Frye* are vulnerable to sandbagging behavior by defendants: defendants "lucky" enough to have incompetent counsel might then pass up a plea bargain, gamble on trial, and, if convicted, get a second chance at the plea bargain by using the *Lafler* claim to void the conviction. *See, e.g.*, Graham C. Polando, *Being Honest About Chance: Mitigating* Lafler v. Cooper*'s Costs*, 3 HLRE: OFF REC. 61, 64 (2013), https://houstonlawreview.org/article/4717-being-honest-about-chance-mitigating-lafler-v-cooper-s-costs [https://perma.cc/BEZ2-HHLU] ("Cooper will get to have his cake and eat it too—he got a shot at acquittal, then, that having failed, he will get the original plea offer . . . ."). That fear is far-fetched for several reasons. *See* Darryl K. Brown, Lafler's *Remedial Uncertainty: Why Prosecutors Can Rest Easy*, 4 HLRE: OFF REC. 9, 10–12 (2013), https://houstonlawreview.org/article/4721-lafler-s-remedial-uncertainty-why-prosecutors-can-rest-easy [https://perma.cc/AHY3-GALT] (listing reasons why the holding in *Lafler* will not result in defendants receiving an unfair advantage); Gerard E. Lynch, Frye *and* Lafler: *No Big Deal*, 122 YALE L.J. ONLINE 39, 42 (2012), https://www.yalelawjournal.org/forum/frye-and-lafler-no-big-deal [https://perma.cc/MJS6-6DG4] ("[T]he heavens will not fall as a result of *Frye* and *Lafler*, because the cases' rule is 'new' only to the Supreme Court."). But like Rule 11 errors, ineffective assistance in the context of plea negotiations is an activity in which prosecutors and judges, as well as defense attorneys, can exercise care to prevent. Prosecutors, for example, can ensure there are written records of plea offers, and judges can inquire with defendants about whether their attorney conveyed to them any plea offer.

must present plea agreements and evidence summaries and also might communicate with agents or victims during the hearing. Defense attorneys must monitor the prosecutor's presentation, communicate with their clients, and keep straight what *they* know that the defendant knows versus what *the court* has confirmed the defendant knows. (It takes some cognitive effort to recognize that the court has not informed the defendant of his right to trial counsel when you know that *you* informed him of it.) Plus, both attorneys' case files often include more information than the court will hear, including things they have mutually agreed the court will not hear.[149] And all these cognitive demands are more challenging in the real world of resource-strained practice, where both attorneys often handle several case files in a series of back-to-back hearings, perhaps with minimal preparation time.

In this context, the parties are unlikely to be the cheapest cost avoider for preventing judicial errors. Their multiple obligations at the hearing make it more difficult to take on the additional duty to watch out for errors by the judge. Exercising care in avoiding errors is less costly for the judge because she has a more straightforward task—to conduct the hearing in accord with familiar constitutional and Rule 11 requirements. Yet the judge has less incentive to do so after *Vonn* and *Dominguez Benitez* because those decisions bar defendants from taking advantage of errors in the hearing—which is to say, they ensure the judge does not bear the cost of her errors by having conviction judgments vacated. That is the lesson the Supreme Court should have taken from the facts in *Dominguez Benitez*, and especially from those in *Vonn*. Both judges were careless in adhering to Rule 11; the *Vonn* judge continued to be despite the prosecutor's diligent attempts to correct him. The judge, then, is likely to be the cheapest cost avoider and could be incentivized to undertake that duty by removing the forfeiture penalty now aimed at defendants.

4. Incentives to Extend and Clarify the Law.—A different objection to this revision of error-prevention duties might go as follows: Many legal rules are unclear or unsettled, at least in some applications. Sometimes it is in the public interest that parties push aggressively for options of uncertain permissibility under existing rules and doctrines. Only if parties attempt tactics of uncertain legality—such as seeking to admit novel evidence for

149. On "fact bargaining," see Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1337–38, 1338 n.107 (2005); Frank O. Bowman III, *To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts*, 8 FED. SENT'G REP. 324, 324 (1996); and David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENT'G REP. 339, 339 (1996) (reporting a survey finding that "approximately forty percent of probation officers believe that guideline calculations set forth in plea agreements in a majority of cases are not 'supported by offense facts that accurately and completely reflect all aspects of the case.'").

specific purposes authorized by the evidence rules or arguing for new statutory interpretations to be conveyed in jury instructions—can the courts address emerging issues and clarify unsettled questions of law. For this to happen, parties must act on the self-interested incentives that the adversarial process creates, rather than play it safe and avoid generating any errors that could jeopardize a winning judgment. Thus, the law's development needs proponents of some tactics to push boundaries; the error-prevention duty should remain on parties opposing tactics to object and prevent errors.

Two responses are worth noting. First, at best this argument applies only to certain kinds of errors. The law must be somewhat unclear (hardly unusual), and both options under the law (for example, admit evidence or not; choose statute interpretation A or B) are plausible policy choices such that we want parties to push for those options and present the issue to courts. That is true for many trial tactics, including many evidence and statutory interpretation choices. But it is not true for many others. Some rules are, as a practical matter, crystal clear in ordinary applications; one example is the list of judicial queries to defendants in a plea colloquy specified in Rule 11. More importantly, there is not a public interest in parties pushing the boundaries of some unclear rules; for those kinds of rules, we want parties to play it safe rather than push for an application that promises partisan advantage. Examples here include potentially prejudicial comments in closing argument, such as appeals to racial bias or comments on a defendant's decision not to testify. Better to encourage parties to play it safe and not attempt marginal comments; the public-interest argument for developing the law's precise boundaries here are weaker than the interest in having parties avoid marginal tactics of this sort altogether. The same for prosecutors' *Brady* disclosure obligation; on close questions of whether a particular item is "exculpatory," better to encourage prosecutors to play it safe and disclose rather than push the argument that it is not.

The second response returns to the earlier point about the multiple sources of party incentives beyond the forfeiting error-correction claims for failing to object. Regardless of which party bears the duty to prevent errors, parties will continue to have other reasons to press for novel evidence admission or favorable readings of statutes and doctrines. Often those incentives will justify aggressive choices even if doing so may provide an opponent with grounds later to challenge the judgment. In other words, substantial incentives remain for litigants to present courts with opportunities to address unsettled questions of law.

III. Explaining the Durability of Forfeiture Rules

All of the foregoing raises a question: why do the Supreme Court and state courts continue to be so persuaded by arguments for the standard forfeiture rule? With regard to legal scholarship, why has commentary on

procedural law ignored the immensely influential insights that have transformed other bodies of law? Economic analysis of tort, contract, and property rules shares the same core premises, goals, and analytical orientation as the policy that motivates forfeiture doctrine: all are instrumental approaches singularly focused on optimizing care to prevent errors or, in tort terminology, accidents. This Part posits some explanations. The first two points build on familiar ideas but ultimately, I suggest, are inadequate. The latter are largely inferential but more persuasive.

A. Path Dependence and Status Quo Bias

The durability of forfeiture rules could be simply a story of path dependence and status quo bias. Rules that penalize procedural default with forfeiture have a long history (although not an entirely consistent one),[150] entrenched frames of reference have a tendency to self-perpetuate,[151] and the forfeiture penalty has numerous error-prevention contexts in the adjudication process to which it can spread.[152] This durability is reinforced by well-known psychological heuristics—the status quo bias and the availability heuristic[153]—which tend to make forfeiture rationality more resilient and less

150. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). For examples of inconsistency over time, compare *McCarthy v. United States*, 394 U.S. 459, 472 (1969), holding that Rule 11 violations require a new plea hearing without regard to harm caused by the violation, with *United States v. Vonn*, 535 U.S. 55, 63 (2002), which adopted the plain error standard for Rule 11 violations; and *Fay v. Noia*, 372 U.S. 391, 432 (1963), which described the "only concrete impact" of assuming federal habeas jurisdiction over defaulted claims as preventing the state from "closing off the defendant's last opportunity to vindicate his constitutional rights," with *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), which described strict habeas procedural-default rules as mandated by comity and federalism.

151. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (discussing differences in fast, intuitive thinking and slow, logical thinking, and the effects of cognitive biases); Eileen Braman & J. Mitchell Pickerill, *Path Dependence in Studies of Legal Decision-Making*, *in* WHAT'S LAW GOT TO DO WITH IT? 114 (Charles Gardner Geyh ed., 2011) (describing the self-enforcing process of events affecting subsequent events as it occurs in legal scholarship and judicial decision-making).

152. Recall that instrumental justifications for forfeiture appear in habeas challenges to state and federal convictions, and to rules regulating guilty-plea hearings, plea bargains, and federal sentencing hearings. *See* cases cited *supra* notes 111, 117, 68, and 109, respectively; *see also* Henderson v. United States, 568 U.S. 266, 286 (2013) (Scalia, J., dissenting) (arguing for stronger deterrence of sandbagging). The justifications appear in restrictions on alternate jurors under Rule 24 as well. *See* United States v. Olano, 507 U.S. 725, 744 (1993) (Stevens, J., dissenting) (criticizing the majority for requiring a showing of prejudice to reverse a forfeited Rule 24 violation). The increasing persuasiveness of the forfeiture rationale is apparent in the shift to restrictions on remedies for defaulted violations of Rule 11 in guilty-plea hearings from *McCarthy* to *Vonn*. *See supra* note 151.

153. *See, e.g.*, Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 197–98 ("[I]ndividuals have a strong tendency to remain at the status quo, because disadvantages of leaving it loom larger than

likely to face critical reevaluation. The standard arguments about forfeiture's purported benefits are now ubiquitous and deeply familiar, which makes them readily available as a judicial or rulemaking justification for reaffirming or extending forfeiture rules. That dominance likely would also lead defense attorneys less often to challenge forfeiture doctrine in courts.

This explanation has its limits. Long-established doctrines sometimes change. The history of forfeiture rules for procedural default itself provides evidence. For federal habeas litigation, the change was sharp in the fourteen years between *Fay v. Noia*[154] and *Wainwright v. Sykes*.[155] The same is true for defaulted guilty-plea rule violations between *McCarthy*[156] in 1969 and *Vonn* in 2002.[157] This is not the place for a full theory of why some entrenched rules and ideas fall to new ones, but that story would surely consider, among other things, changes in context and the strength of competing interests that conflict with status quo rules. In the context of habeas litigation, for example, the Court and Congress shifted to a much stronger preference for federal court deference to state court judgments.[158] Strong forfeiture rules served that policy. In the guilty-plea context, the Court began in the 1970s explicitly to endorse and stress the necessity of plea bargaining—a practice it had not acknowledged prior to 1969—and to opt for rules that it concluded would make pleas more efficient.[159] Forfeiture of claims that could undo the finality of guilty pleas fit that agenda. The general point is that established rules and rationales enjoy an advantage in favor of their perpetuation, as long as they are not confronted with strong countervailing ideas or interests.

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advantages."); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207, 208 (1973) ("A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind.").

154. 372 U.S. 391 (1963).

155. 433 U.S. 72 (1977).

156. McCarthy v. United States, 394 U.S. 459 (1969).

157. *See supra* note 151.

158. *See, e.g.*, Brilmayer, *supra* note 13, at 744–63 (describing different approaches to procedural rules for federal habeas review of state court decisions that vary in the priority they give to federal versus state interests).

159. DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE 94, 99–101 (2016); *see also* United States v. Ruiz, 536 U.S. 622, 631 (2002) (mandating that prosecution disclosure for plea bargains "could seriously interfere with . . . the efficient administration of justice"); United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (noting that the waiver rule will not "stifle the market for plea bargains"); Bordenkircher v. Hayes, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) ("The plea-bargaining process . . . is essential to the functioning of the criminal-justice system."); Santobello v. New York, 404 U.S. 257, 260 (1971) ("[Plea bargaining] is an essential component of the administration of justice.").

B. Prosecutorial Influence in Rulemaking

A second explanation specific to criminal procedure would stress the influence of prosecutors in legislative reform of criminal procedure rules.[160] Forfeiture rules favor prosecutors because, in criminal litigation, they apply overwhelmingly to defendants.[161] Prosecutors are unlikely to relinquish that advantage willingly or to favor reforms that make *them*, rather than defendants, the target of incentives to minimize error prevention. And there is clear evidence that federal prosecutors have come to favor increasingly stronger forfeiture rules in recent decades. The period from *McCarthy* to *Vonn* illustrates the shift in the U.S. Justice Department's preferences on this point. In a Supreme Court argument in 1968, the U.S. Department of Justice endorsed a weak, defendant-protective forfeiture rule: review under harmless error standard for guilty-plea rule violations, with the burden of proof on the government.[162] Thirty years later, the Department argued successfully to the Court for a much stronger forfeiture rule that confined defendants' unpreserved claims to plain error review with the burden of proof on the defense.[163]

Yet this explanation also partly begs the question because it fails to explain *why* prosecutors' preferences shifted over time. A fuller explanation could start by situating the prevailing rationales for forfeiture in a broader context of instrumental reasoning within criminal procedure rather than across disparate substantive law fields.

C. Rudimentary Instrumental Analysis

The preceding parts spelled out the glaring weaknesses in the standard instrumental justifications for forfeiture rules. But the short-sightedness—or rudimentary nature—of that analysis is part of a broader style of analysis that courts employ when speculating on the impact of various criminal procedure rules. This is notably true for the Supreme Court, which, given the unique nature of its docket, often defines new doctrines by choosing among alternate rules adopted by lower courts. The best examples are the Court's decisions defining the law of plea bargaining, where the Court's analysis is consistently, overwhelmingly instrumentalist, just as it is for questions of

160. *See* United States v. Kupa, 976 F. Supp. 2d 417, 427–29 (E.D.N.Y. 2013) (describing successful federal lobbying for criminal law reform); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–57 (2001) (describing prosecutorial influence in criminal justice legislation).

161. As noted, the law of double jeopardy operates as a trial-stage forfeiture penalty for prosecutors. *See supra* notes 57–58 and accompanying text.

162. McCarthy v. United States, 394 U.S. 459, 468–69 (1969).

163. *See* United States v. Vonn, 535 U.S. 55, 76–77 (2002) (Stevens, J., concurring in part and dissenting in part) (arguing that, contrary to the majority's analysis, the burden of proof for demonstrating that a violation of Rule 11 is harmless should be placed upon the Government).

procedural default. The Court's instrumental logic in that context suffers from the same shortcomings. The Justices tend to consider incentive effects on only one side of bilateral activity and to ignore various ways that a dynamic, multi-actor activity could adapt to a change in a specific rule or circumstance.[164]

Particularly in the plea-bargaining context, courts' instrumental analysis reflects an affinity for viewing litigation in explicitly market-like terms.[165] Defining actors' self-interested incentives is the starting point for predicting their behavior, and then for predicting the future effects of various legal rules. Yet courts underestimate how adaptive legal practices and systems are—much like the market systems that inspire this analytical framework.

Constrained analysis of this sort characterizes plea-bargaining jurisprudence. If a new rule might raise the cost of making plea bargains—e.g., by mandating prosecution evidence disclosure prior to guilty pleas—the Court typically assumes that the result will be fewer plea agreements followed by an overburdened justice system.[166] The prediction follows from rudimentary economic logic: raising the price reduces "demand"—or in this context, reduces the number of bargains. But that is hardly the inevitable consequence. Motivated actors have various ways to adapt. More disclosure might *increase* bargains by showing defendants the strength of government evidence—in which case it might not raise aggregate adjudication costs at all.[167] Innovations in discovery management might speed up the process.[168] Prosecutors might respond to some cases of wrongdoing without formally filing charges;[169] courts and lawyers could innovate speedier models of (or

164. For an extensive development of this argument, see BROWN, *supra* note 159, at 147–73 and Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 194–207 (2014). To concede a partial response, judges are busy professionals working within significant resource constraints and responsible for decision-making across the full range of bodies of law implicated in litigation.

165. The market metaphor is explicit in the law of plea bargaining. *See* Puckett v. United States, 556 U.S. 129, 137 (2009) ("[P]lea bargains are essentially contracts."); United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (permitting waiver so as not to "stifle the market for plea bargains"). For a broader discussion of this point, see BROWN, *supra* note 159, at 91–118.

166. *See* United States v. Ruiz, 536 U.S. 622, 632–33 (2002) (noting that requiring prosecutors to make certain impeachment information available to a defendant before they enter into a plea agreement could deprive "the plea-bargaining process of its main resource-saving advantages . . . [o]r it could lead the Government instead to abandon its heavy reliance upon plea bargaining").

167. This is in fact the assumption in jurisdictions that mandate prosecution disclosure prior to guilty pleas. *E.g.*, R. v. Stinchcombe, [1991] 3 S.C.R. 326, 342–43 (Can.).

168. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEXAS L. REV. 325, 380–81 (2016) (reporting that judicial involvement may provide information to defense counsel prior to plea bargaining); Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237, 270–78 (2019) (describing how digital discovery increases cooperation between prosecutors and defense attorneys).

169. Nonprosecution agreements resolve criminal investigations with punishment-like terms

alternatives to) trials.[170] Courts likewise ignore some possible effects, such as incentivizing *more* prosecutions by *reducing* the costs of plea bargains—since lower prices increase "demand."

The broader point from this example is that widely employed instrumental analyses in criminal procedure are often partial and simplistic. The problem is not insurmountable. One need not accurately predict all outcomes in complex, multiplayer endeavors. Rather, criminal procedure jurisprudence needs only to utilize well-established models and insights that have been fruitfully employed elsewhere. The most obvious include recognizing that rules create incentives for *all* parties;[171] that rules' intended incentives can be offset by unintended ones on a counterparty; and that policies to minimize errors should seek to place the duty of care on the party who can most cheaply and effectively prevent the harm.

D. The Superficial Unfairness of Asymmetric Appellate Rights

The flawed assessments that sustain forfeiture doctrine likely draw support from two other, more implicit intuitions. One is the intuition that to minimize *appeals* of errors that could have been easily corrected earlier, the law should restrict *appellants' rights*. This approach is not necessarily the optimal one for preventing *errors*, however. The appellant may not be the party best positioned to prevent the error—i.e., the cheapest cost avoider. Nonetheless, this intuition is reinforced by a compatible one grounded in fairness rather than instrumental considerations. Restricting defense appeals of errors that the defense *could* have prevented earlier hardly seems unfair, particularly when prosecutors are completely barred in the wake of acquittals from appealing even those errors they *did* try to prevent.

The rebuttal to this view points out that the imbalance between error-correction opportunities for the prosecution and defense is not a flaw that forfeiture rules should be used to mitigate. Rather, it instantiates foundational principles of criminal process. It reflects the system's priority on checking government power and on providing greater safeguards against convictions

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but without filing criminal charges. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 7–8, 74–76, 274, 291, 296 (2014) (discussing nonprosecution agreements).

170. For discussions of such possible innovations, see generally BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE (2017); Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 622–28 (2016); and Rappaport, *supra* note 35, at 186–91.

171. An unusual and now-defunct example of courts acknowledging bilateral incentives came from Texas, where state courts for a time considered as part of harmless error analysis "whether finding the error harmless would 'encourage the State to repeat the error.'" Schmutz v. State, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014) (quoting Schmutz v. State, No. 06–12–00059–CR, 2013 WL 1188994, at *3 (Tex. App.—Texarkana Mar. 22, 2013) (mem. op., not designated for publication)). But Texas criminal courts subsequently abandoned that consideration. *Id.* at 39–40.

than acquittals caused by procedural error.[172] But if one fails to keep in mind these core systemic commitments, the superficial unfairness of asymmetric appellate rights[173] reinforces the superficial instrumental analysis that courts invoke to justify forfeiture rules targeted on the defense.

E. Fairness v. Efficiency; Public v. Private Responsibility

The role that noninstrumental notions of fairness play in forfeiture doctrine is in fact much greater than courts like to admit. And the effect of these normative views, as much as anything else, explains both the deficiencies of instrumental analysis in the law of procedure and the persistence of that deficient analysis.

Read carefully, courts' instrumental explanations of forfeiture are always intertwined with a normative story. It is a story about duplicitous defendants who use appellate rights to unfairly exploit procedural errors they could have prevented and that in reality caused them no harm, but which provide a basis for challenging just convictions they would always rather avoid. The concern with "sandbagging" is one example, but not actually the strongest, given that, in specific, narrow circumstances, that kind of strategic behavior can be plausible. The telling evidence lies in the recurring language that characterizes defense behavior surrounding procedural errors. As errors arise, courts perceive or foresee the defense to "just sit[] there when a mistake can be fixed,"[174] "sit idly by,"[175] "simply relax,"[176] "choose to say nothing,"[177] and "remain[] silent."[178] This describes negligence at best, bad faith at worst. These are parties who seek to "'game' the system"[179] and pursue "frivolous post-conviction attacks."[180] Judges and prosecutors are virtually never

172. *See, e.g.*, *In re* Winship, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error."); *id.* at 372 (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (describing a jury as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *In re* Oliver, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."); Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 683–85 (1996) (discussing Founding-era views of the jury as a democratic check on government power).

173. Any asymmetry between the parties' rights to appeal errors that occurred *before* trial is substantially reduced by prosecutors' interlocutory appellate rights. *See* 18 U.S.C. § 3731 (2012) (providing prosecutors with opportunities for interlocutory appeals).

174. United States v. Vonn, 535 U.S. 55, 73 (2002).

175. People v. Ford, 168 N.E.2d 33, 40 (Ill. 1960).

176. *Vonn*, 535 U.S. at 73.

177. *Id.*

178. Puckett v. United States, 556 U.S. 129, 134 (2009).

179. *Id.* at 140.

180. McCarthy v. United States, 394 U.S. 459, 465 (1969).

suspected of equivalent behavior. Despite clear evidence that judicial negligence causes errors, as in *Vonn*, judges are always presumed to be "on their toes" and never unduly relaxed.[181] Even in cases of prosecutors who violate explicit judicial orders on evidence admission[182] or established rules on impermissible arguments,[183] courts do not readily infer that prosecutors have gamed the system by exploiting the freedom to commit error provided by the harmless error standard of review[184] of defendants' failures to timely object.

The lesson here is not one of anti-defense, pro-prosecution judicial bias. Rather, it is how instrumental analysis is undermined by strongly held normative intuitions that distort its application.[185] As much as any other factor, this likely explains the failure of analytical tools to penetrate the law of criminal procedure and generate sound instrumental reasoning. Although instrumentalism dominates much of criminal procedure doctrine, courts, in fact, retain strong descriptive assumptions and prescriptive commitments about criminal adjudication. Too often, instrumental analysis, rather than shedding light on those premises, is employed to affirm and accommodate them.

A deeper, related normative story seems to intersect with this one. From one view, forfeiture reflects a core ethic of adversarial process, which somewhat "privatizes" responsibility for litigation outcomes by placing all responsibility on the parties—generating evidence, ensuring application of the correct law, and preventing procedural errors. Parties who fail at these responsibilities pay a price in an unfavorable outcome. Standard forfeiture rules increase adversarial parties' responsibility for protecting their own interests. They suffer if they fail to protect themselves from judicial errors or

181. *Vonn*, 535 U.S. at 73 (stating that the plain error rule requires that "defense counsel [must] be on his toes, not just the judge"). For an example of a different kind of judicial error, see *United States v. Davila*, 569 U.S. 597, 612 (2013), where a magistrate judge that was actively involved in the plea negotiations advised a defendant to plead guilty, in violation of Rule 11(c)(1).

182. *See supra* note 65 (collecting cases).

183. Darden v. Wainwright, 477 U.S. 168, 180, 183 (1986) (holding that the "undoubtedly . . . improper" comments by the prosecutor did not render the trial "fundamentally unfair"); Johnson v. United States, 318 U.S. 189, 196 (1943) (stating that when a testifying defendant asserts and is "unqualifiedly granted" his Fifth Amendment privilege against self-incrimination, it would be in error for the prosecutor to comment on the defendant's refusal to testify on that matter); Neill v. Gibson, 278 F.3d 1044, 1060–62 (10th Cir. 2001) (clarifying that the impermissible antigay comments by the prosecutor were harmless error).

184. Texas courts once acknowledged, in harmless error analysis, that "finding the error harmless would 'encourage the State to repeat the error,'" but now have explicitly abandoned consideration of that possibility. Schmutz v. State, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014) (quoting Schmutz v. State, No. 06–12–00059–CR, 2013 WL 1188994, at *3 (Tex. App.—Texarkana Mar. 22, 2013) (mem. op., not designated for publication)).

185. In their classic article, Calabresi and Melamed argued that justice considerations are largely subsumed in economic and distributional analysis, and "adhere to efficiency and broad distributional preferences." Calabresi & Melamed, *supra* note 30, at 1102–05.

opponents' rule-violating tactics, and they can reap rewards from rule-breaking if opponents fail to prevent them from doing so.

At bottom, the argument here suggests that criminal adjudication rules reject even *optimal* strategies for error prevention because they depart too far from this strong norm of individual responsibility and *caveat emptor*.[186] Reverse-forfeiture rules would, in many contexts, optimize error prevention. But it would also reorient the rules of adversarial process toward a more public-regarding model in which state actors—prosecutors and judges—bear greater responsibility for preventing errors in public adjudication, and thereby for the integrity of its courts' judgments. Incentives to *evade* rules would be reduced; incentives to abide by them would be stronger.

186. Perhaps more precisely, *cave pars*: "party beware."